The Status of Indigenous People in Australia

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The most fundamental aspect of the status of indigenous people in Australia is the historic denial of equality before the law to them by coloniser governments and their successors. In contemporary times the legislative dictates of equality before the law have demanded a revision of the relationship, but it is a revision which the settler society, and State and Commonwealth Parliaments have only accepted marginally and with reluctance.

The status of indigenous people is examined under the following heads:

1. definition
2. history of relationship with a dominant society
3. social and economic conditions
4. constitutional arrangements
5. legal nature of relationship with dominant society
6. self-management not self-determination
7. impact of international conventions and standards
8. source and test of indigenous rights
9. Special legislative provision and Tribunals
10. Stolen generations.

1. Definition

Contemporary definitions of Aboriginal and Torres Strait Islanders were developed following the 1967 amendment to the Commonwealth Constitution whereby the Commonwealth Parliament obtained power to legislate with respect to people of the Aboriginal race in any State. The Council for Aboriginal Affairs developed the definition of Aboriginal person requiring that a person be of Aboriginal descent, identified him or herself as Aboriginal and was accepted as Aboriginal by other Aboriginal people. The definition was endorsed by members of the High Court in *Commonwealth v. Tasmania (Tasmanian Dam Case)* (1983) 158 CLR1. The definition is found in legislation such as the land rights legislation of New South Wales (*Aboriginal Land Rights Act 1983* section 4 subsection 1), in the legislation governing aboriginal reserves in Western Australia (*Aboriginal Affairs Planning Authority Act 1972* section 4) and in the *Fisheries Act 1905* Western Australia (section 56 (3))

Other legislation simply refers to descent from the indigenous inhabitants such as the *Aboriginal Relics Act 1975* of Tasmania (section 2) or the *Aboriginal Land Act 1970* of Victoria (section 2). Still other legislation refers merely to membership of the Aboriginal race, such as the *Aboriginal and Torres Strait Islander Commission Act 1989* section 4 the *Aboriginal Sacred Sites Act 1980* of the Northern Territory section 3 or the

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The common element in the definitions and in the judicial approach is the requirement of descent from Aboriginal people. No emphasis has been placed on requiring descent only from Aboriginal people — that is, so-called full-blood Aboriginal people. (Attorney General for the Commonwealth v. Queensland (1990) 25 FCR 125. Marriage has not been held to either confer or deny classification as an Aboriginal person.

The significance of the definitions in the legislation is of course to limit the availability of benefits conferred by the legislation. There has been relatively little litigation concerning the definitions presumably because of their unrestrictive nature.

2. HISTORY OF THE RELATIONSHIP WITH THE DOMINANT SOCIETY

The early pattern of the relationship between the colonising government and the Aboriginal population was established in New South Wales. The initial phase consisted in conflict and dispersal and forcibly moving the Aboriginal people away from their traditional lands to make way for the European settlers. Neither the Imperial authorities nor the local government ever contemplated a treaty with the Aboriginal people. An unauthorised surrender agreement was entered into, but the agreement was disallowed by the Crown, on the ground it would injure the 'helpless and unfortunate race by recognising in them a right to alienate to private adventurers the land of the colony'.

As conflict slowed it became possible to establish with tentative Imperial encouragement, small reserves to enable the Aboriginal people to live not as hunters, but as cultivators of the soil. Such was part of the next phase of the Imperial policy, that of civilisation, protection and control. This policy contemplated an immediate concern to 'civilise' and 'christianise' the Aboriginal population with an acknowledgement of the need for their temporary protection. Small reserves for agriculture and residence were developed consistent with this goal. Aboriginal reservations were not, of course, considered permanent or inviolate. In time the policy of 'civilisation' was overtaken by the measures for protection and control which were introduced to achieve it. Such measures became more significant than the original policy. The emphasis upon protection and control did not permit consideration of the rights of Aboriginals to the land reserved for their use. Title always remained in the Crown.

The policy of civilisation, including protection and control, was maintained through until the 1960s in Australia. The control extended to the segregation of Aboriginal people. The Aborigines Act 1905 of Western Australia is illustrative. The powers conferred under the Act, and extended through the first half of the 20th century, embraced every aspect of Aboriginal life, including control of movement and confinement on reserves, removal of children, control of marriage and employment, and suppression of tribal customs. Chief Justice Dwyer observed in 1947 that the object of the legislation was 'the better protection of the natives. Perusal of its provisions makes it evident that the main method by which the purpose is to be achieved is by segregation of the natives from the non-native population': Hodge v. Needle (1947) 49 WAR 1, 3. The original object of civilisation in the interests of the Aboriginal people overtime came to serve the suppression of their rights and interests in the interests of the European settlers. The policies pursued were manifestly racist and denied equality before the law to Aboriginal
people. Not until the 1960s were the policies of control and segregation abandoned in Australia.

In 1961, Commonwealth and State ministers agreed upon a policy of assimilation: To ensure that all aborigines and part aborigines will attain the same manner of living as other Australians and 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.¹

Assimilation was considered to entail uniformity and a denial of any special privileges and disabilities. During this period the limited special privileges of the Aboriginal people in some states with respect to hunting fishing were terminated.

Legislation was introduced throughout Australia to lift restrictions and controls upon Aboriginal people. The Native Welfare act 1963 was enacted to such end in Western Australia. But the Act maintained Crown control over reserves and recognised no Aboriginal interest therein. State legislatures were prepared to rescind controls which manifested the most extreme aspects of a denial of equality before the law, but were not prepared to recognise that equality before the law required recognition of an interest in traditional lands of aboriginal people.

The final phase and that which is said to be in effect at present was that of self-management. From the late 1960s the States and Territories generally sought to make provision for the recognition of some rights in the residual traditional lands of Aboriginal people not already granted to non-aboriginal people. The provision was contemporaneous with the conferment of Commonwealth jurisdiction with respect to Aboriginal people. Queensland and Western Australia fiercely opposed any such development. The 1976 annual report of the Queensland Department of Aboriginal Affairs vilified the concept of Aboriginal land rights and termed it 'Australia's unique form of apartheid — privileges and benefits extended to selected aborigines and denied to other Australians, on the basis of race rather than need. This is discrimination in its purest form and a situation not in the interest of national unity and heritage'.²

The State governments turned the meaning of equality on its head in denying any recognition of the facts and history of prior occupation of the lands of Australia by indigenous people. Not until 1991 did Queensland provide Aboriginal people with rights to their traditional lands, both as to ownership and self-management. Western Australia has never provided such rights to Aboriginal people.

3. Population and social and economic conditions

Population

There are approximately 427,000 people of Aboriginal and Torres Strait Islander descent in Australia, comprising 2.5% of the population. The indigenous population growth is double (2.3% per annum) that of the general community. Approximately 32 percent live in rural and remote areas (as compared to 14 percent of the total population) while

² Annual report 1976: Brisbane.
about 27% live in major urban areas. 3.1 percent of the indigenous population live in very remote areas compared to 0.3% of the total population.

Social and economic conditions

The indigenous people of Australia are by far the most disadvantaged group in the country, reflecting the long history of discrimination. Their disadvantage is particularly evident in health, education, housing and other economic circumstances and manifests itself in their overrepresentation in the criminal justice system.

Health

Indigenous infant mortality (especially due to respiratory illness) is three to four times the nonindigenous rate. Indigenous maternal mortality rates are 10 times higher than the nonindigenous rate. The adult indigenous mortality rate (25 — 54) was 6 — 8 times higher than the nonindigenous rate. Three out of every four adult deaths are due to heart disease, stroke, injury, respiratory diseases, cancer and diabetes. Life expectancy for indigenous females is about 62 years (Australian average 81), and for males 57 years (Australian average 75).

Education

Indigenous people are more likely than all Australians to have never attended school. In 1994 3% of indigenous people aged 51 — 64 had never attended school compared to 0.1% of all Australians. The proportion of indigenous people who had not attended school increased with age.

Indigenous Australians were less likely to be attending an educational institution full time than other Australians. In 1996 73.7% of indigenous 15-year-olds were in full-time education compared to 91.5% of all 15-year-olds. At older ages the disparity between indigenous and total persons increased, so that the at age 19, when tertiary education could be expected to occur, only 12 percent of indigenous persons were in full-time education, one-third the rate for total persons. The proportion of Aboriginal and Torres Strait Islander people with a postsecondary qualification was 13.6% compared to 34.4% of the total population of Australia.

Housing

Home ownership by indigenous Australians is significantly less than that of nonindigenous Australians. Only four out of ten indigenous households in Australia either owned outright or were paying off their homes compared to seven out of ten nonindigenous households in Australia. The majority (58%) of indigenous households were renting their homes, while for nonindigenous households the proportion of renters was just 27%.

Economic

In February 2000 the unemployment rate was 17.6% for indigenous people compared with 7.3% for nonindigenous people. The labour force participation rate was 52.9% for indigenous people and 63.7% for nonindigenous people.
The median personal income of indigenous Australians was $190 per week in 1996, 65.1% of the median income of all Australians (292 $). Government payments were the main source of income for 55 percent of indigenous people.

Criminal Justice

Indigenous people are overwhelmingly more likely to be imprisoned than members of the general community. On March 1 2000 there were 4,080 indigenous prisoners in Australia, 20 percent of the Australian prisoner population. The indigenous rate of imprisonment was 15 times the nonindigenous rate. The highest ratio of indigenous to nonindigenous rates of imprisonment was recorded in Western Australia and New South Wales with indigenous imprisonment rates 20 and 14 times the nonindigenous rates respectively.

4. CONSTITUTIONAL ARRANGEMENTS

4.1 Division of powers
4.1.1 The States

Since responsible government, the colonies, now the States, have been invested with the power to make laws with respect to Aboriginal people and Torres Strait Islanders.

The powers have included 'the entire management and control of the waste lands belonging to the Crown ... Including all royalties, mines and minerals'. The power has always been exercised as though it empowered the States to deny, diminish or extinguish Aboriginal rights to traditional lands. And the High Court affirmed that understanding Mabo No 1 (1988) 166 CLR 186, Mabo No 2 (1992) 175 CLR 1, and in Western Australia v the Commonwealth (1995) 183 CLR 373. All of the justices in Mabo No 1 concluded that the Parliament of Queensland was empowered to extinguish native ride without compensation.

The States further relied on their legislative jurisdiction as to indigenous people to enact the legislation of special application to them which historically controlled and subjugated them and most obviously denied equality before the law.

4.1.2. The Commonwealth

Federal jurisdiction with respect to indigenous people has two critical aspects: the external affairs power (section 51 (29)) and the race power (section 51 (26)) of the Constitution. It is upon the external affairs power that the limited constitutional protection of Aboriginal people and Torres Strait Islanders is founded, because it is pursuant to that power that the Racial Discrimination Act 1975 (Commonwealth) was enacted and upheld.

The other critical aspect of federal jurisdiction with respect to Aboriginal people and Torres Strait Islanders is the race power. On Federation in 1901, section 51 (26) of the Constitution gave to the Commonwealth Parliament power to make laws for the 'peace order and good government of the Commonwealth with respect to ... the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws'. The Constitution thereby conceded jurisdiction with respect to Aboriginal people outside the Commonwealth Territories to the States. In 1967, the phrase excluding the Aboriginal people in the States from federal power conferred by

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section 51 (26) was deleted from Constitution. The power of the Federal Parliament to make special laws respecting the Aboriginal people was thereby made concurrent with that of the States, and by virtue of section 109 of the Constitution, paramount.

After 1967 the race power enabled Commonwealth to pass laws for protection of Aboriginal people. Such laws were passed with particular respect to Queensland: the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975 and the Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self-management) Act 1978. After Mabo No 1 and Mabo No 2 legislation was enacted by the Commonwealth to protect native title under the race power: the Native Title Act 1993.

4.2 No Bill of Rights nor entrenched indigenous rights

There is no constitutionally entrenched Bill of Rights or equivalent in Australia. The protection that is afforded to Aboriginal peoples and Torres Strait Islanders is by operation of federal paramountcy and the Racial Discrimination Act 1975 (Commonwealth). The Act was enacted to give effect to the International Convention on the Elimination of all forms of Racial discrimination. The Convention imposes obligations on parties to prohibit racial discrimination and to guarantee the right of everyone without distinction as to race, colour, or national or ethnic origin, to equality before the law including with respect to the right to own property. The High Court upheld the enactment of the Racial Discrimination Act as a valid exercise of the legislative power of the Commonwealth with respect to external affairs in Koomurri v. Bjelke-Petersen (1982) 153 CLR 168 and Gerhardy v. Brown (1985) 159 CLR 70.

Constitutional protection was provided for a brief period upon the conferral of responsible government upon the colony of Western Australia. In 1887 the Imperial Governor had recommended that some special arrangement should be made once responsible government is granted, to ensure the protection and good treatment of the northern native population. He recommended that the jurisdiction over Aboriginal people and their reserves should remain under Imperial control and not be transferred to the local legislature. The governor's advice was followed in the Aborigines Act 1889 (WA). The statute declared that the administration of Aboriginal affairs should be the responsibility of the Governor without the advice of the executive Council. This jurisdiction could only be amended or repealed upon the assent of Imperial government. But on the third attempt in 1905 the State of Western Australia managed to persuade the Imperial government to assent to the repeal of this denial of local state jurisdiction. A challenge to the repeal was lost in Yungarla v. Western Australia [2001] HCA 47 (Aug 9 2001). The State, along with the other member states of the Federation, assumed exclusive jurisdiction with respect to Aboriginal people and their traditional lands. Jurisdiction became concurrent in 1967 with the Commonwealth government. There were no other constitutional provisions protecting the rights of indigenous peoples in the Constitution of Stares and there are none now.

There are no regional conventions in the Pacific or Asia to which Australia is a party, that provides for the rights of indigenous peoples.

4.3 The limited legislative protection of indigenous rights

The principal legislative restraint on taking away indigenous rights is provided by the Racial Discrimination Act 1975 of the Commonwealth. The standard of protection set
by the Act is equality before the law. Equality before the law requires genuine, not merely formal, equality.

In Mabo No 1 the High Court held that the effect of the Queensland Coast Islands Declaratory Act 1985, which had the effect of extinguishing native title if it existed, was to distinguish between interests according to whether they were ultimately founded in pre-annexation traditional law and custom or post-annexation European law. Any regard to the effect of the impugned Queensland legislation, although on its face non-discriminatory, would entail the conclusion that it discriminated against, indeed singled out, the rights of Torres Strait Islanders: (1988) 166 CLR 186 at 231-2. The High Court struck down the legislation as contrary to the Racial Discrimination Act of the Commonwealth which took paramountcy over the State legislation. A similar result followed with respect to Western Australian legislation which sought to subordinate native title to the rights of non-aboriginal people: Western Australia v. Commonwealth (1995) 183 CLR 373.

The States are subject to the paramountcy of Commonwealth legislation, but of course the Commonwealth can amend the legislation. The Commonwealth impliedly amended the Racial Discrimination Act by the passage of the Native Title Act in 1993 and the Native Title Amendment Act 1998 and thereby limited the guarantee of equality before the law with native title.

The Commonwealth is subject to section 51 (31) of the Commonwealth Constitution requiring the provision of just terms upon the acquisition of property. Substantial authority favours the view that the extinguishment of native title by the Commonwealth would amount to an acquisition of property within section 51 (31). The States are not subject to such requirement, although the territories, in particular the Northern Territory, are.

4.4 No guarantees of political rights

There are no legislative guarantees of the political participation of indigenous people in the Federal or State governments. Indeed not until 1962 were restrictions on the right of Aboriginal people and Torres Strait Islanders to be enrolled to vote for Commonwealth elections removed, and not until 1984 were they obliged to enrol as other Australians. A similar pattern was evident in the States and Territories, Western Australia and Queensland being the last to require Aboriginal people to vote.

Both ATSIC and the Council for Aboriginal Reconciliation have urged the establishment of reserve seats for indigenous political representation in legislatures in Australia.

5. The nature of the legal relationship with the dominant society

5.1 No fiduciary relationship

The relationship of governments to indigenous peoples, based on their historic relationship, has not been characterised as fiduciary or trust like in nature in Australia. The matter has been argued before the High Court and Federal Court in cases respecting the stolen generations and assertions of genocide: Kruger v. Commonwealth (1997) 190 CLR 1, Thorpe v. Commonwealth (1997) 71 ALJR 767, Nuyarimma v. Thompson
[1999] FCA1192. In Thorpe Kirby J. considered the Canadian and United States jurisprudence but commented that no such approach had garnered the support of the High Court.

The High Court has not been prepared to go outside traditional indicia in the finding of a fiduciary relationship. Such indicia would favour the finding of a fiduciary relationship in the context of the management of Aboriginal reserve lands and the surrender of native title lands. But any such obligation would seem to have been largely displaced by the Native Title Act 1993.

5.2 Treaties or other agreements with governments

Unlike in the United States, Canada or New Zealand there was no historic pattern of treaty negotiation with the indigenous people of Australia.

The National Aboriginal Conference proposed a treaty and discussions took place with the Commonwealth government between 1979 and 1983. The 1983 Senate Standing Committee on Constitutional and Legal Affairs examined the constitutional and legal feasibility of such a treaty, and accepted the possibility of a constitutional amendment to such end. The matter was not accepted however by the Constitutional Commission of 1988. In 1988 Prime Minister Hawke accepted the possibility of a treaty which recognised the prior ownership and sovereignty of the aboriginal people, but the matter was not carried through by the government. In 1995 the Council for Aboriginal Reconciliation gave tentative support to the idea of a treaty. The Council’s final report in 2000 proposed a process to secure agreements or treaties which protected the ‘political legal cultural and economic position of Aboriginal and Torres Strait Islanders’. The Aboriginal and Torres Strait Islander Commission is actively pursuing the negotiation of a treaty. The concept of a treaty with the indigenous peoples is opposed by the present Commonwealth government.

The instigating factor with respect to treaties and other agreements in the United States, Canada and New Zealand was the desire of governments to obtain the consent of the indigenous people with respect to the settlement and development of land. The treaties and other agreements in those countries have commonly provided for aspects of social and economic development, self-government, and political and cultural rights.

Native title in Australia has led to the development of regional agreements with governments. But the agreements have not taken on the comprehensive nature of the agreements in other countries. The agreements have been confined to matters affecting land and interests in land. Such may be considered to have been dictated by the limits prescribed by the Native Title Act and the need to get a determination under the Native Title Act. The regional agreements take effect as Federal Court consent determinations, which are entered on the native title register and ensure protection of native title under the Native Title Act.

6. SELF-MANAGEMENT NOT SELF-DETERMINATION

6.1 No general recognition of traditional laws

There is no general recognition of the internal laws or legal systems of indigenous people in Australia, although traditional laws and customs have been incorporated in the specific
context of native title and land rights legislation, distribution of property, child welfare and the criminal justice system.

6.2 Specific recognition of traditional laws

In Mabo No 2 Brennan J. declared that 'native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory'. (1992) 175 CLR 1 at 58. The definition of native title in the Native Title Act followed that language. It referred to rights and interests in land 'possessed under the traditional laws acknowledged, and the traditional customs observed,' where 'by those laws and customs', there is 'a connection with the land or waters'; section 223. The emphasis upon traditional laws and customs in the native title and Aboriginal land legislation can be traced to the Aboriginal Land Rights (Northern Territory) Act 1976 of the Commonwealth which requires that any claim be established on the basis of traditional laws and customs.

General laws regarding estate distribution apply to Aboriginal people in Australia except for the specific provision of the Northern Territory, Queensland and Western Australia. In the Northern Territory and Western Australia provision is made for the distribution of an estate in accordance with the customs and traditions of the Aboriginal community: the Administration and Probate Act 1969 s.6 (NT). Aboriginal Affairs Planning Authority regulations 1972 (WA). In Queensland under the Community Services Act the director-general of community service can determine who is entitled.

A traditional Aboriginal marriage is not recognised under the Marriage Act 1961 of the Commonwealth. Traditional marriages are however recognised for the purposes of adoption legislation, for example the Adoption of Children Act 1965 s.19 of New South Wales. Aboriginal traditional laws and customs are also recognized in the context of the placement of children. Priority is given the placement of Aboriginal children with Aboriginal families and in accordance with Aboriginal tradition, for example the Community Welfare Act 1983 and Adoption of Children Act 1994 s.11 of the Northern Territory.

Traditional laws and customs are not generally recognised in the criminal justice system, and so cannot afford a defence to a criminal charge. But a belief in such traditional laws and customs or reliance thereon may be relevant in establishing a defence which is generally recognised, such as mistake. Moreover they may be very relevant in determining sentence.

6.3 Paramountcy

Traditional laws and customs are of course subject to Commonwealth and state legislation. They can only be given effect in accordance with such legislation.

6.4 Self-management

6.4.1 Local government powers

The Commonwealth, Queensland and Western Australia have provided local law making powers to Aboriginal communities.

The Commonwealth Aboriginal Council and Associations Act 1976 provides for the Constitution of Aboriginal councils. It cannot include an area subject to the local
government law of a state or territory. The range of functions may include those of local government and the powers include the making of by laws relating to the functions (s. 30).

The Queensland Community Services (Aborigines) Act 1984 and the Community Services (Torres Strait Islanders) Act 1984 provide for the administration of trust areas under those Acts. An Aboriginal Council is elected by residents of each community, and generally functions as the local government of the area. The area is excluded from the area otherwise administered under the State local government legislation. The Council may make by laws respecting its functions, including rates, natural and cultural resources, control of alcohol and entry. The Council may appoint Aboriginal police. Aboriginal justices of the peace have jurisdiction over breaches of by laws.

The Aboriginal Communities Act 1979 of Western Australia makes limited provision for the making of local by laws, governing access, nuisance, disturbance, alcohol and firearms, but is subject to all other laws. The Act applies to communities proclaimed by the Minister (s. 4).

The other principal local and regional Aboriginal organisations are Aboriginal community Corporations and land councils.

Aboriginal community Corporations commonly deliver local governments services under Commonwealth funding although they may lie within a larger and different local government area.

Aboriginal land councils are those bodies set up under the land rights legislation and invested with traditional lands under the native title legislation. They may also deliver services. They are empowered to manage the land vested in them.

6.4.2 The Aboriginal and Torres Strait Islander Commission

The Aboriginal and Torres Strait Islander Commission has assumed most of the responsibilities for service delivery of the Department of Aboriginal Affairs. The declared object of the Aboriginal and Torres Strait Islander Commission Act 1989 is to promote self-management, self-sufficiency, economic, social and cultural development for Aboriginal and Torres Strait Islanders, and to ensure coordination of government policies: s. 3. The Aboriginal and Torres Strait Islander Commission is responsible to formulate and implement programs, develop policy proposals, set priorities, assist Aboriginal communities and organisations, and to advise the Minister (s. 7). The Minister must approve the budget of the Aboriginal and Torres Strait Islander Commission (s. 61).

The commission is composed of elected Aboriginal and Torres Strait Islanders. It consists of Aboriginal and Torres Strait Islanders elected to represent particular zones. The chairperson and deputy chairperson are elected from amongst the commissioners. Regional councils have also been established to perform similar functions in their local areas and to assist and advise the Aboriginal and Torres Strait Islander commission. The regional councillors are also elected.

It is the principal national indigenous organisation, but is ultimately subject to the control of the Minister. The commission must comply with any general written direction given by the Minister (s. 12).

7. IMPACT OF INTERNATIONAL CONVENTIONS AND STANDARDS

The impact of international standards and conventions on the relationship of Australia towards its indigenous people has been considerable. The International Convention on Elimination of all forms of Racial Discrimination has been particularly significant in the
context of the development of native title law. The international Convention on the Prevention and Punishment of the Crime of Genocide has also founded argument in seeking redress on account of the treatment of stolen generations and the dispossession of traditional land.

International conventions and covenants that relate to the relationship of Australia towards its indigenous people are considered below

No ratification of ILO Convention 107 and 169

Australia has not ratified ILO convention 107 nor 169. The Australian government elected in 1972 was committed to ratification of ILO Convention 107 but was opposed by the State of Queensland and ultimately did not ratify the convention. Consultation is continuing with respect to ratification of convention 169. The Aboriginal and Torres Strait Islander Commission has recommended ratification but a number of Aboriginal organisations have expressed opposition.

The UN Draft Declaration on the Rights of Indigenous Peoples

The Australian government has opposed the present form of the draft declaration in proceedings in the United Nations Commission of Human Rights.

International Covenant on Civil and Political Rights

Australia signed and ratified the International Covenant on Civil and Political Rights in December 1966. Australia also became a party to the optional protocol to the International Covenant on Civil and Political Rights, whereby individuals may submit a written communication to the human rights committee after all available domestic remedies are exhausted.

The Covenant is attached to the Human Rights and Equal Opportunity Commission Act 1986. The Commission is empowered to attempt to reach settlements with respect to complaints of violations, failing which a report may be made to the Attorney General of the Commonwealth.

Convention on the Prevention and Punishment of Crime of Genocide

Australia signed and ratified the convention in 1949.

The Human Rights and Equal Opportunity Commission 1997 report entitled 'Bringing Them Home', the inquiry into stolen generations, concluded that:

- the policy of forcible removal of children from indigenous Australians to other groups for the purpose of raising them separately from and ignorant of their culture and people could properly be labelled genocidal in breach of binding international law.

In Nuyarinima v. Thompson [1999] FCA1192 in the Federal Court it was asserted that the Native Title Amendment Act 1998, the Ten Point Plan, was an act of genocide and a offence in Australia. The Federal Court held that the international convention was not, in the absence of enabling legislation, such as to create an offence in Australia. Moreover the Ten Point Plan could not be considered genocide lacking an 'intent to destroy, in whole or in part, any international, ethnic, racial or religious group'. Further, in the absence of the constitutional invalidity of the Native Title Amendment Act the role of members of Australian Parliament supporting a valid law could not possibly constitute criminal conduct in Australia.
International Convention on Elimination of All forms of Racial Discrimination

Australia signed and ratified the International Convention in March 1966. The Convention underpins the constitutional validity of the Racial Discrimination Act 1975 of the Commonwealth, the principal legislation protecting the rights of Aboriginal people. The legislation has been critical in protecting native title.

International Covenant on Economic Social and Cultural rights

Australia signed and ratified the international covenant on economic social and cultural rights in December 1966. There is no domestic mechanism for consideration of complaints under the covenant.

Convention on the Rights of the Child

Australia signed and ratified the Convention of the Rights of the Child in November 1989. In 1997 the Committee on the Rights of the Child in Concluding Observations with respect to Australia expressed concern over the standard of education and health of Aboriginal and Torres Strait Islander children, the high number of Aboriginal children in the juvenile justice system, and legislation of Western Australia and the Northern Territory which provided for mandatory sentencing. The Northern Territory repealed the mandatory sentencing provisions with respect to children in 2002.

8. Source and Test of Indigenous Rights

8.1 The source of unique rights for indigenous people: legislation and the common law

The principal rights which are unique to indigenous people in Australia are those relating to traditional land and sacred sites. Those rights were initially granted by legislation. The State of South Australia acted first with respect to land rights legislation in 1966. But it was the Commonwealth Aboriginal Land Rights (Northern Territory) Act in 1976 with respect to the Northern Territory that promoted a more general recognition of the need to provide rights to indigenous people to their traditional lands. All of the remaining states and territories except Western Australia have provided for rights to traditional land by legislation.

It was only in 1992 that the High Court Australia recognised native title at common law. The recognition may be said to have come late in part because of the earlier provision by legislation for land rights. For example, the lower court decision in Milirrpum (1971) 17 FLR141 (Supreme Court of Northern Territory) which had denied native title at common law was not appealed in part because the land in question was in any event granted to the indigenous people pursuant to the Aboriginal Land Rights (Northern Territory) Act. The significance of native title at common law is greatest in the jurisdiction which has failed to provide by legislation for land rights, that is, Western Australia. It must also be said that in 1992 when the High Court recognised native title it would have been difficult in the face of the overwhelming jurisprudence throughout the common law world to come to any other conclusion.

The decision in 1992, Mabo No 2, was itself dependent upon the earlier decision in Mabo No 1 which had applied the protection of the Racial Discrimination Act to
native title if it was held to exist. And of course the Racial Discrimination Act was dependent for its constitutional validity upon the International Convention for the Elimination of Racial Discrimination. The Native Title Act is of course founded upon common law native title but has significantly amended the possible exercise of native title rights so as to diminish the rights that would otherwise be recognised at common law.

8.2 The test for indigenous rights

8.2.1 Proving native title at common law

The elements required to establish native title at common law are:

- connection, occupation, use or presence of land or waters,
- under the laws or customs,
- of an identifiable community, society or group.

In Mabo No 2 Brennan J. emphasised the need for the connection to be in accord with the laws and customs of the indigenous people. Deane and Gaudron JJ referred to a locally recognised special relationship. Toohey J. emphasised physical presence ‘in accordance with the way of life, habits, customs and usages of the [indigenous people] who are its users and occupiers’. The Native Title Act, section 62, requires that the claimant group have ‘continued to hold the native title in accordance with those traditional laws and customs’.

Native title at common law is primarily concerned with whether or not the plaintiff ‘indigenous group can establish that its connection with the land was governed by and in accordance with a system or set of traditional laws, customs and usages. Proving the network of individual relationships and the detail of the complex of laws is not required at common law except to illustrate the existence of the system or set of traditional laws customs and usages. This understanding of the requirements of the common law explains the reduced emphasis on the evidence of anthropologists as to rules of traditional law and the rights as between individual indigenous people compared to the emphasis so placed under statutory regimes, such as, the Aboriginal Land Rights (Northern Territory) Act 1976. The conclusions of anthropologists as to ownership of land in indigenous traditional law are, in themselves, irrelevant to and do not correspond to ownership at common law: Ward v. Western Australia (1988) 159 ALR 483,529 per Lee J.

The essential task of claimants to native title is to establish that the territory claimed constitutes their traditional homeland — the homeland of their society. They must continue to be a society and they must continue to have a societal connection to land.

8.2.2 Evidentiary requirements

In general no unique principles of the law of evidence are applied in connection with the proof of native title at common law. The Native Title Act declares that the Federal Court is bound by the ordinary rules of evidence, except to the extent the Court otherwise orders: section 82. However established principles may well be subject to unique applications demanded by the special circumstances and problems of such action.

As Olney J. declared in the Yarrurr v The Northern Territory (Croker Island) (1998) 156 ALR 370 at [21]:

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any proceeding in which the Court is required to make findings as to traditional laws and customs practised more than 150 years ago must necessarily rely upon evidence other than that of the personal observations of witnesses. Similarly the proof of genealogical connections to ancestors living at or prior to European settlement cannot be proved by reference to official records. To a large extent some of the most important issues before the Court can only be resolved upon evidence which in other circumstances might be regarded as hearsay.

The weight to be accorded evidence should not be discounted because of its admission under exceptions to the hearsay rule. The need to give independent weight to oral histories emphasised by the Supreme Court of Canada in Delgamuuk v. British Columbia (1998) 1 CNLR 14 at [98] [107] has been recognised by Australian courts: Ward v. Western Australia (1998) 159 ALR 483, 504. The oral history will necessarily be complemented by the rendering of the evidence of anthropologists, archaeologists, linguists, geographers and historians.

9. SPECIFIC LEGISLATIVE PROVISIONS AND TRIBUNALS

Legislation of Commonwealth and State governments which specifically targets indigenous peoples is as follows:

- native title
- land rights
- cultural rights
- criminal justice
- hunting and fishing and gathering exemptions.

9.1 Native title and land rights

The traditional lands and resources of indigenous peoples are subject to protection and extinguishment under native title and land rights legislation. Native title is the common law recognition of the rights of indigenous peoples to their traditional lands. Such common law recognition only came about in Australia in 1992: Mabo No 2 (1992) 175 CLR 1. The common law has been supplemented by legislation by the Commonwealth government in the form of the Native Title Act 1993. The land rights legislation was enacted earlier in order to provide some protection for the traditional lands of indigenous peoples.

9.1.1 Land rights legislation

In 1966 South Australia enacted the Aboriginal Lands Trust Act 1966. It recognised and give effect to Aboriginal ownership of the small area of the remaining Aboriginal reserves in the south of the State. 1972, the Australian Labor Party was elected to federal government on a platform including providing for the recognition of aboriginal ownership of traditional lands. The federal government established the Aboriginal Land Rights Commission to inquire into the matter in the Northern Territory. It recommended the transfer of the substantial Aboriginal reserves to Aboriginal ownership and the establishment of an Aboriginal Land Commission to consider and make recommendations with respect to claims to other lands. In 1976 the Aboriginal Land Rights (Northern Territory) Act 1976 was enacted by the Commonwealth. In 1981 and

Western Australia, by far the largest State in area, has made no legislative provision for Aboriginal land rights. It has a large area set apart for Aboriginal reserves (8%), but it is held under Crown management and control. The State government sought to enact land rights legislation in 1985, but it failed to pass the Legislative Council. The Legislative Council is effectively controlled by country and bush electorates under a system of gross malapportionment of representation entrenched in the State Constitution.

The area of land set apart by the land rights legislation in New South Wales and ACT is 0.19 percent, in Tasmania less than 0.01%, in Queensland 1.85 percent, and in Victoria 0.01%. By contrast the areas set apart in the Northern Territory and South Australia are 40 percent and 19.2% respectively.

The nature of the interest granted under the land rights legislation is generally that of freehold but with a reservation of minerals to the Crown. Exceptionally the grant includes some minerals in the lands rights provisions in New South Wales and Tasmania. In the western division of New South Wales the interest granted is that of a lease in perpetuity.

All interests granted under the land rights legislation are restricted as to alienability. Generally such land may not be mortgaged or sold, although it may be leased. Mineral development is generally subject to the consent of the Aboriginal community, although it may be subject to arbitration.

In Western Australia title remains in the Crown. The legislation does not contemplate that the Aboriginal people have any interest in Aboriginal reserves in Western Australia. Some of the reserves have been leased to the Aboriginal communities in which event rights arise under the leases. Mineral development is not subject to the consent of the community.

9.1.2 Native title

Native title is the common law recognition of the rights of indigenous peoples to their traditional lands. The concept is still evolving through judicial decisions in Australia and the content, for example whether it includes mineral resources, is not yet settled. It is settled that native title is subject to extinguishment by acts of the Crown that manifest a clear and plain intention to extinguish, for example by acts that are so inconsistent as to be impossible of coexistence with native title, for example, a freehold grant. It was not until 1975 and the enactment of the *Racial Discrimination Act* that native title received any protection from such acts of the Crown. Accordingly any extinguishment which occurred prior to 1975 was effective to extinguish native title without compensation or consultation of any kind. The effect of the *Racial Discrimination Act 1975* was to require
that native title be entitled to the same protections as an interest held by any other member of society. Such protections would normally contemplate at least consultation and compensation, and in some cases the agreement of the interest holder.

The recognition of native title at common law in 1992 by the High Court Australia led to concerns on the part of non-native title holders that their interests might to some degree be invalid as contrary to the Racial Discrimination Act. The Commonwealth government responded by the enactment of the Native Title Act. It was substantially amended in 1998.

The principal object of the Native Title Act 1993 is the validation of non native title interests in the period 1975 to 1994, and in the so-called future period from January 1 1994. But the Act also provides a process for the determination of native title in the Federal Court.

The validation of non-native title interests granted in the period 1975 to 1994 is effected by the overriding of native title upon the payment of compensation. No consultation is required. In the case of freehold grants and leases native title is generally extinguished.

In the future period from January 1 1994 native title is subject to:

- the paramountcy of pastoral and agricultural interests,
- management of water and airspace,
- the exercise of options, extensions and renewals of interests granted prior to January 1994,
- the development of Crown reserves set apart before January 1994,
- the development of public infrastructure,
- developments in the offshore,
- acts that pass the freehold test.

The regime in the future period generally provides for procedural rights of notice, opportunity to comment and compensation. Except in circumstances of compulsory acquisition native title is not generally permanently extinguished. The procedural rights increase the lower in the hierarchy of overriding events. The lowest in that hierarchy are acts that pass the freehold test. Such acts are those not otherwise validated but which could be undertaken over freehold land, for example, mining leases in Australia may generally be granted over freehold land under certain conditions. Acts that pass the freehold test are subject to the duty to negotiate. The native title parties must be given an opportunity to make submissions regarding the doing of the act, and all negotiation parties must negotiate in good faith with a view to obtaining the agreement of each of the native title parties to the doing of the act, with or without conditions. If no agreement can be obtained after six months any party may apply to the arbitral body for a determination that the act must not be done, may be done, or may be done subject to conditions. The State or Territory Minister may overrule the determination of the arbitral body that an act may not be done.

The amendments made in 1998 substantially diminished native title rights, by limiting their manner of exercise, subordinating them to other interests, deeming extinguishment to have occurred and limiting compensation. The amendments represented an abandonment of any commitment to the maintenance of equality before the law and limited the application of the Racial Discrimination Act to that end. In
August 1999 the United Nations committee on the elimination of all forms of racial discrimination expressed its opinion that the Amendment Act of 1998, the Ten Point Plan, breached the International Convention on Elimination of all forms of Racial Discrimination. The Committee was of the opinion that the Amendment Act diminished native title rights in the interests of non aboriginal people, noting in particular the provisions respecting validation, deemed extinguishment, the primacy of the pastoral industry and the abolition and diminishment of the right to negotiate.

9.2 Cultural rights

The common law has accorded little protection to Aboriginal cultural rights. The acknowledgement and observance of traditional laws and customs is significant in the establishment of native title at common law. But that significance is diminished by the limitations and restrictions on native title itself, and in particular the degree to which native title will be considered to have been extinguished irrespective of the continued observance of traditional laws and customs; Fejo v. Northern Territory (1998) 156 ALR 721.

If native title is established however with respect to a sacred site then the protections of the Native Title Act 1993 will apply. The principal protection otherwise provided is by legislation with respect to sites of traditional significance and to Aboriginal relics. The Aboriginal and Torres Strait Islander Heritage Protection Act 1984 of the Commonwealth is intended to operate in complementary fashion to that of the States and Territories. The object of the act is the 'preservation and protection from injury to or desecration of areas and objects in Australia ... being areas and objects ... of particular significance to aboriginals in accordance with aboriginal traditions'. The Commonwealth Minister is required to consult with the state or territory before making a protective declaration under the act. The Minister is empowered but not required to make protective declarations over areas of land or water and objects. A new Act was proposed in 1998 which will limit Commonwealth protection by requiring applicants for protection to exhaust States/Territory processes before seeking protection of the Commonwealth Act and, where States/Territory regimes are accredited, limiting applications to cases where protection may be in the national interest. The Bill has yet to be enacted.

The legislative protection provided to sacred sites and objects under State and Territory legislation is always under the control of the state or territory Minister. The legislation of the Northern Territory (Northern Territory Aboriginal Sacred Sites Act 1989) and South Australia (Aboriginal Heritage Act 1988) confers some rights of Aboriginal management with respect to such sites and objects, but the remainder of the legislation does not. Consultation with Aboriginal people is provided for under legislation of New South Wales (National Parks and Wildlife Act 1974), Tasmania (National Parks and Wildlife Act 1978 and Aboriginal Relics Act 1975), Victoria (Archaeological and Aboriginal Relics Preservation Act 1972) and Western Australia (Aboriginal Heritage Act 1972). No consultation is provided for under legislation of Queensland (Cultural Record and (Landscapes and Queensland Estate) Act 1987). A distinct part of the Commonwealth legislation is of special application to Victoria — it confers some managerial responsibilities upon Aboriginal people. The essence of the protection under all the legislation is protection from injury or desecration, except where permitted by the Minister.
9.3 Criminal justice

Aboriginals and Torres Strait Islanders are disproportionately affected by the criminal justice system. They are subject to the general criminal law and the jurisdiction of Australian Courts. General legislation such as mandatory sentencing in the Northern Territory and Western Australia, has a disproportionate impact upon persons of Aboriginal descent.

Queensland and Western Australia have provided for the constitution of Courts presided over by Aboriginal justices of the peace which have jurisdiction over violations of municipal bylaws, but they are of limited significance.

Special provision has been made with respect to the detention and questioning of Aboriginal defendants, including the use of a special cautions, legal assistance, the treatment of admissions and confessions and provision of interpreters (Crimes Act 1914 of Commonwealth and see R v Anunga (1976) 11 ALR 412 (Supreme Court of the Northern Territory).

9.4 Exemptions from general legislation: hunting fishing and gathering

The principal exemptions from general legislation provided for Aboriginal people and Torres Strait Islanders is with respect to the application of hunting, fishing and gathering legislation. Most jurisdictions provide exemptions to the application of such legislation where traditional hunting fishing and gathering is carried on.

As to hunting and gathering, for example, the Territory Parks and Wildlife Conservation Act 1977 s. 122 of the Northern Territory declares that nothing in the Act prevents 'Aboriginals who have traditionally used an area of land or water from continuing to use the area of land or water from hunting, fishing or gathering (otherwise than for the purposes of sale) and for ceremonial or religious purposes'. To similar effect is the National Parks and Wildlife Conservation Act 1975 of the Commonwealth, regulations under the National Parks and Wildlife Act 1972 of South Australia, the National Parks and Wildlife Act 1970 of Tasmania, and the National Parks and Wildlife (Land Management) Regulations 1995 under the National Parks and Wildlife act 1974 of New South Wales. The Western Australia provision under the Wildlife Conservation Act of 1950 is somewhat different — it provides exemptions to a person of Aboriginal descent to take fauna or flora sufficient only for himself and his family but not for sale. An exemption in Queensland was repealed by the Fauna Conservation Act of 1974 but was reinstated under the Nature Conservation Act 1993 s. 93. There is no exemption in Victoria.

As to fishing, exemptions are generally provided in accordance with Aboriginal traditions and not for commercial purposes: Fisheries Act 1988 s. 53 (NT), Fisheries Act 1984 s. 14 (Queensland). An exemption from the requirement of a licence is provided in such circumstances under the Fish Resources Management Act 1984 s. 6 (Western Australia) and Living Marine Resources Management Act 1995 s. 60 (Tasmania). The Torres Strait Fisheries Acts 1984 of Queensland and the Commonwealth implemented the Torres Strait Treaty with Papua New Guinea and permit community and traditional fishing. Conservation activities under the treaty must seek to minimise the impact on traditional activities.

The Native Title Act 1993, section 211, provides an exemption to native title holders. Section 211 applies with respect to native title rights to hunt, fish, gather or
engage in cultural or spiritual activities. A prohibition or restriction except where the activities are carried on 'in accordance with a licence, permit or other instrument' is suspended where the native title holders exercise their native title rights 'for the purpose of satisfying their personal, domestic or non-commercial needs'. The intention of section 211 is to remove the requirement of a licence permit or other instrument as a legal condition upon the exercise of native title rights.

9.5 Special tribunals?

There are no special courts, tribunals or other bodies established to hear disputes between indigenous people and governments in Australia, in the manner of the Waitangi tribunal in New Zealand or the Indian Claims Commissions in Canada and the United States.

A specialised tribunal has been established with respect to native title. The National Native Title Tribunal was established under the Native Title Act 1993 with the initial object of providing a more efficient and less adversarial process than the courts to assist in the determination of native title and to mediate and arbitrate disputes as to whether future acts could be done on native title land. Constitutional problems led to changes in the role of the tribunal. Applications for determinations of native title are now made to the Federal Court, which are then referred to the Tribunal for mediation, consideration of registration by the native title registrar, and the ultimate determination by the Federal Court. The mediation and arbitration of disputes under the right to negotiate process as to whether future acts may be done remains with the Tribunal, unless a State or Territory law provides such functions be performed by a recognised State or Territory body or the Commonwealth Minister determines that they may be performed by an equivalent State or Territory body. South Australia and Queensland have established land and resource tribunals which have been recognised by the Commonwealth Minister for the purposes of the Native Title Act.

In the result the National Native Title Tribunal has a mediative function in relation to the determination of native title but an adjudicative function in relation to the determination of whether future acts may be done.

10. STOLEN GENERATIONS

From the late 19th-century all jurisdictions in Australia assumed the power to remove Aboriginal children from their homes without the consent of their parents if it was considered by the departments of Aboriginal affairs to be in the child's interest. The West Australian Chief Protector of Aborigines, A O Neville, observed in 1937 that: it is infinitely better to take a child from its mother, and put it in an institution, where it would be looked after, than to allow it to be brought up subject to the influence of such camps.

The removal of children was a fundamental part of the assimilation policy of Australian governments. It was designed so that, in the words of Neville, the 'coloured people of this country are to be absorbed into the general community'.

The power derives from the declaration of the board or Commissioner of Aboriginal affairs as the Guardian of every native child. The board or the Commissioner in the department was charged with the duty of providing for the custody maintenance and education of the children of natives, for example, Aborigines Protection Act 1909 of New South Wales, Native Administration Act 1905 of Western Australia sections 6, 8.
The children suffered deprivation and abuse of many kinds in the institutions. Obviously they also suffered cultural deprivation which was a principal object of the removal.

Litigation in Australia to date has been unsuccessful in seeking legal redress. The High Court rejected any general fiduciary obligation owed to the stolen generation in *Kruger v. the Commonwealth* (1997) 190 CLR 1. In *Cabillo v. Commonwealth* (2000) 174 ALR 97 the plaintiffs sued in the Federal Court on account of their removal and detention under the *Aboriginals Ordinance 1918* and *Welfare Ordinance 1953* of the Northern Territory. The action failed on all grounds. The cause of action founded on false imprisonment was rejected on the basis that the Aboriginals Ordinance fully authorised their removal and detention. A breach of statutory duty of guardianship, a duty established under the act, was rejected on the basis that no breach of that duty was established. No duty of care was held to exist, and even if it did no breach was established. A fiduciary duty was rejected on the ground that the categories of fiduciary relationship should not be expanded into the area of non-economic interests, and any event no breach was established. The New South Wales Court of Appeal upheld a similar approach in *Williams v. the Minister, Aboriginal Land Rights act 1983*, State of New South Wales (12 Sept. 2000) (NSW C.A.) — no duty was held to be established, but in any event no breach of any such duty was established. Governments have strenuously defended the litigation at considerable cost. The plaintiffs are of course handicapped by significant problems of proof with respect to events taking place such a long time ago.

In 1995 the Commonwealth Attorney General established a national inquiry into the separation of Aboriginal and Torres Strait Islander children from their families. The inquiry reported in 1997. It was entitled *Bringing Them Home*. The report identified the magnitude of the problem and its impact. It recommended reparations in the form of an apology, land, culture and language restitution, monetary compensation, and the provision of services including reunion assistance and counselling for those affected. The Commonwealth government essentially rejected the report. It has refused to apologise or establish a reparations tribunal. It has continued to fight strenuously any legal claims. Moreover, it rejects the magnitude of the problem as identified by the report — it does not consider that there was a generation of stolen children, and in any event if there was a substantial number of people affected, it considers that financial compensation would be much too large for the nation to bear. Fundamentally it rejects the suggestion that the actions of the governments should be considered to be wrongful:

The Commonwealth does not seek to defend or justify past policies and practices, but it does assert the nature and intent of those events have been misrepresented, and the treatment of separated aboriginal children was essentially lawful and benign in intent and also reflected wider values applying to children of the era, as recorded in other recent official reports concerning illegitimacy, adoption, child welfare and institutionalisation practices throughout much of the 20th century. Emotional reaction to heartbreaking stories is understandable, but it is impossible to evaluate by contemporary standards decisions that were taken in the past.

(Commonwealth government submissions, executive summary, to the Senate Legal and Constitutional Committee inquiring into the Federal government's implementation of the recommendations made by the *Bringing Them Home* report).
CONCLUSION

The historic determination of Australian governments to deny equality before the law to indigenous people has been only reluctantly put aside. In two critical areas, that of native title and the stolen generations, there has been a failure to acknowledge prior discrimination and provide redress, in particular by the Commonwealth government. In the case of native title the Native Title Act seeks to diminish the common law rights of native title holders in the interests of non-native title holders. It represents a determination not to give substance to their prior occupation of their traditional lands. In the case of the stolen generations the Commonwealth government refuses to apologise for the dreadful treatment of Aboriginal children, provide reparations or even acknowledge the magnitude of the problem. It represents a determination not to give substance to past misdeeds.

To the extent that pressure has come for change it has come most effectively from comparative and international law. In the case of native title the protection is founded on the Racial Discrimination Act the validity of which is dependant on the International Convention on Elimination of all Forms of Racial Discrimination. Moreover the decision in Mabo No 2 was driven by the overwhelming and long established jurisprudence of all other common law countries. As to the stolen generations the seminal report 'Bringing Them Home' was grounded in part on the Convention on Prevention and Punishment of the Crime of Genocide. Canadian judicial decisions must also be considered a continuing pressure on government responses.

It must properly be said that the status of indigenous people in Australia is not equal, and appears unlikely to be so in the absence of a constitutionally entrenched Bill of Rights providing for equality for all. There is no possibility of the political acceptance of constitutional entrenchment of special rights for indigenous people in the foreseeable future.

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SOME GENERAL REFERENCES


