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ABORIGINES : A HISTORY OF LAW AND INJUSTICE, 1829-1985

PART 2

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CHAPTER 7

ADMINISTRATIVE LAW

(a) Introduction

The lives of Aborigines were controlled in a myriad of ways, but the most common feature of that control was the extent of discretionary powers reposed in officialdom. Statutory authorities ('Aborigines Welfare Board') were established, and designated officers were appointed to occupy and discharge the functions of statutory office, whether as Chief Protector or local guardian. Making, interpreting, and enforcing the regulations was entrusted to officials with little or no parliamentary oversight, save the machinery of disallowance. The subordinate arm of government was removed from the policy areas and endowed both with the functions of government and the means of legislative power to implement them. For disfranchised, dispossessed, and dispersed Aborigines, administrative law was and remains one of the entrenched safeguards to check, oppose, or control the discretions of officials. But how far did Aborigines employ those methods of curial restraint to redress their grievances? In particular, where an Act by its very terms discriminated against Aborigines, what redress was possible?

(b) The prerogative writs

The English common law early adapted the prerogative writs to control the use or abuse or failure to use powers reposed in a person occupying public office or having public duties to perform. The writ of *habeas corpus* requires someone exercising a power of restraint over another to produce the person restrained so that the Court can determine the validity of and justification for the detention. In Ex *parte West* (1861), the Supreme Court of New South Wales issued that writ to a squatter allegedly detaining a young Aboriginal boy and determined not to return him to this tribe(1). Although it later transpired that the squatter's comments had been said in jest, the Court considered the fact of the lad's being 'stolen' as 'a moral wrong - an outrage - an act of gross cruelty which no man of common feeling could hear described without an expression of strong indignation'(2).

In *K and Another-v-H.; The Queen-v-K. and Another; Ex parte H.* (1976), the 'part-Aboriginal' mother of an infant girl sought the return of her daughter whom she had handed over to the custody of a white couple[3]. The writ was a partial response to the couple's request for a Court order for adoption and dispensing with the consent of the natural mother. In the ultimate the Court refused the writ, mainly on the grounds of the mother's conduct which it described as 'reprehensible'.

In *R-v-Silvester Pilimapitjimiri et al., Ex parte Frank Gananngu and Elsie Darrbuma* (1965), another application by the natural parents of children in the custody of foster parents of a different cultural background was made, and again was unsuccessful[4]. The facts of that case are straightforward, if human tragedy can thus be described. The natural parents, from Oenpelli, both contracted leprosy; their four eldest children were placed with foster parents on Bathurst Island where they were raised as part of the Tiwi community. Almost 14 years after the birth of the youngest of the three children whose return was sought, the applicants began formally to demand the return of their children and sought *habeas corpus* to assist in that purpose. The Court refused to make the proper order sought, concluding that it would be 'capricious and cruel' to any child affected by it. Further, the interests of the children must prevail over those of the natural parents in the circumstances outlined in the judgment (religious differences; accepted by their adoptive community; settled and happy; very little knowledge or interest in their natural parents)[5].

Aboriginal legal aid services *were*, however, successful in *R-v-Wittidong, Mulardy and Keith Maine*, a decision of the Supreme Court of the Northern Territory in *1979*[6]. An Aboriginal mother of two infants had placed her children under welfare care in Darwin while she organized her personal life. The unmarried father - who had no legal rights to his children under the *Guardianship of Infants Act 1972* (NT) - was allowed by the Northern Territory welfare authority to remove the children to a foster parent in Broome. The children were eventually returned to their mother.

Ninety years after the *West* case, Fred Waters sought a writ, challenging his detention against his will in the Aboriginal reserve at Haast Bluff, about 165 kms from Alice Springs[7]. The Director of Native Affairs signed an order for the applicant's removal, which the applicant resisted on grounds, *inter alia*, that he was lawfully employed by the North Australian Workers' Union as a caretaker of the Darwin stadium which the union owned. In his judgment refusing the order, Fullagar J. in the High Court characterized the Director's powers as 'vast', his discretion as 'absolute', and those over whom he wielded them are 'likely often to be weak and helpless'(8). Although the Director's responsibility was heavy and, 'when he acts, every presumption has to be made in his favour', 'the Courts must be alert to see that if...he does mistake or abuse his power, the mistake or abuse does not go either undetected or unredressed'(9).

The material before him, however, failed to make even a *prima facie* case of abuse of power but he was of the view that he lacked jurisdiction in any event. He was critical of the motives and the good faith of those who were 'really responsible' for the action. On the question of costs, he said: 'I would not like to discourage any person, who thinks that a *real injustice* has been done to an aboriginal from invoking the assistance of the courts even against the Director'(10) (emphasis added). It is obvious from the tenor of the judgment that the Court considered the deprivation of the liberty of *this* Aborigine, his banishment to a remote reserve against his will, his loss of employment and income, hence the access to the amenities of 'civilised' life, as *not* being a 'real injustice'.

And why is this? Because the Director's 'absolute' discretion, in the absence of malice, could not be shown to have been abused or exercised *mala fide*; no evidence had been made to rebut the presumption that he acted in good faith and in the best interests of the individual. Further, the motives of those aiding and supporting a check to the Director's statutory powers were suspect and wrong. The High Court was thus raising a formidable obstacle which the 'weak and helpless' Aborigine had to overcome : that of a general presumption in favour of the Director and against the Aborigine wishing to secure some semblance of individual freedom. The mightiest and most ancient of the common law adjuncts to civil liberties was sublimated by the judicial arm to the statutory discretion of the executive arm of government.

The Courts nevertheless reassert that their protection and assistance can be invoked in aid whenever 'the liberty of the subject' is involved. In 1979, the South Australian Supreme Court granted *habeas corpus* to an Aborigine wrongfully detained for non-payment of a fine incurred in criminal proceedings. The Court found in that case - *In re Weetra* - that the Clerk of the Magistrate's Court had unlawfully demanded payment of compensation, and that Weetra had been kept in prison upon completion of sentence in a non-related matter(11). His wrongful detention raised the question whether what was 'really a civil claim...should be enforceable by imprisonment over and above any penalty which is imposed for the commission of the crime *per se*[12].

The prerogative writ of *certiorari* enables a superior Court to order an inferior judicial body to submit the records of its proceedings so that it may consider whether they must be quashed on the ground of error in law. In an Aboriginal context this is particularly relevant where partiality or bias - a denial of natural justice - is apparent.

This arose for consideration in the 1962 case of *R-v-Justices of Rankine River; Ex parte Sydney; Ex parte Pluto*[13]. Two Aborigines were summarily tried by two justices for assault. One justice was the manager of the station on which they were employed : the depositions at their hearing were taken by his daughter. The other justice acted as spokesman for the Court. During the trial of the first Aborigine, he said: 'Being told one needed a kick in the arse was something of which no one would take much notice in Australia'[14]. Outside the Court before the commencement of the second trial, he allegedly said: 'Natives must be kept under the thumb'; and during the second trial, 'Welfare Branch is to blame for the attitude of the blacks. One minute they are feted and lauded, the next minute they are being kicked around'; 'Being called a black bastard is not sufficient cause to strike a white man'; 'Calling each other bastards does not mean a thing in Australia'[15].

The Supreme Court considered that it was unfortunate that the man who was the overall superior of each defendant in their working lives formed part of the summary tribunal. But as no objection was made to his, or his daughter's, participation in the trial proceedings, a challenge could not be sustained[16]. That displays a form of judicial ingenuousness. Persons acknowledged to have been 'weak and helpless' under statute in 1951, and latterly economically dependent on substituted, but white, authority in 1961, could not realistically object, assuming that they were aware of their rights to do so. But as to the second justice, the Court was satisfied that he unconsciously, but effectively, allowed discriminatory and disciplinary leanings against the two accused before him to displace judicial impartiality in his mental processes. The Court made absolute the order *nisi* for *certiorari* quashing each conviction.

That Court also considered a third form of prerogative redress, that of *prohibition*, which restrains an inferior Court from proceedings in excess of its jurisdiction. In the present case, the Court noted that from the time of their conviction until their appeal, each appellant had served almost one month of their original sentence. An order for *prohibition* would serve only to quash the unexpired portion of each sentence, such that *certiorari* quashing the original conviction was more effective and appropriate. But *prohibition* is a great remedy where partiality or bias is express or overt, as in Quinn's celebrated : 'Your race of people must be the most interfering race of people I have heard of. You are becoming a pest race in Wilcannia, wanting to interfere in the job of the police. There is only one end to pests'(17). Quinn was then a Stipendiary Magistrate presiding at a Court of Petty Sessions hearing at Wilcannia in the Far West of New South Wales.

The relationship between Aboriginal Legal Services and their clients was raised in issue in *R-v-Barritt and Seears*(18). The applicant for writs of *prohibition* and *certiorari* was charged with causing grievous bodily harm and other offences, and released on $750 bail. After three adjournments the Crown was ready to proceed, but by the time of the fourth hearing the applicant (defendant) had been banished by his community. His legal representative from the Central Australian Aboriginal Legal Aid Service was denied the right to state as evidence of fact his client's non-appearance in seeking an adjournment. The bail was forfeited and a warrant issued for the defendant's arrest.

Muirhead J. granted the writs in the Supreme Court quashing the warrant after reviewing the Magistrate's decision and finding that he 'failed to act fairly and in accordance with the law'. Muirhead reiterated the continuing responsibilities of counsel to their clients and the Courts, but in the case of the Aboriginal Legal Services the relationship was 'probably unique' and due allowance had to be made for the practical difficulties they encountered in obtaining instructions.

Recourse to these ancient remedies therefore provided substantive justice and a salutary reminder to the local Courts of the need for flexibility in their administration of justice.

Prohibition and *certiorari* have been strongly utilized for - and against - Aboriginal land rights claims in the Northern Territory separately or in conjunction with the fourth prerogative writ, *mandamus*. By that writ the Court orders a public officer to perform some function which he should have performed and which the petitioner is entitled to have performed. I shall discuss the eight reported NT land rights cases more fully in Chapter 12, but for ease of citation refer to them in this Chapter as *Ross*, *NLC*, *Meneling*, *Stanton*, *Jawoyn*, *Japanangka*, *Jurlama* and *Kearney (Federal)*. In considering them, a number of features arising from those cases can be discerned[19].

Firstly, the prerogative writs can be applied positively or negatively, that is to advance or pursue a claim, right or interest or to deter, restrain, or frustrate similar attempts by others. Thus even a negative use may confer a positive benefit, result, or advantage.

In *Ross*, the Attorney-General of the Northern Territory sought to restrain the Aboriginal Land Commissioner (hereafter called 'the Commissioner') from hearing a claim to, *inter alia*, Utopia Station. The basis of the application for *prohibition* was the Commissioner's alleged lack of jurisdiction. The Attorney-General argued that the *Land Rights Act* was confined in its operation to identifiable Aborigines or identifiable groups of Aborigines, whereas the obligations of the Aboriginal Land Fund Commission under its enabling Act related to Aborigines <u>generally</u> and not to any specific or identifiable Aborigines. The application to the High Court failed on the ground that the holding of a pastoral lease of Utopia Station by the Commission for Aborigines generally imposed on that Commission a duty to employ it for the benefit of particular groups of Aborigines. Those groups were entitled to make a claim and the Commissioner had rightly heard it.

In *NLC*, the Northern Land Council ('the Council') made a claim on behalf of certain Aborigines to land which included most of the Cox Peninsula, an undeveloped and sparsely populated area about six kilometres from Darwin by sea but approximately 100 kilometres by a land route that was sometimes impassable. The subject land was included by town planning regulation, which came into effect four months later, as part of the township of Darwin. Before the regulations, the town of Darwin occupied an area of approximately 142 square kilometres. The regulations extended that area by 4,350 square kilometres, more than three times that of Greater London!

The Council successfully applied to the High Court for a writ of *mandamus*, ordering the Commissioner to deal in accordance with the law with the Kenbi land claim where he had concluded he had no jurisdiction to do so. An application for *prohibition* was not pressed, and that for *certiorari* attracted only three judicial comments - one in favour, one against, and one equivocal. In reaching its decision, the High Court undertook a far-reaching review of judicial authorities relating to the

Crown's immunity from judicial review of its motive, and in the particular case held that the impugned regulations had been made for an ulterior purpose. Thus a nakedly cynical act of *realpolitik* designed to circumvent legislation specifically enacted for Aboriginal benefit was exposed for the sham it was. Judicial intervention by a minority successfully confounded a political majority in an arena of eminent impartiality.

In *Meneling*, the applicants sought a writ of *mandamus* against the Commissioner, ordering that he deal with a Finniss River land claim properly in accordance with law, in circumstances where the Commissioner had concluded the claim in favour of the Aboriginal claimants; the 'white' interests also sought *prohibition*, restraining the Minister for Aboriginal Affairs from acting upon the Commissioner's recommendations. The High Court refused each application.

Stanton was a continuance of disputes concerning the Finniss River land claim, but there the applicants were Aborigines contesting the Commissioner's decisions and recommendations in favour of other Aboriginal groups. The applicants sought *mandamus* to compel the Commissioner to discharge his duties in accordance with law, that is, to take into account factors he had overruled but which would advance their interests; if that application were successful they then sought *prohibition* to restrain the Minister for Aboriginal Affairs from acting upon the results of the original inquiry. The High Court rejected the first application, such that the second did not arise. The first was lost in a question of fact, discerned from a consideration of the Commissioner's report itself.

In *Jawoyn*, the High Court - by a 4 to 1 majority - ordered the Commissioner to hear a land claim at Katherine where the two subject areas were subsequently incorporated by regulations as part of a 650 square kilometre township. The majority held that the date of an application under the *Land Rights Act* was the date by which the proper status of the land was to be characterized. The majority held that it was unnecessary to determine the validity of the impugned regulations, relying on a statutory interpretation of the policy expressed in the Act.

Various areas near Tennant Creek were the subject of a land rights application in *Japanangka*. The area contained numerous reserves set apart for stock routes and water conservation under various Commonwealth, State and Territory enactments. Following the formal application by Aboriginal claimants, the NT Minister for Lands granted to the Northern Development Land Corporation a lease in perpetuity of the disputed area. The Commissioner held that such grants deprived him of jurisdiction to proceed to hear the claims. By a 4 to 1 majority, the Commissioner was ordered to proceed to deal with the application, save in respect of one area, the subject of an alienation prior to the lodgment of the claim.

A traditional land claim by 'group 11' of the Gurindji people to a small triangle of land at Daguragu was considered by the High Court in *Jurlama*. The Court were unanimous in ordering the Commissioner to exercise his functions according to law. They overruled his decision that he could not hear a claim if the subject land contained no sites, although within a larger area containing such sites of which the applicants were the traditional owners.

The last case, *Kearney (Federal)*, was decided by the Full Court of the Federal Court of Australia in favour of the Northern Land Council and against the Northern Territory Government. The government sought writs of *prohibition* and *certiorari* against the Commissioner in respect of orders made by him requiring the government to produce certain documents. These included legal opinions relating to the promulgation of regulations by which the government sought to frustrate the Jawoyn (Katherine Area) Land Claim and the Kenbi (Cox Peninsula) Land Claim. Production of the documents to the Council would enable the ulterior purpose of the legislation to be exposed.

All three judges by different reasons rejected the government's claim that it was protected by the doctrine of legal professional privilege. The judgments asserted that the public interest displaced such privilege where a case was made out that a statutory power to promulgate legislation had been exercised for an ulterior purpose. One judge castigated the 'abuse of power' by the government as coming within 'crime or fraud' not protected by the doctrine.

It would seem that the legislative cynicism of *Ross* continues, and may be increasing; equally, the vigilance of Aboriginal claimants and their prompt recourse to legal redress in face of their continuing political impotence, are seen as *political* stratagems, or having consequences as much socio-political as legal.

The second feature of these claims is that seven of the eight were heard by the High Court of Australia, and on each occasion a Full Court sat. Thus Aboriginal claims to land were receiving the attention of the highest judicial organs in the land. The Constitution confers original jurisdiction on the High Court when, *inter alia*, 'a writ of Mandamus or prohibition is... sought against an officer of the Commonwealth'[20]. The other prerogative writs may issue under other heads of constitutional power conferred on that Court[21]. Thirdly, Aborigines were engaged in offensive and defensive actions against 'white' interests, the Commissioner, the government of the Northern Territory and a Commonwealth Minister of State, a vastly different situation to the 'weak and helpless' stereotype of 1951, or the persons susceptible to duress or undue influence in 1958. Fourthly, four out of five applications for a prerogative writ advantaging Aboriginal interests were successful and those inimical to Aboriginal interests were defeated in each of the 'white'-initiated actions, namely *Ross, Meneling* and *Kearney* (*Federal*) . Fifthly, the recourse to law and the High Court by groups of individual Aborigines pursuing claims against each other without the intervention of a recognized corporate body like the NLC. To that extent, Aborigines in their use of the legal process have advanced considerably beyond that stratagem urged by Rowley[22].

Finally, and notwithstanding judicial disavowal of a political stance[23], or with regard to political or economic consequences[24], two members of the Court have explicitly recognized the political nature represented by the legal pursuit of land rights claims. In the opinion of Wilson J., one of the judges in *Meneling*, 'the (*Aboriginal Land Rights* (*Northern Territory*)) Act recognizes the political character of a decision to grant traditional Aboriginal land in the Northern Territory for the benefit of Aboriginals'[25]. In the same case Brennan J. was equally forthright : 'the weighing...of all relevant considerations in deciding whether a grant should be made is appropriately a matter for a minister, not for a judge - particularly when the question for decision is pregnant with political controversy'[26]. Brennan's judgment in *Meneling* displayed a fine sensitivity to the deeply religious and societal nature of land for traditional Aborigines and the corresponding lack of 'white' appreciation for its uses other than in an economic or other utilitarian fashion[27].

(c) Declaratory orders

These orders traditionally preceded, and were a tactic to justify, the issues of procedural remedies such as the prerogative writs or injunctions. They were a declaration by a Court as to a juridical fact, anticipating consequential relief. In the Commonwealth arena the stratagem has been almost completely superseded by administrative law review. In the appeals of *Arthur Dingle*[(28)] and of *Jack Mulberry and Rosie Bin a Bu*[(29)], the applicants respectively sought declarations by the Wards Appeal Tribunal that their status as wards be revoked. The result of the two latter is unknown, but that of Arthur Dingle succeeded, the only known case so to do. A review of salient facts put forward by that applicant persuaded the Tribunal that its retention for the particular applicant would be 'humiliating and oppressive'[(30)]. The grant - or judicial recognition - of status was a spectacular example of the legal restraint of a continuing administrative oppression founded on law.

In *Coe-v-Gordon*, the plaintiff sought a declaration that the purported statutory revocation of New South Wales Aboriginal reserves was illegal; that he could sue in a representative capacity without the necessity for the Attorney-General's *fiat* authorizing him to do so; and an order that compensation be paid to the Aboriginal people and communities suffering loss or damage as a result[(31)]. The *Crown Lands (Validation of Revocations) Act 1983* (NSW) was being enacted when the plaintiff mounted his challenge, as the plaintiff well knew[(32)]. But the declaration of illegality was sought as it 'would have utility in advancing the cause of Aborigines in regard to land rights'[(33)], in exposing the legislation 'brought down by the present Government (as) a sell-out'[(34)]. This the Court refused to do 'as to do so would be to step outside its judicial role and become involved in the politics of the day'[(35)].

Injunctions are not generally associated with the common law writs *per se*, although in nature and consequence they may be directed to achieve the same ends. Accordingly, I shall leave them for discussion in Chapter 8.

(d) Federal administrative law

One of the puzzling aspects of Aboriginal litigants - actual or potential - is their, or their legal representative's, failure to avail themselves of the Commonwealth's administrative review procedures. Only three such cases are contained in my *Bibliography* and will be discussed in this section. The procedures would seem entirely apposite to the multiplicity of actions, activities, and decisions, including failure to make a decision, by the Commonwealth or an authority of the Commonwealth and their personnel. The concurrent constitutional power of the Commonwealth was established in the 1967 referendum for the whole of Australia. More importantly, the Commonwealth's greater financial involvement in the initiation and implementation of policies and schemes for the benefit of Aborigines and the immense potential and impetus given by the *Koowarta*, *Viskauskas* and *Tasmanian Dam* decisions for Commonwealth intervention, oversight, management and control of programmes has emphasized the prime importance of utilizing the administrative review procedures. In addition, the recent decisions of the High Court in *Fencott-v-Muller*(36) and *Stack, Wenlowe Pty. Ltd. and Another-v-Coast Securities (No. 9) Pty. Ltd.*(37), confirming and expanding the jurisdiction of the Federal Court of Australia to hear and determine even State-based matters if there is a sufficient 'Commonwealth' aspect, have concentrated attention on the primary role of that latter Court as a Court of review in such matters. The *Administrative Appeals Tribunal Act 1975* (the *'AAT Act'*) and the *Administrative Decisions (Judicial Review) Act 1977* (the *'AD(JR) Act'*), both Commonwealth Acts, provide a mechanism by which, under the *AAT Act*, a person whose interests are 'affected by a decision' can seek a review of the merits of a decision where an enactment so provides(38). Applicants may include an organization or association of persons (whether incorporated or not), providing the matter in question is included in the objects or purposes of that organization or association(39). Legal assistance may be sought in respect of the application or proceedings(40). Decisions reviewable are those of persons, boards, committees or unincorporated bodies empowered by enactment to make a decision(41), but 'enactment' excludes those of the Northern Territory(42). The *AAT Act* nevertheless affords a valuable, inexpensive, and effective means of administrative review, and leaves open a further review by the Federal Court on a point of law. That Court is likewise empowered under the *AD(JR) Act* to receive applications from persons 'aggrieved or affected' by the making of a decision, the failure to make a decision, or conduct - past, present, potential - engaged in making a decision(43). An order for review may be made on legal rather than factual grounds resulting in a denial of natural justice or failure to observe proper procedures or to act in accordance with legal requirement(44). A wide range of decisions is exempted from the purview of the *AD(JR) Act*, including decisions of nominated Commonwealth authorities in respect of their commercial activities, but the Aboriginal Development Commission has not yet been nominated(45).

The question of who is a 'person aggrieved' within the meaning of the *AD(JR) Act* was considered in *Ralkon Agricultural Co. Pty. Ltd.-v-Aboriginal Development Commission; Aboriginal Development Commission-v-Ralkon Agricultural Co. Pty. Ltd.*, a decision of the Federal Court of Australia in 1982(46), and, on virtually identical grounds following a further administrative decision, in 1984[47]. These cases involved a triangular dispute between the Commission, Ralkon, and the Point McLeay Community Council ('PMCC') in relation to a farming property in South Australia owned by the Commission but managed by Ralkon. The Commission's predecessor had indicated to Ralkon that the land should be transferred to the Point McLeay Community once it became incorporated under the *Aboriginal Councils and Associations Act*[48]. The Commission subsequently purported to grant an interest in the land and also offered a 99-year lease to PMCC, while recognizing Ralkon's obligations as manager. That lease was subsequently registered and PMCC gave Ralkon notice to quit the farm. Ralkon then sought an order for review of the Commission's decision, but the Commission objected that Ralkon was not a 'person aggrieved' and so not entitled to seek it. The Commission based its objection on the grounds that Ralkon was not an 'Aboriginal land trust' or an 'Aboriginal corporation' within the meaning of the Commission's Act[49]. Ralkon pointed to its establishment by the PMCC to manage the Council's farming interests, its exclusively Aboriginal shareholders, and to its commercial enterprise which was conducive to Aboriginal advancement. The Court found that the absence of a principal object of advancement in Ralkon's memorandum of association made that corporate other than an 'Aboriginal body'[50]. However, it had a sufficient interest in the subject land to make it 'a person aggrieved', and in the circumstances of that case was entitled to lodge an application for order of review of the Commission's relevant decisions. Ralkon originally sought an order quashing the Commission's decisions and seeking its reconsideration of the issues on the grounds 'that the person who purported to make the decision did not have jurisdiction to make the decision', that 'the decision was not authorized by the enactment' and 'that the making of the decision was an improper exercize of the power conferred by the enactment'[51].

I have cited the facts of *Ralkon* at some length because of its novelty, but more for the use made of administrative review procedures to resolve what obviously was a local political dispute which extended to Canberra. The legislation is innovative in its scope and machinery for resolution of conflict. Its potential for use by Aboriginal groups or individuals is great.

The Act has already been invoked in aid of a land rights claim against the Northern Territory government. In *Kearney (Federal)* (1984), the Full Court of the Federal Court of Australia reviewed the decision of the Commissioner (as a judge of the Northern Territory Supreme Court) in respect of legal opinions and documents for which the Northern Territory claimed privilege. The judicial review extended to procedural and jurisdictional matters, including the capacity of the Federal Court, properly constituted, to rule on the availability of remedies sought. Procedural and jurisdictional questions necessitated also a determination of the substantive matters in dispute between the parties[52]. The outcome has been discussed in section (b) *supra*.

Thus the legislation affords important substantive remedies in the guise of procedure or jurisdiction. To the extent that the Federal Court is available to determine substantive questions in land rights cases, the High Court may now be utilized as a second, or final, appellate tribunal, and the Federal Court as the initial arbiter.

The last piece of Commonwealth legislation which may be availed of by Aborigines in a federal context is the *Freedom of Information Act 1982*[53]. In scope it is, perhaps, more circumscribed than the AAT *Act* or the *AD(JR) Act* but its chief value for potential users is that, where it is applicable, it imposes on the federal bureaucracy strict timetables which must be complied with. Thus dilatory or obstructionist tactics are minimized.

(e) Conclusions

At the highest level, the resources of the executive deal with issues of great moment affecting the welfare and security of society generally. But the implementation of policy, the general governance of the polity, affect individuals to a greater or lesser degree. Aborigines historically have been subjected to such legislative, administrative and judicial compartmentalization based on 'blood' or degrees of 'blood' increasingly refined and re-defined that the negative impact of policies even of general application was borne or felt unequally by them. Policies of denial or exclusion or modification in legislation having positive or beneficial consequence likewise affected them as a group, and as individuals within that group, far more than for non-Aborigines. The enactment of administrative law affords a measure of relief which can be called in aid of basic rights and the common law process of the prerogative writs. But the Northern Territory land rights experience and the Queensland legislation still raise in question whether the processes of law ultimately can curb or overthrow the politics of race.

I believe that the great legal success of the land rights cases, more fully discussed in Chapter 12, are a potent judicial curb on abuse of political power expressed in legislation. Legal reasoning and judicious interpretation have infused the whole area of land rights law with a spirit of legitimacy and a mantle of legal authority. Invocation of the law to redress a moral and legal wrong legitimizes both the protest and the weapons used in it.

REFERENCES

1. (1861) II Legge 1475; *Bibliography* , Case No. 428, p. 145C.
2. (1861) II Legge 1475, at p. 1476.
3. (1967) 11 FLR 34; *Bibliography* , Case No. 100, p. 45.
4. (1965) NTJ 776; *Bibliography* , Case No. 329, pp. 111-2.
5. In one of the great ironies of life, the three children were subsequently named as entitled to be included as a traditional *Oenpelli* land owner in the Alligator River Stage II Land Claim: *vide Report* by Aboriginal Land Commission, Interim Edition, 2 July 1981, p. 99; one lives at Oenpelli.
6. No. 266 of 1979, Gallop J., 2 April 1979, unreported; *Bibliography*, Case No. 369, p. 123, with other cases discussed by Colin Tatz in 'Aborigines : Access to civil law' (1979) 4 *Legal Service Bulletin* 198, at p. 199; and in Australia, House of Representatives Standing Committee on Aboriginal Affairs *Report on Legal Aid*, Australian Government Publishing Service, Canberra, 1980, at p. 87.
7. *Waters-v-The Commonwealth and Others* (1951) 82 CLR 188; 24 ALJ 595; *Bibliography*, Case No. 426, pp. 143-4.
8. (1951) 82 CLR 188, at p. 194.
9. Ibid.
10. Ibid., p. 197; 24 ALJ 595, at p. 597.
11. (1978) 18 SASR 321; *Bibliography* , Case No. 427, pp. 144-5.
12. (1978) 18 SASR 321, at p. 325.
13. (1962) 3 FLR 215; *Bibliography* , Case No. 268, pp. 93-5.
14. (1962) 3 FLR 215, at p. 218.
15. Ibid.
16. Ibid., pp. 219-20.
17. Cited in (1979) 4 *Legal Service Bulletin* 171.
18. (1985) 12 ALB 10; *Bibliography*.
19. The eight cases, in order of their reports, are
    (i) In *re Ross: Ex p. A-G for Northern Territory* (1979) 54 ALJR 145, (1979-1980) 145 CLR 374; (1980) 28 ALR 27; *Bibliography*, (*sub. nom. R-v-Toohey and Others; Ex parte Attorney-General for the Northern Territory*) Case No. 352, pp. 118-9.
    (ii) *Re Toohey; Ex parte Northern Land Council* (1981) 56 ALJR 164; 38 ALR 436; *Bibliography* , Case No. 410, pp. 137C-D.

(iii) *Re Toohey and Another; Ex parte Meneling Station Pty. Limited and Others* (1982) 44 ALR 63; *Bibliography (sub. nom. Meneling Station Pty. Limited et. ors-v-Toohey et anor)* Case No. 118, pp. 50A-F.

(iv) *Re Toohey and Another; Ex parte Stanton and Others and Kenyon and Others* (1982) 44 ALR 94; *Bibliography (sub. nom. Mimbingal Violet McGuinness Stanton et ors.-v-Toohey et anor)*, Case No. 397, pp. 133A-F.

(v) *Re Kearney (Aboriginal Land Commissioner); Ex parte Northern Land Council* (1984) 58 ALJR 218; 52 ALR 1; *Bibliography.*

(vi) *Re Kearney (Aboriginal Land Commissioner); Ex parte Japanangka* (1984) 58 ALJR 231; 52 ALR 31; *Bibliography.*

(vii) *Re Kearney (Aboriginal Land Commissioner); Ex parte Jurlama* (1984) 58 ALJR 243; 52 ALR 24; *Bibliography.*

(viii) *Re Kearney : Re Jawoyn (Katherine Area) Land Claim : Ex parte Attorney-General for the Northern Territory* (1984) 55 ALR 545; *Bibliography.*

The prerogative writs granted (yes) or refused (no) - and the applicants (NT: Northern Territory Government or other white interests; A: Aboriginal claimants) - in each of the cases may simply be expressed as

		Mandamus	*Prohibition*	*Certiorari*
(i)	*Ross*		No (NT)	
(ii)	*NLC*	Yes (A)	No (A)	Not pressed
(iii)	*Meneling*	No (NT)	No (NT)	
(iv)	*Stanton*	No (A)		Inapplicable
(v)	*Jawoyn*	Yes (A)		
(vi)	*Japanangka*	Yes (A)		
(vii)	*Jurlama*	Yes (A)		
(viii)	*Kearney (Federal)*		No (NT)	No (NT)

20. s. 75 (v).

21. For example, within the terms of other grants converred by s. 75 or authorized by s. 76: see *Waters-v-The Commonwealth* (1951) 82 CLR 188, at p. 190; *R-v-Bevan; Ex Parte Elias and Gordon*(1942) 66 CLR 452, at p. 465.

22. Most recently in A *Matter of Justice*, Australian National University Press, Canberra, 1978, esp. at pp. 220-1; see also Colin Tatz,

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23. *Coe-v-Gordon* (1983) 1 NSWLR 419, at p. 430.
24. *Commonwealth-v-Tasmania* (1983) 46 ALR 625, Gibbs C. J. at p. 633, Wilson at p. 758, Brennan at p. 762, Deane at p. 798; and see discussion of *Gerhardy-v-Brown* in Chapter 2.
25. (1982) 44 ALR 63, at p. 80.
26. Ibid., at p. 91.
27. Ibid., at pp. 86-8.
28. *Re Appeal by Arthur Dingle* (1962) 3 FLR 226; *Bibliography.* Case No. 55, p. 22.
29. Supreme Court of the Northern Territory, Joske J., 16 May 1961, unreported; *Bibliography*, Case No. 125, p. 57.
30. (1962) 3 FLR 226, at p. 230.
31. (1983) 1 NSWLR 419.
32. Ibid., at p. 429.
33. Ibid.
34. Ibid., at p. 430.
35. Ibid.
36. (1983) 57 ALJR 317; 46 ALR 41.
37. (1983) 57 ALJR 731.
38. s. 27 (1).
39. s. 27 (2).
40. s. 69 (1).
41. s. 3 (2).
42. s. 3 (1).
43. s. 3.
44. s. 5.
45. s. 13 and Second Schedule
46. (1982) 43 ALR 535; *Bibliography*, Case No. 160, pp. 68 (1)-(7).
47. (1984) 1 FCR 210; *Bibliography.*
48. No. 186 of 1976 (C'th).
49. *Aboriginal Development Commission Act 1980* (C'th), which repealed with *Aboriginal Land Fund Act 1974*, (C'th), the Commission established under that Act, and the *Aboriginal Loans Commission Act 1974* (C'th).

50. (1982) 43 ALR 535, at pp. 542-3; (1984) 1 FCR 210, at p. 233.

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52. (1984) 55 ALR 545, at p. 550.

53. No. 3 of 1982.

CHAPTER 8

EQUITY

(a) Equity and its appropriateness to Aboriginal suits

The great strands of English law are the common law as developed and applied by the royal courts of common law (King's Bench, Exchequer, and Common Pleas), and equity as developed and applied by the Lords Chancellor of England and the Courts of Chancery. Until 1529 the Lord Chancellor was almost always an ecclesiastic, one of his titles being 'Keeper of the King's Conscience'. The law he developed and applied was based on maxims, or principles, of fairness, justice, morality, evenness, the doing of that which is conscionable and right[(1)]. Its remedies were devised to maintain a balance between power and its use, or abuse, between unbridled, unfettered, or unscrupulous usurpation of privilege and the harshness and inequality which would befall the weak and the helpless. It was particularly suitable in actions against guardians and trustees by their wards for breaches of trust or 'fiduciary duty'. In short, it was a body of law which should have been availed of early and often by Aborigines or representatives on their behalf.

An examination of available case law involving Aboriginal parties reveals once again a dearth of action, a failure to seek or obtain redress through remedies swift and sure in their issue, relatively cheap to obtain, and compelling in their efficacy. Even today *not one* case is available in the law reports showing a rectification of any deed which by mistake did not correctly express the common intention of the parties to it. Are we to assume that in 195 years of developing commercial intercourse between the 'civilized' white and the 'uncivilized', the 'retarded', Aborigine there is no example of mistake? Or is it rather more accurate to infer that Aborigines - as legal incompetents - were denied the chance to test or exercise their rights, and that their guardians and protectors saw no profit in the exercise? Or can one assume that Aborigines were so devoid of property that the use of rights associated with them would have been an exercise in futility? One looks in vain for examples of rescission of contracts induced by the fraud or misrepresentation by the other party, and for their specific performance. It is the equitable remedy of the injunction which provided and continues to provide substantial relief, and confers benefits out of all proportion to the time, effort, and cost expended to obtain it . In Australia, the equitable remedy of injunction may compel the performance of an act or duty (mandatory) or restrain it (prohibitory); it may be interlocutory, preserving the status quo pending final determination of the rights of the parties, or it may be perpetual once that determination is made; it may issue on a *quia timet* basis, to restrain the threatened or anticipated breach of a legal right. As in other forms of equitable relief, its issue is discretionary and highly conditional on the conduct of the parties, but may be obtained by one party as against an absent party - on an *ex parte* basis - where a *prima facie* case is made out and the balance of convenience or the threatened injury is sufficiently substantial to warrant its issue.

(b) Injunctions to protect and preserve sacred, cultural, or heritage items

Protection of tribal secrets revealed in confidence to a well-known anthropologist was the subject of a successful *ex parte* application for an interlocutory injunction granted by the Supreme Court of the Northern Territory in 1976. That case - *Foster and Others-v-Mountford and Another* - was the first such action of its kind in Australia(2). The plaintiffs, all members of the Pitjantjara (*sic*) Council, on their individual behalf and as representatives of the Pitjantjatjara people, sought to prohibit within the Northern Territory publication of a book *Nomads of the Australian Desert*. That book contained photographs, drawings, and descriptions of persons, places and ceremonies having deep religious and cultural significance. The Court held that publication would reveal secrets to tribal women, children, and uninitiated men, and would tend to undermine the social and religious stability of the plaintiffs' community. Although there was a judicial surmise as to their capacity to sue in a representative capacity, there was no doubt of their capacity to sue in a personal capacity.

Mountford's photographs next featured in a case decided in 1982 by the Victorian Supreme Court. In interim proceedings in *Pitjantjatjara Council Inc. and Peter Nganingu-v-John Lowe and Lyn Bender*, the plaintiffs successfully sought and obtained injunctions restraining the owner of the Mountford slides (Lowe) and the auctioneer (Bender) from displaying or selling 1,000 slides, 100 of which dealt with secret ceremonies(3). Orders required the defendants to deliver up possession of any slides relating to, or recording, any of the philosophical or religious traditions of the Pitjantjatjara. Subsequently, final orders were made granting ownership of the secret/sacred material to the Council as trustee for its and associated peoples. No objection seems to have been taken to the representative nature of the action, although by the time of that hearing two other relevant decisions had been made.

The first was *Noonkanbah*(4), or the 'Dreamtime-v-Oil debate' in Tatz's felicitous expression(5). Tatz has given a detailed factual exposition of that case(6), but a few short details are required. The Amax Corporation wished to undertake drilling and other exploration activities on land held under pastoral lease on behalf of a local, traditional Aboriginal community in Western Australia. Part of the planned exploration site was an area of religious significance for that community and had been declared an 'Aboriginal site' under the *Aboriginal Heritage Act 1972* (WA) which forbade any activities of the nature contemplated for that site without the permission of the Trustees of the Western Australian Museum. The community obtained an interlocutory injunction to restrain exploration or drilling on the land, and the Corporation moved to have that injunction discharged. The Minister directed the Trustees to give their consent to the Minister for Mines which they were obliged to do. The Court held that the community had sufficient interest to maintain the suit but that the statutory power vested in the Minister to compel the Trustees to give their consent in effect overturned the interests of the community and the desire of the Trustees to protect the site. That injunction was discharged, and the Act amended by removal of such discretions as the Trustees may have had in favour of an express obligation to comply with a ministerial direction 'having regard to the general interests of the community', that is, the State(7).

That community lost its site and what little protection the legislation conferred. They gained moral sympathy and support and exposed the extent of their helplessness and plight and the naked realities of political power. Victorian Aborigines, however, subsequently redressed the power-politics ledger by their signal victory to protect ancestral relics from the depredations of an equally powerful combination of State and corporation. In *Onus and Another-v-Alcoa of Australia Ltd.*, the High Court upheld an appeal by two Aboriginal descendants of the Gurnditch-Jmara community seeking an injunction to restrain Alcoa from carrying out work on land occupied by it(8). The work was likely to interfere with Aboriginal relics, of which the appellants were custodians under their community laws and traditions. The Victorian *Archaeological and Aboriginal Relics Preservation Act 1972* made it an offence, *inter alia*, to carry out an act likely to damage an Aboriginal relic. The appellants failed before a single Justice of the Supreme Court of Victoria, and again before a Full Court on appeal, to obtain an injunction mainly on the ground that they had no *locus standi* (a 'place of standing', that is, a capacity to commence and maintain proceedings), a sufficiency of interest in the subject of the proceedings that they were likely to suffer special damage peculiar to themselves. Those Courts, in other words, adopted the 'common law' standard appropriate to the issue of injunctive relief by a member of the public in a 'public' matter. The High Court - by a massive 6 to 1 majority - held that their custodial position in, and obligations as members of, that community gave them a special interest in the subject matter greater than that of members of the public generally, and this was sufficient to found *locus standi*. A physical impediment or barrier as to access (a fence) to the subject land would not deprive them of *locus standi*, nor would their emotional or intellectual interest in the preservation of the relics. *Onus* subsequently went back to the Victorian Supreme Court - which ordered Alcoa to refrain from crossing five sites, and further to introduce preventative measures to protect them. Alcoa then abandoned its declared intention to construct an aluminium smelter. *Onus* forcefully demonstrated that material interests or economic 'progress' will not always subvert Aboriginal religious or cultural objects. It resulted in a major advance and massive publicity even though, as one High Court Justice (Wilson) noted, the appellants were seeking by civil process to enforce the criminal law(9).

(c) Injunctions in defence of Aboriginal sovereignty and land rights

Mathaman in 1969 and *Milirrpum* in 1970 set valuable precedents for Aboriginal assertions of sovereignty in *Coe* (1974), of breaches of trust in *Peinkinna* (1977), entitlement to take up interests in land in *Koowarta* (1982), and to preserve those interests in *Mabo* (1982). The first three cases dealt with land and commercial interests in the Northern Territory but their outcome created a 'ripple' effect throughout Australia; the last three dealt with Queensland, but *Koowarta*, as has been noted, was the precursor to the *Viskauskas* and *Tasmanian Dam* decisions.

In *Mathaman*, three Aborigines sued in a representative capacity to restrain Nabalco Pty. Ltd., from mining for bauxite in the Gove Peninsula, but more particularly from wrongfully entering and remaining on their lands, breaking down and destroying dwellings, flora and fauna on which they depended for their food, art, beliefs, and way of life, and violating their sacred areas and objects(10). We are aware of the fate of that case, and of its successor *Milirrpum*(11). But those cases stimulated the whole question of land rights for Aborigines, resulting in *Coe's* 1974 challenge to the fundamental capacity of the Crown to enter into arrangements for uranium mining at Nabarlek without prior consultation with and consent of the landowners, namely, the Aboriginal people of Australia(12). *Coe* failed on procedural or technical grounds, but his was not an inglorious failure. His action and the preceding two gauged judicial responses to novel legal actions and found them positive, supportive, encouraging.

Peinkinna is one of those fiduciary actions which should have been brought by Aborigines long before 1976(13). They alleged that the Director of Aboriginal and Islanders Advancement (Qld) was the trustee of a public charitable trust for the benefit of the Aborigines resident on Aurukun Reserve, and had committed a breach of trust by entering into a series of agreements with mining companies for bauxite mining on reserve lands with certain benefits to accrue to Aborigines generally and not just to those at Aurukun. The Director relied on statutory privilege to challenge their objections but the Queensland Supreme Court on appeal rejected his claims. The matter went to the Judicial Committee of the Privy Council who found in his favour.

Legal challenges may not always result in legal victories, but they do expose the parties to considerable and searching public examination of motives, or irregularities in the exercise of power, to compliance with Court directives as to disclosure of extra-legal, mainly executive, motives and policies by which specific legislation may be administered. In *Koowarta*, for example, one of the documents brought to light was a Queensland Cabinet decision that the Government of that State 'does not view favourably proposals to acquire large areas of additional freehold or leasehold land for development by Aborigines or Aboriginal groups in isolation', as 'it is considered that sufficient land in Queensland is already reserved and available for use and benefit of Aborigines'(14). In dismissing Queensland's challenge to the validity of the *Racial Discrimination Act 1975* (C'th), the High Court underwrote the Commonwealth's constitutional position in the field of, *inter alia*, race relations.

An injunction suit therefore has political consequences and potential extending far beyond the individual's immediate economic or other interest. In *Koowarta* it went to the heart of the Commonwealth's relationships with the States in the Australian federal polity.

Wacando sought, but failed, to have Darnley Island in the Torres Strait declared not part of Queensland or the Commonwealth(15). He claimed injunctive as well as prerogative relief in the High Court, illustrating that the equitable relief complements common law remedies, and indeed may be given only where the latter is inadequate or unavailable.

Mabo shows that sovereignty is far from being a dead issue(16). Following the High Court's decision in *Wacando*, Mabo and four other Murray Islanders from the Torres Strait asserted that their usufructuary, or traditional hunting-gathering rights continued after colonization by Queensland in 1879. They sought, *inter alia*, an injunction restraining the Queensland Government from 'doing an Aurukun', that is, revoking the reserve status of their island and thereby subjecting them to greater political control(17). The substantive issues also survived an initial challenge in the High Court but 1985 legislation introduced by Queensland now seems to have pre-empted further hearings.

(d) Injunctions to preserve personal liberty and community entitlements

In 1951 *Waters* sought to restrain the Director of Native Welfare from ordering his banishment to, and detention in, a remote Aboriginal reserve(18). Although he lost on jurisdictional grounds, the High Court exposed the almost unparalleled powers of the Director, referring to his discretion as 'absolute', and the position of Aborigines subject to his directions as generally 'weak and helpless'. Although Waters lost his fight, his case was important as a reminder to the Director, and others similarly placed, that a power higher than theirs did exist and could be invoked in aid of the liberty of the subject.

The 'Lake Nash' case in 1979 is a modern illustration of the historical exploitation and harassment of the underprivileged by those in positions of power, in this case economic coercion(19). A pastoral company closed the company store to Aborigines, that is, those who were residents of long standing at the station, preventing them exchanging welfare cheques for food, petrol, and cash. Their statutory entitlements under the *Crown*

Lands Act[20] to the use of educational, medical and similar facilities, or the provision of substitute facilities at a different site were denied or ignored by the company. An injunction was sought and obtained by Aborigines for restoration of their entitlements. The threat of further proceedings for contempt of the Court's orders was averted only by the company's agreement to restore their access to the subject facilities.

(e) Injunctions to ensure administrative regularity of Aboriginal organizations

Equitable relief may sometimes be more effective than administrative law remedies in *inter se* disputes. By its very nature it tends to be prompt, and as a process of Court, non-compliance is punishable as an offence against the Court, not against those who commenced proceedings. In 1979 two Aboriginal groups complained that the Northern Land Council had not complied with the *Aboriginal Land Rights (Northern Territory) Act 1976* in explaining the terms of the proposed Ranger uranium agreement and fully or adequately consulting them[21]. An interim injunction was obtained restraining the NLC from signing the agreement. The NLC agreed to amend its procedures as to consultation and communication. A significant result, in that legal process was an adjunct to political maturity, the balancing and exercise of responsible legal powers for the benefit of discrete Aboriginal groups.

(f) Conclusions

The range of equity matters discussed is not great, and is of fairly recent origin. But they are eloquent proof of one of the maxims of equity, namely, that 'equity is equality'. In the final analysis a legal loss may mean a moral win, but a small legal victory can intensify and consolidate the nature and direction of succeeding claims. As a tactic, or stratagem, its very 'cost-effectiveness' elevates its utility. As a *corpus* of legal history, practice and procedure, equity stands for responsibility and accountability, for the *coda* of proper behaviour signally absent in Aboriginal-white power relationships. And, as recent experience indicates, it has still to become an exemplar of official behaviour.

REFERENCES

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3. (1982) 4 ALB 11; *Bibliography*, Case No. 149, p. 65A.
4. *Noonkanbah Pastoral Co. Pty. Ltd.-v-Amax Iron Ore Corporation* (Supreme Court of Western Australia, No. 1558/79, 27 June 1979, unreported), *Bibliography*, Case No. 138, pp. 62-3.
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10. *Mathaman and Others-v-Nabalco Pty. Ltd. and Another* (1969) 14 FLR 10; ALR 685; *Bibliography*, Case No. 115, pp. 48-9.
11. *Milirrpum-v-Nabalco Pty. Ltd. and Commonwealth of Australia* (1971) 17 FLR 141; (1972-1973) ALR 65, *Bibliography*, Case No. 119, pp. 50-3.
12. *Coe-v-Queensland Mines Ltd. and the Commonwealth of Australia* (1974) 24 FLR 459; 5 ACTR 53; *Bibliography*, Case No. 44, pp. 17-8.
13. *The Corporation of the Director of Aboriginal and Islanders Advancement -v-Peinkinna and Others* (1978) 52 ALJR 286; 17 ALR 129; *Bibliography*, Case No. 56, pp. 22-3.
14. *Koowarta-v-Bjelke-Petersen and Ors.* (1982) 56 ALJR 625, at p. 627; 39 ALR 417; *Bibliography*, Case No. 101, pp. 45, 45B-C.
15. *Wacando-v-The Commonwealth of Australia and the State of Queensland* (1981) 56 ALJR 16; 37 ALR 317; *Bibliography*, Case No. 419, p. 140A.
16. *Mabo-v-Queensland and the Commonwealth of Australia* (1982) 4 ALB; *Bibliography*, Case No. 112, p. 48A, and discussion in Chapter 2.
17. The whole Aurukun debacle is explored and analysed by Tatz in Chapter IV of his *Race Politics in Australia : Aborigines Politics and Law*, University of New England Publishing Unit, Armidale, 1979.
18. *Waters-v-Commonwealth* (1951) 82 CLR 188; 24 ALJ 595 *Bibliography*, Case No. 426, pp. 143-4.
19. *Tommy Turner, Bushranger Jack Mahoney, Frank Toby, Ned Kelly, Marnie Lewis, Digger Campbell, Alec Neal, Billy Tommy, Flash George, Harry Campbell, Ray Rusty-v-Percy Crumblin, Swift Australia Pty. Ltd. and Queensland and Northern Territory Pastoral Company* (Supreme Court of the Northern Territory, No. 295 of 1979, Toohey J., unreported); *Bibliography*, Case No. 415, p. 138.

20. *Crown Lands Act (No. 3) 1978*, s. 24 (2)-(6).

21. *Dick Malwagu and Johnny Marali No. 1 (sic)-v-Northern Land Council* (Supreme Court of the Northern Territory, No. 703 of 1978, 19 September, 1978, unreported); *Bibliography*, Case No. 113, p. 48.

TORTS

(a) Aboriginal disabilities

The oldest form of civil redress in law was long denied Aborigines not for defects in the substantive law itself, but by operation of those same statutory and procedural rules which gave them the legal status of incompetents, in company with infants and bankrupts. Almost every jurisdiction introduced into its 'Aboriginal' legislation the concept of legal guardianship of 'full-blood' Aborigines and 'half-caste' infants(1). But they also introduced the right and capacity of the administrator - as 'Chief Protector' or 'Director' or simply 'local guardian' - to commence proceedings *in his own name* to sue for, or recover property of, an Aborigine, or to obtain damages for their conversion, their wrongful detention and denial of the rights of the lawful (Aboriginal) owner(2). The 1902 legislation of Queensland required the Aborigine's consent but dispensed with it if action were required to preserve the property. That same provision was inserted and remained in the legislation of Western Australia after 1905, and in South Australia after 1911. Queensland dispensed with consent in 1939, but reinstated it in the 1965 legislation and retained it, in modified form, in its 1971 legislation. The legislation of the Northern Territory followed the South Australia model until 1953 when its *Welfare Ordinance* relegated Aborigines to the same legal basis as infants. Even the 1957 Ordinance preferred to follow the Queensland model of 1939 dispensing with consent, and this provision continued until the 1962 Ordinance inserted it.

Actions for recovery of wages were separately treated, but again Aborigines could be supplanted by action brought in the name of the Protector, guardian, or Director under Queensland's legislation in 1897(3), WA's in 1905(4), SA legislation in 1911(5), NSW legislation in 1936(6), and that of the ACT in 1954(7). Only NSW included as an eligible suitor 'a member of the police force'; all other States and Territories confined that category to specialist 'Aboriginal' agencies.

Even if the Act were silent, the statutory duty to exercise a general supervision and care, and the powers of management and control reinforced by regulation, gave 'welfare' and 'protection' agencies immense powers of influence and suasion over Aborigines in their care. Further, Aborigines generally lacked control over their earnings or finances : the capacity to initiate and maintain an expensive legal suit would be beyond their meagre resources. The procedural handicaps in giving evidence on oath, or in swearing an affidavit, were further obstacles to daunt any prospects of success. And if they were fortunate in recovering damages, their guardian had a large say in its disposition. Aborigines again were punished unduly in pursuing legal redress for legal grievance by the accidental tyranny of 'blood'.

Even today Aborigines are being handicapped by government in pursuit of redress for private wrongs. The Interim Charter, prescribing the conditions under which the Commonwealth Government funds the Aboriginal Legal Services, states areas of priority(8). After representation of Aborigines in criminal cases, 'improving the situation of Aboriginal juvenile offenders before the law', and providing assistance to Aboriginal parents 'relating to the custody and maintenance of children', civil cases are permitted to be undertaken. Even within that category, certain areas are singled out for particular attention, but these do not include tortious actions. And superimposed on *all* civil actions is an 'expectation' that 'cost recovery makes such cases self-supporting'(9). Even those actions that impose no financial drain on the public purse continue to attract government oversight and bureaucratic determinations.

(b) Nature of tortious remedies

Torts may conveniently be classified as 'those affecting the person (trespass, negligence), the family (wrongful death of a relative), reputation (libel and slander), property (trespass to land or goods, nuisance, conversion), economic rights (deceit, inducement of breach of contract, injurious falsehood)'(10). Actions such as assault and false imprisonment necessarily affect the person, but the cases analysed below have one factor in common : with the exception of *Jimarin-v-Hyde*, (1983) (NT), only two suits have successfully been brought by an Aborigine against a member of the police(11). Indeed, only two other suits in an action brought against the police for assault failed in the Supreme Court of the Northern Territory in 1978(12).

(c) Assault

Three cases illustrate novel aspects of claims for assault. In 1956, *Ross-v-Chambers* decided that an adult Aborigine could sue for damages for assault in the Northern Territory without the intervention of a 'next friend' as in suits by infants(13). Two station owners used a stockwhip on two plaintiffs to move them out of the path their horses were using. A subsequent fist fight between the owners and other Aborigines resulted in further assaults with the stockwhip. Kriewaldt refused a defence submission that as the Director of Native Affairs was their legal guardian the position of adult Aborigines was that of a child as in a guardian:infant ward situation. To accede would be to accept that they were under a 'species of perpetual tutelage', which was displaced by other statutory provisions(14). The use of a stockwhip is shocking enough but in 1981 - at Kununurra (WA) - Camer-Pesci, the licensee of an hotel, after assaulting two drunken Aborigines with a broomstick after they attempted a break-in at his hotel bound them with rope and used a pair of clippers to give each a 'mohawk' haircut(15). After being publicly exposed in this humiliating condition for about three hours, they were taken to a police station. Each plaintiff was awarded $1,000. The third case of assault resulted in the plaintiff's jaw being fractured(16). He was a 'full-blood' Aborigine, very slightly built, and very drunk at the time of his assault by the defendant, 'a tall, fairly heavily built European' hotel licensee(17). A fracas between the plaintiff and the plaintiff's wife eventually led to the licensee's intervention and resulting injury. The significance of this case, however, is that the Court's assessment of damages included $1,000 (of a total $3,500) for loss of ceremonial function as loss of enjoyment of life. The injuries, in effect, inhibited his participation in the loud singing of tribal ceremonies.

(d) False imprisonment

Both defendants in the 1981 Kununurra case also chained the plaintiffs to the towbar of a truck between 4 and 8 am (the trial judge described it as 'outrageous'), and the first defendant then sent them off in chains to the police station, also described as 'outrageous'(18). For these acts of false imprisonment each plaintiff was awarded $2,000 against the defendants. The facts in *Bailey-v-McGovern* are not in dispute, although the nature of the relief sought is(19). The case is mentioned as yet another (recent) illustration of the need for vigilance and the efficacy of Court process in matters of personal liberty. The plaintiff, a Crown witness in criminal proceedings, was unlawfully detained for four days at Goodooga, Lightning Ridge, and Walgett until released by order of the Supreme Court on a recognizance of $1. The first defendant was a Walgett justice of the peace and police officers were the other four defendants. The matter was adjourned *sine die*, that is, indefinitely.

A little over a decade ago, a District Court (NSW) jury awarded Ken Brindle damages against a policeman for false imprisonment. More recently, and more spectacularly, a District Court jury awarded a Dubbo Aborigine $5,000 compensatory, and $1,500 exemplary, damages against two Dubbo policemen for his false imprisonment under the *Intoxicated Persons Act*(20).

The plaintiff was detained by the two defendants at approximately 12.30 am, released into the 'care of a responsible person' at 3.00 am, was examined by a doctor and had a blood analysis at 3.50 am. The plaintiff and a prosecution witness denied that, when detained, the plaintiff's speech was slurred, that he was unsteady on his feet, that his eyes were bloodshot, that he was waving his arms about and talking loudly. In cross-examination the defendants admitted they smelt no intoxicating liquor on the plaintiff's breath, that they had not asked him if he had been drinking nor where he had been drinking.

The plaintiff's blood analysis showed no traces of liquor. The plaintiff is a dedicated member of the Aboriginal Inland Mission Church, a teetotaller, and had consumed no liquor since the age of 16. The defendants sought to rely on a statutory defence of acts done *bona fide*. The trial judge ruled that the civil onus should prevail, and that the plaintiff must prove on the balance of probabilities that the police were not acting *bona fide*.

The plaintiff's claim for compensation was for the emotional injury sustained, and the contempt and ridicule in which he was held by the community as a result of his illegal detention.

The award of exemplary damages was a measure of condemnation of the police action and an expression of community outrage for the suffering endured by the plaintiff. His was the first case of false imprisonment under the legislation.

(e) Defamation

In Chapter 6 I discussed the facts and decisions in the New South Wales defamation case of *Coe-v-Barbour*(21) in 1977, and the libel case successfully prosecuted by two Aborigines in Western Australia against the ABC in *Mitchell's* case (1958)(22). Although the damages awarded in each case were small ($100), the legal costs, the adverse publicity, and the successful utilization of law to vindicate reputation could be regarded as positive results for people proud of their heritage and prepared to assert it.

(f) Compensation for death of relative

(i) *Solatium*

In *Cook-v-Cavenagh*, the family of a young girl fatally injured in a motor accident was awarded a total of $8,000 as *solatium*, compensation for grief measured by its intensity and duration(23). Each parent was awarded $3,000, and the two elder brothers (aged 13, and nearly 10 at the time of the accident) $1,000 each. The deceased's younger sister was aged four at the time of the accident and was held ineligible for *solatium*. The trial judge noted in particular the strength of the mother's Aranda culture, her Christian life and upbringing notwithstanding, and her traditional chastisement, the burning of all photographs and clothing of the deceased, the deletion of all references to her by name in place of the 'little angel'.(24). The intensity of grief, therefore, took substantial note of cultural consequence.

The *de facto* wife of a Telecom linesman, electrocuted in the course of his employment, claimed under the *Compensation (Fatal Injuries) Act 1974* (NT) on her own behalf, one child by the deceased and another child accepted by the deceased as his child(25). The parties reached agreement on recovery, and the only issue was the assessment of damages. The Court noted that the wife was born on a cattle station in the Northern Territory and was 'of part Aboriginal descent and in the manner of those days, she was taken from her mother at the age of four and brought up in a church home at Alice Springs until she was 15 years of age'(26).

Economic loss, *solatium* and loss of *consortium* were assessed at $181,000 for the wife, economic loss, *solatium*, and loss of care and guidance to the second child at $16,500, and at $24,500 to the deceased's natural son for economic loss and loss of care and guidance.

A further claim by the wife under the *Law Reform (Miscellaneous Provisions) Act*, as personal representative of the deceased, failed for purely technical reasons.

(ii) Criminal injuries compensation

The mother, father, and younger brother of a boy brought an action for compensation under the South Australian *Criminal Injuries Compensation Act 1969* following the manslaughter of their son and brother(27). After disposing of a jurisdictional objection, namely, that the assailant had not been brought to trial, the Court considered each of the claims(28). That of the father was rejected because there was grief and concern but not the physical, mental or psychological trauma compensable. The mother, however, was awarded $1,500 and the brother, whose psychological distress was more acute, $2,000. Given the intensity of physical violence in some Aboriginal communities, particularly in the Northern Territory and Queensland, it is surprising that there is a dearth of claims for compensation for rape. The only one I have found was in the 1979 NT case of *S-v-Turner*, where the victim, aged 22, and described as 'an unsophisticated and naive woman' 'of Aboriginal origin', was awarded $2,500 under the *Criminal Injuries (Compensation) Ordinance 1976*(29). The Court found that she had not contributed to her ordeal, nor had she suffered a material reduction in her sense of well-being or in her lifestyle. In this case the North Australian ALS acted for the assailant. In terms of their charter, the ALS organizations will not act for one Aborigine against the other. But in acting for the aggressor in this case, has the ALS *itself* created yet another obstacle for the innocent, the victim, to surmount?

(g) Motor vehicle accidents : negligence and injuries

An Aboriginal shearer was injured in a car driven by his wife in Western Australia, the effect of his elbow injury on earnings being described by the trial judge as 'catastrophic'(30). An award of $70,016 was reduced on appeal to $60,500. Two of the judges on appeal noted that the plaintiff was 'Aboriginal' but only one seems to have considered this of significance. Brinsden J., speaking of the plaintiff's lack of other training or skill said: 'being an aboriginal, it is unlikely that he will achieve any further or additional skill' being relegated to doing 'menial jobs'(31). If by that he meant that he would remain in marginal employment, or unemployment, he was highlighting a form of discrimination which Aborigines as a whole suffer more acutely than most. And that is that in the assessment of future economic loss, not only unemployment benefits were deductible, but the base on which calculations are made is set at a level markedly lower than those enjoying higher income from educated skills.

This aspect was taken into consideration in the 1980 NT decision in *Jabanardi's* case[32]. A boy aged 9½ years suffered devastating head injuries, resulting in permanent brain damage and life expectancy of 20 years. He was a 'full blood', following a traditional life style at Warrabri where he could be expected to be given inexpensive food and shelter. Nevertheless the Chief Justice took into account the 'unhappy fact that living in a tribal state the life expectancy of such a person is less than a white person'; economic loss was difficult to determine with spasmodic or seasonal employment, although he had some schooling. He was awarded $362,238, which included $2,500 for loss of expectation of life and $25,000 for pain and suffering, loss of amenities and enjoyment of life.

It now seems clear that in determining compensation the Courts will take as a compensable factor loss of 'cultural amenities' as was seen in *Roberts-v-Devereux*[33]. Two cases illustrate this, both involving 'full blood' plaintiffs.

In 1982, the South Australian Supreme Court awarded a 'full blood' Pitjantjatjara male, aged 22, $74,000 for injuries, including $10,000 for loss of amenities which was basically loss of position in his community[34]. Although made a man in ceremonies, he would not be advanced to further degrees in Aboriginal lore because he might not keep secret what was entrusted to him, and might not pass it on to others accurately. He would continue to play a minor role in the community and would be consulted less than others on tribal matters.

That decision was applied in *Dixon-v-Davies* where the Supreme Court of the NT awarded $134,500 to a 10 year old 'full blood' from Amoonguna[35]. Because of a severe deformity and peculiar gait his likely employment would be as a builder's labourer or gardening, but subject to the restrictions of 'Aboriginal mortality' and 'Aborigines as a rule have a shorter working life than other members of the community'[36]. For loss of standing in his community and his lowered expectation of ever being able to enjoy full tribal rites, his lowered marriage prospects deriving from his deformities, his being denied access to tribal secrets, and the likelihood of his remaining 'wiyai' ('young boy' in its most pejorative sense), he was awarded $25,000.

(h) Conclusions

Tortious actions reflect society's determination to provide proper compensation for resolution of private disputes between citizens or other legal persons. The cases discussed are pitifully small in number, and the overwhelming majority were commenced only with the assistance and availability of *Aboriginal* legal aid organizations(37). Is it credible that *no* other causes of action arose prior to their establishment not 15 years ago? It seems that the indifference of the legal profession and most of academia must be added to judicial determinism, bureaucratic repression, and government neglect as a cumulative legal burden borne by black citizens.

Perhaps 'indifference' is too kind a word for some academic disciplines. It requires little skill and even less imagination to note that Aborigines, until recently, were virtually the academic preserve of anthropologists. And it cannot be stretching credulity to suggest that some anthropologists, in some areas of their fieldwork in the past 100 years since Australoids first aroused and excited scientific enquiry, were witnesses to some illegalities, infractions of moral and legal rights, some acts of cruelty or maltreatment capable of legal redress?

In his 'Some Ethical Problems In Modern Field Work', Professor J.A. Barnes describes the quandaries facing ethnographers(38). His predicament was that the 'scientist' looks at research subjects at a distance, as in a laboratory, through a microscope or the reverse end of binoculars. Rather than imposing his moral values as a citizen, his discipline as a person engaged in scientific research requires him to be scientific, detached, impartial, objective; in a word, he may remain aloof. Although acknowledging that times have changed in the post-colonial era, Barnes did not resolve the *conundrum* which self-defined roles pose for a scientist in the field(39). The need for confidentiality, access, observation, discussion, and dissemination will be paraded as intellectual virtues which explain, if they do not also excuse, the silence of anthropology in exposing and reproving the legal abuses of Aborigines.

Barnes was obviously of the view that field work required one discipline, one code of ethics or behaviour, and civic obligations by the anthropologist required another. 'If he wants to change the state of affairs he encounters he should do this unequivocally as a citizen after he has left the field

<u>and is free of the special constraints of the field work situation</u>'(40) (emphasis added). Scientific inquiry, it seems, was successful for so long in silencing the voice of civic conscience.

REFERENCES

1. See Part II, especially Chapter 5.
2. (N.T.) *Aboriginals Ordinance 1978*, s. 43 (1)(b); *Welfare Ordinance 1953*, s. 24; *Welfare Ordinance 1957*, s. 3 (inserting s. 25 (1A)); the *Welfare Ordinance 1961*, s. 9 repealed the former provisions and required the Director to obtain the Court's leave to sue in that Court on behalf of a 'ward'.
   (Qld) *The Aboriginals Protection and Restriction of the Sale of Opium Act 1901*, s. 13 (b); *The Aboriginals Preservation and Protection Act of 1939*, s. 16 (1)(b); *The Aborigines' and Torres Strait Islanders' Affairs Act of 1965*, s. 28 (1) (c); *Aborigines Act 1971*, s. 38 (1) (b).
   (S.A.) *The Northern Territory Aboriginals Act 1910*, s. 46 (1) (II); *The Aborigines Act 1911*, s. 35 (1) (II); *Aborigines Act 1934*, s. 35 (1) (b); *Aboriginal Affairs Act 1962*, s. 29 (1) (b).
   (W.A.) *Aborigines Act 1905*, s. 33 (2); *Native Welfare Act 1963*, s. 23 (1) (b).
3. *The Aboriginals Protection and Restriction of the Sale of Opium Act 1897* s. 27.
4. *Aborigines Act 1905*, s. 54.
5. *The Northern Territory Aboriginals Act 1910*, s. 54.
6. *Aborigines Protection (Amendment) Act 1936*, s. 2 (1) (i), inserting s. 13 D.
7. *Aborigines Welfare Ordinance 1954*, s. 11 (5).
8. The Charter is set out in full in Australia, House of Representatives Standing Committee on Aboriginal Affairs *Report on Aboriginal Legal Aid*, Australian Government Publishing Service, Canberra, 1980, at pp. 244-5.
9. Para. 6.
10. David M. Walker, *The Oxford Companion to Law*, Clarendon Press, Oxford, 1980, p. 1224.
11. *Bibliography*; see also Chapter 18 for discussion of these cases.
12. *Walter Jamba Jimba-v-George Johnston Davis* (Supreme Court of the Northern Territory, No. 611 of 1976, Forster C.J., 23 August 1978 unreported); *Bibliography*, Case No. 95, p. 44 (perforation of small bowel following alleged police assault; insufficient evidence; claim dismissed with costs); *Gordon Liddle-v-Warwick Owen* (Supreme Court of the Northern Territory, No. 702 of 1977, 17 August 1978, unreported); *Bibliography*, Case No. 105, p. 46.
13. *Ross-v-Chambers* (1956) NT 43; *Bibliography*, Case No. 385, p. 127.
14. *Ross-v-Chambers*, p. 10 of judgment.
15. *Gordon and McDonald-v-Camer-Pesci and Another* (1981) 2 ALB 7; *Bibliography*, Case No. 77, pp. 35A-B.
16. *Roberts-v-Devereux* (1982) 4 ALB 10; *Bibliography*, Case No. 381, p. 125A.
17. Ibid.
18. See 15 *supra*.

19. (Supreme Court of New South Wales, Common Law Division, No. 15074/80, Roden J., 4 March 1981, unreported); *Bibliography*, Case No. 19, p. 7.
20. *Conlon-v-Killen and McFadden* (1984) 11 ALB 11; *Bibliography*.
21. *Coe-v-Barbour* (District Court of New South Wales, Judge Thorley, 5 December 1977, unreported); *Bibliography*, Case No. 41, p. 15.
22. *Mitchell-v-Australian Broadcasting Commission and Middleton* (1958) 60 WALR 38; *Bibliography*, Case No. 122, p. 55.
23. (1981) 10 NTR 35; *Bibliography* , Case No. 46, p. 19A.
24. (1981) 10 NTR 35, at p. 38.
25. *Parsons and Others-v-Australian Telecommunications Commission and Others* (1983) 28 NTR 19; *Bibliography*.
26. (1983) 28 NTR 19, at p. 24.
27. *In re Szekely; In re Gollan* (1980) 25 SASR 112; *Bibliography*, Case No. 404, pp. 135-6.
28. *In re Gollan* (1979) 21 SASR 79; *Bibliography*, Case No. 75, pp. 33-4.
29. (1979-80) 1 NTR 17; *Bibliography* , Case No. 386, pp. 127B-C.
30. *Champion-v-Champion* (Full Court of Supreme Court of Western Australia, Appeal No. 208 of 1976, 2 August 1976, unreported); *Bibliography*, Case No. 39, p. 14.
31. p. 9 of judgment.
32. *Jabanardi-v-A M P Fire and General Insurance Co. Ltd.* (1981) 1 ALB 7; *Bibliography* , Case No. 90, pp. 42-3.
33. See 16 *supra*.
34. *Napaluma-v-Baker* (1982) 29 SASR 192; *Bibliography*, Case No. 133, p. 60A.
35. *Dixon-v-Davies* (1982) 17 NTR 31; *Bibliography* , Case No. 57, pp. 23A-K.
36. (1982) 17 NTR 31, at p. 34.
37. The *Report on Aboriginal Legal Aid*, p. 90, cites the particularly tragic case in 1977 of a 16 year old Aboriginal boy who, as a passenger, was rendered a spastic quadriplegic in a car accident, and had been in Darwin Hospital's paraplegics ward for *two years* when the North Australian Aboriginal Legal Aid Scheme discovered him. No action had been commenced to obtain compensation for his injuries; the only payments being made were his medical expenses. Further enquiries revealed two people had been killed in the collision and many injured. All were Aboriginal. Perhaps legal aid organizations need to intensify their civil law education programmes consistent with their funding obligations to the Commonwealth.

38. *The British Journal of Sociology*, 14, 1963, pp. 118-134.

39. 'We are concerned not with the rights of Aboriginals or Communists or anthropologists as citizens but with how research can be competently carried out in conformity with a professional code of ethics' : 'Politics, Permits and Professional Interests : the Rose Case', *The Australian Quarterly*, 41, 1, pp. 17-31, at p. 23.

40. Ibid., at p. 26.

CHAPTER 10

FAMILY LAW

In Chapter 5 I examined the legal controls and constraints imposed on Aboriginal women in respect of marriage, and the legal cruelties inflicted on them and their children in the name of 'progress'. This Chapter explores cases of marriage, custody, and adoption involving at least one Aboriginal party. It will be seen that legislative caprice was matched in some cases by institutional obduracy and judicial chicanery to the detriment of the Aboriginal mother or parents.

(a) Applications for consent to marry*

In *Re A Minor*, the Supreme Court of the Northern Territory dismissed an application by a European male, aged 19, to marry a girl aged 17, over his mother's opposition(2). The girl, the mother of their young child, was described as 'partly coloured'. The applicant's mother denied that she was racially biased, but admitted to doubts about the baby's paternity. The Court held her refusal to consent not unreasonable. It reacted to counsel's submission that the parents would continue to live together with or without permission to marry as 'utterly contrary to proper standards of moral restraint'(3) and as 'immoral behaviour which the Court would not encourage'(4).

The same judge next year gave his approval, as required by statute, to the marriage of a 14 year old 'part Aboriginal' girl, the daughter of a 'wholly European' father and a 'full blood Australian native' mother, to a 24 year old Chinese man(5). Unlike the proposed spouse in the preceding case, he was possessed of his own business and substantial financial resources. The parents of both favoured their marriage, and the girl was pregnant by her proposed husband. The judge considered that 'apart from their moral lapse...they appear to be of good character'(6). He noted that unmarried motherhood and illegitimacy were regarded with complacency in the Northern Territory, but held that the mutual devotion of the parties over two years, their maturity

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* See reference 1 for the 'case' of *Mick and Gladys*.

and financial security, and the parental care and devotion which could best be given to the unborn child in its parental home were sufficiently exceptional and unusual to justify the order sought. A close reading of these two cases reveals the emphasis the judge placed on the material advantages which the applicant in *Re A Minor* could not provide. The maturity of the parties and the consent of the parents in the second, likewise distinguished *Re P.* from the first case.

(b) Custody of neglected children

The Supreme Court of South Australia, in *Roberts-v-Bilney*, re-affirmed its ancient and inherited equitable jurisdiction exercised over infants as *parens patriae*(7). The Aboriginal parents each sought custody of their seven year old daughter. The girl had been restored to the mother's custody after being placed with foster parents for two years as a neglected child. The Minister of Community Welfare asserted that once a custody order was made he became the child's guardian and thereby ousted certain statutory and inherited equitable jurisdiction of the Supreme Court. On appeal, the Court rejected the Minister's assertion in the above manner, denying another variation of that 'species of perpetual tutelage' described by Kriewaldt in *Ross-v-Chambers*(8). The South Australian case was not decided in 1911 after *The Aborigines Act* was passed : it was decided in 1981.

(c) Custody of illegitimate children

The religious conversion of an Aboriginal mother to the Jehovah's Witnesses faith was a factor in her failure to oppose a custody order being given to the persons having *de facto* custody of her child. The child in *Dodd and Dodd-v-Stuart* was the youngest of three illegitimate children born to the mother who, until her conversion, led a 'wild life'(9). The mother was sister of one of the applicants for custody, to whom she gave the child when it was a few weeks old. The parties were each described as 'an Aboriginal native of Australia' and belonged to the Urabana tribe. The applicants had a stable and happy marriage, good employment, and were held in esteem by their local community. The Court considered that the child enjoyed a *de facto* parental relationship with the applicants, and considered the mother's opposing the application derived more from a desire to have the child reared in her new-found faith. The judge's impression of her as a witness was 'unfavourable'. He had 'grave doubts about the sincerity and motives' of the mother and was 'not persuaded about her over-all fitness to have the custody and control of the child, nor about her ability to provide a true mother's love, attention, care and upbringing'(10).

A NSW Aboriginal mother of an ex-nuptial child who was 'three-quarter caste' sought custody from the European foster parents with whom the child (now 10½ years of age) had been placed and had lived for virtually her whole life(11). The natural mother had five other children prior to her divorce, and was unable to cope with illness and unemployment at the time of fostering. Her other children subsequently became wards of the State. For the mother, it was asserted that her claim as the natural parent was stronger by the Aboriginality of herself and her daughter, and urged that the child should be afforded enjoying the culture of her race and being able to establish her identity with her own Aboriginal natural family rather than being left in a state of uncertainty by being brought up in the environment of non-Aboriginal foster parents. The Court found as a critical feature that the child was living happily and well adjusted in a stable environment with a family to whom she related as a member of that family. Security, stability and certainty were critical factors for her now that she had gone beyond her formative years. As to her Aboriginality, she 'will probably have to come to grips with her unique situation in due course in making her life' which could be 'encountered and coped with' when she was older and more experienced(12). Custody was awarded to the foster mother.

The welfare authorities have sometimes contrived to flout the law by flagrant denials of the Aboriginal mother's rights in favour of the non-Aboriginal father. In *R-v-Wittidong, Mulardy and Maine*, the father, who had no legal rights to two ex-nuptial children under the *Guardianship of Infants Act 1972* (NT), was allowed by the NT welfare authority to remove them to a foster parent in Broome(13). The mother successfully sought *habeas corpus*. In another case heard six months earlier, a NT Court of Summary Jurisdiction declared the unmarried white father of two Aboriginal children their legal guardian and custodian-to-be(14). The order was based solely on the evidence of the father and a welfare officer. The mother was outside the Court, but was not advised of the proceedings, her exclusion being the basis of a successful application to set the order aside.

(d) Custody of children after breakdown of marriage

Sanders was a case which fairly raised issues of cross-cultural values, calling for considerations of the emotional development of the child of an Aboriginal mother and white father, where the 'environmental' assessment included emotional attachments, experience of discrimination, family and tribal relationships, and physical health(15). The Full Court of the Family Court of Australia on appeal overturned the original order and awarded custody to the mother. It found that the fitness of each parent was not in issue. But the standards of cleanliness and hygiene at the mother's location at Elliott, in the Northern Territory, were well below those of the father in suburban Brisbane, and of the white Australian community generally. There was evidence of discrimination against Aborigines in suburban Brisbane but this was confined 'if it exists, to a relatively small portion of the population, and is based more on cultural and socio-economic factors than on colour alone'(16). The baby was only three months old. The father and surrogate mother both worked; the natural mother had gone through a tribal marriage with a 'full blooded' Aborigine whom she intended to marry. The Full Court considered that the child's emotional development arising from being in the constant care of his mother, particularly at his early stage in life, should have been taken into consideration. In its view, the natural mother could fill the role of a full-time caring parent and the child was entitled to the benefit of that care and the emotional security it may bring in the early years of its life.

In *Davies-v-Councillor* an Aboriginal mother failed to retain custody of two children, an order being given in favour of their father(17). The children had been in the custody of his sister-in-law, a 40 year-old grandmother, for a considerable period with the mother's consent. The judge himself raised the question of cultural links, but this was not in issue as the mother and her family had always lived in urban areas, nor was there any example of tribal connection or significant lifestyle differences. The current and future care of the children was considered the important consideration. The judge clearly was not impressed by the natural mother. Her close relationship with her extended family could override her interest in her children : she had twice failed to appear at scheduled welfare conferences. She made infrequent attempts to visit the children even when nearby, was immature in matters of finance, and gave a clear impression in the witness box of being unable to manage. The sister-in-law was 'concerned, caring, and knowledgeable in the bringing up of young children', and had formed a strong attachment to the children which was reciprocated. It seems therefore that favourable or unfavourable impressions gleaned from the behaviour of a witness must also be added to the crucible of relevant factors.

In *F-v-Langshaw and Others*, the Aboriginal father of an ex-nuptial child successfully opposed the child's proposed adoption by a white couple(18). The father, the white mother, and the child lived in Moree, a NSW community notorious for its race barriers and prejudices. The mother had consented to the proposed adoption, and the mother's relatives were described as 'racially prejudiced'. The Court noted overseas studies indicating that transracial adoptions are likely to be successful, but urged caution in seeking to apply such results to the adoption of Aboriginal children by white foster-parents in Australia. A child's part-Aboriginal inheritance was not in itself a reason for placing him with an Aboriginal family and if there were no relatives with whom he could be placed, no preference would be given to Aboriginal foster parents over white.

In the circumstances, the child would benefit as to his personality and mixed racial inheritance if he were brought up with the love and care of his father, grandparents, and relatives.

Goudge and Goudge is a major decision in the custody of children of a racially mixed marriage(19). The part-Aboriginal mother appealed against orders granting custody of three children aged nine, eight and four to their European father. The Full Court of the Family Court dismissed the appeal, the two majority judges noting that an essential part of the mother's argument was that the Aboriginal parent should be preferred if other factors of capacity, security, and environment were equal. In their opinion, lifestyle and identity are factors which have to be weighed with other factors, and no *prima facie* rule should exist that the welfare of the children would be better served by being placed in the custody of one parent over the other. The trial judge had noted the father's belief to 'play down' their Aboriginal background, whereas the mother was offering a more Aboriginal environment. She lived amongst an extended family in Darwin and her relatives took the children on hunting and camping trips to traditional Aboriginal areas and introduced them to aspects of Aboriginal culture. The trial judge considered that the children would fare better in the more stable and disciplined environment of the father's home. In dismissing her appeal, the majority thought her case might have been stronger had she been living in a tribal area offering a stronger Aboriginal alternative rather than in Darwin where the constrasts between white and black society were less marked.

In a prescient dissent, Evatt C. J. agreed that the Court should not prefer one culture over the other. Cultural identity was, however, of great importance; in the case of Aboriginal children it could not be viewed in isolation from the history of Aboriginal culture under white contact. Her Honour rejected positive discrimination of a minority culture, but decried any imposition of Anglo-Saxon values on other ethnic groups under the guise of welfare. She cited the Australian Law Reform Commission's Research Paper No. 4 on Child Custody, Fostering and Adoption, quoting as irrelevant to a proper determination of an Aboriginal child's best interests European concepts of child care embodied in the law.

A consistent thread running through these judgments is the acknowledgment of 'identity' and 'culture' and, subsuming that acknowledgment, of the variety and vivacity of a cultural heritage far from moribund or irrelevant in today's Australia. The clash of cultures is seen more often to be resolved in the favour of the European parent where the traditional lifestyle is not pursued, except where racial prejudice is manifested within the community. In that case, the Aboriginal background is seen to confer the advantages of an extended family, the security of a wider and, arguably, deeper bond of emotional stability.

(e) *Habeas corpus* and custody

In Chapter 7 (b) I considered, *inter alia*, the use of the prerogative writ of *habeas corpus* in aid of parental access to, or custody of, their children. Two Northern Territory cases illustrate their limitations. The first is sometimes known as the case of 'Frank and Elsie' or, as Tatz more vividly describes[20] it, the case of 'Two Black Lepers-v-The Catholic Church'[21]. Although Tatz describes it as 'a classic case of power and powerlessness' which 'rankles deeply'[22], the Court found on the evidence that each of their four eldest children, the subject of the application, was moved from the leprosarium for 'protection against infection' and that the parents 'realised the wisdom of the prompt removal...and consented to it'[23]. Both parents unfavourably impressed the Court in their evidence, being described as 'self-contradictory and evasive'; the mother particularly earned judicial scorn as being 'no less unconvincing in superfluous unsolicited repetitions of assertions of love for the children, her accompanying demeanour comprising constant and transparently over-acted use of an unfolded and neatly pressed handkerchief to wipe both eyes, neither of which showed any sign of a tear'[24]. The Court considered the children's environment in a favourable light, and gave support to their expressed wish not to be separated from their foster parents, supporting their 'emotional composition and functioning'. The judge referred to the 'organs, dimensions, senses, affections, passions' of Aborigines as 'similar to those of Europeans' and that 'sudden and substantial environmental changes' would cause a greater reaction than for Europeans. But overriding those considerations were the children's 'deeply rooted bonds of family devotion and friendships and all other personal interests and ambitions, all of which are confined to Bathurst Island'[25]. My reactions are considerably less than Tatz's, although - unlike Tatz - I had no direct, personal involvement in the case. The children, now adult, visit, and one lives at, Oenpelli.

The Court's displeasure based on unfavourable reaction to the natural mother was manifested in *K's case*, two years later in 1967[26]. This also was an application by the mother for *habeas corpus* in respect of the child, and a cross-application for the Court's order to dispense with her consent to an application for its adoption. The application for the writ failed, largely on the mother's conduct which is discussed below.

(f) Applications to dispense with consent to adoption

The Court considered it should not dispense with the mother's consent unless she had engaged in serious parental misconduct or exhibited other serious inadequacies as parent. This it found. The child was three years of age, 'part-Aboriginal' like her mother. The child's father committed suicide nine months after the child was born : shortly after the mother gave the child to the care of the applicants for adoption. The mother in this case, as in *Frank and Elsie, Davis* and *Dodd*, made an unfavourable impression as a witness, being 'not always truthful or candid'[27]. She subsequently had two affairs before living in a caravan park with a youth aged 16 by whom she had another child. A form she stated in evidence she signed as a consent to surgical operation consented to adoption : the judge disbelieved her. In sum, the judge considered her responsibilities to her fatherless child as 'reprehensible', and that she had increased them by bearing an illegitimate child, she was acting in her own selfish interests and her union with the 16 year-old was parental misconduct. Her indifference to her own child transformed that union into serious parental misconduct. The order dispensing with her consent was given.

In many of the cases discussed there is a strong moral stance which, viewed by contemporary standards, seems overbearing, and puritanical. The extended life style and apparent casualness of the affairs of the Aboriginal mothers, and of what to European eyes appears to be an aimless and drifting life, could be explained in terms of historical alienation of blacks by white legislation, a denial of their right to participate in, and contribute to, the affairs of the community as full and equal members. Extra-legal considerations, however, were not permitted to intrude in the process of judicial reasoning, except on a comparative factual or materialist basis. Personal denigration, if it intruded, certainly worked against Aboriginal mothers.

The final case is, in many respects, the worst. It exposed the naked cynicism and basic disregard of authority for an elemental human right, that of the mother to the custody of her child. In *Freddie's Case*, an American couple applied for an order dispensing with the consent of the mother to his adoption, and for a further order of adoption[28]. The mother was a 'full-blood', the father white, and the child aged two. The mother drank to excess, but when sober was loving and brought him many times to hospital for treatment. While she was in hospital with a broken leg, an application was made by welfare authorities declaring the child neglected. There was no possibility of the mother's getting out of hospital to attend the hearing which proceeded in her absence. The order was granted, and the child committed to the care of the American couple. The mother was not told by welfare or hospital authorities where her child was. The Court held that she had not neglected her child and declined to dispense with her consent. It also refused the order for adoption, contrasting the fondness and material endowments of the American couple with the love of the child's mother and extended family. The child was likely to undergo an identity crisis in America, but not in a community where he would be accepted as Aboriginal and become fully initiated. The order for adoption was refused, and an order restoring the child to his mother granted. The judge was highly critical of the actions of the Department of Social Welfare, and asserted that 'ordinary concepts of justice' required adequate notice be given to a mother if her unworthiness as a parent were an essential ingredient in guardianship proceedings. The Aboriginal Legal Aid Service could be enlisted to ensure that the mother fully comprehended the nature and gravity of the allegations[(29)].

The Court, of course, was correct. *Freddie's Case* was a paradigm of injustice at the behest of power and authority against an illiterate, hospitalized mother. The motives of its instigators can only be a matter of speculation, but historically, with *Freddie's Case* being decided just nine years ago, how many other *Freddies* remain undetected? And how many *Freddies* now live in Dallas or Los Angeles?

(d) Conclusions

The cases discussed in this Chapter are pitifully small, and in the main represent the net results of legal aid against the combined legal, financial, administrative and moral strength of authority, both temporal and secular. Aboriginal interests which historically were ignored are now not only being accorded lawful respect, but recognition born of a growing appreciation of the richness and validity of much of the Aboriginal tradition in contemporary Australia.

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1. The 'case' of *Mick and Gladys* was not a judicial matter as such, but properly deserves its place in the chronicles of bureaucratic obduracy, official deceit, parliamentary cowardice at Federal level, and tenacity of individual purpose. Mick Daly wanted to marry Gladys Namagu. He was a white drover, and she a WA Aborigine tribally married at age 13 to a man considerably older than she and who constantly maltreated her until she refused to return to him. She was subject to the provisions of the (NT) *Welfare Ordinance 1953*; s. 67 (2) required the consent of the Director of Welfare prior to, and as a condition of, the marriage of a ward to a non-ward. By mutual agreement, Gladys and another Aborigine had ceased living together when she met Mick Daly.

In June 1959, Mick was arrested and charged with cohabitation, an offence under the Ordinance, but the joint affirmation of a wish to marry led to Mick's sentence of six months being suspended. Mick sought the Director's permission to marry Gladys. It was refused, and Gladys was removed against her will to Warrabri settlement under the powers vested in the local Welfare Officer. The Director later stated that he had considered Gladys already married, that Mick was unsuitable as a husband, and that Gladys did not know her mind or her own best interests. What he failed to state appears to be the kernel of the matter, namely, that the policy aim of assimilation under the *Welfare Ordinance* did not extend to mixed marriages and 'half-caste' children.

The NT Legislative Council and the federal House of Representatives debated the matter, but the Director was immovable. Evidence of the death of Gladys' tribal husband, mutual declarations by Mick and Gladys of their desire to marry, and repeated applications by Mick for the Director's consent were unavailing over the next six months. Amendments to the *Welfare Ordinance* moved by Mick's supporters in December 1959 enabled appeals to Magistrates against refusals by the Director to consent to marriage. The Director capitulated. Mick and Gladys were married on 1 January 1960.

Mick and Gladys were two ordinary persons; but because one was black, they were denied the most fundamental and basic human right - the right freely to marry as an act of personal choice and commitment and not as a form of administrative largesse.

For a full discussion see C.A. Hughes 'The marriage of Mick and Gladys : a discretion without an appeal' in B.B. Schaffer and D.C. Corbett (eds.), *Decisions : Case Studies in Australian Administration*, F.W. Cheshire, Melbourne, 1965, pp. 302-321.

2. (1964) 6 FLR 129; *Bibliography*, Case No. 121, p. 54.
3. (1964) 8 FLR 129, at p. 136.
4. Ibid., at p. 137.
5. *Re P. (An Infant)* (1965) NTJ 767; *Bibliography*, pp. 64I-K.
6. (1965) NTJ 767, at p. 769.
7. (1981) 29 SASR 179; *Bibliography*, Case No. 380, pp. 125A-B.
8. (1956) NT 43; *Bibliography*, Case No. 385, p. 127.
9. (1976) FLC 90-085, p. 75 ,395; *Bibliography* , Case No. 61, p. 26A.
10. Judgment, p. 7.
11. *Torrens-v-Fleming & Anor.* (1980) FLC 90-840, p. 75, 305; *Bibliography*, Case No. 401, pp. 137D-F.
12. (1980) FLC 90-840, p. 75, 305, at p. 75, 311.
13. Supreme Court of the Northern Territory, No. 266 of 1979, Gallop J., 2 April 1979, unreported; *Bibliography*, Case No. 369, p. 123.
14. *In the Matters of Evelyn Joyce Cameron and Joanne Marcia Cameron* (Northern Territory Court of Summary Jurisdiction, 7 December 1978, unreported); *Bibliography*, Case No. 34, p. 12.
15. *In the Marriage of Sanders* (1976) 10 ALR 604; 26 FLR 474, FLC 90-078, 1 Fam LR 11433; *Bibliography*, Case No. 388, pp. 127, 127B, 128.
16. 10 ALR 604, at p. 606.
17. (1981) 1 SR(W.A.) 264; *Bibliography*, Case No. 52, pp. 21A-B. and c.f. *Stump-v-Johnson* (1979) 1 SR(WA) 49, at p. 51.
18. (1983) 8 Fam LR 833; *Bibliography*, p. 28C.
19. (1984) FLC 91-534; *Bibliography*.
20. In 'Aborigines and civil law', Chapter 5 in Peter Hanks and Bryan Keon-Cohen (eds.), *Aborigines and the law*, George Allen & Unwin, Sydney, 1984, p. 128.
21. R-v-*Silvester Pilimapitjimiri, Simona Tampulureimulla, Dick Mirringmautimiri and Mary Torramura; ex parte Frank Gananggu and Elsie Darrbuma (also known as Elsie Mary Darabome)* (1965) NTJ 776; *Bibliography*, Case No. 329, pp. 111-2.
22. *Op. cit*, p. 46.
23. (1965) NTJ 776, at p. 777.
24. Ibid.
25. Ibid., at p. 786.

26. *K. and Another-v-H.; The Queen-v-K. and Another; Ex parte H.* (1967) 11 FLR 34; *Bibliography*, Case No. 100, p. 45.
27. (1967) 11 FLR 34, at p. 36.
28. *William Francis McMillen and Sheryl* Anne *McMillan-v-Jack Robert Larcombe, Director of Child Welfare* (1976) NTJ 1001; *Bibliography*, Case No. 71 (*sub. nom. ;In the matter of Freddie, McMillan-v-Larcombe*) pp. 30-1.
29. (1976) NTJ 1001, at p. 1006.

CHAPTER 11

EMPLOYMENT, WAGES, AND WORKERS' COMPENSATION

(a) Economic justice

A recurring theme in this thesis is that Aborigines suffered massive discrimination, rank inequalities, and harsher treatment because of colour or of fractions of their 'blood'. They were non-white and were treated and suffered accordingly. Lest this be considered exaggeration or rhetoric, an examination of the laws as they affected employment will sustain my theme. The edifice of legislative discrimination and repression was no mere oversight, or momentary aberration of government. It was systematic, continuous, organized, designed to remove and eliminate any prospect of a reservoir of cheap black labour which might compete with white labour. The unions as much as the judicial system - while professing egalitarian ideals based on mateship and justice, 'a fair day's wage for a fair days work' - in general connived at the opposite.

This Chapter examines the laws specifically enacted in each Australian jurisdiction for Aboriginal labour. For the sake of continuity it leaves to the end a brief conspectus of the legislative treatment of the labour of one colour (black) with another (yellow). The sharp differences in treatment in terms of subject matter, duration, the levels of intervention, and the acquisition of assets illuminate another aspect of Australia's racism.

Its treatment of an impoverished, dispersed and unorganized indigene lacking both capital and industrial skills - and posing no real threat to organized labour or organized capital - was simple bigotry and prejudice sustained by appalling ignorance or utter indifference. Its treatment of its yellow/brown residents, on the other, was nurtured by a deep-rooted fear of economic and capital skills with which Europeans felt unable to compete. Labour and capital formed an unholy alliance to legislate away the competition before they succumbed to its ethos. Aborigines were relegated to the economic dustbin and a legal lid firmly clamped on it.

The end product is with us still. In the case of Aborigines it is a heritage, tradition, a cultural expectation of worthlessness and futility, of helplessness against forces organized to obstruct, thwart and frustrate the goals even of economic justice. Other writers have written extensively in associated socio-economic areas. The *Bibliography* should be consulted for the works particularly of Stevens, Green, Evans, Cronin, Hilliker, Saunders, Sharp and Tatz.

(b) Legislative restrictions on the employment of Aborigines

(i) Aboriginal labour

In Chapter 5 I discussed the system of apprenticeship and domestic labour imposed by white authority on black youth. Legislation operated at two other levels to deprive Aborigines of reasonable prospects of work. The first level was the specific exclusion of Aborigines from designated employment. The second level was an implied exclusion by requiring the employment of non-Aboriginal, or white only, labour.

The Commonwealth's *Sugar Bounty Act 1905* empowered the Minister to grant special permits for any 'half-caste born in Australia...to be employed on a white plantation' without prejudicing the bounty for that plantation's product(1). The *Pacific Island Labourers Act 1901* forbade the entry of such labourers after 31 March, 1904(2), and conferred on the Minister powers of deportation(3). Persons exempted from peace-time training in the militia (other than in non-combatant duties) included 'those who are not substantially of European origin or descent'(4), an exemption extended one year later (1910) to include war service(5), and in 1951, national service(6). The *Aborigines Protection Act 1909* (NSW) predicated that those able to obtain employment should do so : s. 8 (2) empowered the Board to remove from a reserve 'any Aborigine who, in the opinion of the Board, *should* be earning a living away from such Reserve' (emphasis supplied). The object was to lessen their burden on the public purse. Queensland's Aborigines were prohibited from employment in any dairy(7). Aborigines were exempted from service in South Australia's militia; nor were they liable to provide a substitute to serve(8). The 1854 legislation was strengthened in 1895 when they were exempted even from enrolment(9). Queensland, Western Australia, and the Federal Council of Australasia extensively legislated in the employment of Aborigines in pearling and bêche-de-mer fishing.

(ii) Prospective employers of Aboriginal labour

Legislation could either forbid the employment of Aborigines or confer benefits on the employer of an all-white labour force. The *Post and Telegraph Act 1901* (C'th), for example, restricted mail contracts to white labour[10], a legislative provision that remained in effect until its repeal in 1961[11]. The *Sugar Bounty Act 1903* (C'th) conferred a bonus on sugar-cane or beet produced by white labour only[12], although the *Sugar Bounty Act 1905* declared that the employment of 'any aboriginal native of Australia' in such production would not prejudice any claim to bounty[13], and the *Bounties Act 1905* re-confirmed this[14]. The *Sugar Bounty Acts* of 1910[15] and 1912[16] continued references to 'white-grown' sugar cane or beet. The *Excise Tariff 1902* conferred a rebate of excise on sugar cane produced by white labour only. This provision was the subject of legal opinion by the Attorney-General, Alfred Deakin, who concluded that 'Aboriginal labour cannot be considered white labour', but that 'quadroons may reasonably be considered as white labour; persons in whom the blood of a coloured race predominates should not. Half-castes are on the border-line; but in view of the affirmative and restrictive language of the provision, I think that half-castes should be excluded'[17]. The *Navigation Act 1920* exempted from its provisions Aborigines employed on Territory ships in coastal waters[18].

In Queensland Aborigines were forbidden employment as shepherds of infected sheep[19]; and in Western Australia the *Mining Act* from 1904[20] until 1963[21] provided that 'the labour of any aboriginal native of Australia shall not be accounted *bona fide* work in fulfilment of the labour conditions upon any mining tenement, except with the permission of the Warden'. The Northern Territory in its *Wards' Employment Ordinances* from 1953 to 1971 created a great edifice of bureaucratic oversight and control of the *minutiae* of employment for Aborigines, and always below the white norms.

Legislation therefore worked directly on Aborigines or on employers in respect of Aborigines. Their labour was prohibited outright as if diseased (sheep) or dirty (milk) or unreliable (mines) or worth less than the labour of a white man (sugar bounties and excise rebates). This peripheral legislation nevertheless perpetuated the paradigm 'native of Australia' in negative terms of rejection and disparagement from early colonial times (1854) until recently (1963). Its effects extended beyond their subject matter in the mosaic of degradation and depression.

(iii) Accommodation

If an Aboriginal labourer were worthy of hire, was he good enough to share the accommodation of his work 'mates'? Not in the Northern Territory whose *Employees' Accommodation Ordinance 1930* specifically excluded from the definition of employee 'any aboriginal native of Australia'[(22)]. Regulations under the *Wards Employment Ordinance* prescribed the standards of food and accommodation for Aborigines. They were always inferior to those enjoyed by white workers and, as found by Tatz in his doctoral research, the standards were never adhered to by the Government or Settlements or by any Missions, except in relation to mandatory rations at Hermannsburg. Queensland, in *The Shearers and Sugar Workers Accommodation Act of 1905*, first excluded Pacific Island labourers from the definition of 'sugar worker', and provided for separate sleeping and dining accommodation not only for them, but also for Asiatic shearers and sugar workers[(23)]. The 1915 *The Workers' Accommodation Act* continued the provision[(24)], as did its successor in *The Workers' Accommodation Act of 1952* [(25)].

Western Australia excluded 'any aboriginal native' from the definition of 'shearer' in 1912[(26)]. Even though this was a major occupation for Aboriginal pastoral workers, they were excluded from the statutory requirement 'to provide for the proper and sufficient Accommodation of Shearers and Shed-hands'[(27)]. This exclusion remained lawful between 1912 and 1974[(28)]. At the very workface, therefore, law prescribed segregation not on an individual basis, but on 'blood' or racial lines.

(c) Wages, and union support for Aboriginal wage justice

No Government in Australia refrained from discriminatory practices in determining wages for Aboriginal employees. The Commonwealth's *Sugar Bounty Act 1910*, for example, required every grower of 'white-grown sugar cane or beet' to certify the conditions of employment and the rates of wages paid to any labour employed by him when claiming the bounty[(29)]. The definitions and administrative interpretation of 'white-grown' thereby excluded all but 'quadroons' from the requirement of 'fair and reasonable' standards, a practice continued by the *Sugar Bounty Act 1912* which enabled the Minister to obtain a declaration as to those standards from the Commonwealth Court of Conciliation and Arbitration[(30)]. Both Acts were enacted after the historic *Harvester* wage case of 1907 enunciating the 'fair and reasonable' standards of labour, but by legislative prescription it would seem only for whites. During and after World War II, Aboriginal servicemen defending 'their' country were paid at rates substantially below their white counterparts(31), and in terms of war gratuities as much as 650% below(32). The Commonwealth also maintained a close supervision and oversight of Aboriginal peace-time employment. It repealed laws passed by the Federal Council of Australasia known as *Queensland Pearl Shell and Bêche-de-Mer Fisheries (Extra-territorial) Act of 1888* and *The Western Australian Pearl Shell and Bêche-de-Mer Fisheries (Extra-territorial) Act of 1889* and substituted its own *Pearl Fisheries Act 1952*(33). In 1959 ordinances relating to the employment of Aborigines or wards in the Northern Territory were reserved for the Governor-General's signature(34), itself a major intervention as that Territory already had enacted a code of employment legislation in the *Wards' Employment Ordinance 1953* (35).

New South Wales likewise regulated Aboriginal wages mainly through the machinery of its *Aborigines Protection* legislation, requiring constant and intrusive supervision by agents of authority, be they the Aborigines Welfare Board or the police. In Chapter 5 I referred to the system of enforced apprenticeships, the individual determination of wages, the capacity of the Board to direct the manner of payment, including 'pocket money' to the Board or the employee, the Board's retention and investment of monies surplus to the cost of 'keeping' the employee, its capacity to seek payment of back rent from a worker's compensation settlement(36) and to its legal power summarily to terminate the employment of an Aborigine 'in his best interests'. Those provisions and particularly those as to residence and removal extended to adults and, variably, to defined categories of 'half-castes'. Wages paid to the Board's employees, however, were exempt from attachment, a privilege removed in 1957(37).

Queensland's legislation - when it mentioned Aborigines at all - equated 'full-bloods' with 'old, infirm, or non able-bodied men' and - for purposes of overtime - with youths under 16(38). In the latter case they received exactly 50% of the minimum hourly rate payable to 'able-bodied adults'(39). 'Half-castes' were paid the same rates as for (white) adult males(40). Nevertheless it conferred a benefit on Aboriginal employees : their wages were exempted from (State) income tax, although arguably they were so low that to tax them would have been punitive(41). Western Australia compounded Aboriginal health problems by exempting from the provisions of *The Wine, Beer and Spirit Sale Act 1880* any unlicensed person who gave 'fermented liquor' to 'aboriginal natives in their service'(42), a provision which continued for 31 years[43]. The legislative inference was clear : grog in lieu of wages. A parallel may be drawn with South Africa's iniquitous 'tot' system, whereby Cape Coloureds were given a ration of liquor in lieu of cash wages for each day's work, thereby creating generations of near-alcoholics.

The Northern Territory enacted extensive provisions as to the employment of Aboriginal labour, it being the legislative intent to maintain continuous control over it within the administrative framework of the *Aboriginals Ordinances*. Not only Aborigines were discriminated against. An amendment to the *Aboriginals Ordinance 1928* prohibited the employment of female Aborigines by 'any persons of any Asiatic or Negro race'[44]. Under the *Wards' Employment Ordinance 1953*, employers had to be licensed to employ essentially Aborigines and pay them wages not less, but also not more, than prescribed by the Ordinance itself. Notwithstanding that provision, if a welfare officer agreed, a licensed employer could pay less than the wage prescribed by the Ordinance to a ward who was 'slow, aged or infirm'[45], a provision obviously tailored to the needs - or demands - of the pastoral industry in the Territory. In practice, all were paid less, but no penalties were imposed nor charges laid for this offence against statute.

Wards who were trained were denied a certificate of competency until each satisfied the Director of Welfare that he had gained a knowledge of English and hygiene deemed appropriate to his 'calling'[46]. Certificates were given to Aborigines trained for three *weeks* as 'butchers' or 'bakers' and in those days for a maximum of six months as 'nurses'[47]. Obviously they were unemployable (by whites) with such 'training'. Moreover what other class or category of Australians had to endure an olfactory test as a condition of employment? One, moreover, which persisted until 1971[48]. Even the determination of wage conditions persisted for wards until 1965, when the *Wards' Employment Ordinance* provided for awards and determinations to prevail[49].

Aboriginal employees were no less handicapped in their pursuit of wage justice or attempts to enforce payment of even agreed wages. Apart from questions of legal competence as wards of their 'guardian' Protectors and Directors, legislation, which was relatively benign in most other respects, excluded any 'natives of any savage or uncivilised tribe' from the operation, and protection, of the *Masters and Servants Statute 1864*[50], a provision repeated in 1890[51], but repealed in 1891[52]. Western

Australia intruded penal provisions in its Aboriginal employment legislation. The *Breach of Contract Act 1842* provided for the summary conviction and up to three months' imprisonment of any servant for absence, neglect, failure to complete work 'or other misconduct'. It was used conjointly with the *Aboriginal Native Offenders Act 1849* to provide a whipping of up to two dozen lashes in lieu of or in addition to imprisonment(53). *The Masters and Servants Amendment Ordinance 1868* preserved the punitive aspects, as did *The Masters and Servants Amendment Act 1882*. The whipping provisions were continued by *The Aboriginal Offenders Act 1883*(54), and not repealed as an additional punishment in employment until 1892(55).

This recital of legislative content almost doomed to failure any attempt to secure wage justice. Yet attempts were made. The first recorded instance occurred in 1847 when four Aboriginal workers at Wagga Wagga sued their pastoralist-employer for unpaid wages under the *Small Debts Act*(56). The result is not recorded. Virtually no concerted efforts were thereafter made until after World War II. Bill McLeod, a Western Australia and communist trade union official, a born leader, and a sympathizer of Aboriginal workers in the Pilbara, organized them in associations and a company, led them in 'walk-offs', and showed how they could lawfully claim places to rest and live under *Miner's Right*. The difficulties in organizing for better conditions, including wage justice, were compounded by a legislative prohibition on the 'enticement' of - or persuading - any Aborigine to leave any lawful service without the consent of his Protector or local guardian. That provision was first inserted in Western Australia's legislation of 1844(57); it was used in 1947 to prosecute two Aborigines and a European who were persuaded to take part in a strike. The High Court refused them leave to appeal against the decision of the Supreme Court of Western Australia which rejected their appeal against conviction; the Supreme Court considered that the *Native Administration Act 1905* comprehended even that situation where there was a complete cessation of work for a substantial period falling short of a severance of the employer-employee relationship(58).

But as the defamation case of *Mitchell-v-Australian Broadcasting Commission* indicates, the legislative fear and inference was that 'strong' leaders could induce weak and powerless, therefore pliant, Aboriginal workers, to go on strike for better pay and conditions. The status of 'perpetual tutelage' extended, it seems, to a status even of serfdom for Aboriginal citizens in their employment. In Queensland a reserve Aborigine was held entitled to the relevant industrial award only in 1979[59], a position reached even in the Northern Territory 14 years previously[60]. So tenaciously does bureaucracy grasp its discretions.

The pastoral industry provides abundant examples of discrimination, racism, judicial bias, union exclusivity, in short, the exploitation of Aborigines-as-workers by employer and union alike. Between 1924 and 1967 no less than 11 attempts were made to bring certain categories of Aboriginal workers under award conditions. In *Ambrose* (1924), the Commonwealth Court of Conciliation and Arbitration calculated award wages for cooks on the basis that two Aborigines counted as one white person[61]. Aborigines were excluded from the award[62]. The Court noted that Aborigines represented a reservoir of available 'cheap labour', that they received no cash wages at all[63]; although the (Aboriginals) Ordinance required it, it was honoured more in the breach than the observance, 'because it is impossible to enforce it or because of the state of the industry'[64]. White men 'do not work contentedly with Aborigines at the best of times', but the stations in the Northern Territory could not be carried on without them[65]; nevertheless, the stations claimed that Aborigines should not be regarded as employees, that they were 'restless', 'inclined to go bush' and required constant supervision[66]. Even the cooking for Aborigines was not done with the degree of care and skill as for whites, prompting the judicial response 'I hope not for the sake of the white employees'[67]. In the (1928) *NT Pastoral Lessees Case*, the union sought to remove Aborigines from the exclusion clause in the award, a ploy the Chief Judge of the Court described as 'to exclude Aborignals from employment upon cattle stations so as to make work for white employees'[68]. That same union persisted in the claim as late as 1951, when the Court held it lacked jurisdiction as the matter was covered by regulations under a *Northern Territory (Aboriginals) Ordinance*[69].

In 1932, the Court made it 'quite clear' that 'award conditions are not applicable' to Aboriginal station hands[70], an exclusion maintained in 1938[71] and in 1944[72]. The 1944 case affords valuable insights as to the judicial perception and the union fear of Aboriginal workers. The Court considered that the 1938 and 1932 exclusions were *not* based only on their fewness in number as station hands, or their supposed inefficiency, or the necessity to supervise them. It considered the union attitude as 'inconsistent', averring equal efficiency of Aboriginal workers, yet suggesting that equality of opportunity of employment would be lost, to the detriment of the 'whites', unless the cost of employing Aborigines were brought up to the level of award rates and conditions[73]. In other words, Aborigines would be priced out of employment. And why should this be so? Because the Court recognized 'that the natives have, because of their traditions and habits and their incapacity or disinclination to compete with the descendants of European and Asiatic races in the struggles of our economic life, been accorded special protection'[74]. Their values were 'different'; in many cases 'the payment of money wages for their labour would prove a cause of embarrassment both to the native and his employer'[75]; 'receipt of award rates and conditions would add to the bewilderment of the 'full-blood' concerning the ways and customs of the whites'[76]. 'It would be inadvisable and even cruel to pay them for the work they can do at the wage standards found to be appropriate for civilized "whites"'[77]. The Court should therefore intervene 'only where there is a clear case of injustice'[78]. The 1944 decision invoked concepts of 'civilized' and 'uncivilized' labour which General Hertzog introduced in South Africa in 1924.

It would seem that the failure to pay even the prescribed cash wage was not an injustice, at least to 'full-bloods'. 'Half-castes' clearly fell within a different category, except in Queensland where the (State) *Station Hands' Award* excluded Aborigines as given the extended definition of *The Aboriginals Protection and Restriction of the Sale of Opium Act 1897*[79]. The exclusion of 'Aborigines' from the award definition of 'station hand' was continued in the *Pastoral Industry Award 1965*[80], but removed in 1967[81] following the 1966 decision of the Court in *The Cattle Station Industry (Northern Territory) Award 1951*[82].

The *Cattle Station* decision was made by a full bench of the Commonwealth Conciliation and Arbitration Commission in March 1966, after lengthy hearings lasting over 13 months, and resulted in the application of award conditions to all 'full-blood' Aborigines. The case is notable for the wealth of anthropological evidence as to Aboriginal cultural factors impinging on working efficiency and productivity[83]; the timidity of the Union in not refuting some, or any, of the exaggerated submissions by the employers and the Commonwealth[84]; by the inordinately long period of 'adjustment' - 33 months - given by the Commission to employers to enable them to 'rationalise' their operations[85] (in other words, to sack staff which the Commission ingenuously referred to as 'disemployment')[86]; by the deceptions practised by employer bodies[87]; and by the judicial disavowal of the role of the Commission as 'social engineers'[88].

The Commission's starting point was put succinctly: 'There must be one industrial law, similarly applied, to all Australians, aboriginal or not'[89], and that 'overwhelming industrial justice requires us to put aboriginal employees on the same basis as white employees'[90]. Nevertheless the wealth of material presented by the pastoralists convinced the Commission that the great majority of Aborigines employed on NT cattle stations 'are unable to work in a way which employers would expect of white employees'[91]. The reason? 'A significant proportion' of the Aborigines so employed 'is retarded by tribal and cultural reasons from appreciating in full the concept of work'[92]. This is where dissimulation by the pastoralist employers was odious. Despite their admissions to a survey party (Tatz, Stevens, and Gruen) that Aborigines were *more* productive than the whites (which the team confirmed empirically)[93], the official submission to the Commission, which neither the unions nor the Commonwealth controverted, was to the contrary. The paradigm accepted and perpetuated was of a tribal people, non-competitive, non-materialist, unversed in concepts of time, distance, place, transitional between nomadic and western ways, the 'intelligent parasite' of Elkin whose adjustment to a white economic society would create psychiatric and personality problems, and whose dislocation following 'disemployment' had to be introduced with all due tardiness, three years from the time hearings ceased. The writings of Stevens in particular record the economic aftermath of the decision. Justice delayed is justice denied, except when Aborigines were receiving it as industrial justice.

That decision was adopted and applied in respect of the pastoral industry - the sheep and cattle industry outside the Northern Territory - to take effect in designated areas of South Australia and Western Australia on the same day as the *Cattle Industry* award, namely 1 December 1968, and in all other areas from the date of operation of the variation order. The 14 months' 'phase-in' period allowed for the former to be extended if found insufficient[94]. The provision for 'slow workers' was availed of outside the pastoral/cattle industry in the Queensland aluminium industry. Notwithstanding the establishment of such industry in, *inter alia*, Western Australia, the award made for 1 December 1963, and operative for two years, specifically provided for a differential appropriate only to Queensland[95]. The *Aluminium Industry Award 1963*, made by the Commission, provided for a wage less than the minimum to persons who 'by reason of age or infirmity or for any other reason' were unable to earn even the minimum[96]. Although the language had universal application within Queensland, its scope was clearly aimed at Aborigines. Nor were the unions models of enlightened brotherhood. They were utterly opposed to wage justice for Aborigines until after World War II when they had to temper antagonism towards a supply of cheap labour with the democratic ideals for which Aboriginal servicemen fought. They were every bit as racist as the rest of Australia, and perhaps more so, seeing Aborigines not as fellow-oppressed but as competitors in the labour market place and a resource of management exploitation designed to keep wages down[97]. The punitive provisions of 'Aboriginal' legislation to deter or prevent walk-outs and other strike action may explain, but does not excuse, their singular failure to mount a sustained effort on behalf of Aboriginal workers. A history of union activism shows what contemptuous disregard unions had for penal provisions affecting *their* interests. Their support for wage equality was not a support for wage justice : far from it. It was clearly designed to price (cheap) Aboriginal labour out of the workforce and make jobs and wage justice a non-Aboriginal preserve.

(d) Workers' compensation entitlements : law and practice

The Commonwealth and most other jurisdictions discriminated against Aborigines in the area of workers' compensation at two levels. Firstly, there was legislative prescription on their basic entitlement or the amount awarded. Aboriginal ex -servicemen were thus *excluded* from the *Native Members of the Forces Benefits Act 1957* (C'th) which was applicable only to Torres Strait or Pacific Islanders or to Papua-New Guineans[98]. This legislative 'oversight' was not corrected until 1965[99] and then retrospectively[100], but how many ex-servicemen missed out on the benefits and died before the anomaly was rectified? This is more important for reason that, as at 1972, all benefits which 'a native member of the Forces' was eligible to receive for war service derived from this and the *War Gratuity Act 1945* <u>and no other</u>[101]. Secondly, their very way of life rendered the 'wives' and children of Aboriginal workers ineligible because tribal marriages of *de facto* unions did not count as 'lawful' marriage, nor provide compensation upon death of the bread-winner. The Commonwealth <u>as employer</u> did not recognize a tribal spouse until

1971[102]. Western Australia after 1954 preserved an Aboriginal employee's rights under its *Workers' Compensation Act 1912*[103], but between 1936 and 1954 the employer was under minimal liability[104], and continued in modified form in 1954[105] and 1963[106]. Queensland recognized the spouse and children of a traditional racial union only in 1971[107].

The Northern Territory had a long history of legislative discrimination in workers' compensation against Aboriginal employees. The definition of 'workman' in the *Workmen's Compensation Ordinance 1923*, for example, excluded Northern Territory Aborigines, then Australian Aborigines (1931)[108], but in 1950 was restricted to 'any full-blood aboriginal native of Australia'[109], a clear recognition of the differential wage and other employment treatment by the Courts[110], and of continuing refinement and conscious adjustment of the legislation concerning groups identifiable by race (emphasis added). Prior to the 1953 *Wards' Employment Ordinance*, the denial of this basic employment right to Aborigines was constant and deliberate. The only potential benefit derived from the 1941 requirement that the Director of Native Affairs pay to the Commissioner of Taxation all monies received by him for payment into the Aboriginal Medical Benefit Fund, a provision highly discretionary in respect of disbursements in which the Director in practice had the final say[111]. This provision echoed that introduced by Western Australia[112], but seem to have fallen into disuse until replaced by the provisions of the 1963 *Ordinance*.

The 1953 *Ordinance* subsumed the application of compensation provisions under 'external' awards or industrial agreements, and addressed itself to a non-award situation[113]. Extensive amendments in 1959 curtailed the compensation provisions by introducing stringent requirements as to commencement of actions[114], and the ward had no compensation rights independently of the *Ordinance*[115], except as noted where he was already covered by an award. The *Ordinance* did not transform an Aborigine's entitlements overnight. Although assented to on 20 January 1954, it did not commence until 1959. Legislative precedent set the example for judicial precedent. By amendments made in 1963, the employer and the 'ward' could agree upon a lump sum payment by the employer in discharge of the employer's liability, if the agreement were in writing, approved by the Director of Welfare and the Court, and registered by the Court[116]. The Crown - as employer - was made subject to the law only in 1963[117], and in 1964 Aboriginal workers were placed on a footing of substantive equality with whites for the first time in the Northern Territory [118].

But they were subject to procedural inequalities by operation of the (white) cultural and legal recognition of only 'legal' - as opposed to traditional-marriages. This is all the more peculiar in that other contemporary legislation in the Territory recognized the rights of a woman and child in a traditional marriage. In the criminal law, for example, the *Police and Police Offences Ordinance 1961* included as a 'relation' for the purpose of the offence of 'habitually living with a ward' a relation 'whether by blood, marriage, or custom'(119). The definition of relation was also in that manner in the *Intestate Wards (Distribution of Estates) Ordinance 1961*(120), and by amendment to the latter in 1963 'a marriage according to the custom of Aboriginal natives of Australia' was deemed to be valid in the Territory(121). The matter was finally resolved only in 1969, when amendments to the *Workmen's Compensation Ordinance* incorporated in the definition of 'member of family' for the purposes of that *Ordinance* 'a relation of the workman whether by blood, tribal marriage or custom'(122).

I have found very few cases of claims for worker's compensation being pursued by Aborigines, and those that exist reinforce my fieldwork findings that exploitation of Aboriginal workers in this area persists, due to a combination of factors. The principal factor is Aboriginal ignorance of their lawful entitlements; but illiteracy in signing releases or other forms of indemnity without a full realization of the consequences, and fear of going to Court also deter the 'aggressive' action which a civil case entails. Timidity in the face of the unequal 'bargaining' power of the employer, particularly in areas of seasonal or marginal employment, and the Commonwealth-imposed priority given by Aboriginal legal aid services to actions other than for worker's compensation to a large degree militate against such actions(123). Finally, their cost, hence their inability to satisfy the Commonwealth's 'self-supporting' criterion, likewise inhibits the prosecution of such matters(124).

Three cases and one fieldwork example illustrate the difficulties. In *Re Ferguson's Fund; Ex parte Aborigines Welfare Board* the Workers' Compensation Commission of New South Wales in 1969 refused an application by the Board to pay to it outstanding arrears of rent from a lump sum payment made to an Aboriginal worker in redemption of weekly payments of compensation(125). The Court held that an old or current debt payable by a worker was not, of itself, sufficient ground for payment by the Commission to the creditor(126); whether the worker wished it or not was not a relevant consideration[127]. In *Skinner's* case, the Aboriginal *de facto* wife and ex-nuptial children of an Aboriginal husband were refused compensation by the State Government Insurance Office on the grounds that she was not his 'wife'[128]. She took the matter to the Worker's Compensation Board of Western Australia which found that she came within the extended definition of 'wife' in the *Workers' Compensation Act 1912* (WA), and awarded her and the children their statutory entitlement. *Wilton's* case, also in 1977, dramatically illustrates the results of perceived inequalities in bargaining power[129]. An Aboriginal stockman signed a discharge of his employer's liability under the *Workmen's Compensation Act 1971* (SA) for $800. The Aboriginal Legal Rights Movement subsequently commenced legal proceedings on his behalf, even though their client felt he could trust his employers and that he was being well treated. The claim was settled for an amount in excess of $15,000. What this case does emphasize is the need for Aboriginal legal aid organizations to remove worker misapprehension even as to the source of compensation funds. A claim may be instituted nominally against the employer, but the real defender-payer is the insurance company or the fund. Trust and good treatment, at least in that context, are not material considerations. The Western Aboriginal Legal Service are acting for an illiterate Aboriginal farm hand employed since 1939 on a property under a State award and, since 1962, under the *Pastoral Industry Award*[130]. His pay-slips were endorsed 'part payment', and arrears are calculated at $12,000. His union, the Australian Workers' Union, were unco-operative in supplying details necessary to bring the action in the District Court of New South Wales to an early hearing[131]. The employer refused to settle the matter[132].

(e) Conclusions

Employment is a natural human right, but in a materialist society it endows a worker with human dignity and material goods as a reward and visible symbol of that dignity. Historically Aborigines were discriminated against in industrial law and in employment practice. These were no accidents, the result of carelessly formulated policy or legislative oversight. They were deliberate, premeditated, systematic, coherent, provisions enunciated as official decrees and implemented by the organs of state and representative bodies of employer and employee alike. Their foundation was malevolent and racist, not innocent and certainly not ignorant. Even where the law prescribed standards they were neither observed nor enforced as the 1924 decision in *Ambrose* attests[133]. Industrial equality and justice for Aborigines was achieved, in theory, in Australia (except for Queensland reserve Aborigines) in 1968, and for Queensland's reserve Aborigines only in 1979. But the practice and the reality belie the notion of that equality and that justice.

A brief comparison with the treatment of Chinese labour in the several Australian jurisdictions reveals the dichotomy of racial legislation.

Western Australia[134] and Queensland[135] legislated for restrictions on Chinese immigration, and the Federal Council of Australasia restricted naturalization in pre-Federation Australia to any person 'who by lineage belongs exclusively to any of the European races'[136]. Most States closely regulated the hours during which Chinese could open or work in shops and factories[137], in most cases making them more restricted than for Europeans, and in the case of Western Australia's *Early Closing Act 1904* forbidding any 'person of Asiatic, African or Polynesian race' from being 'registered as the keeper of or an assistant in a small shop'[138].

Mining activities by Chinese were effectively proscribed in Queensland, Western Australia and the Northern Territory. *The Mining Act of 1898* (Qld) forbade the employment of 'an Asiatic or African alien upon any goldfield or mineral field'[139], prevented the issue to such a person of a mineral lease[140], and if in possession of a miner's right denied the exercise of it except in limited circumstances[141]. In 1892 Western Australia proscribed the issue of any mining licence, business licence, or mineral lease to any 'Asiatic or African alien'[142], punished their mining on Crown land[143] and their employment in any mine[144] until 1973[145]. South Australian legislation forbade 'Asiatic aliens' both employment and miners' rights for any new goldfield in the Northern Territory, and any extant miners' right could be exercised only for specific localities[146] rather than for the whole of the Northern Territory[147], providing registration of a claim or prospecting area were not required[148].

Similar restrictions existed in agriculture. South Australian legislation for the Northern Territory prohibited the grant of a licence to deal in pearls and pearl-shell 'to any Asiatic alien'[149]. Queensland did not permit any advances by the Agricultural Bank 'to any alien'[150]. In

1908 South Australia disqualified 'Asiatics' from holding leases under the *Irrigation and Reclaimed Lands Act*[151], a provision borrowed from the *Crown Lands Act 1903*[152], and repeated three times between 1914 and its repeal in 1967[153].

Queensland introduced dictation tests to effect bans on employment in railway construction[154], sugar cultivation[155], dairy production[156], and banana cultivation[157]. Petroleum prospecting[158], and cultivation of Crown land[159] also attracted the test.

Western Australia also forbade issue of licences for firearms to any 'Asiatic or African alien' or any Asiatic or African 'claiming to be a British subject'[160].

This legislation differs from 'Aboriginal' legislation in its scope, purpose, direction, and effect. It was specific, rather than general. It created no perpetual machinery of oversight or supervision, nor did it alter the legal status of the subject. It was predicated on an assumption of values (industry, intelligence, application, diligence, frugality) almost antithetical to the foundations of 'Aboriginal' legislation. There were no gradations of colour, only of citizenship, and the intent was to preserve economic *lebensraum* for whites in industries on which the material prosperity of the State rested. The industrial States of New South Wales and Victoria shifted the focus of their legislation to factories and shops, but the values subsumed in their laws were a healthy appreciation but a concurrent fear of assumed Chinese or Asiatic competition.

No provisions appear as to minimal wages appropriate to aged, slow, or infirm workers. Restrictions were necessary not in the payment of their labour, but in its output[161].

Long after the formal legislative restraints were abolished, those for Aborigines were either continued or refined. Economic caprice and deprivation were handmaidens to the tyranny of Aboriginal blood.

1. s. 12.
2. s. 4.
3. Declared valid (*intra vires*) in *Robtelmes-v-Brenan* (1906) 4 CLR 395; 13 ALR 168; *Bibliography*, Case no. 382, p. 126.
4. *Defence Act 1909* (C'th), s. 138 (1) (b).
5. *Defence Act 1910* (C'th), s. 61 (h).
6. *National Service Act 1951* (C'th), ss. 5 (2) and 18 (3). This exemption was continued by the *National Service Act 1964*, s. 9 substituting s. 18 (e) See also case on this provision in *Spitz-v-Eaves* (Court of Petty Sessions, Albany (W.A.), Ryan S.M., 13 December 1971, unreported); *Bibliography*, Case No. 396, pp. 131-3.
7. *The Dairy Produce Act of 1904*, s. 30, although as a matter of interpretation and construction, the exception of persons of European descent could also extend to Aborigines.
8. *Militia Force Act 1854*, s. 7.
9. *The Defences Act 1895*, Second Schedule, para (t).
10. No. 12 of 1901, s. 16 (1).
11. *Post and Telegraph Act 1961* (C'th), s. 3.
12. s. 2.
13. s. 10.
14. s. 4 (c).
15. s. 4.
16. s. 2.
17. Patrick Brazil and Bevan Mitchell (eds.) *Opinions of Attorneys-General of the Commonwealth of Australia with opinions of Solicitors-General and the Attorney-General's Department Volume I: 1901-14* Australian Government Publishing Service, Canberra, 1981; Opinion No. 57, p. 75.
18. s. 135 inserting s. 423A, which remained in force until repealed by the *Navigation Act 1972*.
19. *The Diseases in Sheep Act of 1867*, s. 24 (f); Act repealed by *The Diseases in Stock Act of 1915*.
20. *Mining Act 1904*, s. 291 (re-numbered s. 312 in 1926 reprint and s. 292 in 1946 reprint).
21. Section repealed by *Mining Act Amendment Act (No. 2) 1963*, s. 3.
22. No. 18 of 1930.
23. s. 6 (2) (c), (g), (h).
24. s. 6 (2) (viii).
25. s. 12 (2) (d).
26. *Shearers' Accommodation Act 1912*, s. 3.
27. Long title to the Act.
28. *Shearers' Accommodation Act Amendment Act 1974* , s. 5 (c).
29. s. 4, substituting new s. 9 in the Principal Act.
30. s. 2, substituting new s. 9 in the Principal Act.

31. See articles by Major R. A. Hall in *Defence Force Journal*, 24, (September -October 1980), pp. 28-41, and in *Aboriginal History* 4 (1), 1980, pp. 73-95.
32. *War Gratuity Act 1945*, s. 5. (10/- per month; whites 15/- to £3.15.0).
33. No. 8 of 1952, s. 3 (1).
34. *Northern Territory (Administration) Act 1959*, s. 17, repealing and substituting s. 4W of the Principal Act.
35. No. 24 of 1953; this Ordinance, however, did not commence until 10 October 1959.
36. *Re Ferguson's Fund; Ex parte Aborigines Welfare Board*(1969) WCR 56; *Bibliography*, Case No. 69, p. 28.
37. *Attachment of Wages Limitation Act 1957*, ss. 10(1), (12), and Schedule.
38. *The Sugar Growers' Employees Act of 1913*, Schedule, cl. 2 (c).
39. Ibid., cl. 4.
40. Ibid., cl. 5.
41. *The Income (Unemployment Relief) Tax Act of 1930*, s. 5 (ix).
42. s. 56.
43. *The Licensing Act 1911*.
44. s. 2, substituting s. 23 (5).
45. s. 38 (3) (a).
46. s. 24 (2).
47. Personal communication from Professor Colin Tatz, August, 1984.
48. *Wards' Employment Ordinance Repeal Ordinance 1971*, s. 2.
49. s. 2 inserting s. 3A.
50. (Vic) s. 6.
51. *Employers and Employees Act 1890*, s. 5 Part I (1).
52. *Employers and Employees Act 1891*.
53. s. 2.
54. s. 44.
55. *Aborigines Protection Act (Amendment) Act 1892*.
56. *Sydney Morning Herald*, 7 October 1847, cited by Barry Bridges in *Teaching History*, 4, 3, (December 1970), pp. 40-70, at p. 53, f.n. 57.
57. *An Act to prevent the enticing away the Girls of the Aboriginal Race from School, or from any service in which they are employed* (1844) 8 Vic. No. 6.
58. *McKenna-v-Fletcher* (1947) 20 ALJ 498; *Bibliography*, Case No. 111, p. 48.
59. *The Australian Workers' Union of Employees (Qld)-v-The Director, Department of Aboriginal and Islanders Advancement* (1979) 101 QGIG 133; *Bibliography*, Case No. 13, pp. 4, 4A.
60. See note 49 *supra*.
61. *The North Australian Industrial Union-v-J.A. Ambrose and Others* (1924) 20 CAR 507, at p. 516; *Bibliography*, Case No. 139 (a), pp. 63A-B.
62. (1924) 20 CAR 507, at p. 522, clause 21.
63. The *Northern Standard*, 20 August 1937, quotes Matthew Thomas:

'For ten weeks I was in charge of a gang of natives repairing the road for over 100 miles between Wave Hill and Inverway Station. My gang consisted of three boys and seven lubras. The native wages were: beef, damper, tea, sugar, with three sticks of dried up nicky tobacco for the boys, and two sticks for each lubra per week. Trousers, shirts and boots were sent out for the boys, but nothing for the lubras, who had to make dresses from flour bags to cover their naked bodies. They worked harder and longer hours than the bucks. That the natives were working in slave conditions cannot be disputed, also they worked under appalling conditions with the sanction and approval of the Minister of Territory Affairs and Chief Protector of Aboriginals'.

Cited by Peter Read and Engineer Jack Japaljarri in 'The Price of Tobacco : The Journey of the Warlmala to Wave Hill, 1928', *Aboriginal History*, 2, 2, (1978), pp. 140-8, at p. 146, f.n. 16.

64. (1924) 20 CAR 507, at p. 512.
65. Ibid.
66. Ibid., at p. 516.
67. Ibid.
68. *The North Australian Workers Union-v-The Northern Territory Pastoral Lessees Association and Others* (1928) 26 CAR 607, at p. 623; *Bibliography*, Case No. 139b, pp. 63B-C.
69. *The North Australian Workers Union-v-Alcoota Pastoral Co. Ltd. and others; Bovril Australian Estates Ltd. and others-v-The North Australian Workers Union* (1951) 71 CAR 319, at p. 320; *Bibliography*, Case No. 140, p. 63.
70. *The Graziers Association of New South Wales and others-v-The Australian Workers Union; The Australian Workers Union-v-The Graziers Association of New South Wales and others* (1932) 31 CAR 710, at p. 715; *Bibliography*, Case No. 14, p. 4.
71. *The Australian Workers Union-v-E.A. Abbey and others; The Graziers Association of New South Wales and others-v-The Australian Workers Union* (1938) 39 CAR 607, at p. 632; *Bibliography*, Case No. 15, p. 4.
72. *The Australian Workers Union-v-E.A. Abbey and others* (1944) 53 CAR 212, at p. 216; *Bibliography*, Case No. 16, pp. 4-5.
73. (1944) 53 CAR 212, at p. 216.
74. Ibid., at p. 214.
75. Ibid.
76. Ibid.
77. Ibid., at p. 215.
78. Ibid.
79. *In re Station Hands Award; Ex parte Australian Workers' Union of Employees, Queensland*; Queensland Government Gazette, Vol. CLV, No. 51, pp. 739-742, 2 September 1940; *Bibliography*, Case No. 12, p. 4A.
80. *The Australian Workers' Union-v-The Graziers Association of New South Wales* (1965) 110 CAR 422, at p. 439; *Bibliography*, Case No. 17, pp. 5-6.

81. *The Australian Workers' Union-v-The Graziers' Association of New South Wales* (1967) 121 CAR 454; *Bibliography*, Case No. 18, pp. 6-7.
82. *Re Cattle Station Industry (Northern Territory) Award 1951* (1966) 113 CAR 651; *Bibliography* , Case No. 38, pp. 12-14.
83. (1966) 113 CAR 651, esp. at pp. 660, 662.
84. Ibid., at p. 661.
85. Ibid., at p. 670.
86. Ibid., at p. 667.
87. See particularly Colin Tatz ,'Aborigines and the civil law' in Peter Hanks and Bryan Keon-Cohen (eds.), *Aborigines and the law*, George Allen & Unwin, Sydney, 1984, p. 132.
88. (1966) 113 CAR 651, at p. 656.
89. Ibid., at p. 669.
90. Ibid., at p. 666.
91. Ibid., at p. 663.
92. Ibid.
93. Personal communication by Tatz to author 27 December 1983.
94. (1967) 121 CAR 454, at p. 458.
95. *The Australian Workers' Union and others-v-Alcoa of Australia Pty. Ltd. and others* (1963) 104 CAR 626; *Bibliography*, pp. 4E-G.
96. (1963) 104 CAR 626, at p. 661; Aluminium Industry Award, 1963, clause 13 (a).
97. See especially Ann Curthoys & Andrew Markus, *Who are our Enemies? Racism and the Australian Working Class*, Hale and Iremonger, Neutral Bay, 1978; Kay Saunders, *Workers in Bondage : The Origins and Bases of Unfree Labour in Queensland 1824-1916*, University of Queensland Press, St. Lucia, 1982, Chapter VII 'The Realities of White Australia : The Reconstruction of the Sugar Industry' pp. 144-187, at p. 177; *Bibliography* for Ph.D. thesis and other works by Frank Stevens, and Thesis by Hilliker.
98. s. 3.
99. *Native Members of the Forces Benefits Act 1965*, s. 3.
100. s. 4.
101. Australia, Parliament, *Hansard*, 26 October 1972, Question upon Notice No. 6417.
102. *Compensation (Commonwealth Employees) Act 1971*, s. 5.
103. *Native Welfare Act 1954*, s. 38.
104. *Aborigines Act Amendment Act 1936*, s. 21, inserting s. 33B.
105. s. 37 (2) (i).
106. *Native Welfare Act 1963*, s. 27 (2).
107. *Aborigines Act 1971*, s. 49.
108. *Workmen's Compensation Ordinance 1931* (No. 6 of 1931).

109. *Workmen's Compensation Ordinance 1949* (No. 1 of 1950)

110. See historical review making clear this distinction in the *Cattle Station Industry* decision (1966) 113 CAR 651, at pp. 651-2, and the *Pastoral Industry Award* (1967) 121 CAR 454, at p. 458.

111. *Medical Benefits Tax Ordinance 1941*, s. 4.

112. *Aborigines Act Amendment Act 1936*, s. 21 inserting *inter alios* s. 33B (1).

113. s. 49 (1).

114. Twelve months from receipt of the first payment of compensation, s. 50C (2).

115. s. 50C (1).

116. *Wards Employment Ordinance 1962* (No. 2 of 1963), s. 4. inserting s. 50D; citation changed to *Wards' Employment Ordinance 1962* by the *Wards' Employment Ordinance 1964*, s. 9.

117. *Wards' Employment Ordinance 1961* (No. 18 of 1963), s. 2.

118. *Wards' Employment Ordinance 1964*.

119. No. 10 of 1962, s. 45G inserted by s. 5.

120. No. 11 of 1962.

121. *Intestate Wards (Distribution of Estates) Ordinance 1963*, s. 2. inserting s. 23 (1).

122. *Workmen's Compensation Ordinance (No. 3) 1968* (No. 40 of 1969), s. 2, amending s. 6.

123. Interim Charter of Aboriginal Legal Services, para. 5; the Charter is reproduced as Appendix 23 in Australia, House of Representatives Standing Committee on Aboriginal Affairs, *Report on Aboriginal Legal Aid*, Australian Government Publishing Service, Canberra, 1980, at pp. 244-5.

124. Op. cit., para. 6.

125. (1969) WCR 56; *Bibliography*, Case No. 67, p. 28.

126. (1969) WCR 56, at p. 57.

127. Ibid., at p. 58.

128. *May Lisa Skinner and others-v-Yeeda Station* (Workers' Compensation Board of Western Australia, App. 48/77, unreported), *Bibliography*, Case No. 392, p. 129.

129. *Wilton-v-Innamincka Pastoral Co.* (Industrial Court of South Australia, No. 2621 of 1977); *Bibliography*, Case No. 436, p. 147A.

130. Field notes, 11 April, 1980.

131. Ibid.

132. Ibid.

133. And see also Diane Bell, 'For our families : the Kurundi walk-off and the Ngurrantji venture', *Aboriginal History*, 2, 1, 1978, pp. 32-62, at p. 38.

134. *The Chinese Immigration Restriction Act 1889* s. 8 : one Chinese passenger for every 500 tons of the ship's registered weight.

135. *Chinese Restriction and Regulation Act of 1888*; an 1896 Act to apply and extend it to 'other Coloured Races' was reserved, and lapsed (Act 60 Vic. No. 41).

136. *The Australasian Naturalisation Act 1897* (60 Vic. No. 1).

137. (Vic) *Factories and Shops Act 1896*, s. 23(1), *Factories and Shops Act 1905*, s. 42(1); (WA) *Factories Act 1904*, s. 23, *Factories and Shops Act 1920*, s. 35 until repealed by *Factories and Shops Act 1963*; (Qld) *The Factories and Shops Act Amendment Act of 1908*, s. 2; (NSW) *Factories and Shops (Amendment) Act 1909*, s. 16 (inserting s. 42A(1)), *Factories and Shops Act 1912*, s. 49(1), *Factories and Shops (Amendment) Act 1927*, s. 5 (inserting s. 49(1)) until repealed by the *Factories, Shops and Industries Act 1962* .

138. No. 1 of 1904, s. 6.

139. s. 15 (7)(b).

140. s. 30.

141. s. 15 (7)(a).

142. *The Mineral Lands Act 1892*, ss. 4, 8, 12.

143. *Goldfield Act 1895*, s. 92; *Mining Act 1904*.

144. *Mining Act 1904*, s. 290.

145. Act 1 of 1973, s. 6.

146. *The Northern Territory Mining Act 1903*, s. 21, a continuance of 1886 legislation.

147. s. 17.

148. s. 19 (7)(a).

149. *The Northern Territory Pearl Sale and Export Regulation Act 1901*, s. 3, repealed in 1934 by the *Statute Law Revision Act*.

150. *The Agricultural Bank Act Amendment Act of 1904*, s. 3 (3).

151. s. 18.

152. No. 830 of 1903, s. 211.

153. *The Irrigation and Reclaimed Lands Act 1914*, s. 19; *Irrigation Act 1922* s. 64 (exempting Asiatics who were British subjects); *Irrigation Act 1930*, s. 50; *Irrigation Act Amendment Act 1967*, s. 7.

154. *The Port Norman, Normanton and Cloncurry Railway Act of 1901* s. 7 (1) (for non-Europeans).

155. *The Sugar Cultivation Act of 1913*, s. 4.

156. *The Dairy Produce Act of 1904*, s. 30; *The Dairy Produce Act of 1920*, s. 35.

157. *The Banana Industry Preservation Act of 1921*, s. 3.

158. *The Petroleum Act of 1923*, s. 10(v).

159. *The Land Act of 1897*, s. 85; *The Land Act of 1910*, s. 59(1)(b).

160. *Firearms and Guns Act 1931*, s. 8 (3).

161. 'If we were going to be frightened of a "White Australia", and allowed wretched Annamese and Japanese to keep open until 12 o'clock at night, while Christians closed at the proper time, we would never be able to deal with it', Vincent Lesina, Queensland, *Hansard* Debates, 23 August 1906.

CHAPTER 12

LAND RIGHTS

(a) The political nature of legal struggles

In Chapter 7 I considered, *inter alia*, the relief sought in or in respect to all land rights claims under the *Aboriginal Land Rights (Northern Territory) Act 1976* (C'th) (the '*Land Rights Act*') taken to the Federal Court of Australia and the High Court of Australia. And in other Chapters questions of sovereignty and racial discrimination have been considered in the light of those and other cases. Accordingly, many of the recurring strands of powerlessness, the continuing Aboriginal fight for their *legal* identity, and the judicial reception and treatment of their claims, are present in a consideration of land rights. The legislation has been far outstripped by writings on this subject, which go to the very core of the debate on Aboriginal identity in a dominant but quasi-pluralist cultural *milieu*. My treatment of this vital subject does not set itself in opposition to, or competition with, the many specialist works on the subject[1]. Nor do I propose to traverse single-reference aspects such as uranium, boundaries, or Kakadu Park, important though they are[2]. What this Chapter underscores is the consequential benefits, the major legal victories which the High Court cases have achieved. And underpinning them is the political legitimacy of their claims, their struggles, demands, and tactics. The legal stratagem of invoking the aura and authority of a tribunal where right *is* might is a political answer to legislative and administrative processes where the democratic majority validates the opposite corollary.

(b) Cases heard prior to the 1976 *Land Rights Act*

Mathaman (1969)[3] and *Milirrpum* (1971)[4] both proceeded on the Aboriginal assumption that, irrespective of *de facto* or political sovereignty acquired and exercised by the Crown over Australia, rights enjoyed from 'time immemorial'[5] gave Aborigines a right co-extensive with that of the Crown. The Crown's title perforce had to recognize, and was itself qualified by, that of the Aboriginal parties. Until relinquished or involuntarily acquired, the title possessed and enjoyed by Aborigines was in contradistinction to the *dominium plenum* - or unfettered title - of the Crown. In *Milirrpum* the Court held that it was bound by the decision of the Privy Council in *Cooper-v-Stuart* (1889)[6] - to the effect that

New South Wales and therefore Australia was 'without settled inhabitants or settled law'[7] and devoid of 'land law or tenure...at the time of its annexation to the Crown'[8]. Moreover, a legal loss was subsequently transformed into a moral and political victory with the establishment, and pro-land rights conclusions, of the Aboriginal Land Rights Commission : its first report (July 1973) led to the setting up of the Northern and Central Land Councils; its second report (April 1974) was the basis for the *Land Rights Act*. Nevertheless Aborigines continued to assert claims to a form of title, or a sufficiency of non-statutory interests in land, recognized or recognizable at common law. In the subsequent (1979) High Court decision in *Coe-v-The Commonwealth and Another*, an Aboriginal challenge to the Crown's sovereignty was rebuffed mainly for gross procedural, rather than substantive, deficiency in the claim[9]. But two of the four High Court judges held that the plaintiff was entitled to argue that the Australian colonies were conquered rather than settled, and thereby that the Aborigines had and have cognizable interests in land[10]. None of the four was prepared to entertain a challenge to sovereignty. Three cases heard subsequent to the 1976 Act, namely *Noonkanbah* (1979)[11], *Onus* (1981)[12] and *Coe-v-Gordon* (1983)[13], did not arise from land rights. But each recognized the statutory or common law special interest of the Aboriginal claimants in the *use* which others might make of lands formerly occupied by Aborigines.

(c) Land rights cases decided in the High Court of Australia

(i) *Ross*[14] ('Utopia Station')

Utopia Station was part of a land claim by three clans to land described for purposes of the *Land Rights Act* as being unalienated Crown land or 'alienated Crown land...held by, or on behalf of, Aboriginals'; 'Aboriginal' in the Act was defined a 'person who is a member of the Aboriginal race of Australia'. The Northern Territory challenged the jurisdiction of the Aboriginal Land Commissioner ('the Commissioner') to hear a claim to Utopia Station on the ground that the lessee, the Aboriginal Land Fund Commission, held it for persons other than 'Aboriginals', namely, Torres Strait Islanders. The High Court rejected the challenge on the ground, held by four judges, that each interest in land acquired by that Commission must be for a specific purpose benefitting quite small groups within the general Aboriginal and Islander community. Accordingly, although the definition of 'Aboriginal' in the Commission's 1974 Act was broader than in the 1976 Act, the practical operation of the Commission restricted its acquisitions of interests in land to bring them within the range permitted by the *Land Rights Act*. The reasoning of the majority was based on a factual examination of the subject land in relation to the Torres Strait Islands, to the current occupancy of the land, and by applying to the NT submissions a *reductio ad absurdum* logic.

(ii) *Northern Land Council* (15) ('Kenbi Land Claim')

This decision by the High Court resulted in a major extension of the Court's power to review the purposes for which a regulation was made. In contention were regulations made by the Administrator under the *Town Planning Act 1964* (NT) and the successor *Planning Act 1979* (NT) extending the town limits of Darwin from 142 square kilometres by a further 4350 square kilometres. The Commissioner at a first hearing in July 1979 declined to order the production of government material supporting the Council's assertion of ulterior purposes. Those purposes were a blatant legislative intent to thwart the possibility of a claim under the *Land Rights Act*. The Commissioner relied principally on the ground that the motives of the Administrator, as representative of the Crown, could not be called into question; subsequent to the change of Acts and the making of fresh regulations, the Commissioner heard further argument and in December 1979 held that the land was in a town, and therefore not unalienated. Accordingly, he could not hear the claim. He also held that it had not been shown that the land was not reasonably capable of having some connexion with a town planning purpose.

All six judges granted a writ of *mandamus* to the Commissioner, overruling his judgment, on the basis that there must be a reasonable relationship between the object of regulatory power and the purposes of the Principal Act (Murphy), or because the regulation was made for an ulterior purpose which was examinable in a Court of law (the remaining five Justices). An Aboriginal land rights claim was the basis of one of the most far-reaching assertions of judicial review of administrative action seen in recent years in Australia. The Court in this case was maintaining a stance based on its championship of the freedom of the individual and the corresponding obligation of the executive to act responsibly in accordance with law.

(iii) *Meneling*[16] ('Finniss River I')

The High Court held unanimously that a NT grazing licence was in the nature of a personal right and not a right of a proprietary nature, hence Crown land the subject of such a licence was not alienated and could be claimed under the *Land Rights Act*. By four to one the Court said that in making his recommendations to the Minister, the Commissioner was not bound to have regard to four subject matters referred to in s. 50 (3). Accordingly, application as licensee for a writ of *mandamus* was refused by that majority; and the application for a writ of *prohibition* to quash the Commissioner's report unanimously dismissed. As to the Commissioner's functions, the majority of judges distinguished his statutory obligations; on the one hand to 'have regard to the strength or otherwise of the traditional attachments by the claimants to the land claimed', and on the other to 'comment on each of' the four listed matters in making his report to the Minister. Those matters identified the number of traditional claimants and the extent of the advantage they would derive from a partially or wholly successful claim; the corresponding disadvantages to other groups (including other Aborigines) in consequence; the effect of such a claim on existing or proposed land usage in the region: and in the case of alienated Crown land, the cost of acquiring non-Crown interests in that land. Three of the four majority judges recognized the political results of a ministerial decision. Thus Gibbs C.J. : 'To enable the Minister to give proper consideration to those matters, the Commissioner is required to comment, and it is to be expected that he will do so in a way that will enable the Minister to understand the issues involved and the judgment which the Commission has formed with regard to the matters upon which the comment is made. But the ultimate weight to be given to these matters is for the Minister to decide'[17]. Likewise Wilson J. : 'In my opinion, the Act recognized the *political character of a decision* to grant traditional Aboriginal land in the Northern Territory for the benefit of Aboriginals'[18]; and finally Brennan J. : '...the weighing of the considerations specified in sub-s. (3) and of all other relevant considerations in deciding whether a grant should be made is appropriately a matter for a minister, not for a judge - particularly when *the question for decision is pregnant with political controversy*' (emphasis added)[19].

Meneling is conspicuous for the number and calibre of counsel representing parties interested in the outcome. Not only were the Commissioner and Meneling represented; so were the Minister for Aboriginal Affairs (C'th), the Government of the Northern Territory, the Northern *and* Central Land Councils, and the Maranunggu people, the last three parties intervening in support of their interests. The fact of their separate representation surely supports the view of the majority as to the political character of a decision. And 'political' it must be, an extra-curial conflict, a competition between rival claimants to the same subject matter, a refusal, inability, or unwillingness to compromise the *quantum* of those claims, and the politico-economic, and politico-cultural dynamics which ownership and possession of land imparts in white and Aboriginal society alike. Brennan's judgment in particular displays a sensitive understanding of the anthropological nuances in traditional land claims. He quoted extensively and with approval from Stanner's *White Man Got No Dreaming*, and concluded that the primary criterion for the granting of Crown land - the existence of traditional Aboriginal owners - 'is a test of need as much as it is a test of entitlement', the need deriving from the existence and exercise of usufructuary rights[20]. The effluxion of time may witness as well a waning, or waxing, of a group's spiritual affiliations to sites on land and their corresponding spiritual responsibility for those sites[21]. It is in the evaluation of the perceived strength and weakness of such affiliations and responsibilities that one recognizes a metamorphosis of the claim into one of political rivalry, conferring on the winners legitimacy and additional political strength.

(iv) *Stanton*[22] ('Finniss River II')

Stanton is an example of a political contest, in this cased decided in favour of the Maranunggu people over the competing claims to the same land by the Kungarakany and Warai peoples, represented by the applicants. The Commissioner made his report, the subject of initial proceedings in *Meneling*, in respect of five areas of land. The Kungarakany, jointly with the Warai, claimed areas 3 to 5, and separately to areas 1 and 2. The Maranunggu claimed all of area 1 and portion of area 2. All claims thus made were based on traditional Aboriginal ownership to the exclusion of rival claims, although none could have existed in respect of the joint application to areas 3, 4, 5. The joint claimants nevertheless sought orders directing the Commissioner to exercise according to law his functions under the Act, and, if that application were successful, to restrain the Minister from acting on the original report. The first order sought was based largely on a question of fact, which the Court were unanimous in finding had been satisfied by the Commissioner in terms making the application for the second order inapplicable. The Court found that the Commissioner had complied with the requirement that he take into account the spiritual link with sites abutting, but not co-terminous with those in the claimed areas in dispute; secondly, that he had dealt with each claim on the individual merit; and thirdly, that he had paid proper regard to the likely consequences of recommending a grant based on the stronger primary spiritual attachment and responsibility of one group over the other. This time the Northern Land Council did not intervene. With the exception of each applicant before the Court, all other parties appearing in *Meneling* considered it of sufficient importance to appear also in *Stanton*.

(v) *Jawoyn*(23) ('Katherine')

Two questions under the Act were raised in relation to land which by regulations under the *Planning Act 1979* were brought in to the town of Katherine : the land which embraced 650 square kilometres included two areas of land not alienated by the Crown when the claims were made. The first question was whether those statutory powers can continue to be exercised after an application is made under the (*Land Rights*) Act; and, if yes, whether the Commissioner may and should continue to inquire and report in respect of areas which have become a 'town'. The Commissioner had held he ought not to continue once the land became a town.

The High Court held by a majority of 4 to 1 that the status of the land should be determined at the time of lodgment of the claim, and any subsequent alteration in status does not affect the claimants' right to have the application heard and reported upon. Only the Chief Justice specifically answered the first question (in the affirmative). But he and two of the other three Justices in the majority (Brennan and Deane) confirmed that the Commissioner should comment on town planning consequences when making his report and recommendations.

The Chief Justice referred to the 'policy of' the Act and that 'it would seem contrary to the policy of the Act that a meritorious claim should be defeated by a subsequent change in the status of the land'. He referred to the responsibility of the Minister and the Governor-General in weighing 'the traditional claims of the Aboriginals against the interest of the public...or section of the public, and decide whether justice requires effect to be given to the traditional land claims or to requirements such as those of town planning'[24]. Deane agreed with Brennan who noted the potential incompatibility in similar terms, but resolved the conundrum by reference to 'the high policy' in Commonwealth legislation by which a Commonwealth Minister could, in effect, override the consequences of incompatible Territory legislation[25].

Murphy proposed a canon of construction that the Act 'should be interpreted and applied beneficially towards land rights claims'[26]. In dissent, Wilson (a conservative) opted for that mode of interpretation by which the legislative intent was discerned from the totality of the provisions in the Act. So viewed, changes in status were contemplated, and once the status changed, even if after the lodgment of a claim, the Commissioner's functions ceased. Even though he was in the minority, and was the sole dissentient, a passage in his judgment bears eloquent witness to the judicial perception of the Aboriginal condition. It uses language which would have been inconceivable 20 years ago and is further proof, if proof be needed, how far Aborigines as litigants, as claimants, as an entity, and as humans, have progressed in judicial thinking:

> The close physical and spiritual affinity of many Aboriginal groups to their traditional lands is now well documented and the objects of this legislation reflect a growing appreciation within Australia of the justice of the claim of these groups to legal rights over so much of their lands as can reasonably be made available. The qualification with which I have concluded the last sentence is not intended to diminish regard to the basic justice of the claim but simply to recognize that the objective must be pursued having regard to present realities and the demands of peace, order and good government for all Australians in the 21st. century and the years leading up to it. *The course of history in Australia over the past 200 years cannot be ignored. That history nourishes the moral imperative to acknowledge past injustices in a tangible way at the same time as it calls for a realistic appreciation of the challenge to create in Australia a sense of true community based on mutual respect for the dignity and well-being of all its citizens*[27]. (emphasis added).

(vi) *Japanangka*[28] ('Warramungu/Alyawarra')

Claims were made to certain lands at Tennant Creek, some parts of which had been set apart as stock routes and reserves and water conservation reserves pursuant to Commonwealth and South Australian legislation. Some had been vested in a statutory corporation which by its establishing legislation was not an emanation of the Crown. The Minister for Lands (NT) purported to grant leases in perpetuity of the disputed area to the Northern Development Land Corporation. The Commissioner held that the grant of these leases deprived him of jurisdiction to hear the matters. The High Court granted *mandamus* against the Commissioner by a majority of 4 to 1. As in *Jawoyn*, Wilson was the sole dissentient as to the status of the disputed lands.

Both the Chief Justice and Murphy restated the legal consequence of the *status quo ante*. Brennan more forcefully asserted the scheme of Commonwealth powers preserved after self-government was granted to the Northern Territory. He denied that the Northern Territory could suborn the Commonwealth's discerned legislative object in the land rights legislation:

> The prospect of conflict between the two Governments in the exercise of the respective powers is manifest, but the legal solution to the possibility of political conflict thus created does not depend upon political considerations. The legal solution requires the legislative will of the Parliament with respect to the exercise of the powers to be ascertained from the relevant statutory provisions and made effective[29].

Deane agreed generally with Brennan but asserted as *obiter* that the Northern Territory government could grant interests in land which did not harm 'any Aboriginal site on the land or prejudice the performance of functions or the implementation of procedures under the Act'[30]. Gibbs C.J., and Murphy, Wilson and Brennan agreed that Northern Territory legislation dealing with the lands derived its efficacy from Commonwealth legislation, and was not included in the Act as legislation which could validly alienate 'Crown lands'. Wilson also joined Gibbs C.J. and Brennan in holding that the Conservation Land Corporation was not an emanation of the Crown; consequently, it had been vested validly with part of the disputed area, which was excised from the Commissioner's further inquiry.

Unlike *Jawoyn*, the *bona fides* or ulterior motive of the Northern Territory were not called directly to account. But the relevance and significance of *Japanangka* is the acceptance even by the dissenting minority of the primacy of the Commonwealth's statutory provisions, and an acceptance of the policy objects of those provisions. The Court's intervention was called in aid of a legal resolution of competing juridical but on a higher plane the competing political claims and interests of two sovereigns.

(vii) *Jurlama*[31] ('Daguragu/Gurindji')

This case raised for decision a narrow question of construction of the Act. That is : was the proper interest of claimants confined to land possessing sites with which they had common spiritual affiliation or did it extend also to subject lands possessing no sites but contained within a larger area of which they were traditional owners? A triangular area of land at the Victoria River was claimed by Group 11 of the Gurindji. The Commissioner held that in the absence of traditional sites the land could not be so claimed. The High Court unanimously held that *mandamus* should issue to require the Commissioner to deal with the claim. All the Justices except Murphy agreed with the Chief Justice who argued that

> ...If the section is ambiguous it should...be given a broad construction so as to effectuate the beneficial purpose for which it is intended to serve[32].

Murphy concurred in the result, but referred to *Stanton* and adopted an even broader approach which emphasized that if the subject of a claim were 'merely linked...by dreaming tracks or otherwise' to sites of which the claimants were traditional owners that fact alone would make it the subject of a proper claim[33]. The spectrum of judicial thinking is narrower than the judgments suggest. All the judgments recognize the objects of the legislation and most judgments adopt a broad or liberal approach to the proper construction and interpretation in a way that advances the Aboriginal claims.

One further High Court decision requires mention because of the unusual sympathy and sense of realism permeating the judgments. *Gerhardy-v-Brown* was decided in February 1985 and has been discussed at length in Chapters 3 and 6. Two judgments from the 'liberal' side of the bench are notable. Brennan cited the 'sadly familiar phenomenon of landless, rootless Aboriginal peoples'(34); Deane recognized that

> The core of their existence was the relationship with and the responsibility for their homelands which neither individual nor clan 'owned' in a European sense but which provided identity of both in a way which the European settlers did not trouble to comprehend and which the imposed law, based on an assertion of *terrae nullius*, failed completely to acknowledge, let alone protect(35).

(d) Conclusions

These land rights cases reveal a continuing refinement both of argument and outcome. Aboriginal access to the High Court has had consequences discussed elsewhere(36). But the cases seem to me to represent legal *and* political victories. Legal victories because Aboriginal interests have won claims on purely legal merit; and political for reason that *they have not lost*. Their willingness to engage as legal equals in a lawful confrontation - albeit from a position of unequal political, historic, and economic power - has changed the contest from one purely of political *power* to one of political *strength*. Their costly pursuit of justice for a principle based on and nurtured by a unique heritage has endowed that political contest with a form of moral grandeur - a 'moral imperative' - that kind of pristine virtuosity by which history salutes those whose cause is just.

REFERENCES

1. For example, those by Ken Maddock; or as edited by Nicolas Peterson *'Aboriginal land rights - a handbook'* and as joint editor with Marcia Langton, *Aborigines, Land and Land Rights*, published by the Australian Institute of Aboriginal Studies, Canberra, in 1981 and 1983 respectively.
2. Colin Tatz would be the foremost publicist in this area : *vide* his *Aborigines & uranium and other essays*, Heinemann Educational Australia, Richmond 1982, Chapters Five and Six, pp. 118-190.
3. *Mathaman and Others-v-Nabalco Pty. Ltd. and Another* (1969) 14 FLR 10, ALR 685; *Bibliography*, Case No. 115, pp. 48-9.
4. *Milirrpum-v-Nabalco Pty. Ltd. and The Commonwealth of Australia* (1971) 17 FLR 141; (1972-1973) ALR 65; *Bibliography*, Case No. 119, pp. 50-3.
5. 'Time immemorial or living memory is from a time whereof the memory of man is not to the contrary, such that no man alive has heard proof to the contrary', that is the period for which evidence can be given by the oldest living available witness. 'Legal memory' runs from 1 Ric. I (1189) because the *Statute of Westminster I*, 1274, (3 Edw. 1, c. 39) fixed that period as the time of limitation for bringing certain real actions.
6. (1889) 14 App. Cas. 286; *Bibliography*, Case nO. 47, pp. 19-20.
7. (1889) 14 App. Cas. 286, at p. 291.
8. Ibid., at p. 292.
9. (1979) 53 ALJR 403, 24 ALR 118; *Bibliography*, Case No. 42, pp. 15-7.
10. Per Jacobs J. (1979) 53 ALJR 403, at p. 411; 24 ALR 118, at p. 136; per Murphy J. (1979) 53 ALJR 403, at p. 412; 24 ALR 118, at p. 138.
11. *Noonkanbah Pastoral Co Pty. Ltd.-v-Amax Iron Ore Corporation*(Supreme Court of Western Australia, No. 1558/79, Brinsden J., 27 June 1979, unreported); *Bibliography*, Case No. 138, pp. 62-3.
12. *Onus & Frankland-v-Alcoa of Australia Pty. Ltd.* (1981) 149 CLR 27, 55 ALJR 631, 36 ALR 425; *Bibliography*, Case No. 142, p. 64.
13. (1983) 1 NSWLR 419.
14. *R-v-Toohey and Others; Ex parte Attorney-General for the Northern Territory* (1979) 54 ALJR 145; (1979-1980) 145 CLR 374; (1980) 28 ALR 27; *Bibliography*, Case No. 352, pp. 118-9.
15. *Re Toohey; Ex parte Northern Land Council* (1981) 56 ALJR 164; 38 ALR 439; *Bibliography*, Case No. 410, pp. 137C-D.
16. *Re Toohey and Another; Ex parte Meneling Station Pty. Ltd. and Others* (1982) 44 ALR 63; *Bibliography*, Case No. 118 (*sub. nom. Meneling Station Pty. Limited et ors.-v-Toohey et anor.*), pp. 50A-F.
17. (1982) 44 ALR 63, at p. 67.
18. Ibid., at p. 80.
19. Ibid., at p. 91.
20. Ibid., at p. 88.

21. Ibid., at p. 89.

22. *Re Toohey and Another; Ex parte Stanton and Others and Kenyon and Others* (1982) 44 ALR 94; *Bibliography*, Case No. 397, pp. 133A-F.

23. *Re Kearney (Aboriginal Land Commissioner); Ex parte Northern Land Council* (1984) 58 ALJR 218; 52 ALR 1; *Bibliography.*

24. (1984) 58 ALJR 218, at p. 222; 52 ALR 1, at p. 7.

25. Ibid., at pp. 230 and 22 respectively.

26. Ibid., at pp. 222 and 7 respectively.

27. Ibid., at pp. 225 and 13 respectively.

28. *Re Kearney (Aboriginal Land Commissioner); Ex parte Japanangka* (1984) 58 ALJR 231; 52 ALR 31; *Bibliography.*

29. (1984) 58 ALJR 231, at p. 241; 52 ALR 31, at p. 49.

30. Ibid., at pp. 242 and 52 respectively.

31. *Re Kearney (Aboriginal Land Commissioner); Ex parte Jurlama* (1984) 58 ALJR 243; 52 ALR 24; *Bibliography.*

32. (1984) 58 ALJR 243, at p. 245; 52 ALR 24, at p. 28.

33. Ibid., at pp. 245 and 29 respectively.

34. (1985) 59 ALJR 311, at p. 341; 57 ALR 472, at p. 522.

35. Ibid., at pp. 346 and 532 respectively.

36. John McCorquodale, 'Aborigines in the High Court', *The Australian Quarterly*, 55, 1, Autumn 1983, pp. 104-13.

PART IV

ABORIGINES AND THE CRIMINAL LAW

INTRODUCTION

Historically the judiciary has considered Aborigines 'beneath God and the law' ('*sub Deo et lege*'). The God was the Christian God and the law was the white man's law; the Aborigine was assumed to be inferior in the eyes of both. Even when the white man's faith was embraced, as *Cook-v-Cavenagh* reminds us, the - inferior - black cultures, traditions, and beliefs were just below the surface, waiting to emerge, and to influence the legal behaviour of the subject(1).

Thus a group existed within the legal mainstream whose members were imperfectly understood, or, when understood, contemptuously dismissed or disparaged. The *Bibliography* gives their trial names : 'Long Jack', 'Jackey Jackey', 'Old Billy', 'Neddy Monkey', 'Black Peter', 'Black Bob'. Were the subject races elsewhere in the Empire ever denied the dignity of a proper title? Did the prefix 'Aboriginal', often abbreviated in some official reports as 'Abo', conduce to a proper judicial or even legal regard for the rights of the subject? How could equality of treatment obtain in proceedings begun with a name which at best was unconsciously pejorative and at worst dismissive, condescending, patronising, but always negative?(2).

The earliest cases recognized that the substantive law was unable to accommodate Aborigines perceived as 'savage', 'tribal' or 'uncivilized', yet possessing their own manner of law. Thus, a tribal wife could be compelled to testify against her tribal husband, for an acknowledgement of another system of law would undermine confidence in, and respect for, '*the* law'. Other minorities, races, cultures and beliefs in the Empire were accorded due recognition by the 1860's. But not the Australian Aborigine. How, then, could the law show its majesty, the qualities of mercy and compassion which, in the nineteenth century, were invoked as explanation and assertion of moral superiority and justification? The only clear, legally justifiable way was in the use of those legal discretions reposed by convention and statute in the judges.

Yet an examination of the judgments cited in the *Bibliography* and analysed in this Part suggests that there persisted - and still persists - in judicial minds a stereotyped impression of Aborigines as being not-quite-civilised, of being lesser persons in terms of inability to hold or resist drink, sexual morality, domestic abuse or neglect, capacity to seek out, obtain, and continue in responsible employment, and of public conduct. To that extent, the judges may simply be reflecting what is seen as a societal perspective, from which they could hardly be immune[3]. It would be both fanciful and trite to expect of our sentencing tribunals that they ignore the historical legislative treatment of Aborigines as persons peculiarly in need of care and protection, of the same class and category as children or lunatics.

The concept of legal equality therefore proceeds on a false premise, namely, that substantive legal equality had been conferred on or otherwise enjoyed by the Aborigine, but that certain procedural remedies and relief were denied to Aborigines on account of a condition of legal disability deriving from their membership of a group. There has been an acknowledgement by some of them that Aboriginal society displays the same variety, contrasts and diversity as the larger, dominant society. Accordingly, the administration of justice requires a proper understanding of the dominant strands within that sub-group to which the subject belongs.

Within the last 10 years - as *Davey*[4], *Neal*[5] and *Ngatayi*[6] attest - a significant body of judicial opinion is giving express recognition to the pluralist factor in our society and, in so doing, is questioning the proper role of the system of criminal justice to those who, by acculturation, are even now on the fringes of that society. But judicial self-denial has been preferred to judicial innovation except in procedural matters. There, the judges in the Northern Territory are seen to be far more understanding than their colleagues in other Aboriginally-populous States, such as Western Australia, South Australia and Queensland.

Their awareness seems to derive from a realization of the vitality and centrality of Aboriginal culture in modern Aboriginal life, of the interplay between *lore* and *law*, and of the need for accommodation by the dominant legal system of another system sustained by quite dissimilar values and beliefs. But the degree of accommodation is also seen as an act of judicial magnanimity, of a demonstration of power in relinquishing or modifying some of its external features.

It may derive, in part, from an increasing awareness of the growing financial and economic power of Aborigines - as individuals, as groups, and as communities - particularly in the Northern Territory. The implementation of land rights with its emphasis on traditional links of religion, responsibility, and clan itself poses a dilemma. One can see being grafted on to the ethnocentric monolith of Anglo-Saxon jurisprudence and procedures a set of values and beliefs almost antithetical to the host body. What is likely to emerge is not so much a synthesized body of law as a new species of law-anthropology-sociology, having practical application at specific levels of society and in a specific range of subjects. And the deficiencies of knowledge of practitioners and administrators require an adaptive reliance on - and response to - those same people who formerly were legal, political, social, economic and moral pariahs.

A detailed examination of the judgments of Kriewaldt and Muirhead reveals a degree of bias based on an awareness not of alienation from the white society but of pronounced cultural differences. Granted the application of the law to a singular entity, component parts of it have been accepted as being so dissimilar as to call for a variable response. Kriewaldt formulated several tests of provocation in a striking example of his endeavour to compromise in order to do justice; so, too, was his acceptance of a differing standard of 'civilization', meaning white civilization. But that, all too often, was a two-edged weapon which subjected those who might be advantaged by it to a disability. Thus, juries could be, and were, directed to give a greater or lesser weight to the unsworn evidence of (non-Christian) Aborigines in criminal trials. The legislation of the Northern Territory required no less. Yet in so directing the jury, the trial judge is reinforcing the negative equation of colour with worth.

In sentencing, the bias of Muirhead is seen to work to the advantage of Aboriginal accused, not least because of its acceptance of the ineluctable nature of imprisonment as a deterrent to Aborigines. His awareness of tradition, culture, belief and its potential for good is best seen in his treatment of juvenile offenders and his willingness to subject an offender to (potential or actual) tribal constraints. Where imprisonment is used, it is as a measurement of punishment, of the sanctions of society at large for proscribed conduct, and not with the rehabilitation of the offender in mind. Kriewaldt and later members of the Supreme Court of the Northern Territory were consistent in their exercise of judicial discretion to deter the drunken resort to violence, and particularly the use of knives.

There is also concrete evidence of judicial attempts to curb the use of alcohol for the ruinous and destructive part it plays in Aboriginal society, although at the same time an admission of the proper role, and the limitations imposed on the role, of the criminal law in respect of alcoholism *per se*(7). The variable judicial responses to tribal punishment as a mitigating factor in Aboriginal crime again demonstrate the limitations of judicial activism. On the one hand, the ethnocentric basis of the dominant legal system and its administration require a universal subjection and an equal application. But as against that is the paradox of people for whom the law, and its processes, either are meaningless or irrelevant. The reconciliation of the one with the other not merely supports, but requires, some element of judicial determinism(8). This leads to a higher paradox, namely, that in the exercise of determinist method, the sentencing tribunal perforce must pay due regard to sociological and anthropoligical evidence, viewed, tested, and weighed according to legal standards of proof, themselves of greater or lesser degree depending on the civil or criminal nature of the trial.

The 'arithmetic of colour' - to use Tatz's striking metaphor - so often in the past predisposed their legislative treatment. Those defined by fractions of blood are now also required to undergo the lottery of judicial bias. A ready judicial acceptance of a paradigm of disadvantage, discrimination and dispossession should be accompanied by a corresponding judicial commitment to their legal solution. But the mechanics of conflict-resolution in a conservative, ethnocentric system ill-equip the judiciary to deal with problems whose causes quite often are outside the compass of the law itself. The traditionalist strand of legal philosophy based on Austinian positivist *commands-sanctioned-by-force* and the 'natural' disinclination of the judiciary to depart from the legal mainstream conduce to a narrow judicial self-perception. That role which the judiciary eschews - that of *social engineer* - as was so aptly put by the Full Bench of the Commonwealth Conciliation and Arbitration Commission in the 1966 landmark decision in *Re Cattle Station Industry (Northern Territory) Award (1951)*(9) - is the very role which legislation and social reality increasingly demands of them.

This Part not only analyses the extant case law and relevant statute law in the *Bibliography*, but presents the results of my New South Wales fieldwork in the lower Courts. It therefore presents a two-dimensional analysis of Aborigines in the criminal law Courts. It treats the superior Court judgments on Aboriginal defendants on a national level, ascertaining the extent to which 'Aboriginality' is - or was - a factor in trial, conviction, or sentence. Secondly, it looks at the results of decisions of local Courts in New South Wales and so completes the analysis of all such Courts in Australia (save and except of Tasmania) which Eggleston began almost 20 years ago.

This bifurcation in no way diminishes the central importance of the local Courts which hear and determine the overwhelming majority of criminal cases - for black and white alike. However, the usefulness of such cases is in their statistical significance which may illuminate the generality of the Aboriginal experience of the law. The superior Court decisions are of importance for the principles enunciated either on appeal from the decision of inferior Courts or for the insights they provide for judicial or judicially-perceived societal attitudes towards Aborigines.

The data, following Eggleston, are co-ordinated with the order of their first appearance in the text. Some aspects of criminal law procedures, for example in respect of alcohol offences, lend themselves to discrete treatment. Yet others, such as imposition and payment (or non-payment) of fines and costs, raise broader questions of selectivity of criminal penalties and sanctions, of proper principles of sentencing, of the <u>individual's</u> capacity to pay, hence of substantial-v-procedural equality and substantial-v-procedural justice.

The analysis is presented in such a way that, even if the reader is as unfamiliar as the author with statistics and their proper use, it is systematic and coherent.

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1. (1981) 10 NTR 35; *Bibliography*, Case No. 46, p. 19A.
2. Yet Kriewaldt, as an acting Justice in *R-v-Aboriginal Wally* (1951) NTJ 21, could describe such names to the jury as 'amusing'. This may, in retrospect, be considered as much an expression of judicial innocence as judicial condescension.
3. As Kriewaldt said in *R-v-Aboriginal Kenny Jungarai and Aboriginal Hector Galway* (1959) NTJ 700 *Bibliography*, Case No. 166(a), pp. 68K-L 'the holder of a judicial position is not obliged to live the life of a hermit'.
4. *R-v-William Davey* (1980) 50 FLR 57; 2 A Crim R 254; *Bibliography*, Case No. 217, pp. 79-80.
5. *Neal-v-R* (1982) 42 ALR 609, 6 ALB 10; *Bibliography*, Case No. 134, pp. 60B-G.
6. *Ngatayi-v-R* (1980) 30 ALR 27; 54 ALJR 401; (1981) 4 A Crim R 433; *Bibliography*, Case No. 135, pp. 60-1.
7. Although a judicial disavowal of comment on the social policy in relevant legislation was entered by Kriewaldt in *R-v-Aboriginal Johnny Scott MacDonald* (1953) NTJ 186; *Bibliography* , Case No. 167, p. 68D.
8. Kriewaldt made a significant, and revealing, comment on what utility he saw in trials; they were having a 'civilising effect', in not permitting the Aborigines to 'carry on in their old tribal ways' of conflict - resolution and punishment: *R-v-Aboriginal Timmy* (1959) NTJ 676; *Bibliography*, Case No. 172, pp. 68, 68 O-P. This comment was made towards the end of his judicial career. Super-added to criminal justice, it seems, was the role of promoting civilization. That, in itself, betrays a feeling of superiority ('my system is better than yours, which it should replace') and a functionalist philosophy at odds with the traditional view of criminal trials not as imposers of civilization so much as arbitrators between the demands of society and the rights of the individual arising out of a certain act or pattern of behaviour by that individual.
9. (1966) 113 CAR 651; 8 Industrial Law Review 36; *Bibliography*, Case No. 38, pp. 12-4.

CHAPTER 13

TRIAL PROCEDURES IN SUPERIOR COURTS

(a) Judicial awareness of cultural differences

In several jurisdictions the Courts have accepted that 'special' legislation was addressed to the Aboriginal 'problem' as perceived by the dominant white society. For example, in 1951 the Supreme Court of Western Australia referred to Aborigines as 'disinherited and dishonoured people' who should 'receive the benefit of the provisions made by the legislation for their 'protection in courts of justice'[(1)]. In 1950 they were 'notoriously in this community a class which, generally speaking, is in need of protection and assistance', properly as an object of charity[(2)], so regarded in Victoria in 1976[(3)], and in the Northern Territory even in 1985[(4)]. Legislation, however, all too often resulted in what the High Court has termed 'a special status of pupillage', as in the Northern Territory, where a <u>single</u> declaration by the Administrator under the *Welfare Ordinance* in 1957 made 15,211 Aboriginal men, women, and children wards of that Territory[(5)].

In 1962 this status was described as 'beneficial and desirable...for one so backward as to need its accompanying protection' but recognized as 'unjustifiably humiliating and oppressive for one advanced beyond that need'[(6)]. Kriewaldt contrasted the rights and privileges enjoyed by Aborigines under the *Aboriginals Ordinance 1918* with the restrictions imposed on them by that legislation which created a species of perpetual tutelage. However, he subsequently characterized the succeeding *Welfare Ordinance* legislation as 'designed to extend help and guidance' to them[(7)], 'essential if they are to escape extinction', and considered 'Aborigines as in need of some special care and attention'[(8)]. Accordingly, and having regard to realities, it was 'not the business of the Courts to inquire into the wisdom of individual sections of the law'[(9)]. Perhaps not. But that was what he did in *Ross-v-Chambers*, applying a liberal interpretation of 'native' legislation in the manner exhorted in 1951 by the Chief Justice of Western Australia[(10)].

The test in Western Australia was that if a section (in legislation) were enacted for the protection of 'natives' a liberal interpretation should be given to it[11]. In *Ross*, Kriewaldt refused to accept that an 'Aborigine' under the *Aboriginals Ordinance* should be placed in the legislative category of infants and lunatics, although under the *Welfare Ordinance* wards were so categorized. An Aborigine of full age should therefore be entitled to sue in his own name in a civil action for assault. Nevertheless, Kriewaldt subsequently approximated the status of 'Aborigine' under the *Aboriginals Ordinance* to that of ward under the *Welfare Ordinance* which he accepted as dealing in terms 'with the protection of Aboriginals'[12]. Later that same year, in November 1959, he considered the particular legal status of pupillage in *R-v-Aboriginal Kenny Jungarai and Aboriginal Hector Galway*[13]. In issue was the legal competence of a police tracker, a declared ward, to effect a citizen's arrest. He left open the matter, questioning if the declaration of wardship deprived the ward of that power which 'the *ordinary* citizen possesses' (emphasis added)[14].

The *Welfare Ordinance 1953* had spoken of the declaration of wardship as for an individual, who could contest it on the grounds of '<u>his</u> manner of living, <u>his</u> ability, without assistance, adequately to manage his own affairs, <u>his</u> standard of social habit and behaviour, and <u>his personal</u> associations'. In other words, the language of the Act related to, and was presumably making a distinction between, individuals on their relative merits. But the Administrator's *en bloc* declaration - without regard to individual need or merit - was accepted by the High Court in *Namatjira*. Thus, an administrative device continuing similar government policy for a group characterized in practice only by 'blood' in the Northern Territory, but with different labels, was accepted by the judiciary, remonstrations as to 'liberal interpretation' and individual merit notwithstanding.

Kriewaldt was one judge, but not the only one, who differentiated between white and black, and between black, on the basis of the degree of 'sophistication' displayed, whether as accused or as witness. In 1954 he presided over the trial of an Aborigine accused of a sexual assault of a white woman, the first in living memory in the Northern Territory. The prisoner was 'about 21 years old' and throughout his life had 'been in touch with white people and subject to the influences of white civilisation'. He was described in evidence by the Acting Superintendent of Native Affairs as 'sophisticated' and as 'substantially civilised'. He had had some education and was fairly well conversant with the English language(15). Kriewaldt considered 'that the extent to which the native has adopted white ways and manners, perhaps, rather, the extent to which he has not yet done so, is a very material factor in arriving at a just sentence. The nearer his mode of life and general behaviour approaches that of a white person, the closer should punishment on a native approximate punishment proper to a white person convicted of a similar crime'(16). One gains the impression from his remarks on passing sentence that a measure of civilization accrues, as if by osmosis, through contact with whites. Further, that sophistication varies in some proportion, at a fairly constant level or rate, to knowledge of English. Presumably education and the acquisition of English were correlatives. The extent to which an Aborigine had *not* adopted the mode of life and the outlook towards life of white persons should be regarded as an extenuating circumstance(17).

The Supreme Court of South Australia has referred to the aspect of *acculturation-as-a-determinant* in terms echoing Kriewaldt. In the 1977 case of *Wanganeen-v-Smith*, the Court said:

> where an Aboriginal native has established himself in the more general community and intends to remain there and work side by side with other members of that community, he must accept the ordinary standards of behaviour expected of his fellow-citizens. If he inhabits and uses the cities and towns of our country, then he must expect to abide by the ordinary rules by which law and order are there maintained.

> He cannot expect that special exceptions will be made for him. No doubt his personal characteristics and background and history will be taken into account by a court in the ordinary way; but he cannot expect special treatment just because he is an Aboriginal native...In such a case, he comes as a citizen of Australia and must be treated just like any other citizen who lives in a town or city, and who makes use of the various facilities provided there(18).

In each case, the dominant white society provided the ethos ('industrious'), the behavioural standards, the criteria of sophistication and criminality, the cultural *milieu* against which to measure those of the Aboriginal accused. The statutory treatment of Aborigines as a subordinate class within the legal, political, economic, and social system, created a stereotype in need of 'protection', 'care', 'assistance' in the same way as a child or mental defective. Persons who were 'uncivilized', 'unsophisticated', 'backward', 'retarded' had therefore to look to the law-administrators in much the same way as they looked to the missions and charities for their subsistence and means of survival in the greater part of the nineteenth century. And when judicial zeal was combined with a pronounced moral conscience, as in Kriewaldt's case, the resultant mix of judicial evangelizing was difficult to discard or reverse. When drink was a causal factor of criminal behaviour, as it was so much and continues to be in the Northern Territory, it was difficult to tell which factor was in the ascendant when punishment was being meted out.

In nearly all jurisdictions the Courts seem to have accepted that there is a *continuum* of conditioning which distinguishes Aborigines in various stages of 'sophistication' from a presumably more homogeneous white or - in an increasingly 'pluralist' society - non-Aboriginal society. For them 'Aboriginality as civilization'(19) - to borrow another Tatzian metaphor - is a contradiction in terms unless it refers to another (sub-) stratum of civilization. In the field of sexual *mores* and behaviour, for example, there is a pronounced perception that 'they' are different to 'us' in a way which disparages 'them'.

And so, in the Northern Territory in 1979 the Chief Justice, in sentencing an Aborigine for the drunken rape of a white nursing sister at a Settlement, said: '...I have no doubt *it is my duty* to do what I can to deter you, and people like you, from acting in this way, *and to offer such protection as the law can provide for white women in remote places*. Your crime would, I should think, be disapproved by Aboriginal people as well as by white, *no matter how tolerant the Aboriginal attitude towards rape may be* ' (emphases added)[20]. Nine months later three Aborigines were charged with the drunken rape of an Aboriginal woman in the Todd River, described by one defence counsel as 'an area of complete anarchy and lawlessness'[21]. Defence counsel submitted: 'that rape is considered significantly a lesser crime than the way European people view the crime of rape', because, although 'it is a transgression, an assault on her sexual character' and severely punished, 'when alcohol is involved different rules apply... In Aboriginal culture...the word used to describe a person who is drunk is the same word that is used to say someone is deaf or someone is mad, and in a non-literate society...this is similar to saying someone is outside of that society and here lies this sense of belief that the transgressor has a reduced responsibility because of his intake of alcohol'[22].

He cited a conversation with anthropologist Diane Bell in support of his submission which contrasts strongly with what she, with Pam Ditton, wrote on the situation at Murray Downs, a European-managed cattle station[23]. However, counsel submitted further expert evidence as to a cultural factor which, while not tolerant of rape, demonstrated a cultural justification for the ambivalence which trial judges assumed existed in one portion of Aboriginal society, mainly the Western Desert region of the Northern Territory. In that traditional society, it was said, rape was not considered the cardinal sin that it is in European society, except where incest is involved. Secondly, amongst the Western Desert people, there are some ceremonies where sexual intercourse takes a very prominent role, and far from being involuntary was considered to be an enjoyable experience. Finally, the mythology of those people was the most important factor : a consistent thread is how the male spirit ancestor chases the female spirit ancestor with intent to rape[24]. So much could also be said for the Greek pantheon.

In a subsequent pack-rape trial that year, the judge received and seems to have acted upon evidence that rape was not as seriously regarded in the Aboriginal community as it is in the European[25]; and in 1981, the Court also referred to '*the almost hopeless tolerance or acceptance by some Aboriginal people to drunken assaults of this nature*', although in that case a husband beat his wife whom he suspected of infidelity[26].

In New South Wales, the Courts seem to have accepted a differential between white and black generally in societal attitudes but particularly in sexual offences. At the trial of a 16 year old Aborigine of 'dull normal intellect' for carnal knowledge of a five year old girl, the trial judge described the accused as 'a product of an ethnic background coupled with a form of life within a community which has standards of conduct very different from the standards accepted by the general public and by the laws of this State'[27]. In his trial for rape and buggery, a man described as of 'unfortunate early and deprived background' pleaded 'factors of Aboriginality'[28]. In 1983, at his trial for sexual intercourse without consent, and malicious bodily harm with the same intent, the accused was considered as an Aborigine to be 'at a disadvantage in our society'[29]. At his trial on the same charges before a different judge, another Aboriginal accused was described as having grown up in an atmosphere of 'idleness and perversion', namely, the Wallaga Lake settlement on the New South Wales South Coast[30]. The Victorian Court of Criminal Appeal approved the emphasis placed on 'the disadvantages and difficulties arising from the racial background' of an Aborigine convicted of rape and assault occasioning actual bodily harm while heavily intoxicated[31].

In a 1981 Queensland murder trial at which a mass of ethno-psychiatric, anthropological, sociological and historical evidence was given, the trial judge said '...we have perceived and made allowance for the fact that special problems exist in Aboriginal communities'[32].

However, numerous cases evidence that even the effluxion of time may not eradicate what the judges perceive to be deep-rooted cultural differences. Cases thus speak of 'a man who up to 1934 was a bush native' (1965)[33], 'who has not completely adopted the ways and manners of a white community...he has lived in a community where the sharing of possessions is commonly practised'[34]; 'considerably under the influence of liquor...which in the case of Aboriginal people I regard as something more of an excuse than I do with white people[35]; 'a knife may have many uses, especially, I suppose to an Aboriginal man whose life is largely spent in a bush environment'[36];

and in the case of the distress a mother suffered after her young daughter's death in a car accident, 'although a practising Christian it was inevitable, at a time such as this, that the culture of her people should to some extent be imposed on her'[37].

Other cultural differences judicially noticed have been discussed in respect of, for example, testimony, tortious actions, and workers' compensation. What is seen in the above cases, however, is a judicial awareness of cultural differences in 'our society' which work to the deprivation and disadvantage of Aborigines. Granted the formal equality of black and white in substantive law, the wider application of procedural law afforded a degree of innovation and discretion. But in developing such remedial advantages for Aborigines, the judicial officers have been constrained as much by judicial conventions as by an acknowledged ignorance of Aboriginal conventions. The judicial *milieu*, in other words, affords only limited relief for legal problems whose underlying causes lie outside the judicial arena.

(b) Interrogation of, and confessions by, Aborigines

In *Collins and Others-v-R*, also known as the 'Huckitta murder' case, three Aboriginal juveniles and one adult Aborigine of the Northern Territory were convicted of murder, largely on the strength of material obtained during a filmed re-enactment of the crime[38]. The *voir dire*, to determine the admissibility of their confessions, lasted for about six weeks - an extraordinarily long time, almost a trial within the trial. The Full Court of the Federal Court of Australia, on appeal, held that their confessions were voluntary. In dissent, Brennan cited their considerable period of custody, in trying climatic conditions, the appointment as 'prisoner's friend' of an Aborigine not identified with them by clan or past association, the absence of parents and their lawyer, the inadequacy of cautions administered, and the illegality of their removal from the place of detention to the murder scene, a considerable distance away. He found that the confessions were involuntary. While recognizing the exigencies of distance, time, communication possible shortage of police personnel, and difficulties in finding and speaking to the appellants' community and lawyers on a public holiday (New Years' Day), all of which determined the manner of the police investigation, the basic tenet of common law tradition was *'Nemo tenebatur prodere seipsum'*, that is, that no one can be compelled to incriminate himself.

In all circumstances, but particularly the police failure 'to observe the

Anunga rules, and the rules with respect to the interrogation of children, and the effect of unlawfully taking the prisoners to Huckitta', he concluded that the confessions were involuntary(39). He was at pains to emphasize that the exercise of a discretion is required by the application of a rule of law, one, moreover, which applies to all confessions made by persons prosecuted in the Northern Territory:

> ...The rule of law does not distinguish between black and white, educated and illiterate, sophisticated and simple. The rule applies uniformly, but its operation depends upon the circumstances of each case, and confessions made by those whose wills are more easily overborne - whether because of social condition, environment, natural timidity or subservience - will find reciprocally greater difficulty in being admitted into evidence...<u>The rule is the same for the Aboriginal and for the non-Aboriginal, but the consequence of applying the rule may vary</u> if a particular Aboriginal exhibits, in given circumstances, a different strength of will, or of understanding or of sophistication from that exhibited by a non-Aboriginal...(emphasis added)(40).

Brennan's logic is, with respect, surely as correct as it is compelling. The concept of equality before the law, in other words, refers to the equal operation of the same law: the effect, or the consequences, of the application of substantive rules may produce distortions, variations, inequalities, but surely far greater inequalities would flow if the rules were unequally applied?

In *Collins* Brennan referred to the exceptional power of a Court in criminal trials to reject even admissable evidence. The foundation of the power and the warrant for its exercise were to be found in the attainment of objects which the Courts have perceived to be desirable, but which would not be attained in a particular case if the rules of evidence were strictly applied. The object in rejecting even a voluntary confession, for example, is the elimination of any unfairness to the accused. A second is where its admission might have a prejudicial influence on the minds of the jury which would be out of proportion to its true evidential value. A third object, the serving of the public interest in the observance of the law by the agencies of law enforcement, accounts for a discretion to reject evidence unlawfully obtained.

Brennan was in the minority on the proper weight to be attached to the factual evidence - not the law - in *Collins*, and the appeals by the convicted accused failed[41]. But his judgment - and its reasoning - is compelling in its restatement of the concept of equality in the administration of justice, and of the role of law both as an expression of the popular will and as a protector-enforcer.

The Northern Territory may present particular problems in the interrogation of its Aborigines suspected of crime, but it is by no means unique. Nearly every Australian jurisdiction has recognized that 'factors of Aboriginality' will operate to 'the serious disadvantage' of suspects[42], a disadvantage moreover, not shared by 'their counterparts of similar age drawn from a European culture'[43]. The cases cited in the *Bibliography* suggest three levels of disadvantage, two relating to 'sophistication' for Aborigines in the Northern Territory and generally in Australia, and the third relating to procedural requirements of statute law.

At a general level, judgments from several jurisdictions have as a common theme the 'history of relations between Aboriginals and law enforcement authorities' (NSW - 1983)[44]; not only, but especially, with law enforcement authority. There is a 'customary submission or deference of Aborigines to established authority' in which police officers are seen as the embodiment of that authority (SA - 1976)[45]; Northern Territory Aborigines who are 'unsophisticated' and 'have had little contact with white society are, by upbringing, inclined to be not only polite, but co-operative and frank with authority' (NT - 1980)[46]. One South Australian judge described this *politesse* as 'an irresistible compulsion to answer questions even when they comprehend intellectually that they do not have to answer' (SA - 1976)[47].

Here there is the recurring theme of 'sophistication' or 'intellectual comprehension' and 'contact with white society', the latter presumably, and no doubt for comparative purposes, representing the former. The process of osmosis, it seems, is inexorable in judicial minds but never completed as *Namatjira* and *Cook* remind us : no matter how much sophistication a 'pseudo-white' displays, the 'savage', the 'unsophisticated', the recidivist is ever present, constrained from bursting out only by the inhibitions acquired as a white in a white society. Nor are such reflections confined to youth. True it is that *Collins* (NT - 1980), *Police-v-J* (WA - 1980)[48], *McKellar* (NSW - 1983), *Henry* (Qld - 1979), *Dixon-v-McCarthy* (NSW - 1975)[49], and *R-v-Clevens* (ACT - 1981)[50], involved Aboriginal juveniles and that , except in *Collins*, the confessions were rejected as involuntary. Also true is that, in *Dixon*, the factor of Aboriginality was cited but not as exceptional(51).

Aboriginal adults have been considered equally subjected to the disadvantage of Aboriginality. When considering the voluntariness of a confession, the consideration of the 'apparent sophistication' of an accused is ultimately to be assessed, if not on the record, on the *voir dire*(52). And it was 'a sound and fair rule of practice where a challenge to voluntariness is made that the Crown "should begin"'(53).

The Northern Territory is not as unique in problems of Aboriginal interrogation as its judiciary seem to think. For example, South Australia enunciated judicial guidelines for the interrogation of Aborigines before those in the celebrated *Anunga* case, and these were incorporated as standing instructions to police in South Australia in 1975. Victoria had had similar standing orders in 1964-66, requiring the Aborigines Welfare Board to be notified so that it could arrange for a legal representative or 'prisoner's friend' to be present at the interrogation.

In *R-v-Gibson*, a South Australian case decided in 1973, the Supreme Court considered that 'assistance should be arranged for indigenous persons who not only have a limited command of English but whose culture radically differs from the white culture'(54). Assistance should be provided by a 'prisoner's friend', that is, 'somebody who can act as the friend of the person being accused, somebody familiar with Australian legal principles, able to converse with the person questioned in that person's language and able to ensure that if he makes a statement that statement is made with a full realisation of the possible consequences'(55). The subsequent Police Commissioner's Office Circular No. 354, of 24 March 1975, fell somewhat short of the Court's ideal and was on 10 March 1982 replaced by General Orders (G.O. 3015). The Circular referred to 'an independent third party' (preferably a solicitor or field officer of the South Australian Aboriginal Legal Rights Movement). It also referred to a tribal or semi-tribal Aborigine with an imperfect grasp of English, such that the Circular was intended not to have general application. Moreover the interview was referred to in terms of a 'serious crime'. 'Every effort' should be made to have present such independent third party, or some other person 'preferably' with 'some understanding of the prisoner's language'.

In the subsequent case of *R-v-Williams*, the Court was of opinion that the Circular should be regarded as similar to the Judges' Rules, and that a breach of them 'forms...part of the material upon which, first, the trial judge resolves the issue of voluntariness, and, secondly,...the trial judge determines whether in the exercise of his discretion, he will exclude the confessional material tendered'(56). The ruling in *Williams* was approved and applied in *Walker-v-Marklew*, which treated breaches of the Circular as breaches of the Judges' Rules(57). There a confession was found to have been obtained from 'an exhausted and probably apprehensive juvenile of aboriginal race who had been and was being illegally detained and in disregard of the Commissioner's instructions, and without the presence of any parent, guardian, solicitor or officer of the various bodies which exist for the protection and guidance of aborigines, and while those with a legitimate interest in protecting him had been asking that he be not interrogated in the absence of their solicitor or representative'(58).

In *Henry*, the police failed to obtain independent adults as witnesses at the interrogation, and to ask the accused if such an adult were required; in *Collins*, the person chosen as 'prisoner's friend' was of a different clan; in *R-v-Ajax and Davey* one 'prisoner's friend' was hostile to the accused(59); the other prisoner had no independent third party present and was not cautioned until after he had made admissions(60). Moreover, the effect of two tall policemen on 'a small, primitive Aborigine, in a rather confining interviewing room must have been rather awesome to him'(61).

The physical comfort of juveniles and other accused is a relevant consideration in considering the voluntary nature of confessional material. In *Dixon*, one of the accused had been struck by a policeman and called a 'black bastard' in the presence of the other accused; in *Clevens* the accused had been given no warm or dry clothes after being held in custody a number of hours on a rainy Canberra winter's night; and in *McKellar*, the police failed to have an independent person present at the interrogation, in breach of the *Child Welfare Act*(62), even though an Aboriginal Legal Service solicitor lived in town(63).

Therefore, on the grounds of historical, and actual, relationships and differing strengths of will induced by physical and psychological discomfort, an Aboriginal accused may be at a disadvantage. Further, the degree of understanding or of 'sophistication' may differ according to acculturation and education, it clearly being assumed that Aborigines, particularly in the Northern Territory, are at a disadvantage. In *Anunga*, the Supreme Court of the Northern Territory laid down certain guidelines for the police interrogation of Aborigines, although it must be emphasized that the Court emphasized firstly that the guidelines were not absolute but flexible according to individual circumstance; and, secondly, that 'much of what is said applies equally to the interrogation of migrants whether European or Asiatic'[(64)].

More recently, the Courts have begun to emphasize the social dynamics underlying the introduction and the continuance of the *Anunga* guidelines. In *Willie Gudabi*-v-R, the Full Court of the Federal Court of Australia dismissed an appeal against conviction for rape[(65)]. The ground of appeal principally relied upon was the proper application of the *Anunga* 'Rules' (*sic*) in the identity and role of 'prisoner's friend' and the admissibility of certain confessions by a 70 year old traditional Aborigine who spoke limited English, could not read or write, and had no prior convictions. He chose an elderly man of similar background to be his 'friend' but that person did not participate in the subsequent interview during which the appellant admitted the substance of the Crown case.

The Full Court held that it was not incumbent on the investigating police to consider whether the person chosen by the prisoner to act as his 'friend' was a suitable choice or to suggest more suitable persons. The Court reiterated, firstly, that the guidelines are not rules of law; secondly, that they

> ...were formulated in 1976 in a social climate which differed markedly, in many respects, from that which has prevailed in the Northern Territory for the last two or three years at least. Social conditions and values, and community standards and expectations, have changed and are continuing to change and, while the basic principles underlying the *Anunga* guidelines remain valid, their application must reflect the changes in society'[(66)].

The lack of comprehension of English, of understanding of concepts as expressed in English, of corresponding difficulties in rendering accurate translations of *legalese* both formally and archaicly formulated, may invoke the guidelines. But Northern Territory traditional Aborigines suffer the additional procedural burden of conceptualizing in English *European* concepts of time, place, number and distance. *Their* concepts are described by Molly M. de Lemos in her doctoral thesis as Piagetian concepts of 'conservation'. A 'prisoner's friend' is all the more important to bridge this conceptual gap. As the Full Court said in *Willie Gudabi*, a prisoner would feel more at ease or supported in the unfamiliar environment 'by the mere presence of a friend in whom he had confidence even if that friend had no greater familiarity with the surroundings than the person himself'[(67)].

Finally, the innate courtesy and politeness of traditional Aborigines particularly may prompt that kind of answer they assume the listener or questioner wishes to hear, or the response may derive from a reaction natural to the powerless when faced by authority.

'The guidelines were merely designed to ensure that those who by reason of their ethnic origins, by reason of their separate cultures and traditions, and by reason of embarassment or fear would not suffer disadvantage in their dealings with the law'[(68)]. As against that, however, even adherence to the guidelines in the choice of 'prisoner's friend' would not automatically redress the unequal balance in which such prisoners found themselves. The Court in *Willie Gudabi* accepted the guidelines as containing criteria critical to the admissibility of evidence by the Court in its appellate jurisdiction[(69)]. But the Court - with a remarkable candour almost sanguine - discounted 'any notion that (choice of prisoner's friend) would bring about a "practical equality with the average English speaking person of English descent"'[(70)]. Procedural disadvantages might be eliminated : the substantive inequalities, it would seem, remain.

The *Anunga* guidelines were not intended to 'alter or constitute a departure from the general law relating to the admissibility of confessions..... slavish or unnecessary adherence...technical adherence for the sake of form or apparent compliance was never...intended'[(71)]. Thus the rules as to admissibility while substantively the same for black as for white, might have variable consequences when applied to individual Aborigines exhibiting some or all of the *Anunga* criteria. But surely the converse is equally true. The guidelines were considered to be applicable to Aborigines in the ACT[(72)] and there is no reason why they should not also apply to those States which have not yet adopted Police Standing Orders substantially complying with them.

The historical treatment of Aborigines by police and other agents of power and authority is seen to continue to some extent the legal impotence which Aborigines have endured. But this impotence operates at one of the first steps in the criminal process, namely, after custody and, for serious crime at least, before charge. They therefore suffer serious *legal* disadvantages deriving from *extra-legal* factors which are part of their particular cultural heritage.

(c) Aboriginal testimony

Historically Aborigines laboured under a twin legal disability in respect of evidence, whether in criminal or civil trials. The first was that the ordinary common law rules obtained, until supplanted by legislation in substantially similar terms, denying to Aborigines the right to give evidence on oath. Where legislation permitted them to appear as witnesses, it was to make unsworn statements, the effect of which was somewhat less than sworn evidence. The second was that, even where Aboriginal testimony was admissible, the effect could operate more harshly against Aboriginal accused in that their tribal marriages were given no recognition in the common law : hence one tribal spouse could be compelled to give evidence against the other, a disability which did not attach to Christian and other 'lawfully' married witnesses[(73)]. Further, the trial judge in his summing up could sway a jury with observations as to the weight to be attached to Aboriginal witnesses, depending on his consideration of their innate truthfulness, their propensity to exaggeration, or the degree of their acculturation, hence their capacity to comprehend questions, and the nuances and concepts of English and English law, and their corresponding capacity to articulate a proper and relevant response.

In 1839 New South Wales tried to have evidence not on oath admissible in criminal cases in Courts of law[(74)], but the Act was disallowed by the Crown on the recommendation of the Home Government because its promulgation would be 'contrary to the principles of British jurisprudence'[(75)]. The principles derived from the Judaeo-Christian ethic of the law and, as stated (in the converse) in the preamble to the Act, required 'a distinct idea of religion or a fixed belief in a future state of rewards and punishments', as well as a belief in God and therefore an understanding of the obligations attaching to an oath. The much-vaunted protection afforded to the Queen's Aboriginal subjects in the Australian Colonies accordingly rang somewhat hollow when the only witnesses to offences were black. Procedural inflexibility, in other words, negated substantive equality in the law.

New South Wales in 1876 dispensed with the requirement of oath by permitting declarations obliging the declarant to tell the truth(76). In *R-v-Paddy* (1876), an Aborigine was tried and condemned for the murder of another Aborigine, the principal evidence against him being given under oath by two Aboriginal witnesses(77). The trial judge reserved for the decision of the Full Court of the Supreme Court the question whether he had properly admitted the evidence of those two witnesses. The first appeared to have little idea of a Supreme Being except that he had once heard of a Spirit that lives in Heaven. The second was the tribal wife of the accused. Upon examination, the trial judge was satisfied that she understood that if she spoke falsely in her evidence she would be punished, but he could not determine if she connected her being sworn on 'God's book' or in the existence of a Supreme Being with her obligation as a witness.

The Full Court disallowed the evidence and quashed the conviction, mainly by restating the common law requirements. The Chief Justice also referred to the capacity of 'a Mahomedan...Buddhists and Chinamen...to give evidence after performing some ceremony which they state is binding on their conscience, such as being sworn on the Koran, blowing out a light, cutting off a cock's head, or breaking a plate'(78).

A double standard applied here. Note that the Chief Justice in *Paddy* apparently was prepared to admit evidence on the basis of a statement by the witness as to what was binding on his conscience; no element of proof, no evidence as to the religious belief or nature, force and effect of ceremonies underlying those beliefs was required. Yet in *Neddy Monkey* (1861), it was categorically stated: 'The Court cannot take judicial notice of the religious ceremonies and rites of these people, and cannot, without evidence...assume the fact of marriage'. So the word of an Aborigine was not acceptable, because of a fixed and firm belief that Aborigines had *no* religion or, if they did, it did not sufficiently approximate that of 'a Mohamedan...Buddhist...' or 'Chinaman' (as if the last were a religion and not a race or culture) to be as acceptable as them.

In 1877, an unsworn Pacific Islander - a Kanaka - was able to give unsworn evidence under the 1876 Act which resulted in conviction(79), and in 1882, an Aborigine was permitted to give evidence not on oath after a prior examination by the trial judge had convinced him that the witness did not understand the sanctity of oath, but did understand the requirement that he tell the truth[80].

Legislation permitted Aborigines to give unsworn evidence in Western Australia in 1841[81], South Australia in 1848[82], Victoria in 1854[83], and Queensland in 1884[84]. Queensland's legislation provided the model for the Northern Territory in 1939, when the South Australian legislation was supplanted[85]. It seems that Aborigines were given as a statutory privilege that which was a common law right in others. South Australia's legislation persisted until 1972[86]; that of Victoria until 1961[87]. This 'privilege' was also attended by sanctions peculiar to Aborigines, as if they were arrant liars for whom - as perjurers - special punishment had to be devised. The 1929 *Evidence Act* of South Australia, for example, provided for a maximum of two years imprisonment or a whipping - publicly or in private - up to three times[88]. Moreover, the legislation itself qualified the worth of Aboriginal testimony. The Northern Territory *Evidence Ordinance* 1939 put such weight and credibility upon the unsworn evidence of Aborigines as the jury or, if there were no jury, the judge considered ought to be attached to it[89]. And the jury were under the direction of the Court in this regard.

Judicial perceptions, bias, 'determinism', thus played an important part in the judicial process of the Northern Territory, but particularly in the criminal justice system. Wells J. - who was the Judge of the Northern Territory between at least 1933 and 1950, when Kriewaldt became the Judge and held that office until 1960 - was a notoriously unsympathetic, biased judge, the very model of judicial irascibility. A police constable rounded up, chained, and forced a number of Aborigines to march hundreds of miles to give evidence at a criminal trial; most were maltreated, some were beaten, and at least one was killed and buried *en route*. When he was charged with murder, Wells ordered out of Court a barrister briefed by the Association for the Protection of Native Races to watch the case[90]. The Association's action was described by Wells as 'meddlesome, impertinent, and mischievous'. At Constable Stott's two trials, Wells rejected as untrue the consistent evidence of 12 Aborigines, acquitting Stott the second time with an expression of sympathy. He was castigated by the High Court for a flagrant and illegal breach of judicial behaviour at the trial of Tuckiar, an Aborigine, in 1934[91].

A number of judgments by Kriewaldt are historically illustrative of the judicial perception of Aboriginal testimony in recent times.

In *R-v-Doyle*(1953), referring to the unsworn evidence of two Aboriginal witnesses, he stated '...If Paddy and Timothy had been white witnesses who gave evidence on oath I would not have had the slightest hesitation in believing their evidence in full'(92).

Several reasons were given and yet others were implicit for what, on its face, was a highly derogatory reference. Firstly, he seems, in a cynical and non-believing world, to have placed unduly idealistic emphasis on the importance Christians attach to their oath and, equally, the divine sanctions for breaching that oath. In his summing up in *R-v-Aboriginals Activity & Peter* (1955), for example, he referred to the Christian's knowledge not only of imprisonment for perjury, but also '...the knowledge that he will have to answer to another and a higher court after his death regarding that particular false swearing'(93). A white person, that is, 'has a belief God will punish him if he tells a lie... (whereas) so far as the Aboriginals are concerned, we know they have not that type of belief in the hereafter...'(94). Alternatively, as put to the jury in his summing up in *R-v-Aboriginal Dulcie Dumaia*:'many, nearly all, white people have some respect for the Bible and are less likely to tell an untruth after having taken an oath'(95). Kriewaldt himself was a Lutheran, deeply interested in, and connected with the (Lutheran) Hermannsburg Mission. When delivering judgment in *Namatjira-v-Raabe* he made this extraordinary judicial revelation : 'All my life the duty of Christians towards heathens, and the duty of the more fortunate towards the less fortunate,has been impressed upon me'(96). Apart from its pious pomposity, the language is Calvinistic in its stern admonition, its clear distinction between those possessed of God's grace ('Christians') and those not so ('heathens'), and the responsibility of the former towards the latter, leading them as if delinquents, or, rather, 'delict' of God. And the language is extraordinarily evocative of post-Darwinian nineteenth century sentiment, of Kipling's justification for the Raj - the 'White Man's Burden'.

In the second place, the degree of comprehension of Aboriginal witnesses presented great problems. Kriewaldt ascribed this want of comprehension in *R-v-Doyle* to the fact that:'..the mental processes of the Australian native may not run according to the pattern with which one has become familiar in dealing with white persons...'(97). That problem was compounded, in his opinion, by their intellect which, generally speaking, '...is of a comparatively low standard ...'(98).

Therefore, they have a very limited vocabulary. This is somewhat curious in that the Lutheran missionaries in particular studied and learned Aranda, and discovered that adult Aborigines had a vocabularly three or four times that of the white man(99). In *R-v-Chambers* (1955), he was vociferous in complaining of the difficulties in taking evidence from Aboriginal witnesses, referring to 'the sounds that were uttered in the witness box', which 'might as well have been uttered in a foreign language' leading anyone not present in Court to gain an impression from the evidence in fact given by them[(100)]. Thirdly, 'one should approach native evidence as one approaches the evidence of children: but one should remember that although there is a childlike mind, it is an adult, and sometimes a cunning adult, who is giving evidence'[(101)].

Fourthly, 'the very process of question and answer which is the basis of the extraction of evidence, might not fully extract what he knows, what he tried to say, nor what his intent was. An answer in the affirmative could indicate that the Aboriginal witness is trying to understand the question, that he has understood it, that he has understood part of it, that he may not have understood it at all, or that he does not want the question to go unanswered, or that he thinks an affirmative answer is more likely to be acceptable to the questioner than a negative answer'[(102)]. Lest his comments be considered patronizing and contemptuous of Aboriginal evidence, and the thought processes behind it, it should be remembered that other Northern Territory judges, such as Forster in *R-v-Anunga*[(103)], and judges in other States, such as Wickham in Western Australia in *R-v-Grant*[(104)], and Shanahan in Queensland in *R-v-Henry and Others*[(105)], even the High Court in *Ngatayi-v-R*[(106)], have adverted to the problem in similar terms, albeit in language less insensitive.

Fifthly, it was Kriewaldt's experience that an Aboriginal witness, when giving evidence on oath, despite the warning that he is to speak only of what he has seen 'along your own eye', will recount something as being within his own experience when in fact relating only what he has been told by another Aborigine. 'It seems to me that if a native believes a story to be true he will recount it as having been personally witnessed by him'[(107)]. 'I could give you dozens of examples where that has happened'[(108)]. Further, 'the decrease in the nature of evidence on successive repetition has been a common experience of mine where Aboriginal witnesses are concerned. I cannot readily call to mind any case where the evidence given by an Aboriginal witness in the Supreme Court has been anything as like as full as the evidence recorded in the depositions, or in the statements taken by a police officer, and I have had many cases where I have had access to all three'[(109)].

In weighing such evidence, therefore, and having regard to his statutory obligations under the *Evidence Ordinance*, Kriewaldt took into account any help he received from the witness' demeanour in the box[(110)], the probabilities of the case, the fact that the evidence was not on oath, and the difficulties confronting any person attempting 'to follow the processes of the native mind'[111].

For these reasons, and independently of the provisions of that *Ordinance* he concluded : '...I would normally regard evidence given by natives as not of the same value as evidence given by white witnesses. There have been but few cases in my experience where I would not have scrutinised native evidence with some degree of judicial mistrust. The *Evidence Ordinance* draws my attention to the fact that the evidence of natives is not sworn and, by implication, if not expressly, states that such evidence shall have less value than sworn evidence'[112].

It would seem, therefore, that to the twin disabilities of common law and statutory prescription in respect of Aboriginal testimony, there should, regrettably, be added a third, namely, judicial bias. The judicial disparagement of vital trial mechanisms on the grounds of poor education, want of the same religious beliefs as the judicial officer, inability of the 'native mind' to think in the same way as that of the officer and to express itself similarly, tend to mock the very exposition by those same persons of the equality of the law for black and white.

Nevertheless, the paramount consideration is 'to ensure that justice is done to a people who still suffer obvious difficulties'[113]. Thus Muirhead in *Fry-v-Jennings* (1983), where he stated

> Daily experience in this Territory illustrates the difficulties Aboriginal people experience in giving evidence in Courts, difficulties compounded by lack of comprehension of issues, shyness, language barriers and, at times, embarrassment and fear[114].

(d) Legal defences : the test of provocation

Provocation, at common law, generally comprises an act or series of acts done by one person to another which could cause in a reasonable person, and actually causes in another, a sudden and temporary loss of self-control, rendering him so subject to passion as to make him for the moment not master of his conduct. Killing subject to provocation by the deceased, and done in the heat of the moment, is not murder but manslaughter. Provocation accordingly is not a defence, the language of the Privy Council in *Lee Chun*

Chuen-v-R[115] and *Attorney-General for Ceylon-v-Perera (Kumarasinghege Don John)*[116] otherwise notwithstanding.

Provocation does not mean that malice, as the formation of an intention to kill or inflict grievous bodily harm, is not present, but that the formation of the intent in the particular circumstances is excusable to the extent that the killing, though criminal, should not be regarded as punishable by death[117]. Provocation therefore does not provide an accused with a defence *stricto sensu* nor even an excuse. What it does provide is an extenuation of the offence, a diminution in the quality of the crime, hence a mitigation of penalty which he would suffer but for the factor of provocation.

Provocation may consist of acts, gestures, a series of affronts and words which are violently 'provocative' or grossly insulting.

In those States of Australia which have not codified the criminal law, for example, New South Wales, Victoria, or South Australia 'mere' words would not suffice; New South Wales has statutory provision in the *Crimes Act 1900*, s. 23 (1) that the language be 'grossly insulting'.

The law as to provocation embodies a compromise between a concession to human weakness on the one hand and the necessity on the other hand for society to maintain objective standards of behaviour for the protection of human life[118]. An ordinary man in a civilized community would regard it as absurd, and as an affront to his notions of justice, if some trivial provocation, such as mild abuse or a light blow, were regarded as extenuating the use of savage violence. On the other hand, the law does not require that there should be an exact correspondence between the provocation and the force which it provoked. Substantial difficulties occur in formulating and applying an appropriate test of 'reasonableness' in respect of accuseds of particularly, but not exclusively, tribal Aborigines.

In a number of murder trials over which he presided, Kriewaldt refused or declined to follow the test, although he somewhat disingenuously asserted in at least one of them that <u>he</u> had to apply the law equally, but that the jury might adopt a different standard. It is not clear if his remarks also extended to those trials where he was both judge <u>and</u> jury.

The latter aspect of his observation gains greater currency when considered in light of the Privy Council decision in *Kwaku Mensah*-v-R (1946) AC83, at p. 93, that the test for provocation in that case was that of 'the ordinary West African villager' and that 'on just such questions...the knowledge and commonsense of a local jury are invaluable'(119).

Kriewaldt postulated not one variation but <u>three</u> variations of the 'reasonable man' test. Those were:

(i) the 'local Aboriginal community' test (1951, 1956),

(ii) the 'average native of the northern parts of the Northern Territory' test (1956); and

(iii) the 'reasonable native inhabitant of Australia' test (1953, 1959).

In yet another case (in 1959) he also appears to have put to the jury the 'reasonable man' test, unqualified by reference to Aboriginality.

(i) The 'local Aboriginal community' test

In R-v-*Aboriginal Patipatu*, the accused was tried for the murder of his deceased's wife's sister(120). The victim, after her sister's death, had assumed responsibility for the care of the accused's young son. During a hunting expedition she left the child unattended by the roadside. The accused threw a spear at her and killed her. Even though counsel for the accused did not rely on provocation, Kriewaldt felt obliged to raise the aspect of provocation in his summing up to the jury. After instructing the jury that there was, in the Territory, no distinction in its laws 'between white and coloured', such that they were to consider the facts 'as if the act of throwing the spear had been performed by a white man', he adverted to the 'normal ordinary reasonable person' test. Remarkably, he then went on to assert that 'no Court has yet said what acts and what acts alone will amount to provocation'. If by that he referred to a test of universal application, fixed and immutable, and not subject, as was the Northern Territory, to common law standards, then he was undoubtedly right. But not otherwise. Kriewaldt then formulated as the appropriate test: '...If you think that, in the circumstances prevailing in that particular locality, the abandonment of a young child - we do not know how old the child was - by the person appointed to look after it, if you think so, it is not for me to say so - that that would cause an ordinary reasonable person in that vicinity and of that description so to lose his emotions so as to retaliate with a spear, then you would be entitled in this case to find a verdict of manslaughter' (emphasis added)[121].

A verdict of manslaughter was returned. Although the law report does not identify the locality where the offence was committed, the accused and the tribe lived in a traditional manner, not only as regards hunting-gathering, but also as regards traditional punishment. The trial, moreover, was held at Alice Springs, so it is reasonable to assume that the 'condition' and 'vicinity' referred to Aborigines living in a tribal state.

In *R-v-Aboriginal Muddarubba*, Kriewaldt again distinguished the 'reasonable man' test by reference to a specific community standard[122]. The accused speared an Aboriginal woman to death after she had seriously insulted him by gestures and words. In his summing up, he reiterated the common law that 'for a white person...mere words are not provocations...' (emphasis added). That, of course, is a distortion. Moreover, he confessed to his 'worry' on the issue of provocation in 'native trials', which he had, after due deliberation, resolved by departing somewhat from the strict rule applied in trials of a white person. In his opinion, in any discussion of provocation the general principle of law is to create a standard which would be observed by the average person in the community in which the accused person lived. Moreover, what was once regarded in white communities a century ago as sufficient provocation would not be so regarded today. This suggested to him that the standard is not fixed and unchanging:

> ...it leaves it open,...to regard the Pitjinjara (*sic*) tribe as a separate community for the purpose of considering the reaction of the average man. I tell you that if you think the average member of the Pitjinjara tribe (and you must remember

> these are 'Myall' blacks) would have retaliated to the words and actions of the woman by spearing her, then the act of spearing is not murder but manslaughter...I may be wrong but until put right by a higher court I shall continue to tell juries that the members of the Pitjinjara tribe are to be considered as a separate community for the purposes of the rules relating to provocation. I shall not apply to them the standard applied to the white citizens of the Northern Territory(123).

Kriewaldt was thus enunciating for a group identifiable only by affinity to a social sub-stratum a legal protection or, as the High Court put it in *Parker-v-R*(124), 'a line of defence' not available to the rest and residue of the society of which that sub-stratum formed part. And not only that. Within the rule, as relaxed, was to be entertained an extension of provocation resulting from words, the knowledge, degree of insult, and likely black reaction to which were to be assumed within the compass of an all-white jury. The artificiality of reasonableness deriving from assumed knowledge of a community regarded as separate, and to be separately treated, *vis-a-vis* not only white communities but other black communities, is seen as itself creating the very divisions and inequalities which elsewhere in his judgment he eschewed.

(ii) The 'average native of the northern parts of the Northern Territory' test

One month after *Muddarubba* in March, 1956, he summed up to the jury in *R-v-Aboriginal Nelson*(125). At the end of a drinking party an elderly white man hit the accused with a piece of iron to stop him from further beating an Aboriginal woman to whom the accused was married. A few minutes later the accused, who had left the house, heard his wife scream from inside the house. He returned and saw the deceased outside. The accused then hit the deceased with a boomerang : the deceased fell down and died shortly after.

In his summing up to the jury he referred to 'a partial defence, the defence of provocation':

> ...if you believe the average native of the northern parts of this Territory would still have been smarting from the effects of that wound and would have been likely to retaliate, then that defence is open. *To that extent the law must be regarded as more favourable to native than white people.* Although I must lay down the law exactly the same for white people as for natives, the application of the rules of law by you may well be different...In the case of a native you may think it right to say the effect of provocation lasts longer than in the case of a white person...(emphasis added)(126).

Although Kriewaldt twice mentioned 'native' without geographical or other limit, the critical part of his summing up clearly confined the test of reasonableness in the present case to 'northern parts' of the Northern Territory. Whereas *Muddarubba* was tried at Alice Springs, *Nelson* was tried at Darwin, and was taken into custody at Pine Creek.

Kriewaldt's dilution of the rules to accommodate a separate group was not accompanied by any rigorous examination of the degree of sophistication, or the disadvantages, suffered by the particular accused, his community or the wider community of Aborigines in the 'northern parts', of the Northern Territory. The trial judge and jury could have been under no misapprehension as to the rule to be applied in *Nelson*. Why it should have been expanded beyond the standards of the accused's immediate community to embrace a broader stratum identified only by colour, but clearly within the purview, in 1956, of a whole host of legislative and other restrictions(127), is not instantly clear. But a degree of consistent, favourable, amendment of the common law rules was considered and applied by Kriewaldt to an extent not elsewhere applied in Australia.

(iii) The 'reasonable native inhabitant of Australia' test

In July 1953, more than two years after his 'local community' test in *Patipatu*, Kriewaldt's third variation of the provocation defence was put to a trial jury in *R-v-Aboriginal Johnny Scott MacDonald*(128). The accused and deceased, having consumed an amount of liquor, became argumentative and in an ensuing fight the deceased struck a blow causing a wound above one of the eyes of the accused. The accused went some distance to collect two boomerangs and resumed the argument, in the course of which at least one boomerang was thrown or used, inflicting a fatal blow on the deceased. The summing up also indicates that, subsequent to inflicting the wound, the deceased at the time of the second, fatal, argument also threw a *nulla nulla* at the accused.

In his summing up to the trial jury on the test of provocation, the Judge reiterated 'the strict statement of the rule...that a reasonable man has to be deprived of his self-control'. He then stated:

> ...You may use these words, reasonable man, as meaning, a reasonable native inhabitant of Australia. You may draw a distinction between the amount of provocation which is needed before the ordinary reasonable human being, such as you are, would lose his self-control, and the lesser, if you think it applies,...needed before an Aboriginal native of Australia loses his self-control...You will apply as the law in this case that you may adopt a lesser standard as amounting to provocation where a native is charged with murder than you would be entitled to where a white person is charged with murder...[129]

He reinforced this test also by referring to the distance the accused went to obtain the weapons of retaliation. In such a situation, there has been sufficient time to cool off such that 'the average person', necessarily implying non-Aborigine, does not retaliate. A verdict of manslaughter was returned.

In *R-v-Aboriginal Jimmy Balir Balir*, Kriewaldt summed up in the trial of an accused charged with the murder of another Aborigine[130]. The accused and the deceased, with others, had been drinking when they had an argument. The deceased struck the accused a number of blows with a large stick. The accused obtained a knife and struck the deceased inflicting a wound which, although treated by surgery, resulted in paralysis from which the deceased died.

Kriewaldt followed his usual preface as to the application of identical law to black as for white. After referring to the blows inflicted by the deceased on the accused's head and arm as sufficient to be regarded as provocation, he then considered the question whether the time which elapsed between that provocation, the obtaining of the knife, and the inflicting of the fatal wound, was sufficient for the accused to have cooled down.

On this aspect, he considered that the law may be applied more leniently to Aborigines than to whites. Even though a judge could not apply the law differently, he saw no reason why a jury ought not to do so. Thus, based on their own knowledge of Aborigines, a white jury might take the view that a white man recovers more quickly from provocation than a black, or conversely that an Aborigine might not. Similarly, a jury might not consider as provocation in the case of a white man something which, in the case of an Aborigine, would be so. Finally, in the same circumstance, a white might not retaliate with a knife whereas, from their knowledge, an Aborigine might.

In one of the last judgments in which provocation was an issue, Kriewaldt seems to have abandoned the differential tests altogether, and reverted to the common law standard. In *R-v-Aboriginal Timmy*, the accused was charged with the murder of another, by spearing him three times, one of the blows severing an artery which caused death(131). The accused had had an argument with a third person whom he speared twice; the deceased then struck the accused a hard blow to the head with a *nulla nulla*. Subsequently, the fatal wounding took place. In describing the blow to the head as sufficient provocation to 'the average reasonable person', Kriewaldt's emphasis shifted not only the test of reasonableness, in which the locality, tribal affinity, or racial identification of the accused was irrelevant, but also the consideration of the reasonableness of the response. The use of a *shovel-nosed spear* was, perforce, inextricably wound up with every-day Aboriginal use, but, unlike *Jimmy Balir Balir* this seems to have been left for the jury to imply. The jury returned a verdict of not guilty.

Thus Kriewaldt traversed a number of differing tests of the same concept in respect of Aboriginal accused. It is not easy to reconcile these tests with the facts of several cases, and one can assume only that the judge was trying to 'do justice' as the merits of the individual cases demanded. His use and adaptation of procedural rules showed both judicial enterprise and judicial cowardice. Recognizing the inappropriateness of white legal concepts in mainly traditional situations, he postulated a mechanism for others to implement. In leaving it to the jury to decide on the basis of a statement of the law at variance with the established law - his remonstrations to the contrary notwithstanding - Kriewaldt was being innovative and benign; and tactically clever, too, as jury verdicts are much more difficult to overturn. In fact, *his* tests did confer a benefit denied most whites, but as most other procedures did not advantage Aborigines, was imprisonment for manslaughter less unpalatable than for murder?

I have located only one other, non-Northern Territory non-Kriewaldt case, where Aboriginality, provocation, and the test of reasonableness were in issue. In *R-v-Rankin*, in the Supreme Court of Queensland (1966), an Aborigine was tried for wilful murder of another Aborigine(132). A question arose as to the manner in which the trial jury should be directed on the question of provocation, which had been raised by the defence. The accused was a person to whom *The Aboriginal Preservation and Protection Acts, 1939 to 1946* applied. The trial judge was influenced by the accused's life-long association with the Woorabinda Settlement, where the alleged crime was committed. Accordingly, he proposed to direct the jury that the question they must consider was whether the provocation was sufficient to deprive an ordinary Aborigine living on a settlement of his power of self-control (emphasis added). The jury was aided in their deliberation by a cross section of such Aborigines who appeared before them and gave evidence. Unfortunately, the report does not indicate either the manner of their selection nor the nature of their evidence. *Rankin's* case is distinguishable from another Queensland murder trial where an Aboriginal accused knifed to death a victim presumed to be white. In *R-v-Callope*, the accused, aged 23, had been born and bred 'in the Gulf', where he worked for four years before going to Charters Towers where he worked droving on a number of stations before getting a job on the railways(133). There was thus little of the antecedent association with an Aboriginal settlement such as characterized *Rankin*. On appeal the Court of Criminal Appeal cited the 'ordinary person' test making no allowance for the accused's 'Aboriginal extraction'.

The most recent authoritative case involving homicide, an Aboriginal accused, and provocation, is that of *Veen-v-R*, a decision of the High Court of Australia on appeal against severity from the New South Wales Court of Criminal Appeal(134). The appellant was an Aboriginal homosexual prostitute, aged 20, who had been brought up and educated until 15 by a white family, who found him difficult to handle by the time he was 11. He had had a series of convictions for malicious wounding and stealing. He was invited by the deceased to the deceased's flat, where a weekend was spent in homosexual activities. On Sunday night, after both men had been drinking heavily, the accused asked the deceased for payment, but the deceased refused, saying: 'No, you black bastards are all the same, always wanting hand-outs'.

The accused took a sharp pointed knife from a rack and stabbed the deceased repeatedly with it until the victim died. The trial judge instructed the jury that they might, if they thought it proper to do so, treat the deceased's reference to the accused's race, in the circumstances, such provocation as would reduce the charge of murder to manslaughter. Jacobs J. in the High Court was clearly of opinion that the case was not one of provocation: what inflamed the accused, who in any event had a history of brain damage, was not the reference to his race or colour, however, derogatory, but the refusal of payment. Nevertheless, Jacobs , with whom Murphy J. agreed, found that the jury could have found manslaughter upon the ground of provocation[135].

There appears, however, to be a reversion by the Courts to the objective or 'reasonable man' test in cases involving Aborigines. Even the reference in *Veen* to the derogatory remarks would accord with the common law requirement that words, to be a provocation, must go beyond a 'mere' effect and be grossly insulting. Here there is, on the objective test, an insult which may not be particularly inflammatory to the average person, but to a person of a given ethnic, racial or religious background could be held to be so. The social cohesion of a community, the need to avoid divisiveness in favour of a constant, the uniform application of the (common) law, has tended to downgrade the extra-ordinary application of procedural rules which Kriewaldt introduced in varying forms more than 20 years ago.

As the *Peters* case reminds us, perhaps some Aboriginal communities and their members retain a sufficiency of identity and display a degree ofsimilarity of response to provocation deriving from a common or shared environment that special rules are required[136]. But I would accept, and argue, that those rules must emanate as a legislative expression, and not as an expression of judicial goodwill, patronage, or eccentricity.

(e) Traditional punishment as a mitigating factor

It would seem that only in the Northern Territory and, to a far lesser extent Western Australia, was native custom or law taken into account :in the Northern Territory in mitigation of a penalty only for murder[137], and in Western Australia only in mitigation of penalty for those matters which the Native Court could hear[138].

In one of his first murder trials, that of *Patipatu* in 1951, Kriewaldt said: '...The law makes no distinction between white and coloured, therefore the fact that this accused has already sufferred some punishment from his tribe - if you think that is so - that is immaterial in the same way that it is immaterial that the accused person may be liable to suffer further punishment from his tribe. These are the matters the law says you must disregard'[139]. That cannot be a correct statement of the law. Certainly, the jury properly were to disregard the effect of tribal custom, but the provisions of statute made such customs very much a relevant factor in the case, not least in mitigation of penalty upon conviction.

Nor was tribal law permitted to excuse or condone conduct made criminal by white man's law. In *R-v-Tiger and Captain*, the two accused were of a group of elders who, because the deceased victim had broken a tribal law, ordered a younger Aborigine to kill the offender[140]. They were acquitted. The man ordered to kill the offender was also tried, separately, for murder in *R-v-Aboriginal Charlie Mulparinga*[141]. He was found guilty and sentenced to eighteen month's imprisonment with hard labour. In the course of summing up Kriewaldt dismissed the effect on the accused of adherence to tribal law, in terms which strike the modern reader as peremptory: '...if you believe it to be a fact that the accused acted in accordance with his tribal law, in accordance with a law which, if he broke it, might mean his own death, that is no excuse in this Court for his act. It does not come into the question of whether he is guilty or not...'[142]. However, he continued, '...It is only relevant on an entirely different question, namely, as to what punishment should be inflicted upon him'[143].

In a revealing indicator of his feelings concerning *Charlie*, Kriewaldt later wrote of these two Areyonga murder trials:

> 'In my opinion it was a difficult decision to make whether there should be a prosecution of the aborigine Charlie in that case. At the time I had some doubts as to the prosecution of that aborigine because of the extremely limited extent to which he had been in contact with whites, but I realised that *failure to prosecute would be misunderstood by the aborigines at Areyonga*' (emphasis added)[144]

As will later be seen, the educative role of the criminal justice system seems to have been a permanent fixture of his Honour's judicial mentality. In trials conducted in 1953 and 1956, he again reminded the jury in his summing up that 'it is no excuse for a native that he acts in accordance with his tribal law'(1953)[145], and 'a tribal custom or tribal law permitting the accused to inflict punishment on the woman is not regarded by the law as an excuse' (1956)[146]. The relevance of tribal law or custom as a determinant of punishment was not mentioned in either case. It had been in *R-v-Aboriginal Charlie Mulparinga (supra)*, and then only *en passant* and without further explanation. In *R-v-Aboriginal Roy Pananka* (1957), Kriewaldt acknowledged the statutory criteria for flexibility in these terms: 'I can see in this case no relevant aspect of Aboriginal custom sufficient to justify any substantial remission of sentence'[147]. That case, however, did not concern a murder, or conviction therefor , and so would not ordinarily invoke the provisions of the *Ordinance*. The accused had engaged in a drunken brawl with two other

Aborigines, one of whom thrust at him with a spear inflicting a wound in the thigh. The accused thereupon took his knife and cut the assailant across the cheek and across the shoulders, inflicting serious wounds. Upon that crime he was convicted.

Only in one murder trial have I found Kriewaldt summing up to a jury both in terms of their duty to apply the law *and* his duty as trial judge to apply the statutory provisions. That was *R-v-Aboriginal Timmy*, held in the last year of his judicial office and life(148). The accused was charged with the murder of another Aborigine whom he speared to death. There were elements of provocation and of self-defence. In summing up, the judge linked the elements of customary law, conviction and punishment thus:

> ...if an Aboriginal native is convicted of murder it is then my duty to hear evidence as to the tribal laws and tribal customs that may have influenced him and to take those laws and customs into account when I fix the penalty. I have an unfettered discretion to impose any penalty I think proper, from one minute to hanging. Native laws and customs are relevant on the question of punishment, but they are quite irrelevant on the question of whether a person is guilty of a crime or not (149).

The jury returned a verdict of not guilty.

The judgments and remarks of Kriewaldt in the decade of the 1950's may be contrasted with those of the Supreme Court of the Northern Territory, and of judgments of the Full Court of the Federal Court of Australia on appeal from that Supreme Court, in the last decade.

Although the statutory provisions appear to have remained basically unchanged, the Courts have become less inhibited and restrained than was Kriewaldt in taking into account evidence of tribal laws and customs, but, more pertinently, what may be called 'community attitudes', the community in this case being the local Aboriginal community to which the accused belongs or with which he was, at the time of the offence, generally associated. The cases, moreover, while including murder or other homicide, have gone far beyond the trials for murder or (grievous) bodily harm over which Kriewaldt presided. This attitude and recourse to extra-statutory requirements seems also to have been adopted by the lower Courts in the Northern Territory.

Muirhead J., in particular, seems to have been to the fore in seeking out, or receiving, anthropological and other evidence as an aid for the more effectual administration of criminal justice. But in *Putti-v-Simpson* he was at pains to emphasize that he was not acting alone, but in concert with his judicial colleagues(150):

> Where offences involve an aboriginal community, I and my brother judges agree that it is right and proper (subject to evidentiary procedures being followed in the case of dispute) that we should obtain the views of the defendant's own community to which he will probably return. We have found, on most occasions, that those views have been helpful particularly in cases where custom may be relevant or where conditional release is under consideration(151).

This comment was made in the course of observations as to the responsibility of solicitors and counsel to ensure that all necessary submissions and evidence in mitigation of penalty are placed before the Court (emphasis added). The submissions in question would reflect as well any pre-sentence report or psychiatric opinion. In other words, the kind of sociological data which was used to such devastating effect in *Peter* was now acceptable, indeed desirable and, as such, represents a considerable advance on the strict application of evidentiary rules to which Kriewaldt confined himself.

The views and attitudes of the accused's community, particularly as to payback (retribution(152)) were also sought by Muirhead in order to arrive at a penalty appropriate to the crime and the circumstances(153). Accordingly, he received anthropological evidence as to resolution of a conflict along traditional lines in *R-v-Samuel Duncan*, where the accused pleaded guilty to the manslaughter by gunshot of a non-tribal wife taken in defiance of custom(154). It is curious that, whereas a judge as prudent and conforming to the traditionalist view as Kriewaldt would allow, even encourage, jurors to apply their own knowledge of Aboriginal culture and custom in a consideration of the innocence or guilt of an accused on trial, neither he nor Muirhead seemed reticent in applying their personal knowledge of such culture and custom in determining penalty in those cases where they acted also as jury in assessing relevant facts and the weight to be attached to them.

Kriewaldt was conscious, however, of the deficiency of his anthropological training and knowledge and the lack of facilities to acquire them(155). Muirhead acknowledged the vitality of custom and tradition in daily Aboriginal life, but asserted the role of the Court as guardian-protector 'to ensure that such old customs or laws are not falsely applied or utilised in exploitation of other people'(156) (emphasis added). Muirhead therefore seems to distinguish the true laws, customs and traditions and their false application. The distinction may be a fine one in any given case, thus admitting of, or otherwise requiring or necessitating, anthropological evidence to explain it.

Gallop J. in *R-v-Andy Mamarika*(1980)[157], Nader J. in *R-v-David Moongi* (1982)[158], and O'Leary J. in *R-v-Jacky Jagamara* (1984)[159], took into account the community's attitude, in *Mamarika's* case being construed as 'a very significant matter for a sentencing power', and in *Moongi's* case as being accorded 'due weight'. The Full Court of the Federal Court of Australia, in hearing appeals against severity of sentence imposed by the Supreme Court of the Northern Territory, likewise has had occasion to express itself on the recourse to traditional punishment. Toohey J., a judge of great experience of Aborigines in the Northern Territory, and the first Aboriginal Land Commissioner under the *Aboriginal Land Rights (Northern Territory) Act 1976* (C'th), sat on both appeals.

In *Jungarai-v-R*, a 'full-blood' Aborigine with a substantial record of convictions, including crimes of violence (although none since 1972) and offences relating to alcohol, pleaded guilty to manslaughter[160]. While on bail, he returned to his community where he was beaten with *nulla nullas* and boomerangs until he was unconscious. At his trial, it was submitted that the tribal punishment had assuaged the community's feelings and that he was unlikely to offend again. The Crown did not oppose that submission; the appeal therefore depended on whether the trial judge had given due weight to the expression of community feeling as evidenced by the infliction of tribal punishment. The Full Court were unable to say that the trial judge had not; accordingly, the appeal was dismissed.

In *Jacky Anzac Jadurin-v-R*, a husband and wife, after consuming a quantity of alcohol, had an argument which led to the husband's striking his wife with a piece of wood, breaking her left arm. He later drove her back to their camp and subsequently struck her a number of times on the back with a piece of polythene piping, rupturing her liver and causing severe internal haemorrhaging from which she died[161]. On appeal the Court rejected the suggestion that in Aboriginal society it is not unusual for women to be beaten if they disobey their husbands, principally on the ground that the appellant and his wife were both drunk. Such beatings usually take place after a great deal of alcohol has been consumed. Next it considered the aspect of traditional punishment. Contrasting *Jungarai*, the beating of *Jadurin* with the same instruments 'may have been largely symbolic'. Future traditional punishment, including potential crippling or other permanent injury at the hands of the deceased's relatives, further punishment and close supervision by the community for a period of years, and even the punishment of his own family, were all considered by the appeal Court to have been given due weight by the trial judge. The Court acknowledged, but felt it unnecessary to resolve, the problem of giving due regard to certain facts which exist only by reason of that offender's membership of a particular group. Acknowledgement of some form of that community's retribution was not a sanction of it. The appeal was dismissed.

Nevertheless it is clear that, in dealing at least with tribal or semi-tribal Aborigines, the Courts in the Northern Territory are not only willing, but anxious to receive evidence of community attitudes, causal influences of custom and tradition, and similar factors even beyond their statutory obligations.

In *R-v-Charlie Jagamara*, decided in 1984, Muirhead developed to the fullest extent so far his judicial acceptance of traditional custom and tribal law as a mitigating factor in homicide[(162)]. The accused speared the deceased whom he suspected of infidelity with the accused's traditional wife. The accused was 75 and had undergone severe tribal punishment. Expert anthropological evidence showed that the accused followed traditional law and was traditionally married; 'that the accused's wife was seen to behave in a way which could leave someone to believe that she was engaged in a relationship with a person who stood as a son-in-law to her - and this was one of the most tabooed relationships'; that the accused would have to see his wife's actions as involving a very serious transgression that would require a response from him; that he merely intended to teach the deceased a lesson; that he held a highly important position within the Warlpiri community and that his presence was critical for the continuance of certain ceremonies.

Muirhead regarded the case as one where '<u>complete regard should be had</u> for Aboriginal custom and tribal law'[(163)] (emphasis added). This was not acceptance as a basis for complete legal exculpation, but for purposes only on imposition of appropriate legal punishment. The accused was convicted, but sentenced only 'to the rising of the court', that is, he was released instantly. Muirhead is seen to be propounding perhaps the most liberal acceptance of traditional law but not to the point of supplanting white man's law even in a situation like the present where the accused

> ...is a man who probably never saw a white man until he was 30 years of age or so, and in that time the Aboriginal law

> became the law pursuant to which he lived and will no doubt in his own mind be the law pursuant to which he will always live if circumstances enable him to do so'[164].

At the level of summary justice, a similar awareness is entertained. In two 1977 cases heard by two different Courts, on the bench of one of which an Aboriginal stipendiary magistrate sat, the sentence imposed was substantially mitigated by an appreciation of community attitudes. In *Police-v-Melville Wurramurra*, the accused pleaded guilty to stabbing his wife with a bayonet for her suspected infidelity, occasioning grievous bodily harm[165]. The magistrate's view was that the matter essentially was of a family or customary tribal nature; the defendant's conduct and punishment were dictated and performed in accordance with custom; the defendant and his wife were reconciled; and their community regarded the matter as at an end. Accordingly, although convicted, the defendant was discharged upon entering into his own recognizance in the sum of $100 to be of good behaviour for twelve months. The Court in *Police-v-Eric Jackson* went even further[166]. The defendant pleaded guilty to a charge of indecent assault committed while drunk. He had already been punished by the women, but had yet to be speared through the leg in accordance with tribal law. The Magistrate was influenced by the decision of the elders so to punish the offender, and by the two months he had already spent in gaol. Accordingly, no sentence was passed, but 'the defendant will be released <u>for punishment by his tribal</u> elders' (emphasis added)[167].

Finally, in *Atkinson and Another-v-Walkely*, the Supreme Court of the Northern Territory cited the local magistrate's views during the course of hearing an appeal against sentence[168].

> Now I take the view that in a community such as the Northern Territory the local community, the village such as Bamyili or Beswick or Angurugu is to be considered when looking at the view that society ought to take and if the local community thinks the matter is pretty trivial then even if I think that most people in the outside community would regard the matter far more seriously, then I regard myself as entitled to treat a man with a good deal of leniency[169].

While the Courts of the Northern Territory have expressly taken into account tribal punishment - actual or potential - in determining penalties, the

Courts in other States have been reluctant to do so. The celebrated case of *R-v-Williams* (1976)[170], in South Australia, and the Western Australia decisions of Burt J. in *R-v-Ferguson* (1970)[171], Wallace J. in *R-v-Fazeldean* (1973)[172], and Smith J. in *R-v-Felton* (1980)[173], merely symbolize an awareness of a distinct cultural difference deriving from membership of a sub-cultural group within the dominant society. The paradox for the Courts is to weigh the need for individual justice against the reasonable expectations of the wider community, and yet arrive at a conclusion which will be more readily comprehended and approved by a sub-stratum within the community to which the individual belongs.

(f) Conclusions

As in every facet of the administration of justice, flexibility must not be seen as a form of judicial, and even less of *political*, patronage, nor as a sign of eccentricity or a willingness to 'bend the rules' in a given case. Justice requires substantive equality and, at its apogee, the even application of the rules of procedure. If there exist in the wider community sufficiently large, identifiable, groups sharing a common characteristic based on culture or tradition, the ethnocentric foundation of 'the law' clearly needs a re-definition, a re-formulation to accommodate legitimate expectations demands and requirements. Aborigines *do* form such a group, linked less by 'skin' and more by a common or shared historical treatment. So many of the accommodations refined by whites and discussed in this Chapter have conferred peripheral advantages, intruding at far too late a point in the criminal justice system. And these are applicable at a constant level generally in only one part of Australia. What is needed is a politico-legal acknowledgment of the cultural realities of contemporary Australia.

It is beyond the purview of this thesis to provide such an acknowledgment. It does attempt to provide the proper context of statute law and case law within which such an acknowledgment may be formulated. The current reference to the Australian Law Reform Commission is one political response in recognition of a current problem, a legal conundrum, which not only will not go away but is likely to intensify in our increasingly pluralist society. One obvious starting point in the process is a recognition of fundamental human values. As discussed in Chapter 3, the application of 'the law' in recognition and enforcement of, or support for, those values may require recognition of consequences the dominant society considers antithetical, inimical, or simply undesirable.

Not every demand or expectation should be regarded as legitimate - let alone realistic. The integrity of the body politic cannot be rendered by fissiparous 'notions'.

But the *corpus* of my material may make the unthinkable thinkable, the unpalatable less so, and result in a conforming to Lord Acton's principle of 'the emancipation of conscience from authority'.

1. *Bolton and Others-v-Neilson* (1951) 53 WALR 48, at p. 50; *Bibliography*, Case No. 22, pp. 7-8; c.f. *Gerhardy-v-Brown* (1985) 59 ALJR 311; 57 ALR 472; especially Brennan at pp. 341 and 522, and Deane at pp. 346 and 532 respectively.

2. In *re Mathew, deceased; the Trustees Executors & Agency Co. Ltd.-v-Mathew* (1951) VLR 226, at p. 232; *Bibliography*, Case No. 116, pp. 49-50.

3. *Re Bryning* (1976) VR 100; *Bibliography*, Case No. 29, p. 11.

4. *Aboriginal Hostels Limited-v-Darwin City Council* (1985) 13 ALB 10 (Supreme Court of the Northern Territory, Nader J.); *Bibliography*.

5. *Namatjira-v-Raabe* (1959) 100 CLR 664 at p. 669, referring to 'pupilage' (*sic*); LXVI Argus LR 690, at p. 693; (1959-60) 33 ALJR 24; at p. 26; *Bibliography*, Case No. 132, pp. 59-60.

6. *Re Appeal by Arthur Dingle* (1962) 3 FLR 226; *Bibliography*, Case No. 55 p. 22.

7. *Ross-v-Chambers* (1955) NT 326; *Bibliography*, Case No. 206, pp. 76, 76A-C.

8. *Namatjira-v-Raabe* (1958) NTJ 608, at p. 618.

9. Ibid.

10. In *Bolton-v-Neilson* (1951) 53 WALR 48.

11. (1951) 53 WALR 48, at p. 50.

12. *Eric Grosvenor Lewis-v-Alan Frederick Metcalfe* (1959) NT 24; NTJ 639, at p. 642; *Bibliography*, Case No. 104, p. 46.

13. (1959) NTJ 700; *Bibliography*, Case No. 166 (a), pp. 68, 68K-L.

14. (1959) NTJ 700, at p. 704.

15. *R-v-Anderson* (1954) NT 43; NTJ 240 at p. 249; *Bibliography*, Case No. 181, pp. 70, 70A-B.

16. (1954) NTJ 240.

17. *Hayes-v-Fay*, Matter No. 88 of 1958, unreported: *Bibliography*, Case No. 83, p. 38A; *Albert Namatjira-v-Gordon Edgar Raabe* (1958) NTJ 608, at p. 629; *Bibliography*, Case No. 132, pp. 59-60.

18. (1977) ACT : DT 54, 73 LSJS 139 (Supreme Court of South Australia, No. 1037 of 1976, 28 January, 1977); *Bibliography*, Case No. 423, p. 143.

19. See *Bibliography*, Part III, p. 171.

20. *R-v-Norman Jabarula* (SCC No. 104 of 1979, 23 August, 1979, unreported); *Bibliography*, Case No. 252, p. 88.

21. *R-v-Burt Lane, Ronald Hunt and Reggie Smith* (SCC No's 16-17, 18-19, 20-21 of 1980, Gallop J., 29 May 1980, unreported); *Bibliography*, Case No. 280, p. 98. Transcript of Proceedings, p. 91.

22. Ibid., Transcript, pp. 88-9.

23. *Law : the old and the new : Aboriginal women in Central Australia speak out*, published for the Central Australian Aboriginal Legal Aid Service by Aboriginal History, Canberra, 1980, p. 66, para 4.110.
24. *R-v-Burt Lane*; Transcript, pp. 94-5.
25. *R-v-Gus Forbes and Others* (Supreme Court of the Northern Territory, SCC No's 22-23 of 1980, 29 August, 1980 unreported); *Bibliography*, Case No. 228, p. 82.
26. *R-v-Pat Edwards* (Supreme Court of the Northern Territory, SCC No's 155-6 of 1981, Muirhead J., 16 October, 1981, unreported); *Bibliography*, Case No. 223, p. 81B.
27. *R-v-Kelly*, (New South Wales Court of Criminal Appeal, Appeal No. 28 of 1978, 22 June, 1978, unreported); *Bibliography*, Case No. 271, p. 96.
28. *R-v-Robert Michael Simpson* (Supreme Court of New South Wales, Nagle J., 15 December 1981, unreported); *Bibliography*, Case No. 341, p. 115A.
29. *R-v-James Andrew Gordon* (Supreme Court of New South Wales, Criminal Division, Lee J., 5 August 1983, unreported).
30. *R-v-Darryl James McLeod* (Supreme Court of New South Wales, Criminal Division, No. 82/9/231, Maxwell J., 21 March, 1983, unreported); *Bibliography*, Case No. 291, pp. 101A-B.
31. *R-v-Daryl Gordon Charles* (Winneke C. J., Hudson and McInerny J.J., 2 May, 1966, unreported); *Bibliography*.
32. *R-v-Alwyn William Peter* (Supreme Court of Queensland, Dunn J., 8-19 September 1981); *Bibliography*, Case No. 326, p. 109. A *cause célèbre* discussed and analysed in Paul R. Wilson, *Black Death White Hands* George Allen & Unwin, Sydney, 1982.
33. *Jackie Jamieson-v-R* (Supreme Court of Western Australia, Full Court, 7 April, 1965, unreported), per Wolff C. J., *Bibliography*, Case No. 94, p. 44.
34. *Namatjira-v-Raabe* (1958) NTJ 608, at p. 631.
35. *R-v-Wayne Ashley* (Supreme Court of the Northern Territory, SCC No's 84-5 of 1978; Forster J., 12 June, 1978, unreported); *Bibliography*, Case No. 184, p. 72; *Seven-v-Seears* (1985) 12 ALB 10.
36. *Dixon-v-Seears* (1982) 16 NTR 20, at p. 21; *Bibliography*, Case No. 59, pp. 26 B-D.
37. *Cook-v-Cavenagh* (1981) 10 NTR 35, at p. 38; *Bibliography*, Case No. 46, p. 19A.

38. (1980) 31 ALR 257 on appeal from the Supreme Court of the Northern Territory (Gallop J.) 4 NTR 1; *Bibliography*, Case No. 211, pp. 77-8.
39. (1980) 31 ALR 257, at p. 325.
40. Ibid., at pp. 310-11; c.f. *Fry-v-Jennings* (1983) 25 NTR 19, at p. 23.
41. Brennan J. has since been elevated to the High Court where his liberalist views are seen to be shared with three other Justices, (Mason, Murphy, Deane) in concepts of criminal law and Federal-v-States rights. In the matter of Aboriginal land rights, as seen in Chapter 12 (*supra*), the High Court now seems to be speaking with one voice.
42. *R-v-Henry and Others* (District Court, Rockhampton, Judge Shanahan, 22 August, 1979, unreported), *Bibliography*, Case No. 244, p. 86. In *R-v-Coleman, Johnson, Cobbo and Cobbo* (District Court, Brisbane, Judge Gibney, 7 June, 1978, unreported); *Bibliography*, the youth and Aboriginality of the children were described by the trial judge as a 'joint disability'.
43. *R-v-Henry and Others*; and in *R-v-Murray* (Supreme Court of Queensland, Andrews J., 1977 (?), unreported), *Bibliography*, an Aboriginal youth aged 17, who had resided all his life on Cherbourg Aboriginal Settlement, was found to have a full scale IQ of 66, that of a 9-10 year old white school child. The judge considered that while he was of relatively normal intelligence within his own culture, when exposed to the white Australian culture his functioning would be considered well below average, and sentencing principles should be those appropriate to a child (emphasis added).
44. *McKellar-v-Smith; Booth-v-Smith* (1983) 7 ALB 8; *Bibliography*, Case No. 110, pp. 48E-F.
45. *R-v-Williams* (1976) 14 SASR 1 at p. 7; *Bibliography* Case No. 365, p. 122.
46. *Collins and Others-v-R* (1980) 31 ALR 257, at p. 275.
47. *R-v-Williams* (1976) 14 SASR 1, at p. 7.
48. Perth Children's Court, 15 February 1980, unreported, *Bibliography*, Case No. 244, p. 86.
49. (1975) 1 NSWLR 617; *Bibliography*, Case No. 58, pp. 23-6.
50. (1981) 37 ACTR 57; (1982) Crim L J 54; *Bibliography*, Case No. 208, p. 76F.
51. (1975) 1 NSWLR 617, at p. 641.
52. *R-v-Jungala and Jagamara* (Supreme Court of the Northern Territory, Forster C.J., 21 March, 1980, unreported); *Bibliography*.

53. *Fry-v-Jennings* (1983) 25 NTR 19; (1984) 11 ALB 6; *Bibliography.*

54. (Supreme Court of South Australia, Bright J., 12 November, 1973, unreported); *Bibliography*, Case No. 231, p. 83.

55. Ibid., cited in Australia, House of Representatives Standing Committee on Aboriginal Affairs, *Report* on *Aboriginal Legal Aid*, Australian Government Publishing Service, Canberra, 1980, p. 80.

56. (1976) 14 SASR 1, at pp. 6-7. The Circular is reproduced at pp. 9-12, and G.O. 3015 in *R-v-S. and J.* (1983) 32 SASR 174, at pp. 178-9.

57. (1976) 14 SASR 463; *Bibliography*, Case No. 421, p. 142.

58. (1976) 14 SASR 463; at p. 466.

59. (1977) 17 SASR 88, at p. 89; *Bibliography* Case No. 178, p. 69.

60. (1977) 17 SASR 88, at p. 90.

61. Ibid.

62. s. 81C.

63. In *MD-v-McKinlay* (1985) 31 NTR 1 (Supreme Court of the Northern Territory, Nader J.); *Bibliography*, the Court dismissed on appeal by a child against admissibility of a record of interview taken in the presence of an independent person nominated by the defendant but in the absence of an Aboriginal Legal Aid officer. No request for the latter had been made. The Court considered that no unfairness had thereby resulted.

64. *R-v-Anunga and Others; R-v-Wheeler and Another* (1976) 11 ALR 412, at p. 413; *Bibliography*, Case No. 183, pp. 70, 70C, 71-2.

65. (1984) 52 ALR 133, 1 FCR 187, 10 ALB 6; *Bibliography.*

66. (1984) 52 ALR 133, at p. 145; 1 FCR 187, at p. 199.

67. Ibid., at p. 145; at p. 198.

68. *Jabarula-v-Svikart* (1984) 11 ALB 8; *Bibliography.*

69. Ibid.

70. (1984) 52 ALR 133 at p. 144; 1 FCR 187, at p. 198.

71. Per Muirhead J. in *Stevens-v-Lewis* (Supreme Court of the Northern Territory, No. 872 of 1979, 31 October, 1979, unreported); *Bibliography*, Case No. 399, p. 133.

72. *R-v-Clevens*, note 50 *supra.*

73. *R-v-Neddy Monkey and Others* (1861) 1 Wyatt and Webb Reports (L) 40; *R-v-Byrne* (1867) 6 SCR (NSW) 302; *R-v-Paddy* (1876) 14 SCR (NSW) 440; *R-v-Cobby* (1883) 4 LR (NSW) 355, Tarleton's Term Reports 179; *Bibliography*, Cases No's 311, 321 and 209 respectively.

74. *An Act to allow the Aboriginal Natives of New South Wales to be received as competent Witnesses in Criminal Cases* (1839) Act of Council 3 Vic. No. 16.
75. HRA, Series I, Vol. 20, p. 756. A similar Act of Western Australia, 4 Vic. No. 8 (1840) was also refused.
76. *Evidence Further Amendment Act 1876* (40 Vic. No. 38), s. 3.
77. (1876) 14 SCR (NSW) 440; *Bibliography*, Case No. 321, pp. 107-8.
78. (1876) 14 SCR (NSW) 440, at p. 443.
79. R-v-*Mary Ann Lewis* (1877) Knox 8; *Bibliography*, Case No. 284, p. 99.
80. R-v-*Peters* (1882) III NSWR 455; *Bibliography*, Case No. 327, p. 99.
81. 4 & 5 Vic. No. 22.
82. Act 3 of 1848.
83. 17 Vic. No. 11.
84. *Oaths Act Amendment Act 1884* (48 Vic. No. 19).
85. *Evidence Ordinance (No. 2) 1939*; s. 9A; that sub-section was repealed by the *Evidence Ordinance 1967*. However, the *Oaths Ordinance 1967* inserted s. 25A into the *Oaths Ordinance 1939*, providing for a prior determination upon examination by the trial judge whether, as a preliminary question of fact, the potential witness is capable of comprehending the nature of an oath or of understanding the meaning of an affirmation, and the punishments for giving false witness.
86. *Evidence Act Amendment Act 1972*, ss. 6, 9.
87. *Evidence (Children) Act 1961* (No. 6758), s. 23.
88. *Evidence Act 1929*, s. 14.
89. s. 9A(5).
90. R-v-*Stott* (Supreme Court of the Northern Territory, 1933, unreported); *Bibliography*, Case No. 347, p. 118A.
91. *Tuckiar-v-The King* (1934) 52 CLR 335; *Bibliography* , Case No. 412, pp. 137-8.
92. (1953) NTJ 202, at p. 203; *Bibliography*, Case No. 219, pp. 81, 81A.
93. (1955) NT 82; NTJ 312; *Bibliography*, Case No. 174, p. 68.
94. R-v-*Aboriginal Wadderwarri* (1958) NT 53; NTJ 516; *Bibliography*, Case No. 357, p. 121.
95. (1959) NTJ 694, at p. 695.
96. (1958) NTJ 608, at p. 614.
97. (1953) NTJ 202,at p. 203; *Bibliography*, Case No. 219, pp. 81, 81A.
98. R-v-*Aboriginal Wally* (1951) NTJ 21, at p. 23; *Bibliography*, Case No. 173, p. 68.

99. Personal communication to author by Professor Colin Tatz, 13 December 1983.

100. *R-v-Chambers* (1955) NT 326, at pp. 327-8; *Bibliography*, Case No. 206, pp. 76, 76A-C.

101. (1955) NT 326, at p. 331.

102. Ibid., and *R-v-Aboriginal Dulcie Dumaia* (1959) NT 274; NTJ 694, at p. 695; *Bibliography*, Case No. 220 (*sub. nom. R-v-Dumaia*) p. 81.

103. (1976) 11 ALR 412, at pp. 413-4.

104. (1975) WAR 163; *Bibliography*, Case No. 237, pp. 84-5.

105. (District Court, Rockhampton 22 August 1979, unreported); *Bibliography*, Case No. 244, p. 86.

106. (1980) 30 ALR 27; 54 ALJR 401; 4 A Crim R 433; *Bibliography*, Case No. 135, pp. 60-1.

107. *R-v-Chambers* (1955) NT 326, at p. 330.

108. *R-v-Aboriginal Dulcie Dumaia* (1959) NT 274; NTJ 694, at p. 695.

109. *R-v-Allan Kunoth* (1957) NT 111; NTJ 420, at p. 425; *Bibliography*, Case No. 278, p. 98.

110. For an example of histrionics by such a witness, *R-v-Allan Kunoth* (*supra*); and *R-v-Silvester Pilimapitjimiri and Others* (1965) NTJ 776, at p. 777.

111. *R-v-Doyle* (1953) NTJ 202, at p. 203.

112. *R-v-Chambers*, (1955) NT 326, at p. 330.

113. *Fry-v-Jennings*, (1983) 25 NTR 19, at p. 27; (1984) 11 ALB 6.

114. (1983) 25 NTR 19, at pp. 26-7.

115. (1962) 3 WLR 1461, at p. 1464, per Lord Devlin.

116. (1953) AC 200, at p. 206, per Lord Goddard.

117. Mr. Justice Barry, 'The Defence of Provocation', 4, *Res Judicatae*, 129, at p. 133.

118. *Johnson-v-R* (1976) 11 ALR 23, per Gibbs J.

119. See also discussion by Colin Howard, 'What Colour is the 'Reasonable Man'?' in (1962) *Crim LR 41*; see also B. Brown, 'The Ordinary Man in Provocation : Anglo-Saxon Attitudes and Unreasonable Non-Englishmen' (1964) 13 *ICLQ 203*; and Glanville Williams, 'Provocation and the Reasonable Man' (1954) *Crim LR 740*; 'Reasonable is a relative term : what may be reasonable for a semi-literate psychiatrically backward Aboriginal native confined in prison is no doubt quite different to what would be considered to be reasonable for a literate, intelligent white man of Anglo-Saxon extraction who is at liberty' : per Forster C.J. in *Seven-v-Seears* (1985) 12 ALB 10; *Bibliography*. This was <u>not</u> a provocation/murder case but the judicial observation is apt.

120. (1951) NTJ 18; *Bibliography*, Case No. 324, p. 108.
121. (1951) NTJ 18; at p. 20.
122. (1956) NTJ 317; *Bibliography*, Case No. 169, p. 68F.
123. (1956) NTJ 317; at p. 322.
124. (1963) 111 CLR 610, at p. 627.
125. (1956) NTJ 327; *Bibliography*, Case No. 312, pp. 106, 106A-B (*Sub nom. R-v-Nelson*).
126. (1956) NTJ 327, at p. 335.
127. See especially, Colin Tatz's seminal Ph.D. thesis 'Aboriginal Administration in the Northern Territory of Australia', Australian National University Canberra, 1964, unpublished.
128. (1953) NTJ 186; *Bibliography* , Case No. 167, p. 68D.
129. (1953) NTJ 186; at pp. 189-90.
130. (1959) NTJ 633; *Bibliography*, Case No. 163, p. 68, 68H-J.
131. (1959) NTJ 676; *Bibliography*, Case No. 172, pp. 68, 680-P.
132. (1966) Qld WN 10; *Bibliography*, Case No. 335, p. 113.
133. (1965) Qd R 456; *Bibliography*, Case No. 203, p. 75.
134. (1978-1979) 143 CLR 458; (1979) 23 ALR 281; *Bibliography* , Case No. 417, pp. 139-40.
135. (1979) 23 ALR 281, at pp. 304 (Jacobs J.), and 311 (Murphy J.)
136. *R-v-Alwyn William Peter* , Supreme Court of Queensland, Dunn J., 8-19 September, 1981, unreported; *Bibliography*, Case No. 326, p. 109.
137. The *Crimes Ordinance 1934* (No. 10) of the Northern Territory amended s. 6 of the *Criminal Law Consolidation Act and Ordinance* by inserting the following proviso:

   > '...where an aboriginal native is convicted of murder, the Court shall not be obliged to pronounce sentence of death but, in lieu thereof, may impose such penalty as, having regard to all the circumstances of the case, appears to the Court to be just and proper'.

   That same *Ordinance* also inserted a new section 6A:

   > 'For the purpose of determining the nature and extent of the penalty to be imposed where an aboriginal native is convicted of murder, the Court shall receive and consider any evidence which may be tendered as to any relevant native law or custom and its application to the facts of the case and any evidence which may be tendered in mitigation of penalty'.

   That *Ordinance* was gazetted in *Commonwealth Gazette* No. 26 of 3 May 1934, and commenced the same day. It remained in force until repealed by the *Criminal Law Amendment Ordinance 1939* (No. 17) which re-enacted the above amendments. The 1939 *Ordinance* was gazetted in *Commonwealth Gazette* No. 49 of 27 July 1939 and commenced that same day. It would thus appear that both Kriewaldt and Cranston are respectively in error, the former for implying that the substitute for death was not given statutory effect prior to 1939 (in (1960) 5 *UWALR* 1, at p. 47), and the latter for stating that the 1939 *Ordinance* was never proclaimed (in (1973) 8 *UQLJ* 60, at p. 65, f.n. 43).

Section 6A has remained unchanged (to 1982), but the proviso to S.6 was subject to changes in 1968 and 1973 when, as S.6(1C), it provided:

> 'Where an aboriginal is convicted of murder, the judge may impose such penalty as, having regard to all the circumstances of the case, appears to him to be just and proper'.

South Australian legislation, from which that of the Northern Territory was drawn, originally provided in the *Aborigines Offences Act 1853* S.1, that offences committed by Aborigines were not punishable by death. However, the 1853 Act was repealed by the *Criminal Law Consolidation Act 1876*, S.14 of which even provided for the public execution of Aborigines. That section continued in force until repealed in 1971, 95 years later.

138. A similar provision was contained in the *Capital Punishment Amendment Act 1871 Amendment Act 1875* of Western Australia, and repeated in the *Criminal Code Act 1901-1902*, S.663, of that State and continued by S.678 of the *Criminal Code Act Compilation Act 1913* . Upon the establishment of Courts of Native Affairs by S.59D of the *Aborigines Act Amendment Act*, 1936 (itself repealed by the *Native Welfare Act, 1963*) the Court in certain circumstances was empowered to take into account in mitigation of punishment any tribal custom which provided the reason for the commission of the offence.

139. *R-v-Patipatu* (1951) NTJ 18, at p. 19; *Bibliography*, Case No. 324, pp. 108, 108G-H. Kriewaldt restated this in the trial next day of one aborigine who killed another during a tribal fight 'That is a matter which is quite outside this Court Room. It has nothing to do with this case and you must disregard it' : *R-v-Aboriginal Wally* (1951) NTJ 21, at p. 27; *Bibliography*, Case No. 173, pp. 68, 68Q.

140. (1953) NTJ 211; *Bibliography*, Case No. 350, pp. 118, 118A.

141. (1953) NT 290; NTJ 205; *Bibliography*, Case No. 207, pp. 76, 76D-E, (*sub. nom. R-v-Charlie*)

142. (1953) NTJ 205, at p. 209.

143. Ibid.

144. (1960), 5 *University of Western Australia Law Review*, 1, at p. 27.

145. *R-v-Tiger and Captain*, (*supra*, n. 125).

146. *R-v-Aboriginal Muddarubba* (1956) NTJ 317, at p. 321; *Bibliography*, Case No. 169, pp. 68, 68F, 68F1-3.

147. (1957) NTJ 453; *Bibliography*, Case No. 170, pp. 68, 68M-N.

148. (1959) NTJ 676; *Bibliography*, Case No. 172, pp. 68, 680-P.

149. (1959) NTJ 676; at p. 677.

150. (1975) 6 ALR 47; *Bibliography*.

151. (1975) 6 ALR 47; at p. 51.

152. e.g. *R-v-Bulleen and Ward* (Nos. 127-130 of 1975, unreported); *Bibliography*, Case No. 196, p. 74.

153. In *R-v- Harry Gilmiri*, the accused pleaded guilty to the manslaughter of the deceased whom he killed with a blow struck by a didgeridoo whilst intoxicated. Muirhead asserted the application of 'the law of the land' but also said: '...The Courts of this Territory, in finding an appropriate penalty when Aborigines and Aboriginal customs and emotions become involved, endeavour to pay regard to these factors and to the views of the Aboriginal communities':
(SCC No. 23 of 1979, 21 March 1979, unreported: *Bibliography*, Case No. 232, p. 83).

154. SCC No. 441 of 1979, 18 April 1980, unreported; *Bibliography*, Case No. 221, p. 81.

155. (1960), 5, *UWALR*, 1, at p. 48.

156. *R-v-Banjo Anglitchi, Major Mickimin Raymond, Nicholas Anglitchi, Rollo Berry, Jabiru Lewin, Billy Raymond, Rupert Wodidjic*, (SCC Nos 316-322 of 1980, 1 December 1980, unreported); *Bibliography*, Case No. 182, p. 70.

157. 1980, unreported; *Bibliography*, Case No. 295, p. 102. *Mamarika* pleaded guilty to the drunken manslaughter with a spear of another Aborigine. Gallop received 'abundant evidence' of the community's attitude, namely that the accused had a nonviolent nature, was of good standing, and had already undergone the traditional punishment of trial by spears, such

that imprisonment was expected by the community neither in relation to the offence nor the particular accused. The accused was sentenced to three years' imprisonment with a non-parole period of 12 months, but discharged upon entering into his own recognizance in the sum of $500 to be of good behaviour for three years.

158. SCC Nos 1 and 2 of 1982, 20 April 1981; *Bibliography*, Case No. 301, p. 103A. *Moongi* stabbed and killed his step-father after an argument and fight over alcohol, instigated and provoked by the deceased. Evidence was led as to tribal punishment inflicted by the Port Keat's outstation community, comprising the burning off, over a fire, of all the hair on his body, his banishment to a sacred place for a period to be determined by the elders, and his isolation from his wife. The trial judge nevertheless sentenced Moongi to seven year's imprisonment, with a three year non-parole period.

159. (1985) 12 ALB 12; *Bibliography*.

160. (1981) 5 A Crim R 319; (1982) 10 ALB 10; *Bibliography*, Case No. 99, pp. 45C-D.

161. (1982) 6 ALB 11; *Bibliography*, Case No. 93, pp. 44A-E.

162. (1985) 12 ALB 11; *Bibliography*.

163. (1985) 12 ALB 11, at p. 12.

164. (1985) 12 ALB 11.

165. Court of Summary Jurisdiction, T. Pauling SM and N. Amagula, SM: No. G.E. 439 of 1977, 27 July, 1977, unreported; *Bibliography*, Case No. 154, p. 66.

166. W.J.P. Towers, SM: No. 2678 of 1977, 22 November 1977, unreported; *Bibliography*, Case No. 151, p. 65.

167. Ibid.

168. (1984) 27 NTR 34; *Bibliography*.

169. (1984) 27 NTR 34, at p. 37.

170. (1976) 14 SASR 1; *Bibliography*, Case No. 365, pp. 122-23.

171. 8 April 1970, unreported; *Bibliography*, Case No. 226, pp. 82, 82A.

172. 21 December 1973, unreported; *Bibliography*, Case No. 224, p. 81.

173. No. 96 of 1980, 5 November 1980, unreported; *Bibliography*, Case No. 225, p. 82.

CHAPTER 14

SUPERIOR COURTS AND THE SENTENCING OF ABORIGINES

'Retributive justice was all the savage could understand', Wells J. *Caledon Bay Natives Case*(1).

(a) General principles in sentencing

The starting point is to be found in the High Court decision in *Neal-v-R*, particularly the judgment of Brennan J. Although in dissent on critical issues, he restated what seems not only good law but common sense as well: 'The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice'(2).

In *Channon-v-R*, he spoke of the necessary and ultimate justification for criminal sanctions as 'the protection of society from conduct which the law proscribes'(3). This aspect, that of 'the protection of society', invokes the shield of the law; once the law is broken, the sword of justice descends. Accordingly, the protection of society involves many aspects of punishment. But that in turn requires the society, particularly in the case of Aborigines, to be identified more precisely. In the case of a dispute between tribal Aborigines, is society there to comprehend 'sophisticated' 'civilized', white, urban dwellers? Whose interests are put at risk or otherwise prejudiced? The Australian Law Reform Commission has been considering this aspect for a number of years: the answer may well lie in particular matters outside the criminal law and more in the field of social anthropology.

In turn the sanctions of the law are required to strike an appropriate balance, meting punishment appropriate to an offence, sufficient both to expiate the impugned conduct and prevent its repetition by the individual offender, and to deter similar conduct by others within that community. This is not meant to be a paper on penology, but it is clear from an examination of the available case law that a number of paradoxes emerge in the judicial approach to the sentencing of Aborigines.

In *Channon's* case, Brennan referred to the deterrent aspect in these terms:

> Deterrence (whether of the offender or others) from committing other kinds of crime, reformation in respect of other failures, or retribution for other kinds of social misconduct, are not purposes to which the judicial discretion in sentencing is directed. But a sentence which is imposed with the object of deterring the offender from committing offences of the same kind again, and with the object of rehabilitating him by reducing or eliminating the factors which contributed to the conduct for which he is sentenced, serves the appropriate purpose, provided the sentence is apt to secure those objects.

Sometimes the perceived general moral sense of the community, reflecting what the community would see as well-deserved punishment, may be given greater weight than the rehabilitative aspects. In *R-v-Diamond Turner*, for example, heard before Gallop J. in the Northern Territory Supreme Court in 1979, the accused, while heavily intoxicated, attacked his wife with a tomahawk, inflicting fatal wounds(4). The accused had 58 convictions for alcohol-related offences between 1962 and 1978. Gallop considered that although the accused was not a danger to the community, alcohol for him was a major problem, and that apart from alcohol he had a good background; nevertheless he felt that the deterrent aspect should be given greater weight in arriving at a penalty 'which others like him will recognize as being the sure consequence of this sort of behaviour'. He laid some emphasis on the 'community' which, in the sense of moral reprobation and deterrence 'includes other fringe-dwelling Aborigines in and around Alice Springs'(5).

The 'interests of the community' in *R-v-Darryl James McLeod*, on the other hand, were the community in its general sense of the dominant society(6). That New South Wales trial, and that of *R-v-Robert Michael Simpson*, involved sexual offences by urban or town-dwelling Aboriginal youths committed on white women(7). But, in both, factors of 'Aboriginality' were pleaded in mitigation: factors, in other words, within the purview of what Brennan incorporated in *Neal*.

In the 1984 case of *R-v-Stewart*, the South Australian Chief Justice dealt with an application for a non-parole period by an Aborigine convicted of the stabbing of his *de facto* wife(8). This 'terrible crime of extreme violence'(9) impelled the judge to ask 'what is the minimum time which the prisoner must spend in prison in order to satisfy the punitive and deterrent and preventive purposes of punishment?'[10], King C. J. applied 'the conscience of the community'[11], the community described as 'including the aboriginal (*sic*) community'[12].

Superimposed on sentencing tribunals is the requirement of detachment and objectivity such that they 'will refrain from exhibiting savagery while at the same time purporting to condemn it'[13]. And towering over those considerations is 'the voice of the people'[14].

Thus, the judges in the Northern Territory have been strongly supportive of legislative attempts to restrict alcohol where a community, under legislative provisions, has sought to ban or severely limit its availability in a given area[15] and equally supportive of legislative attempts to prevent drunken use of knives or broken bottles[16]. Both judgments cited were pronounced by Muirhead who seems to be more outspoken on the limitations and effectiveness of the Northern Territory criminal justice system. He has consistently queried the effectiveness both of imprisonment and of suspended sentences in the case of Aboriginal offenders. In R-v-*Wesley Nganjmirra*, for example, the accused and the victim had an argument while intoxicated. The accused struck the victim a hard blow with a piece of sharp metal, causing the victim to go blind. The judge said: '...Prison is seldom constructive, but the law provides imprisonment as a punishment for crime and courts, by whose authority I am bound, have emphasized very strongly that, where crimes of violence are concerned, the deterrent aspect of punishment becomes a powerful consideration, the law accepting that punishment by imprisonment may deter'[17]. That view contrasts strikingly with another trial over which he presided, R-v-*Douglas Wheeler Jabanunga*, where the accused, again intoxicated, struck his young wife with stones and killed her. While acknowledging that the Courts could not effect a cure or diminution of the incidence of alcohol-induced violence, Muirhead said: 'All the Courts can do in the meantime is to punish those who kill or injure, but the deterrent value of what we do is, I am afraid, precisely nil'[18].

Four years later, however, he restated the educative-deterrent nature of punishment in R-v-*Charlie Limbiari Jagamara*[19]. A tribal Aborigine had undergone severe punishment, including ritual spearing, stabbing, beating and banishment, over the killing of another. He occupied an important ceremonial position within the community, and the crime and the community punishment were regarded by Muirhead as having been 'tackled energetically by the people'. It was 'truly a cultural matter'. Punishment 'for the general protection of Aboriginal people, and to prevent larger areas of misunderstanding' was quite inappropriate as the accused had 'already suffered punishments far more severe than any that I would be authorized to inflict'[20]. In *R-v-Jacky Jagamara*, a similar factual situation involving pay-back sufficiently severe that the accused was 'in no sense a threat to the community at large', resulted in a sentence 'to the rising of the court'[21]. The trial judge (O'Leary J.) was of opinion that 'it is not an offence that calls for any deterrent or retributive punishment by the court'[22].

(b) Court process utilized to advance social or 'community' ends

Both *Jabanunga-v-Williams*[23] and *Dixon-v-Seears*[24] were instances of strong curial support for legislation clearly intended to advance, directly, a social end. In *Green-v-Josey*, however, Mr. Justice Wickham in the Supreme Court of Western Australia allowed an appeal against conviction imposed on a town 'nuisance' whom the police and justices, although acting humanely and conscientiously, considered was becoming a 'problem' to himself and the community[25]. Though sympathizing with the justices and townspeople, Wickham also held that 'in the administration of the law and the sentencing of offenders, principle cannot be allowed to give way to expediency'[26].

In *Murphy, Davidson & Ward-v-Watson*, the Full Court of the Supreme Court of Western Australia heard appeals against severity of sentence imposed on the Aboriginal female appellants for disorderly conduct[27]. Each was an alcoholic, and no criminal activities were associated with such conduct. The Court considered that rehabilitation and retribution did not arise, nor would deterrence. Probation would be 'pointless'. Custodial sentences without the availability of treatment would be inappropriate for what was 'the tip of a deep and serious social problem, the solution to which must be found outside the criminal law'. A fine of $10 was substituted for the sentences of six month's imprisonment.

In *Kartinyeri-v-Faehrmann*, the Supreme Court of South Australia drew attention to the difficulty that faces justices in small country towns where persons who are manifestly drunk are both a danger to themselves and a cause of annoyance and inconvenience to other members of the public[28]. And in

Brown-v-Nunn, the Supreme Court of Western Australia asserted that in the case of chronic drunkenness, 'retribution as a motive is not really relevant'(29). It was 'contrary to modern principles of sentencing to sentence an offender to prison to give him or her the opportunity of "drying out" or having treatment'(30).

It cited with approval *Kartinyeri,* when the Court said

> ...a special magistrate who sits in a country town knows what is necessary for that locality in order to secure a measure of law and order in the interests of the citizens who live there(31).

In the District Court of Queensland, Judge Shanahan upheld an appeal against severity of sentences imposed on an Aboriginal woman convicted of vagrancy(32). The judge noted that the legislation as such was not directed to the punishment of poverty. He noted also that on many occasions, stipendiary magistrates, moved by Christian charity or humanitarian motive, sent people to prison 'for their own good'; such people not, as a rule, committing criminal offences but being considered as 'nuisances' whose appearance was an affront to the susceptibilities of the community not subject to the same disability. The sentence was reduced, and the appellant freed.

In *Matthews-v-Stokes,* the appellant was charged with the sale of liquor to an Aborigine, and with a further charge of the supply of such liquor(33). He was convicted and sentenced to cumulative terms of imprisonment. Kriewaldt held, *inter alia,* that the more serious charge should, as a general rule, be dealt with first, that sentences imposed for convictions arising out of the one incident should normally be concurrent, and that the power to impose cumulative sentences should normally not be used so as to increase a sentence beyond the maximum permitted by law for the offence in respect of which the cumulative sentence is imposed. Again, this restatement of law and legal principle must be correct for a community which purports to be both civilized and therefore humane. And in *Jagamara-v-Arnold,* the Chief Justice of the Northern Territory approved the imposition of a concurrent sentence of imprisonment, where a fine was appropriate for some of the (liquor) offences, as 'more merciful to the appellant since if fines had been imposed or were to be substituted by me (the appellant) would have to pay them or serve short terms of imprisonment in default'[34]. Moreover, 'a recognizance to be of good behaviour for 12 months was probably seen by their Worships as being a sentencing tool potentially useful in persuading the appellant to mend his ways', a consequence with which Forster expressly agreed[35]. Savagery in society cannot be mirrored by the tribunals of justice. The educative role of the law, the legal expression of moral precept, also dictates humanity in its dispensation. In *R-v-Raymond Bigfoot*, where the accused was aged 25 and intoxicated, Muirhead suspended sentence without supervision 'hoping that the constraints of your tribal situation will suffice'[36]. Finally, in *Taylor-v-Beames*, Mitchell J. in the Supreme Court of South Australia upheld an appeal against conviction in circumstances where a young Aborigine was arrested on a charge of being drunk in a public place and, upon being found unfit to plead, was remanded without bail to a sitting of the Court five days thence[37]. No appeal was taken on that aspect; therefore the judge's remarks are *obiter*. Nevertheless, they are a reminder of the vigilance of superior Courts in this regard: '...it would be a matter of deep concern if any Court were to use a remand without bail as an indirect means of imposing a penalty'[38].

A (white) judge in exercising his sentencing discretion somehow has to balance the requirement of community protection and punishment for its violation. Where the offender is also subject to traditional punishment, the judge must apply the law in such a way that the whole community will be satisfied with the result. The reconciliation of societal expectations with individual *and* societal justice inevitably compel value judgments dependent on extra-legal knowledge. The receipt and cogency of that knowledge - particularly when the offence is caused by factors of drunkenness, or cultural belief outside the proper processes of the criminal law - are dysfunctional or antithetical in our current narrowly-defined legal system.

(c) Aboriginal children

In the leading case of *Jabaltjari-v-Hammerseley*, Muirhead - with the authority of the other members of the Court - laid down general guidelines on the sentencing of Aboriginal juvenile offenders in the Northern Territory[39]. The appellant, a 14 year-old, was convicted in the Children's Court at Alice Springs of the illegal use of a motor vehicle, driving while unlicensed, and driving without due care. He was sentenced to concurrent terms of imprisonment of three months, seven days and one month, designed, according to the magistrate, to protect the public. The appellant was represented and the proceedings lasted six minutes. On appeal, evidence was given that, since the appellant had been released pending the appeal, he had been returned to his people and was undergoing traditional punishment. He would soon be initiated into manhood. It was probable that the appellant had seen going to gaol as a way of escaping his initiation ceremonies. The appeal as to sentence was allowed, and the sentences set aside. The appellant was to enter into a bond, with the condition, *inter alios*, that he be subject to the discipline and training of his own community.

Muirhead considered, firstly, the detention of the child in an adult prison for 26 days following an earlier Court appearance as: '...an appalling indictment of the system of justice as applied to aboriginal children in the Territory'[40]. Secondly, he considered that for many Aboriginal children a term of imprisonment tended to be regarded as a sign of manhood, and much more comfortable than the initiation ceremonies. Thirdly, imprisonment can provide practically nothing of value or training for prisoners, young or old, black or white. Fourthly, the imposition of custodial penalties on restless children might turn them into recidivists and was against the expression of legal policy both in Australia and elsewhere. Fifthly, Aboriginal children face tremendous social problems: alcohol, conflicts between the strict but community-based cultural traditions of their people, and the more tempting short-term inducements of white society. Sixthly, facilities for the treatment of young offenders in the Northern Territory were either woefully deficient or totally non-existent, thus making the tasks of magistrates in dealing with juvenile offenders almost impossible of successful performance. Therefore, only in grave and exceptional circumstances, and for very serious offences, should children of 14 to 16 years be imprisoned and then only when the sentencing tribunal has carefully examined, and for good reason discarded, the available alternatives. With children in that age group whose understanding might be limited, sentences of imprisonment might be 'suspended' subject to an appropriate recognizance, as judicial experience shows that the offences of young Aborigines tends to occur in repetitive waves, sometimes associated with petrol sniffing, sometimes associated with other sociological causes peculiar to tribal or geographic group. Courts should not sentence under a sense of urgency, nor without a pre-sentence report and a thorough background knowledge, obtained from parents or relatives who should attend the hearing, and from Aboriginal legal aid and other organizations, particularly child welfare officials in lieu of police.

This judgment acknowledges the strengths and problems posed for contemporary Aboriginal youth by a still-vibrant and relevant culture in the Northern Territory. Two years later, the Chief Justice, in *R-v-Jacob Ah Won*, declined to imprison a 13-year old Aboriginal boy who had engaged in a knife fight with another, whom he wounded(41). He recorded a conviction, and committed the defendant to the care of the Director of Child Welfare, but recommended that he be allowed to return to his own people so that he might receive the support of his extended family and undergo the initiating process.

In an urban, non-tribal situation such constraints are clearly inapplicable. Statute law will supplant any such extra-legal constraints. In *R-v-Wilson*, for example, the South Australian Supreme Court asserted that rehabilitation of juvenile offenders was the prime intent of legislation, pithily observing 'general deterrence is forbidden territory'(42). The offender in that case was described as 'a young man of Aboriginal descent', with no previous convictions, who came from 'an exemplary family' and of 'a happy home background'.

(d) Additional factors of 'Aboriginality'

Kriewaldt was consistent in considering that the extent to which an Aborigine had adopted white ways was a very material factor in arriving at a just sentence(43). The nearer the mode of life and general behaviour approximated that of a white, the closer should punishment approximate that of a white convicted of a similar crime(44). However, as the High Court in *Namatjira*, and as Muirhead sitting in the Full Court of the Federal Court of Australia in *R-v-Davey*, observed: '...association with white people does not necessarily erase deep-rooted customary fears or beliefs, nor does it eradicate the sense of what is, or what is not, acceptable or appropriate(45).

The lower Courts appear to have accepted, as hierarchically they were bound to do, the decisions and guidelines of the superior Courts. In *Police -v-Melville Wurramurra* (decided in July, 1977), T. Pauling SM, in binding over a man who bayonetted his wife for suspected infidelity, noted Muirhead's observations 'that suspended sentences of imprisonment are irrelevant so far as most Aboriginal persons are concerned'(46). Such observations are, of course, qualified, in respect of Northern Territory Aboriginal juveniles, by *Jabaltjari-v-Hammersely* (*supra*).

Kriewaldt also adopted what might be called a 'deterrent-educative' approach in sentencing Aborigines, again adopting as a factor of significance the test of 'sophistication' or 'civilisation'. In *R-v-Aboriginal Roy Pananka*, for instance, on the trial of an Aborigine for an act of drunken violence visited upon another, he was of the opinion that: '...the Aboriginals concerned in this affray have reached a sufficient stage of civilisation that they can be made to understand that the use of knives or other instrument which may cause wounds in a fight will merit punishment, especially if they have previously taken enough liquor to be affected thereby'(47). In not a few cases he seems to have been dissuaded from releasing the accused upon conviction by a consideration of the effect of such a release on the (Aboriginal) community. His Honour, unfortunately for the accused, also ventilated his opinion, thus inflicting on the prisoner the double punishment of imprisonment and the aborted prospect that, but for the trial judge's broader perspective, he would in fact have been released. Thus, in *R-v-Aboriginal Nelson* he said: 'My inclination would be to release you having regard to the circumstances, but my duty requires me to consider what effect that might have on other persons...It seems to me I must let it be known that the use of weapons, when under provocation, will result in punishment being inflicted'(48).

For 'other persons' substitute 'the native community in Alice Springs' and a similar result obtains in *R-v-Aboriginal Sambo Djungla*(49), and in *R-v-Aboriginal Barney*, only in that latter case it was 'the defendant's community'(50). I am not suggesting that Kriewaldt should not have paid close regard to the likely effect on the community from which an Aboriginal accused came. As Muirhead put it in *R-v-Davey*: '...When dealing with offences which take place within Aboriginal communities, and involving only those people...' it is relevant and proper to have 'consultation with aboriginal communities in remote areas' and to pay close regard to what the community thought and to treat as important the community's view that the accused 'should come back into that community'(51). Although the trial judge in *Mamarika-v-R* was not identified, his sentiments are very much in tune with those of Muirhead: 'I doubt whether imprisonment has ever made much sense to your people...but imprisonment is now well understood as a punishment handed out by the Courts of this Territory...'[52]. In that case the judge recognized that traditional punishment methods, for example, temporary banishment from the accused's homeland, were far more effective, if salutary. But the Full Court in *Jacky Anzac Jadurin-v-R*[53], and Forster in *Jungarai-v-R*[54], have emphasized that acknowledgement of certain traditional punishment, whether it accords with the law of the land or not, is not sanction of that punishment. It is rather recognition of certain facts existing only by reason of the accused's membership of a particular 'ethnic or other' group.

Nevertheless, it now seems settled law in the Northern Territory that

> ...in fixing penalty, a court should take into account the fact that the offender, by his actions, has brought on himself the anger of members of his community and that, as a result, he has received, or is likely to receive, punishment of some kind or other at their hands. That, of course,...is not to be seen as necessarily giving any sanction to the punishment or retribution imposed[55].

Thus extraordinary factors evoke extraordinary responses. In the *Jungarai* case the accused, a 'full blood' tribal Aborigine, was charged with the murder of another member of this tribe. After commital proceedings the accused applied for bail pending trial. This was refused by the committing magistrate. He then applied for bail to the Supreme Court. Evidence in support of this application for bail established that, according to Aboriginal law and custom, the accused would be held responsible for the death of the deceased and would have to be punished accordingly. Such punishment would consist of a single ceremonial spearing in the leg followed by banishment into the bush for a period to be fixed in order to remove from the community a possible focus for trouble. The extended families of the deceased and the accused were in a state of mutual hostility which would only cease when the appropriate tribal punishment was inflicted. The accused was willing and anxious to undergo the punishment. In granting the application, Forster noted the relevant circumstances as above, and that Aboriginal customs in the Northern Territory vary from place to place. So, too, must the circumstances of killings. The proposed punishment had been endorsed by 'the community' but he expressed neither approval nor disapproval of it, simply taking it as important fact to be considered.

(e) Effect of imprisonment

In *R-v-Nadigi Tjalpaltjari*, Blackburn J. presided over the trial of a tribal Aborigine who pleaded guilty to the manslaughter, by spearing, of his incestuous wife(56). Counsel for the accused, in his submissions on the question of sentence, put it to the trial judge that for a member of the Pintubi tribe at Waruwiya, any gaol sentence would impose on the accused virtually a term of solitary confinement. Not only would he be unable to communicate, but he would be confined to a place so far removed from his (ordinary) environment that it would be the equivalent of banishment to a foreign country.

In a similar situation in Western Australia the next year Burt J., in *R-v-Ferguson*, indirectly made a recommendation that in the event that the Parole Board did not quickly release the defendant, he should be detained in one of the country prisons where other Aborigines constituted the majority of the population(57).

A Perth (conventional) gaol venue would be for him, on account of want of communications, virtually solitary confinement liable to inflict extreme physical and psychological harm, and potentially fatal to the prisoner. Not that such a recommendation would necessarily advance the prisoner. Norman Ngatayi was transferred to Broome Prison on similar grounds and for the same broad humanitarian reasons. He was, however, ostracized by his own people, and was subsequently transferred to Fremantle Prison(58). Generally, however, Broome Regional Prison, with an Aboriginal prison population of 75-80% regarded them as 'more peaceful than the whites'(59). In Chapter 15, I refer to official perceptions of the 'benefits' which imprisonment confers on Aborigines. To the list of 'gaol is good for them', 'they like it', 'they can dry out', 'they get three square meals a day - comfortable beds - fresh-warm clothing - regular exercise'(60), there can be added some more. Professor Tatz recalls two others cited by magistrates during his original field work: 'they learn to read and write', and 'Muldoon's prison was the greatest place of assimilation in the Hasluck program'(61).

(f) Conclusions

The cases cited above, although drawn mostly from the Northern Territory, suggest a judicial sensitivity to the proper role and function of the law. But for traditional or even 'semi-tribal' Aborigines 'the law', meaning the substantial *corpus* of Anglo-Saxon jurisprudence, the legal mechanisms and responses for resolving conflicts and disputes, is far less meaningful than for 'sophisticated' Aborigines or whites. Even in respect of the former, there seems to be an underlying judicial acceptance, an expectation almost, that the cultural inheritance of any (Northern Territory) Aborigine is so strong that the civilizing processes are not yet complete. The judicial acceptance of cultural diversity and richness has induced an innovative response that strays modestly from the legal mainstream and then only in individual cases. What has yet to be determined, and what is not yet known, is whether there exists a *corpus* of Aboriginal customary rules for dispute-settlement available in civil and criminal causes alike.

One can discern the first, tentative, judicial forays into an area way beyond the judicial norm. The two *Jagamara* cases decided by two different judges in the Northern Territory in 1984 not only took into account expert anthropological evidence on ritual, ceremony, standing, but also such evidence on marriage, relationships and kinship taboos according to traditional law. True it is that the dominant white law was being applied as to the fundamental questions of trial, guilt and conviction, but one of the two cases represented, for the first time, judicial acceptance of tribal/traditional law and custom as a complete answer on the question of punishment. The white principles of sentencing, in other words, were subordinated to those of the local black community.

It may be expecting too much of this work to provide answers to the problem which so bedevilled policy makers that it was referred to the Australian Law Reform Commission. If and when the ALRC provide definitive (white) answers, based on a legalistic white understanding - however sympathetic - of black lore/law/custom/tradition, it may be possible to indulge in *post hoc* judgment. Some answers may emerge, particularly from the Australian Law Reform Commission's *Report of a Working Seminar on the Aboriginal Customary Law Reference*[62].

What was remarkable about one answer - by a well-known anthropologist - was that he *did not know* if there existed a *corpus* of 'native law'[63]. The danger for any white lawyer is that he has only a lens of conceptualization and training likely to distort what he considers the traditional law to be. Legal anthropology is, indeed, very much in its infancy in Australia.

Anthropologists of great eminence gave expert evidence in *Milirrpum* and were found to be in error in such a way as to undermine and finally destroy what chances the Aboriginal plaintiffs may have had in asserting property claims and titles. And yet this is precisely what Land Rights legislation requires : concepts of anthropology must somewhat be made to fit within a legal construct artificially designed and enshrined. The exposure by Marc Gumbert of a 'paradigm lost' reminds us that anthropology, like the law, is undergoing dynamic revision and reformulation.

The content, scope, direction, application and enforcement of whatever modest *corpus* of Aboriginal laws may exist owes little, it would seem, to anthropology. And if anthropologists can't tell us, or tell us incorrectly, why should the equally narrow focus of a (white) lawyer provide greater insights?

On one topic it may be possible to contemplate some agreement. If traditional Aboriginal law confers greater benefits or invokes fewer penalties than white law in matters - civil or criminal - properly within its compass, and both the parties and the immediate community agree upon its application, the majesty of the English law is surely not lessened by express, if limited, recognition of another.

In those countries of the Empire where English common law intruded, the genius of authority was in according respect to a limited application of native or local law. This accommodation in turn endowed the paramount law with a greater moral authority without denying the recognized law its validity, practicality, and utility.

In the final analysis the quest for the revelation and recitation of such customary rules may be an exercise in futility if the cumulative substantive and procedural legacy of white law overshadows, overbears and overwhelms even the modest relics of traditional rules still subsisting.

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CHAPTER 15

ALCOHOL AND CRIME

(a) Introduction

Aborigines and alcohol evoke a great deal of emotion, condemnation, prejudice, myth and 'settled argument'. Racists - whether here or in South Africa, New Zealand, Canada, or the United States - have no doubts about the correlation : blacks are biologically and genetically, thus racially, incapable of 'handling' white man's, or even their own, grog. Effects include savagery, or increased savagery, barbaric but certainly 'uncivilized' behaviour, homicide, mutilation, rape, assaults and the wanton resort even to cruel, inhuman, *sub*-human weapons of attack - broken beer bottles, sharpened sticks or broom handles, tomahawks, the whole martial weaponry of unruly, unprincipled, unpredictable, and ungovernable 'throwbacks'.

Social scientists look for cultural, social, historical, environmental explanations - and often find them. The history of prohibition in the United States, its effect of producing a nation of near-chronic alcoholics, is a case in point : that constraints, prohibitions, proscriptions, and circumscriptions can and do lead to an inability to 'handle' liquor, to increases in crimes of violence, and to more pronounced or *visible* deviant behaviour. There is urgent need of a sociology of alcohol : of why and how people drink, of what they drink, and to what ends. All we have at present is speculation, some observation, and much myth, including a very poor Parliamentary Standing Committee *Report* on 'Alcohol Problems of Aborigines'(1), one seemingly at pains to reassure whites about their prejudice. Alcoholism or even over-indulgence in alcohol is a sociological phenomenon in Australia. Billboards scream 'Go For It' - and people do. Booze and *machismo* are bedfellows. It assures cult status, the key to social acceptability and mobility. Its devotees dwell in bonhomie and reverie and in a bleary miasma have a certain status conferred on them : that of recognition, approval, solidarity with a peer - or other - group and the nation. Aborigines are considered by this 'moral majority' to drink more and 'handle' less, triggering latent criminality. There is a great deal of cant and hyprocrisy in this. A nation whose official currency was once rum is now the fourth largest consumer of beer *per capita* in the world. White nations head the list; Darwin boasts the highest consumption of beer *per capita* in the world, and has maintained its primacy to ensure its place in the *Guinness Book of Records*.

In 1977 the Senate Standing Committee on Social Welfare reported that more than one in every 25 Australian males over the age of 18 has a bad drink problem, and one in every 100 females[2]. In the decade 1967-77, there were 30,000 alcohol-related deaths[3]. Deaths caused by cirrhosis of the liver had risen by 75% between 1957 and 1977[4]. Over a quarter of a million Australians were alcoholic or had a bad drinking problem[5], and two of every five divorces or judicial separations were caused by alcohol-related problems[6]. This Chapter examines only the legislation and some of the cases heard by the Courts. A fair amount of subjective judgment is inevitable in this inexact 'science'. But the Courts themselves can hardly be immune from the emotion, the prejudice, surrounding these myths, truths or half-truths.

(b) Legislation

Each State and Territory early recognized, and legislatively addressed, the problem of alcohol among Aborigines. What they failed to address, however, was the underlying sociological cause of that problem. The *Licensed Publicans Act 1838* (NSW) established the pattern for all other legislatures[7]. The preamble to s. 49, forbidding the sale, supply or gift of intoxicating liquor 'to any aboriginal native of New South Wales or New Holland' recited how those proscribed liquors were 'productive of serious evil' to the Aborigines[8]. New South Wales thereafter - regularly and until 1963 - proscribed alcohol in respect of Aborigines and 'half-castes' who were subject to 'Aboriginal' legislation[9]; Queensland did likewise between 1863 and 1971[10]; South Australia between 1839 and 1967[11]; Victoria between 1864 and 1957[12]; Western Australia between 1843 and 1972[13]; the Northern Territory between 1911 and 1964[14]; and the Australian Capital Territory between 1915 until 1929, when its own legislation replaced that of NSW, thence until 1965[15].

(c) Cases on supply of alcohol to Aborigines

Most of the earlier cases cited - all in the form of criminal prosecutions - deal with questions of identity of the person supplied as an Aborigine or a 'half-caste' to whom liquor was supplied. In a 1903 case in New South Wales 'aboriginal native of Australia' was held to refer only to 'full-bloods': 'half-castes' were therefore exempt, the person supplied in that case being the son of a 'full-blood' father and a 'half-caste' mother[16].
Later cases heard after the *Aborigines Protection Act 1909* - or the *Liquor Act 1912* introducing offences of 'strict liability' (rendering the intent of offender irrelevant) - included supply to a person who declared he was a 'half-caste' and in possession of a blanket from the Aborigines Board. He was held to be in contravention of the Act[17]. So, too, was supply to a 'half-caste' living on a

reserve, even though that was not known by the supplier[18]. A statement by a Kanaka that he was a Kanaka was held not sufficient evidence of that fact[19], and in Queensland the supply of liquor even to a Kanaka who was a naturalized British subject was an offence[20]. The legislation was directed at subjects classified by race which not even marriage to a foreigner could change, in the same way as a leopard 'could not change his spots'[21]. The existence of a dual legislative disability in New South Wales as to the supply of alcohol did not imply a qualification of the earlier by the later[22]. In South Australia, it was held in 1925 that justices could form their own opinion as to whether the person supplied fitted the legislative category of prohibited persons[23]. Unlike New South Wales, the son of a 'half-caste' father and 'full-blood' mother did fall within that category in South Australia, if he identified as an Aborigine and the prosecuting police had formed a similar view[24]. Even where, on the evidence, the person charged as an Aborigine was a 'half-caste' the charge could be amended procedurally[25]. Contrasting the 1912 New South Wales decision in *Steele-v-Starr*, the Northern Territory decision of *Dowling-v-Bowie*, on appeal to the High Court in 1952, held that an honest belief by the supplier that a person supplied was an 'exempt' 'half-caste' was a good defence to a charge[26].

The legislation therefore created a special class or category of persons on the basis of race in a way which discriminated them from all others. Moreover, it operated against two persons, the supplier and the person supplied, and by introducing strict liability (at least in New South Wales) made it virtually impossible even for 'exempt' persons to drink. Thus the 'innocent' were thrown in with the 'guilty', the operation of the legislation attracting an extended effect in its choice of 'victim'. The onus in other jurisdictions enhanced the arbitrary and capricious method of identification and supposition by persons ill-trained to decide. And their decisions had punitive consequences. The Acts reached even beyond the grave. In Queensland, a supplier was denied repayment of an unpaid account from the estate of a deceased Aborigine on the grounds of the general prohibitions on supply contained in that State's *Liquor Act*[27].

(d) Some cases on alcohol and Aborigines in the Northern Territory

Judges in the Northern Territory have been conscious of the disastrous impact of alcohol on Aboriginal society in the Territory, and of the causal link between excessive consumption of alcohol and crime. What they have not done, however, is address themselves to the wider question of the causes of that excessive consumption. Judges in other States have done so in terms that the problem is a special one, whose solution must be found outside the criminal law[28]. In the meantime, judges, whatever their sociological views on alcoholism, had to impose a penalty which did not, in effect, punish addiction or nuisance offences falling short of contumacy, nor at such a level (if a monetary penalty) that imprisonment in default would almost certainly follow[29]. Alternatively, if a penalty were imposed, the defendant should also be given reasonable time to pay 'save where there are compelling reasons to the contrary'[30].

Kriewaldt seems to have despaired of a judicial way out of the impasse. Towards the end of his career he lamented that he had begun each year as Judge of the Northern Territory with a murder case, so many of an Aborigine by an Aborigine, 'and nearly always because liquor has been consumed by the parties that figured in the incident'[31]. He regarded the supplier of liquor to an Aborigine 'as a disgrace to the community and as a person entitled to no consideration'[32]. Nevertheless, he considered that violence induced by alcohol should be punished, and exercised his judicial discretion as much in an educative-deterrent way as to punish individual offenders, particularly where the offenders had 'reached a sufficient stage of civilization that they can be made to understand that the use of knives or other instruments which may cause wounds in a fight will merit punishment, especially if they have previously taken enough liquor to be affected thereby'[33].

Forster, on the other hand, seems to have treated alcohol as a mitigating factor at least in sexual and other violent assaults. In *R-v-Wayne Ashley* (1978), for example, the accused was convicted of indecently assaulting a four year-old boy[34]. Forster said: 'It is apparent that you were considerably under the influence of liquor when the offence was committed, which in the case of Aboriginal people I regard as something more of an excuse than I do with white people'[35]. The reason for that excuse is seen, in part, in his comments as trial judge in *Kevin Corby*, a case of intoxicated break and enter with intent to rape, unlawful wounding, and attempted rape: 'Your people, unaccustomed to intoxicants, have learned the abuse of alcohol from the white man'[36].

In *Seven-v-Seears*, a case of aggravated assault and offensive behaviour, he contrasted the self-induced drunkenness of Aborigines (which he reiterated as 'something of a mitigating factor') with that of Caucasian people which 'in their case...may be an aggravating factor'[37]. O'Leary J., on the other hand, seems to have taken a contrary view, at least in respect of murder. In *R-v-Herbert and Others*(1983), he presided over the trial of three traditional Aboriginal women who murdered a white man 'with great callousness and brutality'(38). In the course of his reasons for judgment he acknowledged the 'valuable assistance' of Dr. Diane Bell on the kinship systems, social organization, and ritual life of Aboriginal women, Mr. Ian Joblin a clinical psychologist specializing in the psychology of criminal behaviour and the trans-cultural psychology of native people, and a forensic psychiatrist.

O'Leary J. viewed as a trans-cultural dimension of the Aboriginal condition the sociological phenomena of a drift to city life; the loss of family and close-knit, complex web of relationships; the loss of relationships which protected against undue physical violence and censored moral conduct; the inadequacy of coping with individual relationships; association with others similarly affected; and the disintegration of their lives to brutality, violence and feelings of helplessness, hopelessness and purposelessness(39).

Nevertheless, he concluded:

> Whilst I appreciate that drunkenness <u>is not normally regarded as a mitigating factor</u>, I think that in the case of Aboriginals, and specially the present prisoners, it may be considered as at least giving some weight to the other mitigating factors involved (emphasis added)(40).

His conclusion does not accord with long-standing practice in other superior Courts of the Northern Territory.

Forster's comments in *Kevin Corby* as to the learning process are also open to challenge. They ignore a whole host of socio-economic and cultural factors which intrude at various levels of Aboriginal - and white - society and in varying degrees of intensity. It palpably ignores the different patterns of drinking (clubs vs. pubs; private vs. public; individual vs. group), the reasons for drinking, the financial capacity to drink; the psychological impact of drunkenness and the weight of community *opprobrium*, the physiological condition of white and black drinkers; in short, his is a gross over-generalization. Nevertheless, it demonstrates the Court's concern at a problem and the attempt on an individual-case basis to exercise some form of discretion to alleviate some of its consequences.

Muirhead, on the other hand, has stressed more the extra-legal nature of problem, calling out 'for community concern, intelligently planned programmes and action rather than words. All the Courts can do in the meantime is to punish those who kill or injure, but the deterrent value of what we do is, I am afraid, precisely nil'(41). He considered the consumption of alcohol to be 'one of the greatest threats to their dignity and existence, (and) the continuing disruption of their social structure'(42). Accordingly, he considered that 'the law should be energetic to support the restrictions relating to alcohol in the particular area, which represent in this case the wishes of the people living in the Warrabri area'(43). This form of support for the wishes of the community or for the understanding and knowledge of local conditions of justices or magistrates has also received support in Western Australia and South Australia. In 1947 the Supreme Court of Western Australia upheld a conviction for supplying intoxicating liquor(44). On appeal, the Court held that justices were entitled to take into account local circumstances which affected the seriousness of the offence(45).

In 1984 that Court acknowledged the difficulties facing country justices and magistrates who 'are responsible for maintaining law and order in their areas and...look to this Court to support them in that regard'(46). It nevertheless upheld an appeal against sentence which was imposed by the local magistrate to enable the offender to be treated for alcoholism while in custody. A similar expression and a similar result obtained in South Australia in 1982(47).

(e) Analysis of criminal/alcohol cases in the *Bibliography*

It must be emphasized that the *Bibliography* cites cases heard mostly in Supreme Courts - or their equivalent or superior : thus the jurisdiction of the lower Courts, such as Petty Sessions, Children's Courts - and District or County Courts, has been left untouched. This is particularly important for a proper understanding of the presentation of the cases and of the fieldwork. The cases which are cited have dealt with alcohol whether as a primary, aggravating, or mitigating factor. The vast majority of alcohol or alcohol-related offences have involved misdemeanours dealt with at local level by a magistrate or by justices. The superior Courts deal with the more serious crimes - the indictable offences - or as a Court of appeal from lower Courts. Alternatively, they may try a lower Court matter *de novo*.

However, their position in the hierarchy, and the fact that many of their

Table 1.

Chronological Tabulation of Aboriginal Superior Court Actions

	1788-1838	1839-1887	1888-1937	1938-1963	1964-1973	1974-1983	Total 1788-1983
Supply Consume, receive alcohol				1			1
Offences against property							
Break, enter, steal		2		4	2	29	37
Larceny, embezzlement, receiving					1	9	10
Arson						1	1
Offences against Person:							
Murder/Manslaughter by:							
Drunk H of drunk W					1	7	8
Drunk W of drunk H				1			1
Drunk child of drunk parent						4	4
Drunk male of drunk female						1	1
Drunk female of drunk male				1		2	3
Drunk male of drunk male				1	1	4	6
Drunk male of non-drunk male				1		7	8
Drunk H of non-drunk W						4	4
Non-drunk male of drunk male					1		1
Non-drunk male of non-drunk male	3	5	3	6	4	19	40
Non-drunk H of non-drunk W		2		1	2	1	6
Non-drunk parent of child				2		1	3
Non-drunk female of non-drunk female				1	1		2
Sexual Assault By:							
Drunk male of drunk female						6	6
Drunk male of non-drunk female				1		11	12
Drunk male of male						1	1
Male of female				1	1	8	10
Male of Male					1		1
Non-sexual Assault By:							
Drunk male of drunk female						1	1
Drunk male of drunk male						1	1
Drunk male of non-drunk male		1		1		7	9
Non-drunk male of drunk male		1		1		3	5
Non-drunk male of non-drunk male				3		5	8
Non-drunk male of non-drunk female				1		1	2
Female of male				1			1
Drunk male of non-drunk female						4	4
Offences against Public Order			1	2	4	31	38
TOTAL CRIMINAL	3	11	4	30	19	168	235
Common Law				2	1	14	17
Statutory					2	24	26
Administrative Law		1	1	2*	1	14	18*
Conciliation and Arbitration			1	1	2	4	8
Equity			1	1	1	9	12
Family		1*		1	3	5	19*
Ejectment, electoral, legal status				2		3	5
TOTAL CIVIL		1	3	8	9	68	89
TOTAL	3	12	7	38	28	238	326

* Two civil matters included in more than one category; excluded from 1788-1983 totals.

decisions are reported, gives the Supreme Court decisions an authority binding on lower Courts. The Supreme Courts play a critical role in the interpretation and enunciation of law, legal principles, and legal guidelines. Their appearance in this part is merely to quantify the incidence of alcohol.

Table 1 examines 326 *Bibliography* cases available at the time of completion of my research. A number of broad themes may be stated.

Firstly, non-Aborigines committed the vast majority of offences relating to the supply of alcohol to Aborigines : only one case in 21 had an Aboriginal defendant. Secondly, the era of liberalized drinking for Aborigines - 1962-1972 - did *not* result in a greater number of Aboriginal homicides. Indeed that period shows a decline. Thirdly, the last decade reveals a marked increase in drunken Aboriginal homicides, particularly by males. Fourthly, homicides within families similarly increased and accounted for 30% of all homicides. Fifthly, sexual assaults were committed by a drunken male assailant in 63% of cases and drink was a factor in 20 of 31 non-sexual assaults.

Sixthly, alcohol was present in at least 36% of all criminal cases cited, and in 40% of all offences against the person. Seventhly, such offences were specific rather than random and the weapon used reflected the living conditions and general environment of the offender. Thus, a firearm was used in only two of the cases. *Nulla Nullas*, knives, sharpened sticks, and tomahawks - the armoury of a non-urban, 'primitive'/traditional society - were the weapons employed in the great majority of cases. Apart from domestic disputes, most of the deaths and assaults occurred within a community relationship, in which the victim knew the assailant. Homicides often occurred during, and as a result of, a group drinking spree.

The Northern Territory stands out in the statistics on Aboriginal crime as cited in the *Bibliography*. Table 2 analyses by jurisdiction the 238 *Bibliography* cases reported in the decade 1974-1983. Intoxicated Aborigines, for example, committed 40% of Northern Territory 'break and enter' cases in that period, but this figure underscores the offences subsequently committed (rape, intent to rape) which are dealt with in the category of sexual assaults. Drunken homicides in the Northern Territory accounted for 73% of all Northern Territory homicides, and for 76% of the national total.

Table 2.
1974-1983

Criminal	N.S.W.	A.C.T.	Vic.	Qld.	S.A.	N.T.	W.A.	Total
Offences against property:								
Break, enter, steal	1		1		2	20	5	29
Larceny, embezzlement, receiving	2					7		9
Arson						1		1
Murder/manslaughter by:								
Drunk H of drunk W	1			1		4	1	7
Drunk child of drunk parent *1						4		4
Drunk male of drunk female				1				1
Drunk female of drunk male						2		2
Drunk male of drunk male	1					2	1	4
Drunk male of non-drunk male						6	1	7
Drunk H of non-drunk W						4		4
Non-drunk male of non-drunk male	5			1	3	7	3	19
Non-drunk H of non-drunk W						1		1
Non-drunk parent of child							1	1
Sexual assault by:								
Drunk male of drunk female						6		6
Drunk male of non-drunk female	3					8		11
Drunk male of male						1		1
Male of female	1			1		5	1	8
Non-sexual assault by:								
Drunk male of drunk female						1		1
Drunk male of drunk male						1		1
Drunk male of non-drunk female						4		4
Non-drunk male of drunk male	1				1		1	3
Non-drunk male of non-drunk male						2	3	5
Drunk male of non-drunk male	1					6		7
Non-drunk male of non-drunk female						1		1
Offences against public order	2	1		3	6	11	8	31
					Total Criminal			168

*'Parent' includes step-parent or person *in loco parentis*

Civil	N.S.W.	A.C.T.	Vic.	Qld.	S.A.	N.T.	W.A.	Total
Common Law	3				3	6	2	14
Statutory	1					22*2	1	20*2
Administrative law/prerogative writs	3			2	1	6*3	2	14*3
Conciliation and arbitration/employment				1	1	1	1	4
Equity	1		2	2		3*4	1	8*4
Family law/custody	1		1		2		1	5
Ejectment/electoral/legal status						2	1	3
					Total Civil			68

*2 4 of the Statutory cases also sought prerogative or equitable remedies and are included in the latter's total

*3 3 of the prerogative cases also dealt with land rights claims

*4 2 of the injunctive cases dealt with land rights or prerogative writ matters; 1 of these is included in the statutory cases' total

Total	238

Sexual assaults in the Northern Territory accounted for 77% of the national total in that decade, with drink a factor in three-quarters of all sexual assaults in the Territory and 83% of the national total. Non-sexual assaults repeat the pattern of the Northern Territory's dominance in alcohol-related crimes of violence. Four-fifths of the Territory's cases cited in the *Bibliography* came within this category, and accounted for 92% of the national total.

Too much can be made of the raw data, but clearly they support and reinforce the judicial concern of Forster and Muirhead that 'something must be done'. A distinction needs once again to be made on the underlying causes and the extent of the drinking problem - and it clearly is a serious societal problem - in the Northern Territory. The figures cited are those almost exclusively of the indictable offences, heard at first instance by a Supreme Court judge. They do not show the petty offences, the misdemeanours, or drunkenness, driving under the influence, offensive behaviour, possession of alcohol in a 'closed' community and the like, dealt with locally.

It may be possible to call in aid the hypothesis developed by Emanuel Marx. An anthropologist who worked among black Israelis at the lower end of the socio-economic spectrum, and whose societal values were subject to the same ethnocentric pressures of the kind exerted on Aborigines, he developed the concepts of 'appealing violence' and of 'coercive violence'(48). The former is a demonstration of man at the end of his psychological tether, unable to achieve a social aim unaided by others. He manifests his 'appeal' for help by battering himself, his wife, and children, other objects normally prized and loved. His is a form not of immolation but of visible disintegration manifested in conspicuous and excessive consumption of alcohol. A person uses 'coercive' violence, on the other hand, rationally and in premeditated and controlled manner, as an extreme but often effective means towards achieving a social objective.

Aborigines in the Northern Territory have the legal and financial means to consume alcohol. Their alcohol 'problem' is not considered by whites and by other levels of Aborigines as mateship, camaraderie, conviviality, still less a means of social acceptability and mobility. Nor does it seem to fall within the other criteria usually stated as 'the' explanation, or one of them. Thus it is difficult to assert with any confidence that 'it's a way out of poverty' - or 'pain' - that 'it's a way of obliteration', of shutting out or anaesthetizing the destruction of so much of their heritage and culture; or that 'it's a form of defiance', a reaction to boredom and *ennui*. Rather, their 'criminal' behaviour seems less a protest against society and more an appeal for help in terms of Marx's critique. And that appeal directs attention to the fragmentary and divisive nature of the response by whites to land rights and the continuing politico-legal struggles over land rights in the Northern Territory between white and black authority, and between and within Aboriginal communities.

Finally, it seems that the 'appealing violence' of many Northern Territory Aborigines reflects the legacy of a denuded and denied identity, the struggle to attain and maintain it within a threatened cultural *milieu* and a legal deprivation or refusal of the means to protect it. The conflict between Aboriginal demands and white-imposed means inconsistent or in conflict with them creates a *Catch-22* situation which the disadvantaged and desperate can resolve only by resorting to violence.

(f) Analysis of fieldwork in New South Wales : the *Intoxicated Persons Act 1979*

The 1979 Act ('the Act') was one of 16 cognate enactments in 1979 repealing, amongst others, the *Summary Offences Act 1970*. Section 6 made it an offence to be drunk in a public place or school and imposed a maximum penalty of $10. The 1970 legislation made a criminal offence of something which had been an offence at least since 1901 when the *Police Offences Act* made it an offence to be drunk or drunk and disorderly(49). The populations, the number of convictions, and the population rates for convictions for public drunkenness in New South Wales under the pre-1979 legislation appear in Appendix II. The essence of the 1979 legislation was the decriminalization of drunkenness, and the detention of the person intoxicated in a 'proclaimed place' if he were behaving in a disorderly manner, or likely to cause injury to himself or another person or damage to property, or was in need of physical protection because of his incapacity(50). The maximum period of detention prescribed was eight hours, and release to a responsible person willing to undertake the care of the intoxicated person was also provided(51). The Act commenced on 17 March 1980, and at the time of my fieldwork between April 1980 and June 1981 no places for detention had been 'proclaimed' in any of the centres I visited; accordingly the police cells were the only other proclaimed places for purposes of detention. Section 8 of the Act exempted police, lock-up keepers and those administering the Act from legal action for acts or omissions if done or omitted in good faith.

Table 3

Persons Detained Under *Intoxicated Persons Act 1979* (NSW)

AGE	16-20				21-25				26-30				31-35			
	BM	BF	WM	WF	BM	BF	WM	WF	BM	BF	WM	WF	BM	BF	WM	WF
Armidale	13	-	13	-	2	1	6	-	3	-	4	-	3	-	7	-
Bega	3	-	11	-	-	1	7	-	1	-	2	-	-	-	-	-
Bourke*	5	3	1	-	4	-	1	-	4	5	1	-	3	1	1	-
Brewarrina*	10	3	-	-	16	6	1	-	33	18	1	-	9	1	-	-
Broken Hill	-	-	3	-	-	-	6	-	1	-	1	-	-	-	-	-
Casino	1	-	2	-	-	-	-	-	-	-	1	-	-	-	-	-
Coonamble	-	-	-	-	-	-	-	-	2	-	-	-	-	-	-	-
Dubbo	2	-	-	-	2	-	2	-	3	-	1	-	1	-	1	-
Eden	3	-	5	-	-	-	4	-	-	-	1	-	-	-	-	-
Enngonia*	1	-	-	-	1	-	-	-	2	-	1	-	1	1	-	-
Grafton	-	-	3	-	-	-	-	-	-	-	-	-	-	-	1	-
Kempsey	8	1	-	-	4	-	4	-	1	-	1	-	2	-	-	-
Lismore	-	-	2	-	-	2	-	-	1	-	-	-	-	-	-	-
Maclean	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Moree*	3	-	1	-	3	-	1	-	-	-	-	-	-	-	2	-
Narooma	5	-	8	-	-	-	4	-	1	-	-	-	-	-	1	-
Nowra	6	3	25	3	5	-	11	1	3	-	8	2	9	1	6	1
Redfern	4	-	7	-	3	-	7	-	6	-	5	-	8	-	13	1
Tamworth	-	-	7	-	2	-	4	-	-	-	10	-	-	-	3	-
Taree	7	-	11	-	9	-	22	-	-	1	5	-	1	-	4	-
Tingha	-	3	-	-	3	-	3	-	1	2	-	-	-	-	-	-
Walgett*	3	3	-	-	24	2	3	-	21	6	2	-	20	2	-	-
Wee Waa*	2	-	1	-	-	-	-	-	1	-	-	-	-	-	-	-
Wellington	2	-	-	-	-	-	-	-	1	-	1	-	-	-	-	-
Wentworth	-	-	1	-	-	-	-	-	-	-	-	-	-	-	-	-
Wilcannia*	2	2	-	-	1	2	-	-	3	2	1	-	10	3	1	-
Woodenbong	-	-	-	-	1	-	-	-	-	-	-	-	-	-	-	-
	80	18	101	3	80	14	86	1	88	34	46	2	67	9	40	2

AGE	36-40				41-45				46-50				51-55				56-82			
	BM	BF	WM	WF	BM	BF	WM	WF	BM	BF	WM	WF	BM	BF	WM	WF	BM	BF	WM	WF
Armidale	4	-	6	-	6	-	2	-	-	-	-	-	-	-	1	-	1	-	-	-
Bega	-	-	-	-	-	-	2	-	-	1	-	-	-	-	1	-	2	-	1	-
Bourke*	5	1	1	-	9	1	-	-	4	-	-	-	1	3	1	-	6	-	4	-
Brewarrina*	9	4	-	-	64	12	-	-	51	2	-	-	37	37	2	-	6	-	-	-
Broken Hill	-	-	-	-	-	-	1	-	-	-	1	-	-	-	5	-	-	-	6	-
Casino	-	-	-	-	-	-	-	-	-	-	-	-	-	-	2	-	-	-	-	-
Coonamble	1	-	-	-	1	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Dubbo	-	-	1	-	-	-	-	-	1	-	2	-	1	-	-	-	1	-	1	-
Eden	-	-	-	-	-	-	-	-	-	-	1	-	-	-	-	-	1	-	4	-
Enngonia*	2	-	-	-	-	9	-	-	-	-	-	-	7	-	-	-	-	-	-	-
Grafton	-	-	-	-	-	-	3	-	1	-	2	-	-	-	1	-	-	-	-	-
Kempsey	-	-	-	-	-	-	1	-	1	-	1	-	-	-	1	-	2	-	4	-
Lismore	1	-	-	-	1	3	8	-	-	-	3	-	1	-	1	-	3	-	1	-
Maclean	2	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Moree*	-	-	2	-	3	-	1	-	1	-	-	-	-	-	14	-	-	-	2	-
Narooma	-	-	1	-	-	-	-	-	-	-	-	-	-	-	1	-	2	-	1	-
Nowra	3	-	2	-	3	1	3	-	9	1	2	1	6	-	7	-	15	-	9	1
Redfern	3	-	1	-	7	-	4	-	9	-	1	-	2	-	10	-	1	-	13	-
Tamworth	-	-	1	-	-	-	1	-	1	-	-	-	-	-	4	-	-	-	2	-
Taree	-	-	1	-	11	-	2	3	-	-	3	-	1	-	-	-	2	-	4	-
Tingha	2	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Walgett*	31	8	-	-	22	3	1	-	23	-	1	-	11	16	-	-	69	-	1	-
Wee Waa*	-	-	4	-	4	-	3	-	-	-	2	-	-	-	-	-	2	-	1	-
Wellington	-	-	1	-	-	-	-	-	2	-	1	-	-	-	1	-	-	-	-	-
Wentworth	-	-	-	-	-	-	-	-	1	-	2	-	-	-	-	-	-	-	-	-
Wilcannia*	1	1	-	-	2	-	-	-	4	-	1	-	4	1	1	-	-	-	1	-
Woodenbong	-	-	-	-	3	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
	64	14	21	-	136	29	32	3	108	4	23	1	71	57	53	-	113	-	55	1

AGE	Total				Grand Total
	BM	BF	WM	WF	
Armidale	32	1	39	-	72
Bega	6	2	24	-	32
Bourke*	41	14	10	-	65
Brewarrina*	235	83	4	-	322
Broken Hill	1	-	23	-	24
Casino	1	-	5	-	6
Coonamble	4	-	-	-	4
Dubbo	11	-	8	-	19
Eden	4	-	15	-	19
Enngonia*	14	10	1	-	25
Grafton	1	-	10	-	11
Kempsey	18	1	12	-	31
Lismore	7	5	15	-	27
Maclean	2	-	-	-	2
Moree*	10	-	23	-	33
Narooma	8	-	16	-	24
Nowra	59	6	73	9	147
Redfern	43	-	61	1	105
Tamworth	3	-	32	-	35
Taree	31	1	52	3	87
Tingha	6	5	3	-	14
Walgett*	224	40	8	-	272
Wee Waa*	9	-	11	-	20
Wellington	5	-	4	-	9
Wentworth	1	-	3	-	4
Wilcannia*	27	11	5	-	43
Woodenbong	4	-	-	-	4
	807	179	457	13	1,456

* 'Aboriginal' towns identified by the New South Wales Bureau of Crime Statistics and Research as having the highest known concentration of Aborigines based on 1976 census figures. Wee Waa included because of the concentration of its Aboriginal seasonal workers.

The Act thus decriminalized what was for more than 80 years a criminal offence, but retained the agents and instruments of enforcement, namely police and police detention. Table 3 shows the number of persons detained in New South Wales under the Act from its inception to the time of fieldwork. It shows the number in each age, sex, and racial group in each town. Those towns shown as 'Aboriginal' provided records of the first six weeks' operation of the Act. The Table shows firstly, that in every age category except 16-25 for males, and 56-82 for females, Aboriginal detainees vastly outnumbered white detainees notwithstanding the greater numbers of white population. The absence of Aboriginal females in the 56-82 age bracket most likely derives from their lowered life expectancy and higher mortality at this age. Secondly, the Far West accounts for a grossly disproportionate number of detentions and of those Brewarrina stands out. There they comprised approximately 36% of the total population but represented over 98% of detentions. An Aboriginal female was 46 times more likely to be detained than a white woman. Even in Moree where more whites(72%) than Aborigines (29%) were detained, Aborigines comprised only 12% of the population. The incidence of detentions relative to size of the respective populations again shows an alarming and disproportionate number of detentions. For Aborigines in Bourke the figure in the first *five weeks* was 7%. But in Brewarrina for the same period, the figure was equal to 64% of the entire Aboriginal population. Those statistics are not a mistake. In Wee Waa the number of Aborigines detained represented 8% of their population, or a ratio nearly 14 times greater than for the corresponding white population. In Bourke Aborigines were 22 times more likely to be detained than whites, and in Wilcannia 20 times(52).

A number of factors suggest themselves. Firstly, the 'public' nature of the act of drinking, and police access in enforcing or carrying out the legislative requirements. Very few of the country towns I visited had clubs with any sizeable number, and even less proportion, of Aboriginal membership. Walgett R.S.L. Club, for example, had 45 Aborigines of a total membership of 1,450(53); Walgett District Sporting Club had 30 of 1,200(54); and there was none in Brewarrina R.S.L. Club(55). The paucity in numbers suggests more than inability to pay the requisite fee, the most commonly stated reason. Group pressure not to join has doubtless discouraged many Aborigines, inducing in those who have a feeling of discomfort and anxiety to prove their worthiness as a member, often leading to identity crises as fear of rejection by whites becomes greater than fear of rejection by the Aboriginal community. However, the absence of general recreational facilities in many of the towns I visited, particularly in a Far West enduring the worst drought in living memory, encouraged in Aboriginal men and women alike a hotel-community feeling, a camaraderie strengthened by the common bond of colour, culture, and unemployment. A recent Northern Territory judgment puts it succinctly : there was 'the pervasiveness of a culture which has not come to terms with them and with which they have not come to terms, except insofar as there is by and large a tacit agreement to live separately'(56).

I am unable to agree with Beckett that alcoholism was sufficiently prevalent to be sign of adult male status(57). The figures in Table 1 indicate that female alcoholism starts earlier than male, and has earlier, and far more devastating, effect. The youngest age group shows Aboriginal females aged between 16 and 20 detained six times more frequently than their white counterparts. The ratios worsen with age : 14 to 1 for women aged 21 to 25 and 17 to 1 in the 26 to 30 years category; 14 times in the age group 36 to 40, and almost 10 times in that 41 to 45. Only in age group 31 to 35 was there a significant decrease, but the ratio was still almost 5 to 1. The astounding ratio of 57 times for the age group 51 to 55 is misleading in that it represented the multiple detentions of the same females.

Aboriginal males detained greatly outnumbered whites in every age group over 25; even in the 21 to 25 category there was almost parity. Lack of employment and ineligibility for any social security benefits until they reached 18 probably accounts for the fewer number of Aboriginal youths, the ratio even there being 4 to 5. Nor is it a sign of adulthood : the depressing aspect of the figures is that Aboriginal youths in most NSW country towns are introduced to a communal pattern of drinking at a fairly early age. The domestic environment not only does not inhibit, but positively encourages drinking, although it should be added that certain communities of fundamentalist Christian commitment - such as Woodenbong - have a minimal drinking problem. The benefit of assured income, in the form of social welfare benefits; the lack of alternatives on which to spend what is really (in the absence of mortgage commitments and of widespread car ownership) a continuously discretionary income; the overwhelming sense of isolation of country towns in the Far West and North West(58); and a pervading climate of the inability or the futility of regular, 'meaningful', employment, combine to create the conditions in which the 'lowest-common-denominator' is the status of the deprived country Aborigine. The 'poor white' doubtless exists, but he seems less visible, or is more

Table 4. Penalties imposed by justices of the peace for drunkenness in each location for each race (B = Black, W = White), Sex (M = male, F = Female) and amount

Zone	Period	Race & Sex	Admonished & Discharged	Recognizance $1	Recognizance $5	Recognizance $10	No appearance of defendant : Recognizance forfeited $
Far West - Bourke	Jan 79	BM	2	17	1	16	20 (unknown), 13 ($1)
		WM	1	-	1	6	8 (unknown), 7 ($1)
		BF	-	6	-	3	6 (unknown), 3 ($1)
		WF	1	1	-	-	-
Brewarrina	Apr 79	BM	-	15	-	19	13 ($10)
		WM	-	2	-	-	-
		BF	-	7	-	6	25 ($1)
		WF	-	-	-	-	-
		Unknown	34	-	-	89	-
Wee Waa	78-79	BM	-	-	-	-	-
		WM	-	-	-	-	-
		WF	-	-	-	-	-
		Unknown	-	970	-	4	-
Wilcannia	Jan-Mar 79	BM	-	140	-	-	-
		WM	-	-	-	-	-
		BF	-	-	-	-	-
		WF	-	-	-	-	-
	Jan-Mar 80	BM	-	-	-	-	-
		WM	-	-	-	-	-
		BF	-	49	-	-	-
		WF	-	-	-	-	-
North Coast - Grafton		BM	-	-	-	-	-
		WM	-	-	-	-	-
		WF	-	-	-	-	-
		Unknown	-	61	-	-	-
Kempsey		BM	-	20*	-	-	-
		WM	-		-	-	-
		BF	-	40*	-	-	-
		WF	-		-	-	-
Maclean		BM	-	5	-	-	-
		WM	-	6	-	-	-
		BF	-	-	-	-	-
		WF	-	1	-	-	-
TOTAL			38	1304	2	143	95

* Race unknown

mobile, or is subject to greater (white) community feeling without a network of support in the shared denominator enjoyed by Aborigines. Accordingly, the pervading atmosphere of intoxication seems to substantiate Marx's concept of 'appealing violence'.

Prior to its repeal in 1982(59), the *Liquor Act 1912* regulated the sale and supply of intoxicating liquors. Police were given powers as inspectors or sub-inspectors(60) to inspect licensed premises(61) (including registered clubs(62)), day or night, if they reasonably suspected that a breach of the *Liquor Act* was being committed(63). Moreover, a licensee could request the assistance of any police constable to refuse admittance to, or cause to be turned out, of licensed premises any person then 'drunk, violent, quarrelsome, disorderly, or who is using disgusting, profane or foul language'(64). Any persons whose presence might involve the licensee in a penalty - such as those drunk, under age, or inebriated - could also be expelled under police authority. A licensee, for example, was liable to a penalty not exceeding $200 for the sale, supply or delivery of liquor 'to any person who is at the time in a state of intoxication'(65).

Police had the power to have 'a person who habitually uses intoxicating liquor or intoxicating or narcotic drugs to excess' declared an 'inebriate' under the *Inebriates Act 1912*: supply to such a person by a licensee also involved a penalty of $200. In my fieldwork I examined the records of detention of 1,456 persons under the *Intoxicated Persons Act* and 362 for drunkenness under the *Summary Offences Act*. Not one had been declared an inebriate, even though in Brewarrina, for example, the five worst offenders convicted for drunkenness in 1979 were a male, aged 43, with 151 convictions; a female (43) - 147; a female (52) - 138; a male (45) - 129; and a male (50) - 126. No action had been taken, so far as Court records show, against licencees for breaches of the *Liquor Act*.

Table 4 shows the penalties imposed by justices of the peace for drunkenness in Far West and North Coast zones. Penalties were either admonitions and discharges, or recognizances of prescribed amounts. As can be seen from the table, Aborigines attracted a greater number of the maximum of ($10) recognizances than whites. Bourke and Brewarrina were the only places in the State regularly setting recognizances at a level beyond the capacity of the person to pay, necessarily resulting in their imprisonment in default. Justices or Clerks of Petty Sessions imposing such amounts, generally without time to pay, did so for misconceived reasons. It was said that gaol would benefit the prisoner because it enabled him to 'dry out'; he would receive nourishing food; he 'enjoyed the exercise' of keeping the lock-up surrounds neat and tidy; and, in winter, he had shelter and warmth. Nevertheless imposing a fine beyond the known capacity of the person to pay is 'an indirect means of imposing a penalty'(66) which superior Courts have been quick to condemn, however honourably and charitably motivated the tribunal(67).

A common complaint I heard during my fieldwork was that police would walk through hotels picking up drunks, and then always Aborigines. 'White' clubs were rarely policed because, it was said, they were 'private'. When I was in Walgett and Brewarrina I observed what seemed to be regular, routine patterns of police patrol through hotels, and the collection of intoxicated persons. The number of detentions and the site of detention for Aborigines and whites appears in Table 5.

Table 5 Sites of arrest for drunkenness of Aborigines and whites in towns in the fieldwork

	Aborigines	Whites
Street	476	395
	76.0%	88.4%
Hotel/Wine Bar	85	6
	13.6%	1.3%
Park	49	9
	7.8%	2.0%
Police Station	6	11
	1.0%	2.5%
Hospital	4	5
	0.6%	1.1%
Other (showground, railway station, oval).	6	21
	1.0%	4.7%
Total	626	447

The numbers of persons found intoxicated in hotels accounts for only 8% of the total of 1,073 detentions, but the Aboriginal detentions of that kind were 10 times that for non-Aborigines. If the figures for Brewarrina are removed from the table white and Aboriginal detentions are comparable to absolute terms, but still disproportionate in terms of population(68).

Comparing the position in Walgett before the Act and in Brewarrina after similar patterns occur.

The disturbing feature of these data is that they highlight the continuing dealing of Aborigines with police, in public, and that there seems a curious reluctance to undertake the remedial action then available both to enforce the legislation against defaulting licensees, and to have chronic alcoholics declared 'inebriate'. Where police discretion has been exercised, it is in favour of the supplier of the intoxicant and against the person affected thereby. My figures of 1,456 detentions for intoxication and 362 charges of drunkenness compare unfavourably with those of Eggleston in Western Australia and suggest that the Aboriginal position has deteriorated over 12 years in New South Wales[(69)]. As against that, however, are the fewer legal constraints, the greater 'assimilation' in New South Wales, and the greater availability of social service benefits than when she wrote. She was writing, also, in respect of 'Aboriginal towns' : my figures encompass New South Wales equivalents, and more. On balance, therefore, the decriminalization of drunkenness in New South Wales has not diminished police-Aboriginal contact and the exercise of statutory powers and authority by one over the other.

The computer analysis of my fieldwork data substantiates similar, apparently discriminatory, attention by police to Aborigines in country areas, which is at the least over-zealous (see Table 6 below).

Table 6

(a) Alcohol-related offences

Charge	Aboriginal Male	Aboriginal Female	White Male	White Female
PCA	71	4	62	-
SAA	63	27	29	3
Unseemly words	36	29	8	1
Offensive behaviour	31	7	5	-
Drunkenness	19	6	2	-
DUI	16	1	13	-
Fail to quit licensed premises	9	-	-	-

(b) Breathalyser alcohol content for PCA offences

	Aboriginal	White
0.050-0.099	3	1
0.100-0.149	15	19
0.150-0.199	18	14
0.200-0.249	14	9
0.250+	8	6
Unknown	17	13

(c) Fines imposed for PCA offences

	$100-$200	$201-$300	$301-$400	$401-$500	Over $500	Total
Reading 0.050-0.099						
Aboriginal	2	1	-	-	-	3
White	1	-	-	-	-	1
Reading 0.100-0.199						
Aboriginal	6	7	5	4	3	25
White	4	9	11	6	3	33
Reading 0.200 or more						
Aboriginal	2	3	6	2	1	14
White	-	-	1	5	9	15
	15	20	23	17	16	91

Drink-related offences show a strong correlation between drink, deviant behaviour, and police attention (Table 6 (a)). Aboriginal drivers charged with 'prescribed content of alcohol' (PCA) and 'driving under the influence' offences outnumber, in absolute terms, their white counterparts, accounting for almost 30% of all PCA offences in the range .150-.249 (Table 6(b)). Whites, however, attracted more substantial fines once convicted of PCA offences (Table 6 (c)). For example, of those fined over $400, 70% were white, while of those fined under $400 only 45% were white. The conclusion to be derived is that the generally more affluent white population is not attracting the same degree of police attention in the country for drink-driving offences as are Aborigines. But once in Court, and upon conviction, they are being fined more substantially than Aboriginal defendants. The reasons are relatively straightforward. Country whites are employed, and Aborigines generally are not; and country whites generally have both a credit rate and access to credit facilities, such as Bankcard, which Aborigines lack.

Seasonal variations also were evident : Aborigines accounted for 70% of summer offences but 83% of winter offences (see Appendix 5.1 for the number of offences by Aborigines and by whites for the periods October-March and April-September). Such employment as they enjoy is generally seasonal, the greatest demand for their labour being in summer for grape and fruit picking, and for cotton chipping. Winter months provide less opportunity for work, and more for spending earnings on alcohol.

(g) Conclusions

The improvement in the legal and economic 'stature' of the Aborigines has not been matched by a decrease in police surveillance or attention. The New South Wales experience suggests that the discretionary powers reposed in police under the Act are being used as a means of 'nuisance' control rather than for the benefit of the individuals concerned. The Brewarrina results, although an aberration, should not overshadow the extent of well-meant but excessive use of discretion generally in the Far West of the State. My observation of police operations generally was that of their 'tidying up' what they considered a social nuisance of chronic proportions. The Act provides for detention for a maximum of eight hours[70]. What the legislation failed to take into account was that, except in those country towns boasting a 24-hour police station, the proclamation of police cells as proclaimed places negated that aspect of the Act if the cells were locked at 11 pm and not opened until

6 or 7 am.. In Grafton, six of seven Aboriginal detainees in April-June 1980 were released between 5.10 - 6.10 am, presumably without breakfast and certainly without transport; in Armidale, on the other hand, three whites were detained in October, 1980 for 12, 9 and 10 hours respectively; another for 12 hours in April 1980 and one for 10 hours in June of that year; the only Aborigines detained longer than the permitted maximum were a male (aged 36), detained from 6.55 pm - 8 am in July, 1980, and a male (aged 42) between 9.40 pm - 8 am in August 1980. I attribute no underhand motives for these detentions: if the Act is impossible of performance it should be amended.

The field research of lower Court and police records and the analysis of superior Court cases poses, but does not resolve, a crucial dilemma. The law as to consumption of alcohol addresses itself not to causes but to consequences. It reposes in law-enforcement agencies considerable discretions with very few, if any, limitations or fetters. The police are seen as using statutory power to enforce conformity to perceived 'community' standards. The Aborigine's response to crushing individual and extra-legal pressures is to 'appeal' for help in violent, self-abusive, fashion of a kind and degree almost certain to invoke criminal sanctions and the negative consequences of legal process. A whole construct is required to explore and expose the causal nature of behaviour *we* brand as aberrant. The problem is extra-legal as Courts in most jurisdictions have recognized. Sociology and anthropology have far more to contribute than does the process of law, particularly where tradition, custom or other normative forces still have some value and effect. Judicial recognition of the causes, and an effort (however belated) to understand the context within which they arise and are locally answered, may move the operation of law in a more appropriate direction. And the agencies of the law likewise need to be educated, trained, sensitive to the wider realities of their responsibility.

The statistics do not encourage a paradigm of Aboriginal lawlessness *per se* nor of innate Aboriginal propensity to alcohol or of inability to hold it. They do sustain my belief that determinism and racism are complementary, and that Aborigines currently endure those burdens far greater than do whites.

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 'For over 10 years sitting in this Territory, I have endeavoured to draw attention to the need for something to be done about the marketing, regulation and supply of alcohol, particularly to our Aboriginal community, the need for detoxification units, modern treatment and rehabilitation centres. I have not been alone in this exercise but it has been entirely fruitless. The courts can achieve little, if nothing. The Aboriginal councils appear to recognize the problem and it is the Aboriginal people who almost entirely suffer its consequences. One can only keep hoping that at national level there will be recognition of the seriousness and complexity of the problems coupled, I hope, with some action'.
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68.

	Street	Hotel	Park	Reserve	Police Station	Hospital
Walgett	73.4*	21.3	-	2	2.9	0.4
Brewarrina	65.4	24.6	9.7	-	0.3	-

* in %

Source : McCorquodale, op. cit., at p. 51.

69. Elizabeth Eggleston *'Fear Favour or Affection'*, Australian National University Press, Canberra, 1976; Table 2.1, p. 326.
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CHAPTER 16

LOCAL COURTS AND THE CHILDREN'S COURT OF NEW SOUTH WALES

Your race of people must be the most interfering race of people I have heard of. You are becoming a pest race in Wilcannia, wanting to interfere in the job of police. There is only one end to pests. Kenneth Patrick Quinn, SM cited in (1979) 4 *Legal Service Bulletin* 171.

(a) Magistrates' attitudes and perceptions

In common with their Northern Territory colleagues, the magistrates of New South Wales assert and enforce perceived 'community standards'. In the words of one magistrate: 'I have to enforce the law in the community as I see it, without distinctions'. But the question to be asked is; who and what *is* 'the community', particularly in some Far West towns where the Aboriginal and white population may be roughly equal or where Aborigines are a sizeable minority? One magistrate in such a location stated: 'You must remember this is a Court whose basic function is the interest of the community. That does not mean one thousand people in ('-') it means the whole of the State'. An Aboriginal female in that same location was charged with behaving in an offensive manner. The magistrate remarked:'I know there are some difficulties in living in ('-') and the life style here is different to anywhere I have seen. Even though you cannot be put outside the law (*sic*). You are entitled to move about the streets but if you place yourself outside the law then the Court must take some deterrent action'.

That magistrate saw the Court's role as punishing behaviour deviating from a State-wide norm. The problem with so many Far West communities is that they *are* different to the norms obtaining elsewhere within the State. The pervading sense of isolation, the lack of recreational facilities, of even reasonable employment prospects and then only in seasonal, low-esteem and poorly paid tasks, the impoverishment of hope and feeling of worth could not but result in aberrant behaviour. In Chapter 15, I referred to Christine McIlvanie's picture of life in Wee Waa. That was a life shared by *all*, although the economic malaise of Aborigines may - perversely -

condition them to a lifetime of lowered expectations. But I suspect that the human attributes of desire can never be erased from the psyche, however great the 'conditioning'.

Most Aboriginal cases of 'unseemly words' involve use of the words 'fuck' or 'cunt' or both. As another magistrate at a mid-North Coast town put it: 'I am a firm believer in one rule as far as conduct is concerned, and that is you don't use language anywhere that you would not use in front of your mother or father. If you become this way with your habits after consuming liquor you should give up the booze'. But where these are patterns of socially accepted behaviour within a certain societal unit, the law which purports to enshrine, express and enforce 'community' values rejected by that unit is unlikely to have even a deterrent effect.

Magistrates are aware of differences between Aborigines and Aboriginal communities. In Nowra I was told that the local Aborigines are different from those of Taree in that 'they have fitted in more easily and don't stand out too much'. In Lismore a 'different' type of Aborigine lived there, compared with those at Tweed Heads who had a higher 'strain' of 'Kanaka blood'. Aborigines were compared to 'Kanakas' in disadvantageous terms, the latter stated as being of bigger build, possessing more crinkly hair, more sociable, better looking, inclined to be better workers, better educated, better dressed, commit fewer offences, and present much better in Court. What was missing from this atavistic catalogue was a classification of brain size reflecting skull shape and body structure! Nevertheless, it is a widely-shared perception of at least social traits deriving from areas less isolated, less dispiriting. In Bourke I was assured by another judicial officer that there exists three kinds of Aborigines : those of 'the West', 'the Coast' and 'the city'. But the range of magisterial classifications does not, apparently, end there.

Once a distinction is made of differences within the Aboriginal community, how are they presented to the magistracy? Again, negative stereotypes emerge. At Tamworth, one Youth and Community Services report on a 14-year old Aboriginal girl described her father 'as a man who has achieved fairly well in terms of the Aboriginal community *by holding down a regular job for quite some time*' (my emphasis). In Kempsey, an eviction report to the magistrate described the Aboriginal family in these terms:

> There were spasmodic complaints received over the next 18 months mainly relating to drunken behaviour, bad language, disturbances

> which were dealt with at a local level. We feel that all reasonable steps have been taken *to encourage the family to meet an acceptable social standard* however (*sic*), it has been without success and it is considered that the only action available to the (Housing) Commission is to obtain vacant possession of the property...We feel that (the tenants) have had a very fair consideration from us, *we feel that we have done everything possible to be able to reconcile their social habits with that of the community*...(emphases added).

The remarks by Mr Quinn cited at the beginning of this Chapter are a classic example of patent racism, whatever the degree of exasperation underlying it. His expostulation voiced the feelings of many of the 'old-guard' of magistrates who worked their way to the bench after years of duty as Court officers, particularly Clerks of Petty Sessions and chamber magistrates. At one training seminar I attended in 1980, groups of magistrates attending a parallel course discussed Aboriginal and homosexual guest speakers in highly unflattering, generalized, terms. There was a form of group cohesion, of solidarity in both thinking and expression, which consigned those hapless guest speakers and the category they represented to a kind of limbo. The magistrates were unable to ascribe to those individuals any attributes other than those of a stereotype. The 'community standards' therefore reflect a personalized, narrowly pre-conceived, and highly prejudiced view of groups considered to be non-conforming, deviant, opponents of the established order. Magistrates as legal guardians seem also to perceive of police as the moral guardians of those standards in terms to be discussed in Chapter 18.

(b) Other analyses : Eggleston and the Anti-Discrimination Board (NSW)

Appendix III presents the methodology of my analysis of fieldwork data, the towns visited (Table 1), the computer code frame for the data collected (Table 2), the six categories of offences (Table 3), and the 64 individual offences - or groups of offences - comprising those six categories and subjected to individual computer analysis (Table 4).

At the time of my fieldwork the relevant Courts of summary jurisdiction in New South Wales were Courts of Petty Sessions, presided over by a stipendiary magistrate(1). For juvenile offenders(2) or young persons(3) the appropriate Court was the Children's Court presided over by a 'Special

Magistrate', in practice the stipendiary magistrate[4]. A number of differences between my field research and that of Eggleston thus emerge.

Firstly, there is not in New South Wales very much reliance on JPs to discharge judicial functions unlike, for example, Western Australia or Victoria; secondly, when she undertook much of her field research, the system of reserves and missions in Western Australia was still extant whereas in New South Wales they were substantially disbanded and their assets transferred elsewhere in the early 1960s[5]; thirdly, New South Wales enacted the *Bail Act 1978* which emphasized a general entitlement to bail and largely removed the discretion to refuse it. Thus bail, which featured so prominently as to frequency and amount in Eggleston's research in Western Australia, is largely absent from mine. The size of her fieldwork groups never exceeded 4000[6] and quite often was considerably less. However, in my fieldwork the number of cases cited for individual subjects very often exceeded hers (for examples, see Appendix V). While she concentrated on a number of 'Aboriginal' towns my fieldwork extended also to parts of New South Wales containing only 'pockets' of Aboriginal population. The Aboriginal population and its proportion to the total population given as at the 1976 census are contained in Table 5.2.

My analysis of certain offences may also be considered against results tabulated and published in 1982 by the New South Wales Anti-Discrimination Board (hereafter cited as 'Board') as its *Study of Street Offences by Aborigines*[7]. The Board's *Report* examines the operation of s. 5 of the *Offences in Public Places Act 1979* in 10 north-western 'Aboriginal' towns in NSW. The study examined the types of behaviour for which Aborigines were charged and whether there was any appreciable change in numbers charged under the new legislation compared with the old. Its further aim was to make recommendations to the State government to eliminate any discriminatory aspects. The geographical areas and the records of Courts and police researched by the Board were also traversed by me, and roughly at the same time and for the same periods, but the conclusions reached were dissimilar. My methodology differed from that of the Board, and the range of subjects dealt with by me was somewhat greater. The strength and interest of its *Report*, however, lies in the mass of data as to peripheral incidents of crime, the verification of which is somewhat arguable. Nevertheless it is a useful check on my research findings.

Eliciting conclusions from statistics evokes moral, intellectual, emotional dilemmas, particularly if they confound or confront shibboleths, truths, rank prejudice or personal theories. To avoid the lassitude which develops with the seemingly endless citation of raw data, to make the findings more readable, certainly more coherent, I shall endeavour to state the findings or conclusions at the beginning of major sections of each sub-chapter. These will be followed by a citation of the relevant tables for ease of reference and verification, but otherwise will not intrude on the narrative.

The reader should bear in mind that Eggleston's analysis as published was entirely of the criminal law, presented in 10 Chapters in a book of nearly 400 pages. There are certain advantages which accrue from a concentrated study which my thesis cannot enjoy. Ability to engage in wide-ranging narration, of descriptive analysis, is the most obvious benefit of which I - and the reader - are deprived in the analysis of my fieldwork. It may seem that the quantity of raw data is not matched by the quantity of analysis. That does not imply that the raw data should not be capable of better or more extensive analysis.

It is important and is presented as fully as space constraints allow so that the serious researcher may undertake further analysis or research. The totality of the material, however, is vastly less than that contained in the *Bibliography*, and the fieldwork was also proportionate to the product. But the work does complete for the mainland States the work pioneered by Eggleston and assumes a relevance and an importance from that factor alone.

(c) Age and sex of offender

Aboriginal juveniles accounted for more than six times the number of white juvenile offenders, but the ratio of offences by white males to white females was proportionately higher than for Aborigines. White female juveniles were charged with less than one tenth of all female juvenile crime and one third less 'white' crime than Aboriginal girls. Aboriginal girls accounted for nine times the amount of all juvenile crime than white girls (Table 5.3). I ascribe this to the heavier and more constant family constraints in the case of white girls, and to their ability or willingness to leave country centres for employment in cities. Aboriginal girls tend to remain in a given area where family and friends provide a supportive environment, albeit with fewer job opportunities.

Of all juvenile male offences, Aborigines accounted for 86% against 14% for whites. This, too, reflects lack of employment opportunities, the ready availability of social welfare, the greater family environment in a defined geographical or cultural area, and to the higher drop-out rate of Aboriginal males than for females. Most of the boys seem to be leaving school at or prior to School Certificate (Year 10) level, whereas the girls are continuing at least to Year 11, first or second term. At Brewarrina Central School, for example, of eight students in Year 11 in 1980, five were Aborigines, four female and one male. In Year 10, of 28 students 21 were Aborigines, 10 female and 11 male; and in Year 9, of 28 students, 12 were Aboriginal females and only six Aboriginal males(8).

In country centres white youths are more likely to be employed in family enterprises, particularly farms or other properties. The increasing mechanization of country properties and the effect of drought had also squeezed out what little employment opportunities there were for young males. Aboriginal males did not continue at school, despite their eligibility for a (Commonwealth) secondary school grant, because of the futility of educational qualifications in the face of extremely high unemployment. Employable skills would result in either no local job or a job away from the area, both unattractive results.

Female Aborigines appear even more disadvantaged than their male counterparts. An analysis of figures compiled at one Far West health clinic for Aboriginal pregnancies in one year shows that, by the time an Aboriginal girl has reached 21 she is likely to have had three pregnancies, and the number of pregnancies rises as she gets older(9).

The propensity to commit criminal offences seems to pass with adulthood, although Aborigines again far outnumbered white defendants. Twice the number of adult Aboriginal males were charged compared with adult white males, and more than eight times the number of Aboriginal females as against white females. But white adult males accounted for more than twice the proportion of total offences than white juveniles, suggesting an 'improvement' in adult Aboriginal behaviour, particularly following the decriminalization of drunkenness. A comparable 'improvement' also extends to adult females, the improvement factor being about one-third. There is a considerable discrepancy between my figures for Aboriginal female offences and those of the Board, but my data gives an overall State conspectus whereas the Board confined its research activities to 'Aboriginal Local Government Areas' (Table 5.4).

As mentioned in Chapter 15, more white women are detained for intoxication than black only in the age group of 56 years and over, reflecting the lower mortality of whites (see Table 3, Chapter 15). In no other age category were Aboriginal women detained less than six times more than whites, and for the age group 51-55 it was more than 30 times. For males, white drinkers were detained more than Aboriginal only for the age groups 16-25, and then those for the group aged 21-25 the numbers were almost equal. Aborigines on a *per capita* basis are vastly overrepresented by the figures. Those of the Board differ significantly from mine, but this again reflects its concentration on a narrower group.

(d) Type of offence

In every category surveyed, Aborigines accounted for a proportionately greater number of offences than did whites. Marked variations can be seen in the pattern of offences. Table 5.5 shows offences against six categories of subject matter committed by Aborigines and whites. In each category, Aborigines committed more offences in absolute terms than did whites. Aborigines committed proportionately three times more offences against 'good order' than whites, nearly 10 times those against 'justice', 14 times those against the person, six times in respect of property, and slightly more than an equal proportion of miscellaneous and traffic offences.

The table also shows that the 'good order' offences accounted for an almost equal proportion of the respective total of black and white offences, but that Aborigines offended against 'justice', that is, police, more than three times in the totality of their offences than whites. The inference which can be drawn is that Aboriginal-police contacts are not only more frequent, but that they more frequently result in charges against Aborigines.

Aboriginal offences against property accounted for 33% of their total, twice that of the whites. Only in the categories of 'miscellaneous offences' and 'traffic' matters did the white totals double those for

Aborigines. But each of those offers less opportunity for confrontation, is generally classified as a lower level of criminal behaviour, and attracts fewer gaol and more monetary penalties.

Individual offences by adults and juveniles, race, and sex are tabulated in Table 5.6. It can be seen that the greater number of offences were those of 'seriously alarm or seriously affront' (Item 1), break enter and steal (Item 30), steal (Item 32), PCA (Item 47), and motor licence offences (Item 52).

Aboriginal adult males committed twice the number of Item 1 offences than whites, but Aboriginal adult females 22 times. Aboriginal male juveniles committed five times more such offences than whites, and female juveniles three times. The rate of adult Aboriginal female offences in Item 1 is almost entirely referable to the nature of their public drinking habits in which drink is the great leveller, the matrix by which societal/community links are forged or sustained.

The pattern is repeated in the case of 'break enter and steal' except that it emerges as an almost exclusively male preserve. Thus adult male Aborigines were charged 15 times more than were whites, and juvenile male Aborigines almost 13 times. Aborigines accounted for 93% of Item 30 offences, and juvenile males for 76%. The pattern of crime indicates parental neglect and juvenile mischief. Some of the items stolen were ludicrous. In one country town it was a packet of potato crisps and a number of similar items valued at less than $2; in another, it was a carton of 'paddle pops'.

The items stolen were neither valuable nor excessive. The regularity of theft, mainly of foodstuffs or individual packets of cigarettes, does not indicate chronic or even mild criminality *per se* but more nuisance pilfering by impressionable, under- or un-supervised and bored young children. The component of 'break and enter' in the charge reinforces this assumption.

Female theft, on the other hand, did attract a sizeable juvenile Aboriginal number, 14 times that for whites, as against a ratio of 6 to 1 for juvenile male.

Item 47 (PCA) highlights the element of alcohol, Aborigines accounting for 58% of all such offences. Licence offences again reveal a pattern of over-representation of Aborigines, adult males being charged twice as greatly in number as adult whites, and Aboriginal male juveniles 50% more.

The net effect seems that, in petty offences, Aborigines attract greater attention, or by the nature of their activities come under greater scrutiny, than do whites of similar age or sex. But a record of trivial offences, police scrutiny, and minor convictions, seems to predispose to more frequent intervention by white authority. Items 10, 11 and 12 ('hinder, resist, assault police') conclusively establish this. Aborigines accounted for 88% of all such offences. 'Resist police' charges were more frequently laid, followed by 'assault police' and 'hinder police'. Not one white adult female or juvenile male was charged for any of these offences, and only one juvenile female ('resist police'). The Aboriginal total, on the other hand, was 24. This phenomenon will be more fully considered in Chapter 18.

Wide variations also occurred in the geographical distribution of offences. Table 5.7 analyses the figures numerically, and by proportion, for each of the six categories and each zone. The table shows that in the Far West, for example, Aboriginal offences against good order accounted for more than one-half of *all* such offences in the State, and accounted for almost 70% of all Aboriginal 'good order' offences compared with 46% for whites. In Moree, by way of contrast, these offences were committed almost equally. 'Good order' offences were far more likely to attract police attention and response in the Far West than any other part of the State. This leads to a more intense Aboriginal-police conflict situation. Aborigines in the Far West accounted for 16 times the number of these offences compared with whites, 13 times the number of offences against the person, and more than seven times the number of offences against property. Traffic offences by whites were greater than by Aborigines only in the Far West and North West. This is explained by the greater affluence of whites, their numerical strength, and the disproportionate ownership of vehicles. It perhaps needs to be emphasized that the figures being discussed are not on a *per capita* basis but are absolute.

How do the NSW figures for 1979-80 compare with Eggleston's for Western Australia 13 years previously? A substantial deterioration is evident in offences against 'good order', offences against the person and against property. The comparative lack of isolation of NSW Aborigines from country towns, their greater accessability and proximity to liquor outlets, and their assured income from social welfare have contributed to the differentials, not merely levelling the ratios observed in WA, but even reversing them[10].

(e) Employment status

Aboriginal defendants continue to represent the lowest end of the socio-economic spectrum. Unemployed Aborigines and those on a different form of pension greatly exceeded whites in absolute terms. Aboriginal unemployed accounted for more than half of *all* defendants, 15 times greater than comparable whites. Unskilled Aborigines accounted for almost one-fifth of *all* defendants, or almost eight times the proportion of whites. Unskilled Aboriginal labour and unskilled white labour were comparable in their representation of defendants, but 'skilled or professional' whites were seven times greater than Aborigines. The upward mobility of the former, and their greater capacity to pay fines, contrasts with the reduced or impoverished circumstances of the latter (Table 5.8, and contrast the Board's Table 3.5 included as Table 5.9).

Aborigines are not employed proportionate to their numbers in 'Aboriginal Local Government Areas'. When they are employed it is in respect of males to the near-total exclusion of females, in the lowest range of unskilled and the lower range of semi-skilled outdoor employment, and on a casual rather than a permanent basis. (Tables 5.10, 5.11).

These factors create aspects of financial instability, a climate of economic uncertainty or indifference, making it all but impossible for Aborigines, certainly those in the Far West, to compete on equal terms with whites for jobs, to acquire a home by mortgage loan, to work for a stake in the future of which they will be a proprietor. In the administration of criminal justice the most important consequence is the capacity to pay a fine and, conversely, the acceptance by judicial tribunals of the economic inequalities in imposing monetary penalties and granting realistic time to pay. These aspects are dealt with particularly in Sub-Chapter (h) below.

(f) Home address : social status

Aborigines in New South Wales country towns have a high degree of stratification within and between groups. There are, to use their expressions, 'up-town niggers' and 'down-town niggers', reflecting the possession of house, car, regular employment, acquisition of 'white-ness' and discarding or disparagement of other Aboriginal contact. Those in positions of discretionary authority carrying the capacity to recommend or distribute largesse, whether as members of National Aboriginal Conference, the ALS, Aboriginal Health Service, Aboriginal housing co-operatives, or as teachers aides and alcoholic rehabilitation workers enjoy enhanced social and political status and power in the eyes of the Aboriginal community and acknowledgment or respect by the white. Like satellites, people or groups may cluster around a person or may occupy an area possessing a a certain social cachet. Even out-of-town dwellers are differentiated according to residence on a former mission (recalling welfare, passivity, institutionalization) or reserve. In Walgett, for example, Dewhurst Reserve was in a flood-prone area; Gingi and Namoi were two other Aboriginal 'reserves', Namoi being considered superior to Gingi, both better than Dewhurst but neither as good as a residence in Walgett proper(11). Being closer to 'white' ways, however, seems to have increased the propensity to crime. Of 307 criminal charges against Aborigines in 16 months at Walgett 63% involved townspeople; only 8% involved people from Dewhurst; Gingi accounted for 24%, and Namoi for the remainder. This may be asserted by some to derive from intense psychological conflict, the trauma of being between two cultures/systems, of belonging to neither and leading to feelings of alienation, hostility, insecurity, tension, loss of identity(12). Addresses for adult and juvenile Aboriginal offenders were available in 92 cases. These present an interesting contrast. 54% of adult offenders came from a 'town' residence, and only 47% from a reserve; but juvenile offenders from Reserves represented 78% of offenders and only 22% came from a town. Those figures make no allowance for the markedly different conditions on reserves throughout the State, the standard of housing or the degree of Aboriginal pride in the given community.

(g) Legal representation

Aboriginal defendants were represented by legal aid more than white defendants. My figures are similar to those of the Board and represent a vast improvement over the situation obtaining at the time of Eggleston's research (Table 5.12 (a)). Very little difference in changes of plea from those of Eggleston are apparent so far as concerns Aboriginal defendants. As against that, however, the number of adjournments sought prior to final hearing of the matter for Aboriginal adult defendants was 2.6, but for juveniles it was 4.4; for white adults it was 3.8, and I came across no such results for white juveniles (Table 5.12 (b)). Adjournments may properly be sought and granted for any number of sound professional reasons : the illness or absence of defendants or witnesses, the need for additional documentary evidence or the failure to have such evidence collated and produced in time; the state of the Court list; the desire to hear a number of unrelated charges against the same defendant heard at the same time or the same charges arising from a common incident heard against a number of defendants; and the inability of defence counsel or solicitors to appear due to other professional commitments.

But in the course of conducting my field research I was told on numerous occasions by magistrates, by police, and by private practitioners that certain Aboriginal legal aid lawyers were seeking adjournments as a tactic deliberately to delay indefinitely the hearing of matters in themselves fairly straightforward, or to cause a sufficient effluxion of time, particularly in relation to juvenile offenders, as to show a reversion to good behaviour by the time the matter came on for hearing. In criminal cases, however, this is not at all an uncommon tactic. A reversion to good behaviour since the time of the original charge or since the preliminary hearing is a potent factor to be pleaded in mitigation of any penalty.

The corollary of defence delays may be seen in the incidence of changes of pleas. Aborigines and whites who change pleas do so overwhelmingly from 'not guilty' to 'guilty' than from 'guilty' to 'not guilty'. In most instances it would be rare to obtain or seek an adjournment where the initial plea is one of 'guilty' (Table 5.12(c)). The number of changes from 'not guilty' to 'guilty' by Aboriginal defendants is proportionately greater than for whites but in numerical terms, and having regard to their representation, is miniscule.

It would be misleading, therefore, to ascribe underhand or unprofessional motives to the defendant's representatives such as were voiced in the course of my fieldwork.

Final pleas, too, reflected the incidence of representation. My fieldwork shows that Aborigines pleaded 'not guilty' more than four times more often than whites; but a marginally higher percentage also pleaded 'guilty'. The increased availability of legal aid, and the continuing educative experience of its benefits, seems to have encouraged recourse to 'not guilty' pleas. Equally, the proportion pleading 'guilty' (69%) was lower than as found by the Board (76%) and significantly lower than found by Eggleston (94%). The proportion of white defendants pleading 'guilty' was also markedly lower than Eggleston. The 'not guilty' pleas showed a similar result. This reflects the growing awareness of legal aid, and recourse to it, the increasing community appreciation of the legal process, and the modern emphasis on individual rights. The efficacy of Aboriginal legal aid is seen in the paucity of matters proceeded with *ex parte* under s. 75B of the *Justices Act* - mainly traffic offences - which represented only 3% of Aboriginal matters but 21% of white matters. (Table 5.13).

(h) Court disposition of non-traffic offences

New South Wales Aboriginal adults continued to suffer a higher proportion of imprisonment than white defendants. The rate for Aborigines was greater than for whites in terms of total disposition of their respective offences, in terms of the alternatives, and as a proportion of all results by race. Table 5.14 analyses 887 cases for seven alternative punishments in non-traffic offences, and shows that New South Wales Aborigines were imprisoned more frequently and fined less frequently than whites. Aborigines fined represented 10% of the total number in the sample, and whites only 4%; however, fines represented 12% of all Aboriginal penalties but 17% of all white penalties. Imprisonment of Aborigines represented 25% of the sample, but 32% of all Aboriginal penalties. White imprisonment represented 5% of the sample, and 24% of their total. The rate of Aboriginal imprisonment is therefore seen as five times that for whites.

Fines <u>with</u> imprisonment for Aborigines represented 28% of the sample (10% for whites) and 36% of all Aboriginal penalties but 45% of all white. Fines with an order for compensation were ordered in 6% of all Aboriginal results, but 3% of white; the proportion to the total for Aborigines was eight times that for whites. The nature of the offence is therefore seen to involve property damage. Recognizances given to Aborigines accounted for 9% of the total in the sample, four times that for whites. It seems that the element of control of Aborigines is the preferred choice of the magistracy, but the agency of control (police) offers greater opportunity for recurring friction between the supervisors and the supervised.

My figures also show that Aborigines were almost twice as likely to receive a fine as were whites, five times more likely to be imprisoned than whites and at a rate *worse* than those shown in Eggleston. The ratio of fines to imprisonment has, however, swung dramatically away from the latter (43% in Eggleston, 10% in my research) towards the former. The position of whites has moved in the opposite direction, again in contradistinction to Eggleston's results.

These movements reflect the improved legal representation and financial status of Aborigines, and does not infer a diminution in either for whites (Table 5.15). Aborigines attracted fines in 90% of the cases analysed by the Board in 1980, compared with 64% (for minor offences) in Eggleston[13].

Aboriginal defendants are disadvantaged in respect of fines both as to amount and time to pay. Fines in the lowest category were imposed on more whites than Aborigines and there were more Aborigines who were fined greater amounts. A fine of \$50-\$74 was imposed on almost four times the number of Aborigines than for whites; three times where it was \$75-\$99, more than three times in the range \$100-\$149, four times in the range \$150-\$199 and almost three times in the range \$200-\$499. The percentage ratios are revealing in that they show the fines of \$100-\$499 imposed on Aboriginal and white defendants as being nearly co-extensive proportionate to the total for that racial group. Thus fines of \$100-\$149 represented 25% of fines for black <u>and</u> white defendants. However, fines of \$10-\$24 represented nearly 20% of all 'white' fines, but only 4% of black. In the next higher category, fines of \$25-\$49 represented nearly 12% of all 'black' fines, but only 3% of white. Those of \$50-\$74 represented 23% of 'black' fines, but 19% of 'white'. There is a clear result : whites are being fined at levels lower than those for Aborigines (Table 5.16). Eggleston's figures suffer from the passage of time in terms of amount; but her second category, of fines in excess of \$5, also shows the disadvantages of Aborigines compared with whites (Table 5.17). The Board's sampling showed no fines imposed in the range \$121-\$140 or \$161-\$180, but shows fines of \$41-\$100 imposed in 74% of cases; my own figures showed 32% in the range \$50-\$199 during the same period. (Table 5.18)

Too much can be made of these figures. All three analyses contain one serious deficiency. They do not show the offences which attracted the disproportionate penalties. It is therefore difficult to make other than vague inferences on the extant results. But, all other things being equal, a heavier burden has continued to fall on those less able to pay.

Strangely, the Board's analysis did not proceed to consider either the aspect of time to pay fines, or the subsequent treatment of fines. This is particularly important in the case of defendants as financially parlous as Aborigines. The exercise of discretions reposed in magistrates can likewise be considered against the criterion of time to pay. There has been a distinct improvement over the Eggleston findings, time being refused to whites at a rate almost twice that of all Aboriginal cases, and a grant in excess of 48 hours given to 81% of Aboriginal cases but only 64% of white. (Table 5.19). However benevolent this might appear, it was no less than a recognition of Aboriginal impoverishment and their need to acquire or accumulate the requisite amount.

Table 5.20 analyses over 1000 black and white cases where time was granted or refused for payment of fines. It has nine categories ranging from 'no time' to in excess of 361 days to pay. The most common time granted was 8-30 days for black (33%) and white (29%) alike. Longer periods between 31 and 90 days retained roughly equal proportions, but thereafter the black proportion of lengthy periods was markedly higher than for white, twice that in the range of 91-120 days, three times in the range of 121-180 days, and one-third greater in the range 181-360 days. No whites were given periods in excess of 361 days, whereas 3% of Aborigines in my sample were.

The effectiveness of the grant of time to pay is seen in Table 5.21. Aborigines paid only 22% of their fines, compared with 52% for whites; unpaid Aboriginal fines were 58%, nearly twice that for whites. The comparisons with Eggleston are telling, 79% of Aboriginal fines and 94% of white fines being paid, 21% and 6% respectively remaining unpaid. It is perhaps facile to blame the effects of drought on the sharp fall in the rate of white payments, but the economic circumstances and opportunities of New South Wales Aborigines might reasonably be expected to be better than those in Western Australia.

Time had not expired for nearly 12% of the Aboriginal cases in my fieldwork, as against 4% for white, reflecting the greater periods given to Aboriginal defendants in the sample.

Does the grant of time to pay their fines result in fewer Aborigines going to gaol in default? The figures in Table 5.22 would suggest otherwise. Although gaol resulted for Aborigines and whites in almost all cases where no time to pay was allowed, the grant of time still resulted in Aboriginal imprisonment rates more than twice that for whites in the range of 8-60 days allowed. Paradoxically, the longer the time allowed the worse the Aboriginal position becomes. In the range of 61-90 days, 57% of Aboriginal fines remained unpaid; in the range 91-120 days, 48%, in the range 121-180 days 61% and even in the range 181-360 days 58%. The white fines showed none unpaid in the periods 91-180 days, 11% in the next period (Aboriginal figure 58%); in the lower range of 61-90 days, unpaid white fines represented only 12% of the total (Aboriginal 57%).

The conclusion is that, given the uncertain nature of Aboriginal income, the sanction of a fine merely defers and generally ensures imprisonment[14].

It was my belief that many country magistrates refused time to pay where the defendant was imprisoned on other charges, the result being that he served out the penalty imposed and acquitted the fine. Aboriginal defendants treated in this way were more than twice the proportion of whites but the sample size (39) is too small to enable this result to be considered as other than tentative (Table 5.23).

(i) Juvenile offenders

At the time of my field research in Wilcannia, I was informed by one youth welfare office that a count on one day in 1980 showed that 19 of 54 (or 35%) Wilcannia boys aged between 12 and 18 were in institutions. The separation of children from their parents under superseded legislation has now been replaced by separation as a formal part of the criminal process. But is there any clear pattern of general discrimination in the sentencing of juvenile Aboriginal offenders? I believe there is not. Table 5.24 analyses the results of 245 court dispositions of juvenile offenders by race, sex, and penalty. Although Aboriginal offenders account for more than four-fifths in the sample, the proportion committed to an institution 'in general terms' (CIGT), that is, until they were considered reasonably fit for release, was <u>less</u> than the total proportion of juvenile whites - male and female - committed.

Whites attracted heavier institution sentences than blacks, accounting for 65% of all sentences between seven and 12 months. Such sentences represented almost 30% of all white juvenile punishments, but less than 4% of black.

The preferred method of disposition of Aboriginal males (females of both races provided only 10 of the 245 cases) is probation, the middle period of 12-17 months attracting a higher proportion of sentences (as it did for whites). Aboriginal boys placed on probation for a period of between one and 11 months accounted for almost 6% of their total dispositions (less than half of one per cent for whites). The period of 12 to 17 months represented another 15% (white boys 2%) and 18 to 36 months almost 13% (white boys 1%).

If anything, the figures show an overwhelmingly more lenient disposition of Aboriginal youth under probation than whites committed to an institution. The agents of probation, also, differ in the case of juveniles from those of adults. Juveniles on probation come under the general administrative oversight of the Department of Youth and Community Services (Y+CS), and not the police nor the Parole Board and other similarly associated enforcement bodies.

It might be noted, however, that these cases came from all over the State. Wide, and sharply pronounced, regional differences provide a plausible basis for complaints of local discrimination and practices not consistently followed elsewhere. Table 5.25 shows the figures for CIGT sentences by location and zone. Wilcannia accounted for almost half of the sentences ranked by frequency. As the number of defendants (60) was half the total in the sample (119), Wilcannia accounted for over one-fifth of the State's total.

At the time of my fieldwork there had been a rash of 'break, enter, and steal' offences in Wilcannia over four consecutive nights by six Aboriginal males aged between 12 and 17. All were charged with a number of break, enter and steal counts, one (aged 15) with receiving stolen goods (*three packets of potato chips*) and all were given CIGT sentences. Four other offenders were put on probation for 12-18 months.

It is manifest that the presiding magistrate considered it necessary to 'break up the gang' by removing them from an environment conducive to serious social mischief. But I question the efficacy in removing all the gang members to institutions (not necessarily the same institutions) where it is likely that other skills could be acquired or refined. And I would disagree with the use of such a penalty not as rehabilitation, but as protection of community property, community values, and community order and a general deterrent for infringements against them. This process of the criminal law is entirely inappropriate for the product of isolation, boredom, and grossly inadequate recreational facilities. As shown in Table 5.25, the Far West accounted for over half of the CIGT sentences in the State. The sociological conditions in that zone require an extra-legal response. The commital of a juvenile from a community providing a modicum of support to an institution providing regular food, regular exercise, and some training, conjures up the reasons advanced for the confining of Aboriginal parents to missions or reserves, and the removal of their children to a more civilizing environment. But the paradox is that the agency of the State has replaced that of the Churches, and the victim is being punished for his environment.

Clearly there must be a limit to lawless behaviour, but isolated instances of denuding the youth is not the proper way to tackle a valid problem. The

Youth and Community Services' report on one male juvenile offender at Wilcannia summarizes the bleakness of a social problem for which law has provided and can provide no reasonable solution:

> 'It can be seen from the lad's Court record that he appeared at the last Court sitting at Wilcannia in November 1979 (2 months previously) and was released on Probation for a period of 12 months. During the last two months he has been involved in several matters which are now before the Court. X (aged 15) is typical of many lads living in Wilcannia. Placed in another environment with some hope for the future the lad is bright enough to improve his situation. Life in Wilcannia however does not seem to hold hope for the future and there is little motivation for a lad to work towards the normally accepted goals in the normal community such as education and future considerations of employment. The easy, happy-go-lucky life of Wilcannia is accepted. Encounters with police and Courts are also accepted as part of the lifestyle. On speaking to X in connection with this current Court appearance, he realizes full well that there is a likelihood of being committed to an institution. Rather than cause him concern he is looking upon it as a great adventure and his only concern is whether he will go to the same home as any of his partners in crime.
>
> A basic problem with X and lads like him is that the normal social sanctions of shame and embarrassment have little effect as the adults in the community, to a certain degree, accept such lawless behaviour, perhaps with a comment of disapproval but barely (*sic*) is an effort made to control the behaviour and activities of the children. The major problem in (X's) home is the poor standard of supervision exercised over the children by the mother. X is the third child of the family and the third one to come under adverse notice. Even with the prior history of his elder brothers, X has not been motivated to stay out of trouble, nor has (X's mother) attempted to improve her standards of supervision and control. Having regard to the offences which X has committed (take and drive motor vehicle without permission) it is felt that in my opinion there is no alternative but for X to undergo a further period of training in the hope that some change of attitude and self-discipline might be developed in the lad'.

X was born in 1964. His previous record included a charge of break, enter and steal and one of steal (age 14) for which he was placed on probation for 12 months; another of steal (aged 14) on which he was remanded for four months; one of larceny of motor vehicle (age 14) for which he was committed to an institution; and one of break, enter and steal (age 15) for which he was put on probation for 12 months.

The pattern of offences most commonly committed by Aboriginal juveniles attests to deprivation, boredom and lack of supervision. Table 5.26 lists the five offences most commonly committed by juvenile offenders by reference to the computer item number, race, and sex. Break, enter and steal accounted for more than 50% of all male Aboriginal crime, but only 22% of white. Stealing offences by white and black males were comparable, but the rate for black females was twice that for white.

Car thefts by white males accounted for 32% of all their crime, three times that for blacks; white females had a rate twice that of black. Crime associated with country conditions also figured prominently with white youths but not with black. Thus licence offences accounted for 14% of male white offences, and firearm offences 8%. Neither was represented in black figures. Aboriginal males were high in the associated offences of break and enter with intent, and malicious damage, but these did not figure in the sample for any other group.

Aboriginal females were prominent for drink-related offences. Drunkenness, seriously alarm or affront, and unseemly words were their next most commonly committed offences. Lack of mobility of Aboriginal youths probably accounts for the overwhelming accent on their break enter and steal figures. Economic circumstances obviously favour whites in regard to petty theft, hence the predominance in their figures of offences associated with car theft and usage.

(j) Recognizances

The degree of continuous and expanded control over Aboriginal juveniles is reflected also in those adult Aborigines given a recognizance. Aborigines are discriminated against both in terms of duration and amount. Table 5.27 analyses recognizances for convicted adult offenders by term, and race. The sex of the offender is also given for the analysis of term. It will be seen that recognizances for all groups were reasonably steady up to two years. But the rate of recognizances in excess of two years doubled in the case of Aborigines compared with whites. No figures were obtained for any white female, but figures for 20 Aboriginal females were obtained. A recognizance in excess of two years is highly unusual in practice. It extends the period during which any subsequent offence will render the offender liable on both the original and subsequent offence. It is an instrument of social control, of ensuring behaviour conforming to a norm.

A similar pattern of inconsistency and discrimination against Aborigines is also seen in the amounts set as the potential monetary loss upon breach of the terms of the recognizance.

Amounts set below $100, and between $200 and $300 were comparable for black and white. But recognizances of $101-$200 represented one-half of all white recognizances but less than one-third of those for blacks; and recognizances of $301-$500 given to Aboriginal defendants accounted for one-third of their recognizances, but one-tenth that of whites.

Aborigines therefore were subjected to recognizances of higher amount and extending for longer periods than in the case of whites.

(k) Conclusions

The tables and analyses show quantitative, but little overall qualitative, change from Eggleston's findings. Although this derives in part from some perceptible bias on the part of magistrates, my feeling is that it rather originates in the pronounced socio-economic gulf between country whites and country blacks. In many ways the 'community', when applied to many NSW country towns, is a contradiction in terms, if that expression means a settlement of like-minded persons, or those participating in the life of the community on roughly equal terms. The law of property, and the law of propriety, operate unequally in their consequences for a community of 'have-nots'. The agencies of law enforcement do not, and can not, hope to comprehend, to feel, or experience the economic, social, or cultural interstices which is the historical experience of the Aborigine. The aberrant public, visible behaviour of country and inner-urban Aborigines, and the clear differences in their motivation reflect their past - their recent past - of dislocation, disruption, and despair. Today 'community attitudes' reflect the comfortable property rights and enjoyment of the white 'haves' : they can scarcely reflect the interests and attitudes of a formerly powerless and fragmented, and still-alienated, minority.

Legal constraints, deterrents, and punishments are being imposed for actions whose roots and causes are extra-legal. I am not suggesting that deprived or poor whites, 'browns' or 'yellows' do not also suffer serious disadvantages when measured against 'community attitudes' and a dominant (white) stereotype. But the reality and the substance of contemporary Aboriginal experience is a violation of human dignity and a stifling of the modern demand for, and expectation of, human rights in a civilized and caring country.

REFERENCES

1. The Courts were established under s. 5, and the stipendiary magistrates appointed under s. 7, of the *Justices Act 1902*, in each case by the Governor. Justices of the Peace could conduct commital proceedings, grant bail, issue summons, and warrants. These functions are not judicial, but ministerial in character. However in proclaimed 'police districts' no justice other than a stipendiary magistrate could sit to adjudicate matters determinable summarily: s. 13 (1) *Justices Act 1902*.
2. Defined in the *Child Welfare Act 1939* as a child (that is under 16) or young person.
3. Defined in the *Child Welfare Act 1939* as over 16 but under 18.
4. Courts of Petty Sessions have now been abolished and replaced by Local Courts, presided over by magistrates, by the *Local Courts Act 1982*. Similarly, the Children's Courts have now been replaced by the Children's Court of New South Wales as established by the *Community Welfare Act 1982*.
5. See *Bibliography* for N.S.W. *Aborigines Act 1969, Aborigines (Amendment) Act 1973* and cognate (1973) legislation.
6. Eggleston's Table 2.1 which has 1913 Aborigines and 2047 whites, a total of 3960. This is the largest number of cases cited in her work.
7. Sydney, 1982.
8. At Walgett High School the Aborignal enrolment in 1978 for years 9 - 12 was 13, 20, 4, 1; in 1979, 9, 11, 7, 2; and in 1980, 40, 27, 4, 4. At Coonamble High School the numbers for years 9 - 11 in 1978 were 16, 10, 0; in 1979, 18, 15, 1; and in 1980, 13, 15, 8. In Wilcannia, the 1980 enrolment figures for students in years 7 - 10 - there being no enrolments beyond that - were : year 7, 5 Aboriginal males, 2 Aboriginal females and 4 whites; year 8, 6 male, 4 female 2 white; year 9, 3 male, 8 female, 2 white; year 10, no male, 4 female, 4 white. I was told that most white students in years 11 and 12 are sent to boarding school. Field notes.
9. Pregnancy is cited as the main reason for girls leaving school at what, in most cases, would be age 17. The figures compiled by me at one Far West health clinic for Aboriginal pregnancies in one year show the age of the person pregnant, and the number of previous births/pregnancies to that person; 18 (3); 16 (1); 21 (4); 24 (3); 27 (5); 18 (1); 19 (3); 17 (1); 17 (1); 27 (1); 18 (1); 16 (1);

19 (2); 18 (1); 26 (4); 22 (3); 26 (4); 18 (1); 21 (4); 16 (3); 29 (6); 22 (4); 28 (2); 18 (1); 29 (6); 28 (4); 18 (1); 21 (2); 18 (2); 20 (2); 22 (1); 19 (1); 22 (2); 20 (3).

10. Eggleston Table 4.2. Compare with my Table 5.5, noting that I included 'Traffic' and 'Justice' as separate categories, and she 'forgery and uttering'.

11. Wilcannia Aborigines lived mainly in three locations: the Mallee, where children were squeezed together in confined conditions and provided most of the trouble because of loose or non-existent parental control; the Mission where there were permanent houses beyond the Darling River, and Hood St., regarded as 'upper-crust' or 'uppity', comprising Housing Commission homes, where the children had their own bed and were rarely before the Court. Brewarrina's Aborigines were scattered throughout the town proper, but a community lived at 'Dodge City' on the western outskirts, and another - rival - group at Barwon Four where the Ngemba Housing Co-operative holds a 99-year lease of a reserve held by the Aboriginal Lands Trust. In Bourke almost three-quarters of the Aboriginal population live in the Adelaide Street area, and others, mostly the older Aborigines, on the reserve. The pattern is repeated at Moree, Wee Waa, Kempsey, in fact, at nearly every location of a former reserve or mission. Enrolment of Aboriginal students at Walgett High School in March 1980 was : town 66%, Gingi 13%, Namoi 7%, Dewhurst 14%. Field notes April 1980.

12. See, for example, Max Kamien's *The Dark People of Bourke*, Australian Institute of Aboriginal Studies, Canberra, 1978.

13. Board's Table 3.27; Eggleston's Table 2.38, as to sentence imposed for 'minor offences'.

14. In *Kennedy-v-Blisset* (Supreme Court of New South Wales, Hunt J., 24 June 1983) (*sub. nom. R-v-Kennedy* (1983) 9 ALB 7), an application for bail, the Supreme Court described as 'manifestly unfair' the refusal by a magistrate to allow an unemployed Aboriginal labourer at Walgett time to pay the larger part of fines totalling $525. Mr. Justice Hunt, in granting the application, said that he considered it quite wrong to impose a penalty so heavy that it effectively meant a gaol sentence when someone wealthier would be able to pay the same fines without penalty. The Court was voicing the same criticism made by the Supreme Court of South Australia in *Gollan-v-Samuels* (1973) 6 SASR 452, at p. 455; *Bibliography*, Case No. 76, pp. 34-5, and by that of the Northern Territory in *Scobie-v-Walter* (per Muirhead J.,

2 September, 1983, unreported) cited in *Young-v-Arnold* (1984) 27 NTR 19, at p. 20; *Bibliography*.