

**MAKING LAND AVAILABLE FOR  
NATIVE LAND CLAIMS IN AUSTRALIA:  
AN EXAMPLE FOR CANADA**

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A major difficulty in the way of meeting the land claims of an indigenous people is the extent to which land has been alienated to private and public interests. In both Canada and Australia most of the land suitable for modern agricultural and industrial settlement and development has long ago been alienated. In Canada and Australia reserves of Crown lands were set apart for the indigenous people of these areas, but many claims were left unsettled. In Australia much greater efforts have been made in recent years than in the past to meet these claims. This study indicates the land made available for claim in Australia, alienated and unalienated, and the mechanisms developed to make it available. It is suggested that the study has relevance to the claims of the non-treaty status Indians of the Maritimes, Southern Quebec and British Columbia, to the claims for the outstanding treaty land entitlement on the Prairies and in Ontario and to the claims of the Metis. The Australian experience indicates a preparedness to provide interests in alienated land as well as unalienated land to meet such claims. It may be of particular significance to the Metis insofar as Australian legislation does not distinguish between persons with different degrees of Aboriginal ancestry. The provision of land to persons of only partial Aboriginal ancestry may be considered in the context of the estimate that in 1961, 80% of the population of Aboriginal descent might be described as "half-caste" and the remainder as "full-bloods".<sup>1</sup> The "half-castes" were estimated to comprise 85% of the total half-caste and full-blood population in 'settled' Australia, that is New South Wales, Victoria, South East South Australia and Queensland, and South West Western Australia. The "full-bloods" were estimated to comprise 78% of the total half-caste and full-blood population in the remaining 'remote', desert and tropical regions of Australia.

### I. Reserves and Former Reserves

Historically, unalienated Crown lands were provided for Aborigines by the setting apart of lands for their benefit. Authority to set apart reserves for such purposes still exists in each State<sup>2</sup> and Territory<sup>3</sup>, except Tasmania. Such authority is, however, rarely employed except for temporary or administrative purposes.<sup>4</sup> The provision of "reserves" is not considered in accord with the provision of security of tenure to Aborigines by some States and the provision of further land is considered inappropriate by others.

By the 1960's only small areas of land in 'settled' Australia remained as land reserved for Aborigines, although it must be observed that the reserved

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1. C.D. Rowley, Appendix B "The Aboriginal Population" in *Destruction of Aboriginal Society* (Pelican 1972) at 365 *et. seq.* The estimates are much qualified.

2. *Land Act* 1958, No. 6284, s.14(a) (Vic).  
*Crown Lands Consolidation Act*, 1978 (NSW).  
*Community Welfare Act*, 1972, No. 51, s.84 (SA).  
*Land Act*, 1962, No. 42, s.334 (Q'land).  
*Land Act*, 1933, No. 37, s.29(1)(a) (W.A.).

3. *Crown Lands Act*, 1933, s.103(1) (N.T.).

4. On January 4, 1980 a new reserve of 0.3 kilometres was set apart in New South Wales.

areas had never been large. Title to the remaining reserves was granted to Aboriginal land trusts between 1966 and 1973 in South Australia, Victoria and New South Wales.<sup>5</sup> It was recognized in South Australia and New South Wales that the areas of land provided were inadequate for Aboriginal needs and purposes. The *Aboriginal Land Trust Act* of South Australia provided accordingly, not only for the transfer of the former reserve lands, but also "any Crown lands" to the Lands Trust. The transfer of "any Crown lands" might be effected by Governor's proclamation only "upon the recommendation of the Minister of Lands or the Minister of Irrigation as the case may require and the recommendation of both Houses of Parliament by resolution passed during the same or different sessions of the same Parliament."<sup>6</sup> The authority has been used sparingly. Lands transferred pursuant to it have consisted of former reserves that had been abrogated in the past, Aboriginal affairs administrative areas and leases purchased on behalf of Aborigines. Only in New South Wales has similar authority been enacted. The *Aborigines Act* provides that the Minister may "arrange with the Minister administering the Crown Lands Act the terms and conditions upon which Crown lands other than reserves may be granted and otherwise disposed of to the Trust."<sup>7</sup> Pursuant to such authority small areas previously comprising former reserve land as well as burial grounds and housing centres have been transferred to the Trust. Claims to larger areas of land, some of which are of considerable economic value, have not been acceded to by the Government, provoking the Trust to observe: "It is the Trust's view that this section of the Act requires amendment to establish some criteria upon which claims for Aboriginal rights will receive favourable consideration by the government."<sup>8</sup>

In the 'remote' areas of Australia in Queensland, Western Australia, South Australia and the Northern Territory large areas of unalienated Crown land were set apart as reserves for Aborigines. In Queensland and Western Australia much of the land set apart continues to be reserve land. Title, control and beneficial entitlement in the minerals obtained from such lands is vested in the Crown. There is no provision for Aboriginal claims against other lands in either State. In the Northern Territory, pursuant to the Woodward Report, title to reserve lands was transferred to Aboriginal land trusts. In the remote areas of South Australia title to the Yalata reserve was transferred to the Aboriginal Land Trust, and title to the North West Reserve was transferred to the Pitjantjatjara. In the Northern Territory former reserves are subject to traditional land claims, as considered below, to the extent that they are unalienated Crown land.

## II. The Referendum and the Aboriginal Enterprises (Assistance) Act 1968

*The Constitution Act 1901*, pursuant to which the Commonwealth of Australia was created, empowered the Commonwealth to make laws for "the

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5. *Aboriginal Land Trusts Act, 1966*, No. 87 (SA).  
*Aboriginal Land Trusts Act, 1970*, No. 8044 (Vic).  
*Aborigines Act Amendment Act, 1973*, No. 35 (NSW).
  6. 1966, No. 87, s.16(1) (SA).
  7. 1969, No. 7, s.16(1)(a)(b); 1973 No. 35 (NSW).
  8. Annual Report, 1978-79.

people of any race, other than the Aboriginal race in any State, for whom it is deemed necessary to make special laws.”<sup>9</sup> The provision remained in effect until 1967 when the reference to persons of the Aboriginal race was deleted following a referendum. The assumption of jurisdiction by the Commonwealth enabled it to fund and legislate for the furtherance of policies relating to Aborigines. In 1968 the *Aboriginal Enterprises (Assistance) Act*<sup>10</sup> was passed. It established the Commonwealth Capital Fund for Aboriginal Enterprises. Its objects were declared to be: “to enable persons of the Aboriginal race of Australia to engage in business enterprises that have prospects of becoming and continuing to be successful.” No definition or criteria were legislated to further identify “persons of the Aboriginal race of Australia”. The Minister declared that for the purposes of the Fund an Aboriginal “is a person of Aboriginal descent, who identifies himself as an Aboriginal and is accepted as such by the community with which he is associated.”<sup>11</sup> Such an understanding of the ambit of the term “Aboriginal” includes the vast majority of those of only partial Aboriginal descent, otherwise described as “half-castes”. The definition represented a rejection of the former interpretation that had “defined an ‘Aboriginal native’ as one in whom Aboriginal descent preponderates and stated that ‘half-castes’ were not Aboriginal natives” for the purposes of section 127 of the Constitution Act which had excluded “Aboriginal natives” from “reckoning in the number of the people of the Commonwealth, of a State or other part of the Commonwealth.”<sup>12</sup> The current understanding of “Aboriginal”, first adopted for the purposes of the *Aboriginal Enterprises (Assistance) Act 1968*, has not been the subject of any legal challenge. Indeed, in a recent law review article “The Australian Aborigine: Full Commonwealth Responsibility under the Constitution” the question of whether persons of only partial Aboriginal descent were properly described “as persons of the Aboriginal race of Australia” was not even alluded to.<sup>13</sup>

The Annual Reports of the Commonwealth Capital Fund for Aboriginal Enterprises did not provide a State by State breakdown of the distribution of funding. It is, however, evident that funding was widely distributed in ‘settled’ Australia, including New South Wales and Victoria, and accordingly was necessarily made available to persons of only partial Aboriginal descent. The Minister of Aboriginal Affairs was charged under the *Aboriginal Enterprises (Assistance) Act* with the control and administration of the Commonwealth Capital Fund for Aboriginal Enterprises. He was advised by the Capital Fund Advisory Committee, composed of three members none of whom were Aboriginal. The initial payment into the Fund was \$4,650,000. A further \$89,126 was credited to the Fund in 1969-70. The monies in the Fund were to be used to make loans or purchase shares or stock in furtherance of the statutory objects of the Fund. The Fund was not primarily or necessarily directed to the purchase of alienated land, nor was there any necessary relation to any claim to such land.

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9. s.51 (xxvi).

10. 1968, No. 154 (C’th).

11. Annual Report, Commonwealth Capital Fund for Aboriginal Enterprises, 1970-71.

12. C.D. Rowley, Appendix A “Who is an Aboriginal” in *Destruction of Aboriginal Society* (Pelican 1972) at 344.

13. J.E. Eastwick, “The Australian Aborigine: Full Commonwealth Responsibility Under The Constitution” (1980), 12 *Melb. L. Rev.* 516.

The monies were in fact applied to, inter alia, community enterprises investing in a brick-works, a sea-produce deep sea freezing unit, an orchard, and cattle stations. In the case of the cattle stations, the provision of the monies enabled the purchase of the pastoral leases upon which the stations were located. These purchases were made under the Act by making a loan for such purpose, or by purchasing shares in the company holding the lease.<sup>14</sup> The leases were declared to be held in trust for the community. The Annual Report 1974-75 upon the operation of the Fund declared that the purchases would assist the Aboriginal communities to "determine their own social, cultural and economic future" and assist in making them "economically independent and free of handouts." The language of the Act did not direct the provisions of lands to meet the claims of Aboriginal groups, but it did in fact enable such claims to be met and it represents the beginning of the settlement of claims with respect to alienated lands in Australia. The Act was repealed by the *Aboriginal Loans Commission Act* in 1974.<sup>15</sup>

### III. The Northern Territory

Until July 1, 1978 the Northern Territory was subject to Commonwealth administration. On that date it became self-governing, although subject to the *Aboriginal Land Rights (Northern Territory) Act*.

#### (A) The Woodward Report

Woodward was appointed Commissioner to inquire into Aboriginal land rights in the Northern Territory by the Commonwealth Government on February 3, 1973. He submitted his second and final report in May, 1974. The terms of reference of the Commission required inquiry into and a report upon:

"The appropriate means to recognize and establish the traditional rights and interests of the Aborigines in and in relation to land, and to satisfy in other ways the reasonable aspirations of the Aborigines to rights in or in relation to land, and, in particular, but without in any way derogating from the generality of the foregoing:

...

(b) the desirability of establishing procedures for the examination of claims to Aboriginal traditional rights and interests in or in relation to land in areas in the Northern Territory of Australia outside Aboriginal reserves or of establishing alternative ways of meeting effectively the needs for land of Aboriginal groups or communities living outside those reserves.

(c) the effect of already existing commitments, whether in the nature of Crown leases, Government contracts, mining rights or otherwise, on the attainment of the objects of recognizing and establishing Aboriginal traditional rights and interests in or in relation to land.

The Commissioner and his Research Officer visited Canada and the United States at the end of 1973 in furtherance of the inquiry. Woodward referred to the visit in his final report and, after making particular reference to the difficulties of "the large number of Canadian Indians of mixed descent whose ancestors elected to surrender their Indian status in return for certain civil rights and allotments of land or cash payments", described as a "pitfall" to be avoided:

14. Willowra Report, Aboriginal Land Commissioner, 1980 para. 20.

15. 1974, No. 103 (C'th).

the great harm that can be done if benefits are extended to some native people and not others — whether by reasons of degree of native blood of historical or geographic factors — particularly if decisions as to entitlement within a community are made outside that community.<sup>16</sup>

Woodward recommended that “differences between Aborigines should be allowed for, but any artificial barrier, in particular those based on degrees of Aboriginal blood, must be avoided.” He explained, “that no artificial wedge should be driven between people whose Aboriginal ancestry is the dominant factor in their upbringing and their thinking.” But it was recognized that “the Aborigines of mixed descent in New South Wales share only some of the beliefs and aims of the tribal Aborigines of Arnhem Land” and accordingly “people from one background should not readily be accepted as spokesman for people of the other.”<sup>17</sup> Woodward suggested the following definition of “Aborigine”: “a descendant of an indigenous inhabitant of Australia.” The definition would obviously extend to persons of only partial Aboriginal ancestry.

Woodward recommended the transfer of title to all Aboriginal reserves in the Northern Territory to Aboriginal land trusts. He also recommended the transfer of the proposed reserve at Delissaville, the pastoral properties held for the benefit of Aborigines at Kildurk and Willowra, the ‘missions to Aborigines’ leases at Hemannsburg, Saint Theresa and Daly River, and the wildlife sanctuaries on the Cobourg Peninsula and Tanami Desert. Title to all of the lands recommended for transfer was transferred pursuant to the *Aboriginal Land Rights (Northern Territory) Act 1976*<sup>18</sup> except for Kildurk, the Cobourg Peninsula and the Tanami Desert. Willowra was transferred following a successful traditional land claim under the Act.

Woodward recommended a “freeze” upon alienation of interests in the areas of unalienated Crown land claimed by the Aboriginal Land Councils to enable claims to be lodged with an Aboriginal Land Commission and to enable claims to be considered.<sup>19</sup> The Commission would be empowered to recommend the transfer of title and “if a claim is based on traditional ties to land it would normally result in a proclamation of Aboriginal title. If not, an appropriate form of lease would be used.”<sup>19A</sup> Woodward suggested that to give effect to such recommendation it might be necessary to purchase or compulsorily acquire grazing licences and agricultural or special purpose leases.

National Parks and other conservation areas would be subject to traditional claim before the Aboriginal Land Commissioner, but Ayers Rock and Mount Olga Park were “special” and accordingly not so subject. However, these areas should be managed only with Aboriginal consultation and co-operation.<sup>19B</sup>

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16. Second Report, 1974, Parl. Paper C'th Aust. 69, paras. 27-40.

17. *Id.*, at paras. 62-66.

18. 1976, No. 191 (C'th).

19. Second Report 1974, Parl. Paper C'th Aust. 69, paras. 162-176.

19A. *Id.*, at paras. 179-180.

19B. *Id.*, at paras. 510-516.

Both Aboriginal Land Councils urged that alienated land in the form of pastoral leases should be subject to traditional claims before an appropriate tribunal and if successful should result in the declaration of reversionary interests in the land.<sup>19C</sup> Pastoral leases cover a large part of the Northern Territory. Woodward rejected the suggestion, citing the complexity and enormity of such a task, a reluctance to establish principles to resolve situations arising as much as forty years in the future when some of the leases terminated, the raising of false expectations in Aborigines who did not appreciate the need to compensate a leaseholder for improvements and a likely reduction of capital expenditure by leaseholders. He referred to the "divisive" effect of allowing claims only on a traditional basis entailing distinction between those Aborigines, probably full-blood, with traditional ties, and those without, probably part-blood.<sup>19D</sup>

Although it is true that these people can be dealt with and provided for in other ways, I am still reluctant to make a recommendation which would draw such a clear dividing line between persons of the full blood who have had the good fortune to retain close contact with their country and those who, because of their mixed descent or for other reasons, have lost touch with their traditional lands. I am concerned about the danger of creating by implication, categories of first and second class Aborigines.<sup>19E</sup>

Finally Woodward cited the inapplicability of a "reversion to Aborigines" scheme to other parts of Australia where lands were not alienated by lease but had been granted in fee simple. Woodward considered that such alienation would make such a scheme difficult to "match" elsewhere in Australia. In the result Woodward recommended that the Aboriginal Land Commission should:

- (a) inquire into the likely extent of traditional Aboriginal claims to pastoral lease land,
- (b) establish a register of such claims,
- (c) consider and report upon the feasibility of determining such claims with sufficient certainty to justify interfering with the rights of others,
- (d) consider and make recommendations concerning any disputes between Aborigines and pastoral leaseholders about the setting up, and excision from leases, of community areas. and
- (f) receive, investigate and make recommendation as to priorities for, all major claims for grants for the purchase or economic development of land for Aborigines.<sup>20</sup>

Woodward regarded "the purchase of properties from lessees to provide a substantial land base for Aboriginal tribal groups" as a "positive step which can be taken towards meeting Aboriginal claims in pastoral areas."<sup>21</sup> Woodward recommended that an Aboriginal Land Fund and an Aboriginal Land Development Fund be established, the former to fund "purchase and compulsory acquisition of land" and the latter to fund by loans and grants the

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19C. *Id.*, at paras. 191.

19D. *Id.*, at paras. 195-208.

19E. *Id.*, at paras. 207.

20. *Id.*, at para. 273.

21. *Id.*, at para. 240.

“economic development of the land.”<sup>22</sup> Woodward considered that compulsory acquisition of pastoral leases should be “avoided if possible” although different considerations applied where “a lessee is quite willing to sell, but is asking an extortionate price, or where the owner is a public company, or not resident on the property.”<sup>23</sup>

It was suggested that it be within the jurisdiction of the Commission to make recommendations to the “relevant authorities” as to which areas ought to be compulsorily acquired by excision from pastoral leases. Appropriate compensation would be paid. Such excisions would recognize the right of Aborigines to live more or less permanently on land of their choice whether it is their own traditional land or not. “The areas concerned should be large enough to ensure privacy and provide an opportunity for small farming ventures such as pig or poultry raising, or the keeping of a few dairy cattle to supply the needs of the community.” It was suggested that the Commission consider the strength of traditional claims, the length of recent association, loss to leaseholder, conduct of leaseholder, and the economic benefits to the Aborigines.<sup>24</sup>

With respect to Aboriginal city and town dwellers, who were more likely to be of only partial Aboriginal descent, the Woodward Report quoted counsel for the Central Land Council:

In respect of practically all of these township people, certain common features exist. They are all Aborigines who have been over the years dispossessed of their traditional land and have occupied areas of land for a number of years as virtual squatters. They have become attached to these areas of land and generally speaking desire to continue to live there. In no case could it be established that the land in question also constituted the traditional land of the persons now occupying it, although it may have formed part of the general tribal area of these people. In practically each case the land upon which they are now living is Crown land.<sup>25</sup>

The Report recommended that “Aborigines should, generally speaking, be housed or otherwise accommodated in the places where they are accustomed to live, provided that is their wish.” The Land Councils could make submissions upon behalf of the Aborigines to the Lands Commission which would “make recommendations to the Government concerning the acquisition of the necessary land for Aborigines in town. Where monies would be required for such acquisitions, they should come from the Aboriginal Land Fund.”<sup>26</sup> Woodward declared that “the aim should be that, within a reasonable time, all Aboriginal groups are living or camping on land in which they have an interest.” The interest to be held would be that held by “other members of the urban community”, normally a special purpose lease. The lease could be held “in the first place by trustees nominated by the Land Council and in due course, by others nominated by the local residents themselves.”<sup>27</sup>

The Woodward Report suggested that the Aboriginal Land Commissioner should have jurisdiction with respect to claims based on both traditional

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22. *Id.*, at paras. 225-259.

23. *Id.*, at para. 271.

24. *Id.*, at paras. 228-235, 273.

25. *Id.*, at para. 276.

26. *Id.*, at para. 328.

27. *Id.*, at paras. 283-286.

entitlement and "the needs of individual Aborigines or of Aboriginal groups or communities in the Northern Territory for land to be used for residential, employment or other purposes" and be required to report thereon.<sup>28</sup> Claims might be brought in respect of both Crown land and alienated land.<sup>29</sup> In considering claims it was suggested that the Commission should have regard to:

- (a) the strength of any traditional claims being made,
- (b) the number of Aborigines who could be advantaged if the claim were granted,
- (c) the nature and extent of the likely advantages to Aborigines,
- (d) the cost of purchasing or developing the land in question, and
- (e) any detriment which might be caused to others by the granting of the claim.<sup>30</sup>

Woodward suggested that the funding of the Aboriginal Land Fund and the Aboriginal Land Development Fund "could enable the recovery of some traditional lands, the purchase of other lands which have more meaning for Aborigines (perhaps because of long association) whose traditional connections have been broken, and assistance in the appropriate development of all lands for Aborigines, whether held by traditional owners or not."<sup>31</sup> Woodward contemplated that the Land Commission would consider claims for such funds in respect of alienated land and would recommend priorities, particularly with respect to the purchase of pastoral leases and urban lands.<sup>32</sup>

The recommendations of the Land Commission were to be considered by the Land Fund which would consider all applications and reach "an impartial decision." Aboriginal participation as trustees at the outset should develop to Aboriginal full voting control "as soon as appropriate Aborigines with the necessary experience became available to fill such positions." The Government should retain the power to veto or impose conditions upon any planned expenditure.<sup>33</sup> Woodward observed, "I do not envisage the trustees as needing any substantial staff support. They could be largely serviced by departmental officers, who could make, or arrange for, any enquires which the trustees found necessary."<sup>34</sup> It was stressed that a "sufficient amount should be set aside for each year to enable substantial visible progress to be made in this field" and, referring to a Commonwealth Government promise of five million dollars a year for ten years, wondered if perhaps larger amounts would not be necessary.<sup>35</sup>

### **(B) The Labour Government Bill and the Interim Land Commissioner**

In July 1974 the Commonwealth Labour Government announced acceptance "in principle" of the recommendations contained in Woodward's

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28. *Id.*, at Appendix D., cl. 13, 26-27.

29. *Id.*, at paras. 714-715.

30. *Id.*, at paras. 716, 250.

31. *Id.*, at para. 260.

32. *Id.*, at para. 714.

33. *Id.*, at paras. 266-268.

34. *Id.*, at para. 270.

35. *Id.*, at para. 261.



Second Report. The *Aboriginal Land Fund Act* and the *Aboriginal Loans Commission Act*, which are considered below, were enacted that year. On October 16, 1975 the Government presented the *Aboriginal Land (Northern Territory) Bill 1975* to the House of Representatives. It adopted most of the recommendations of the Woodward Report including the establishment of an Aboriginal Land Commissioner to consider claims founded upon traditional entitlement and “needs of Aboriginal for land to be used for residential, employment or other purposes.”

Mr. Justice Ward of the Supreme Court of the Northern Territory was appointed Interim Land Commissioner pending the passage of the legislation. He heard claims to urban land in and around Alice Springs and Darwin and made recommendations with respect thereto. He reported in respect of four claims to Parliament on November 11, 1975. No further reports by Mr. Justice Ward were made public and hearings ceased early in 1976.

On November 11, 1975 both Houses of the Commonwealth Parliament were dissolved. On June 4, 1976 the Commonwealth Liberal-National County Government introduced the *Aboriginal Land Rights (Northern Territory) Bill 1976*. The Bill provided for the establishment of an Aboriginal Land Commissioner with jurisdiction to deal with applications based upon “traditional ownership” but not upon “needs”. The *Aboriginal Land Rights (Northern Territory) Act 1976*<sup>36</sup> was assented to on December 16, 1976.

The recommendations of the Interim Land Commissioner as to urban land required to meet claims founded upon a “needs” basis were met by the leasing of public land. In September 1976 the Commonwealth Government announced that “most of the applications [made to Ward J.] for camping and housing areas had been agreed to” and that leases would be granted to Aboriginal associations with respect to six Alice Springs urban areas. By the end of 1980 public land had been leased in eight areas of Alice Springs, four areas of Darwin and two areas of Katherine.

### **(C) The Aboriginal Land Commissioner**

The Aboriginal Land Commissioner is empowered to hear traditional land claims and recommend the granting of title with respect to “unalienated Crown land or alienated Crown land in which all estates and interests not held by the Crown are held by or on behalf of Aboriginals” in the Northern Territory.<sup>37</sup> To date the Minister for Aboriginal Affairs has in large part accepted the recommendations of the Commissioner.

With respect to alienated Crown land generally the Commissioner is empowered merely:

- (b) to inquire into the likely extent of traditional land claims by Aboriginals to alienated Crown land and to report to the Minister and to the Minister for the Northern Territory, from time to time, the results of his inquiries.

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36. 1976, No. 191 (C'th).

37. *Id.*, at s.50(1)(a).

(c) to establish and maintain a register of the traditional land claims referred to in paragraph (b).<sup>38</sup>

There is no jurisdiction in the Commissioner to consider claims on a "needs" basis. Nor is the Commissioner empowered to recommend grants or purchases of land for the settlement or determination of claims to alienated Crown land. The Commissioner may merely determine the extent of traditional land claims to such land and compile a register thereof.

The Commissioner has stated that in the performance of section 50(1)(b) and (c) functions "I do not envisage a formal enquiry, certainly not a hearing of the sort that takes place in regard to unalienated Crown land. Essentially it involves the identification of areas of land, together with the names of those or some of those who appear to be the traditional owners." He has pointed out the limited significance of such functions:

... [I]t is important that the nature of the register be understood. It must be made clear to the Aboriginals concerned that the entry of a claim on the register carries no automatic consequences. It must be made clear to others, particularly the holder of the land in question that the register does not and cannot operate to deprive them of their land. It will be a source of information for various purposes, including, no doubt, decisions as to the purchase of land.<sup>39</sup>

"In making a report in connection with a traditional land claim" relating to alienated Crown land the Commissioner is required to have regard to "the cost of acquiring the interests of persons (other than the Crown) in the land concerned."<sup>39A</sup> The Ranger Inquiry relied upon such authority to tentatively recommend the resumption of pastoral leases adjacent to claimed land but said to be subject of traditional Aboriginal ownership. The Aboriginal Land Commissioner has not adopted such approach and, as the above declarations of policy indicate, has not been prepared to issue recommendations except with respect to alienated Crown land held by or on behalf of Aboriginals.

The Commissioner has no jurisdiction at all with respect to land other than "unalienated Crown land" and "alienated Crown land". He accordingly has no jurisdiction with respect to land the subject of a grant in fee simple, which is excluded from the definitions of "Crown land".<sup>40</sup> The areas of land excluded on such account, other than grants to Aboriginal Land Trusts, is not great because of the historical policy of granting leasehold rather than freehold interests in non-urban land in the Northern Territory. A statutory vesting may be held to constitute a "grant in fee simple" as appears to have been the conclusion of the Commissioner with respect to the vesting of the Uluru (Ayers Rock-Mount Olga) National Park in the Director of National Parks and Wildlife.<sup>40A</sup> Also, excluded from the definition of "Crown land" and accordingly from the Commissioner's jurisdiction is "land set apart for, or dedicated to, a public purpose under the *Lands Acquisition Act* or under any other Act." The Commissioner has determined that only land set apart or dedicated

38. *Id.*, at s.50(1)(b)(c).

39. Annual Report, Aboriginal Land Commissioner, June 30, 1978 at 5.

39A. 1976, No. 191, s.53(3)(d) (C'th).

40. *Id.*, at s.3(1).

40A. *Uluru claim* (Appendix).

pursuant to a Commonwealth Act is excluded.<sup>41</sup> The Commissioner would accordingly have regarded the Uluru (Ayers Rock-Mount Olga) National Park as so excluded upon proclamation under the *Commonwealth National Parks and Wildlife Conservation Act* if it was not in any event beyond the jurisdiction of the Commissioner. The Commissioner has refused to exclude from his jurisdiction lands set apart by "laws of the Northern Territory" as a reserve for travelling stock<sup>42</sup> and a desert wildlife sanctuary.<sup>43</sup> He has emphasized that a "setting apart" of land must comply with the prescribed requirements of the Act under which the land is purported to be set apart.<sup>44</sup>

"Land in a town" is excluded from the definitions of "unalienated Crown land" and "alienated Crown land".<sup>45</sup> The Commissioner has no jurisdiction at all with respect to "land in town", and in particular none to hear claims and recommend the acquisition and purchase of land to meet such claims as was suggested in the Woodward Report. Town "has the same meaning as in the law of the Northern Territory relating to the planning and developing of towns and the use of land in or near towns, and includes any area that, by virtue of regulations in force under that law, is to be treated as a town."<sup>46</sup> The definition allows the exclusion from the Commissioner's jurisdiction not only of lands currently used for urban development, but also those set apart for future use. In the *Uluru* claim the claimants conceded that the proposed Yulara village site adjoining the Ayers Rock-Mount Olga National Park was "land in a town".<sup>47</sup> More significant are the large areas of land about the towns of Darwin, Alice Springs, Tennant Creek and Katherine described to be town land under the Northern Territory regulations made on December 28, 1978. The land so declared about Darwin amounted to 4,350 square kilometers. In the *Kenbi (Cox Peninsula) Claim* it was sought to exclude this area from the land subject to claim. The Commissioner upheld the objection to the claim upon reasons delivered on 20 December 1979 wherein he determined that the regulations were validly promulgated insofar as it had not been shown that the land was not "reasonably capable of having some connection with or fulfilling a town planning purpose because it includes the Cox Peninsula."

The Commissioner concluded that, because bad faith could not be imputed to the Administrator of the Northern Territory, he could not inquire into the motives with which the regulations were made. On December 24, 1981 the High Court of Australia issued an order for mandamus to the Commissioner, declaring that the Commissioner had jurisdiction to entertain a claim that the regulations were invalid because they were made for the ulterior purpose of removing the land from the reach of a land rights claim.<sup>47A</sup>

41. The *Aboriginal Land Rights (Northern Territory) Act* has been suggested by the Commissioner to distinguish between "laws of the Northern Territory" and Acts of the Commonwealth. At the time of the enactment of the Act the laws of the Northern Territory were described as "ordinance" not "Acts". See, *Kenbi Land Claim — Status of Islands* decision, June 27, 1980.

42. *Mudbura* claim, para. 10.

43. *Warlpiri* claim, para. 369.

44. *Uluru* claim (Apdx. 1); *Willowra* claim (paras. 40-41); *Finniss River* claim (paras. 51-52).

45. 1976, No. 191, s.3(1) (C'th).

46. *Id.*, at s. 361.

47. *Uluru* claim, paras. 12, 16.

47A. *Re Toohey, Ex parte Northern Land Council* (1981), 56 A.L.J.R. 164 (Aust. H.C.).

The Commissioner has no jurisdiction to hear traditional land claims and recommend the granting of title with respect to alienated Crown land except where "all estates and interests not held by the Crown are held by or on behalf of Aborigines." "Alienated Crown land" is "Crown land in which a person (other than the Crown) has an estate or interest."<sup>48</sup> It is clear that pastoral leases<sup>49</sup> and special purpose leases confer an estate or interest such that land subject thereto constitutes "alienated Crown land". The Commissioner has commented: "[t]here is no doubt, and no one suggested otherwise, that a special purposes lease constitutes an estate or interest so that this land may not be claimed."<sup>50</sup> The extent of pastoral leases in the Northern Territory severely restricts the ability of Aborigines to claim land. One commentator has observed that those Aborigines "whose traditional territory does not coincide with vacant Crown land are left in a position where town areas and cattle stations have totally alienated their land and the Act offers no redress." "They themselves would argue they have lost much in political terms by the introduction of the Act."<sup>51</sup>

Where a formal grant has not been made but a right against the Crown to an estate or interest in lands exists the Act includes such right in the meaning of an "estate or interest in land".<sup>52</sup> "It is I think designed to safeguard the position of a person who has complied with the requirements of the Crown Lands Ordinance or Special Purposes Leases Ordinance but who has not received a formal grant."<sup>52A</sup>

A more difficult problem to resolve is the status of grazing and occupation licences issued under the Crown lands legislation of the Northern Territory. Grazing licences may be issued for up to one year, and are generally renewed from year to year. An occupation licence may be issued for up to five years. Both forms of licence may be cancelled upon three months' notice and forfeited upon non-compliance with a condition of the licence. The Commissioner has concluded that such licences do not constitute "estates" or "interests in land" because they do not "fall into any of the accepted categories" nor are they "proprietary" in nature.<sup>52B</sup> In the *Finniss River*<sup>53</sup> claim he declared that the licences were creatures of statute and not profits à prendre. Land subject to such licences is accordingly subject to claim before the Commissioner. It is understood that a legal challenge to the jurisdiction of the Commissioner in this respect has been instituted.

The *Aboriginal Land Rights (Northern Territory) Act* expressly declares that "unless the contrary intention appears, a reference in this Act to an estate or interest in land" does not include a reference to a mining interest, an interest under the *Atomic Energy Act* or an interest arising by virtue of a miner's right.<sup>54</sup>

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48. 1976, No. 191, s. 3(1) (C'th).

49. Ranger Uranium Environmental Inquiry, Second Report at 253.

50. *Borroloola* claim, para. 129; *Uluru* para. 13; *Ranger* Report at 272.

51. A.B. Palmer, "Aborigines the Land Rights (N.T.) Act 1976 Forgotten", Feb. 1980.

52. 1976, No. 191, s. 3(2).

52A. *Borroloola* land claim, para. 142.

52B. *Borroloola* claim, para. 141; *Warpiri* claim, paras. 273-274.

53. 1981, para. 36.

54. 1976, No. 191, s. 3(2) (C'th).

The Commissioner has observed that a reading of the Act "must lead to the conclusion that no interest created under the *Mining Ordinance* can render land alienated Crown land."<sup>55</sup> Traditional land claims may accordingly be heard with respect to lands otherwise unalienated although subject to the issuance of tenements under the *Mining Act* and *Petroleum Act* of the Northern Territory. Such tenements will continue in effect upon the grant of title to an Aboriginal land trust but the issuance of further tenements is subject to the negotiation of consent and compensation agreements with the Land Councils.

Only alienated Crown land where "all estates and interests not held by the Crown are held by or on behalf of Aboriginals" is subject to traditional land claim before the Commissioner. Such land has been held to include pastoral leases purchased under the *Aboriginal Enterprises (Assistance) Act 1968* and the *Land Fund Act 1974* for the benefit of Aboriginals. In *In re Ross; ex parte Attorney General for Northern Territory (Utopia case)*<sup>56</sup> the Government of the Northern Territory sought a writ of prohibition against the Aboriginal Land Commissioner in respect of a traditional land claim to land comprising a pastoral lease, known as the Utopia Station, held by the Aboriginal Land Fund Commission. The majority of the High Court considered, upon examining the Land Fund Commission's statutory authority, that when the "Commission acquires an interest in land it must be for the purposes of enabling Aboriginals to occupy it" and accordingly "it involves no straining of language to describe the Commission's holding of its leasehold interests in Utopia Station as being 'on behalf of' Aboriginals." The Chief Justice dissented and favoured a restriction of the expression 'on behalf of' so as to apply only to lands held in trust. His reasons appear to consist of a discernment of a Parliamentary intention to "closely limit the areas of land with which the Commission might deal" and the use by Parliament of language "well understood in the area of land tenure." In the *Willowra* claim the Commissioner held a pastoral lease subject to claim where the shares for the company holding the lease were purchased with funds provided under the *Aboriginal Enterprises (Assistance) Act*. The shareholder had executed a declaration of trust in respect of the shares in favour of the Aboriginal community, and the company had executed a similar declaration of trust in respect of the pastoral lease. In the event of a pastoral lease being held subject to claim, the counsel for the Northern Territory Government pointed out in the *Utopia* case that "acceding to such a claim will convert an estate of leasehold into the fee simple contemplated by the *Land Rights Act* and that Aboriginal land may not be resumed, compulsorily acquired or forfeited."<sup>57</sup>

Alienated Crown land subject to claim has also been held to include interests held by Aboriginals in their individual capacities. Such discriminatory provision for claims against individual Aboriginal land holdings is contrary to Woodward's recommendations. In the *Borrooloola* claim the Commissioner concluded that a special purposes lease held by five Aboriginal brothers, sons of a European father and Aboriginal mother who settled on the leased

55. *Warpipi* claim, para. 306.

56. (1979), 54 ALJR 145 (Aust. H.C.).

57. *Utopia* claim (Appendix 1).

land, "may be claimed." He observed: "It is unlikely that Parliament had such a situation in mind when framing the terms of s.50(1)(a), nevertheless the language of the statute is clear enough."<sup>58</sup> The Commissioner recommended that the land subject to the lease should be granted to the traditional owners, which did not include the brothers. It is suggested that the Commissioner might readily have construed the meaning of 'held by, or on behalf of, Aboriginals' to refer to land held by, or on behalf of, a community of Aboriginals. Such would have allowed traditional land claims, founded essentially on communal title, to override only other Aboriginal communal interests. The Commissioner made no suggestions as to how the Minister should treat the interests of the Aboriginal brothers. Section 53(1)(d), requires the Commissioner to report upon the cost of acquiring the interests of such persons in alienated Crown land and assumes compensation will be payable. In January 1981 the Minister stated that title would not issue to the Aboriginal Land Trust until the issue was resolved and that further discussions would be held between the Land Council and the lessees.<sup>59</sup>

Upon the acceptance of the Woodward Report recommendations by the Commonwealth Government in 1974 a "freeze" was imposed upon the development of unalienated Crown land. No interests in land or mining interests were granted. The freeze was extended by later Commonwealth Governments until 1978. Upon attaining self-government and responsibility for land management and disposition in July 1978 the Northern Territory Government advised that "continuation of the freeze on the development of unalienated Crown land for a period of two years from 24 August 1978 will apply only to traditional land claims when they have been lodged with and accepted by the Aboriginal Land Commissioner." At that time it was expected that all land claims before the Commissioner would be resolved by August of 1980. The freeze expired on August 24th, 1980. The freeze sought to maintain lands as 'unalienated Crown land' subject to claim during the period that the *Aboriginal Land Rights (Northern Territory) Act* was introduced and traditional land claims were filed thereunder. The expiration of the freeze in 1980 allows Crown land to be alienated, for example by the grant of a pastoral lease, and thus excludes such areas of land from claim.

The Commissioner has jurisdiction only with respect to "traditional land claims". Such claims require proof of traditional Aboriginal ownership by a local descent group of Aboriginals.<sup>60</sup> Proof of traditional Aboriginal ownership entails the establishment of spiritual affiliations to a site on the land and entitlement by Aboriginal traditions to forage as of right over the land. Persons of only partial Aboriginal descent may have difficulty meeting such burden of proof inasmuch as their ancestors or themselves may have left their traditional lands and not maintained their spiritual affiliation. As Woodward feared the limitation of claims to those based on traditional entitlement may work to exclude claims by persons of only partial Aboriginal ancestry more than those of "full-blood".

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58. *Borroloola* claim, para. 202.

59. *Commonwealth Record*, Jan. 19, 1981.

60. 1976, No. 191, s. 50(1)(a), 3(1).

61. *Id.*, at s. 3(1).

The definition of "Aboriginal" in the Act is "a person who is a member of the Aboriginal race of Australia."<sup>61</sup> In the *Uluru* claim the question arose whether children of a "white father and a black mother" were "Aboriginals" under the Act for the purpose of establishing traditional Aboriginal ownership. The Commissioner observed:

I was not directed to any authoritative definition of that expression. In a Victorian will construction case, *Re Bryning deceased*<sup>62</sup>, Lush J took the view that, when used to describe a general body of persons, the words "aborigine" and "aboriginal" were not confined to persons of full-blood.

Without seeking to resolve the matter finally, I am of the opinion that these children are members of the Aboriginal race. The definition in the Act is genetic rather than racial.<sup>63</sup>

In the *Finniss River*<sup>64</sup> claim the Commissioner declared that "there is nothing in the Act to compel the view that a person who is descended from both Aboriginal and non-Aboriginal ancestors cannot be considered an Aboriginal." He refused to lay down "rigid criteria" but expressly adopted Woodward's comments that "artificial barriers in particular those based on degrees of Aboriginal blood, must be avoided." He indicated however that "persons whose predecessors were predominantly non-Aboriginal" might not necessarily qualify as Aboriginals within the Act.<sup>65</sup> The Commissioner indicated an undefined regard for beliefs and customs and the recognition that might be accorded persons of mixed blood as a member of a tribal, linguistic or other group.

In the *Finniss River* claim many of the claimants among the Kungarakany were persons "born to an Aboriginal woman and a European man or descended from such union." The Commissioner referred to the "serious issues" raised thereby as to "the existence of local descent groups, their composition and the 'Aboriginality' of many of the claimants."<sup>66</sup> In the result the claimants established their claims before the Commissioner who recommended the grant of title to the unalienated Crown land in the claimed area.<sup>67</sup>

The practice and remarks of the Commissioner indicate that land may be formally claimed before him by persons of only partial Aboriginal descent provided their predecessors are not predominantly non-Aboriginal. Such claims must, of course, be based on traditional entitlement and may afford no ground for grant to urban Aboriginals.

#### (D) The Ranger Inquiry

The Ranger Uranium Environmental Inquiry was empowered to inquire into the "environmental aspects" of the proposed Ranger uranium mine in the Northern Territory and to determine the traditional Aboriginal entitlement to the land. A finding of the Inquiry of entitlement "by Aboriginal tradition to the

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62. (1976) VR100.

63. *Uluru* claim, paras. 114-115; also *Borroloola* claim, para. 131.

64. *Finniss River* claim, paras. 117-121.

65. *Id.*, at para. 121.

66. *Id.*, at para. 105.

67. *Id.*, at paras. 243, 268.

use or occupation'' of the land was declared to take effect as if the Aboriginal Land Commissioner had recommended under paragraph 50(1)(a) of the *Aboriginal Land Rights (Northern Territory) Act* that the land be granted to an Aboriginal Land Trust.<sup>68</sup> Despite the absence of an explicit requirement to prove ''traditional Aboriginal ownership'' the Inquiry decided to act insofar as possible as the Aboriginal Land Commissioner was required to do under the Act and accordingly imposed such requirement. The Northern Land Council made no objection to such requirement.<sup>68A</sup> The Inquiry determined that traditional Aboriginal owners were entitled to the unalienated Crown land claimed and recommended the land be transferred to land trusts. The Commonwealth Government accepted such recommendation and provision for the land to be transferred was made by attachment to Schedule I of the *Aboriginal Land Rights (Northern Territory) Act*, which also listed the former reserves.<sup>69</sup>

The Mudginberri and Munmarlay pastoral leases were situated adjacent to the land claimed and were part of the region subject to the Inquiry. Counsel for the Northern Land Council conceded that the leases were alienated Crown land and not subject to transfer under the *Aboriginal Land Rights (Northern Territory) Act*. A recommendation that the properties be resumed by the Crown at an early date was sought so that the properties could then be subject to a land claim. The Inquiry observed that, in making such a recommendation, it ''would be acting in much the same way as a Land Commissioner is intended to do under sections 50(1)(b) and (3)(d) of the Act.''<sup>70</sup> The Inquiry recommended ''in accordance with the suggestion of the Northern Pastoral Services (the owners of the two pastoral leases), and the request of the Northern Land Council, ...that their properties be resumed.''<sup>71</sup>

The Commonwealth accepted the recommendation of the Ranger Inquiry and purported to compulsorily acquire the pastoral leases under the *Lands Acquisition Act* on June 23, 1978. The lessees began proceedings to challenge such compulsory acquisitions. In order to render the status of the land certain and to enable land claims before the Aboriginal Land Commission<sup>72</sup> with respect to the land to proceed the *Land Acquisition (Northern Territory Pastoral Leases) Act 1981*<sup>73</sup> was enacted. The Act vested all non-mining interests in the land subject to the Mudginberri and Munmarlay leases in the Commonwealth, subject to a right of compensation as provided under the *Lands Acquisition Act*.<sup>74</sup> The Act represents one of the rare occasions in contemporary times in Australia when interests in lands have been compulsorily acquired to make land available for Aboriginal claims. The result was that the claim succeeded as to eastern parts of the Mudginberri lease but largely failed as to the remainder of the land resumed.<sup>75</sup>

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68. 1976, No. 191, s.11(2) (C'th); Ranger Inquiry, Second Report at 254.

68A. *Alligator River Stage II* land claim, 1981, paras. 8-9.

69. *Ibid.*

70. Ranger Inquiry, Second Report at 253.

71. *Id.*, at 272.

72. *Alligator River Stage II* land claim, Aboriginal Land Commissioner, July 1981, No. 105, s.14 (C'th).

73. 1981, No. 105 (C'th).

74. *Id.*, at s.5, 7, 10, Schedule.

75. *Alligator River, Stage II*, Land Claim, Aboriginal Land Commissioner, July 1981 para. 212, Exhibit 2, 58.



#### IV. Land Purchase

No State legislation provides for the compulsory acquisition of alienated land for the purpose of providing land for Aboriginal communities. In South Australia,<sup>76</sup> New South Wales<sup>77</sup> and Western Australia<sup>78</sup> the Aboriginal Land Trusts are, however, empowered to *acquire* land by gift, grant or purchase. In 1967 the Minister for Aboriginal Affairs in Victoria was empowered to purchase or otherwise acquire land to "promote the interests of Aborigines" but such authority was repealed upon the transfer of all functions in that respect to the Commonwealth in 1974.<sup>79</sup> There has never been any such legislation enacted in Queensland or Tasmania. The State authority to acquire alienated land in South Australia, New South Wales and Western Australia has not been used by the States to purchase interests in land to transfer to the Land Trusts. Such State inaction is to some extent explicable by reference to the role of the Commonwealth in the funding and purchase of land for such purpose, and the provision for the increased financial responsibility of the Commonwealth with respect to the administration of Aboriginal affairs in the States.<sup>80</sup>

Commonwealth involvement in the purchase of alienated land for Aboriginal communities had initiated with the Commonwealth Capital Fund for Aboriginal Enterprises. It developed significantly following Woodward's Second Report. The Commonwealth Government responded to the recommendations of the Woodward Report by the enactment of the *Aboriginal Loans Commission Act 1974*<sup>81</sup> and the *Aboriginal Land Fund Act 1974*.<sup>82</sup> The former Act established the Aboriginal Loans Commission and the latter the Aboriginal Land Fund Commission. Both Commissions were composed of a Chairman and four other members appointed by the Governor General. Two of the four members other than the Chairman were required to be Aborigines. The members were appointed for a term of office not to exceed five years. Both Commissions were expressly subject in the performance of their functions to "any general directions given by the Minister." "Aboriginal" was defined in both Acts as "an indigenous inhabitant of Australia." Neither Commission declared an interpretation of the expression in its Annual Reports. Practice in the application of monies and purchases indicated that no distinction was drawn between persons upon the basis of different degrees of Aboriginal ancestry. Practice followed the usage of the Commonwealth Department of Aboriginal Affairs which defined an Aboriginal as a "person of Aboriginal descent who identifies himself as such and who is recognized by the Aboriginal community as being an Aboriginal."

##### (A) Aboriginal Loans Commission 1974-1980

The *Aboriginal Loans Commission Act 1974* repealed the *Aboriginal Enterprises (Assistance) Act 1968*. The Act established the Aboriginal Enter-

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76. *Aboriginal Lands Trust Act*, 1966, No. 87, s.5 (SA).

77. *Aborigines Act*, 1969, No. 7, s.10H (NSW).

78. *Aboriginal Affairs Planning Authority Act*, 1972, No. 24, s.23(b) (W.A.).

79. 1967, No. 7574, s.26. (repealed) *Transfer of Functions Act*, 1974, No. 8606 (Vic).

80. *Aboriginal Affairs Planning Authority Act, Amendment Act*, 1973, No. 100 (W.A.).

81. 1974, No. 103 (C'th).

82. 1974, No. 159 (C'th).

prises Fund as a successor to the Commonwealth Capital Fund of Aboriginal Enterprise. The Fund was vested in the Commission. Its objects were those of the Fund established under the 1968 Act, but its application was more broadly stated to include the acquisition of real or personal property.<sup>83</sup> The Commission was specifically empowered, in the furtherance of those objects, "to sell, lease or otherwise make available property so acquired to an Aboriginal or Aborigines or to an approved body, upon such terms and subject to such conditions as are determined by the Commission."<sup>84</sup> The Annual Reports of the Commission do not indicate to what extent land or leases were purchased. It appears that to a large extent it left such acquisition to the Aboriginal Land Fund Commission. An Aboriginal Housing and Personal Loans Fund was vested in the Aboriginal Loans Commission, but the monies were not applicable to the acquisition of community lands, but rather "to assist Aboriginal families to obtain housing and to encourage them to become home owners."<sup>85</sup>

## (B) Aboriginal Land Fund 1974-1980

### i. Objects and Power

The long title of the *Aboriginal Land Fund Act 1974* was an Act to assist Aboriginal communities to acquire land outside Aboriginal reserves. The Act established the Aboriginal Land Fund and vested it in the Aboriginal Land Fund Commission. The Commission was empowered to "acquire by agreement any interest in land", including by purchase of the shares of a corporation holding such interest, for the purpose of granting an interest in land upon such terms and conditions as it thinks fit to an Aboriginal corporation or Aboriginal land trust so as to enable members of that corporation or Aborigines "to occupy that land".<sup>86</sup> The Commission might also grant monies to such bodies to enable the acquisition of such an interest for that purpose.<sup>87</sup>

The Commission bluntly explained its object as a supplementary method of providing land to dispossessed Aboriginal groups:

The Commission sees its purpose as to supplement other measures to provide landed property for groups which have been dispossessed, which have not had access to a share of the Australian national estate by inheritance, and which have little if any chance to acquire property by participation in the Western economy. The whole implication of a land rights policy is compensatory. The purpose is in the wider sense political, to do away with the situation of a helpless and dependent minority.

Government policies may pursue such an objective by various means. A land purchase program is one of them. Its advantage is that it contributes to the solution of the problem by compensating the non-Aboriginal owner at a price to which he has agreed through a recognized method of bargaining. It is especially suited (if any procedure can be) to deal with the so-called white 'backlash' reaction. It can be a continuous process, operating in a flexible way to deal with particular problems in particular areas.<sup>88</sup>

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83. 1974, No. 103, s.20(1)(c) (C'th).

84. *Id.*, at s.22.

85. Annual Report, 1978-79.

86. 1974, No. 159, s.20-21 (C'th).

87. *Id.*, at s.19 (C'th).

88. Aboriginal Land Fund Commission, Annual Report, 1979-80.

## ii. Funding

In the Commission's first Annual Report it observed:

The effectiveness of the future operations of the Aboriginal Land Fund Commission will be dependent on the level of funds made available to the Commission by the Australian Government.<sup>89</sup>

The Woodward Report had referred to a funding level of five million dollars per annum. Over the five and one half years of operation of the Commission only \$6,217,500 was paid into the Land Fund. \$2,106,500 was initially paid into the Fund as the "unexpended balance..of the amount set aside...for acquisition of properties off reserves" under section 17(1)(a) of the Act. \$2,018,000 was appropriated for 1975-76, no amount for 1976-77, \$750,000 for 1977-78, \$563,000 for 1978-79, and \$800,000 for 1979-80. In the Commission's final year of operation it commented that because of the decline in appropriations and the rise in prices of land and stock it "was no longer able to bid for those properties of high value which formed some of its earlier purchases." The Commission did not, however, generally blame a shortage of funds for its failure to acquire more land in its years of operation. Rather it ascribed such failure to the difficulties and delays occasioned by Ministerial directives, bureaucratic procedures, and State obstruction.

A particular cause of difficulties and delays arising from the manner of funding were the bureaucratic procedures required to secure funding of items other than land and fixtures. The Commission was only empowered under the Act to acquire or assist the acquisition of interests in "land", defined by the Attorney General to exclude stock and moveable property.

This has made it necessary for the Commission, from its inception, to seek matching funds from the Department of Aboriginal Affairs where a 'walk-in walk-out' purchase (which is the standard transaction in the pastoral industry in some States) is involved. Through this dependence on departmental funding, the Commission has always been to some extent subject to departmental decisions and delays in reaching them.

Such hindrances, and the fact that they may cause purchases to be missed or frustrated, were the main reasons why no purchase was completed in the last six months of the year.<sup>90</sup>

Not until 1979-80 were such difficulties eased by the provision in advance of a fixed amount of the Enterprise Vote of the Department of Aboriginal Affairs. To June 30, 1980 \$1,741,353 had been provided by the Department of Aboriginal Affairs.

## iii. Requirements, Factors to be Considered and Priorities

The Commission was subject to Ministerial direction.<sup>91</sup> The Minister directed in May 1975 that the Commission should only act upon *claims* for land.

The Commission should only acquire land when an Aboriginal community has requested that such land should be acquired. Similarly, the Commission should not make monies available to State Aboriginal Land Trusts for the purpose of stockpiling land in the expectation of undefined future Aboriginal interest.<sup>92</sup>

89. *Id.*, 1974-75.

90. *Id.*, 1977-78.

91. 1974, No. 154, s.5(2) (C'th).

92. Aboriginal Land Fund Commission, Annual Report, 1974-75.

In due course the Commission determined that ad hoc meetings and deputations largely through the local officers of the Department of Aboriginal Affairs did not adequately "provide the information of needs required as the basis of a long-term purchase program."<sup>93</sup> In August 1978 the Commission accordingly held a Land Needs Conference of representatives of Aboriginal Land Councils, Aboriginal Land Trusts and other Aboriginal bodies "basically concerned with acquisition of land." The proposals, not suggested to be exhaustive of needs, have been summarized as follows:

	Purchase					Excision	Other	Total
	Pastoral	Rural	Town	Urban	Site			
South Australia	3	—	2	1	1	—	—	7
Victoria/Tasmania	—	4	—	—	—	—	4	8
Queensland	—	7	3	1	5	—	5	21
New South Wales	12	10	4	—	1	—	3	30
Northern Territory	21	—	2	1	—	46	9	79
Western Australia	36	2	8	—	—	21	4	71
	72	23	19	3	7	67	25	216

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The Minister further directed in May 1975 that:

In order that as many Aboriginal groups as possible may benefit from the Fund, the Commission should not provide land to groups which already have adequate land available to them.<sup>95</sup>

The emphasis of the Land Fund was to be on the dispossessed and those for whom other mechanisms to receive land were not available, including those persons of only partial Aboriginal descent in "settled" areas of Australia. The Commission observed with respect to the provision for traditional land claims under the *Aboriginal Lands Rights (Northern Territory) Act* that "the emphasis in the Northern Territory should be on other requirements."

In dealing with claims the Commission was directed by the Minister to take into account the matters Woodward had listed as appropriate for consideration by the recommended Aboriginal Land Commission in recommending priorities in the acquisition or development of land.<sup>96</sup> Woodward had suggested the following factors:<sup>97</sup>

- a. the number of Aborigines
  - i. claiming the land as their own
  - ii. with tribal affiliations with the area and intending to live there
  - iii. who would be advantaged if the claim were met, and its nature and extent
- b. the strength of any traditional claims being made
- c. the cost of purchasing and developing the land
- d. the viability of suggested development schemes
- e. the availability of administrative and expert assistance in the area
- f. any detriment to others caused by the granting of the claim.

93. *Id.*, 1978-79.

94. *Id.*, 1979-80, Apdx. III.

95. *Id.*, 1974-75.

96. *Id.*, 1974-75.

97. Second Report, para. 250, 716.

The Aboriginal Land Commissioner is required to consider such matters in his report to the Minister upon a traditional land claim under the *Aboriginal Land Rights (Northern Territory) Act*.<sup>98</sup>

The Minister made clear that such considerations should not preclude claims based on other than traditional grounds:

While the strength of traditional ownership of particular areas of land is an important factor, the Commission should have regard to communities (particularly in N.S.W. and Victoria) which, while not being able to claim traditional ties, have had long association with particular areas since European settlement commenced. Where traditional ties or long association no longer exist, economic considerations for the usage of land should have a greater role in influencing the Commission's decisions. This does not mean however, that economic factors should outweigh social considerations and the Commission is empowered to acquire land for purely social purposes.<sup>99</sup>

The Minister thereby specifically declared the need to provide lands to groups made up of persons of only partial Aboriginal descent.

In response to the Ministerial directives the Commission declared the following policy:

- (a) that it would attempt 'to give a fair allocation of funds throughout the Commonwealth';
- (b) that it would purchase to meet 'social needs, economic needs and needs which are both social and economic', and
- (c) that it should aim to purchase in each State and the Northern Territory pastoral leaseholds, farming blocks, and smaller blocks for economic purposes, for home areas, and for traditional and ritual purposes.<sup>100</sup>

The Commission adopted the following priorities:

1. Land required to meet both traditional, social and economic needs; or to meet both non-traditional, social and economic needs.
2. Land required to meet social needs.

The belief on which this is based is that any Aboriginal group must have some secure property in land before it can make economic progress; that without 'home' areas, social disintegration and absence of any stimulus to work in order to change one's circumstances will continue. Such a 'home area' may or may not include places sacred in tradition. Where it includes such places the case for purchase is increased and confirmed, even if the area itself has little or no economic potential. The Commission considers that economic development depends on the state of mind which conceives achievement of change to be possible.

3. Land required to meet economic needs.

With Aboriginals, purchases will seldom if ever be requested for purely economic purposes. Even the purchase of a pastoral leasehold for a group with no particular ties to the place may fulfil some of the need for a home area; for the attitude to the area will seldom be primarily motivated by the chance to exploit it economically. This does not mean that it will not bring economic development in time; in fact it will provide one of the prerequisites for such development.<sup>101</sup>

98. 1976. No. 191. s.51(3) (C'th).

99. Aboriginal Land Fund Commission. Annual Report. 1974-75.

100. *Id.*, 1979-80.

101. *Id.*, 1979-80.

A further priority adopted by the Commission in 1976-78 was "that it would purchase to protect Aboriginal people from belligerent land owners; this category is termed 'purchase for special circumstances'."

#### iv. The Land Acquired

During the operation of the Fund the Commission made grants under section 19 in the amount of \$1,480,489 to Aboriginal corporations and land trusts, and acquired properties under section 21 to the value of \$4,567,083. The properties thereby acquired were:<sup>102</sup>

Property	Lease title holder	Size	Cost		Reason for purchase
			S(b) ALFC	S(a) DAA	
<i>Northern Territory</i>					
Mt Allen Station	ALFC	2 359 km <sup>2</sup>	200 068	100 000	Economic/Social
Ti Tree Station	ALFC	3 587 km <sup>2</sup>	214 442	28 711	Economic/Social
Utopia Station	ALFC	1 963 km <sup>2</sup>	156 861	30 000	Economic/Social
Wattie Creek (Wave Hill)	Murramulla Gurindji PL	3 072 km <sup>2</sup>	262 987	—	Economic/Social
Bazzo's Farm	ALFC	0.734 ha	7 838	—	Social
Chilla Well	ALFC	2 991 km <sup>2</sup>	26 073	—	Social
Lynchs Farm	ALFC	68.0 ha	—	80 000	Social
Narwietooma Excision	Mbunghara Incorporated	2.59 km <sup>2</sup>	13 000	—	Social
Kybrook Farm	ALFC	97.1 ha	15 000	—	Social
Mt Ebenezer Excision	Imampa Community	20 km <sup>2</sup>	24 302	—	Social
<i>Western Australia</i>					
Billanooka Walgun Stns.	WAALT	1 744 km <sup>2</sup>	42 281	26 718	Economic/Social
Coongan Warralong Stns.	ALFC	1 783 km <sup>2</sup>	150 719	75 000	Economic/Social
Dunham River Station	WAALT	4 270 km <sup>2</sup>	190 512	50 320	Economic/Social
Lake Gngangara	WAALT	64.0 ha	201 620	—	Social
Noonkanbah Station	WAALT	4 728 km <sup>2</sup>	340 544	200 000	Economic/Social
Pandanus Park	WAALT	87.2 ha	23 000	52 000	Social
Arbuckle's Farm	ALFC	2.73 km <sup>2</sup>	70 000	4 950	Economic
Frazier Downs Station	ALFC	860 km <sup>2</sup>	59 681	100 000	Economic/Social
Lake Gregory/Billiluna Stns.	WAALT	4 582 km <sup>2</sup>	275 778	112 500	Economic/Social
Argyle Downs Excision	WAALT	516 km <sup>2</sup>	25 000	10 750	Social
Moreil's Farm	WAALT	1.50 km <sup>2</sup>	40 965	—	Economic/Social
Leonora Land	ALFC	0.304 ha	12 124	—	Social
<i>South Australia</i>					
Bartletts Farm	ALFC	8.9 km <sup>2</sup>	292 390	63 260	Economic
Bartsch Farm	SAALT	15.4 km <sup>2</sup>	40 000	—	Economic/Social
Kenmore Park Station	ALFC	7 368 km <sup>2</sup>	458 996	48 182	Economic/Social
Bell's Farm	ALFC	30.3 ha	38 500	1 500	Social
Port Lincoln Land	ALFC	0.214 ha	55 000	—	Social
<i>Victoria</i>					
Baroona Echuca	ALFC	1.28 km <sup>2</sup>	194 815	45 500	Economic/Social
New Norfolk Gippsland	ALFC	12.7 ha	38 024	29 300	Social

<i>Property</i>	<i>Lease title holder</i>	<i>Size</i>	<i>Cost</i>		<i>Reason for purchase</i>
			<i>S(b) ALFC</i>	<i>S(a) DAA</i>	
<i>New South Wales</i>					
Glanville Mungindi	ALFC	21.5 km <sup>2</sup>	168 881	11 152	Economic/Social
Ross Property	ALFC	4.0 ha	34 267	—	Social
Willot Property Coraki	ALFC	8.9 ha	12 002	—	Social
Purfleet Land	ALFC	0.305 ha	2 000	—	Social
Corolamo Island	ALFC	5.7 ha	27 500	—	Economic/Social
Bundjalung Alstonville	ALFC	87.0 ha	82 797	—	Economic/Social
Forgionne Property	ALFC	48.6 ha	75 287	1 980	Economic/Social
Jiggamy Property	ALFC	61.5 ha	93 658	—	Economic/Social
The Pines Property	ALFC	2.08 km <sup>2</sup>	218 994	31 043	Economic/Social
Tucki Property	ALFC	79.53 km <sup>2</sup>	113 258	—	Economic/Social
Warren Land	ALFC	14.24 ha	12 513	—	Economic/Social
Moonacullah	NSWALT	4.9 km <sup>2</sup>	500	—	Social
Geyer's Farm	ALFC	22.84 ha	131 424	20 737	Economic/Social
Ferla Balranald	ALFC	8.34 km <sup>2</sup>	129 987	33 850	Economic/Social
Collum Collum Station	ALFC	40.47 km <sup>2</sup>	250 511	74 720	Economic
Mackintosh/Harwood Farms	ALFC	1.63 km <sup>2</sup>	272 605	39 070	Economic
Penryn Peak Hill	ALFC	10.71 km <sup>2</sup>	172 635	33 000	Economic
East Bootingee Menindee	ALFC	24.64 km <sup>2</sup>	108 700	—	Economic/Social
<i>Queensland</i>					
Murray Upper Land	ALFC	28.40 km <sup>2</sup>	210 047	—	Economic/Social
Redlynch Land	ALFC	0.732 ha	—	3 600	Social
Daintree Land	ALFC	1.76 km <sup>2</sup>	90 000	—	Economic/Social
Wallace Land Kuranda	ALFC	38.4 ha	86 000	200	Economic/Social
Prettejohn Land Cairns	ALFC	14.2 ha	60 697	—	Social
<i>Tasmania</i>					
Trefoil Island	ALFC	1.03 km <sup>2</sup>	199 654	—	Economic
Cape Barren Land	ALFC	19.80 ha	3 110	—	Social
Launceston Land	ALFC	0.10 ha	31 025	—	Social

### (a) Cattle Stations

The Fund acquired twelve major areas of pastoral land, situated predominantly in the Northern Territory and Western Australia, and ranging in area from 860 to 7368 square kilometres.

<i>Property</i>	<i>Area</i>
<i>Northern Territory</i>	
Mt. Allen Station	(km <sup>2</sup> ) 2,359
Ti-Tree Station	3,587
Utopia Station	1,963
Wattie Creek (Wave Hill)	3,072
Chilla Well	2,991
<i>Western Australia</i>	
Billanooka/Walgun Stations	1,745
Coongan/Warralong Stations	1,783
Dunham River Station	4,270
Noonkanbah Station	4,728
Frazier Downs	860
Lake Gregory/Billiluna Stations	4,582
<i>South Australia</i>	
Kenmore Park	7,368

No pastoral leases were acquired in Queensland because the State Minister of Lands refused to approve any attempted transfers of the leases the Commission acquired in the State under the *State Lands Act*.<sup>103</sup> Upon the refusal to approve the transfer of the Archer River Station lease the Minister explained that it was considered that sufficient land had already been set apart for the Aborigines, that the State was opposed to the provision of further lands "for development by Aborigines or Aboriginal groups in isolation", and that existing reserve lands suitable for pastoral stations had not been properly developed. The Community Relations Office under the *Commonwealth Racial Discrimination Act* has issued three certificates with respect to decisions of the Queensland Minister of Lands certifying that a valid complaint has been lodged and thereby permitting action under the Act. An action has now been commenced with respect to the refusal to approve the transfer to the Archer River property. The States of Western Australia and Victoria joined Queensland in challenging the constitutional validity of the *Commonwealth Racial Discrimination Act*. On May 11, 1982 the High Court of Australia upheld the validity of the Act and remitted the action with respect to Archer River to the Queensland Supreme Court for hearing.<sup>103A</sup>

In Western Australia the Minister of Lands has expressed opposition to the acquisition of pastoral leases for Aboriginal groups on the grounds of alleged inefficiency of Aboriginal management of pastoral properties and on the grounds that the terms of the leases did not allow the establishment of Aboriginal villages on the properties. In April 1980 the Minister advised that no commitment to approve the transfer of a lease "could be given until an assessment had been completed of the management and conduct of one particular pastoral lease which had previously been acquired for the benefit of Aborigines."<sup>104</sup> In October 1981 it was reported that approval would likely be forthcoming at the request of an Aboriginal community, located on a reserve where "living conditions are extremely poor with inadequate water, almost no housing and no job prospects."<sup>105</sup>

Acquisition of lands for Aboriginal communities in the more remote areas of Australia necessitates the purchase of pastoral leases. The States and the Territory have not generally been prepared to transfer the title to land subject to such leases to the Commission. The Commission has accordingly been required to comply with the covenants imposed upon pastoral leases and to arrange to meet its objectives in accordance with the boundaries of such leases. The Commission has observed that such difficulties hinder the achievement of its objectives particularly as State and Territory Governments appear to put "stock-raising before the needs of people." It has referred particularly to the non-viability of many pastoral leases and the enforcement of more onerous obligations with respect to a Commission-acquired lease than in the case of other pastoral leases.<sup>106</sup>

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103. 1962, No. 42, s.286 (Q'land).

103A. *Kwoowata v. State of Queensland*. See "The Australian", May 12, 1982. As yet unreported.

104. Aboriginal Land Fund Commission, Annual Report, 1978-80.

105. Cundelee, W.A. Western Mail, October 17, 1981.

106. Eg. Noonkanbah, Aboriginal Land Fund Commission, Annual Report, 1978-79, 1979-80.



### (b) Farms and Properties

The majority of the interests in land acquired by the Commission consist of some form of agricultural enterprise upon the land on which the community may live, e.g., vineyards — Geyer's Farm, New South Wales; cattle — Daintree, Queensland. They are described as having been acquired for "economic/social reasons." A large number of the properties are located in "settled" areas of Australia, particularly New South Wales. It is evident that persons of only partial Aboriginal descent have benefited from such purchases.

Five properties are described as being acquired for "economic" reasons. The properties consist of cattle, sugar-cane or other forms of farm that provide an economic base for the Aboriginal community.

### (c) Tasmania

The Aboriginal Land Needs Conference in 1978 asserted that a high priority should be accorded the provision of lands in Tasmania by the Commission. In 1978-79 an urban block and buildings were acquired for a community centre in Launceston, and in 1979-80 Trefoil Island a mutton bird island, and a small area of Cape Barren Island were acquired.

### (d) Metropolitan Areas

The Minister directed in 1975:

The Commission should not proceed with any purchase of land within the metropolitan area of any capital city except after consultation with the Minister, through the Department, as to the most appropriate source of funding for such purchase, e.g. Housing Associations, Housing and Personal Loans Fund (A.L.C.) and Aboriginal Hostels Ltd.<sup>107</sup>

The directive also stated that the "Land Fund should not as a general rule, provide land for purely housing purposes."

### (e) "Social" Reasons for Purchase

The remaining properties were acquired by the Commission for social reasons such as alcohol rehabilitation, recreation and the provision of community centres and areas.

## v. Obtaining the Best Form of Title

A Ministerial directive of May 1975 stated that:

Wherever practicable, the Commission should obtain the best form of title for Aboriginal land and seek the co-operation of State Governments in obtaining such title.

State Governments have generally not been prepared to enlarge the interest purchased by the Commission where the remainder was vested in the State. The Commission has acquired whatever interests in land were available "in the market-place." Large areas of land have accordingly been acquired in the form of pastoral leases. Freehold title has been acquired where available, particularly in Queensland, where it proved to be the only form of interest that might be acquired. The Chairman of the Commission has observed: "But freehold is expensive, so the Commission could not get enough to prove any real challenge to Queensland policies."<sup>108</sup>

107. *Id.*, 1974-75.

108. N. Peterson, *Aboriginal Land Rights* (1981). C.D. Rowley, *Destruction of Aboriginal Society* (Pelican 1972). Aboriginal Land Fund Commission at 255.

An exception to the above description of the policies of State Governments is afforded by South Australia. In 1979 the State Government transferred title to Bartsch Farm to the Land Trust. The farm had been acquired by the Trust with Commission funding. In 1981 title to Kenmore Park Station was transferred to the Pitjantjatjara under the *Pitjantjatjara Land Rights Act*.<sup>109</sup> In New South Wales the only instance of such "enlargement" of title to provide the "best form of title", was in the case of the former Moonacullah Reserve, for which the Commission provided \$500 to the New South Wales Aboriginal Land Trust.

#### vi. Inalienable

The Commission was required to ensure that the interest conferred upon the Aboriginal community was inalienable. A Ministerial directive of May 1975 stated:

Until such time as Aboriginal communities become incorporated under the proposed Aboriginal Councils and Associations Bill, the Commission should act under section 20 [by grant of an interest in land rather than by grant of monies under section 19] in order that the land made available shall not be disposed of.

The *Aboriginal Councils and Incorporated Aboriginal Associations Act 1976*<sup>110</sup> did not come into effect until 1978 because State Ministers feared the Act might intrude into State responsibilities for local government. The Act declares void any purported transfer or dealing in any estate or interest in land acquired by an Aboriginal Council or Incorporated Aboriginal Association from or as a result of the grant of monies by the Commonwealth.<sup>111</sup> The Commission has sought to comply with the Ministerial directive by the acquisition of interests in land in its own name and the granting of lesser interests to the Aboriginal communities. The Commission appears to have granted its entire interest to an Aboriginal community in only one instance, that being the well publicized case of the Wattie Creek (Wave Hill) lease.<sup>111A</sup> The Commission is barred by the Act from requiring any payment in spect of the granting of an interest in land.

The Commission has been prepared to grant monies to State Land Trusts to enable them to purchase interests in land, particularly in Western Australia. The Land Trusts, in turn, have sought to protect the inalienability of the land by sub-leasing the land to the Aboriginal communities. There are, of course, no Land Trusts in Queensland and Tasmania, and the Land Trusts in Victoria are confined to the communities of Framlingham and Lake Tyers. The *Aboriginal Land Fund Commission Act* imposes no restrictions upon the manner in which a Land Trust may dispose of lands acquired with Commission funding, but the Land Trusts in South Australia and Western Australia require the consent and prior approval respectively, of the State Minister for Aboriginal Affairs prior

109. 1981. No. 20 (SA) Sched. 1.

110. 1976. No. 186 (C'th).

111. *Id.*, at s.78(2)(5).

111A. The struggle of the Gurindji people for their traditional lands at Wave Hill received great publicity from 1966 to 1975 and was an important part of the "land rights movement" in Australia. In 1966 the Gurindji walked off the Wave Hill property in furtherance of their protest.

to such a disposition.<sup>112</sup> The New South Wales Aboriginal Land Trust is not subject to any restrictions on the alienation of "its property", which may explain the unwillingness of the Land Fund Commission to grant monies to enable the Land Trust to acquire lands.<sup>113</sup>

### vii. Provide Land Direct to Aboriginal Communities

Ministerial directive of May 1975 declared:

As a general rule, the Commission should provide land direct to Aboriginal communities rather than to State Land Trusts. Communities should, however, be made aware of any advantages available by vesting title in a Land Trust, for example, additional security of tenure or protection against mineral exploitation.

The Commission has sought to ensure that all Aboriginal communities for whom land is acquired obtain an interest in such lands. It has accordingly not granted interests in lands to Land Trusts, preferring to directly grant or sub-lease lands to the communities. Where greater "security of tenure" and "protection against mineral exploitation" are obtained by vesting title in a Land Trust, the Commission has granted monies to the Land Trust upon the understanding that the lands would be sub-leased to the communities. In South Australia vesting title in the Land Trust affords such benefits. In Western Australia such benefits are subject to the overriding control and direction of the Lands Trust vested in the State Minister for Aboriginal Affairs.

### viii. Ministerial Control and Direction

The Act declared that "the Commission shall perform its functions in accordance with any general directions given by the Minister."<sup>114</sup> The Commission considered that its functions were impaired by its subjection to Ministerial directives and the substance of particular directives. It referred, inter alia, to a directive of February 10, 1978:

[I have] decided to direct, pursuant to the power vested in me by section 5(2) of the Aboriginal Land Fund Commission Act that:

- (a) the Commission inform the Minister for Aboriginal Affairs of its intentions to enter into any negotiations for a property before an initial approach is made to a vendor and, in conjunction with this advice,
- (b) the Commission provide the Minister for Aboriginal Affairs with a statement outlining the reasons in support of the purchase (including the social and economic objectives, and the financial implications for the Commission and the Department). The statement should also contain information about the Aboriginal co-operation involved, in sufficient detail to enable the Minister to satisfy himself as to whether the members are members of a community of Aborigines.
- (c) The Commission be in receipt of the views of the Minister for Aboriginal Affairs, before taking a decision to purchase a property.<sup>115</sup>

The Commission observed with respect to the February 10, 1978 directive:

112. 1974, No. 24, s.20(2)(c) (W.A.).

1966, No. 87, s.16(5) (SA).

113. 1969, No. 7, s.101(1)(a) (NSW).

114. 1974, No. 159, s.5(2) (C'th).

115. Aboriginal Land Fund Commission, Annual Report 1977-78.

Conformity with this instruction made the process of purchase very difficult and time consuming. The effect was to give to officials handling Commission business in the Department of Aboriginal Affairs a means of delay in any case of a purchase which they considered to be controversial. The Commission's view was that the instruction disregards the proper standing and duties of the Commission as a statutory authority.<sup>116</sup>

The Commission gave a particular example of a purchase thwarted by the need to comply with Ministerial directions which restricted the Commission's power otherwise conferred by the Act:

The need to obtain the Minister's views before proceeding to purchase created difficulties in meeting the expectations of vendors in the open market where the Commission operates. In one instance the Minister's views were sought in December, 1978, and although requested again in April, had still not been received when the Directive was revoked and a new Directive issued on 28 June 1979.

A number of delays, including the need to obtain the Minister's views, caused the loss of a major, and very important, purchase during the year. The Aboriginal group which had requested the purchase are widely recognized as one of the few large N.T. groups without ready access to any of their traditional land. The Minister's views were sought on 12 July and formally conveyed to the Commission on 19 September. Oral advice of the tenor of those views had allowed the Commission to commence negotiations just prior to their official receipt. Agreement on price was reached, but further delays occurred as contracts were prepared and amended, until on 9 January the Commission received advice that purchase of the property would take the area of its holdings over the legal limit as regards pastoral land held by any one person or company. Six days later, after confirming this situation, the Commission formally sought the Minister's approval to act under section 19 of its Act, rather than sections 20 and 21 as required by the Ministerial Directive of May, 1975. The Minister approved this procedure on 8 February. By this time, however, the beef cattle market was improving and despite some further discussions the Commission was advised in April that the property was withdrawn from sale. A sum of \$375,000 had been held against this purchase for some 7 months.<sup>117</sup>

The February 10, 1978 directive remained in effect until June 28, 1979 when the following was substituted:

The Commission be in receipt of the views of the Minister for Aboriginal Affairs before taking a decision to purchase a pastoral lease, and provide such information as the Minister required to enable him to reach an informed view of any such proposed purchase.<sup>118</sup>

Following the issuance of the June 28, 1979 directive the Commission was able to record:

For the full twelve months under review, the Commission was able to operate in terms of the Ministerial Directive of 28 June, 1979. This directive allowed the Commission greater flexibility to meet market pressures and vendor expectations, and was instrumental in the Commission completing ten purchases during the year at a total cost in excess of \$1.2 million.

The Minister's Directive helped overcome some of the problems the Commission had faced for most of the previous year.<sup>119</sup>

### **(C) Aboriginal Development Commission**

In October 1978 the Commonwealth Minister for Aboriginal Affairs announced the proposed establishment of an Aboriginal Development Agency:

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116. *Ibid.*

117. *Id.*, 1978-79.

118. *Id.*, 1979-80.

119. *Ibid.*

[It would] embrace the present functions of the Aboriginal Land Fund Commission and the Aboriginal Loans Commission, and take over from the Department of Aboriginal Affairs the administration of its Enterprise program. In addition the Government will be looking to the Agency to put forward new kinds of programs designed to contribute to the self-sufficiency of Aboriginal and Torres Strait Island communities.

The Aboriginal Land Fund Commission entered a submission to the Minister emphasizing the benefits of land purchase, particularly with respect to alienated land:

There is, however, a limit to what legislation alone can do, mainly because of the long established claims of whites under British land law. In the closely settled areas, where the need of Aboriginal groups is probably more important than traditional ties, the purchase of land is essential to approach a reasonable balance of land ownership and a property base for Aboriginal groups. No other way than purchase seems possible except in areas which have always been Aboriginal reserves, or in areas which remain Crown Land. The long term advantage of purchase at market rates, and at the taxpayers expense, is that it avoids injustice to the present owners...

A land base is an essential ingredient in the social, cultural, and economic development of tribal and non-tribal, rural and urban Aboriginals. A land base can provide a means of achieving social cohesion and stability, or an economic base, or both, from which the Aboriginal community is better able to cope and compete with non-Aboriginal groups.<sup>120</sup>

It was urged that the governing body of the proposed Agency should be composed of a majority of Aboriginals, although the need for sufficient expertise would require some non-Aboriginals on such body. The need for autonomy and the elimination of the bureaucratic difficulties faced by the Aboriginal Land Fund Commission, including staffing and its inability to grant monies for non-fixtures, was stressed. The retention of the Minister's power to give general direction was not challenged. The Land Fund Commission urged the establishment of a Capital Account of sufficient size that the proposed Agency could perform its functions upon the funding provided by the income from such an account, rather than from annual appropriations.

The *Aboriginal Development Commission Act 1980*<sup>121</sup> came into effect on July 1, 1980. It repealed the *Aboriginal Loans Commission Act 1974* and the *Aboriginal Land Fund Act 1974*.

### **i. Objects, Functions and Power**

The purpose of the *Aboriginal Development Commission Act 1980* is declared to be:

[T]o further the economic and social development of people of the Aboriginal race of Australia and people who are descendants of indigenous inhabitants of the Torres Strait Islands and, in particular, (as a recognition of their past dispossession and dispersal of such people) to establish a Capital Account with the object to promoting their development, self-management and self-sufficiency.<sup>122</sup>

“Aboriginals” are defined as “members of the Aboriginal race of Australia.”<sup>123</sup> Persons of only partial Aboriginal ancestry are not excluded from the benefits of the Act.

120. *Id.*, 1978-79.

121. 1980, No. 34 (C'th).

122. *Id.*, at s.3.

123. *Id.*, at s.4(2).

In order to accomplish its statutory purpose the Act provides for the establishment of the Aboriginal Development Commission.<sup>124</sup> The functions of the Commission are "to further the economic and social development of Aborigines and, in particular", inter alia, "to assist communities and groups of Aborigines to acquire land", "to assist Aborigines in business enterprises", and "to administer and control the Capital Account."<sup>125</sup>

The power of the former Aborigines Land Fund Commission to acquire land and grant interests therein and to grant monies for such acquisition to Aboriginal land trusts and Aboriginal corporations "for the purposes of enabling Aborigines to occupy land" are vested in the Aboriginal Development Commission.<sup>126</sup> The Commission may grant such monies or interests in land "on such terms and conditions as it may determine" and is expressly empowered to grant an interest "derived" from an interest in land it has acquired.<sup>127</sup> The Commission may also acquire interests in land and grant money for such purpose "to enable Aborigines to engage in business enterprises" and for Aboriginal housing purposes.<sup>128</sup> Such power continues the functions of the Aboriginal Loans Commission.

## ii. Control and Administration

The Commission is subject, as were its predecessors, to the "general directions" of the Minister.<sup>129</sup> Such control in the Minister is expressly declared to extend to dictating the content of Commission advice or recommendations.

The structure of the Commission follows that suggested in the Woodward Report which contemplated "full voting control" in Aborigines "as soon as appropriate Aborigines, with the necessary experience became available to fill such positions."<sup>130</sup> The Commission consists of ten members appointed by the Governor General. The members hold office for their appointed term, but are subject to removal by the Governor General for "misbehaviour or physical or mental incapacity."<sup>131</sup>

All members of the Commission must be Aborigines.<sup>132</sup> Of the initial appointments, three are from the "remote" area of Australia, six are from the "settled" areas, and one is from the Torres Strait Islands. Half of the members are of only partial Aboriginal descent.

## iii. Funding

The Act provides for an Aboriginal Entitlement Capital Account, vested in the Commission, consisting of a Capital Fund and a General Fund.<sup>133</sup> Monies

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124. *Id.*, at s.7.

125. *Id.*, at s.8.

126. *Id.*, at s.27, 23(1)(a)(b).

127. *Id.*, at s.27, s.23(1)(a)(b).

128. *Id.*, at s.24, 25, 28, 29.

129. *Id.*, at s.11.

130. Second Report, 1974 paras. 266-268.

131. *Id.*, at s.17.

132. *Id.*, at s.13(2).

133. *Id.*, at s.20.

payable into the Capital Fund consist of, *inter alia*, "any monies appropriated by law for the purpose of providing capital for investment. Such monies must be invested in bank deposits, Commonwealth securities, or in another Treasury approved manner."<sup>134</sup> It may not be used to purchase or grant money for the purchase of land. Monies payable into the General Fund include "any monies appropriated by law for the purposes of the General Fund" and "any income derived from the investment of monies standing to the credit of the Capital Account." Both Funds are thus initially dependent upon annual appropriations. It is the General Fund from which monies must be provided for the purchase and grants for the purchase of land. As monies are appropriated to the Capital Fund, the Commission will become to some extent independent of annual appropriations. In 1980-81 10 million dollars was appropriated to the Capital Fund, and 13.8 million dollars to the General Fund.

The Aboriginal Development Commission announced that in 1980-81 ten million dollars of the General Fund will be allocated to housing loans. Such allocation is in accord with the funding level of the Aboriginal Loans Commission.<sup>135</sup> It suggests that less than one-third of the funding available to the Development Commission will be allocated to the functions previously performed by the Aboriginal Land Fund Commission.

#### **iv. Aboriginal Land Register**

The funding and acquisition of land by the Commission for the purpose of enabling Aboriginals to occupy land is subject to an application in writing in relation to that land "by or on behalf of a community or group of Aboriginals" being entered in an Aboriginal Land Register.<sup>135A</sup> The Commission cannot act in the absence of such a claim.

#### **v. Consultation with States and Territory**

The Aboriginal Development Commission, unlike the Aboriginal Land Fund Commission, is expressly required to endeavour "to consult with the appropriate authority responsible for planning in relation to the use and development of land in the State or Territory in which that land is situated" before purchasing or granting monies for the purchase of land to enable Aboriginals to occupy land.<sup>136</sup>

#### **vi. Inalienable**

An interest in land acquired by an Aboriginal corporation as a result of a grant or purchase by the Aboriginal Development Commission to enable Aboriginals to occupy land may only be disposed of after the Gazetting of a notice by the Commission, and after consultation with the Minister who must consent to the disposal of such specified interest.<sup>137</sup> The Commission must be

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134. *Id.* at s.22, 37.

135. Dept. of Ab. Affairs, Background Notes No. 8 "Aboriginal Housing" Jan. 1981.

135A. *Id.* at s.23(3)(a), 32.

136. *Id.* at s.23(3)(b).

137. *Id.* at s.31.

satisfied that the "disposal of the interest in accordance with the notice will further the economic and social development of Aborigines." Such restriction upon alienation does not limit the right of the corporation to authorized occupation of the land by its members, nor does it extend to Aboriginal land trusts.

### V. Excisions From Pastoral Leases

In 1848 the Secretary for the Colonies urged the Governor of New South Wales to ensure that it was recognized that pastoral leases were "not intended to deprive the natives of their former right to hunt over these districts or to wander over them in search of subsistence, in the manner to which they have been heretofore accustomed, from the spontaneous produce of the soil, except over land actually cultivated or fenced in for that purpose."<sup>138</sup> Pastoral leases issued in Western Australia<sup>139</sup> and the Northern Territory<sup>140</sup> remain subject to such a reservation today.

In 1971 a report upon the "situation of Aborigines on pastoral properties in the Northern Territory" recommended:

- a. that in appropriate areas land be obtained by excision, or by sub-lease from the pastoralists for limited village, economic and recreational purposes to enable Aborigines to preserve traditional cultural ties and obligations and to provide the community with a measure of autonomy; such land naturally needs access to adequate water supplies but in addition it should be of such an area and such a quality that some supplementary activities may be encouraged upon it e.g. pig, poultry, fishing, gardening and artifact making etc;
- b. where it is inappropriate to excise or sub-lease land for an Aboriginal community some arrangement be made between pastoral management, perhaps co-operation with Government to develop a village community and to provide Aborigines with an increasing say in the management of the village area; the arrangement should be the subject of regular review to enable more responsibility to devolve upon the Aboriginal community.<sup>141</sup>

Woodward adopted such recommendations in the Second Report.<sup>142</sup> He suggested that, upon agreement with the pastoralist, a special purpose lease should be issued in respect of the excised land. Failing agreement Woodward suggested that the matter should be referred to the Aboriginal Land Commission for recommendation as to lands which might be compulsorily acquired. It was considered that compensation should be paid in respect of the excised land allowing for the entitlement of the Aborigines to traditional use of the land in any event.

The Aboriginal Land Commission was not accorded the suggested jurisdiction with respect to excised community areas under the *Aboriginal Land Rights (Northern Territory) Act*. The Commonwealth Department of Aboriginal Affairs and the Land Councils have sought to negotiate excisions relying upon the reservation of Aboriginal use expressed in the pastoral leases and

138. Earl Grey to Sir Fitzroy, Feb. 11, 1848, H.R.A. Series I, v. 26, at 225.

139. *Land Act*, 1933, No. 37, s.106(2) (W.A.).

140. *Crown Lands Act*, 1978, s.24 (N.T.).

141. 1971, C.A.G. 66, Report on Situation of Aborigines on Pastoral Properties in the Northern Territory, at 74.

142. Second Report, 1974, paras. 228-235.



funding from the Aboriginal Land Fund Commission. In 1978 the reservation expressed with respect to pastoral leases in the Northern Territory was amended to include the right to continued use of "educational, medical and other facilities" formerly provided where the Aboriginal group resided within 2 kilometres of the homestead "until adequate facilities of a similar nature are provided in a site suitable to the group of Aboriginals".<sup>143</sup> The amendment had assisted in the negotiation of eight excisions and three pending excisions of land in the Northern Territory by the end of 1980. Special purpose leases have been issued. The areas excised have generally been less than 10 square kilometres in area. In Western Australia there has been no amendment of the reservation to Aboriginal use and excisions of land have not been as successfully negotiated.

The Aboriginal Land Fund Commission encountered considerable difficulty in negotiating excisions from pastoral leases. By June 30, 1980 it had provided funding for three excisions but thirteen remained under consideration. It observed with respect to the attitude of pastoralists:

The response of some family enterprises to the Commission's requests for excision have been prompt and helpful, indicating a genuine concern for the Aboriginal people. Large pastoral companies are not, in general, as responsive so far. One British company indicated that it would conform to government policy; with the implication that it would make no further concession.<sup>144</sup>

The Commission sought to maintain the inalienability of excised lands by providing monies to Aboriginal corporations in the Northern Territory on condition that the special purpose lease provided:

The lessee shall not mortgage, change, or otherwise dispose of his interest in the land described...without the written consent of the Minister for Aboriginal Affairs.<sup>145</sup>

## VI. Compulsory Acquisition in Queensland

The Commonwealth of Australia enacted the *Aboriginal and Torres Strait Islander (Queensland Reserves and Communities Self-Management) Act 1978*<sup>146</sup> in response to the announcement of the intention of the Government of Queensland to take over the management of Aurukun and Mornington Island reserves from the Uniting Church of Australia against the wishes of the Aboriginal inhabitants. The Commonwealth Minister for Aboriginal Affairs declared that all necessary steps would be taken to ensure Aborigines "a policy of self-management and freedom of choice."<sup>147</sup> Section 15 of the Act declares that the Commonwealth may compulsorily acquire land under the *Lands Acquisition Act* for the purpose of making it available to an Aboriginal Council of a reserve or community under the *State Aborigines Act* to which the 1978 Act applies. The 1978 Act applies only where an Aboriginal Council has

143. 1978, s.24(4) (N.T.).

144. Aboriginal Land Fund Commission, Annual Report, 1978-79.

145. *Id.*, Ministerial Directive, August 28, 1978.

146. 1978, No. 11 (C'th).

147. Commonwealth Record, 1978:223.

requested its application or the Minister is satisfied that a substantial majority of the adult residents wish to manage and control their affairs in the manner provided by the Act, and the Minister has declared by notice that the Act shall apply to the reserve or community.<sup>148</sup>

The powers declared under the *Aboriginal and Torres Strait Islander (Queensland Reserves and Communities Self-Management) Act 1978* have never been exercised. On April 6, 1978, the day the Act received second reading in the House of Representatives, the Government of Queensland rescinded the reserves at Aurukun and Mornington Island and thereby precluded the application of the Act. Petitions from Cherbourg and Kowanyama communities were not acceded to because "although signed by a significant number of residents they did not satisfy the criteria for declaration under the Act in that neither had enough signatures to indicate unequivocally that it was supported by a substantial majority of the adult Aboriginals."<sup>149</sup> A petition from Yarrabah Council met the requirements of the Act, but the Commonwealth preferred to pursue as yet unconcluded negotiations with the Queensland Government rather than declare the reserve subject to the Act.

### VII. The Pitjantjatjara

The Pitjantjatjara tribe traditionally owned and occupied land in the Central Desert in the Northern Territory, South Australia and Western Australia. The transfer of title to the former reserves at Haast Bluff and Peterman and to the special purpose mission lease at Hemannsburg in the Northern Territory was provided for by the *Aboriginal Land Rights (Northern Territory) Act 1976*. The Act authorizes traditional claims by the Central Land Council on behalf of the Pitjantjatjara against unalienated Crown land and alienated Crown land held by or on behalf of Aboriginals. Title to the Central Desert, Warburton and Cunderlee reserves in Western Australia remains vested in the Crown in the right of the State.<sup>150</sup> There is no provision for traditional land claims in Western Australia. In South Australia the "land rights" of the Pitjantjatjara in the State were the subject of the Pitjantjatjara Land Rights Working Party Report of 1978.

The Working Party reported to the Premier of South Australia and recommended, inter alia, the transfer of title to the Pitjantjatjara of the North West Reserve (7.3 million hectares), the former Indulkana reserve, the pastoral leases held on behalf of Aboriginals at Mimili and Kenmore Park, and the mission pastoral lease at Ernabella. The Commonwealth Department of Aboriginal Affairs had acquired the Mimili pastoral lease on behalf of the Aboriginal community in 1972. The Aboriginal Land Fund Commission had acquired the Kenmore pastoral lease in 1975. The Working Party also recommended the establishment of a tribunal to hear traditional land claims by the Pitjantjatjara. The tribunal would be "empowered to make recommendations to the Minister in relation to the claims. The decision to allow a claim should rest with the

148. 1978, No. 11 s.5 (C'th).

149. Department of Aboriginal Affairs, 1978-79, Annual Report.

150. *Aboriginal Affairs Planning Authority Act*, 1972, No. 24 (W.A.).

Minister." All land would be subject to claim, including land to which freehold title had been issued. It was contemplated that such claims would in fact extend to unalienated Crown land in the area, the defence reserve at Maralinga, a conservation park and unspecified pastoral properties. In order to give effect to the jurisdiction of the tribunal with respect to all land it was recommended that the *Lands Acquisition Act* of the State be invoked to give effect to the Tribunal's recommendations.

The *Pitjantjatjara Land Rights Act*<sup>151</sup> was enacted in 1981. It provided for the transfer of title to the Northwest reserve, Indulkana, Mimili, Kenmore Park and Ernabella to the Pitjantjatjara. It did not provide for the establishment of a land rights tribunal. Rather it provided for the additional transfer of title to the Granite Downs pastoral lease and 500 square kilometres immediately, and at the same time precluded any future claim to further lands. The compromise followed negotiations and an agreement between the State Government and the Pitjantjatjara which was hailed as a "milestone in the history of Aboriginal Affairs."<sup>152</sup> The Granite Downs pastoral lease was held by a third party interest. The lawyer acting for the Pitjantjatjara declared:

This meant, for the first time in Australia, that an Aboriginal traditional interest in land occupied as pastoral property was to be recognized under title overriding the incumbent European interest.<sup>153</sup>

Albeit title to Granite Downs pastoral station was granted to the Pitjantjatjara the lease remains in effect till surrender or expiration. It shall not be renewed upon such surrender and expiration, and the lessee is entitled to compensation from the Crown for such non-renewal. The Pitjantjatjara are required at such time to pay compensation for improvements.<sup>154</sup>

### VIII. New South Wales and Tasmania Proposals

Tasmania and New South Wales were the location of the earliest conflicts between Aborigines and European settlers. The destruction of Aboriginal society was greater and took place earlier than in more remote parts of Australia. In both States little or no land has been provided for Aboriginal communities. In both States the great majority of those asserting Aboriginal status are of only partial Aboriginal descent.

In November 1977 a petition was presented to the Tasmanian Parliament on behalf of approximately forty Aboriginal electors seeking the transfer to the Aboriginal people of the State of title to the mutton-bird islands of Big Dog, Chapel, Babel, Trefoil and fifteen lesser mutton-bird islands, former reserves and settlement areas significant to Aboriginal people because of their association with the deline of their tribal ancestors, rock-carving areas, and the former reserve at Cape Barren Island. It also sought the return of all unalienated Crown land in Tasmania in trust for the Aboriginal people "otherwise negotiations to be commenced for compensation for all dispossessed land in Tasma-

151. 1981, No. 20 (SA).

152. *Weekend Australian*, March 7-8, 1981, at 5.

153. P. Toyne, D. Vachon, D. White, "Land, Law and Mining", (1980) 56 *Arena*, 52.

154. 1981, No. 20, s.15(3) (SA).

nia." An Aboriginal Affairs Study Group was established by the State Government in April 1978. It recommended in 1978 that title to Cape Barren Island, Babel Island and Big Dog Island be vested in an Aboriginal Lands Trust "less those parts of these islands already freeholded, and provided that the terms of the existing leases and licence to Aboriginals or non-Aboriginals already on those islands are respected." It was also recommended that should the Trust wish to increase its holdings of mutton-bird rookeries, it "should make submission for loans to the appropriate Commonwealth body for the acquisition of privately held freehold land and/or further separate submissions to the State Government for commercially viable and vacant Crown land."

In 1979-80 the Aboriginal Land Fund Commission acquired Trefoil Island at a cost of \$200,000 and nineteen hectares of Cape Barren Island. In June 1981 the State Minister of Lands announced the grant of title to 6.5 hectares of land on Cape Barren Island to the Aboriginal community. Legislation to provide for an Aboriginal Lands Trust was expected to be introduced at the end of 1981.

The recommendations of the 1980 Report of the Select Committee of the Legislative Assembly of New South Wales<sup>155</sup> on Aborigines were not as limited as those of the Tasmanian Study Group. The Report recommended the establishment of an Aboriginal Land and Compensation Tribunal to hear and determine Aboriginal land claims in New South Wales.<sup>156</sup> Claims to land might be founded upon spiritual, social or economic "needs", including provision for housing and economic enterprise, compensation for past dispossession, "long association" arising from movement after European contact, and traditional rights.<sup>157</sup> The Report contemplated that claims would include land in urban areas, former reserves and fringe dwelling areas. It was suggested that claimable land should not be "restricted, but may include Crown, freehold and leasehold lands" in urban and country areas. Private interests would be compulsorily acquired pursuant to the upholding of a claim by the Tribunal. The decisions of the Tribunal would not constitute mere "recommendations", as is the case with the Aboriginal Land Commissioner in the Northern Territory, but would be binding on all parties, including the Government and the proposed Aboriginal Land and Development Commission.

The Report recommended the establishment of an Aboriginal Land and Development Commission:

[It would be] elected and controlled by Aborigines and comprised of representatives from each Aboriginal Regional Land Council. The Commission would acquire properties at the direction of the Aboriginal Land and Compensation Tribunal and also purchase properties on the recommendation of an Aboriginal Regional Land Council.<sup>158</sup>

The Commission would essentially be the funding agency for purchases of land for Aboriginal Community Councils. It would fund the compulsory acquisitions directed by the Tribunal and could determine whether to fund purchases recommended by Regional Land Councils. Upon such acquisitions

155. Gov't Printer. NSW. Parl. Paper. 1980.

156. *Id.*, at Chap. 5.

157. *Id.*, at Chap. 4.

158. *Id.*, at Chap. 5:37.

it would transfer the title to the land to the appropriate Aboriginal Community Councils.

The level of funding would, of course, determine to a large extent the efficacy of the proposed Commission. The Committee lamented that the present "amount of funding made available by both the State and Federal Governments for projects falls well below that which is necessary to make a qualitative improvement in social-economic conditions as distinct from continual 'band-aid' treatment." It was observed that "if self-determination is to be realized, and if land rights are to be of practical effect, then there will need to be an assured source of funding over a long term. This would mean not only that existing urgent needs would be met but also it would allow Aboriginal initiatives to be fostered." It was suggested that the policy of funding should be based upon principles directed to "certainty of funding, adequate level of funding, and the adoption of a policy of self-determination."<sup>159</sup> The Committee considered that a scheme which would reflect these principles could allocate 7.5% of the State land tax revenue to the Commission until such time as the allocation of half that amount in a Capital Investment Account provided sufficient monies that the Commission's land purchase activities could thereafter be funded on half of the Capital Account's income. Thereafter the retention of the other half of the Account's income would enable the Account to increase in accord with increasing land values. Until that time the Commission would utilize half of the State land tax revenue allocated to the Commission to fund its activities. The Select Committee contemplated that such arrangements could provide five million dollars for land purchases and compensation in 1980-81, rising to ten million by 1994-95.

The Committee also recommended the provision of additional land in a reference to the "gentle" traditional methods of land use of the Aborigines prior to European settlement. It was suggested that degraded lands might be restored by such traditional land use, and at the same time provide areas for out-stations to develop and for Aboriginal recreation. The Committee accordingly recommended:

that land be designated by the Government in appropriate areas for use by Aboriginal citizens who would have the care, control and management of such areas for the benefit of all citizens of New South Wales.<sup>160</sup>

Fifteen months after the Report was submitted to the State Parliament, and five months after the Government was re-elected, the Government had yet to indicate its attitude to the Report.<sup>161</sup>

### Conclusion

As in Canada, reserves are the primary source of land which has been made available for use and claim by Aborigines in Australia, particularly in the "remote" areas of the Northern Territory, Western Australia, Queensland and South Australia. Former reserves have also been transferred back to Aborigin-

159. *Id.*, at Chap. 8:14.

160. *Id.*, at Chap. 10:16.

161. *See Weekend Australian*, Nov. 21-22, 1981, at 5.

al title in both settled and remote areas of Australia. It is only in the Northern Territory that all unalienated Crown land has been made subject to claim, and only then upon the basis of traditional Aboriginal ownership. In South Australia and New South Wales such land has been transferred to Aboriginal land trusts but only in negligible amounts and only at the direction of the State Government.

It is with respect to alienated land that the Australian experience may be most relevant in Canada. The Commonwealth, with complementary State legislation, has provided authority for voluntary land purchases to meet Aboriginal claims since 1968. The Aboriginal Land Fund Commission sought to meet claims founded upon traditional, social and economic needs. It has emphasized that "in the closely settled areas, where the *need* of Aboriginal groups is probably more important than *traditional* ties, the purchase of land is essential to approach a reasonable balance of land ownership and property base for Aboriginal groups." The Aboriginal Development Commission has been charged with such function since 1980. All its members are Aboriginal and it has the structure and potential to achieve independent funding of its land purchase activities. The Commission is considered capable of meeting at least some of the land settlement claims of persons of Aboriginal descent in and about urban areas. Urban Indians and Metis might wonder if the indigenous people of Australia might not in this respect be receiving a more appropriate response to their claims than they receive in Canada.

The Commonwealth has acted to authorize the compulsory acquisition of land to meet Aboriginal claims in the Northern Territory and Queensland. No such general inclination to so act can, however, be identified. In the Northern Territory the owners of the interests in land originally agreed to acquisition by the Crown, and in Queensland the authority conferred has yet to be exercised.

This paper might properly conclude with a reference to the 1980 Report of the Select Committee of the Legislative Assembly of New South Wales. The Report recommended the provision of independent funding to an Aboriginal Land and Development Commission and the establishment of an Aboriginal Land and Compensation Tribunal with jurisdiction to hear claims with respect to *all* land in the State. The Aboriginal Land Fund Commission has declared that "a land base is an essential ingredient in the social, cultural, and economic development of tribal and non-tribal, rural and urban Aboriginals." The provision of such a land base in New South Wales may suggest that it should be considered to what extent land is available for use or claim for persons of Indian descent in Canada, particularly in areas similar to the 'settled' areas of Australia.