



Research Paper  
No. 10 2000-01

The Parliament of the Commonwealth of Australia  
and Indigenous Peoples 1901-1967

ISSN 1328-7478

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Published by the Department of the Parliamentary Library, 2000

## The Parliament of the Commonwealth of Australia and Indigenous Peoples 1901–1967

The Vision in Hindsight: Parliament and the Constitution: Paper No. 10

### ***Vision in Hindsight***

*Vision in Hindsight* is a Department of the Parliamentary Library (DPL) project for the Centenary of Federation.

*The Vision in Hindsight: Parliament and the Constitution* will be a collection of essays each of which tells the story of how Parliament has fashioned and reworked the intentions of those who crafted the Constitution. The unifying theme is the importance of identifying Parliament's central role in the development of the Constitution. In the first stage, essays are being commissioned and will be published, as IRS Research Papers, of which this paper is the tenth.

Stage two will involve the selection of eight to ten of the papers for inclusion in the final volume, to be launched in conjunction with a seminar, in November 2001.

A Steering Committee comprising Professor Geoffrey Lindell (Chair), the Hon. Peter Durack, the Hon. John Bannon and Dr John Uhr assists DPL with the management of the project.



**Centenary of Federation 1901-2001**

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## Major Issues

In 1901 it might have been expected that the Commonwealth Parliament would play little role in Aboriginal matters. The Constitution of the Commonwealth of Australia, as it existed, specifically excluded the Parliament from making special laws for Aborigines in the States. However, as a legislature and as forum for debate on national issues, the Parliament always had the power to shape the rights and entitlements of Indigenous peoples and to play a role in determining the position of Aborigines within Australian society.

First, the Commonwealth Parliament legislated in relation to certain rights and entitlements of Indigenous peoples under Commonwealth law—the Commonwealth franchise and Commonwealth benefits and entitlements. Second, in 1911 the Commonwealth obtained undivided legislative power over the Northern Territory and thereby direct responsibility for the administration of Aboriginal Affairs in the Territory. Further, in the 1950s and 1960s the Commonwealth Government's establishment of the Woomera rocket range, and its involvement in the British nuclear tests in the north-west of South Australia gave it direct powers and involvement in relation to some Aboriginal groups outside the Northern Territory.

Given the role commonly attributed to the Parliament in the system of responsible cabinet government, it might have been expected that the Parliament would have played a significant role in checking and questioning the Government in its use of its powers in these areas. However, in the case of the Commonwealth Government's administration of the Northern Territory and Woomera and the British Nuclear Tests, and to some extent in its enactment of Commonwealth legislation, it is the things that the Parliament did not do, rather than what it did do, that are most noteworthy.

In relation to Commonwealth legislation the first matter directly affecting Indigenous peoples was the Commonwealth Franchise Bill 1902 and in this case the Parliament's role was decisive. The Parliament rejected Government legislation for a uniform franchise which would have included all Indigenous peoples, and after a lengthy debate legislated to exclude 'aboriginal natives of Australia' from the Commonwealth franchise. For the next half century or so, often with little or no debate, the Commonwealth Parliament legislated systematically to discriminate against Indigenous peoples, denying them the same citizenship rights and benefits as other Australians. To the extent that the legislation was debated parliamentarians almost invariably rationalised the exclusion in terms of 'race' or 'blood' or 'caste'. Legislation granting or denying benefits or rights was expressed in terms

of 'race'—a person's legal position was determined by his or her proportion of Aboriginal 'blood'.

In relation to the Northern Territory the Commonwealth obtained undivided power at a time of special importance for Aboriginal affairs. Aborigines were a majority population in the Territory and most still lived in a frontier situation or in more remote areas beyond the boundaries of European occupation. There was an opportunity for the Commonwealth Parliament to take a lead in Aboriginal Affairs and to set a course different from that of the States. The Parliament, however, delegated its legislative power in the Northern Territory to the Government to legislate by Ordinance and Regulation. In parallel with developments in the States the whole thrust of the administration of Aboriginal Affairs in the Territory, until after the Second World War, was toward greater restriction of Aborigines' rights through regulation and institutionalisation and the enactment of discriminatory laws which applied to wider and wider categories of people.

In the 1920s and 30s, in response to reports of abuses of Aborigines in the north, there was growing political pressure on the Government in relation to the condition of Aborigines in the Northern Territory. In the Parliament there were several attempts by members from all sides to have the Government improve the welfare provisions for Aborigines but the pressure was never sustained. The Parliament as a whole showed little interest in reports which revealed the appalling conditions of the Aborigines in the Territory and ignored reports of a punitive expedition against Aborigines. The most important questioning of the Government and pressure for reform came from humanitarian and Aboriginal support groups; in the face of 'spectacular injustices' little was heard from the Parliament.

In the case of the development at Woomera and the British Nuclear Tests, the Parliament was almost completely silent. Very little was done by the Parliament to discover what was actually involved in the nuclear tests or what effect the tests were having on Aborigines. Even when important questions were raised elsewhere Members of Parliament from both sides chose not to press the matter.

A turning point in Indigenous policy came after the Second World War when the social changes which had been taking place in Australia were reflected in the election, to both sides of the Parliament, of a small number of members who had a strong and persistent interest in Aboriginal welfare. In the early 1950s, with bi-partisan support in the Parliament, and against a background of persistent and tireless campaigning by Aboriginal and humanitarian organisations for equal citizenship rights, the Commonwealth Government adopted a policy of assimilation and equal rights for Indigenous peoples and announced plans to implement the policy in the Northern Territory. Very slowly, through the 1950s and 1960s, the discriminatory provisions in Commonwealth (and State) laws were repealed.

Importantly, however, in the Northern Territory the Commonwealth was very slow to give effect to the stated policy of equal rights. The old practices of regulation and



institutionalisation continued and the extremely poor pay and working conditions of Aboriginal workers remained largely unchanged.

A decisive change occurred in the mid-1960s when Aboriginal communities in the Territory began to press for Indigenous rights in a new way. The Aboriginal community from Yirrkala in Arnhem Land pursued a claim to obtain ownership of their land and at Wave Hill cattle station the Gurindji people went on strike and sought to obtain ownership of their land. The Commonwealth Government and Parliament had overseen a system under which the Aborigines in the Northern Territory were largely pauperised and excluded, with their lives regulated by administrators. The initial Aboriginal protests in the Northern Territory against discrimination and poor treatment broadened into a much wider campaign. Aboriginal communities no longer sought just civil rights but now pursued Indigenous rights—land rights and control over their own lives. Although the institution of Parliament did play a role in the Yirrkala claim, the new campaign for Indigenous rights was not taken up in the Parliament until the Aboriginal groups and their white supporters had made it a national and international political issue.

One issue which had been raised periodically in the Parliament since its first session was the Constitutional provisions on Indigenous peoples. In the 1960s various proposals for constitutional amendment were discussed. A proposal for constitutional change—to remove s. 127, which stipulated that for the purposes of the census 'aboriginal natives shall not be counted', and to remove from s. 51(xxvi) the prohibition on the Commonwealth Parliament making special laws for 'the aboriginal race in any State'—became a major objective of Indigenous and other reform groups. Given the Commonwealth Parliament's legislative record and the history of neglect in the Northern Territory it is surprising that the campaign for Aboriginal rights should have placed such importance on extending Commonwealth powers. However, for many of those supporting the change, the concern was simply the removal of provisions which were discriminatory and insulting to Indigenous peoples. A Referendum proposal to remove s. 127 from the Constitution and amend s. 51(xxvi) was overwhelmingly passed in 1967.

Despite the great support for the changes to the Constitution, the Coalition Government was reluctant to exercise the new powers over Indigenous affairs. Inevitably, however, given that the Commonwealth Parliament now had this power, the political campaign for Indigenous rights focused on the Commonwealth. For the last three decades of the century Indigenous affairs were an inescapable issue for the Commonwealth Government and Parliament.



## **Introduction**

### **The Commonwealth Parliament and Indigenous Peoples 1901–1967**

This paper discusses the Commonwealth Parliament and Indigenous affairs in the period before 1967 when the original constitutional provisions relating to Indigenous matters were changed by referendum. Many of the most notable events relating to Indigenous matters took place in the Parliament after this time. The only two Aborigines to be elected to the Commonwealth Parliament won their positions after 1967. Neville Bonner (Liberal, Queensland) was a Senator from 1971 until 1983, and Aden Ridgeway (Australian Democrat, NSW) was elected to the Senate in 1998. Also, much of the most notable legislation of the Commonwealth Parliament directly related to Indigenous peoples was passed after 1967 when the Commonwealth Parliament's powers in this area had been greatly expanded. These included the Racial Discrimination Act 1975, the Aboriginal Land Rights (NT) Act 1976, the Aboriginal and Torres Strait Islander Heritage Protection Act 1984, the Native Title Act 1993, the Hindmarsh Island Bridge Act 1997 and the Native Title Amendment Act 1998. This legislation is not dealt with here. Nor are the important and controversial post-1967 discussions in the Parliament such as the debate on the 'stolen generation' following the publication in 1997 of *Bringing Them Home*, the Report of the Human Rights and Equal Opportunity Commission on its Enquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families,<sup>1</sup> or the debate in the late 1990s on Aboriginal reconciliation.

The focus of this paper is on the Parliament in the period before 1967 when it operated under the original constitutional provisions relating to Indigenous peoples, as they were drafted by the framers of the Constitution.

## The Constitution

### Sections 51(xxvi) and 127

The Constitution which came into effect in 1901 contained two provisions explicitly relating to Aborigines. First, s. 51(xxvi), the 'race power', gave the Commonwealth Parliament power to make laws with respect to 'the people of any race, other than the aboriginal race in any State, for whom it was deemed necessary to make special laws'. Aboriginal affairs remained within the jurisdiction of the States and, on the face of it, the Commonwealth Parliament would have little or no role to play in Aboriginal affairs. Second, s. 127 of the Constitution read '[i]n reckoning the numbers of people of the Commonwealth, or of a State or part of the Commonwealth, aboriginal natives shall not be counted'.

The rationale behind s. 127 is not absolutely clear. Two matters for which the measure of the population of the States could be of consequence were the apportionment of revenue, or costs, between the States, and the distribution of House of Representatives seats among the States.<sup>2</sup> In the case of s. 51(xxvi) there is also doubt about what the drafters of the Constitution intended. From the relatively brief discussion of the section in the Convention Debates it appears that the 'race power' was intended to give the Commonwealth power to deal with 'coloured' groups from outside Australia—such as people who may have come to Australia as indentured labourers—but in line with the general federalist philosophy of the Constitution, Aboriginal matters would remain with the States.<sup>3</sup>

For the law-makers the important question about the qualifying phrase, 'other than the aboriginal race in any State', in s. 51(xxvi) was what legislative measures were outside the powers of the Commonwealth Parliament on account of it. One possible meaning was that it prevented Parliament from making *any* 'special laws' for Aborigines and therefore from making laws which contained measures which treated Aborigines differently from non-Indigenous peoples. If this were the proper understanding of the meaning of the qualification to s. 51(xxvi) it could have been seen as a constitutional protection against Commonwealth laws which discriminated against Aborigines. This interpretation, however, is not the accepted one.<sup>4</sup> As will be discussed in greater detail below, many laws of the Federal Parliament, which were never challenged on constitutional grounds, discriminated against Aborigines in many ways. The qualification to s. 51(xxvi) only denied the Parliament power to enact legislation for Aborigines which would have relied entirely on s. 51(xxvi) and for which the Constitution made no other grant of power to the Commonwealth Parliament. Thus, laws dealing with, for example, the Commonwealth franchise or the payment of pensions were within the law-making power of the Parliament because of the constitutional provisions granting those powers to the Commonwealth Parliament. Special provisions in those laws which disadvantaged, or advantaged, Aborigines were not made invalid on account of the qualification 'other than the aboriginal race in any State' in s. 51(xxvi).

A related issue which has often been raised in relation to the qualification to s. 51(xxvi) and s. 127 is the question of Aboriginal citizenship. It is part of a pervasive popular mythology that until the 1967 referendum, which removed s. 127 and the qualifying words from s. 51(xxvi), the Constitution denied Aborigines citizenship rights and that the 1967 referendum resulted in Aborigines achieving citizenship. It is important in the discussion of the role of the legislature in Aboriginal Affairs to be clear about the extent to which it was actually the Constitution which denied rights to Aborigines, and the extent to which the denial of rights was the result of deliberate legislative and executive acts. In terms of the legal rights of Aborigines the Constitution, as it stood, did no more than prevent the Commonwealth Parliament from making 'special laws' for 'the aboriginal race in any state'. The legal rights of Aborigines in relation to Commonwealth matters was not the product of the restriction on the Commonwealth Parliament's powers, but on the rights and entitlements that were extended to, or denied to, Aborigines in Commonwealth legislation.<sup>5</sup> The provision did, however, deny the Commonwealth Parliament the legislative power which would have been necessary for the Commonwealth to move into the whole general area of Aboriginal Affairs. The overall administration of Aboriginal Affairs and the entire legal and administrative framework which governed Indigenous peoples in the States could not have been taken over by the Commonwealth.

Another question about the negative provisions in the Constitution is exactly who was covered by them. There is no definition in the Constitution of either expression—'aboriginal race' in s. 51(xxvi) or 'aboriginal natives' in s. 127. One unresolved matter is whether the expressions included Torres Strait Islanders.<sup>6</sup> At the time of Federation Aborigines were subject to a range of State laws which variously classified people as Aboriginal or not depending not only on their parentage but also on their circumstances and in some cases classified them differently for different purposes.

State laws, covering matters such as the supply and possession of alcohol or opium, giving evidence in court, work conditions, summary trial for certain offences, marriage and sexual relations, possession of firearms, and the guardianship of children, denied Indigenous peoples rights which were available to non-Indigenous peoples, and restricted relations between Indigenous and non-Indigenous peoples.

In Western Australia and Queensland Aborigines were explicitly denied the right to vote on the same terms as other residents.<sup>7</sup> In New South Wales and Victoria many Aborigines were effectively denied voting rights by a requirement that voters not be in receipt of charitable aid. Only in South Australia were Aboriginal men and women entitled to vote. Elsewhere in Australia Aboriginal women were excluded either because of gender or race.<sup>8</sup>

## Section 41

One other provision of the Constitution, ssection 41, that does not explicitly mention Aborigines, is relevant because it figured prominently in debates about Aboriginal rights in the Commonwealth Parliament. section 41 states:

no adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth.

In the Convention Debates proponents of s. 41 were concerned to ensure that women who, in two of the States had won the right to vote, would not be denied it in Commonwealth elections (and would not campaign against and vote against acceptance of the Constitution). Exactly what s. 41 meant in terms of ensuring Commonwealth voting rights for those Aborigines already entitled to vote in State elections became a most contentious matter. From one point of view s. 41 should have at least guaranteed the right to vote in Commonwealth elections of Aborigines in those States where they were entitled to vote but, as discussed below, that turned out not to be the case.

## First Speech on Indigenous Peoples in the Commonwealth Parliament

The question of Aboriginal rights and the constitutional powers of the Commonwealth in relation to Aboriginal matters was raised starkly in the House of Representatives less than three months after its opening. On 26 July 1901 Mr Mahon, the ALP Member for Coolgardie, moved to establish a Royal Commission on the conditions of Aborigines in northern Western Australia.<sup>9</sup> Mindful of the likely objection, that the Constitution gave the Commonwealth 'no right to interfere' in the matter, he raised the question in terms of the Commonwealth's constitutional powers. He moved:

[T]hat, with a view to determine the expediency or otherwise of amending section 51, sub-section (26), of the Constitution Act by the omission of the words 'other than the aboriginal races of any State,' it is, in the opinion of this House, desirable that a Royal Commission should be appointed to investigate and report—

on the condition of the aboriginal inhabitants of Western Australia north of the 30th parallel of latitude,

on the system by which aboriginal natives are assigned and indentured to white employers, and

on the administration of justice in the lower courts of Western Australia in so far as the aboriginal inhabitants of that State are or have been affected thereby.<sup>10</sup>

In this first speech on Aboriginal Affairs in the Commonwealth Parliament Mr Mahon raised matters which would become important in the rationale for the constitutional change in 1967, but they were matters which received very little attention in the Parliament for the next four decades. He argued that 'in this particular matter the reputation of the whole people of Australia is at stake'.<sup>11</sup> Newspapers overseas, and in Australia, had carried stories of ill-treatment of indentured and assigned Aboriginal workers in Western Australia who it was claimed were in a position akin to slavery. Mr Mahon argued that since Western Australia had obtained self-government in 1890 amendments to the laws governing Aborigines and Aboriginal employment had allowed abuses of Aboriginal rights in the lower courts. Under a 1892 law on Aboriginal employment, Aborigines found guilty of a misdemeanour at a summary hearing could be imprisoned and flogged. Provisions which had explicitly prohibited an interested party from hearing a charge as the sole Justice of the Peace had been removed from the law. In remote regions, when no other Justice of the Peace was available, an employer could hear charges against an Aborigine sitting as a single Justice of the Peace. Seeking recourse in higher courts was not a practical possibility for Aborigines in remote areas.<sup>12</sup> Despite the forcefulness of his speech, Mr Mahon did not provoke any action from the Parliament. There was no further debate on his motion and on 10 October 1902, at the close of the First Parliament, it lapsed.<sup>13</sup> There was, however, another matter before the First Parliament which required a decision about Aboriginal rights which could not be left to lapse at the end of the session.

## **The Franchise Act 1902**

The First Parliament was not elected with a uniform franchise. The voting rights were based on existing franchise laws in each of the States. Thus, in South Australia and Western Australia women had the vote, in South Australia Aborigines (men and women) were entitled to vote and in Queensland and Western Australia Aborigines were explicitly denied voting rights.

In April 1902 Senator the Hon. R. E. O'Connor (Vice-President Executive Council) introduced the Commonwealth Franchise Bill into the Senate with the object of instituting a 'uniform franchise for the Commonwealth'.<sup>14</sup> Clause 3 read:

Subject to the disqualifications hereafter set out, all adult persons—

- (a) who are inhabitants of Australia and have resided therein for six months continuously, and
- (b) who are natural born or naturalized subjects of the King, and
- (c) whose names are on the Electoral Roll for any Electoral Division,

shall be entitled to vote at the election of Members of the Senate and the House of Representatives.

One matter of controversy was that this provision extended the franchise to women for Commonwealth elections throughout Australia. An attempt in the House of Representatives to amend the clause to confine the right to 'male persons' obtained little support.<sup>15</sup> More controversial was the fact that it would grant the Commonwealth franchise to Aborigines and to 'coloured people' from overseas. In the parliamentary debate on the Bill these two matters became inextricably mixed.

O'Connor argued that people who are affected by the laws of the Parliament and have to obey those laws should not be denied the right to vote for those who make the laws. In relation to Aborigines he said:

[w]here they have settled down in occupations of some kind, I fail to see why they should not be allowed to vote in the same way as is any other inhabitant of the country. I think we might treat this question of the position of aboriginals under our electoral laws not only fairly, but with some generosity. Unfortunately they are a failing race. In most parts of Australia they are becoming very largely civilised, and when they are civilised they are certainly quite as well qualified to vote as are the great number of persons who already possess the franchise.<sup>16</sup>

In relation to 'coloured people' who were British subjects O'Connor argued that the Immigration Restriction Act would '... enable us to shut out altogether any influx of coloured persons into Australia, whether British subjects or not'. However, no people who were already in Australia and who were naturalised should be disenfranchised. The strongest argument for the White Australia Policy, he said, was that 'we do not want to have in our community any section which is in a servile condition; we do not want to have any proportion of our community disenfranchised and in a position of political inferiority, having no right to a voice in the making of laws'.<sup>17</sup>

The Government argument did not prevail. Senator A. P. Mathieson (Free Trade, WA) moved an amendment to add the words:

no aboriginal native of Australia, Asia, Africa, or the islands of the Pacific, or persons of the half blood shall be entitled to have his name placed on the electoral roll, unless so entitled under s. 41 of the Constitution.<sup>18</sup>

By current standards the language of the debate is unbelievable. Senator Mathieson argued that in the matter of Aboriginal votes there was no need for uniformity:

surely it is absolutely repugnant to the greater number of the people of the Commonwealth that an aboriginal man, or aboriginal lubra or gin—a horrible, degraded, dirty creature—should have the same rights, simply by virtue of being 21 years of age, that we have, after some debate today, decided to give to our wives and daughters. To me it is as repugnant and atrocious a legislative proposal as any one could suggest.



And later:

why should this parliament force a measure which is absolutely repugnant to the greater number of people of the Commonwealth on those States which have hitherto kept themselves clear from this slur.<sup>19</sup>

One concern of Senator Mathieson was that employers of Aborigines in pastoral districts would be able to 'put everyone of these savages and their gins upon the federal roll' and then instruct them how to vote.<sup>20</sup>

Also notable were the arguments of Senators who spoke for Aboriginal rights, and made reference to Aborigines being the original inhabitants of the land and to the injustice involved in denying rights to a people on the basis of their colour.<sup>21</sup> Senator O'Connor, who spoke for the Government in the Senate, said that:

... it would be a monstrous thing, an unheard of piece of savagery on our part, to treat the aboriginals, whose land we were occupying to deprive them absolutely of any right to vote in their own country, simply on the grounds of their colour, and because they were aboriginals.<sup>22</sup>

Senator T. Playford (Protectionist, SA) made a similar argument:

I contend that it would be a heartless thing to disenfranchise Aborigines. It is absurd that we should say we are so frightened of the original inhabitants of this continent that we dare not allow them the right to vote.<sup>23</sup>

Senator Playford, however, did see the Chinese as a threat and said 'I am inclined to vote for the portion which relates to Asiatics, Africans, and Polynesians, but I shall not vote for the portion relating to aboriginal natives'.<sup>24</sup>

The Senate, by twelve votes to eight, supported the amendment but without the restriction on the voting rights of the 'aboriginal natives of Australia'.<sup>25</sup>

In the House of Representatives two members spoke against an exclusion of Aborigines which applied to them 'as a class' simply because of their race and without any consideration to their circumstances. Mr J. B. Ronald (ALP, Southern Melbourne, Vic.) said that:

[t]o draw a 'colour line' and say that because a man's face is black he therefore is not able to understand the principles of civilization is misanthropic, inhumane, and unchristian.<sup>26</sup>

However, a motion of Mr H. B. Higgins (Protectionist, Northern Melbourne, Vic.), to amend the Bill to exclude 'aboriginal natives of Australia' from the franchise and to remove the exclusion of people 'of the half blood' was supported by 27 members to five against.<sup>27</sup>

As passed by the House of Representatives, and agreed to by the Senate, the provision read:

no aboriginal native of Australia, Asia, Africa or the Islands of the Pacific except New Zealand shall be entitled to have his name placed on the Electoral Roll unless so entitled under section forty-one of the Constitution.<sup>28</sup>

The *Commonwealth Franchise Act 1902* was important for a number of reasons. In a real sense it was the Parliament which framed the legislation. The provisions on the franchise and the wording were not the result of a party vote 'rubber stamping' the Government's legislation. The Government had proposed a uniform franchise with no distinctions on the basis of 'race', ethnicity or place of birth. This was rejected by the Parliament in favour of a number of exclusions from the Commonwealth franchise which were expressed in terms which became the pattern for much legislation which was to come.

Having debated the matter vigorously and set the patterns of excluding Indigenous peoples from one basic right, there seemed to be no impetus within the legislature to raise the matter again. A series of laws, many following the formula established in the Franchise Act for denying benefits to Aborigines, was enacted. The phrase 'aboriginal natives of Australia' was a standard description of those to be excluded or denied rights.

## Other Exclusionary Legislation

### 'White Labour' Only Laws

Several laws contained provisions which, although they did not explicitly refer to Indigenous peoples, excluded 'colour labour'. Subsection 16(1) of the *Posts and Telegraphs Act 1901* provided that, '[n]o contract or arrangement for the carriage of mail shall be entered into on behalf of the Commonwealth unless it contains a condition that only white labour shall be employed in such carriage.'

The Schedule of Excise Duties under the *Excise Tariff Act 1902* provided for a rebate to the growers of sugar cane and beet provided that 'white labour only has been employed'. The *Sugar Bounty Act 1903* which provided for the payment of a bounty to growers of sugar cane and beet contained a requirement that no bounty would be paid for production that was grown on land which was 'cultivated by other than white labour' or production from planting which was done by 'other than white labour'. The *Sugar Bounty Act 1905* contained similar provisions but also exempted Aborigines from the 'white labour' requirement. Clause 10 stated that 'the employment of any Aboriginal native of Australia in the growing of sugar-cane or beet shall not prejudice any claim to bounty under this

Act'. The *Bounties Act 1907* contained similar provisions about 'white labour' and also the exemption of 'aboriginal natives of Australia'.

## Emigration

The *Emigration Act 1910* could be seen as a protective measure for children and 'aboriginal natives'. The protection, however, was achieved by diminishing the legal status of Aborigines. The Act prohibited the emigration of children contracted to perform theatrical and other work outside Australia and any European child, unless in the care of a European adult, and 'any aboriginal native'. The Minister, the Hon. E. L. Batchelor (ALP, Boothby, SA), said '[t]he aborigines of Australia ought not to be exploited by persons who merely wish to make money out of them.'<sup>29</sup> The only aspect of the provision which was debated was the definition of 'aboriginal native' which would apply under the *Act*. After some debate 'aboriginal native' was defined to include 'any native having one aboriginal parent'.<sup>30</sup>

## Social Welfare Legislation

Under paragraph 16(1)(c) of the *Invalid and Old-age Pensions Act 1908* which established a national system of means tested pensions for residents of 25 years or more, old-age pensions were not payable to 'Asiatics (except those born in Australia), or aboriginal natives of Australia, Africa, the Islands of the Pacific, or New Zealand'. In the same terms subsection 21(1)(b) stipulated that 'aboriginal natives of Australia' could not qualify for an Invalid Pension. As introduced, the Bill excluded 'Asiatics or aboriginal natives of Australia, Africa, the islands of the Pacific, or New Zealand.' Mr Batchelor moved an amendment to remove the whole clause. He argued that it was only necessary to exclude those who were not born or naturalised British subjects. He said:

[i]n perhaps ninety-nine cases out of a hundred it would be absurd to give pensions to Aborigines, but we have some aboriginals who are farmers, who cultivate their land and live precisely as Europeans do ... [T]hey should not be debarred, on the grounds that they are aboriginals, from receiving an old-age pension ... [W]e ought not to debar a man from receiving pensions simply because he is an aboriginal.<sup>31</sup>

Most of the debate was concerned with the exclusion of 'Asiatics' and the aboriginal natives of other countries. In relation to that point Mr Batchelor argued: 'if we naturalise them and call upon them to bear taxation exactly as we do every other member of the community—we should not refuse them a pension'.<sup>32</sup>

It was argued that some long-term residents who had qualified for a state pension would now not be eligible. The Government, however, did not want to concede ground and the only concession made was to remove the exclusion of those 'Asiatics' born in Australia.

In 1912 Parliament passed the *Maternity Allowance Act* to provide for the payment of an allowance to women living in Australia upon the birth of a child. Under subsection 6(2) the allowance was not to be paid to '[w]omen who are Asiatics, or are aboriginal natives of Australia, Papua, or the Islands of the Pacific'. Senator Walker (Free Trade, NSW) unsuccessfully attempted to amend the exclusionary clause. His concern was the meaning of the word 'Asiatic' and wished to ensure that women of European descent who were born in Asia were not excluded. The debate highlighted problems of inconsistency which arose out of laws which use 'racial' categories to define entitlement or rights. It was noted by Senator J. Vardon (Free Trade—Liberal, SA) and Senator T. D. Chataway (Free Trade, Qld) that a white woman married to a black man would be entitled to receive the benefit, but a black wife of a white man would not. The Government assumed that the inconsistency could not be avoided.<sup>33</sup> There was no objection to the exclusion of Aborigines and no discussion of Aborigines except a passing reference to the fact that under the clause the daughters of a white father and a 'half caste' Aboriginal woman would be entitled to the benefit but their mother would not.<sup>34</sup>

## Defence Legislation

The *Defence Act 1910* exempted from service in time of war '[p]ersons who [were] not substantially of European origin or descent, of which the medical authorities appointed under the regulations shall be the judges ...' In other circumstances the exemption from compulsory military service might have been seen as beneficial treatment. However, although there was no mention of Aborigines in the Parliamentary Debate, there was no reason to see the exemption as being underpinned by anything other than the same ideology which gave rise to the other exclusions.<sup>35</sup> The Act did not prevent Aborigines enlisting and in the First World War a number served with distinction in non-segregated units.<sup>36</sup>

## Interpreting the Law

Parliamentarians may have anticipated that the application of these laws would be a relatively straightforward matter. The reality was that it was anything but straightforward. Laws that classified people on the basis of 'race', did not, and could not, provide clear cut objective criteria. It was always difficult to maintain consistency in administrative practice, and to interpret the law in a way which was not open to attack for inconsistency and contradiction. As with the Apartheid laws in South Africa and the White Australia Policy, administrators were always confronted with problems of interpretation in relation to people who did not fit neatly in the racial categories established by the law. For the people administering the laws there was a concern that their interpretation of the law in cases which were not clear-cut might establish a precedent which would make it more difficult to 'hold the line'.

To fully appreciate the complexities and contradictions involved in the administration of these 'racially' excluding laws it is necessary to understand the meaning that was placed on the expression 'aboriginal native' as it applied to people from outside Australia, as well as to the Indigenous peoples of Australia. The term 'aboriginal', was taken to mean being of the 'race' of original inhabitants of a country, whereas 'native' meant being born in the country. Much could be said about the reasoning behind this understanding of the terms but for the purposes of understanding the effect of the legislation, an 'aboriginal native' of a country was taken to be a person who was both born in the country and was of the original 'racial' group of the country. Thus, that legislation which excluded 'aboriginal natives of Asia' did not apply to Australian-born children of Asians, whereas that legislation which excluded Asians—such as the *Maternity Allowance Act 1912*—continued to apply to second and subsequent generations of people from Asia. The effect was that while the Australian-born children of, say, 'aboriginal natives of Asia' were not excluded from the Commonwealth franchise, the exclusion continued to apply to Aborigines, or to be more precise, to 'all persons in whom the aboriginal blood preponderates'.<sup>37</sup>

The full impact of the law was a complex administrative jigsaw in which people of Asian or African background could be naturalised and still be denied a range of normal rights and benefits, and their Australian born children could have a different set of rights.

The legal status of Indigenous peoples was equally problematic and inconsistent. Individuals could be Aborigines for some purposes and not others. In the administration of the Franchise Act it was decreed that 'half-castes' were not 'aboriginal natives'. Secretary to the Attorney-General's Department, Robert Garran, advised that 'half-castes' were not disqualified from voting 'but that all people in whom the aboriginal blood preponderates are disqualified'. By 'blood', he noted, he meant 'ancestry'.<sup>38</sup>

In 1901 the Attorney-General, Hon. Alfred Deakin, had expressed a similar opinion. He stated that in relation to s. 127:

half-castes are not 'aboriginal natives' within the meaning of this section, and should be included in reckoning the population'.<sup>39</sup>

However, in relation to the term 'white labour' in the *Excise Tariff Act 1902* Deakin wrote that:

half-castes are on the borderline; but in view of the affirmative and restrictive language of the provision, I think that half-castes should be excluded.<sup>40</sup>

As more laws using 'racial' categories came into operation the position became more confused and irrational and the legal status of Aborigines was made even more complex by the operation of State laws. State and Territory laws, which became more restrictive and discriminatory over the first half of the century, subjected Indigenous peoples to a wide range of restrictions. In some cases these laws applied to people with *any* Aboriginal

antecedents.<sup>41</sup> Individuals who were subject to the restrictions and legal disabilities under State laws could at the same time be required to comply with Commonwealth legislation under which they were regarded as non-Aboriginal. Chesterman and Galligan give the example of 'half-castes' who under a State law were regarded as Aborigines and were denied a whole range of legal rights but, at the same time, were subject to conscription under the *National Registration Act 1939*.<sup>42</sup>

## **Constitutional Rights of Indigenous Peoples?**

In the debate on the first Commonwealth Franchise Bill great attention was paid to how s. 41 of the Constitution might affect the voting rights of Aborigines. Senator O'Connor, speaking for the Government in the Senate, appears to have believed s. 41 only applied until the Commonwealth Parliament legislated under s. 9 and s. 30 for the Commonwealth franchise.<sup>43</sup> Senator Playford agreed and argued that the words 'or acquires' in s. 41 referred to those who acquired the vote in a State between the proclamation of the Constitution Act of the British Parliament and the enactment of the franchise law by the Commonwealth Parliament. Once the Commonwealth Parliament had legislated, s. 109 would give precedence to Commonwealth law.<sup>44</sup> On this interpretation, s. 41 provided no constitutional protection because the Commonwealth Parliament would be able to legislate for a uniform franchise which was more limited than that in a State.

In the House of Representatives the Hon. Sir William Lyne (Minister for Home Affairs) spoke for the Government. Along with a number of others he interpreted s. 41 to mean that it 'prohibited the taking away of an existing electoral right in a State'.<sup>45</sup> In the words of Mr Higgins, s. 41 only compelled the Parliament to 'keep alive existing electoral rights'.<sup>46</sup>

Senator Mathieson and others argued that s. 41 guaranteed the Commonwealth franchise to anyone who at any time in the future obtained a State franchise.<sup>47</sup> According to this view the words 'or acquires' meant acquires at any time in the future. Some speakers who accepted this interpretation were alarmed at the implication that an Act of a State Parliament could have the effect of extending the Commonwealth franchise.

Despite the disagreements about its meaning and effect on the operation of the legislation, the reference to s. 41 remained in the Commonwealth Franchise Act, and the problem of interpreting it was passed to the electoral officials who administered the Act and compiled the electoral rolls. An influential reference in this matter was Quick and Garran's *Annotated Constitution of the Australian Commonwealth*.<sup>48</sup> When electoral officials, and other Commonwealth Departments, sought advice on the meaning of s. 41 Robert Garran, as Secretary to the Attorney-General's Department, put forward the position taken in the *Annotated Constitution*.<sup>49</sup>

Quick and Garran saw three possible interpretations of the rights conferred by s. 41. First, that a right could be acquired at any time in the future if State law extended the franchise.

Second, that the right could be acquired at any time in the future by people who were eligible under a State law which had been in existence before the Commonwealth Parliament determined the Commonwealth franchise. Thirdly, 'that the right must be acquired by the [person] concerned before the Federal franchise was fixed'.<sup>50</sup> Although they thought that the matter was not beyond argument they preferred the third and most restrictive interpretation—that is that s. 41 only protected the right to vote in Commonwealth elections of those *individuals* who actually had the right to vote in a State election before the Commonwealth Parliament determined the franchise for Commonwealth elections.

Quick and Garran noted that a point against their interpretation was that in the Convention Debates the main advocate of the inclusion of s. 41, Mr F. W. Holder from South Australia, sought to ensure that women in South Australia—presumably not just the individual women who were already enrolled for State elections—were not disenfranchised in Commonwealth elections. This pointed to the second possible interpretation, which would have ensured not only that the federal franchise could not be taken away from women in general in the two States where they already had the vote, but also would have preserved the rights of all Aborigines in South Australia and that class of Indigenous peoples who had met the restrictive franchise requirements in other States.

The narrowest interpretation of s. 41, favoured by Quick and Garran, would only have given Commonwealth voting rights to *individual* Aborigines who had already exercised their rights in State elections *prior* to the Commonwealth Parliament legislation on the Commonwealth franchise. As it turned out, in the administration of the franchise legislation, no Aboriginal rights were protected. In a detailed study of the electoral rolls and the administrative practices of Commonwealth electoral officers, Pat Stretton and Christine Finnimore show how Aborigines were systematically denied their rights. On any pretext, for example a change of address, Aborigines who had exercised their State voting rights since before 1901 were removed from the Commonwealth rolls. Stretton and Finnimore conclude that many of the removals were simply illegal.<sup>51</sup> Neither the interpretation by officials of s. 41 in relation to Aborigines, nor the administrative removal of Aborigines from the electoral rolls, were challenged in the courts. Nor, despite the fact that it was confronted with issues relating to the voting rights of other groups, were the administrative practices which denied Aborigines the vote raised in the Parliament until the 1940s.<sup>52</sup>

In 1923, however, there was a challenge in the High Court by a Japanese-born British subject, Jiro Muramats, whose application for enrolment for Commonwealth elections had been refused by electoral officials, even though he was enrolled for Western Australian elections.<sup>53</sup> Muramats lost the case on account of a technicality in the Western Australian legislation which denied him a vote even though his name was on the electoral roll. The importance of the case, however, was that Justice Higgins' judgement contained an opinion on the meaning of s. 41 which ran counter to the administrative orthodoxy. Justice Higgins held that but for the technicality in the Western Australian law Muramats:

... right to vote at elections for the [Western Australian] assembly, and therefore to be enrolled on the Commonwealth roll, would seem to be clear.<sup>54</sup>

In 1924 a magistrate in Melbourne upheld an appeal by an Indian-born British subject, Mitta Bullosh, whose application for enrolment had been rejected by the Commonwealth Electoral Office. The magistrate was influenced in his decision by the Higgins' interpretation of s. 41.<sup>55</sup> The Commonwealth Electoral Officer in Victoria believed that, if the decision stood, he would be obliged to accept applications for enrolment by those 'Aboriginal natives' of Australia, Asia, Africa and the Pacific Islands who were entitled to vote in State elections, and thereby significantly extend the franchise.<sup>56</sup> Initial plans by the Commonwealth Government to appeal against the magistrate's decision were abandoned in the face of increasing pressure to comply with previous undertakings made at Imperial Conferences, and to the Indian Government, to remove discrimination against Indians who were British subjects and were resident in Australia.<sup>57</sup> Instead the Government introduced legislation which dealt in the narrowest possible way with the dilemma caused by the decision in the Mitta Bullosh case. Legislation was introduced to make all Indians who were British subjects in Australia eligible to vote.

The object of the Bill, the Minister explained, was 'to remove the existing disqualification on racial grounds from adult natives of British India who are inhabitants of the Commonwealth'.<sup>58</sup> The Parliament was reassured that the total numbers involved were small (approximately 2300 in the whole Commonwealth) and would decrease as British Indians could no longer obtain permanent entry. The measure had bipartisan support. The several Senators who spoke argued that it was a just measure which would help dispel misconceptions in India about Australia's policies and, noting that there would be no relaxation of the White Australia Policy and that the Bill only applied to those Indians already domicile in Australia, expressed support.<sup>59</sup>

The introduction of this legislation had presented the Parliament with an opportunity to examine all the exclusions in the franchise legislation, but it did the reverse. In the entire debate on the Electoral Bill 1925 there was not a single reference to the 'aboriginal natives of Australia', who were, and remained, excluded by exactly the same clause in the Act which had denied Indians Commonwealth voting rights.<sup>60</sup> Nor, despite the interest shown in the meaning and effect of s.41 during the debate on the franchise in the First Parliament, was there any discussion of it in 1925. On both sides of the Parliament there was an eagerness to deal quickly with the internationally embarrassing matter of discrimination against British Subjects without questions about the rights of other groups being raised.

## **The Northern Territory**

Under s. 122 of the Constitution the Commonwealth Parliament can 'make laws for the government of any territory'. Thus, in 1911 when the Northern Territory was transferred to



the Commonwealth from South Australia, the Commonwealth Parliament obtained undivided law-making power over the Territory.

The Commonwealth Parliament obtained this full legislative power at an important time. Aborigines were the majority population in the Territory and many still lived in a frontier situation on cattle stations or in more remote areas beyond the frontier where there had been very little contact between Aborigines and Europeans. It was open to the Commonwealth Parliament to attempt to regulate the dispossession of Aborigines from their land and to bring some enlightenment to the administration of the 'colonial situation' in the Northern Territory.<sup>61</sup> With the lessons of what had happened in each of the British colonies in Australia it might have been possible for the Commonwealth Parliament, with full law-making power, to seek better outcomes for Aborigines than had been achieved in any of the States. However, given the attitudes which had already been expressed in the Parliament about Aboriginal Affairs it is not surprising that the question of Aboriginal rights in the Northern Territory was not raised in the debate on the Northern Territory Bills. As Yarwood and Knowing observe, there appeared to be no 'awareness that the Commonwealth was embarking on an important responsibility, in the exercise of which the world might measure, some day, its humanity and generosity.'<sup>62</sup>

From the outset members of the Parliament indicated a preparedness to 'turn their backs' on the Northern Territory. The provisions in *The Northern Territory (Administration) Act 1910* for the administration of the Territory were brief and were dealt with briefly by the Parliament. The Act established the position of Administrator for the Territory, who was responsible to the Minister for External Affairs; the Commonwealth Parliament's legislative power in relation to the Territory were delegated to the executive branch. In essence the Parliament handed its new legislative powers to the Government. Section 13(1) stated:

until the Parliament makes other provision for the government of the Territory, the Governor General may make Ordinances having the force of law in the Territory.

Although the Act required the tabling of the Ordinances in both Houses, and provided for their disallowance by either House, it is a notable feature of the Parliament's attitude to the governance of the Northern Territory that it so readily delegated its legislative power.<sup>63</sup> Normal Commonwealth laws operated in the Territory in the same way as elsewhere in Australia and Commonwealth Departments continued to operate directly in the Territory, but in relation to those matters which would otherwise be State matters, the Commonwealth governed through an Administrator.<sup>64</sup>

The legislation transferring responsibility for the Northern Territory from South Australia, the Northern Territory Acceptance Bill 1910, was given much closer attention. Almost the entire debate was concerned with the cost to the Commonwealth. The legislation ratified an agreement which had been made between the Commonwealth and South Australia, which included commitment to complete the railway line from South Australia to Darwin.

More than anything in the Bill the matter of the railway line took up the Parliament's time.<sup>65</sup>

Amongst all the words spent on the proposed railway line one matter—the value of pastoral leases and the profitability of the cattle industry—did indirectly foreshadow issues which were to be central to race relations in the Territory. Senator R. J. Sayers (Free Trade-Liberal, Qld) observed that leases on 'enormous estates' of thousands of square miles, with up to 42 years to run, would 'be made very valuable by the construction of a railway at the expense of the Commonwealth.'<sup>66</sup> For reasons unrelated to the railway (which ninety-nine years on still had not been built) the value of the land was to become a matter of continuing importance. The value of the 'enormous estates' did depend on the running costs of cattle stations, and for the next 50 to 60 years the question of the cost of Aboriginal labour was central to race relations in the Territory and was one issue relating to the Territory with which the Parliament did concern itself.

One provision of the Bill which attracted the attention of Parliamentarians proved to be more important than could have been anticipated. Under the heading *Disposal of Crown Lands*, s. 11 of the Act required that:

[n]o Crown Lands in the Territory shall be sold or disposed of for any estate of freehold, except in pursuance of some contract entered into before the commencement of this Act.

Opposition members, resigned to the fact that they did not have sufficient votes in either chamber to defeat it, spoke briefly against the measure, arguing that it would discourage immigrants settling in the Territory and would 'stand in the way of improvements being made'.<sup>67</sup> The question of type of land ownership continued to be a divisive issue and ultimately, with the Mabo and Wik decisions in the 1990s, became a matter which very directly affected indigenous rights to land.

*The Northern Territory (Administration) Act 1910* gave the Territory no representation in the Commonwealth Parliament. Before its transfer to the Commonwealth the Northern Territory had had representation in the South Australian Parliament. Section 122 of the Constitution allowed the Parliament to grant representation to the Territory in either house but it was not until 1922 that the Territory gained representation and then only on a limited basis.<sup>68</sup> Even with one representative the Northern Territory was marginal to the party contest of the Parliament. Unless an issue in the Territory touched the broader Australian community, or affected important economic interests, it was unlikely to get much attention in the Commonwealth Parliament.

## **Legislating for Indigenous Peoples in the Northern Territory**

The South Australian law governing Aboriginal Affairs in the Northern Territory, the *Northern Territory Aboriginals Act 1910 (SA)*, which was in place when the

Commonwealth took control was protectionist and segregationist and denied Aborigines the most basic legal rights. Modelled on the Queensland *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* it was in line with laws which had been enacted in all the mainland States. Accounts of deprivation and economic exploitation and abuse of Aborigines in remote areas had led to public pressure for the adoption of protectionist measures which, whatever the motives of the proponents, took the form of segregationist laws, making Aborigines an institutionalised and administered people subject to the direction and control of officials.

The first Ordinance relating to Aborigines made under Commonwealth control of the Northern Territory, the *Aboriginal Ordinance 1911*, and the Regulations made under it, contained very similar provisions. On its face the Ordinance was designed to protect Aborigines from exploitation. The employment of Aborigines was subject to the control of a Protector or Sub-Protector and Europeans could be prohibited from entering Aboriginal camps and under subsection 6 (1) there was power to remove Aborigines where:

any Protector or police officer [had] reason to believe that any aboriginal or half-caste [was] not being properly treated.

However, whatever 'protection' was achieved it also entailed the denial of rights. Aborigines were placed under the direction of the Protector. Aborigines could be excluded from designated areas and the Protector was given power to have Aborigines taken into custody. The Ordinance also gave to the Protector the powers that were used in the removal of part-Aboriginal children from their parents. The Protector was made the legal guardian of every Aboriginal and part-Aboriginal child under the age of 18, and under s. 3(1) of the Act was:

entitled at any time to undertake the care, custody, or control of any aboriginal or half-caste if in his opinion, it [was] necessary or desirable in the interest of the aboriginal or half-caste for him to do so.

In 1918 a new comprehensive Aboriginal Ordinance intensified the existing law's protectionist and discriminatory provisions. The definition of 'Aborigine' included 'aboriginal natives of Australia and of the adjacent islands', and depending on their circumstances and gender, some 'half-castes'. 'Half-castes' living as the spouse of an Aborigine, and 'half-castes' who associated and lived with Aborigines were included in the definition. All male 'half-castes' under the age of 18, and female 'half-castes' who were 'not legally married to a person who [was] substantially of European origin or descent' were defined as Aboriginal.

The Protector was given extraordinary powers and Aborigines were subject to extraordinary restrictions. Aborigines, as defined by the Ordinance, could be directed to live on Reserves unless employed. The Protector (and police) could arrest Aborigines without a warrant for breach of an Ordinance and could order Aborigines to move from

one reserve to another or to move their camp. Aborigines were prohibited from entering hotels and locations could be declared prohibited areas.

Under the Regulations made in 1919 Aborigines who worked and lived in towns could not be 'at large' one hour after sunset without written permission. The penalty for a breach of the regulation was one month imprisonment.<sup>69</sup> Missions could be declared Aboriginal institutions for children and became important instruments for separating children with lighter coloured skin from their parents. The Ordinance put children sent to institutions under the control of the superintendent.

The Ordinance contained provisions which were rationalised in terms of the need to protect Aboriginal women, but they also reflected an official concern about the growth of the part-Aboriginal population. The effect of the 'protective' measures was to even further lower the status of Aboriginal women. It was an offence for non-Aborigines to 'habitually consort' with or keep an Aboriginal or 'half-caste' mistress or to have carnal knowledge of Aboriginal or 'half-caste' women. An Aboriginal women needed permission to marry a non-Aboriginal man.

The official position saw 'caste' or 'breed' or 'strain' as being a measure of, or determinant of, competence. Ordinances became more complex and convoluted as rules and regulations increasingly classified people, and their rights, entitlements and obligations in terms of their racial mix.

In the name of greater protection, subsequent amendments to the Aboriginal Ordinance increased the regulation and control of Aborigines. Over the next two decades officials were vested with more and more discretionary power over a wider and wider range of people. In line with developments across Australia Commonwealth policy in the Northern Territory aimed to separate and absorb the children with light coloured skin.<sup>70</sup>

Another legal change in the Northern Territory, which was also in line with developments in the States, was the adoption of a system of exemptions. The *Aboriginal Ordinance 1936* allowed Chief Protectors to conditionally exempt part-Aborigines from the provisions of the Ordinance. The system of exemptions was presented as a progressive measure which was aimed at Aboriginal progress and advancement. However, the ideology behind the system—its paternalism and cultural arrogance—and the bureaucratic and overbearing way in which exemptions were administered were deeply resented by Aborigines.<sup>71</sup> Although an exemption could release an individual from the restrictions of the Act or the Ordinances and the control of officials, it could also drive a wedge into communities or even families (see below). In later years the importance of the exemptions extended beyond the fact that an individual could be freed from the restrictions and controls of the Ordinance. Exempted Aborigines became entitled to a range of other Commonwealth benefits which would otherwise have been denied to them as an 'Aborigine' as defined by the Ordinance.

The parliamentary record shows that the discriminatory Ordinances were accepted by the Parliament largely without complaint. There were, however, two matters which did provoke Parliamentary challenges to Northern Territory Ordinances; firstly, the terms under which land could be held in the Northern Territory, and secondly any suggestion that a minimum wage for Aborigines would be set by regulation, or that the Protector would acquire the capacity to regulate employers effectively.

## **Leasehold versus Freehold Land**

Throughout 1911 and 1912 the Opposition attacked the Fisher Labor Government over its policy of making land available in the Territory only as leasehold. Opposition members argued that only freehold title would provide the security which would be necessary to induce settlers to take up residence in the Territory.

In August 1912 the Opposition moved in the Senate and the House of Representatives to disallow the *Crown Lands Ordinance 1912* which set the terms for the leasing of Crown land in the Territory. Since the Act under which the Ordinance was made—the *Northern Territory (Administration) Act 1910*—prohibited the disposal of Crown land as freehold title it was not possible for the Opposition to achieve its ultimate objective by having the Ordinance disallowed. Nevertheless the Opposition argued that only short-term leases should be allowed as a temporary measure until it was possible, through a change in the legislation, to dispose of Crown land to freehold title.<sup>72</sup>

As with the two Northern Territory Acts, in the course of a very lengthy debate on the Crown Land Ordinance and on land settlement in the Northern Territory, there was almost no mention of Aboriginal rights or of the future place of Aborigines in the Territory. However, the outcome of the debate was ultimately to be of great significance for Aboriginal rights in the Northern Territory. The existing Pastoral Leases in the Northern Territory had been made under South Australian law which explicitly preserved Aboriginal rights to enter pastoral leases and hunt and gather and take surface water. In the debate on the Crown Land Ordinance the Opposition attacked many aspects of the terms under which the leases would be held. There were objections to the powers of the Director of Lands, the 'reservations, covenants conditions and provisions' which could be placed on a lease, and the provision for periodic review of the rent. The preservation of certain Aboriginal rights, however, was not taken up directly.

Although the question of the terms of landholding continued to be raised periodically the step of converting leasehold to freehold was never taken.<sup>73</sup> There were a number of subsequent amendments to the Crown Land Ordinance but none of these removed the rights of Aborigines to 'enter and be on the leased land; take water; take or kill animals for food or ceremonial purposes; and take vegetable matter growing naturally'.<sup>74</sup>

This reservation of Aboriginal rights had very important implications following the *Mabo*<sup>75</sup> decision in 1992 in which the High Court found that, contrary to previous legal decisions, native title to land had existed in Australia prior to European settlement, that it had survived the acquisition of sovereignty by the Crown and that although it was extinguished by deliberate acts of the Crown, such as the sale of a freehold title, where land had not been 'alienated' Indigenous peoples might still be able to claim some right to the land. This raised the possibility that some Aboriginal rights had been preserved on pastoral leases. In the *Wik*<sup>76</sup> decision in 1996 the High Court found that 'the granting of a pastoral lease ... did not necessarily extinguish all native title rights, and interests that might otherwise exist.'<sup>77</sup>

At the time of the debate on the *Crown Land Ordinance 1912* in the Commonwealth Parliament the accepted orthodoxy was that under Australian law Aborigines had no right to claim land on the basis of rights arising from prior occupation. To the extent that such rights were even contemplated it was supposed that Aboriginal rights would be accommodated through the creation of Aboriginal Reserves.

## **Aboriginal Employment in the Pastoral Industry in the Northern Territory**

Throughout the 1920s there were press reports of Aboriginal deprivation in the North, and the Government came under pressure from humanitarians and Christian groups to improve the lot of Aborigines. There was extensive press coverage of a massacre of Aborigines in the north of Western Australia in 1926, and the subsequent investigations, and acquittal of two policemen charged with murder.<sup>78</sup> Humanitarian groups became more insistent in calling for reforms and for action by the Commonwealth Government. Eventually the cause was taken up, in a bi-partisan way, in the Parliament. In October 1927 Mr D. S. Jackson (Nationalist, Bass, Tas) called for the establishment of a Joint Select Committee to report on Aboriginal welfare. He moved (in part):

that in view of the fast increasing death rate among the aboriginal tribes in Australia, and the urgent need for their protection against disease and other effects brought about by the populating of areas which for centuries have been their hunting grounds a joint select committee be appointed to inquire into—

- (a) the segregation in large areas in the Northern Territory of its present aboriginal population,
- (b) co-operation with States in matters affecting the welfare of aboriginal tribes,
- (c) the half-caste problem,
- (d) allocation of assistance to Aboriginal Mission Stations, and
- (e) any other matters which will assist the welfare of aboriginals and half-castes.<sup>79</sup>

Mr Jackson described the 'pitiful' condition of Aborigines in institutions in the Northern Territory. Aborigines, he warned, would become a 'vanishing' people, like Indigenous peoples elsewhere in the world, unless action was taken. He said,

[p]robably the world will not remember very much of the speeches of honourable members in this Parliament; but it will remember what we do here, and how we treated our aboriginals.<sup>80</sup>

The motion was supported by Mr N. J. O. Makin (ALP, Hindmarsh, SA) who urged that consideration be given to the views of the Aborigines Protection Society of South Australia:

the Australian aboriginal is the rightful owner of this country ... Protection should be granted to him against any harm that might come to him from association with white men. The Aborigines Protection League urges that an area be set aside for our aboriginals, and that a model State should be created and governed by an administrator, the aboriginal himself having some voice in its government.<sup>81</sup>

The proposal, he said, was not for total segregation. 'It would certainly be wrong to compel them to occupy certain areas'. However, in outback Australia, where Aboriginal well-being was so threatened by the appropriation of their hunting ground and water springs and by mistreatment it would be desirable:

to constitute these people [into] a community of their own, and encourage them to develop along their own lines.<sup>82</sup>

The Nationalist Government of Stanley Bruce (1923–1929) resisted the establishment of a Joint Select Committee. Its preferred position had been to establish a Royal Commission into Aboriginal Affairs in all States and Territories but the States had not been willing to co-operate. The Minister for the Home and Territories, the Hon. C. W. C. Marr, urged the Parliament not to dwell on the wrongs of the past which, he said, could be detrimental to Australia's interest overseas.

[T]o review the past ... would be to unjustly misrepresent the conditions that obtain today. If we were to broadcast to the world that nearly 100 years ago the aborigines were treated in a dastardly way—and admittedly they were—we should do injury to our White Australia policy; whereas we wish to convince the world that we are as mindful of our black brethren as of the whites.<sup>83</sup>

However, the Government was also under pressure from outside the Parliament. Various deputations had urged reforms on the Government. The Minister had received a letter from the Anti-Slavery and Aborigines Protection Society of London and a deputation had called on the High Commission in London. The Aborigines Protection Society of South Australia and the Association for the Protection of Native People of the Commonwealth lobbied the Government, and a Petition from 7113 people, seeking the creation of a 'model Aboriginal state' was presented to Parliament.<sup>84</sup>

In December 1927 the Prime Minister announced that rather than agreeing to the establishment of a Joint Select Committee or a Royal Commission, the Government would hold an inquiry into the conditions of Aborigines and 'half-castes' in the Northern Territory.<sup>85</sup> The Chief Protector of Aborigines in Queensland, J. W. Bleakley was commissioned to conduct the enquiries. Bleakley was concerned to improve the material well-being of Aborigines and their prospects, but his *Report on the Aboriginal and Half-Castes of Central and North Australia*<sup>86</sup> was very much a document of its time. Bleakley accepted the paternalistic and protectionist policies of the day and advocated the continued separation of 'half-caste' children from their parents. There are many things that could be said about the Report but the point of interest here is the account to the Parliament of living and work conditions in the Territory.<sup>87</sup>

Bleakley noted that the cattle industry in the Northern Territory was totally dependent on Aboriginal labour. Equally, Aborigines who had been deprived of their traditional mode of survival were forced to seek station employment. Employers were required to be licensed and to provide the most minimal conditions and facilities. In some areas where labour was in short supply employers paid a cash salary above the minimum and some employers provided reasonable conditions. However in many cases even the absolutely minimal conditions were not enforced and were not met. Aboriginal workers lived in camps on the cattle stations.

[B]y the payment of a licence fee of 10[shillings] per annum, the employer is entitled to employ an unlimited number of aboriginals without payment, on condition that those employed are clothed and fed, and reasonable shelter is provided for them. The licence stipulates that any permanently employed shall be paid a wage of 5[shillings] per week ... As employers on pastoral holdings have claimed that many more natives have to be fed than are employed by them, the payment of wages has not been insisted upon, at any rate in North Australia.

In relation to living conditions Bleakley reported that, '[a]lthough it is one of the conditions of employment that reasonable shelter be provided for all natives employed, at very few places inspected was there found any evidence of a real attempt to fulfil these conditions'.<sup>88</sup>

In many places workers had to make shelter for themselves from waste material which 'usually, for lack of material ... were mere kennels and most unsanitary'.<sup>89</sup> No education was provided and Bleakley noted the opposition of some employers who believed that 'education spoils them, making them cunning and cheeky'.<sup>90</sup>

A few employers, Bleakley observed:

with a humane recognition of some measure of obligation to relieve the old natives of the camp, who have been deprived of their natural means of subsistence by the usurpation of their tribal hunting grounds, and the employment of their food winners, supply the old people with rations.



Usually, however, this was not the case and 'as a result of the semi-starvation that often exists' young women in the camps were forced into prostitution.<sup>91</sup>

Bleakley made a large number of recommendations, most of which were in accord with the paternalistic framework and the racial stereotypes of the day. Among them, however, were a number of recommendations relating to the adoption of Regulations to enforce minimum wages, a fixed scale of wages for permanent workers and better living conditions. This caused great alarm in the Northern Territory cattle industry which opposed fixed wages, however minimal.

At the same time that the Bleakley Report was being finalised, another event in Central Australia put further pressure on the Government already under pressure in relation to Aboriginal Affairs.

### Coniston Killings

In August 1928, in the vicinity of Coniston Station, 160 miles north-west of Alice Springs, a party led by police, was assembled to seek out Aborigines who had killed a white station hand.<sup>92</sup> There had been growing tension between Aborigines and Europeans in the vicinity. As pastoral expansion and drought put pressure on Aboriginal food and water supplies there had been threats against Europeans and some spearing of cattle and goats. In August–September the party killed at least 31 Aborigines. When the news made its way to the Department of Home Affairs, and the Australian and overseas press, the Government was inundated with representations from humanitarian, church and missionary, and Aboriginal protection societies seeking a broad independent inquiry.<sup>93</sup> Under pressure, the Government established a Board of Enquiry to be chaired by A. H. O'Kelly, a Police Magistrate from Queensland, with two other members—P. A. Giles, a Police Inspector from Oodnadatta in South Australia, and J. C. Cawood, the Police Commissioner for Central Australia.

The Board was to inquire into whether the shooting of the Aborigines was justified and:

[w]hether on the part of the settlers in the districts concerned, or in any other direction, any provocation has been given which could reasonably account for the depredations by the aborigines and their attacks on white men in Central Australia. If not, what, in the opinion of the tribunal, were the reasons for the aborigines' actions.<sup>94</sup>

In less than three weeks, having interviewed thirty witnesses (all but one of whom were Europeans), the Board submitted its Report. The Board was, it said, 'prepared to believe the evidence of all witnesses', and concluded that the shootings had been justified. Further, it found that:

[no] provocation had been given which could reasonably account for the depredations by the Aborigines and their attacks on white men in Central Australia.

On the reasons for the Aborigines' actions the Board concluded:

- (a) the advance of the Walmalla tribe on a marauding expedition from the border of Western Australia into the Coniston country—the tribe had intentioned to wipe out the settlers and working boys, as the evidence shows,
- (b) unattached Missionaries wandering from place to place, having no previous knowledge of blacks and their customs and preaching a doctrine of equality,
- (c) inexperienced white settlers making free with the natives and treating them as equals,
- (d) semi-civilized natives migrating and getting in touch with [uncivilized Aborigines],
- (e) semi-civilized natives losing their skills for hunting wild game through lack of practice, preying on the working boys at stations,
- (f) a woman Missionary living amongst naked blacks thus lowering their respect for the whites,
- (g) crimes and minor offences by natives going unpunished owing to insufficient Police,
- (h) insufficient Police patrols,
- (i) imprisonment not being a deterrent to native offenders, and
- (j) escaped prisoners from Darwin not being rearrested—wandering about in their native country and causing unrest and preaching revolt against the whites.<sup>95</sup>

Hartwig has made a detailed analysis of the findings in relation to the Proceedings of the Enquiry, and other accounts and facts that were not collected by the Board. He argues that many of the conclusions of the Board are inconsistent and are contradicted by the evidence. The various justifications for the killings—self-defence, to prevent escape, and the 'unfortunately-drastic-action-had-to-be-taken' explanation—were garbled and contradictory.<sup>96</sup> No evidence was taken from the relatives of those who were shot or other Aborigines. Accounts from the other side, and other evidence pointed to quite different conclusions. A number of the Board's findings in relation to the reasons for Aboriginal attacks were simply ridiculous. There was no 'Walmalla tribe', the only woman missionary in Central Australia was stationed in a quite different area and there was no evidence of 'unattached missionaries' operating in the area or of the presence of escaped prisoners from Darwin.

Many of these matters were taken up with the Government by humanitarian and mission organisations who argued that the hastily written Report looked like a 'white-wash' undertaken by a Board which was far from impartial. There were no truly independent members representing outside organisations, and the Aborigines had no legal representation. In the time that it took to write the Report the Board could not possibly have examined the matter carefully. It was unreasonable to believe that in the

circumstances the killing of at least 31 Aborigines (with none wounded) had been justified.<sup>97</sup>

Although many newspapers accepted the Board's Report without criticism there were persistent complaints from Aboriginal protection and church organisations. Continuing reports of the condition of Aborigines in the Territory made it difficult for the Government to ignore the public demands for action. However, it appears that whatever damage the Coniston incident could do to the Government's standing, it was more worried about the recommendations of the Bleakley Report on wages and working conditions in the cattle industry. Along with the cattle industry the Government opposed the implementation of Bleakley's recommendations on minimum wages and conditions but now faced growing public pressure over Aboriginal conditions and mistreatment of Aborigines in the Territory.

The Government chose to conflate the issues raised in the two reports and to defuse the issue by holding a conference of a wide range of interested parties. *The Findings of the Board of Enquiry* were tabled in the Parliament on 7 February 1929, and the Bleakley Report the next day, and the Minister for Home Affairs, the Hon. C. L. A. Abbott, announced that a meeting of all interested parties would be held in April. The participants included departmental officials, representatives of the cattle industry, mission and church societies from around Australia, Aboriginal rights protection societies, women's organisations, and anthropological societies.<sup>98</sup>

What is remarkable about these events is that in the Parliament there was absolutely no discussion of either Report after they had been tabled. *The Findings and Evidence of the Board of Inquiry* were ordered to 'lie on the Table', and although a copy was made available to the Association for the Protection of Native Races, it was never printed.<sup>99</sup>

For the remainder of the Government's term there was no debate in the Parliament on either the Bleakley Report or the Findings of the Board of Inquiry. The Government had felt under sufficient public pressure to consult with a wide range of community organisations but in the Parliament nothing was said.

The public reaction was such that subsequent Governments were careful to try and ensure that such incidents did not happen again. When, in August 1933, it was reported that a 'show of force' was planned against Aborigines at Caledon Bay and Woodah Island area in eastern Arnhem Land the public reaction forced the Government to hold back and immediately to deny that any punitive expedition was contemplated.

The incident in the Caledon Bay and Woodah Island area arose out of the killing of police Constable McColl who at the time had been a member of a police party investigating the killing of five Japanese trepanger fishermen by Aborigines. Again, despite the public attention and press coverage, there was almost no discussion of it in the Parliament. With the exception of a question by E. J. Ward (ALP, East Sydney, NSW) in the House of Representatives—who asked:

will the Minister for the Interior withdraw the punitive expedition which has been sent out against the harmless and defenceless blacks of North Australia.

—the discussion related to the need to protect white settlers.<sup>100</sup>

Debate in the Parliament on the matter then centred on accusations by H. G. Nelson (ALP, NT) against meddlesome missionaries and the Association for the Protection of Native Races. Nelson called for stronger action by a better equipped and stronger force of police against 'atrocities by aborigines'.<sup>101</sup> The Minister for the Interior (Hon. J. A. Perkins) defended the government's restraint:

the [Member for the Northern Territory] has said that the policy of the Government in respect of native affairs in the Northern Territory has been weak. [A]fter Constable McColl was murdered recently ... the government thought of sending an expedition of about 25 men into the area concerned to apprehend the murderers; but there was straight away a cry throughout Australia, in the press and elsewhere, against such a policy. The expedition was immediately branded as a punitive expedition ... It seems certain that had police visited those areas at the time bloodshed would have occurred, and this was what everybody desired to avoid.<sup>102</sup>

Although the 'show of force' had been called off, the events which followed were very revealing about the administration of law and justice in the Northern Territory. The suspects were persuaded—by missionaries who acted as go-betweens—to give themselves up and go to Darwin on the understanding that they would receive a fair trial.<sup>103</sup> Those accused of killing the Japanese were found guilty at a trial in the Northern Territory Supreme Court conducted by Judge Wells and sentenced to 20 years imprisonment. The same month, Tuckiar, the Aboriginal man accused of killing Constable McColl—a European—was tried by the same Judge. In an extremely flawed trial, where Tuckiar was incompetently defended, he was found guilty and sentenced to death. There were many reasons for community outrage—most obviously there was the harsher sentencing when the victim was a European. There were also reports of extremely prejudicial statements by the Judge. It was reported that in the previous case Judge Wills had said of the Aboriginal prisoners, '[p]ossibly the best and kindest thing to do to them is to hang them'.<sup>104</sup>

Tuckiar's conviction was quashed in the High Court.<sup>105</sup> The Court held that there were flaws in the conduct of the trial; that the Judge had misdirected the jury, that evidence had been admitted improperly and that the advocate for Tuckiar had not properly discharged his duty to his client.

The Court also made damning observations about the whole system of justice as it related to Aborigines in the Northern Territory. Mr Justice Starke said:

it is manifest that the trial of the prisoner was attended with grave difficulties, and indeed was almost impossible. He lived under the protection of the law in force in Australia, but had no conception of its standards. Yet by that law he had to be tried. He understood little or nothing of the proceedings or of their consequences to him ...<sup>106</sup>

Mr Justice Starke also observed that '[Tuckiar] neither understands nor speaks English', and elsewhere that the:

Chief Protector of Aboriginals for the Northern Territory informs us that 'the conditions of interpreting the statements of aboriginals through other aboriginals, especially during the formal proceedings of the Court, make it difficult and almost impossible to get more than an approximation of the truth'.<sup>107</sup>

These and subsequent events raised questions about the whole operation of the justice system for which the Commonwealth Government was responsible. Similar questions, about how the law might be applied in such circumstances, and about how the system might be changed to make greater allowance for cultural difference, had been raised at protest meetings and in submissions to the Government.<sup>108</sup> Surprisingly, however, in the Parliament these matters were not pursued.

The Coniston massacre may have signalled the end of the old ways in relation to punitive expeditions<sup>109</sup> but there was one other glaring matter which came out of the two Reports which had been tabled in the Parliament in February 1929: the condition of Aboriginal workers in the Northern Territory cattle industry. The Bleakley Report had exposed terrible conditions and great abuses in the cattle industry.

Aboriginal wages and conditions of employment in the cattle industry, however, were matters on which there was determined opposition to reform. The author C. D. Rowley observed that:

labour relations constituted the 'neuralgic point' of inter-racial contacts, and of relations between government, economic, and mission interests.<sup>110</sup>

The Scullin Labor Government, which was elected on 12 October 1929, held only seven of the 36 places in the Senate. Even the most minimal reforms proposed for the Territory by the Scullin Government were opposed in the Senate.

In March 1931 Senator Sir Hal Colebatch (Nationalist, WA) successfully moved to disallow Ordinances because regulations made under them set minimum standards of housing of workers on pastoral properties in the Northern Territory which he said would:

greatly ... increase the cost of providing accommodation, and ... harass employers unnecessarily.

Senator Colebatch argued that regulations were:

part of a policy by which the Government appears determined to hamper to the greatest possible extent those persons who, in the face of the greatest difficulties, are endeavouring to develop industries in the northern portion of the continent.<sup>111</sup>

Supporting the motion for disallowance Senator Sir George Pearce (Nationalist, WA) argued that:

the purpose behind the regulations was to give power to the Australian Workers Union.<sup>112</sup>

Government Senators argued that the Ordinance and regulation did no more than require 'decent accommodation' but, with only seven Senators, were not able to prevent the disallowance.<sup>113</sup>

Opposition Senators' determination at this time to prevent any further regulation of Aboriginal employment affected their attitude to other questions. At face value the Northern Territory (Administration) Bill 1930, had nothing to do with Aboriginal matters, but in the debate in the Senate the question of Aboriginal wages and conditions in the cattle industry was never far below the surface. The Bill provided for some limited self-government in the Territory through an elected Advisory Council with the power to make non-financial Ordinances, subject to the approval of the Commonwealth Cabinet, and the power of disallowance by either House of the Parliament.<sup>114</sup> The measure was opposed by Nationalist Senators who argued that it involved an unnecessary cost, but also that it was likely to result in the election of Australian Workers Union officials by the 'loafers' and 'wild lawless men' of Darwin.<sup>115</sup> As elected members of the Advisory Council, it was argued, union organisers would be able to travel the Territory at the taxpayers' expense, and the ordinance-making power would be used to increase Aboriginal wages to serve the ultimate goal of the Union.<sup>116</sup>

Throughout the debate on the Northern Territory (Administration) Bill Opposition Senators attacked a Regulation which had been made under the Aboriginals Ordinance to increase the wages of Aboriginal drovers.<sup>117</sup> One exchange between Government and Opposition Senators is instructive about attitudes to Aboriginal labour:

Senator GREENE (Nationalist, New South Wales).—I cannot understand why the Government should desire to sacrifice the remnants of the cattle industry in this way.

Senator BARNES (ALP, Victoria, Assistant Minister).—The honourable senator knows that aborigines have been employed without pay when white men should have been employed and paid wages.

Senator GREENE.—It is clear that the Government wants to force the lessees in the Northern Territory to employ white men instead of aborigines. It has deliberately set itself to kill what remains of the cattle industry.

Senator BARNES.—The industry should not remain if it cannot employ white men.<sup>118</sup>

## Pressures for Change

Throughout the 1920s and 1930s there was continuing pressure from organisations outside the Parliament for reform in Aboriginal Affairs. There were, in the late 1920s, in Australia at least thirty different organisations concerned with Aboriginal welfare.<sup>119</sup> The activities of these humanitarian and church organisations were given impetus by the development of anthropological studies in Australia. Revelations in the Bleakley Report about living conditions in the North, and other accounts from the outback—the Coniston killings and the trial of Tuckiar, and a massacre of Aborigines in the Kimberleys in 1926—added to the pressure for change. Also, Australia was coming under increasing international pressure in relation to the treatment of Indigenous peoples.<sup>120</sup>

Also at this time, in response to increasingly restrictive legislation in the States, and worsening conditions on Aboriginal reserves, a number of Aboriginal political organisations formed.<sup>121</sup> These included the Australian Aboriginal Progressive Association and the Aborigines Progressive Association in New South Wales, the Native Union in Western Australia and the Australian Aborigines' League in Victoria. Amongst the more prominent Aboriginal leaders and campaigners were Joe Anderson, William Cooper, William Ferguson, Pearl Gibbs, Fred Maynard and John Patten. The operation of these organisations was severely handicapped by the use of the restrictive laws by officials to intimidate Aboriginal supporters and isolate Aboriginal activists. Although, with minor exceptions, the membership of these organisations was exclusively Aboriginal they did obtain support from white groups and individuals—in some cases from unions and left-wing groups and also in the case of the Aborigines Progressive Association, from right-wing nationalists.<sup>122</sup>

The specific concerns of these organisations included the forced removal of Aboriginal children from their families, the dispossession of Reserve land, the authoritarian management and poor conditions on Reserves, the exclusion of Aboriginal children from the normal education system and the denial of social welfare benefits to Aborigines.

While there was not unanimity amongst all Aboriginal groups or their leaders about policies for the long-term advancement of Aborigines, the overwhelming concern was the removal of the legal discrimination based on 'race'. Some Aboriginal leaders advocated special measures such as Aboriginal representation in the Commonwealth Parliament, and supported the creation of inviolable reserves to protect 'primitive' Aborigines from white intrusions and to varying degrees the objectives of the organisations emphasised the importance of maintaining Aboriginal traditions and culture. However, the main thrust of the political activity was the achievement of legal equality with whites for all Aborigines and the repeal of the system of laws which denied rights and entitlements on the basis of 'race'.<sup>123</sup>

In a large number of letters, publications and speeches Aboriginal leaders campaigned against the widely held view which saw 'development' or 'degree of civilisation' or capacity of an individual in terms of the degree of European ancestry, and against the

legislation based on that belief. The organisations adopted a number of tactics to publicise their cause and to attract public support. William Cooper organised a petition to the King in the mid-1930s.<sup>124</sup> In 1937 Aboriginal activists were successful in publicising particularly oppressive actions of the NSW Protection Board and the extremely harsh conditions which some Aborigines had been subjected to in NSW. In November that year a NSW Parliamentary Select Committee on the Aborigines' Protection Board was established. Despite evidence of great abuses under the Board's administration, the work of the Committee faded out, and it made no report.<sup>125</sup>

On Australia Day 1938 the Aborigines Progressive Association organised a conference of Aborigines in Sydney as part of a Day of Mourning as a protest against the celebrations being conducted for the sesqui-centenary of British settlement in New South Wales. Speakers at the Conference called for 'full citizenship rights' and full entitlement to social security benefits for Aborigines who lived a 'civilised' lifestyle, the repeal of oppressive 'protectionist' laws, an improvement of conditions on Reserves, an end to the removal of Aboriginal children from their families and full access to education for Aboriginal children. The Conference passed a resolution:

[w]e, representing the Aborigines of Australia ... on the 26th day of January, 1938, this being the 150th Anniversary of the white man's seizure of our country, hereby make protest against the callous treatment of our people by the white men during the past 150 years, and we appeal to the Australian Nation of today to make new laws for the education and care of Aborigines, and we ask for a new policy which will raise our people to full citizen status and equality within the community.<sup>126</sup>

Following the Day of Mourning, on 31 January 1938, a deputation of 20 Aborigines met the Prime Minister, Joseph Lyons, and the recently appointed Minister for the Interior, John McEwen. The delegation requested an urgent financial grant to the States to help relieve the very poor conditions of Aborigines on reserves. They also called for Commonwealth control of Aboriginal affairs, and urged the Prime Minister to adopt a long range policy of '[raising] all Aborigines throughout the Commonwealth to full Citizenship Status and civil equality with whites' including equality in educational opportunity, employment, workers compensation and insurance, pensions, ownership of property and control of personal finances. The delegation also urged the implementation of a land-grant scheme similar to that available to soldier-settlers and immigrants, for those Aborigines who wanted to settle on the land.<sup>127</sup>

One very small step had been taken towards a change in policy when, in April 1937 the first Commonwealth-State Authorities Conference on Aboriginal Welfare adopted a statement of objectives:

this conference believes that the destiny of the natives of Aboriginal origin, but not of the full-blood, lies in their ultimate absorption by the people of the Commonwealth and it therefore recommends that all efforts be directed to that end.<sup>128</sup>



This Conference has been seen as something of a watershed in Aboriginal Affairs because although many of the officials attending believed that 'absorption' meant the disappearance of part-Aborigines through intermarriage and still assumed that 'full-bloods' would die out,<sup>129</sup> it was a first step in the abandonment of the discriminatory, segregationist and protectionist policies that were being pursued by all governments in Australia.

There was no discussion in the Parliament of the new policy or of the representations from Aborigines to the Government. There was, however, in 1938 one debate in the House of Representatives which raised the matter of Indigenous rights. In June 1938 the Lyons UAP-Coalition Government introduced the National Health and Pension Insurance Bill which was intended to establish a compulsory insurance scheme for the payment of old age, invalid and disablement pensions to be funded from contributions by employers, employees and consolidated revenue. The Bill excluded 'aboriginal natives of Australia [and] the islands of the Pacific'. C. A. S. Hawker (UAP, SA) moved an amendment to remove the exclusion of Aborigines. He argued that it was unjust to 'exclude Australian aborigines regardless of the conditions under which they may live or of what educational qualifications they may have attained.' He gave examples of Aborigines he knew who participated in the workforce who were excluded from Commonwealth entitlements simply because of their 'race'. One example, he said, was a man:

in whom the aboriginal blood predominates, who is in charge of livestock, water improvements, and other valuable property ... Under the State law, that man is entitled to vote—the State law does recognize him as a human being—but under the federal law, as it stands today, he would not be entitled to an invalid or old-age pension, nor will he be eligible to insure under this bill. That state of affairs constitutes a grave injustice ...<sup>130</sup>

The sentiment expressed by Hawker, that 'the total exclusion of aborigines, just because they are aborigines be removed from the ... bill' was supported by a number of members from both sides of the house and the Government immediately agreed to remove the exclusion of Aborigines and Pacific Islanders.<sup>131</sup>

The legislation was passed but it did not mark any great change in social policy in relation to Indigenous peoples. With the threat of approaching war the *whole* scheme was abandoned.<sup>132</sup> An interesting feature of the debate is that, even though there was use of old stereotypes, for the first time there appeared to be a rough consensus in the Parliament that rights and entitlements of citizens should not be based on 'race'. In the post-War period there was a gradual shift of social policy in that direction but it was at least three decades before all legislation which granted one group of people less rights 'just because they were aborigines' was repealed.

The shift in the stated objectives of Government was taken further in February 1939 by the Minister for the Interior, the Hon. John McEwen (Country Party, Indi, Vic.), in a Statement, 'The Northern Territory of Australia: Commonwealth Government's Policy with Respect to Aborigines'.<sup>133</sup>

McEwen's 'New Deal' contained two divergent elements. For those 'detrribalised Aborigines' living in 'unsatisfactory conditions' the objective would be to find them a place in European society. For those Aborigines 'still living in tribal state', however, the policy, for the present, would be to leave them 'to their ancient tribal life protected by Ordinances from the intrusion of whites and maintaining the policy of preventing any exploitation of the resources of the reserve'.<sup>134</sup>

These two elements in the Statement reflected two quite different visions of the future of Aborigines. The competing schools of thought were represented by two anthropologists, both of whom had sought to influence Government policy. In the Statement McEwen said that the Government had 'closely studied' the reports of Dr Donald Thomson who in 1935–36 and 1936–37, after lengthy fieldwork, had reported to the Commonwealth Parliament on conditions in Arnhem Land and recommended sweeping policy changes which were aimed at protecting 'tribal' Aboriginal society against the destructive effects of white intrusion.<sup>135</sup> Thomson was representative of a school of thought which saw segregation, at least until it was demonstrated that proven methods of absorbing Aborigines into white society had been developed, as the only way of saving Aborigines from degradation and alienation from both cultures. He argued that:

the remnant of native tribes in Federal Territory not yet disorganised or detribalized by prolonged contact with alien culture be absolutely segregated, and that it be the policy of the Government to preserve intact their social organization, their social and political institutions, and their culture in its entirety.<sup>136</sup>

On the other hand McEwen had been advised by A. P. Elkin, Professor of Anthropology at Sydney University, who was a strong advocate of assimilationist policies and legal equality for Aborigines. Elkin believed that it was not possible to successfully segregate Aborigines from white society. Aborigines would inevitably be drawn to European goods and the only way to prevent the degradation and destruction of Aboriginal people, which had characterised previous contacts between the two cultures, was to provide the positive measures—training and education—which would direct the cultural change in a way which would enable Aborigines to deal successfully with European ways.<sup>137</sup>

Despite that element in the policy relating to the protection of Aborigines 'living in a tribal state' the Statement was seen, by both Elkin and his critics, as a victory for the assimilationists. In the Statement McEwen had rejected what he said was a policy of merely reacting to problems. Instead, he said, the Commonwealth would work towards a final objective of Aboriginal people:

raising ... their status so as to entitle them by right and by qualification to the ordinary rights of citizenship and enable them and help them to share ... the opportunities that are available in their own native land.<sup>138</sup>

The initiatives which might have come out of the McEwen policy were held back by the Second World War. The impetus for reform in Indigenous affairs which had come from

the political activities of humanitarian groups—and was manifest in initiatives like the Initial Conference of Commonwealth and State Authorities on Aboriginal Welfare, and the McEwen Statement—was lost. Other matters became more urgent. Paul Hasluck observed that in almost all the popular literature written during the war about post-war reconstruction there is almost no mention of Aboriginal welfare.<sup>139</sup>

In the broader context, however, the War can be seen as a turning point in Aboriginal Affairs. Within Australia the impact of the War accelerated social changes and helped alter old attitudes, and in the post-war period from outside the country there was growing pressure on Australia in relation to its treatment of 'native people'. In some cases the war had a very direct impact on Aborigines' lives and on their relations with white Australians. With labour shortages an increasing number of Indigenous peoples moved off reserves and missions and into employment in towns and cities. In the Northern Territory the Army provided an alternative source of employment. By many accounts relations between Aboriginal workers and members of the armed forces were generally good.<sup>140</sup> Aborigines employed as workers in Army camps were paid in cash plus rations and accommodation. In contrast with the employment on many pastoral properties the rations provided a good diet, the accommodation and ablution facilities were adequate and the cash salary was actually paid.

Official military policy in relation to Indigenous peoples, as members of the armed forces, reflects less well on the services than did their treatment of Aboriginal workers in the Northern Territory. The Defence Act exempted persons 'not substantially of European origin or descent' from compulsory training and call up for war service, but as British Subjects Aborigines were not barred from enlisting.

During the first few months of the war a number of Aborigines did enlist. The Military Board, however, was concerned about the consequences of white soldiers having to take orders from Aboriginal NCOs, and without any legislative authority, adopted a policy of rejecting further Aboriginal volunteers. In response to protests a slightly relaxed but arbitrary policy of accepting part-Aboriginal volunteers who had citizenship rights under State law was adopted. The actual recruitment was quite inconsistent; Aborigines with identical backgrounds to serving soldiers were turned away.<sup>141</sup>

Some Aboriginal organisations hoped that the enlistment of Aborigines would lead to full citizenship rights. The Australian Aborigines' League on the other hand thought that the rights should come first. In a letter to the Minister for the Interior the League said that most Aborigines had:

no status, no rights and no land ... and nothing to fight for but the privilege of defending the land which was taken from him ... [T]he enlistment of natives should be preceded by the removal of all disabilities.<sup>142</sup>

With the entry of Japan into the war recruitment became more urgent and more Indigenous peoples were taken into the armed forces. In the North of Australia segregated Aboriginal

and Torres Strait Islander units were formed. In these units (again without any legislative basis) Indigenous soldiers were paid about one third the amount paid to equivalent white soldiers and had less favourable leave and recreation entitlements and as NCOs had no authority over white soldiers.<sup>143</sup>

Aborigines served in many capacities. As in the First World War, Indigenous peoples who did enlist in the Second AIF served with distinction in Europe and the Pacific. In the North, Indigenous peoples played a role in the construction of airstrips, security patrols, reconnaissance, air-sea rescue, coastal patrols and coast watch.<sup>144</sup> Despite this significant contribution to the war effort, in many cases with less reward and less to gain than white Australians, at the end of the war there was little public recognition or change of heart by officials who administered the laws which regulated Aborigines' lives.

One immediate, if unintended, consequence for Aboriginal rights was the extension of Commonwealth voting rights in 1943 to all military personnel serving overseas for the duration of the war and for six months after the end of hostilities. Aborigines who had served in regular units were also entitled to Returned Soldier benefits. Some State laws were also amended to extend more rights to Aborigines in the services. However, these pressures for reform that came out of the experiences of the Second World War and its aftermath did not produce an immediate response from the Commonwealth Government or the Parliament.

Neither the Chifley Labor Government, nor the Menzies Liberal-Country Party Government which succeeded it, gave Aboriginal Affairs a high priority. In 1944 the Labor Government had unsuccessfully sought a constitutional change through referendum to expand Commonwealth Parliament's law making powers over a number of matters, including 'the people of the Aboriginal race', for a period of five years after the end of the war. In the debate on the Constitution Alteration (Post-war Reconstruction) Bill the Attorney-General and Minister for External Affairs, H.V. Evatt, said that:

[f]ew would deny that the care and welfare of the Australian aborigine should, in principle, be a national responsibility.

He saw the proposed amendment as simply correcting an anomaly in s. 51(xxvi).<sup>145</sup>

There was no other debate on that section of the Bill and so it is not clear how the Government planned to use that power, or what any other Parliamentarians might have had in mind. There appeared to be general acceptance by the Parliament that discriminatory provisions in Commonwealth laws should be wound back but there was no push for a comprehensive program which would have required an extension of Commonwealth powers.

Although it did not appear to have any program to advance Aboriginal welfare the Labor Government did make some very limited changes to social security laws. The *Child Endowment Act 1941* had extended entitlement to Aborigines who were not nomadic or

dependent on government benefits. In 1942 the Labor Government, on the recommendation of the Joint Committee on Social Security, legislated to extend the entitlement for old-age and invalid pensions to 'aboriginal natives of Australia' who were 'exempt' under State or Territory Laws. In the case of States which did not have exemption provisions, the pension could be paid if the Director General was satisfied that 'by reason of the character and the standard of development of the native, it [was] desirable that the pension should be granted'.<sup>146</sup>

Similar changes were made in the *Maternity Allowance Act 1942* and the *Widows' Pension Act 1942* allowed a lesser amount to be paid to an Aborigine if it was thought desirable, or for the pension to be paid to a third party. Under the *Unemployment and Sickness Benefits Act 1944* the benefits were available to Aborigines if the Director General believed that 'by reason of the character, standard of intelligence and development' it was reasonable that the benefits should be paid.

In 1947 the *Social Services Consolidation Act* brought all these laws together and provided for the very qualified or discretionary entitlements of the sort which were available to Aborigines under the existing laws. In the debate on the Bill Mr Blain (Independent, NT) who was supported by Mrs D. A. Blackburn (Independent Labor, Bourke, Vic.) expressed concern about the definition of 'aboriginal native' and the uncertain nature of the entitlement. He asked:

who is to be the qualified person who will nominate an aboriginal native as being qualified to receive an unemployment benefit or a sickness benefit.

He was concerned that the decision about entitlement would be made on the basis of whether a person was 'slightly coloured' or a 'pure-blood native'. All Aborigines who had been 'driven out' of their land, or who were 'being assimilated into the white population', he said:

whether [they] be black or brindle ... has every right to receive the same treatment as is accorded to white people.<sup>147</sup>

The Commonwealth Franchise and Electoral Acts had been amended a number of times in the first four decades of the Parliament, but the exclusion of 'aboriginal natives of Australia' remained.<sup>148</sup> In 1941 the issue of the voting rights of Indigenous peoples was again raised by Mr M. M. Blackburn (ALP, Bourke, Vic.) who attacked the Electoral Offices' use of the narrow interpretation of s. 41. He complained that Aborigines who had the vote in some States had been:

struck off the rolls because the Commonwealth Electoral Office acts on the opinion expressed by Quick and Garran.<sup>149</sup>

A minimal concession was made to Aborigines in 1943 on account of a provision which gave the vote to all members of the defence forces during the war and for six months after the end of the war. In 1946 T. W. White (Liberal, Balaclava, Vic.) observed that:

... aborigines, although educated, entitled to exercise a vote at State elections, and liable for municipal taxes, are not eligible at Commonwealth elections.

He asked, in the light of s. 41 of the Constitution, how it was that Aborigines who were entitled to vote at State elections could be denied the Commonwealth franchise. He urged the Government to remedy the situation.<sup>150</sup> The Minister's reply was encouraging<sup>151</sup> but it was not until 1949, in response to a concerted campaign on Aboriginal voting rights, that the Commonwealth franchise was extended to all Aborigines who were entitled to vote under State Legislation as well as any Aborigine who had served in the forces.<sup>152</sup>

However, there were not any sweeping changes and no reform in the area where it might have been expected that a Labor Government and Labor members would have felt the greatest obligation to act—Aboriginal wages and conditions of employment in the Northern Territory.<sup>153</sup> In answer to a question in 1945 the Prime Minister, J. B. Chifley, said that the policy for the welfare of Aborigines in the Northern Territory was 'satisfactory' although because of the war it had not been possible 'to implement that policy to the extent desired'.<sup>154</sup>

## **Assimilation for all Aborigines**

The Menzies Liberal-Country Party Government which came to office in December 1949 was no more enthusiastic about reform in Aboriginal welfare than its predecessor. However, there were growing pressures both outside and inside the Parliament. In the immediate post-war period there was elected to the House of Representatives a handful of members on both sides who forcefully took up the question of Aboriginal welfare and rights. On the Liberal side P. M. C. Hasluck (Curtin, WA) and W. C. Wentworth (Mackellar, NSW) were elected in 1949. On the Labor side K. E. Beazley (Fremantle, WA) was elected in a by-election in 1945 and G. M. Bryant (Wills, Vic.) in 1955.

A speech by Hasluck, as a new backbencher from the Government party, in 1950 is seen to have had a significant impact. He moved:

[T]hat this House is of the opinion that the Commonwealth Government, exercising a national responsibility for the welfare of the whole Australian people, should cooperate with the State Governments in measures for the social advancement as well as the protection of people of the aboriginal race throughout the Australian mainland, such cooperation to include additional financial aid to those States on whom the burden of native administration falls most heavily; and the House requests the Government to prepare proposals for submission at the earliest opportunity to a meeting of State Premiers and, in preparing such proposals, to pay due regard to the principles of (a) State administration of native affairs and (b) cooperation with the Christian missions.<sup>155</sup>

Hasluck proposed an assimilationist policy. He argued that the days when segregation was acceptable were past and that:

the nation must move to a new era in which the social advancement rather than the crude protection of the native should be the objective ...

It was necessary, he said, to work towards the advancement of Aborigines within white Australia's society and economy. Because the problem was one for the whole community, and because the Commonwealth 'is the custodian of the national reputation in the world at large' there was a special obligation on the Commonwealth to take the lead:

When we enter into international discussions, and raise our voice ... in defence of human rights and the protection of human welfare, our very words are mocked by the thousands of degraded and depressed people who crouch on the rubbish heaps throughout the whole of this continent. Let us cleanse this stain from our forehead or we run the risk that ill-intentioned people will point to it with scorn. When we have done that we will be able to stand with greater pride and more self confidence before the world as a self-respecting nation.

Notwithstanding the limits on its constitutional powers, Hasluck said, the Commonwealth needed to create cooperative programs in which the cost would not be disproportionately borne by the States which happened to have the largest Aboriginal population.<sup>156</sup>

The motion was supported by T. V. Gilmore (Country Party, Leichhardt, Qld) and Mr Beazley. The Minister for the Interior, P. A. M. McBride, said that he was sympathetic to the sentiments expressed by the speakers, and acknowledged the need for cooperation, but pointed to the complexity of the social problem that faced the nation.<sup>157</sup> In his own account Hasluck claimed that the Minister was supportive of his efforts<sup>158</sup> but it does appear that the Government did not really welcome the action of the new backbencher. The motion was not given any priority; it was not debated further and lapsed on the dissolution of the Parliament in June 1951. When the Liberal Government was returned, however, Hasluck was made Minister for the newly created Ministry of Territories, and held that position for twelve years.

In October 1951 Hasluck made a statement of policy to the House of Representatives and reported on the outcome of a Native Welfare Conference of Commonwealth and State officials which had met in September 1951. In his statement to the Parliament Hasluck put a detailed argument for the abandonment of the past segregationist policies. First, he said, segregationist measures were not possible:

[C]ontact between the natives and the white people has now gone so far that in no part of the country are we dealing with a virgin problem, and more than two-thirds of the natives are either de-tribalised or well on the way to losing their tribal life. In spite of the creation of large reserves ... in the North and Central Australia, contact with the remaining one-third is bound to increase ... Even if we wished to place the remnant of tribal natives in some sort of anthropological zoo in the isolated corners of the continent, it is extremely doubtful whether we could arrest the curiosity that is daily extending their knowledge of white ways.

Second, he argued that 'the blessings of civilization [were] worth having'—cultural adaptation would bring health and other benefits to Aborigines. On the matter of cultural change he said:

[a]ssimilation means not the suppression of the aboriginal culture but rather that, for generation after generation, cultural adjustment will take place. The native people will grow into the society in which, by force of history they are bound to live.

Thirdly, Hasluck said, there was a large number of Aborigines who were '... already losing grip on their tribal life or [had] lost it altogether ...' who would be:

... left spiritually as well as materially dispossessed unless something satisfying is put in the place of their tribal custom.<sup>159</sup>

The alternative to segregation Hasluck said was a policy which accepted the inevitability of Aborigines losing their old way of life and the desirability therefore of instituting measures which would provide the opportunity for Aborigines to take a full place in the broader Australian community. Under this policy, he told Parliament:

in the course of time, it is expected that all persons of aboriginal blood or mixed blood in Australia will live as do white Australians.<sup>160</sup>

Speakers from the Labor Party supported the policy statement. L. C. Haylen (ALP, Parkes, NSW) said that in relation to the Native Welfare Conference the Minister '... has certainly done a remarkably good job' and endorsed the recommendations.<sup>161</sup> Other speakers for the ALP, though critical of the Government for not going far enough fast enough, supported the assimilation policy spelt out by the Minister.<sup>162</sup>

In August 1952 Hasluck gave a further explanation of the assimilation policy—spelling out the objective of removing restrictions and extending the rights of Aborigines. In that statement he announced his intention of amending Northern Territory Ordinances to remove special provisions which applied only to Aborigines on account of their 'race' and to allow for the resumption of Aboriginal Reserve land which was no longer needed.<sup>163</sup> The Ministerial Statement was followed by a wide ranging parliamentary debate on Aboriginal policy in which there was general acceptance by speakers from both sides of the proposal to move to a policy of assimilation through the repeal of restrictions and the extension of full citizenship rights to Aborigines.

The policy of assimilation became an entrenched orthodoxy which had the support of all Australian governments. The 1961 Conference of State and Federal Ministers of Aboriginal Affairs agreed that:

The policy of assimilation means, in the view of all Australian governments, that all Aborigines and part-Aborigines *are expected* eventually to attain the *same* manner of living as other Australians and to live as members of a single Australian community enjoying the same rights and privileges, accepting the same responsibilities, observing



*the same customs and influenced by the same beliefs, hopes and loyalties as other Australians.*<sup>164</sup>

There was at this stage no important partisan division within the Parliament on the policy of 'assimilation for all Aborigines'. Hasluck believed that the goals he had as Minister for Territories were broadly supported by the Opposition. In his own account of his time as Minister, Hasluck makes much of the unity of purpose which existed, not only between the Government and Opposition but also between the Commonwealth and State Governments.<sup>165</sup> However, as it became the uncompromising official goal of governments, the objective of assimilation came to be increasingly criticised by Aboriginal activists, academics and commentators outside the Parliament and some State politicians. At one level the critics were concerned about the objective itself<sup>166</sup> and from the 1970s this question, of the ultimate objective of Indigenous policy, became a central issue in the debate on Indigenous Affairs in the Commonwealth Parliament. In the 1950s and 1960s, however, the debate focused on the implementation of the policy. Critics argued that the same old methods of the past—institutionalisation and regulation of Aboriginal life—had not changed, and despite the rhetoric about 'same rights' the discriminatory legislation had not been repealed.

Much of this criticism was directed at the protectionist State laws which institutionalised Aborigines, and subjected them to administrative control. The idea that the Commonwealth needed to take the lead was frequently raised in the Parliament. Hasluck had expressed it in terms of the need to bring the States into co-operative programs with the Commonwealth to advance the welfare of Aborigines. However, the Commonwealth Parliament itself was extremely slow to act in removing discriminatory provisions in its own laws. While it was not behind all the State Parliaments in legislating to grant full citizenship rights to Aborigines it was slower than some.<sup>167</sup>

## **Equal Rights under Commonwealth Law**

Throughout the 1950s the Commonwealth Government was confronted with tireless lobbying and campaigns by groups outside Parliament—Aboriginal activists, church groups, Aboriginal advancement associations—to extend full rights and benefits to Aborigines.<sup>168</sup> It was not until 1961 that the Parliament dealt decisively with the Aboriginal franchise. In April 1961, on a motion of the Minister of the Interior, the House of Representatives established a seven person Select Committee on Voting Rights for Aborigines. The Committee travelled extensively through all States and the Northern Territory and interviewed a wide range of witnesses. It recommended that voting rights be extended to all Aborigines and Torres Strait Islanders. However, 'for the time being' enrolment for Indigenous peoples should not be compulsory. For those who were enrolled, however, voting should be compulsory. The Committee argued that compulsory enrolment for Aborigines could result in injustice for the:

many aborigines still in the tribal state, ... or not completely integrated into the Australian community.<sup>169</sup>

In 1984 the electoral law was amended to remove any distinctions between Indigenous peoples and other citizens.

In the case of Commonwealth benefits the winding back of exclusionary provisions was also slow. In 1959 the Social Services Act was amended to exclude only those Aborigines who were '... in the opinion of the Director General, nomadic or primitive'<sup>170</sup> Introducing the Bill, the Minister for Social Services, Hon. H. S. Robertson, said:

this is an occasion of great historic importance both nationally and internationally. For more than 50 years successive Commonwealth governments have been called upon to defend—or to remove—the traditional discrimination levelled against the aboriginal natives of our country who ... were unable to qualify for social service benefits in the normal way ... [T]he legislation I now bring down to the House is to sweep away the provisions that place restrictions on Aboriginal natives in qualifying for social service benefits, except where they are nomadic or primitive ...

We are aware that in some quarters there have been apprehensions lest benefit payments may not only be misused but may, in addition, be used in a way that would in fact deteriorate the conditions of some natives ... Where the Department is satisfied that a native's social development is such that he can with advantage handle the pension himself then the payment will be made to him direct. In other cases some or all of the pension payable in respect of the native will be paid to the mission, to a state or other authority, or to some other person for the welfare of the native. But no restrictions will be imposed that are not common, under similar circumstances, to all sections of the Australian community.<sup>171</sup>

In the very lengthy debate on the whole Bill the provisions relating to Aborigines were not discussed.

In 1966, introducing the Social Services Bill the Minister for Social Services, the Hon. Ian Sinclair (Country Party, NSW), said the legislation would:

... remove all references in the Act to 'Aboriginal natives of Australia'.<sup>172</sup>

The Bill was passed with almost no discussion of this significant milestone.

## **Assimilation in the Northern Territory**

In the Northern Territory, where the Commonwealth had a free hand to pursue the policy of assimilation, the developments continued to parallel those in the States. The laws which institutionalised people and subjected them to administrative control were only very slowly dismantled. In addition, other events in the Territory arising directly from the

Commonwealth's handling of Indigenous Affairs highlighted the deprived condition of Aborigines in Australia and fuelled growing concern in the broader electorate about Aboriginal welfare. As much as anything that happened in the States it was events in the Northern Territory which attracted international attention and became the focus of Australia-wide political activity about Indigenous rights and welfare.

As part of the new assimilation policy Hasluck announced to the Parliament in August 1952 that the Government was taking two steps in relation to Aboriginal Affairs in the Northern Territory. The first related to the Aboriginals Ordinance and citizenship for Aborigines. There had been growing Aboriginal protest against the way the restrictions on Aborigines were being enforced and the way the powers of the Director of Native Affairs were being used.<sup>173</sup> Hasluck said:

[t]he present system is based on an attempt to define the term 'aboriginal', all special legislation being made to apply to those persons who come within the definition unless, by application to an official, they can obtain exemption from the special legislation. It is now proposed to abandon this old method and to assume that, unless a person is brought under the special legislation, it does not apply to him or her. The ground on which a person will be brought under the legislation will not be colour, or any other racial or genealogical reason, but the test whether he or she stands in need of special care or assistance.<sup>174</sup>

The second involved the enactment of an Ordinance to give the Administrator of the Northern Territory the power to allow prospecting and mining rights on Aboriginal Reserves and to recommend the resumption or revocation of land from Aboriginal Reserves (subject to the power of either House of the Commonwealth Parliament to disallow the action). Hasluck said:

[a] Policy of assimilation and the measures taken for the education and care of natives mean that less dependence is placed on reserves as an instrument of policy than was placed on them in the days when it was considered that the interests of the natives could only be served by keeping them away from white settlement. Nevertheless, ... for many generations large reservations will still be necessary ...

On the other side of the picture, we see the necessity for developing our national resources. At the present time, the strongest pressure comes from the need that is seen to extract the latent mineral wealth of the territory.

[R]eserve land which is not being used by the natives should not be closed forever to exploration or development. [The Government] also recognises that to-day the large reserve is a less essential means of protecting the welfare of the natives than it was a generation ago. At the same time, the Government is convinced that the excision of land from reserves, or any exploration of reserves, must be handled with great care and gradualness in order to safeguard the interests of the natives and that some form of compensatory benefit should be given.<sup>175</sup>

In a wide ranging Parliamentary debate on Aboriginal policy which followed the Ministerial statement, speakers from both sides expressed general approval of the Government's proposal. The only disquiet about the Ministerial statement came from K. Beazley who was concerned about the resumption of Aboriginal Reserves. He argued that:

[t]he destruction of every native people that has been destroyed on the earth has begun with the destruction of its rights in land ... The only way to safeguard some of the interests of the Australian natives in the land was by a system of reserves. While the Minister's statement on the subject of aboriginal citizenship was very vague, his statements on the future of those reserves was very definite. What emerges ... is that land is to be impinged upon in the interests of the development of minerals in the Northern Territory. We are only humbugging ourselves if we assume that the natives will ever own any of that land, or that they will start in an advantageous position in the exploitation of minerals in the reserves. So the breakdown of natives' reserves will take place very largely in the interests of European industry.<sup>176</sup>

With the exception of Beazley's concern there appeared to be general support for the adoption of a policy of assimilation and the Government's plans for Aborigines in the Northern Territory.

In line with Hasluck's announcement the Aboriginals Ordinance was amended in 1953 to automatically exempt all 'half castes' (unless the Director deemed them to be Aborigines). Also in 1953 two new Ordinances—the Welfare Ordinance and the Wards Employment Ordinance—were enacted (though they did not come into operation until 1957). The Welfare Ordinance was said to represent a move away from racially based legislation. It replaced the Aboriginal Ordinance but was drafted to be 'colour blind'. Instead of making reference to Aborigines, under the Welfare Ordinance the Administrator could declare a person to be a ward if the person by reason of—

- (a) his manner of living,
- (b) his inability ... without assistance, adequately to manage his own affairs,
- (c) his standard of social habit and behaviour, and
- (d) his personal associations,

stands in need of such special care or assistance as is provided for by this Ordinance.

The Director of Welfare was to promote the welfare, health and wellbeing of wards. The Director was also given extraordinary powers over wards. For most purposes the Ordinance made the Director the guardian of the ward 'as if that ward were an infant and the Director were the guardian of that infant' (subsection 24(1)) and he held the property of wards in trust. A ward could be taken into custody, kept within an institution or reserve or shifted from one reserve to another, if it were thought to be in the ward's interest.

A ward ceased to be a ward if they married a person who was not a ward but a ward needed the permission of the Director to marry a non-ward. Also it was an offence for a person to 'habitually live with a ward unless he [was] a ward or a relation of the ward'. The Director could order a ward not to live with another ward, and males were, amongst other things, not permitted to:

between the hours of sunset and sunrise, be in the company of a female ward to whom he [was] not married, except with lawful excuse.

It was an offence to sell to, or buy from, a ward an item worth more than ten pounds, and it was an offence to buy from a ward a painting or drawing done by a ward without the written consent of the Director.<sup>177</sup>

There were also provisions which gave the Director power to protect wards from ill-treatment. Indeed the whole Ordinance was rationalised in terms of the need to protect people who could not otherwise protect themselves from exploitation and mistreatment.<sup>178</sup> Whatever rationale could be produced for the restrictions and control of wards the actual debate on the drafting of the Bill for the Ordinance told a quite different story.

The Northern Territory Legislative Council objected to the Ordinance because of the unchecked powers that it gave to officials. The Acting Crown Law Officer of the Northern Territory at the time said 'I have read [the Bill] through again and again and I cannot find anything in [it] to remove the revulsion which I felt on my first reading of it'.<sup>179</sup> The Bill was amended to include a prohibition against any person who was entitled to vote in the Northern Territory and House of Representatives elections being declared a ward. This had the effect of ensuring that only Aborigines could be declared wards.<sup>180</sup> In addition any Aborigine from interstate who was covered by Aboriginal protection legislation was deemed to be a ward upon entering the Northern Territory.

A reason for the delay in commencing the operation of the Welfare Ordinance was that it took three years to compile the Register of Wards. In 1957, 15 700 Aborigines were made wards in a block declaration. Of the total 'full-blood' population of the Northern Territory only about 80 were intentionally omitted from the Register.<sup>181</sup>

Whatever the intentions of the Minister when he announced his plans for the Welfare Ordinance, or of the parliamentarians from both sides who welcomed Hasluck's announcement, the implementation of the 'race neutral' ordinance could be seen as nothing other than a thinly disguised version of the old Aborigines Ordinance with the same (or even more restrictive) rules, prohibitions and controls, and the same established administrative assumptions and practices.

The employment of wards was controlled by the *Wards' Employment Ordinance (1953)*. It contained a number of provisions which could be seen as safeguards for Aboriginal employees. A licence was required to employ wards, and there were provisions for training and assistance to wards and for inspection of work places.

In its operation, however, it appears to have achieved little or nothing in advancing the welfare of Aborigines, or in protecting them as employees. A number of studies concluded that it did the reverse. In the words of Chesterman and Galligan, it appeared that it 'served more to ensure a regular supply of cheap labour than it did to protect wards from oppressive employment practices'.<sup>182</sup> A 'prescribed wage' was set by the Administrator but 'slow' workers could be paid at a lower rate. One telling clause of the *Ordinance* made it an offence to 'entice or persuade a ward to leave his lawful employment'. The outcome was that under the Wards' Employment Ordinance Aboriginal workers were paid approximately one fifth of European wages.<sup>183</sup>

For the very reasons that had frequently been stated in the Parliament and in the rhetoric surrounding the adoption of the assimilation policy, it was no longer possible to defend or sustain a regime of exclusion and legal discrimination against Aborigines. The cases of particular individuals publicised the operation of the Welfare Ordinance. One such case arose out of the prosecution of a white drover, Mick Daly, for cohabiting with a ward, Gladys Namagu, and subsequent attempts of the couple to marry. The case was revealing about the nature of the restrictions the Ordinance placed on Aborigines and the way the powers of the Director of Welfare could be used.

On the charge of cohabiting with a ward Mick Daly received a suspended sentence after he told the court that the couple wished to marry. Subsequently, however, the Director of Welfare refused his application to marry Gladys Namagu and she was sent to an Aboriginal settlement. The couple were effectively prevented from seeing one another. The Director of Welfare argued that he was acting in the interest of the ward, and claiming that Gladys Namagu was a party to traditional marriage, that he was protecting the integrity of 'tribal marriage'. However, the way the Director of Welfare used a range of his powers under the Ordinance—prosecution for cohabitation, refusing a ward permission to marry, removal of a ward to a native settlement—appeared arbitrary and even malicious.<sup>184</sup> Gladys Namagu repeatedly stated that she wished to marry Mick and the man who had been presumed to be her 'tribal husband' repeatedly said that he was not married to Gladys Namagu and that he had no objection to her marrying Mick Daly.

After the case had received extensive publicity several questions were asked in the Commonwealth Parliament.<sup>185</sup> Surprisingly, however, given the media attention it had received, neither the matter of the policy nor its implementation were debated. In response to a 'Dorothy Dixer' about whether the actions of the Director of Welfare were in keeping with the policy of assimilation the Minister said that the case was not as straightforward as was suggested by the press.<sup>186</sup> Several of the speeches on the matter were very light hearted. At no stage were any of the important issues—the rights of individuals, the use of the powers of the Director of Welfare, the means being used in the Northern Territory to achieve the stated goal of assimilation—really pressed in the Parliament. Colin Hughes says of the case:

[w]hat occurred in the House [of Representatives] could hardly be called a zealous scrutiny of Ministerial or public service decisions in defence of the citizen, even of the citizen [as] ward.<sup>187</sup>

In contrast, the elected members of the Northern Territory Legislative Council pursued the matter vigorously. An attempt to have the Director of Welfare reverse his decision was defeated by the appointed majority in the Council. However, a motion to amend the Ordinance to include a right of appeal to a magistrate against decisions of the Director of Welfare in relation to the marriage of wards, was accepted by the appointed members of the Legislative Council, and by the Federal Cabinet. Immediately the amendment became law Mick Daly lodged an appeal. The Director of Welfare who had previously said that he would welcome an appeal, as it would free him to make a full statement of his case in the appropriate place, did not contest the appeal. It would not be possible, he said, to prove that Gladys Namagu was a ward. Whatever the reason, the failure of the Director to press ahead with the case removed the possibility of any public scrutiny of the basis of his judgement in the exercise of his powers. Mick Daly and Gladys Namagu were married 1 January 1960, six months after he was first prosecuted for cohabitation.

The case of Gladys Namagu and Mick Daly also illustrated the significance of the different legal status Aborigines had in different jurisdictions across Australia and raised questions about the Commonwealth's claim that it was leading the States in promoting assimilationist policies and in removing discriminatory 'race'-based legislation. Had Gladys Namagu been able to return to her home State of Western Australia there would have been no legal obstacle to the marriage (provided she was 21 years of age). Also, had the couple been married before they entered the Northern Territory, the Director of Welfare would have had no powers over Gladys Namagu as the spouse of a non-ward.

Another case which attracted widespread criticism of the Government, and the operation of the Welfare Ordinance, was the conviction and gaoling of the famous Aranda artist Albert Namatjira for supplying alcohol to a ward.<sup>188</sup> Because of his fame and standing and the earnings he had made from painting he was not included in the Register of Wards, but his family and friends were. Like the system of exemptions which had existed under the Aboriginal Ordinance, the Welfare Ordinance divided communities and families. Individuals who were omitted from, or removed from, the Register of Wards, had an entirely different set of rights and entitlements from other members of their community and members of their family who were wards. Namatjira, it was reported, had refused to seek an exemption under the Aboriginal Ordinance.<sup>189</sup> Under the Welfare Ordinance he was given no choice: his name was omitted from the Register of Wards while those of his family and friends were included.

Namatjira appealed against the conviction to the Northern Territory Supreme Court, where the conviction was upheld but the sentence reduced from six to three months. An Application for Leave to Appeal was made to the High Court where it was argued that the men to whom the alcohol had been supplied had not properly been declared wards because their names had been placed on the Register of Wards in a 'block' declaration in which

their individual circumstances had not been considered against the criteria laid down in the Ordinance. The High Court refused the Application.<sup>190</sup>

The prosecution of Namatjira gave extensive publicity to the operation of the Welfare Ordinance. Namatjira was famous in Australia and overseas.<sup>191</sup> There was widespread sympathy for his plight and the dilemma he had been placed in by the law and his circumstances.<sup>192</sup> There was extensive reporting of the case and comment in the press about the situation in the Northern Territory. On the one hand some commentators argued that protectionist legislation of the sort which was in place for the Northern Territory was necessary. Others argued that discriminatory legislation which denied a range of rights to one category of people could not be justified.

In the Parliament the Minister, Hasluck, announced that Namatjira would be allowed to serve his sentence at an Aboriginal Settlement rather than in the Alice Springs gaol and the Opposition Leader, H. V. Evatt, spoke in support the action.<sup>193</sup> Apart from this there was no debate about the case in the Parliament. Despite the very active debate about fundamental issues of Indigenous policy which took place in the community almost nothing was said in the Parliament. On both sides there appeared to be an unwillingness to become involved in the debate.

The operation of the *Welfare Ordinance 1953* became so discredited that in 1962 the Administrator of the Northern Territory refused to act on the recommendation of the Director of Welfare to add 3000 additional names to the Register of Wards. The *Ordinance* lost much of its force after Aborigines obtained the Commonwealth and the Northern Territory franchise in 1961. The *Welfare Ordinance 1953* was replaced in 1964 with the much less restrictive Social Welfare Ordinance. Under s. 10 of the Social Welfare Ordinance the duty of the Director was to provide relief and assistance for people who he determined were 'socially and economically in need of assistance' and to 'supervise and regulate the use and management of reserves'. The Reserves remained regulated institutions with restrictions on entry and the wages and conditions of employment of most 'full-bloods' was still regulated under the Wards' Employment Ordinance but many of the prohibitions which had applied to almost all Aborigines as a consequence of being wards were removed.<sup>194</sup>

From the point of view of the Government much damage had been done. The rhetoric of assimilation and equal rights in the Northern Territory had resulted only in extremely slow and reluctant dismantling of the discriminatory and restrictive laws and the actions of the Administration, which had attracted press and public attention, had become extremely difficult to defend. In addition the events in the Territory had become the trigger for a new sort of Aboriginal activism. The Yirrkala community in Arnhem Land and the Gurindji people at Wave Hill cattle station took steps which grew from small local protests for civil rights into protracted political campaigns for Indigenous Rights which attracted national and international attention and obtained support from a range of white organisations.



## Yirrkala

In August 1963 the people of Yirrkala Methodist Mission in north east Arnhem Land sent a petition painted on bark to the Commonwealth Parliament protesting against the resumption of 140 square miles (330 square kilometres) of Gove Peninsula from the Aboriginal Reserve. Special mining leases had been granted on the excised land adjacent to the mission and it was planned to develop a bauxite mine and build a township to house the mine workers.

The petition was written in the Aboriginal language with an English translation. It stated that no explanation had been made to the people about the procedure for the excision of the land or of their fate, that their views had not been communicated to the Government, that the land had been their hunting grounds for time immemorial and that it contained sacred places. The petition said that '... the people of this area fear that their needs and interests will be completely ignored as they have been in the past, and they fear that the fate which has overtaken the [Aboriginal people from the Darwin area] will overtake them.' It asked the House of Representatives to establish a Committee to hear the views of the Yirrkala people before the land was excised, and requested that:

... no arrangements be entered into with any company which will destroy the livelihood and independence of the Yirrkala people.<sup>195</sup>

On the motion of Mr Beazley a Select Committee was established in September 1963. It took evidence in Darwin and Yirrkala. Aboriginal witnesses who were interviewed with the aid of interpreters complained that they had not been given any information about the mining development. They did not necessarily oppose the development but they believed that there should be negotiations with them as the land owners and that if the mine were to go ahead they should share in the benefits.

The Committee accepted some of the arguments put to it by the Yirrkala people. It found that there had been some communication problems and recommended that measures be implemented to protect hunting rights and sacred places. Also it recommended that there be some compensation in the form of land and capital grants and a monetary payment for the loss of occupancy. The Committee, however, was clear that the excision of the land had been done legally. It also took the view that the development could help the social advancement of Yirrkala people. The building of a town and a mine should not necessarily reduce the Aborigines to fringe dwellers. The Committee recommended the adoption of measures to provide opportunities for the Yirrkala people to participate in the opportunities the development would offer.<sup>196</sup>

Two years later when the Government entered an agreement with the mining company Comalco for the development to proceed, Beazley moved in the House of Representatives that the recommendations of the Select Committee, especially those relating to the formation of a Standing Committee to monitor developments, be implemented.<sup>197</sup> The Minister of Territories, the Hon. C. E. Barnes, had taken the position that the welfare of

Aborigines at Yirrkala could be handled by the Northern Territory Legislative Council and that adequate safeguards were in place. Beazley argued that the Northern Territory Legislative Council was not a representative body which could properly represent the interests of Aborigines.<sup>198</sup> The Commonwealth Parliament was the only body which could act independently of vested interests and the Administration of the Northern Territory. Other Opposition members argued that on all important matters which affected the interests of the Yirrkala people—the control of the reserve land, the signing of the lease with the mining company—it was the Commonwealth Parliament which was responsible to the people of Australia. It was not sufficient to leave the matter of the conditions of the people of Yirrkala to the Legislative Council in the Northern Territory. Bryant said that:

[w]e are here concerned with a social operation of extreme delicacy that has both national and international implications. We are here attempting something which ... has not previously been successfully attempted in Australia. The impingement of white communities on Aboriginal communities in the past has always brought disaster to the Aboriginal communities ... [A]ll the resources of the commonwealth and all the sympathetic scrutiny and complete regard of this Parliament ought to bear on this question.<sup>199</sup>

Despite the continuing concerns of the Yirrkala people the Government proceeded with the project as planned. With the assistance of the Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCAATSI), Methodist supporters and others the Yirrkala people took their case to the Northern Territory Supreme Court. In *Mathaman and Others v Nabalco Pty Ltd and Commonwealth* (1969) they challenged the Government's right to grant a mining lease without the approval of the inhabitants of the Aboriginal Reserve. The court found that the Commonwealth was not obliged to obtain approval. In a second case, *Milirrpum v Nabalco Pty Ltd and the Commonwealth of Australia* (1971) the Yirrkala people took a more radical step, arguing that their traditional ownership of the land should be recognised by Australian law. Mr Justice Blackburn in the Northern Territory Supreme Court found that Australian common law did not recognise native title to land.

## Equal Pay Case 1965

One area where Aborigines in the Northern Territory might have hoped the assimilation policy announced by Hasluck in 1951 would have made an immediate change was in the conditions of workers in the cattle industry. Aboriginal conditions of employment on cattle stations had changed little since the revelations of the Bleakley Report. In 1944–45 Ronald and Catherine Berndt undertook a detailed and extremely well documented study of employment conditions, race relations and cultural change on both cattle stations and army camps in the Northern Territory. The Berndts contrasted the relative good circumstances of Aboriginal families working and living on the armed forces settlements with the 'appalling working conditions, the squalor and poverty ... endemic malnutrition and the

high rate of infant mortality' on many cattle stations.<sup>200</sup> Employers on pastoral properties expressed resentment at the Army for having 'spoilt' and 'ruined' the Aborigines as it would be difficult to get back to 'normal conditions' of employment.

The example of the employment of Aborigines on armed forces settlements made two connected questions more difficult to avoid. First, what were the appropriate wages and conditions for Aboriginal employees on pastoral properties. Secondly, in the words of C. D. Rowley:

whether any industry which could not provide for its workers the basic necessities for a materially safe and civilised life, by western standards, was worth subsidising at the cost of miseries which the workers had never had to endure as nomads.<sup>201</sup>

In 1948 the Commonwealth Conciliation and Arbitration Commission, the precursor to the Australian Industrial Relations Commission, rejected an application by the North Australian Workers' Union to have Aboriginal workers in the cattle industry receive equal pay with white workers by having them included in the Cattle Industry Award.<sup>202</sup> In line with its previous decision the Commission accepted the argument that it had no jurisdiction over Aboriginal wages which were set by Regulations made under Northern Territory Ordinances. The Regulations gazetted in 1949 provided for a cash wage of one pound a week plus minimal rations and accommodation, a fraction of the rates paid to European workers.<sup>203</sup>

The adoption of an assimilationist policy by the Commonwealth did little to change this situation. The status of Aboriginal workers, and the level of pay did not change until 1959 when the supposedly non-racial *Welfare Ordinance* 1953 came into operation. As discussed above almost all 'full-blood' Aborigines in the Territory were declared to be Wards and continued to have their levels of pay set by Regulations made under the *Wards' Employment Ordinance* 1953. In 1959 after protracted negotiations between the Northern Territory Administration and employer groups the cash and allowances payment for male wards employed in the cattle industry was set at just over three pounds a week compared with the Award payment of more than 16 pounds per week for the equivalent European workers.<sup>204</sup>

In 1965 the North Australian Workers' Union took another case to the Commonwealth Conciliation and Arbitration Commission applying to have Aborigines included in the Cattle Station Industry (NT) Award with pay and conditions equal to other workers. The pastoral industry opposed the application arguing that it was in the best interest of Aborigines to have the Commonwealth continue to set their wages by regulation. The Commonwealth, however, intervened in the case and gave qualified support to the union's case, submitting that Award conditions should be extended to Aborigines but with provision for the improved conditions to be phased in gradually.

The reasons for the Commonwealth's decision to allow the matter to be decided by arbitration, rather than use its powers to determine it by regulations are not clear. It was

within the power of the Commonwealth Government to use regulations to set the Aboriginal wages in the Territory (as it had done previously) or to use regulations to link Aboriginal wages to Award rates with a phase in period. One explanation is that the Government had a number of conflicting interests, and while it was under pressure from the pastoral industry it was also increasingly coming under international and domestic political pressure to remove discrimination based on race (including that discrimination which was veiled behind the legal category of ward).<sup>205</sup>

In March 1966 the Commission awarded 'equal pay' to Aboriginal pastoral workers in the Northern Territory, but with its implementation delayed until December 1968. It might have been expected that the 'equal pay' decision, and the moves to extend civil rights would have taken some of the pressure off the Commonwealth Government. However, the reform, which came 15 years after the Commonwealth Government had made a commitment to assimilation and equal rights, came too late. Also the Court's decision to delay the implementation of equal pay, and attempts by employers to find ways to get around the Award did little to satisfy the demands by Aborigines for a better deal. Aborigines remained an excluded group living in extremely deprived conditions and in April 1966, only months after the 'equal pay' decision, the Aboriginal workers on Wave Hill cattle station went on strike.

## Wave Hill

The action of the Gurindji people at Wave Hill was not only a protest against wages and conditions and poor living conditions, but also against the abuses suffered at the hands of white overseers and jackaroos and the disregard shown for their skills and abilities.<sup>206</sup> They had 'walked off' the station because they had 'decided to cease being treated like dogs'.<sup>207</sup> The Gurindji moved from the Welfare Settlement at Wave Hill stations to a water supply at Wattie Creek to set up their own township. They requested the return of 500 of the 6000 square miles (1295 of the 15 540 square kilometres) of the Wave Hill pastoral lease in order that they could live on their own land independently of the pastoral company.

The Northern Territory Administration unsuccessfully attempted to induce the Gurindji to leave their camp at Wattie Creek and return to the Welfare Settlement at Wave Hill where improved welfare and health facilities were promised. The Gurindji held out at Wattie Creek and the cause was sympathetically represented in many media accounts in which the deprived circumstances of Aboriginal workers was contrasted with the power and wealth of Vestey's, the British company which held the lease on Wave Hill Station.

These two incidents—at Yirrkala and Wave Hill—mark an important turning point. Neither were immediately successful in achieving their goals. For the rest of its period in office the Coalition Government opposed any recognition of prior Aboriginal ownership

of land.<sup>208</sup> In a statement to the Parliament in 1970 the Minister for the Interior, P. J. Nixon, put the Government's position:

the Government believes that it is wholly wrong to encourage Aboriginals to think that because their ancestors have had a long association with a particular piece of land, Aboriginals of the present day have the right to demand ownership of it.<sup>209</sup>

However both these events attracted national and international attention. The Bark Petition and the strike at Wave Hill drew attention to the deprived condition of Aborigines in the Northern Territory and helped make Aboriginal Affairs a national political issue. They became powerful symbols not only in a growing political campaign for Aboriginal Land Rights but a wider campaign for Indigenous Rights. In the Parliament Labor members took the matter up with a number of questions to the Government, and in the case of Yirrkala the parliamentary processes helped publicise and promote the case of the Aboriginal Community. However, the issues related to Indigenous Rights were never debated or pursued at length until the campaigns had become national issues. Pressure from the media and Aboriginal support groups more than any thing in the Parliament put the Government under pressure on the issue.

The Whitlam Labor Government which came to office in late 1972 explicitly rejected the policy of assimilation in favour of self determination and in 1973 the Whitlam Labor Government, in line with a promise made at the election, appointed Mr Justice Woodward as Royal Commissioner to investigate how land rights in the Northern Territory should be granted. In 1974 Whitlam handed over to the Gurindji a lease for 3236 square kilometres of land purchased from Wave Hill. The Land Rights (NT) Bill, which was based on the recommendations of the Woodward Royal Commission, was before the Parliament in 1975 when the Labor Government was dismissed. A slightly modified form of the Bill was passed under the Coalition Government of Malcolm Fraser in 1976. The Act transferred all Aboriginal Reserves in the Northern Territory to Aboriginal ownership, and established processes for Aboriginal groups to claim their traditional lands which were still Crown Land and for Aboriginal Land Councils and traditional owners to be paid mining royalties.<sup>210</sup>

## **The Woomera Rocket Range and the Nuclear Tests**

Another area where the Commonwealth had direct dealings with Aborigines was through the establishment of the Woomera Rocket Range, as part of the Anglo-Australian Joint Project, in northern South Australia. At the end of World War Two there were secret discussions between the British and Australian Governments about building a facility in Australia for testing guided missiles. In November 1946, in response to questions from within and outside the Parliament about the proposed Rocket Range and its impact on Aborigines in the area, the Minister for Defence, the Hon. J. J. Dedman, announced that the path of the Rocket Range would be in a line north-west from Woomera to the Indian

Ocean. In the first instance the Range would only extend 300 miles from Woomera, but it would be lengthened in stages through the Central Aboriginal Reserves and on to the Western Australian coast between Port Hedland and Broome.<sup>211</sup> The Minister told Parliament that although '[t]he probability of a missile falling on them would be extremely remote' every care would be taken to protect Aborigines. He said that:

[r]eports that huge areas of central Australia [would] be blasted by explosives [were] highly-coloured figments of the imagination.

In relation to plans to establish observation posts along the path of the Range in the Central Aboriginal Reserves he said:

I am conscious of the need to do everything possible to safeguard the Aborigines from contact or encroachment on any area of special significance to them ...<sup>212</sup>

Despite the assurances of the Minister there was a campaign of opposition to the project and heated public debate.<sup>213</sup> The most prominent opponent of the Range encroaching on the Central Aboriginal Reserves was the well respected campaigner for Aboriginal rights, Dr Charles Duguid.

Not all opposition to the Guided Missile project, however, related to protecting Aborigines. Pacifist and anti-war arguments were also made against the deployment of resources for the development of weapons. The various arguments were often conflated by the opponents, and the proponents, of the project. In the political climate of the late 1940s, with the battle lines being drawn between left-wing pacifist groups and anti-communist advocates of rearmament, even the most reputable advocates of Aboriginal rights could easily be discounted as having suspect motives once their cause had been joined by anti-war activists.

Dr Duguid's credentials as an advocate of Aboriginal rights could hardly be questioned. The concerns he expressed in 1946–47 were in line with the position he had taken in relation to Central Aboriginal Reserves, and his own tireless work in that regard, since the mid-1930s. Duguid had been active in the Presbyterian Church and the Presbyterian Board of Missions in pressing for a greater commitment to Aborigines. He had made a number of trips into the arid and largely unexplored country west of Alice Springs in the 1930s and had been outspoken about the economic exploitation of Aborigines in northern Australia. Duguid's prescription for the protection of Aborigines living within the Central Aboriginal Reserves was in line with the Commonwealth policy for the Northern Territory—which had been adopted by McEwen in 1939 on the recommendation of Dr Donald Thomson—of reserving large areas of land for 'tribal' Aborigines and providing a buffer against the intrusion of Europeans.

Duguid argued that contact between Europeans and traditional Aborigines had always led to social disintegration, pauperisation and misery for Aborigines. The only hope that the process would not be repeated with those Aborigines who still survived largely untouched

in central Australia was for their contact with Europeans to be carefully managed and for there to be a period for adjustment. It would be necessary to stop the free movement of Europeans through the land reserved for Aborigines so that Aborigines could adjust to European society at their own pace and on their own terms. Duguid had been instrumental in persuading the Presbyterian Board of Missions to establish Ernabella Mission in the far north-west of South Australia adjacent to the South Australian section of the Central Aboriginal Reserves. Ernabella did not conform to the popularly held picture of a mission. Aboriginal culture was to be respected and European ways and Christianity would not be forced upon the Aboriginal people. Duguid's hope had been that in time a series of mission stations, run on the same basis as Ernabella, with staff who respected Aboriginal culture, would be established across the Central Aboriginal Reserves to cushion the destructive effects of the clash of cultures.<sup>214</sup>

In April 1947, in the House of Representatives, Mrs D. Blackburn (Independent Labor, Bourke, Vic.) moved that:

[T]he proposal to establish a rocket bomb testing range in Central Australia is an act of injustice to a weaker people who have no voice in the ordering of their own lives; is a betrayal of our responsibility to guard the human rights of those who cannot defend themselves; and a violation of the various charters that have sought to bring about world peace ...

She spoke against what she said were the expensive preparations for war and the need to consider '... the rights of the black men and women ... from whom we took this country.'<sup>215</sup>

Mrs Blackburn obtained no support in the Parliament. Much of the parliamentary debate was concerned with the pacifist and anti-war objections to the development of the Range. Members from both sides of the Parliament argued that the development of long-range weapons, and the alliance with Britain, were in Australia's interest and crucial to its defence. The Liberal Opposition appeared to be even more in favour of the project than the Government. The Leader of the Opposition, Rt Hon. R. G. Menzies, said that preparation for the defence of 'the British world' was imperative and that its importance out-weighed the minimal danger to Aborigines.<sup>216</sup>

The parliamentary debate on Mrs Blackburn's motion did raise questions about the direction of the Commonwealth's Aboriginal policy. The alternative policy positions of two prominent anthropologists—Dr Donald Thomson on the one hand, and A. P. Elkin, the Professor of Anthropology at Sydney University, on the other—were canvassed. Thomson, who had been a long standing advocate of strictly preventing white encroachments into land occupied by 'tribal' Aborigines in the Northern Territory, had been influential in 1939 when the Minister for the Interior had adopted a policy of protecting Aborigines 'still living in tribal state' from intrusion and exploitation by whites.<sup>217</sup> An alternative position was represented by Elkin who espoused an active policy of assimilation, and who had also played a role in the Minister of the Interior's adoption, in

1939, of a policy of achieving 'the ordinary rights of citizenship' for Aborigines. In the face of the public protests against the Woomera Rocket Range the Government had established an 'expert' committee, comprised of a British and an Australian representative of the project, a representative from South Australia, Western Australia and the Northern Territory, and importantly Professor Elkin, to examine the possible impact of the proposed Rocket Range on Aborigines.<sup>218</sup>

The Committee interviewed Dr Duguid, who was accompanied by Dr Thomson. The Committee in its Report explicitly rejected Duguid's and Thomson's objections that the Rocket Range endangered the welfare of Aborigines:

after hearing the views expressed by Dr Charles Duguid and Dr Donald Thomson, the Committee confirmed its conclusion ... It was of the opinion that neither of these gentlemen had advanced any reason which precluded the making of satisfactory arrangements to ensure the safety and welfare of the aborigines in the proposed range area.

The Committee also questioned the policy which had been advocated by Thomson and Duguid. It concluded that:

[d]e-tribalization of the aborigine is inevitable, and, provided the contacts brought about by the construction and use of the range are controlled and of a wholesome nature, the only effect would be the putting forward of the clock regarding de-tribalization by possibly a generation.<sup>219</sup>

The Committee also argued that 'satisfactory arrangements [could] be made to ensure the safety and welfare of the aborigines in the proposed range area'. The Committee was also satisfied that there would be no interference with the Aborigines of the Central Reserves through the mass movement of Aborigines or the employment of Aborigines. No roads would be built in the Reserves and personnel for the proposed observation posts would be flown in and out.<sup>220</sup>

In support of the proposal to establish the Rocket Range the Minister for Defence quoted a letter from Elkin:

I, personally, am satisfied that the welfare of the aborigines is not jeopardized by the experimental work that is to be undertaken and that most of the opposition is emotional and unenlightened. [I]t is the duty, not only of the Government, but those of us who are experienced in these matters of contact, to see that by positive measures no harm comes to aborigines, either directly or indirectly.<sup>221</sup>

From Duguid's point of view the debate on alternative policy approaches may have been a false dichotomy. Duguid was a passionate believer in racial equality and advocated equal rights for Aborigines. His goal was the achievement of social and economic equality for Aborigines in the broader Australian community. His concern, however, was that in all previous encounters between 'tribal' Aborigines and Europeans Aborigines had not only



been dispossessed of their land and denied legal equality, but had become degraded paupers and fringe dwellers within the European society. His hope for those Aborigines remaining on the Central Reserves was that with protection against white intrusion, and with the contacts with Aborigines made by Europeans who respected Aboriginal culture, the 'de-tribalisation' might be much less destructive. In the mood of the 1940s and 1950s, however, Elkin's argument was much more attractive to the Government, and to the vast majority of the Parliament, than was that of Duguid and Thomson.

Although the groups opposed to the Rocket Range passing through the Reserve had not been successful in having the project relocated there was the consolation that the Government had given clear assurances to the Parliament in relation to the protection of Aborigines from intrusion on to the Reserve; no roads would be built into the Reserve and Native Patrol Officers would be appointed to see to the welfare of the Aborigines.<sup>222</sup>

It is possible that the undertakings given in the Parliament *might* have been kept, and the development of Woomera Rocket Range *might* have had little effect on the Aborigines living in the Central Reserves, had it not been for the subsequent development of an atomic weapons testing program. Following secret negotiations, which commenced in 1950, the British Government obtained agreement to test atomic weapons in Australia. The initial commitments on behalf of Australia were made on the basis of discussions between the British Government and the Australian Prime Minister, the Rt Hon. R. G. Menzies, without any discussion in Cabinet, much less in the Parliament.<sup>223</sup> Between 1952 and 1957 a series of atomic tests were conducted at Monte Bello Islands, 80 kilometres off the coast of northern Western Australia, Emu in the Great Victoria Desert 400 kilometres north-west of Woomera, and Maralinga, north of Ooldea on the Transcontinental Railway 500 kilometres west of Woomera.<sup>224</sup>

The test sites and surrounding areas were made restricted areas and all but the most basic information about each explosion was kept secret. It was not until the 1984 Royal Commission on British Nuclear Tests that many of the details about the nature of the spread of radioactivity were revealed.

When the testing program was announced there was no opposition to the atomic tests from the Labor Party which only raised questions seeking reassurance about safety. In the Parliament the debate about atomic testing related to the safety of people in the settled areas and the implications of the tests for the international arms race. There were no specific questions about the possible effects on Aborigines. Prior to the first mainland test in October 1953 the Minister for Supply, the Hon. O. H. Beale, assured the House of Representatives that the cities were safe.<sup>225</sup> On 15 October (which coincidentally was the day of the first mainland test) a Government backbencher, W. C. Wentworth, initiated a major debate on the testing of nuclear weapons, with a motion 'directed to the avoidance of war and world disaster'. The motion urged the United Nations:

to devise and implement forthwith a world-wide and water-tight system for the control of atomic armaments.

In that whole debate there was no mention of the tests being carried out in Australia.<sup>226</sup> The day after the test the Prime Minister, on the basis of a reported statement of Professor Titterton of the Safety Committee, assured the Parliament that there had been no adverse effects.<sup>227</sup> A week later the Prime Minister said that:

[i]t has been stated most authoritatively that no conceivable injury to life, limb or property could emerge from the test ... [I]t would be unfortunate if we in Australia began to display some unreal nervousness on this point ... If the experiments are not to be conducted in Australia, with all our natural advantages for this purpose, we are contracting out of the common defence of the free world. No risk is involved in this matter.<sup>228</sup>

Until 1957—the final year of the major explosions—very little was said in the Parliament about the impact on Aborigines. Throughout the whole period of the trials the Government continued to argue, on the basis of advice from scientific experts, that the tests were safe. On many occasions the Minister for Supply and the Prime Minister assured the Parliament that there would be no injury to life or property.<sup>229</sup> In response to the very few questions that were asked the Government assured the Parliament in the most vague and general terms that Aboriginal interests and safety were being protected. In September 1956, for example, in reply to a question the Minister for Supply said,

[e]ver since the commencement of the joint project, the Government has given carefully consideration to the welfare of aborigines.<sup>230</sup>

The Minister was also adamant that no radioactive cloud drifted over Aboriginal territory and that great care was taken to ensure that no Aborigines were in the area of the tests.<sup>231</sup>

Despite the assurances that were given to the Parliament, and the undertakings which had been given when Woomera was established, the trials at Emu and Maralinga did lead to the disruption of Aborigines in the way Duguid and others had feared.<sup>232</sup> There were intrusions into the Central Reserves, some Aborigines were subject to high levels of radiation, Aborigines were moved from the Ooldea and surrounding areas and were prevented from travelling to their traditional hunting and ceremonial areas in the Maralinga area, and some Aboriginal lands around Maralinga were left in an unusable condition because of radioactive contamination.

Also the claims made in Parliament that there had been no spread of radiation, and that there was no possibility of any harm being caused by the tests, proved to be false. The Royal Commission into the British Nuclear Tests in Australia concluded that the first land based test at Emu on 15 October 1953 resulted in the spread of a radio-active cloud which drifted north-west from Emu and caused illness in Aborigines living on Wallatinna and Wellbourne Hill pastoral properties approximately 160 kilometres from the explosion.<sup>233</sup>

One matter which directly related to the welfare of Aborigines was the determination of how far people needed to be from the explosion to avoid harmful levels of radiation. At the time of the tests the calculations of 'safe' levels of radiation were highly confidential.

The initial calculations of the 'acceptable' levels of radiation, which applied for the first tests, were made on the assumption that the population lived in houses and wore clothes and shoes. On the basis of this calculation the minimum distance between the explosion and any population was set at 160 kilometres. In 1956, at the request of the Australian Atomic Weapons Testing Safety Committee, the acceptable level of fallout for 'people living in semi-primitive conditions' was determined. It was set five times lower than for the remainder of the population. The new standard for 'tribal' Aborigines, if acted upon, presented a problem for the test program because the fallout from planned tests would have exceeded the new maximum level for a distance of up to 400 kilometres from Maralinga. A number of cattle stations, Ernabella Mission and part of the Central Aboriginal Reserve were within that distance of Maralinga. Having raised the matter of Aboriginal safety, the Safety Committee then appeared to ignore it. A highly technical and ambiguous submission on the maximum levels of fallout was sent to the Australian Cabinet which in turn made an ambiguous decision which was taken to give authority for the planned tests proceed.<sup>234</sup> The Royal Commission found that the tests at Maralinga in 1956 were conducted in 'conditions which violated the firing criteria' and the fallout did exceed the proscribed maximum levels.<sup>235</sup> Milliken concludes that '... despite the apparent flurry of belated concern ...' by the Australian Safety Committee about fallout levels and 'tribal' Aborigines '... there was never any real prospects of making sure that the new restrictions worked'.<sup>236</sup>

The project had obtained a scientific or bureaucratic rationale of its own which was quite independent of the commitments made in the Parliament, including assurances about protection of Aborigines. This was starkly demonstrated by the relationship between the Native Patrol Officer, Walter MacDougall, and those in control of the project.

MacDougall had been appointed by the Commonwealth Government as Native Patrol Officer in 1947 following undertakings to the Parliament by the Minister of Defence. He had previously worked at Ernabella Mission and was a very experienced bushman. By any account MacDougall was a remarkable man.<sup>237</sup> He stands out in the way in which he spoke out against actions which he believed threatened the welfare of Aborigines and what he saw as breaches of the undertakings which had been given by the Government. The Royal Commission into British Nuclear Test in Australia described the ongoing conflict between MacDougall and his superiors about the protection of Aborigines during the Emu and Maralinga tests and the persistence with which MacDougall spoke up within the organisation for the rights of Aborigines. At the same time that confident assurances were being given that the trials were having no adverse effects MacDougall was warning that insufficient effort had been made to determine the location and numbers of Aborigines in the vast area covered by the range and to ensure that no Aborigines came too close to the test areas.<sup>238</sup>

Documents quoted in the Royal Commission revealed that MacDougall made repeated reports that he could not be certain about the numbers or movements of Aborigines in the area. The Royal Commission Report states that:

[o]ne man ... could not be expected to have a complete picture of the demography and lifestyles of the people ... scattered over and travelling around an area in excess of 100 000 square kilometres.<sup>239</sup>

MacDougall was shown to have been right to have been concerned when in May 1957 a family of Aborigines (two adults and two children) were discovered at Maralinga coming from the crater of an atomic test which had been conducted in October 1956. They were collected and tested for radioactive contamination. The level of radioactivity on these people was not considered by the officials to be 'harmful'. They were showered, and in a state of shock, transported to Yalata Mission. As people who had previously had almost no contact with Europeans they were terrified by the whole experience. One observer at the time said that they 'were in a state of apprehension and bewilderment and ... frightened'<sup>240</sup> The woman was pregnant at the time and her baby was born dead. Whatever the cause of the still birth the women from the area believed that it was the result of the 'poison' in the ground.<sup>241</sup> It is not clear what long-term physical effects the radiation had but the woman continued to be traumatised by the incident, probably for the remainder of her life. The authorities took no further interest in the physical or psychological welfare of the family. The Royal Commission observed that:

[t]he only follow-up action was taken at the Range Commanders request, on receiving instructions from ... the Secretary of the Department of Supply: the dogs [which had been with the family], having escaped the showering process, were shot in case they had been contaminated!<sup>242</sup>

Because the incident was seen as a 'political embarrassment' it was kept secret. The personnel who had been involved in the incident were reminded that they were covered by special security provisions and that there:

could be great difficulties for them if they started breaking the security that was required of them in this matter.<sup>243</sup>

The Royal Commission concluded that:

the attempts to ensure Aboriginal safety during the [1956 tests] demonstrates ignorance, incompetence and cynicism on the part of those responsible for that safety. The inescapable conclusion is that if Aborigines were not injured or killed as a result of the explosions, this is a matter of luck rather than adequate organisation, management and resources allocated to ensuring safety... [A] site was chosen on the false assumption that the area was not used by its traditional owners. Aborigines continued to move around and through the Prohibited Zone and inadequate resources were allocated to locating them and to ensuring their safety. The reporting of sightings of Aboriginal people was discouraged and ignored.<sup>244</sup>

MacDougall also clashed with the project leaders over intrusions into the Central Reserves. Peter Morton, in a history of Woomera and the Anglo-Australian Joint Project, gives an account of MacDougall's reports and his correspondence with his supervisors.<sup>245</sup>

In 1955 it was decided to establish a meteorological station at Giles in the Rawlinson Ranges, within the Western Australian part of the Central Reserves. MacDougall objected to the choice of a location in the Aboriginal Reserve. The site chosen would lead to unnecessary interference with the Aborigines in the vicinity, and other equally good sites could be found outside the Reserve. MacDougall also believed that he had been included in a reconnaissance party, which ostensibly had the task of choosing the site of the weather station, simply to give credibility to the decision which had already been made to locate the station at Giles. In his report of the reconnaissance trip he said '[t]here was no attempt made to select a site that would interfere as little as possible with Aborigines occupying the Rawlinson Range'. He objected to the failure to comply with commitments of the Government:

the actions and attitude of the reconnaissance party shows that there is no intention of fulfilling or seriously regarding the promises made by the Commonwealth to the People of Australia ... [P]rogress and science must advance, but if existing measures necessary for the protection and welfare of Aborigines are obsolete, impracticable or to be disregarded, please publish the fact so that new measures can be taken, and organisations function smoothly and without false pretences.<sup>246</sup>

In a subsequent memo relating to the 'untrained' staff who would be sent to Giles, MacDougall said:

'[t]he result is certain to be a degeneration from self-respecting tribal communities to pathetic and useless parasites—it has happened so often before that surely we Australians must have learnt our lesson.

He also observed that as an area was to be excised from the Aboriginal Reserve the project now involved the appropriation of land which he said:

belongs to the tribe and is recognised as such by other tribes. However, we propose to take it away from them and give nothing in return—we might as well declare war on them and make a job of it.

The Chief Scientist wrote to the Controller of the Weapons Research Establishment in March 1956 concerning MacDougall's complaints:

in the first place, Mr McDougall [*sic*] is not concerned with policy matters: these are the responsibility of more senior officers, and Mr. McDougall's duties are to ensure that any extension of the [project's] activities is carried out in such a way that the impact [on] any aborigines in an area involved in such an extension, is kept to a minimum. To this end he should accompany reconnoitring or other parties going into areas where aborigines may be expected to be encountered. This duty, and this duty only, is Mr McDougall's concern, and we look to him for advice and guidance in this particular aspect ... The setting up of the Maralinga meteorological station is no concern of Mr McDougall's ... The joint project has been agreed between two Governments ... These decisions having been taken on a very high level, it behoves all of us to implement them with the least possible upset to any existing economy in the territory concerned, whether it be aboriginal or

pastoral ... [H]e is out of step with current opinion, and the sooner he realises his loyalty is to the Department that employs him, and which is glad to take advice from him on matters on which he is an expert, the sooner his state of mind will be clarified, and he will be enabled to carry out his duties without any sense of frustration or disappointment, as is evident in your assessment.

The same letter contained the very revealing statement:

your memorandum discloses a lamentable lack of balance in Mr McDougall's outlook, in that he is apparently placing the affairs of a handful of natives above those of the British Commonwealth of Nations.<sup>247</sup>

Six months later in reply to a question seeking the reports of the Patrol Officers the Minister for Supply, Howard Beale, said in the House of Representatives that since Woomera had been established the:

care and welfare of Aborigines has been in the forefront of the minds of officers managing and administering the range. It is not usual to publish official reports of this kind, but there has not been one single instance reported of harm or injury to an aboriginal due to range operations.<sup>248</sup>

The establishment of the Giles Weather Station did result in exactly the sort of disruption that Duguid and MacDougall had predicted. Aborigines who had lived a largely undisturbed traditional life in the vicinity were attracted to a scavenging and, to the eyes of most observers, a squalid fringe dwelling life on the periphery of the Weather Station, where the European workers lived in relative material comfort.

It was the development at Giles more than any other part of the atomic test which, at the time, created a public controversy. It was not, however, the scrutiny of the Commonwealth Parliament which brought the question to public attention. The matter was given prominence by a Select Committee of the Western Australian Parliament which was chaired by a Liberal member, W. A. Grayden. The Report of the Select Committee, and a book published by Grayden, presented a picture of Aborigines in the remote eastern part of Western Australia as being in a sickly and starving condition, and made accusations of interference with Aborigines by Europeans who had come to construct roads and to work at the Weather Station. Grayden also argued that Aborigines, forced from their land by the atomic tests, had put pressure on resources in adjacent areas in Western Australia which had left Aborigines there in a particularly deprived condition. Subsequent investigations showed that some of Grayden's claims were exaggerated. However, the claim that the Aborigines' lifestyle had been transformed, and the contrasting picture of the lifestyle of the Aborigines and the European workers at Giles, could not easily be dismissed. Also, while Grayden's claims about the removal of people from the area of the atomic tests to Western Australia may have been false, it was the case that Aborigines had been removed from the Maralinga area. On the one occasion that the claim that Aborigines had been pushed from their land to accommodate the tests was raised in the Commonwealth Parliament it was flatly and summarily dismissed by the Government.<sup>249</sup> However, as the

Royal Commission into British Nuclear Tests in Australia showed, Aborigines were removed from their country on account of the tests. Prior to the tests at Emu in October 1953 Aboriginal people who had lived at Ooldea, and in the surrounding country, were moved over 100 kilometres to the South to Yalata Mission near the Great Australian Bight. The decision to move the people away from their country, and to prevent them from returning, was taken as a direct result of the atomic tests.<sup>250</sup> It was not until 1983, with the passage of the South Australian Bannon Labor Government's *Maralinga Land Rights Act*, that the Maralinga People were given the opportunity to return to their land.<sup>251</sup> Even then, areas of land had been rendered permanently uninhabitable by some of the highly secret so-called 'minor tests' which took place between 1958 and 1961 which resulted in the dispersal of plutonium over many square kilometres.

Questions in the Parliament in the 1970s and 1980s—when public attitudes to atomic tests had become much more hostile—brought a number of previously secret matters to public attention and contributed to the decision of the Government in 1984 to establish the Royal Commission into British Nuclear Tests in Australia, but in the whole time the atomic tests were being conducted the Commonwealth Parliament played almost no role. The Parliament provided no real check on the atomic tests or on their impact on Aborigines. Few questions were asked and almost nothing was done by the Parliament to question or investigate what was actually happening in the tests. An emphatic undertaking that was given to the Parliament was simply taken at face value. What scrutiny, checking and questioning there was, or advocacy on behalf of Aborigines, largely came from outside the Commonwealth Parliament.

## **Constitutional Change—the 1967 Referendum**

In 1967 the Parliament passed legislation for a referendum to remove s. 127 and the excluding clause from s. 51(xxvi) of the Constitution. This was the culmination of a vigorous campaign by Aboriginal groups and Aboriginal advancement associations to change the Constitution, and of a number of debates in the Parliament on the Commonwealth's role in Indigenous Affairs.

One element in the argument for Constitutional change was that the exclusion of Aborigines was discriminatory. Another was that the costs of providing the necessary welfare benefits and programs for the advancement of Indigenous peoples should not be, and could not be, borne by the States which had the largest Aboriginal population. An argument which had been made periodically, since the first speech in the Parliament on Aboriginal Affairs by H. Mahon, was that internationally the whole nation would be judged on the treatment of Indigenous peoples and so it should be the national government which had the constitutional powers to deal with the matter. Behind these various propositions there was a general theme in the advocacy of humanitarian and Aboriginal associations that Aboriginal welfare would be better served if the Commonwealth were to take over Aboriginal Affairs.

The Royal Commission on the Constitution which reported in 1929 had considered the question but was not unanimous on the question of s. 51(xxvi). The majority recommended against change, in terms which were revealing about the prevailing ideology of the time:

we do not recommend that section 51(xxvi) be amended so as to empower the Commonwealth Parliament to make laws with respect to aborigines. We recognise that the effect of the treatment of aborigines on the reputation of Australia furnishes a powerful argument for the transference of control to the Commonwealth. But we think that on the whole the States are better equipped for controlling aborigines than the Commonwealth. The States control the police and the lands, and they to a large extent control the conditions of industry. We think that a Commonwealth authority would be at a disadvantage in dealing with the aborigines, and that the States are better qualified to do so.

The minority report argued for the Commonwealth Parliament having power in Aboriginal matters because the whole nation should accept financial responsibility for Aborigines.<sup>252</sup>

In the post-World War Two period the campaign for Constitutional change was pressed more vigorously inside and outside the Parliament. To some extent the debates in the Parliament reflected the different positions the parties had on federal arrangements. In the debate on the Constitutional Amendment Bill 1944 Labor's Attorney-General, the Hon. H. V. Evatt, appeared to think that no argument was necessary for the proposition that the Commonwealth should have power in relation to Aboriginal Affairs. The Leader of the Opposition, the Rt Hon. R. G. Menzies, expressed concern about any proposal which expanded the Commonwealth's power. Hasluck also was cautious about disturbing federal arrangements. In his important 1950 speech arguing for a lead from the Commonwealth he had only sought greater cooperation between the Commonwealth and the States and more Commonwealth funding—not a Commonwealth takeover.

In 1959 the Joint Committee on Constitutional Review recommended that s. 127 be repealed, but made no recommendation on s. 51(xxvi). No immediate steps were taken to implement any of the recommendations of the Review. However, demands for constitutional change from reform organisations and Aboriginal groups became more insistent and for many activists it came to be seen as a key to Aboriginal advancement.

At its 1961 Federal Conference the Labor Party adopted a policy of removing both s. 127 and the exclusionary clause from s. 51(xxvi) from the Constitution.<sup>253</sup> In August 1962 K. Beazley moved an Urgency Motion in the House of Representatives urging the Parliament to legislate for a referendum to make those changes to the Constitution. In support of the motion he argued that the exclusions were discriminatory and that their removal would allow the Commonwealth to act to remove many of the disabilities which Aborigines were subjected to under State laws (though he noted that not all discriminatory State laws would be affected by the proposed changes).



Hasluck agreed that s. 127 should be removed from the Constitution but argued that removing the excluding clause from s. 51(xxvi) would be a move in the wrong direction. The effect of changing s. 51(xxvi) would be to allow the Commonwealth to make special laws for Aborigines. The object, however, should be the reverse. The policy of assimilation sought to remove all special provisions for Aborigines and to have Aborigines become full citizens. There should be no legal distinctions between Aborigines and other Australians. Hasluck referred to what he said had been happening successfully under Commonwealth administration in the Northern Territory.

During the term of this government we have brought in amendments in the Northern Territory to lessen, as much as we can the application of any special legislation to these people.<sup>254</sup>

No member appears to have contradicted the statement.

The following year the Leader of the Opposition, the Hon. A. A. Calwell, introduced a private member's bill—the Constitution Alteration (Aborigines) Bill (1964)—for a referendum to remove both exclusionary provisions from the Constitution. Again the Government accepted that s. 127 should be repealed but argued against the removal of the words 'other than the aboriginal race in any State' from s. 51(xxvi). The difference between the Government and the Opposition on this question was partly the result of different approaches to federalism but it also revealed some difference in the approach of the two parties to the implementation of the assimilation policy.

Labor speakers argued that the Commonwealth power should be used to take positive steps to remove Aboriginal disadvantage. Calwell went further and suggested that he had some reservations about an assimilation policy which was simply aimed at the absorption of Aborigines into white society:

the Aborigines are not a dying race; they are not being absorbed, or assimilated . . . , and there are many educated and sophisticated aborigines who want to see their race preserved intact, who do not want to be absorbed by the majority of Australians.<sup>255</sup>

Calwell urged action but did not say how enhanced Commonwealth powers might be used to achieve the policies he hinted at.

The Attorney-General, the Hon. B. M. Snedden, again argued that the Government's objective was to remove all special laws which applied to Aborigines. If the Government were successful, he said, there would be no need for the Commonwealth to have power to make special laws. Indeed, the exception in s. 51(xxvi) should be seen as a constitutional protection. Snedden said that:

[t]hese words were put there as an essential safeguard for the aboriginal race so that special laws discriminating against a race could not be laws discriminating against the Aboriginal race. The essential intention of those words from the outset was the provision of a safeguard: the words were not meant to be discriminatory.

Snedden explicitly rejected the idea that the Commonwealth might make special laws which were beneficial to Aborigines.

Even beneficial discrimination is discrimination. We want to move to a stage where there is no special legislation whether it is beneficial or disadvantageous.<sup>256</sup>

On both sides of the Parliament there appeared to be satisfaction with the claim that the Commonwealth was doing a good job in the Northern Territory.<sup>257</sup> The Bill lapsed at the dissolution of the Parliament.

In November 1965 the Prime Minister, the Rt. Hon. R. G. Menzies, introduced the Constitutional Alteration (Repeal of s. 127) Bill for a referendum to remove s. 127 from the Constitution. In presenting the Bill Menzies explicitly rejected the idea of amending s. 51(xxvi). He repeated the argument that the exception in it did not discriminate against Aborigines, but actually provided a protection:

what should be aimed at, in the view of the government is the integration of the Aboriginal in the general community, not a state of affairs in which he would be treated as being of a race apart. The mere use of the words 'Aboriginal race' is not discriminatory. On the contrary, the use of the words identifies the people protected from discrimination. ... If the words were removed ... it would change dramatically the scope of the plenary power conferred on the Commonwealth. If the Parliament had, as one of its heads of power, the power to make special laws with respect to the Aboriginal race, that power would very likely extend to enable the parliament to set up, for example, a separate body of industrial, social, criminal and other laws relating exclusively to Aborigines. It is difficult to see any limitations on the power ... Conferring such a new power could have most undesirable results.<sup>258</sup>

Menzies raised the possibility of other changes to s. 51(xxvi). The whole sub-section (xxvi) could be repealed. While he thought that the idea had merit—the power had never been used by the Commonwealth—he thought that in an uncertain world it was possible that the Commonwealth may have good cause to use it in the future. The other amendment which had been suggested was to add a new provision which would invalidate any Commonwealth or State laws which discriminated on the grounds of 'race'. This, he said, (on the basis of the experience of the United States with the 'bill of rights') might do no more than produce definitional arguments and 'a crop of litigation' which 'could readily invalidate laws which, while designed to protect the special interests of Aborigines, could be held technically to discriminate either for or against them.'<sup>259</sup> W. C. Wentworth, a government backbencher, spoke in support of the argument made by the Prime Minister on the dangers of simply removing the words 'other than the aboriginal race in any state' from s. 51(xxvi). Such a move would allow the Parliament in future to pass special discriminatory laws for Aborigines. Also, to simply remove s. 51(xxvi) would do nothing to prevent the States from passing special discriminatory laws. Wentworth argued that the Constitution should be amended to give the Commonwealth power to make laws for the advancement of Aborigines *and* to add a prohibition on discrimination on the grounds of

'race'.<sup>260</sup> Subsequently he introduced a private member's bill for such a change (see below).

The Opposition supported the repeal of s. 127 but argued that the Bill should also contain a proposal to amend s. 51(xxvi). Opposition members argued that the exclusion of Aborigines from s. 51(xxvi) had not protected Aborigines from discriminatory Commonwealth social security benefits and voting rights laws. It would be better, therefore, they argued, to 'confer upon the Commonwealth a positive power to make laws for the benefit of Aborigines' by removing the exception from s. 51(xxvi).<sup>261</sup> Opposition speakers, and Wentworth, agreed with the Prime Minister that it would be undesirable for Commonwealth laws to be used to make Aborigines a 'race apart'. Wentworth argued that any expanded Commonwealth power could be used to create a 'non-racial, homogenous society'.<sup>262</sup>

Wentworth's Constitutional Alteration (Aborigines) Bill 1966 contained two parts. He proposed that s. 51(xxvi) be repealed and in its place the Commonwealth Parliament be given power to make laws for 'the advancement of the Aboriginal natives of the Commonwealth of Australia', and secondly a new section be added—177A—as follows:

neither the Commonwealth nor the States shall make or maintain any law which subjects any person who is born or naturalised within the Commonwealth of Australia to any discrimination or disability within the Commonwealth by reason of his racial origin.<sup>263</sup>

Wentworth argued that it was desirable to remove s. 51(xxvi):

the plenary racial powers in sub-section (xxvi) are not needed, and indeed, they are an impediment to the good name of Australia overseas.<sup>264</sup>

Speakers from both sides of the House supported the Bill.<sup>265</sup>

One member noted a point which related to a question which was rarely, if ever, raised in this context; the applicability of the constitutional provisions on Aborigines to Torres Strait Islanders. M. D. Cross (ALP, Brisbane, Qld) said that it was understood that the provision would apply to Torres Strait Islanders.

It is important in drafting any legislation relating to the Aboriginal people to realise and recognise that Torres Strait Islanders do not regard themselves as Aborigines.

It would be many more years before that point was made explicit in any Commonwealth legislation.<sup>266</sup>

The whole debate had no immediate results. The Constitutional Alteration (Repeal of s. 127) Bill 1965, and another referendum proposal—the Constitutional Alteration (Parliament) Bill 1965 which sought to alter the Senate 'nexus' in s. 24 which required that number of members of the House of Representatives be 'as nearly as practicable, twice the number of the senators'—were both passed through the two Houses of the Parliament with

the support of both sides but neither was submitted to referendum. The Wentworth Bill lapsed at the dissolution of the Parliament.<sup>267</sup>

The next year, after Menzies' retirement in January 1966, the new Prime Minister the Rt Hon. H. E. Holt, introduced two bills to alter the Constitution. The first, the Constitution Alteration (Parliament) Bill 1967, proposed the removal of the Senate 'nexus' in the same term as the 1965 Bill. The second, the Constitution Alteration (Aborigines) Bill 1967 proposed both the removal of the words 'other than the aboriginal race in any State' from s. 51(xxvi) and the deletion of s. 127.

The Aborigines Bill was dealt with speedily by the Parliament. It passed through all three readings in the House of Representatives on the same day. The Prime Minister explained that the Government had reconsidered the question of s. 51 (xxvi), and had been influenced by the 'deep rooted' belief that the exclusionary clause was discriminatory. He said that the Government had decided against the inclusion of a 'constitutional guarantee against discrimination on the ground of race'. Although it was an 'attractive' proposition there were disadvantages: it 'could provide a fertile ground of attack on the constitutional validity of legislation which [the Government did] not consider discriminatory' and would only limit governments without preventing discriminatory behaviour by individuals.<sup>268</sup>

The Bill was supported by the Opposition. The Leader of the Opposition agreed that a constitutional guarantee against discrimination was likely to result in 'greater benefits to lawyers than to litigants'. It was better, he said, 'to keep the position simple as this will enable the members of the National parliament to carry out their duties'.<sup>269</sup> Wentworth supported the Bill saying that although he thought his own Bill 'was perhaps better for the Aboriginal people', the Government's Bill gave 'more than three-quarters of the substance' of what he was seeking.<sup>270</sup> The Bill passed the House of Representatives and the Senate without dissent.

The Government's reasons for a change of mind had more to do with its perception of public opinion, and concern about Australia's international image than with any conviction that the change was desirable.<sup>271</sup> Had the Government hoped that in putting the two questions simultaneously—the Aboriginal question and the Senate 'nexus' question—the less popular question on the Senate 'nexus' would get more support by being associated with the politically popular change in relation to Aborigines, it was not realised.<sup>272</sup> The Aboriginal question, which was supported by all political parties, was overwhelmingly passed with a majority in support in all States, and an overall majority of 90.8 per cent—the largest ever majority for any referendum proposal in Australia.<sup>273</sup> The Senate 'nexus' question was opposed by some Liberal Senators and by the Democratic Labor Party and was overwhelmingly defeated with a majority 'no' vote in all but one State (NSW) and with an overall vote against of 59.8 per cent.<sup>274</sup> Electors distinguished between the two questions, though exactly what the majority understood to be the effect of the constitutional change in relation to Aborigines is not clear.

Little, if any, of the public discussion of the proposal, or the public arguments made in favour of the change, were in the same terms as the parliamentary debates about the power of the Commonwealth Parliament. In the media much of the discussion focused on the counting of Aborigines in the census. The 'yes' case argued that the proposal would remove words which discriminated against Aboriginal people, and would allow the Commonwealth to cooperate with the States to ensure that the Government's actions would be 'in the best interests of the Aboriginal people'.<sup>275</sup> What evidence there is from public opinion polls indicates that most voters thought that the constitutional change would result in a better deal for Aborigines.<sup>276</sup>

The constitutional change had little immediate impact on Indigenous Affairs. The Government which had sought the change had no plans for its use.<sup>277</sup> In September 1967 the Prime Minister said in the Parliament that:

it is now possible for the Commonwealth Parliament to legislate, but it does not mean that the States automatically lose their powers. There is no intention on the part of the Commonwealth that authority should be ... wrested from the States... [W]hile the Commonwealth Parliament is now in a position to make laws and to prevail should a conflict arise with the States, the Commonwealth does not seek to intrude unnecessarily in this field, or into areas of activity currently being dealt with by the States.<sup>278</sup>

The apparent reticence of the Liberal-Country Party Government to use the new power of the Parliament gave no indication of the true significance of the change. Over the next five years the Liberal-Country Party Government held to the view that the States should continue to have the major role in Aboriginal Affairs, but very gradually expanded the Commonwealth's role.

By this time the focus of the campaign for Aboriginal rights had shifted from the jurisdictional question to substantive issues and it became impossible for the Commonwealth Government and the Parliament not to be drawn into Aboriginal Affairs. The Commonwealth was now confronted with new demands and new issues. The push for full civil rights for Aborigines expanded into a call for Indigenous rights. The political campaign for land rights which had grown out of the Wave Hill and Yirrkala disputes attracted national and international attention. The Yirrkala and Wave Hill disputes which had always been within the Commonwealth's jurisdiction—a fact which appeared to have been almost obscured by the referendum campaign—increasingly put pressure on the Commonwealth.

In 1973 the Whitlam Labor Government took steps decisively to move the Commonwealth into an active role in Aboriginal Affairs and since that time Aboriginal Affairs has been an inescapable issue for Commonwealth Governments and the Parliament. With the *Racial Discrimination Act 1975*, *Aboriginal Land Rights (NT) Act 1976*, the *Aboriginal and Torres Strait Islanders Commission (ATSIC) Act 1989*, the *Native Title Act 1993* and the *Wik* amendments to it in 1998 the Parliament passed some of the most politically controversial and socially important legislation in its hundred year history. In the case of

the ATSIC Act the Native Title Act and the Wik amendments to that Act, more than with most legislation, it was true to say that the Parliament was the forum in which the legislation was made. The final content of the legislation was not what was presented to the Parliament by the Government. The legislative process which produced those laws was a tortuous and difficult one in which redrafting, political manoeuvrings, parliamentary debate and many rounds of negotiation within the Parliament and with Aboriginal groups outside it were instrumental in securing the necessary majority in both chambers.

This outcome was not part of the vision of the framers of the Constitution. The federal model they adopted by the framers left Indigenous affairs within the jurisdiction of the States. The only provisions in the original Constitution relating to Indigenous peoples were expressed in negative terms. The framers of the Constitution did not, and could not have, anticipated that Indigenous Affairs would become a national issue which would periodically be central to the deliberations of the Commonwealth Parliament.

## Endnotes

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1. Commonwealth of Australia, *Bringing them Home: Report of the National Enquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, Human Rights and Equal Opportunity Commission, Sydney, 1997.
2. G. Sawyer, 'The Australian Constitution and the Australian Aborigine', *Federal Law Review*, vol. 2, June 1966, pp. 25–35 and John Chesterman and Brian Galligan, *Citizens without Rights: Aborigines and Australian Citizenship*, Cambridge University Press, Melbourne, 1997, pp. 70–2.
3. See Chesterman and Galligan, *op. cit.*, pp. 67–73; G. Sawyer, 'The Australian Constitution and the Australian Aborigine' and G. Sawyer, 'Grant of Franchise to Aborigines by the Commonwealth', Appendix IV, House of Representatives, Report from the Select Committee on Voting Rights of Aborigines: Part I, Report and Minutes of Proceedings, Government Printer, 1961, pp. 38–9.
4. G. Sawyer, 'The Australian Constitution and the Australian Aborigine', *Federal Law Review*, vol. 2, June 1966. See also G. Sawyer, 'Grant of Franchise to Aborigines by the Commonwealth' and K. H. Bailey, 'Voting Rights of Aborigines', Appendix V, House of Representatives, Report from the Select Committee on Voting Rights of Aborigines: Part I, Report and Minutes of Proceedings, Government Printer, 1961, pp. 40–1.
5. After 1967, when the words 'other than the aboriginal race in any State' had been removed, the question of the extent of the Commonwealth's powers under s. 51(xxvi) in relation to the States' powers became a contentious matter, but in the period before 1967 Commonwealth laws which affected the rights and entitlements of Aborigines were not problematic in relation to the boundaries of Commonwealth and State powers.
6. G. Sawyer argues that there is no clear answer to the question. See 'Grant of Franchise to Aborigines by the Commonwealth,' p. 39 and Bailey, 'Voting Rights of Aborigines'. In

relation to s. 127 the Bureau of Statistics in publishing census data excluded Aborigines but not Torres Strait Islanders. See also Sawer, 'The Australian Constitution and the Australian Aborigine', *op. cit.*, p. 26.

7. In both States at the time of Federation Aborigines who fulfilled a freehold property qualification were exempted from the restriction, but in both States this provision was subsequently repealed. See Chesterman and Galligan, p. 66.
8. Chesterman and Galligan, *op. cit.*, pp. 66–7 and G. S. Reid and M. Forrest, *Australia's Commonwealth Parliament 1901–1988: Ten Perspectives*, Melbourne University Press, Melbourne, 1989, pp. 94–6.
9. Mahon became a Minister in three Labor Governments—Postmaster General 1904, Home Affairs 1908–9 and External Affairs 1914. In 1920 he became the first and only member to be expelled from the Parliament. Mahon attacked British policy in Ireland in what were seen to be extreme terms. Using the powers of the Parliament under s. 49 of the Constitution, Prime Minister Hughes moved to have Mahon expelled for making statements which were 'seditious and disloyal' and 'inconsistent with the oath of allegiance which he [had] taken,' Senate and House of Representatives, *Debates*, 11 November 1920, p. 6382, See pp. 6382–475. See *House of Representatives Practice*, J. A. Pettifer, ed., Australian Government Publishing Service, Canberra, 1981, pp. 190–1, and H. J. Gibbney, 'Hugh Mahon 1857–1931' in B. Nairn and G. Searle, eds, *Australian Dictionary of Biography*, vol. 10, 1891–1939, Melbourne University Press, Melbourne, 1986, pp. 379–80.
10. Senate and House of Representatives, *Debates*, 26 July 1901, p. 3150.
11. *ibid.*, p. 3150.
12. Senate and House of Representatives, *Debates*, vol. III, 26 July 1902, p. 3152. See also Peter Biskup, *Not Slaves, Not Citizens: The Aboriginal Problems in Western Australia 1898–1954*, University of Queensland Press, St. Lucia, 1973, pp. 36–7.
13. *Votes and Proceedings of the House of Representatives*, vol. 1, 1901–02, Government Printer, Victoria, p. lvi.
14. Senate and House of Representatives, *Debates*, vol. IX, 9 April 1902, p. 11 450.
15. Reid and Forrest, *op. cit.*, p. 96–7.
16. Senate and House of Representatives, *Debates*, vol. IX, 9 April 1902, p. 11 453.
17. *ibid.*, p. 11 453.
18. Senate and House of Representatives, *Debates*, vol. IX, 10 April 1902, p. 11, 580.
19. *ibid.*, pp. 11, 580–2.
20. *ibid.*, p. 11 582. See also Senator Stewart, 10 April 1902, p. 11 596.
21. See Senator O'Connor, Senate and House of Representatives, *Debates*, vol. IX, 10 April 1902, p. 11 587 and Senator Harvey, 10 April 1902, p. 11 588.
22. *ibid.*, p. 11 584.
23. *ibid.*, p. 11 592.

24. *ibid.*, p. 11 594.
25. Senate and House of Representatives, *Debates*, vol. IX, 10 April 1902, p. 11 598–9.
26. *ibid.*, p.11 980. See also Mr Mahon, Senate and House of Representatives, *Debates*, 24 April 1902, p. 11 978.
27. Senate and House of Representatives, *Debates*, vol. IX, 24 April 1902, pp. 11 977 and 11 980.
28. *Commonwealth Franchise*, no. 8 of 1902. An Act to provide for an Uniform Federal Franchise, Clause 4. However, see wording as printed in Senate and House of Representatives, *Debates*, 30 May 1902, p. 13 145 which appears to have wording different from that in the Act.
29. Senate and House of Representatives, *Debates*, vol. 59, 10 November 1910, p. 5992.
30. See Senate and House of Representatives, *Debates*, vol. 59, 10 November 1910, pp. 5999–6000.
31. Senate and House of Representatives, *Debates*, vol. 46, 3 June 1908, p. 11 968.
32. *ibid.*, p. 11 968.
33. Senate and House of Representatives, *Debates*, vol. 66, 4 October 1912, p. 3882 and 9 October 1912, p. 3987.
34. *ibid.*, p. 3881.
35. Senate and House of Representatives, *Debates*, vol. 56, 31 August 1910, pp. 2273–8.
36. R. A. Hall, 'Aborigines and Torres Strait Islanders in the Second World War' in D. Ball, ed., *Aborigines in the Defence of Australia*, ANU Press, Botany, NSW, 1991, p. 32. The total number of Aborigines serving in the First World War is unknown but at least 300 from NSW, Victoria and Queensland enlisted in the First AIF. The 'race' of soldiers was not recorded and some Aborigines claimed to be some other race in order to escape the authority of State Protectors who had the power to control their earnings. Aboriginal soldiers had approximately the same casualty rate as other soldiers and three received awards for gallantry. See Hall, *op. cit.*, pp. 32–3. See also D. Huggonson, 'The Dark Diggers of the AIF', *Australian Quarterly*, Spring, 1989, pp. 352–7.
37. Chesterman and Galligan, *op. cit.*, p. 92.
38. *ibid.*, p. 92.
39. Quoted in Chesterman and Galligan, *op. cit.*, p. 92.
40. Quoted in Chesterman and Galligan, p. 97.
41. For example s. 4 of the *Aborigines Act 1934–39 (SA)* defined an Aborigine as anyone who descended from the original inhabitants of Australia. See J. Summers, 'Aborigines and Government in the Twentieth Century' in Eric Richards, ed., *The Flinders History of Australia: Social History*, Wakefield Press, Adelaide, 1986, pp. 493–4.
42. See Chesterman and Galligan, *op. cit.*, pp. 113–4. See also John McCorquodale, 'The Legal Classification of Race in Australia', *Aboriginal History*, vol. 10, 1986, pp. 7–24.



43. Senate and House of Representatives, *Debates*, 10 April 1902, pp. 11 585 and 11 590.
44. *ibid.*, p. 11 592.
45. Senate and House of Representatives, *Debates*, 24 April 1902, p. 11 978.
46. *ibid.*, p. 11 977.
47. *ibid.*, p. 11 580. See also Senator Ewing, p. 11 586, Senator Harney, p. 11 590 and Mr Isaacs, Senate and House of Representatives, *Debates*, 24 April 1902, p. 11 979.
48. J. Quick and R. R. Garran, *Annotated Constitution of the Australian Commonwealth*, Legal Books, Sydney, 1976 [1901].
49. P. Stretton and C. Finnimore, 'Black Fellow Citizens: Aborigines and the Commonwealth Franchise', *Australian Historical Studies*, vol. 28, no. 101, October 1993, pp. 527–8.
50. Quick and Garran, *op. cit.*, p. 486.
51. Stretton and Finnimore, *op. cit.*, pp. 530.
52. The High Court did ultimately adopt the narrow meaning of s. 41. In *R v Pearson; ex parte Sipka*, 1983, 152 CLR 254 it held that s. 41 only guaranteed the right to vote in Commonwealth elections of those individuals who had a right to vote in State elections in 1902 when the Commonwealth Parliament first legislated for the franchise for Commonwealth elections. This interpretation makes s. 41 a 'transitional' provision which has no force beyond the lifetime of those individuals who had the right to vote in State elections before the Federal Parliament legislated for the Commonwealth franchise. See Michael Coper, *Encounters with the Australian Constitution*, CCH Australia Ltd, Sydney, 1987, pp. 335–8.
53. *Jiro Muramats v The Commonwealth Electoral Officer for the State of Western Australia* (1923) 32 CLR, pp. 500–8.
54. *ibid.*, at p. 504. Emphasis added. See also p. 505.
55. Stretton and Finnimore, *op. cit.*, p. 526–7.
56. *ibid.*, pp. 528–9.
57. Chesterman and Galligan, *op. cit.*, p. 103.
58. Senate and House of Representatives, *Debates*, vol. 110, 2 July 1925, p. 617.
59. *ibid.*, pp. 691–2 and 17 September 1925, pp. 2506–7.
60. In the House of Representatives the Bill was amended to extend the franchise to an additional narrow range of naturalised British Subjects resident in Australia, Senate and House of Representatives, *Debates*, vol. 111, 23 September 1925, p. 2603.
61. C. D. Rowley, *The Remote Aborigines*, ANU Press, Canberra, 1970, chapter 1.
62. A. T. Yarwood and M. J. Knowling, *Race Relations in Australia: A History*, Methuen, Sydney, 1982, p. 250.
63. The question of the use of delegated legislative power did become an important issue when, in later years, Regulations were used to set conditions for the employment of Aborigines. In

- April 1930 Senator Sir Hal Colebatch moved for the disallowance of the Aboriginal Ordinance (no. 9 of 1918) in an effort to have it amended. Under the Ordinance (subsection 67 (2) and (3)) regulations could be made by the Administrator, subject to the Minister's approval, and it had been argued that there was no requirement for the regulations to be tabled in the Parliament. Senator Colebatch said that the view 'that [regulation and ordinances] may never be laid on the table and still have the force of law, is to argue that Parliament is prepared to abrogate its power as the final legislative authority'. See Senate and House of Representatives, *Debates*, vol. 123, 9 April 1930, p. 957. Senator Colebatch was concerned that regulations relating to the employment of 'half-castes' in the Northern Territory had not been tabled. The Government gave assurances that no further regulations would be made under the Ordinance and a new Ordinance requiring the tabling of Regulations under it, would be enacted. Senate and House of Representatives, *Debates*, vol. 123, 9 April 1930, pp. 956–64.
64. The *North Australia Act 1926* divided the Territory into North Australia and Central Australia. Each had a Government Resident and separate administrative structure. This was reversed by two Northern Territory (Administration) Acts in 1931 which re-established the single Northern Territory. An attempt to introduce an elected Legislative Council with limited powers to make Ordinances was rejected by the Senate and the Territory continued to be run by an Administrator responsible to the Minister. It was not until 1947 that the Act was amended to establish a Legislative Council, with six elected and seven appointed members, with limited powers to make Ordinances. The elected component was gradually increased, until 1974 when a fully elected Legislative Council was established. Self-government was achieved in 1978, but the Commonwealth Parliament still had the capacity to legislate on any matter in relation to the Territory. See Alistair Heatley, *Almost Australians: The Politics of Northern Territory Self-Government*, ANU North Australia Research Unit, Darwin, 1990, pp. 98–103.
  65. Senate and House of Representatives, *Debates*, vol. 56, 17 August 1910, pp. 1582–93; 26 August 1910, pp. 2130–61, 7 September 1910, pp. 2625–6, 8 September 1910, pp. 2796–804, vol. 57, 9 September 1910, pp. 2873–6, 20 September 1910, pp. 3340–82, 21 September 1910, pp. 3460–78, 6 October 1910, pp. 4249–56, 12 October 1910, pp. 4423–47.
  66. Senate and House of Representatives, *Debates*, vol. 57, 20 September 1910, p. 3 350.
  67. Senate and House of Representatives, *Debates*, vol. 59, 16 November 1910, p 6269, see also 9 November 1910, pp. 5331–3.
  68. In 1922 the Northern Territory was granted one representative in the House of Representatives but with no voting rights. In 1936 the member for the Northern Territory was given the right to vote on motions for the disallowance of Northern Territory Ordinances. It was not until 1968 that the member for the Northern Territory was given full voting rights in the House of Representatives. In 1974 the Northern Territory obtained representation in the Senate with the right to elect two Senators.
  69. Chesterman and Galligan, *op. cit.*, p. 145.
  70. Commonwealth of Australia, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, pp. 132–

40. See also B. Cummings, *Take This Child: From Kahlin Compound to the Retta Dixon Children's Home*, Aboriginal Studies Press, Canberra, 1990, pp. 1–53 and A. Markus, *Governing Savages*, Allen and Unwin, Sydney, 1990, pp. 88–107.
71. For a discussion of the exemption system see Rowley, *Destruction of Aboriginal Society*, pp. 360–1.
72. See Senate and House of Representatives, *Debates*, vol. 65, 1 August 1912, pp. 1523–36.
73. Rowley, *The Remote Aborigines*, op. cit., pp. 200–4. The opposition to converting leasehold to freehold did not relate to Aboriginal rights but was based largely on the need for proper supervision of leases to prevent negligent land use, and to prevent high capital gains being made by subdivision of the large properties held by overseas companies.
74. Raelene Webb and Kenneth Pettit, 'The Effect of Wik on Pastoral Leases with Provision for Access by Aboriginal People', in Graham Hiley, ed., *The Wik Case: Issues and Implications*, Butterworth, Sydney, 1997, p. 32.
75. *Mabo v Queensland* [No. 2] (1992) 175 CLR 1 at 107.
76. *Wik Peoples v Queensland* (1996) 187 CLR 1.
77. Graham Hiley, ed., *The Wik Case: Issues and Implications*, Butterworth, Sydney, 1997, p. 1.
78. See P. Biskup, op. cit., pp. 84–6.
79. Senate and House of Representatives, *Debates*, vol. 116, 13 October 1927, p. 507.
80. *ibid.*, p. 509.
81. *ibid.*, p. 514.
82. *ibid.*, pp. 513–7.
83. *ibid.*, pp. 523–4.
84. *ibid.*, p. 529, 20 October 1927, p. 663, and vol. 117, 7 December 1927, p. 2754.
85. Senate and House of Representatives, *Debates*, vol. 117, 6 December 1927, p. 2708.
86. J. W. Bleakley, 'The Aborigines and Half-Castes of Central Australia and North Australia: Report 1928', *Commonwealth Parliamentary Paper no. 21, 1929. The Northern Territory Act 1926* had established a system of government by Commission and divided the Territory into Central and North Australia with separate administrations. In 1931 the process was reversed with the re-establishment of a single Territory under an Administrator responsible to a Minister.
87. For a detailed analysis of the Bleakley Report see Rowley, *The Destruction of Aboriginal Society*, ANU Press, Canberra, 1971, pp. 259–80; Rowena MacDonald, *Between Two Worlds: The Commonwealth Government and the Removal of Aboriginal Children of Part Descent in the Northern Territory*, IAD Press, Alice Springs, 1995, pp. 20–5.
88. Bleakley, op. cit., p. 6.
89. *ibid.*, p. 6.
90. *ibid.*, p. 8.

91. *ibid.*, p. 9.
92. For an account of the incident see M. C. Hartwig, *The Coniston Killings*, Honours Thesis, University of Adelaide, 1960s, John Cribbin, *The Killing Times*, Fontana, Sydney, 1984, C. D. Rowley, *op. cit.*, pp. 288–90.
93. Hartwig, *op. cit.*, pp. 35–9.
94. *ibid.*, pp. 39–40.
95. Quoted in J. Cribbin, *The Killing Times*, , *op. cit.*, pp. 152–5.
96. Hartwig, *op. cit.*, p. 56.
97. *ibid.*, pp. 47–51.
98. Rowley, *The Destruction of Aboriginal Society*, *op. cit.*, pp. 270–2.
99. Parliament of the Commonwealth of Australia, *Votes and Proceedings of the House of Representatives*, 7 February 1929, p. 9, *Journals of the Senate*, 7 February 1929, p. 8. See also Hartwig, pp. 46, 48 and 68.
100. See Senate and House of Representatives, *Debates*, vol. 141, 5 October 1933, p. 3284, 18 October 1933, p. 3549, 25 October 1933, p. 3899, 26 October 1933, p. 3981, vol. 142, 2 November 1933, p. 4170.
101. Senate and House of Representatives, *Debates*, vol. 142, 1 November 1933, p. 4121. See vol. 142, 1 November 1933, pp. 4118–26 and 14 November 1933, pp. 4441–9.
102. Senate and House of Representatives, *Debates*, vol. 142, 14 November 1933, pp. 4446–7.
103. The understanding of the Aborigines appears to have been quite different from that of the Administration and they felt betrayed when they were chained and imprisoned. See Rowley, *op. cit.*, p. 291 and T. Egan, *A Justice All Their Own: The Caledon Bay and Woolah Island Killings, 1932–1933*, Melbourne University Press, Melbourne, 1996.
104. Egan, *op. cit.*, p. 97. For a discussion, the press coverage of it, the remark, and other public comments by Judge Wills see Egan, *op. cit.*, pp. 96–100, and A. Markus, *Governing Savages*, pp. 108–12.
105. *Tuckiar v. the King* (1934) 52 CLR 333.
106. *ibid.*, p. 349.
107. *ibid.*, at p. 348 and 352.
108. See Rowley, *Destruction of Aboriginal Society*, *op. cit.*, pp. 293–7.
109. A. Powell, *Far Country: A Short History of the Northern Territory*, Melbourne University Press, Melbourne, 1982, p. 180.
110. Rowley, *Destruction of Aboriginal Society*, *op. cit.*, p. 259.
111. Senate and House of Representatives, *Debates*, vol. 128, 19 March 1931, p. 377. The motion was to disallow North Australian Ordinance no. 18 of 1931, and Central Australian Ordinance no. 15 of 1930, made under *The North Australia Act 1926*.

112. Senate and House of Representatives, *Debates*, vol. 128, 19 March 1931, p. 378.
113. See Senate and House of Representatives, *Debates*, vol. 128, 19 March 1931, pp. 375–97.
114. Senate and House of Representatives, *Debates*, vol. 127, 11 December 1930, pp. 1298 and 1311. See also Powell, op. cit., p. 170.
115. Senate and House of Representatives, *Debates*, vol. 127, 11 December 1930, pp. 1308–9. For an account of protests by unemployed workers in Darwin in 1930–31, see Powell, op. cit., pp. 170–2.
116. Senate and House of Representatives, *Debates*, vol. 127, 11 December 1930, p. 1301 and vol. 129, 1 May 1931, pp. 1524–5.
117. See Senate and House of Representatives, *Debates*, vol. 129, 1 May 1931, pp. 1519–20 and 1525–30; 13 May 1931 p. 1819.
118. Senate and House of Representatives, *Debates*, vol. 129, 1 May 1931, p. 1530.
119. Powell, op. cit., p. 179.
120. See Rowley, *The Destruction of Aboriginal Society*, op. cit., p. 317; Biskup, op. cit., pp. 86–9; A. P. Elkin, *Citizenship for the Aborigine*, Australian Book Company, Sydney, 1944.
121. For an account of the growth in restrictions, and control of Aborigines lives, under State laws, and the widening scope of those laws see Andrew Markus, 'Under the Act' in Bill Gammage and Peter Spearritt, eds, *Australians 1938*, Fairfax, Symes and Weldon Associates, Sydney, 1987, pp. 47–54.
122. For a discussion of these Aboriginal organisations and their campaigns Bain Attwood and Andrew Markus, *The Struggle for Aboriginal Rights: A Documentary History*, Allen and Unwin, Sydney, 1999, pp. 58–169; Russell McGregor, *Imagined Destinies: Aboriginal Australians and the Damned Race Theory, 1880–1939*, Melbourne University Press, Melbourne, 1997, pp. 249–60; and Russell McGregor, 'Protest and Progress: Aboriginal Activism in the 1930s', *Australian Historical Studies*, no. 101, October 1993, pp. 555–68.
123. see McGregor, *Imagined Destinies*, op. cit., pp. 249–60.
124. Attwood and Markus, op. cit., p. 144.
125. For an account of the Select Committee see Jack Horner, *Vote Ferguson for Aboriginal Freedom*, Australian and New Zealand Book Company, Sydney, 1974, pp. 46–54.
126. Horner, op. cit., p. 199. For an account of the Day of Mourning see Jack Horner and Marcia Langton, 'The Day of Mourning' in Bill Gammage and Peter Spearritt, eds, *Australians 1938*, Fairfax, Symes and Weldon Associates, Sydney, 1987, pp. 29–35.
127. Attwood and Markus, op. cit., pp. 89–91.
128. Commonwealth of Australia, *Aboriginal Welfare*, Initial Conference of Commonwealth and State Aboriginal Affairs Authorities, Government Printer, Canberra, 1937, p. 21.
129. See, for example, M. O. Neville, Commissioner of Native Affairs, Western Australia, in Commonwealth of Australia, *Aboriginal Welfare*, Initial Conference of Commonwealth and State Aboriginal Affairs Authorities, p. 11.

130. Senate and House of Representatives, *Debates*, vol. 150, 7 June 1938, p. 1898.
131. *ibid.*, pp. 1897–1905. Speakers supporting the amendment were: Mr H. P. Lazzarini (ALP, Werriwa), Mr E. J. Harrison (UAP, Wentworth), Mr J. S. Rosevear (ALP, Dalley), Mr A. M. Bain (Independent, Northern Territory), Mr M. M. Blackburn (ALP, Bourke), Mr G. W. Martens (ALP, Herbert), Mr J. Francis (UAP, Morton), Mr J. B. Anthony (Country Party, Richmond), Mr A. S. Drakeford (ALP, Maribyrnong), Mr T. Paterson (Country Party, Gippsland), Mr E. J. Holloway (ALP, Melbourne Ports). Some debate related to how the desired outcome should be achieved. The amendment was ruled out of order because it imposed an additional cost on the budget but the Government agreed to remove the exclusion and deal with the matter of entitlement through the schedule of entitlements.
132. See G. Sawyer, *Australian Federal Politics and Law, 1929–1949*, Melbourne University Press, Melbourne, 1963, pp. 102 and 106.
133. For a discussion of the Statement see Rowley, *The Destruction of Aboriginal Society*, *op. cit.*, p. 328. See also Commonwealth of Australia, *Bringing Them Home*, pp. 140–1.
134. J. McEwen, 'The Northern Territory of Australia: Commonwealth Government's Policy with Respect to Aboriginals', Statement issued by the Minister for the Interior, February 1939, p. 5.
135. Donald Thomson, 'Interim General Report of Preliminary Expedition to Arnhem Land, Northern Territory of Australia 1935–36', April 1936; Parliament of the Commonwealth of Australia, *Recommendations of Policy in Native Affairs in the Northern Territory* by Donald Thomson, Government Printer, Canberra, 1938; and Commonwealth of Australia, *The Northern Territory of Australia, Report on Expedition to Arnhem Land, 1936–37* by Dr Donald Thomson, Government Printer, Canberra, 1939. See also W. E. H. Stanner and D. Barwick, 'Not by Eastern Windows Only: Anthropological Advice to Australian Governments in 1938', *Aboriginal History*, vol. 3, part I, 1979, pp. 37–61.
136. Parliament of the Commonwealth of Australia, *Recommendations of Policy in Native Affairs in the Northern Territory* by Donald Thomson, p. 5.
137. See A. P. Elkin, *Citizenship for the Aborigines: A National Aboriginal Policy*, Australian Book Company, Sydney, Markus, *Governing Savages*, *op. cit.*, p. 156 and McGregor, *Imagined Destinies*, *op. cit.*, p. 240–1.
138. McEwen, *op. cit.*, p. 5.
139. P. Hasluck, *Shades of Darkness: Aboriginal Affairs, 1925–1965*, Melbourne University Press, Carlton, 1988, p. 75.
140. R. M. and C. H. Berndt, *End of an Era: Aboriginal Labour in the Northern Territory*, Australian Institute of Aboriginal Studies, Canberra, 1987, pp. xi and pp. 155–77. See also Hall, p. 53, and Powell, pp. 214–7.
141. See R. Hall, 'Aborigines and Torres Strait Islanders in the Second World War', in D. Ball, ed., *Aborigines in the Defence of Australia*, ANU Press, Sydney, 1991, p. 36.
142. Quoted in Hall, *op. cit.*, p. 34.

143. See Hall, *op. cit.*, pp. 37–40 and Powell, *op. cit.*, pp. 216–7.
144. See Hall, *op. cit.*, pp. 35–59.
145. Senate and House of Representatives, *Debates*, vol. 177, 11 February 1944, p. 152, and vol. 178, 15 and 16 March 1944, p. 1393.
146. Section 4 of the *Invalid and Old-Age Pension Act 1942*.
147. Senate and House of Representatives, *Debates*, vol. 192, 30 May 1947, p. 3221.
148. Section 4 of the *Commonwealth Franchise Act 1902* became subsection 39(4) of the *Commonwealth Electoral Act (1918–1925)*.
149. Senate and House of Representatives, *Debates*, vol. 166, 3 April 1941, p. 703. For an account of the operation of s. 41 and moves within the Commonwealth Public Service on the Aboriginal franchise see Stretton and Finnimore, pp. 531–5. cf R. D. Lumb and G. A. Moens, *The Constitution of the Commonwealth of Australia Annotated, 5th ed.*, Butterworths, Sydney, 1995, pp. 92–4. In *R. V. Pearson, ex parte Sipka*, 1983, 152 CLR 254, the High Court opted for the narrow Quick and Garran interpretation of s. 41. See also Michael Coper, *Encounters with the Australian Constitution*, CCH Australia, North Ryde NSW, 1987, pp. 335–8.
150. Senate and House of Representatives, *Debates*, vol 187, 28 June 1946, pp. 2061–2.
151. Senate and House of Representatives, *Debates*, vol 187, 28 June 1946, p. 2064.
152. See commentary by Stretton and Finnimore, *op. cit.*, p. 534.
153. Unlike Scullin, the Curtin and Chifley Governments had a majority in the Senate from July 1944.
154. Senate and House of Representatives, *Debates*, vol 184, 24 July 1945, p. 4381. The question was on notice from Senator Collett (Liberal, Western Australia).
155. Senate and House of Representatives, *Debates*, vol. 208, 8 June 1950, pp. 3976–7.
156. *ibid.*, pp. 3976–81.
157. *ibid.*, pp. 3984–6.
158. P. M. C. Hasluck, *op. cit.*, p. 78.
159. Senate and House of Representatives, *Debates*, vol. 214, 18 October, 1951, pp. 875–6.
160. *ibid.*, p. 875.
161. Senate and House of Representatives, *Debates*, vol. 216, 21 February, 1952, p. 216.
162. See Senate and House of Representatives, *Debates*, vol. 216, 5 March 1952, pp. 882–4.
163. Senate and House of Representatives, *Debates*, vol. 218, 6 August 1952, pp. 46–7.
164. Quoted in G. F. Gale and A. Brookman, *Race Relations in Australia: The Aborigines*, McGraw-Hill, Sydney, 1975, p. 72.
165. Hasluck, *op. cit.*, *Shades of Darkness*, pp. 76–78.

166. See for example C. D. Rowley, 'Aborigines and other Australians' *Oceania*, vol. 32, no. 4, June 1962, T. G. H. Strehlow, *Assimilation Problems: An Aboriginal View Point*, Aboriginal Advancement League, Adelaide, 1964.
167. For a discussion of the achievement of full citizenship rights in the two tiers of government see Chesterman and Galligan, *op. cit.*, chapter 6.
168. See Faith Bandler, *Turning the Tide: A Personal History of the Federal Council for the Advancement of Aborigines and Torres Strait Islanders*, Aboriginal Studies Press, Canberra, 1989; Richard Broome, *Aboriginal Australians: Black Response to White Dominance 1788–1994*, 2nd ed., Allen and Unwin, St Leonards, NSW, 1994, p. 174; W. De Maria, "'White Welfare: Black Entitlements': the Social Security Access Controversy, 1939–59", *Aboriginal History*, vol. 10, part I, 1986, pp. 29–34.
169. House of Representatives, Report of the Select Committee on Voting Rights of Aborigines: part I—Report and Minutes of Proceedings, Government Printer, Canberra, 1961, p. 8.
170. *Social Services Act 1959* s. 24. For a discussion of the application of the Act see Chesterman and Galligan, *op. cit.*, p. 165 and J. C. Altman and W. Saunders, 'From exclusion to Dependence: Aborigines and the welfare State in Australia' in J. Dixon and R. P. Scheurell eds, *Social Welfare with Indigenous People*, Routledge, London, 1995, pp. 209.
171. House of Representatives, *Debates*, vol. 24, 3 September 1959, p. 930.
172. House of Representatives, *Debates*, vol. 52, 15 September 1966, p. 935. Although the wording of the legislation no longer contained any specific reference to Aborigines other provisions did affect the eligibility of Aborigines to benefits. Under provisions which allowed benefits to be paid to third parties child endowment and other entitlements of Aborigines living on missions and reserves were paid to the controlling authorities and Aborigines in remote areas did not qualify for unemployment benefits because of their circumstances.
173. See Chesterman and Galligan, *op. cit.*, pp. 174–5.
174. Senate and House of Representatives, *Debates*, vol. 218, 6 August 1952, p. 45.
175. *ibid.*, pp. 46–7.
176. *ibid.*, p. 168.
177. The Northern Territory had been criticised in the press for allowing Aboriginal artists to be exploited by 'unauthorised' art dealers who it was claimed had made huge profits by offering artists immediate cash for paintings which could be sold later for a mark-up of as much as 400 per cent. See J. D. Batty, *Namatjira, Wanderer Between Two Worlds*, Rigby, Adelaide, 1976, pp. 91–3 and T. Rowse, 'Painting From Memory: Art, Economics and Citizenship 1940–60' in J. Hardy, J. V. S. Megaw and M. R. Megaw, eds, *The Heritage of Namatjira: The Watercolourists of Central Australia*, William Heineman, Melbourne, 1992, pp. 177–200.
178. See reference in *Namatjira v Raabe* 100 CLR 664 at p. 669 to the claim by the Crown 'that the real purpose of [the Ordinance] is beneficial and not adverse'.
179. Quoted in Hughes, *op. cit.*, p. 303.



180. The Northern Territory Legislative Council at this time was composed of six elected and seven appointed members. The administration could have ignored the objection of the elected members but it chose to negotiate to achieve an outcome which was more acceptable to Territorians. For an account of the process in the Northern Territory Legislative Council see F. S. Stevens, 'Parliamentary Attitudes' in F. S. Stevens ed., *Racism: The Australian Experience, A Study of Race Prejudice in Australia, vol. 2, Black Versus White*, Australia and New Zealand Book Company, Sydney, 1972, pp. 117–21.
181. See F. S. Stevens, *Aborigines in the Northern Territory Cattle Industry*, pp. 13–17.
182. Chesterman and Galligan, op. cit., p. 175.
183. For an account of the Operation of the Wards' Employment Ordinance, see F. S. Stevens, *The Politics of Prejudice*, Alternative Publishing Co-operative Ltd., 1980, pp. 64–83; F. S. Stevens, *Aborigines in the Northern Territory Cattle Industry*, ANU Press, Canberra, 1974; and Rowley, *Remote Aborigines*, op. cit., pp. 285–310.
184. For an account of the case see Colin A. Hughes, 'The marriage of Mick and Gladys: A Discretion Without an Appeal', in B. B. Schaffer and D. C. Corbett, eds, *Decisions, Case Studies in Australian Administration*, Cheshire, Melbourne, 1966, pp. 302–323. cf Powell, op. cit., p. 233.
185. House of Representatives, *Debates*, vol. 24, 13 August 1959, p. 183; 18 August 1959, pp. 267–8, and 27 August 1959, pp. 633 and 714.
186. House of Representatives, *Debates*, vol. 24, 13 August 1959, p. 183.
187. Hughes, op. cit., p. 308.
188. For an account of the events surrounding Namatjira's circumstances and conviction see, J. Hardy, 'Visitors to Hermannsburg: An Essay in Cross-Cultural Learning', in J. Hardy, J. V. S. Megaw and R. Megaw, eds, *The Heritage of Namatjira: Watercolourists of Central Australia*, William Heinemann Australia, Melbourne, 1992, pp. 137–75; T. Rowse, 'Painting From Memory: Art, Economics and Citizenship 1940–60' in J. Hardy, J. V. S. Megaw and R. Megaw, eds, pp. 177–99; J. D. Batty, *Namatjira, Wanderer Between Two Worlds*, Rigby, Adelaide, 1977.
189. Batty, op. cit., p. 101.
190. *Namatjira v Raabe*, 100 CLR, p. 664. An interesting feature of the judgement is the extent to which effectively showed that the Ordinance was not and was not meant to be 'race neutral'.
191. For an account of the extent of Namatjira's fame see Batty, op. cit., pp. 33–158.
192. Newspaper surveys of the time indicate that there was a 93 per cent recognition of Namatjira and 30 per cent of those surveyed believed he should not have been gaoled. See S. Bennett, *Aborigines and Political Power*, Allen and Unwin, Sydney, 1989, p. 7.
193. House of Representatives, *Debates*, vol. 22, 17 March 1959, p. 644–5.
194. For a discussion of the Social Welfare Ordinance 1964 and of the debate in the Northern Territory Legislative Council on the Ordinance see Rowley, *The Remote Aborigines*, op. cit., pp. 198 and 308.

195. Commonwealth of Australia, Report from the Select Committee on Grievances of Yirrkala Aborigines, *Arnhem Land Reserve, part I—Report and Minutes of Proceedings*, Government Printer, Canberra, 1963, p. 5.
196. *ibid.*, pp. 10–12.
197. House of Representatives, *Debates*, vol. 49, 18 November 1965, p. 2877.
198. *ibid.*, p. 2877–8.
199. *ibid.*, p. 2885.
200. R. M. and C. H. Berndt, *End of an Era*, *op. cit.*, pp. xi and 155–77.
201. R. M. Rowley, *The Destruction of Aboriginal Society*, *op. cit.*, p. 336.
202. C. D. Rowley, *The Remote Aborigines*, *op. cit.*, p. 287.
203. For a detailed account of the rates of pay and conditions in the Northern Territory cattle industry see: F. S. Stevens, *Aborigines in the Northern Territory Cattle Industry*, ANU Press, Canberra, 1974; F. S. Stevens, *The Politics of Prejudice*, Alternative Publishing Co-operative, Sydney, 1980, pp. 49–83; R. N. and C. H. Berndt, *End of an Era*, *op. cit.*; W. E. H. Stanner, 'Industrial Justice in the Never-Never', *Australian Quarterly*, vol. 39, no. 1, March 1967, pp. 38–56; Rowley, *The Remote Aborigines*, *op. cit.*, pp. 283–310; J. H. Kelly, *Struggle for the North*, Australian Book Society, Sydney, 1966, pp. 120–41.
204. For details of the different rates and allowances for different categories of workers see Rowley, *The Remote Aborigines*, *op. cit.*, p. 300.
205. See Rowley, *The Remote Aborigines*, *op. cit.*, pp. 324–5, Stanner, 'Industrial Justice in the Never-Never' p. 45 and B. Attwood and A. Markus, *The 1967 Referendum, Or When Aborigines Didn't Get the Vote*, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 1997, p. 31.
206. For an account of the strike and associated events see Frank Hardy, *The Unlikely Australians*, Nelson, Melbourne, 1968.
207. Letter from Vincent Lingiari, a leader of the Gurindji, in the *Australian*, 18 October 1966, quoted in Rowley, *The Remote Aborigines*, *op. cit.*, p. 341. See also T. Egan, 'Treated Like a Dog' in A. Wright, ed., *Take Power Like This Old Man Here: An Anthology Celebrating Twenty Years of Land Rights in Central Australia 1977–1997*, IAD Press, Alice Springs, 1998, pp. 11–3.
208. See Coombs, *op. cit.*, pp. 159–83 and I. Palmer, *Buying Back the Land: Organisational Struggle and the Aboriginal Land Fund Commission*, Aboriginal Studies Press, Canberra, 1988, p. 9–26 for accounts of the Government's handling of the land rights issue.
209. House of Representatives, *Debates*, vol. 69, 3 September 1970, p. 968. See pp. 967–71 for a considered statement of the Government's position.
210. K. Maddox, *Your Land Is Our Land*, Penguin, Melbourne, 1983, pp. 60–72.
211. The Central Aboriginal Reserves were adjacent areas which had been reserved for Aborigines in three different jurisdictions, Northern Territory, South Australia, and Western Australia. The total area of the Reserves was 259 000 square kilometres.

212. Senate and House of Representatives, *Debates*, vol. 189, 22 November 1946, pp. 527–9.
213. For an account of the public debate see P. Morton, *Fire Across the Desert: Woomera and the Anglo-Australian Joint Project. 1946–1980*, Australian Government Publishing Service, Canberra, 1989, pp. 69–77.
214. For an account of the operation of Ernabella Mission see W. Hilliard, *The People in Between: The Pitjantjatjara People of Ernabella*, Hodder and Stoughton, London, 1968, chapters 6–16; C. Duguid, *Doctor and the Aborigines*, Rigby, Adelaide, 1972, chapters 10–18; C. Duguid, *Ernabella: The Medical Patrol*, Brown, Prior and Anderson, Melbourne, 1939; Board of Missions of the Presbyterian Church of Australia, *Ernabella*, Brown, Prior and Anderson, Melbourne, 1937; C. Duguid, *Ernabella, Origin and the First Ten Years: A Short Historical Sketch*, Processed, circa. 1953.
215. *ibid.*, p. 1826.
216. *ibid.*, p. 1835–6.
217. See above.
218. The Committee was made up as follows: L. F. Loder, Director-General of Works and Housing, Lieutenant-General J. F. Evetts, representing the British Long Range Weapons Organisation in Australia, F. H. Moy, Director of Native Affairs for the Northern Territory, representing the Department of the Interior, W. R. Panhall, Secretary, Aborigines Protection Board, South Australia, representing the South Australian Government, A. O. Neville, Representing the Western Australian Government, and Professor A. P. Elkin, Professor of Anthropology, representing the Australian National Research Council. Senate and House of Representatives, *Debates*, vol. 191, 1 May 1947, pp. 1830–1.
219. Senate and House of Representatives, *Debates*, vol. 191, 1 May 1947, p. 1832.
220. *ibid.*, p. 1832.
221. *ibid.*, p. 1832.
222. *ibid.*, p. 1832.
223. See Royal Commission into British Nuclear Tests in Australia, Report, vol. 1, Australian Government Publishing Service, Canberra 1985; R. Milliken, *No Conceivable Injury: The Story of Britain and Australia's Atomic Coverup*, Penguin, Ringwood, Victoria, chapter 3; and J. L. Symonds (for the Department of Resources and Energy), *A History of British Atomic Tests in Australia*, Australian Government Publishing Service, Canberra, 1985, pp. 5–9 and 62–3.
224. Royal Commission into British Nuclear Test in Australia, Report.
- There were a total of 12 nuclear tests as follows:
- |                     |                     |                 |
|---------------------|---------------------|-----------------|
| Operation Hurricane | Monte Bello Islands | 3 October 1952  |
| Operation Totem     | Emu                 | 15 October 1953 |
|                     | Emu                 | 27 October 1953 |
| Operation Mosaic    | Monte Bello Islands | 16 May 1956     |
|                     | Monte Bello Islands | 19 June 1956    |

Operation Buffalo	Maralinga	27 September 1956
	Maralinga	4 October 1956
	Maralinga	11 October 1956
	Maralinga	22 October 1956
Operation Antler	Maralinga	14 September 1957
	Maralinga	25 September 1957
	Maralinga	9 October 1957

- British Tests of Hydrogen Bombs were also conducted in 1957 and 1958 on Malden Island and Christmas Island in the Pacific Ocean.
  - Further tests involving radioactive material, the so called 'Minor Trials', were also conducted at Maralinga and Emu until 1963. See Milliken, *op. cit.*, pp. ix–xi.
225. House of Representatives, *Debates*, vol. 1, 8 October 1953, p. 1132, and 14 October 1953, p. 1342.
226. *ibid.*, pp. 1412–28.
227. House of Representatives, *Debates*, vol. 1, 16 October 1953, p. 1510.
228. *ibid.*, p. 1610. See also House of Representatives, *Debates*, vol. 1, 20 October 1953, p. 1548.
229. House of Representatives, *Debates*, vol. 1, 21 October 1953, p. 1610. vol. 6, 20 April 1955, pp. 15–6, vol. 8, 4 October 1955, pp. 1201–2, vol. 9, 22 February 1955, pp. 103–4, vol. 9, 6 March 1956, p. 495, 7 March 1956, pp. 585–6, vol. 10, 18 April 1956, pp. 1407–8, vol. 11, 6 June 1956, p. 2827, vol. 12, 5 September 1956, p. 204, 25 September 1956, p. 785, 27 September 1956, p. 903 and pp. 958–9, vol. 13, 17 October 1956, pp. 1529–30, 18 October 1956, p. 1672, and vol. 16, 2 October 1957, p. 949.
230. House of Representatives, *Debates*, vol. 12, 11 September 1956, p. 406.
231. House of Representatives, *Debates*, vol. 13, 9 October 1956, p. 1288 and 31 October 1956, p. 2108.
232. Royal Commission into British Nuclear Tests in Australia, Report, vol. 1, pp. 118–22, 151–94, 259–62, 299–324, 368–81, and Report, vol. 2, pp. 564–8, 574–82; M. Brady, 'Leaving the Spinifex: the Impact of Rations, Missions and the Atomic Tests on the Southern Pitjantjatjara' Records of the South Australian Museum, vol. 20, May 1987, pp. 35–45; Peter Morton, *Fire Across the Desert: Woomera and the Anglo-Australian Joint Project 1946–1980*, Australian Government Publishing Service, Canberra, 1989, chapters 2 and 4.
233. For a discussion of the evidence and the basis of the conclusion see Royal Commission into British Nuclear Tests in Australia, *op. cit.*, vol. 1, pp. 174–94.
234. Milliken, *op. cit.*, pp. 217–20. See also Symonds, *op. cit.*, p. 367.
235. Royal Commission into the British Nuclear Tests in Australia, *op. cit.*, p. 299.
236. Milliken, *op. cit.*, p. 220. See also Royal Commission into British Nuclear Tests in Australia, *op. cit.*, p. 280–4.
237. See Milliken, *op. cit.*, chapter 4.

238. See Royal Commission into British Nuclear Tests in Australia, op. cit., pp. 155–64, 302–3, 312–4, 318–9.
239. *ibid.*, p. 158.
240. *ibid.*, p. 320.
241. *ibid.*, p. 321.
242. *ibid.*, p. 321.
243. Memo from the Range Commander, quoted in Royal Commission into British Nuclear Tests in Australia, op. cit., p. 321.
244. *ibid.*, p. 323.
245. Morton, op. cit., chapter 6.
246. *Report of the Native Patrol Officer*, 17 December 1956, quoted in Morton, op. cit., p. 84.
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259. *ibid.*, pp. 2639–40.
260. House of Representatives, *Debates*, vol. 49, 23 November 1965, p. 3070.
261. *ibid.*, p. 3077.
262. *ibid.*, p. 3071. See pp. 3067–79.
263. House of Representatives, *Debates*, vol. 50, 10 March 1966, p. 123.
264. House of Representatives, *Debates*, vol. 50, 10 March 1966, p. 124.

265. *ibid.*, pp. 125–36. Those speaking in support of the Bill were K. E. Beazley (ALP, Fremantle), G. D. Erwin (Liberal, Ballarat), G. M. Bryant (ALP, Wills), I. L. Robinson (Country Party, Cowper), M. D. Cross (ALP, Brisbane).
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