Human Rights Commission

ABORIGINAL RESERVES BY-LAWS AND HUMAN RIGHTS

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This is the fifth of a series of Occasional Papers to be published and distributed by the Human Rights Commission. It was prepared within the Commission by Ms Cynthia Cheney and Dr John Hookey, while Mrs Christine Sarkies was responsible for the preparation and amendment of the manuscript from its earliest drafts until it was ready for publication. All three are members of the Legal and Projects Branch of the Human Rights Commission.

Occasional Papers will be issued by the Commission from time to time to deal in depth with a particular problem or subject. In some cases, as with this paper, they are intended to provide an analytic review of a subject, raising what are seen to be key issues and arguments. In other cases, they may set out facts or background to assist in a better understanding of a problem or a subject area. Their overall objective is to promote greater awareness and public discussion of human rights.

This paper has been issued to encourage discussion of relevant issues with a view to assisting the Commission in deciding what action it should take in relation to its subject matter.

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ABORIGINAL RESERVES BY-LAWS AND HUMAN RIGHTS

PREFACE

A substantial number of complaints of racial discrimination come from Aboriginal people on reserves. To provide essential background to the investigation and resolution of these complaints, the Commission has investigated in some depth the legal arrangements that provide for reserves and for the regulation of those who live on them. The outcome is the comprehensive review that forms the content of this occasional paper. The review examines the laws constituting Aboriginal reserves and the issues of human rights and racial discrimination raised by the by-laws that apply in them.

The paper focuses on by-laws rather than regulations and Acts of Parliament because their presence or absence is indicative of the philosophy of particular governments in their dealings with Aboriginal Australians. The total absence of by-laws in a particular state or territory, or the existence of rules adopted by the Aboriginal communities themselves, suggest that there Aboriginal Australians living together on what were once reserve lands are being left to manage themselves according to their own customs and way of life. On the other hand, the presence of uniform, comprehensive and detailed by-laws covering almost every aspect of the daily lives of Aboriginal AUstralians on reserves, particularly if accompanied by an inability to change them, suggests a different approach, involving outside control rather than self-management. And, of course, there are various positions in between. Where by-laws, though relatively uniform, only intrude to a limited extent in the day-to-day

lives of Aboriginal Australians on reserves or former reserved lands, or can be varied without unreasonable difficulty in response to the needs of the community itself, then self-management may well be on the way to realisation.

Change is on the way, and the old system of by-laws is either being replaced or seems about to be replaced. Though the process of change is by no means uniform, throughout Australia the old system of reservations of crown land for the use of Aboriginal persons is giving way to a recognition of their traditional rights to own the lands they have occupied, in a number of cases, since time immemorial. As the reserves go, so too will the by-laws. Nevertheless, wherever communities of people exist in Australia, irrespective of their racial composition, some system of local government will be necessary, and the question is rapidly becoming - what sort of arrangements will replace the old by-law system?

At the time of writing, by-laws applicable in Aboriginal reserves are only tO be found in Queensland and Western Australia. An examination of these remaining by-laws suggests that, taken by themselves, and ignoring sociological factors of the kind which can only be objectively evaluated by field research, many are, in human rights terms, acceptable. Others, however, discriminate against Aboriginal people and some are, in addition, inconsistent with or contrary to the human rights specified in the International Covenant on Civil and Political Rights. There is a further category of by-laws that involve paternalistic and out-dated concepts of administration, though falling short of racial discrimination or infringing human rights, while there are some that are simply absurd, offensive or ridiculous.

One of the purposes of this paper is, by describing in some detail the by-laws that still exist, to provide a basis for planning the arrangements that must follow, as Aboriginal communities throughout Australia acquire ownership of the land on which they live. The existing by-laws are examined to record

in terms of human rights their appropriateness, or inappropriateness, as the case may be. It is hoped that this examination will assist Aboriginal communities to make up their own minds as to the system they wish to have which will replace them. It may also help to avoid the mistakes of the past and make it possible for all Australians to join, at the request of Aboriginal communities, in helping them to draw up new arrangements to apply to their communities in the future.

The review contained in this paper is, however, only a beginning. It should ultimately be supplemented by a further comprehensive study of how the by-laws and other subordinate legislation applying to Aboriginal reserves actually work in practice. It is one thing to study the law as it is written, and quite another to observe its administration in practice.

Where the Commission is critical of particular by-laws, this does not necessarily involve criticism of the manager or Council of a reserve entrusted with the onerous task of their administration. Nor does it necessarily follow that on the reserve in question the human rights of the Aboriginals are infringed: the by-laws in question may be administered in a humane fashion. However, it is wrong that such by-laws should exist, and in the Commission's view they should be repealed or amended. The later study will probably show that in some cases human rights are respected notwithstanding the existence of unsatisfactory by-laws, while in others human rights are infringed notwithstanding that the by-law involved is in itself acceptable.

The law as stated in this Occasional Paper is as it was at the end of April 1983.

INTRODUCTION

Aboriginal reserves have traditionally been located On Crown land allocated to that purpose. The establishment of the Australian Federation left the States, formerly internally self-governing colonies, in the control of unused Crown land within their boundaries. The result is that the laws of the Australian States and Territories need to be examined to find out the position about Aboriginal reserves.

2. In the following sections of this paper the laws providing for Aboriginal reserves in Australia are identified, together with the nature of the statutory powers to make by-laws in these reserves. Attention is given to the nature of any statutory criteria affecting the exercise of these by-law making powers; express or implied limitations on their scope; and whether there is a statutory requirement for their publication in gazettes or otherwise. The by-laws still in existence are examined in relation to the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination. While the Commission is well aware that taken by itself, the International Covenant on Civil and Political Rights, forming as it does a schedule to the Human Rights Commission Act 1981, does not directly apply by virtue of that Act in the States and the Northern Territory, it is of the opinion that the instruments in the schedules of the Human Rights Commission Act, including the International Covenant on Civil and Political Rights, can support a complaint under the Racial Discrimination Act 1975. Sub-section 9(1) of that Act is not limited in its operation to the Racial Discrimination Convention set out as a schedule to the 1975 Act: it talks of 'any human right in the political, economic, social, cultural or any other field of human life'. In the Commission's view this reference must extend the operation

of the Racial Discrimination Act to the rights *set* out in the instruments which the Parliament of the Commonwealth, in the Human Rights Commission Act, has declared as defining human rights for the purposes of the operations of the Commission. As the field of discrimination extends beyond the Racial Discrimination Convention to include acts of discrimination inconsistent with the human rights in the International Covenant on Civil and political Rights, it is appropriate for this study to raise issues involving the ICCPR where these are relevant.

3. Although the Commission had no difficulty in obtaining a copy of the by-laws applicable in Queensland from the Department of Aboriginal and Islander Advancement, it has been brought to its notice that some residents of Aboriginal reserves in Queensland and other people interested in the subject have, from time to time, had difficulty is ascertaining what by-laws are in force and obtaining copies of them. As will be discussed later, the Queensland by-laws are not published in the gazette or other official publication in general circulation. By way of contrast, the by-laws applicable in Western Australia are required to be published and directly available. Where there is uncertainty as to the provisions of the by-laws, then unfortunately there is scope for allegations as to impropriety in their application.

THE REGULATION OF RESERVES IN THZ AUSTRALIAN CAPITAL TERRITORY

4. There is now no provision in the law of the Australian Capital Territory for Aboriginal reserves. This, however, has not always been the case. Following the establishment of the Australian Capital Territory, the Aborigines Protection Act 1909 of the State of New South Wales, together with a great deal of other legislation from that State, was adopted as part of the law of the Australian Capital Territory. After the enactment by the Commonwealth Parliament of the Jervis Bay Territory Acceptance Act 1915, the Australian Capital Territory included Jervis Bay and its adjacent peninsulas, including Wreck Bay, where a small settlement of Aboriginal people, living mostly by fishing, had existed for many years. The Aborigines Protection Act of New South Wales continued to apply in the Australian Capital Territory until it was repealed by the Aborizines Welfare Ordinance 1954. Section 3 of this Ordinance defined a reserve as:

> 'land declared ... to be a reserve for the use of Aborigines'.

Section 17 of the 1954 Ordinance made provision for the making of regulations. Paragraph 17(c) permitted regulations to be made:

> 'for the control of aborigines and other persons residing on a reserve'.

Although neither the 1954 Ordinance nor the Aboriginal Welfare Regulations made under it contained any by-law making powers, a very wide discretion was vested by the regulations in the managers of Aboriginal reserves. Thus, Regulation 6(1) stated that:

> 'The Manager of a reserve may give such orders and instructions as are necessary to maintain discipline and good order on the reserve and to secure a compliance with Regulation 8'

relating to the prohibition of certain acts and the prohibition of bringing certain goods onto reserves.

5. The Aborigines Welfare Board in New South Wales nevertheless managed the reserve at Wreck Bay for the Commonwealth Government. In 1965, the 1954 Ordinance was repealed by the Aborigines Welfare Repeal Ordinance. This repeal had the effect of revoking the sole ACT reserve at Wreck Bay and transferring administrative responsibility for the community from the Aborigines Welfare Board back to the Department of the Interior. Considerable concern was expressed in some quarters after the proclamation in 1971 of the Jervis Bay Nature Reserve, which included all of the old Aboriginal reserve except for the lands occupied by houses and an area called Cemetery Point. Various negotiations took place which ultimately involved the offering of a residential lease to the Aboriginal community at Wreck Bay. Finally, the Leases (Wreck Bay Aboriginal Housing Company Limited) Ordinance 1977 was passed authorising the grant of leases of land in perpetuity to a company established by the Aboriginal people of Wreck Bay limited by guarantee, and registered under the ACT Companies Ordinance 1962, called the Wreck Bay Aboriginal Housing Company Limited. Section 4 of the Ordinance provided that any lease in perpetuity granted should be at a nominal rent, but subject:

> ' ... to such covenants and conditions as are determined by the Minister'.

Section 5 of the Ordinance restrained the company from alienating the perpetual lease.

6. The Memorandum of Association and the Articles of Association of the Wreck Bay Aboriginal Housing Company Limited give the Company very wide powers in managing the lands comprised in the perpetual lease, though no by-law making power is to be found either in the Memorandum or the Articles. Nevertheless, in such a small community, the opportunity

afforded in general meetings of the Company and in the meetings of its Directors to manage the lands under its control would permit, in practice, the sort of controls to be exercised at Wreck Bay which might be administered elsewhere through by-laws. However, short of beginning another study along the lines of B. J. Egloff's 'Wreck Bay: An Aboriginal Fishing Community' published by the Australian Institute of Aboriginal Studies in 1981, it is impossible to establish with any precision the nature of the management of the Wreck Bay community, except that within its small area of operation, it appears to be a system of independent self-management by the Aboriginal community concerned.

THE REGULATION OF RESERVES IN NEW SOUTH WALES

7. There is still provision in the law of New South Wales for Aboriginal reserves. Sub-section 2(1) of the Aborigines Act. 1969 defines a reserve as:

> ... an area of land ... reserved under the Crown Lands Acts for the use of Aborigines ...

Prior to the enactment of paragraph 7(1)(b) of this Act Aboriginal reserves had been under the control of the Aborigines Welfare Board, a body originally set up under the now repealed Aborigines Protection Act. The effect of paragraph 7(1)(b) was to divest all reserves from the Aborigines Welfare Board and to describe them as:

> ' ... Crown lands ... reserved from sale or lease generally for the use of Aborigines ...

In 1974 the Aboriginal Lands Trust was established which, under sub-section 10H(1) of the Aborigines Act, may acquire real property by various means, including transfer from the Crown. Section 17 of the Aborigines Act permits the revocation of Aboriginal reserves and the transfer of lands contained in them to the Aboriginal Lands Trust. By 1980, when the Select Committee of the (New South Wales) Legislative Assembly Upon Aborigines made its first report, almost all Aboriginal reserves had been revoked and the land comprised in them transferred to the Trust: Select Committee Report pages 24, 106, and 131. Thus, although the law of New South Wales provides for Aboriginal reserves, they have virtually disappeared.

8. The Aboriginal Lands Trust, it should be added, does not have a power to make by-laws or other subordinate legislation relating to the conduct of persons on the lands it

administers. So there is no suggestion that Aboriginal Lands Trust by-laws have replaced Aborigines Act by-laws. In fact, though the Aborigines Act contains a by-law making power, no by-laws made under it are in existence. Had any been made', it would have been necessary to publish them in the Gazette: Interpretation Act, 1897 (NSW), s.41. In any event, the by-law making power under section 14 of the Aborigines Act does not extend to:

> ... a part of a reserve on which stands a building ... occupied by an Aboriginal ...

9. Discussions with the New South Wales Ministry of Aboriginal Affairs confirm the conclusion that, although the law of New South Wales makes provision for Aboriginal reserves and by-laws applicable in them, no by-laws are at present in existence.

10. The absence, in New South Wales, of by-laws and other subordinate legislation relating specifically and exclusively to Aboriginal persons on Trust lands does not mean that there is a jurisdictional vacuum in this regard. They are subject to the ordinary law of the land. This was established as early as 1836 in Murrell's case, 1 Legge [NSW] 72 followed in R. v. .Wedge [1976] 1 581. Accordingly, the ordinary laws of New South Wales apply to people living on Trust lands. Subordinate legislation made under the Local Government Act, 1414, as amended covers most of the fields traditionally dealt with by Reserve by-laws: health, sanitation, building, traffic and the like. However, Ordinances made 'under section 576 of the Local: Government Act which confer the general power to make Ordinances in respect of any of the powers or duties conferred on Councils, may be limited in their ' ... application by reference to time, place or circumstances ... '. Sub-section 576(2A) also permits them to be restricted in their application to a specified class of subject matter, or to differ in their application according to specified factors or circumstances. Conceivably, this power could be used either to exempt persons on Trust lands from the

application of certain local government Ordinances, or, alternatively, Ordinances could be made applying only to Trust lands. Ordinances are made by the Governor pursuant to section 575 of the Local Government Act and, pursuant to paragraph 576(1)(e) override existing by-laws, rules and regulations on the same topic, which are repealed by virtue of the making of such Ordinances. Enquiries to date, however, have not revealed any Ordinances which exclude Trust lands from their operation, or apply only to Trust lands.

11. As persons living on Trust lands are subject to local government legislation, the question then arises as to whether they share in the local government franchise. The right to vote in local government elections in New South Wales is not dependent upon the ownership of rateable property. Pursuant to sub-section 51(1) and to paragraph 54(1)(b) of the Local Government Act the franchise extends to residents who are British subjects and at least 18 years of age. However, the right to vote is dependent upon a resident or a ratepayer being placed on the roll. Accordingly, it does not follow that every resident or ratepayer actually can vote at any particular election.

12. Interestingly, land vested in the Aboriginal Lands Trust which is not alienated by lease for private purposes or occupied and used by the Trust for the purpose of carrying on a business, is exempted from rates under paragraph 132(1)(1). Therefore, were the franchise to be exclusively dependent upon the ownership or occupancy of rateable land, persons living on Trust land would be excluded. Their franchise is dependent upon residency, rather than the possession of rateable land.

13. Another interesting issue relates to the power, pursuant to section 61 of the Local Government Act to divide shires into ridings. It is not suggested that this power extends to excluding Trust lands from any riding, and thereby, to excluding Aborigines from the franchise, for this depends, as

far as residency is concerned, upon residence within a riding or ward. However, there is nothing in the Act as to the criteria to *be* applied in the division of shires and ridings. It would thus, conceivably, be possible to divide a shire into ridings in such a way as to give unequal representation to Aboriginal persons on Trust lands, since no nexus is required between the size of ridings and their population. However, there is nothing to suggest that this power has been used in such a discriminatory way. There is, however, a potential for discrimination in the way this power is defined.

THE REGULATION OF RESERVES IN VICTORIA

14. While vestigial provision still is to be found in the law of Victoria relating to Aboriginal reserves, the two remaining reserves have been the subject of Crown grants to Aboriginal trusts. These trusts do not possess by-law making powers, whilst the legislation originally providing for the control of reserves by regulations has been repealed.

15. The Aborigines Act 1958 (No. 6190) consolidated the law relating to Aboriginal persons in Victoria, and, amongst other things, made provision for Aboriginal reserves and their management. The definition of 'Aboriginal reserve' in section 3 included not only Crown land reserved for the use and benefit of Aborigines, but also land acquired by the Aborigines Welfare Board and designated by that Board as an Aboriginal reserve. Paragraph 11(1)(d) gave the Governor in Council a regulation making power which extended to the making of regulations

> '... for the control of Aboriginal reserves and Aborigines and other persons thereon, including the maintenance of discipline and good order thereon, the issue of permits to reside thereon and the exclusion or removal therefrom of persons not authorised to enter thereon'.

16. The Aborigines Act was repealed by the Aboriginal Affairs Act 1967 (No. 7574) which, by section 2, inserted a new definition of 'Aboriginal reserve'. The new definition was

> '... any area of Crown land temporarily or permanently reserved under the ',and Act 1958 or any corresponding previous enactment for the use of benefits of the Aboriginal inhabitants and includes any other land acquired by the Minister which is declared by the Minister to be an Aboriginal reserve by notice published in the Government Gazette'.

Although paragraph 42(c) did not contain a by-law making power in respect of reserves, it allowed the making of regulations for

> 'the use, development or management of Aboriginal reserves and other land acquired by or vested in the Minister and any improvements, buildings or developments thereon'.

Paragraph 42(d) also contained a regulation-making power in respect of the conditions relating to the entry of Aborigines to training and other institutions on Aboriginal reserves. In 1967 the Aboriginal Affairs (General) Regulations were made pursuant to the powers contained in section 42 of the 1967 Act,

17. The Aboriginal Affairs Act was repealed by the Aboriginal Affairs (Transfer of Functions) Act 1974, which made no provision for the continuance in force of regulations made under the 1967 Act. The present position, therefore, is that no regulations or by-laws are in existence specifically relating to Aboriginal reserves in Victoria.

18. Meanwhile, the position as to reserves was altered by the Aboriginal Lands Act 1970 (No. 8044). The definition of reserve contained in the 1967 Act was repealed, and section 3 of the 1970 Act provided that the term Reserve now meant 'the Framlingham reserve or the Lake Tyers reserve' and, by implication, no other areas of land. The preamble to the Aboriginal Lands Act recited that both the Framlingham reserve and the Lake Tyers reserve, previously temporarily reserved as sites for the use of Aborigines, had now been permanently reserved for that purpose by virtue of orders made by the Governor in Council in 1965 and 1967. Sub-section 9(1) of the 1970 Act authorised the Governor in Council to issue Crown grants of the lands comprising the two reserves to Aboriginal trusts. Paragraph 8(b) also made provision for the revocation of the two reserves, a process closely linked with the issuing of Crown grants to the trusts.

19. Section 11 authorised the trusts to manage and develop the lands in question, and subsequent provisions of the Act provided for a committee of management of the trust and for various financial and auditing duties to be observed. By section 8, the initial membership Of the trusts was confined to residents on the reserves. Neither the trusts nor their committees 9f management had by-law making powers. However, the provisions for general meetings contained in sections 19, 22 and 23 of the Aboriginal Lands Act undoubtedly could be used for the purposes of self-management of the reserves, and resolutions passed at these general meetings could, in practice, fulfil many of the functions of by-laws, though, of course, no penal sanctions are authorised by the Act.

The result is that, in Victoria', Aboriginal reserves have ceased to exist, whilst no special provision exists for the making of subordinate legislation applicable only to the residents of these former reserves, who are now, like other citizens, governed by the general law of Victoria. The position now is that the Aboriginal communities living at Framlingham and Lake TYers are subject to the local government subordinate legislation applicable in their respective areas just as are other residents of the local government areas concerned. There is no suggestion that Lake Tyers or Framlingham are enclaves outside the ordinary local government system applicable in Victoria.

THE REGULATION OF RESERVES IN OUEENSLAND

21. Two statutes provide for reserves in Queensland, the Torres Strait Islanders Act 1971-1979, and the Aborigines Act 1971-1979. Under each statute reserves are defined to mean Crown lands reserved and set apart by the Governor in Council for the benefit, in the former Act, of Islanders, and in the latter, of Aborigines.

22. Under the Torres Strait Islanders Act, there is a by-law making power vested in each Island Council. Sub-section 36(1) provides that each Island Council:

> ' ... has and may exercise the functions of local government of the reserve or community for which it is established, and is hereby charged with the good rule and government thereof in accordance with the customs and practices of the Islanders concerned, and, for that purpose, may make by-laws and may cause by-laws lawfully made by it to be observed and enforced'.

Subsequent sub-sections of section 36 deal with the wide scope of the by-law making power vested in each Island Council. These extend, pursuant to sub-section 36(2), to a power to make by-laws:

> ' ... for promoting, maintaining, regulating and controlling the peace, order, discipline, comfort, health, moral safety, convenience, food supply, housing and welfare of the reserve or community

Under section 37 no by-law has force or effect until approved by the Minister. As far as can be ascertained, no by-laws have been approved by the Minister.

23. It should be added that, had by-laws been made under the Torres Strait Islanders Act, it would be unlikely that they would be published in the Queensland Government Gazette. This is a result of the combined effect of section 37 of the Torres Strait Islanders Act, and section 28A of the Acts Interpretation Act 1954-1977. Section 28A of the latter Act, requiring the publication of regulations in the Gazette, and their tabling in the Legislative Assembly, does not extend to by-laws. Its silence on the publication and tabling of by-laws indicates that there is no obligation, and indeed, perhaps no power, to do this. The Acts Interpretation Act, is not one of those statutes which uses the term 'Regulations' in an omnibus sense to include all forms of subordinate legislation. However, section 37 of the Torres Strait Islanders Act , does require the printing of copies of by-laws made under it and for them to be kept at the appropriate Council's office, as well as to be exhibited for a reasonable time in a prominent place in the reserve to which they apply.

24. The position as to by-laws under the Aborigines Act 1971-1979, is somewhat different. It contains no express power enabling Councils to make by-laws. This power is to be found in the Aborigines Regulations of 1972, as amended. However, it would be difficult to assert that the power contained in section 56 of the Aborigines Act to make regulations does not extend to a power to make regulations authorising Councils to make by-laws. Sub-section 56(8), dealing with Aboriginal Councils, includes authority to make regulations, amongst other things, specifying:

'the powers, duties and functions of such councils

There is no statutory restriction found in the Act which could be interpreted to the effect that Councils could not be granted, by regulation, a by-law making power. Indeed, it is implicit in sub-sections 35(2) and (3) of the Act that a Council will make by-laws.

25, As in the case of the by-law making power under the Torres Strait Islanders Act, by-laws made under the Aborigines Act, need not be tabled in Parliament nor published in the Gazette: Acts Interpretation Act, sections 28A and 36. The ascertainment of what by-laws exist could thus be a very complex exercise. However, the Department of Aboriginal and Islander Affairs has provided a copy of the by-laws which apply uniformly in each of the 14 Aboriginal reserves in Queensland. Because of their length, these are found in Appendix 2.

26. In 1978, the Aurukun and Mornington Island Reserves ceased to be subject to the Aborigines Act and to the regulations and by-laws relating thereto. These reserves were formally abolished by Order in Council and became local government areas under the Local Government Act 1936-1977 by virtue of the Local Government (Aboriginal Lands) Act 1978 and a subsequent amendment to that Act in the same year. Section 6 of the Local Government (Aboriginal Lands) Act provides for the granting of leases of the former reserves to the Councils of the Shires of Aurukun and Mornington respectively. The new councils are constituted of former members of the Aboriginal Councils of the two reserves. The term of the lease for each area is 50 years with provision for the granting of a further extension of time in sub-section 6(5). By a combination of the Local Government Act of 1936 and the Local Government (Aboriginal Lands) Act the Councils of the Shires of Aurukun and of Mornington have the power to make by-laws. However, to date, no by-laws have been made.

27. Such action taken on Aurukun and Mornington Reserves seems to have foreshadowed the end of Aboriginal reserves in Queensland and the by-laws operating in them. In 1982, the Lands Act 1962-1981 was amended by the and Act (Aboriginal and Islander Land Grants) Amendment Act 1982. It is understood that under this legislation which may be further amended to take account of policy changes, the Governor in Council will ultimately grant Crown land now reserved for the use and benefit

of Aboriginals to community reserve councils in trust for the benefit of the Aboriginal and Islander inhabitants. Thus, the lands of existing community reserves will be made the subject of deeds of grants in trust. So far, the so-called services legislation relating to the administration of the deeds of grant in trust has not been passed. But it is envisaged as soon as such legislation is passed, the Queensland Aboriginal by-laws will cease to apply to such areas. There may, however, be provision in the new services legislation for the making of by-laws.

The Queensland By-laws, Human Rights. and Racial Discrimination Issues

28. In this section the Queensland Aboriginal Council By-laws are examined in relation to human rights and racial discrimination issues. At the same time, where appropriate, comparisons are made between the Aboriginal Council By-laws and by-laws of the City of Townsville, which latter are regarded as reasonably representative of by-laws operating in local government areas throughout Queensland. The Townsville by-laws were selected for comparison because Townsville is a well-developed city and has a substantial Aboriginal population.

29. The Aboriginal Council By-laws are not expressed so as to apply only to Aboriginal persons. Most by-laws apply to 'a person', though some are expressed as applying to 'a householder', 'the occupier' or 'a community resident'. Though it would be reasonable to expect that some householders, occupiers and community residents on Aboriginal reserves, such as Government officials, would not be Aboriginal persons, it may well be that people who are not Aboriginal persons are not bound by the by-laws.

30. In the first place, there does not seem any mechanism for enforcing the by-laws against people who are not Aboriginal persons. By-law 4 of Chapter Twenty-four, dealing with penalties

for the contravention of the by-laws, provides that each penalty is to be determined by 'the Court'. By-law 2 of Chapter One provides that, unless the context otherwise indicates or requires, terms used in the by-lays shall have the same meaning as those given to them by the definition sections in the Aborigines Regulations of 1972 and the Aborigines Act. The term 'Court' is defined in Regulation 2 of the 1972 Regulations to mean:

> 'An Aboriginal Court preserved and continued in existence pursuant to the Act or established under these Regulations'.

Thus, as the context of Chapter Twenty-four does not suggest any new or original Interpretation Of the term 'Court' to rbut'the definition supplied in the Regulations, it is to be assumed that the Court referred to in by-law 4 of Chapter Twenty-four is an Aboriginal Court.' However, the jurisdiction of Aboriginal Courts is confined by Regulation 46 of the 1972 Regulations to:

> 'Hear and determine complaints for offences: against these Regulations or against any By-laws of an Aboriginal Council by Aboriginal residentS' of the Reserve or Community for which such court-: is established'.

31. There are other indications in the enabling legislation that the by-laws only apply to Aboriginal persons in reserves. Pursuant to sub-section 31(3) of the Aborigines Act Aboriginal Councils:

> may exercise such functions, duties and powers of local Government as are prescribed

By Regulation 19 of the Aborigines Regulations of 1972 each Aboriginal Council it given the:

> ... power to make By''laws resolutions And orders for the'well7beingand progressive development of Aboriginal residents

By Regulation 21 further by-law making powers are given to each Council:

> for promoting, maintaining, regulating and controlling the peace, order, discipline, comfort, health, moral safety, convenience, food supply, housing and welfare of the inhabitants of the Reserve or Community

while Regulation 20 charges each Council with the function of 'good rule and government' of reserves:

> ...- in accordance with Aboriginal customs and practices and shall have power to make by-laws for such good rule and government and to cause all by-laws lawfully made by it to be observed and enforced',

32. The question arises as to whether Regulations 20 and 21,, and, indeed, other by-lawmaking powers found in the Regulations extend the potential scope of by-laws from Aboriginal residents to all persons within reserves from time to time, irrespective of whether they are permanent residents or not, and ,irrespective of racial origins. While this question is not entirely free from doubt, on the whole, it would be unsafe to conclude that the by-laws extend to persons on reserves who are not of Aboriginal descent, and there is even some doubt as to whether extend to Aboriginal persons visiting reserves.
Ultimately, as the by-laws can only be enforced against Aboriginal persons, it is difficult, if not impossible, to argue that they apply to other Australians found on reserves.

33. However, the Mere fact that the by-laws are confined in their Operation to Aboriginal persons on reserves does not Of itself means that they are discriminatory in an unlawful Way: Unlawful discrimination involves a distinction based on a prohibited ground having an invidious or arbitrary effect in prejudicing particular classes or persons (affirmative action, which may involve preferring the class or person, is
specifically Contemplated by the Racial Discrimination Act and Convention). As pointed out by the European Court Of Human Rights in the Belgian Linguistics case in its judgement of 23 July 1968 at page 34,unlawful discrimination is not necessarily involved in every difference in treatment in the exercise of

rights and freedoms. Nevertheless, the fact that Australians living on Aboriginal reserves in Queensland live under a special legal regime derived from the by-laws and their administration invites consideration of whether human rights are infringed by the very, existence of the body of by-laws. Taking this point a little further, for their permanent residents at least, the Queensland reserves are their principal or only places of residence. They are where the residents prefer to live. In many cases, the lands concerned are of traditional significance and have been in Aboriginal possession since time immemorial. In other cases, existing residents or their forbears have been compulsorily settled in particular reserves. Even in such cases, the reserves have come to represent their home. However, the Aboriginal residents of reserves can live in them only if they are subject to the by-laws. They cannot opt out. Put another way, their right to live in their preferred place of residence is subject to a condition which many must find intolerable - that is, coming under the provisions of the by-laws. The imposition of this condition for living in the reserves is itself a form of discrimination. It is no answer to this argument to say that most Australians live under some system of local government regulation from which they cannot opt out, for the position of Aboriginal residents on reserves in Queensland is very different from that of most residents in shires and municipalities in other parts of Australia. The by-laws under which they live are a form of external control not imposed on other residential groups and bearing no substantial relationship to the differing characteristics of the various reserve communities. In their offensively intrusive nature, as well as their selective applicability to residents on reserves, the by-laws are a clear form of discrimination.

34. Professor Garth Nettheim argued in 1981 in 'Victims of the Law', at page 113, that the by-laws have not in any real sense been made by the Aboriginal Councils at all, but are a standard set of by-laws produced by the Department of Aboriginal and Islanders Advancement which the Aboriginal Councils simply adopt. The advice from that Department that the same set

of by-laws have been adopted without variation in all 14 Aboriginal reserves is consistent with this proposition. It would be reasonable to expect variations in the by-laws from one reserve to another to deal with variations in local conditions and perceived needs if the by-laws were in fact a meaningful exercise in Aboriginal autonomy. Indeed, it has come to the Commission's notice that allegations have sometimes been made that certain Aboriginal Councils have, from time to time, sought to alter the by-laws applicable to their reserves but have been prevented from doing so. If in reality the by-laws of general application reproduced in Appendix Two are not effectively made by the Aboriginal Councils at all then the question arises as to whether, in cases where the Racial Discrimination Act is applicable, there is an infringement of Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, which recognises, in Article 5(c), political rights, including the right ' ... to take part in the Government as well as in the conduct of public affairs at any level ... '. Questions of inconsistency with Article 25 of the ICCPR also arise.

35. It may also be the case that from time to time individual Councils by-pass the formalities of the by-law making process and produce and enforce .informal by-laws which have not been approved by the Minister in accordance with Regulation 27 of the Aborigines Regulations of 1972. An example of what may very well be such an informal by-law which may be applied in practice has been brought to the notice of the Commission. It purports to be a by-law made by the Weipa South Community Council and is signed by the Chairperson, though it is, in the form provided to the Commission, undated. It imposes a curfew on residents of the community, and makes it clear that a $40 fine or a gaol sentence would be imposed for the breaking of the curfew. It may be of interest to reproduce the text of the by-law in full.

WEIPA SOUTH COMMUNITY TIME

Order of the Council and the by-law

Children:- Home at 9.00 p.m.

Adults:- 10.30 p.m. no one to leave this community after 10.30 p.m. or coming in after 11.00 p.m.

If you do break this law you shall be brought before the court. $40 fine or Jail Sentence for breaking the by-law.

Any outside parties you should see the Council for safety, the Council will give you 3 hours 8 p.m. - 9p.m. to 10.30 p.m. you shall wander home before 11 p.m, you got responsibility at home your duty and your children.

If you have a night out you have broken the law. You shall be brought before the Court. $40 fine or Jail Sentence.

If you are going out to Disco the same thing is given 3 hours 8 p.m. - 9 p.m. to 10.30 p.m. then you shall wander home.

If you break this Law you shall be brought before the Court $40 fine or Jail Sentence.

If any Function taking place here in the Community up to 12 p.m. it shall be closed.

No more grog party out in the water front or out where the Welcome sign, [this section obliterated] everybody remain in there own premise after hours.

This way we will find ourselveS with Love, Joy, Peace and plenty Obedient and Disciplined doing the things together hand in hand and walk ahead for future to come.

ORDER BY THE COUNCILS

36. There follows an analysis of the by-laws applying throughout Aboriginal reserves in Queensland from a human rights perspective. It is not proposed to deal with every by-law. Human rights issues of significance do not arise at every point in the by-laws. Thus, Chapter One, standing by itself, has no human rights implications of significance, dealing as it does only with definitions and need not be discussed. Chapter Three,

which, when it was in force, had serious human rights implications, because it authorised Managers to force people to work at tasks determined by him, need not now be considered in this part of the paper because the Commission has been informed that it has been repealed.

37. The provisions in Chapter Two as to the meetings of Aboriginal Reserve Councils are unremarkable from the point of view of human rights. However, the Commission is aware of allegations that. sometimes meetings have been held in the absence of certain Councillors who were not made aware of the fact that a meeting had been called. The by-laws may be, to some extent, at fault here as they fail to provide for the minutes of meetings to be distributed to members. If minutes are distributed to members these minutes will normally contain a note of when the next meeting is to be held. They thus have a valuable function in reminding members who have missed a meeting when the next meeting is to be held. If meetings of Councils are to function with maximum efficiency, Councillors should be furnished with copies of the minutes of the previous meeting and also informed of when future meetings are to be held. Article 5(c) of the Racial Discrimination Convention, and Article 25 of the ICCPR, which both require full,opportunity to participate in the conduct of public affairs, are relevant.

38. Chapter Four, dealing with conduct and behaviour on reserves, contains a number of provisions dealing with minor offences, and two rather strange provisions which should be considered. The first, contained in by-law 1(g) of Chapter Four, prohibits the carrying of:

> 'tales about any person so as to cause domestic trouble or annoyance to such person'.

Telling tales, as it is colloquially known, is regarded by many Aboriginal persons as very offensive and is understood to be a frequent cause of minor disputes. The idea behind this particular by-law is no doubt to prevent unnecessary trouble in families and the reserve communities generally. The by-law

attempts to deal with a genuine problem, even though such a by-law would be regarded as absurd and irrelevant in most other local government systems in Australia. For example, there is nothing comparable in the City of Townsville By-laws. Nor is A$_L$ provision about telling tales likely to be seen in any other shire or municipal by-laws in Australia.

39. It can be argued that the prohibition on the carrying of tales which cause domestic trouble or annoyance is a: by-law$_A$ protecting the rights and reputations of people and therefore a justified restriction on the right to freedom of expression. The by-law is, however, expressed so widely as to raise questions of inconsistency with Article 19.2, dealing with freedom of expression. It is true that the wide scope of paragraph .2 of Article 19 is qualified by paragraph 3, which states that the: right to freedom of expression may be restricted by laws providing for respect for the rights and reputations of others. On the other hand, penal sanctions are associated with v.breach of any by-law: Chapter Twenty-four, by-law 4. The carrying of tales could result in a fine not exceeding $40 or 14 days imprisonment. One solution would be to make this by-law more precise, as it is now so vague and general that it covers practically anything that might be deemed to cause:annoyance, es well as having the potential to be used to stifle freedom of speech and political dissent.

40. By-law 1(h) of Chapter Four is also worthy of consideration. It prohibits games of chance ' or games prohibited by the Manager' but includes a proviso giving the Manager an unfettered discretion to permit the playing of any game. The juxtaposition of 'games' with 'games of chance.' indicates that the Manager may prohibit any game at all, even if it does not involve gambling. He thus could prevent the playing of cricket or football or, for that matter, marbles. Moreover, the power of the Manager to prohibit the playing of games is $_{no}$t confined to games in public places. The by-law is expressed so widely that it could be used to Prevent the playing of games in houses or gardens occupied by residents on a reserve. While

by-law 1(h) of Chapter Four, taken by itself, is merely absurd or officious, it is important to realise that it must be read in conjunction with by-law 4 of Chapter Twenty-four, discussed above, which has the effect of permitting the Manager's decrees on the playing of games to be enforced with fines of up to $40 or 14 days imprisonment. The important aspect of this by-law is that it is the Manager who decides whether a game should be permitted. In some communities, it may be in the interest of the people that, for example, gambling be controlled and a by-law specifically dealing with gambling might be appropriate in some places. But surely this should be a matter for the Council to decide rather than the Manager? However, the by-law, as it now stands, can be regarded as infringing human rights, notably Articles 19, 21 and 22 of the ICCPR. The same comment might well be made about a number of other by-laws discussed below which seek to regulate personal conduct in a way which is not attempted in the wider community outside the Queensland reserves.

41. Again, comparison is invited with the by-laws of the City of Townsville. A number Of city by-laws deal with the playing of games. Thus, in Chapter Thirteen prize-fighting, dogfighting and cock fighting are prohibited by by-law 447(1). In Chapter Fifteen of the Townsville By-Laws, dealing with parks and reserves, dangerous games are prohibited by by-law 517, while by-law 518 contains detailed provisions preventing the players of particular games from monopolising parkland to the exclusion of other users. This by-law also contains a provision permitting the Council to set aside particular areas for the playing of certain games, while by-law 492 permits the Council to place sections of parkland under the exclusive control of sporting clubs, providing that the rights of the public to the general use of parklands are not unreasonably interfered with. These latter provisions are reasonable provisions permitting the Council to allocate space as between potentially competing users of parkland. They are quite different in character from the sweeping powers contained in by-law •(h) of Chapter Four of the

Aboriginal Council By-laws and do not appear to extend to privately owned lands, except in the case of by-law 447, prohibiting prize, dog and cock fighting.

42. When the International Covenant on Civil and Political Rights was being drafted, specific attention does not seem to have been given to laws giving such sweeping powers to control and prohibit the playing of games as are found in by-law 1(h) of Chapter Four. It may well be that such laws were thought to be no longer in existence, although precedent is to be found in England under Cromwell. Nevertheless, team games do involve the assembling of persons together, and the right of peaceful assembly is recognised in Article 21 of the ICCPR. They also involve the association of people with each other, and the right to freedom of association is guaranteed by Article 22. In addition, questions of inconsistency with Article 19 also arise. It would therefore seem that by-law 1(h) of Chapter Four is inconsistent with or contrary to Articles 21 and 22 of the ICCPR.

43. Chapter five makes provision for the health and medical needs of reserve communities. By-law 1 of Chapter Five states that:

> 'A person shall attend for medical attention or examination in cases of sickness or when so directed by the Council, the Manager or the Medical Officers'.

This by-law imposes on Aboriginal communities a requirement to have a health check-up if directed to do so. Outside a reserve, such a check-up could not be enforced in communities of white Australians. Some laws are still to be found in Australia requiring notification of infectious diseases and the like, but nowhere else is to be found such a sweeping requirement to accept compulsory medical treatment. Whilst this by-law seems well-meaning in its approach to the health of Aboriginal communities, prima facie it discriminates against them by imposing on them potentially onerous obligations not applicable outside reserves, and is inconsistent with Article 17 of the

ICCPR which seeks to protect people against arbitrary interference with their privacy and their family life. As it is understood that some Aboriginal persons on reserves feel that they are exposed to medical experimentation, questions of inconsistency with Article 7 of the ICCPR may also arise. This provides that 'no one shall be subjected without his free consent to medical or scientific experimentation'. It might be argued that given the notorious health problems of many Aboriginal communities in Australia the provision for compulsory medical examinations is perfectly proper, and an appropriate response to a serious cause for concern. However, before this conclusion could be reached with confidence, it would have to be established that adequate medical services were readily available on reserves and were being rejected unreasonably by the residents. Only then would this compulsory power be justified. To put it the other way round, if, on certain reserves health and sanitation facilities are inadequate, it is hypocritical to have a compulsory requirement to attend for medical examination in the absence of proper facilities.

44. Chapter Six relates to hygiene and sanitation and no doubt was originally designed to protect communities living without sewerage and septic tanks or piped water supplies. Over the years however, improvements have been made in this area and it is understood that septic sanitation and piped water are now common on reserves. Therefore the provisions of Chapter Six now seem to be somewhat out of date and rather paternalistic in their application to reserves where these improvements have been introduced. Bearing in mind that the penalty for a breach of any of these by-laws involves a fine of up to $40, it does seem that the provisions of Chapter Six are somewhat oppressive raising questions of inconsistency with Article 5 of the Racial Discrimination Convention which guarantees equality before the law. By way of comparison, the City of Townsville by-laws seem to be framed on the assumption that a comprehensive system of sewerage and septic tanks operates throughout the city, and that it is supplied with piped water. Nevertheless, there is some similarity between some provisions in both sets of by-laws.

Thus, by-law 15 of Chapter Six of the Aboriginal Council by-laws, prohibiting the disposal of wastes in community areas, parks and water supplies is similar to, though in some respects wider than, by-law 289 of the City of Townsville by-laws which restrains the deposit of wastes in water courses.

45. The provisions about the control of dogs in Chapter Seven of the Aboriginal Council By-laws are, in a simplified form, not unlike those found in Chapter Ten of the City of Townsville by-laws, except that in the case of Townsville, a system of registration is mandatory. Accordingly, no question of discrimination appears to arise.

46. The Aboriginal Council By-laws do not deal with the construction of buildings in any detail. By-law 5 of Chapter Eight restrains the construction of buildings without the permission of the Manager, but there are no criteria as to how buildings may be constructed. By way of comparison, Chapter Four of the by-laws of the City of Townsville deals in a very detailed way with the control of building operations within the city. This is another example of virtually unrestricted discretion being entrusted to reserve managers which has the potential to be exercised in an oppressive way. The absence of clear criteria as to building and construction standards could lead to the result that unsafe or insanitary structures were permitted by the Manager were he in fact unfamiliar with sound building practice and standard building codes. Moreover, by-law 6 of Chapter Eight is worded in such a way as to permit the invasion of the privacy of householders on Aboriginal reserves. This by-law provides that:

> 'A householder shall allow an authorised person to enter his house for the purpose of inspection'.

Although the inspection has to be undertaken by 'an authorised person', the purposes of inspections are not specified, so that any petty official intrusion into the houses of residents seems to be justified by the by-law. Householders could be subjected to unnecessary invasions of privacy. Therefore, this by-law seems inconsistent with Article 17 of the ICCPR which, amongst

other things, states that everyone has the right to the protection of the law against arbitrary and unlawful interference with his privacy and home. Further, there is the added burden of the potential penalty for the breach of this by-law if a householder refuses entry by an inspector, even in circumstances when an inspection would seem to be unwarranted. Taken by itself, the by-law does seem to have potential for authorising arbitrary and paternalistic intrusions into the houses occupied by residents of reserves.

47. It may be useful to make some comparison between the provisions of the Aboriginal Council by-laws relating to entry onto premises by officials and comparable provisions of the City of Townsville by-laws. A scrutiny of the voluminous by-laws applicable in the City of Townsville indicates the caution and restraint with which this issue is approached. There are very few provisions in the City of Townsville by-laws permitting local government officials to enter premises without the consent of the occupier. Where such provisions exist, the tendency of the by-laws is to circumscribe and confine the powers of entry with some care. Thus, by-law 325 of Chapter Eight gives a right of entry to inspect registered flats, tenements and hostels. However, except in a case of emergency, the power can only be exercised between 9am and 6pm between Monday and Saturday, and not at all on Sundays. In cases of emergency, a direction of the Medical Officer of Health is necessary before entry can be made, and in such special circumstances, inspectors must be accompanied by a police officer.

48. However, by-law 6 of Chapter 8 must now be read down by section 8 of the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975, which provides that:

> 'Where premises situated on a Reserve are occupied by an Aboriginal or Islander, a person is not entitled, without the consent of the Aboriginal or Islander, to enter those premises unless, if the Reserve on which the premises are situated were not a Reserve, the entry would not be unlawful'.

The effect of section 8 is to limit the scope of by-law 6 of Chapter Eight so that the consent of the reserve resident concerned is required for all entries to houses except where, under the laws of Queensland applicable outside the reserve, entry without the consent of a householder would not be unlawful.

49. By-law 3 of Chapter Nine provides that:

> 'A person using a gate or any other opening in a fence capable of being closed shall close it unless instructed by an authorised person to leave it open'.

No reason need be given for leaving a gate open. The by-law was most probably drafted with a view to controlling the straying of animals. However, an authoritarian enforcement of such a by-law could create problems, even if human rights issues are not directly involved.

50. Another unfettered discretion given to Managers of reserves is found in by-law 1 of Chapter Ten, which provides that:

> 'A person swimming and bathing shall be dressed in a manner approved by the Manager'.

Though interesting problems of interpretation could arise in the case of a person swimming but not bathing, if this is possible, or alternatively, bathing, but not swimming, nevertheless where both activities are combined, the Manager does appear to be given an unrestricted discretion as to the manner of dress used, which conceivably could be exercised in such a way as to be oppressive. Questions of inconsistency with Articles 17 and 19 of the ICCPR arise in this context. Article 17 provides that 'no one shall be subjected to arbitrary or unlawful interference with his privacy'. Article 19 provides that 'Everyone shall have the right to freedom of expression'. Though it is in a sense unusual in the context of bathing to say that the right to dress as one pleases, consistent with public decency as a right of privacy, nevertheless it can be seen as such when the question

arises of arbitrary official interference in the choice of dress. At the same time, such interference could amount to an infringement of a person's right to freedom of expression, because dress is one form of expression of one's personality. It is therefore reasonable to conclude that by-law 1 of Chapter Ten is inconsistent with Articles 17 and 19 of the ICCPR.

51. It is likely that by-law 1 of Chapter Ten, or its administration, is affected by section 7 of the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act, sub-section 1 of which provides that:

> 'An Aboriginal or Islander shall not be ejected from a Reserve, or be penalised in any other way, under any law of Queensland relating to a Reserve by reason only that he has conducted himself in a way that is not to the satisfaction of an authority or person established or appointed by, under or for the purposes of a law of Queensland, if his conduct was not unreasonable in all the circumstances of the case'.

Section **4** of this Act applies its provisions to the Crown in right of Queensland, as well as the Commonwealth, while the effect of sub-section 7(1) is to import the test of reasonableness into decisions about bathing dress made under by-law 1 of Chapter Ten. It is true that the phraseology of by-law 1 of Chapter Ten does not specifically refer to the requirement for bathers to dress to the satisfaction of the Manager, but in a manner approved by the Manager, but no distinction of substance can be discerned between the two forms of words. An interpretation of sub-section 7(1) pursuant to section 15AA of the Acts Interpretation Act 1901 of the Commonwealth would mace it applicable to by-law 1 of Chapter Ten with the result that the powers of the Manager under that by-law could not be exercised in an unreasonable or arbitrary way. Sub-section 7(2) of the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act also reverses the burden of proof in such circumstances, providing that:

> 'The burden of proving that the conduct of an Aboriginal or Islander was unreasonable in the circumstances of a particular case lies upon the person who alleges that the conduct was unreasonable'.

52. By-law 1 of Chapter Ten of the Aboriginal Council By-laws invites comparison with by-law 6(2) of the City of Townsville Bathing Reserves By-laws, made under section 45A of the Queensland Local Government Act. The Bathing Reserves By-laws comprise Chapter Twenty-four of the City of Townsville By-laws. By-law 6(2) of the City of Townsville Bathing Reserves By-laws provides that:

> 'Any inspector or authorised person may require any person in a bathing reserve, who is in his opinion improperly clothed, to leave the reserve'.

Though this by-law gives a wide discretion to inspectors and authorised persons as to what constitutes impropriety in dress, at least the lownsville by-law contains a criterion. The inspector or authorised person is not entitled to intervene except where it is thought a person is improperly clothed. Intervention cannot occur merely because the inspector or authorised person disapproves of a bather's dress. By way of contrast, by-law 1 of Chapter Ten of the Aboriginal Council By-laws, taken by itself, gives a much wider power to the Manager. His discretion extends not only to insisting upon rigid standards of propriety in bathing dress, but also to the opposite. He could require, for example, bathers to have very scanty dress, if this was his whim. Though in each case a wide discretion is conferred on officials, the Townsville by-law on the subject of bathing dress is much less likely to involve an arbitrary interference with privacy.

53. Chapters 11, 12 and 13, dealing with cemeteries, noxious weeds and electricity do not raise any fresh human rights issues and need not be discussed in this paper.

54. The provisions about nuisance and annoyance control in Chapter Fourteen deal mainly with noise. Their function is to protect residents of reserves from noise pollution. Comparing Chapter Fourteen of the Aboriginal Council By-laws with the relevant provisions of the City of Townsville By-laws, the principal difference is that in the latter there is a greater attempt to establish objective standards of what constitutes nuisance in the form of noise. Thus, by-law 3 of Chapter Fourteen of the Aboriginal Council By-laws permits an authorised officer to intervene in respect of a noisy dog whether or not a complaint has been received, and there is no attempt at defining an objective standard of what constitutes the nuisance of noise. However, by-law 417a(2) provides a series of tests for determining whether noise is a nuisance in Townsville, including the proposition that:

> 'Whether any distress, annoyance, irritation, or disturbance is undue, is to be determined according to the sensitiveness of normal persons, and with due regard to the time, place, intensity, and frequency of the noise complained of'.

Moreover, by-law 417a(3) of the City of Townsville By-laws provides a series of defences to a prosecution in respect of nOise, including the defence that the noise in question was:

> ' ... necessary and incapable of mitigation without unreasonable expense or delay ... '.

On the other hand, it would be reasonable to expect that the question of noise control would be dealt with in greater detail in a city than in the rural environment of most Aboriginal reserves, and it is difficult to conclude that anything in Chapter Fourteen of the Aboriginal Council By-laws relating to noise control is inconsistent with or contrary to Article 19 of the ICCPR, dealing with freedom of expression. However, by-law 5 relates to the control of conduct of a person who is annoying others, and is expressed in very broad terms. It proves that:

> 'A person shall so conduct himself in the community area and in any building so as not to annoy other residents'.

This by-law contains no hint of any objective standard which might be used to determine whether a person's behaviour constituted an annoyance to reasonable people in the vicinity. Its generality could lend itself to oppressive use and the stifling of the freedom of expression of residents on Aboriginal reserves.

55. Chapter Seventeen relates to Parks and Roads and what may be done in these areas. By-law 3 states that:

> 'A person shall not, without permission of the Manager, engage in any trade or business in a park or anywhere in the Community/Reserve area'.

By-law 4 of Chapter Seventeen goes on to provide that:

> 'A person shall not, without the permission of the Manager, organise a game or play in a park or anywhere in the Community/Reserve area where places have not been set aside for the playing of games'.

Both these by-laws give the Manager unfettered power to exercise his personal discretion over the Aboriginal community in question, in the first instance over a person's economic circumstances and in the second, over the freedom to play games. If these broad powers were used improperly then the residents on reserves could be severely restricted both in earning their livelihood and in their recreation.

56. Chapter Eighteen provides for roads in a general way and by-law 4 is worthy of notice. It provides that:

> 'A person shall not travel on any road which the Manager has declared shall not be used'.

Suggestion has been made to the Commission that in the past this by-law may have been used on occasion to prevent Aboriginal persons from using certain roads or paths traversed by whites. Whether this is so or not, the nature of the by-law does involve potential restrictions on the right to freedom of movement and, as no reasons need be given under it before declaring a road unusable, it seems to be inconsistent with Article 12 of the ICCPR, which provides for liberty of movement. It is interesting

to make some comparison between this by-law and the voluminous provisions of the City of Townsville By-laws. The latter deal with streets and roads, in Chapter Three of those by-laws, and with traffic and parking in Chapter Thirty-three. The general thrust of these detailed provisions is to restrain any interference with, or obstruction to, public roads. The by-laws are directed at keeping roads open and preventing private individuals from obstructing them.

57. Chapters Nineteen to Twenty-one inclusive, dealing respectively with vehicles and bicycles, water supply and hospitals, do not raise human rights issues of significance and are not discussed.

58. The right of policemen, under by-law 2 of Chapter Twenty-two to enter buildings ' ... when it is reasonably suspected that any offence is being or has been committed therein' may raise questions of inconsistency with Article 17 of the ICCPR, which provides that, in paragraph one, 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence ... '. However, it could be said that the requirement in by-law 2 of Chapter Twenty-two for reasonable suspicion before a building may be entered by policeman prevents the entry from being arbitrary, while the specific authority given to policemen under the by-law to enter premises prevents the interference with privacy and the home from being unlawful. Importation of the requirement for reasonable suspicion does leave open, at any rate in theory, the possibility of judicial intervention to restrain trespasses by policemen.

59. By-law 2 of Chapter Twenty-two and by-law 6 of Chapter Eight are also affected by section 8 of the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act. The effect of section 8 is to confine powers of police entry in reserves to those derived from the general law of Queensland. The result is that the by-laws must be read down so as not give the Queensland police wider powers of entry than they enjoy under the general law of Queensland.

60. Chapter Twenty-three, dealing with functions in halls and the use of boats and vessels, does not raise significant human rights issues and is not discussed.

61. Chapter Twenty-four makes provision for various matters including, in by-law 1, the prohibition of sorcery. While the Commission is of the opinion that sorcery 'which interferes with the harmony or well being of the residents' is wholly reprehensible, it is nevertheless aware that other practices relating to traditional methods of medicine may, by outsiders, be termed 'sorcery' and conceivably punished under this by-law which has the potential to be used to inhibit the practice of traditional rites and customs of Aboriginal communities. In such circumstances, questions of inconsistency with Article 18 of the ICCPR could arise. This Article provides for the freedom of each person ' ... to manifest his religion or belief in worship, observance, practice and teaching'. This by-law also raises issues under Article 27 of the ICCPR, which provides that ethnic and religious minorities have the right

> '... to enjoy their own culture, to profess and practice their own religion, [and] to use their own language'.

In Papua New Guinea, protection from the practice of certain types of sorcery has been provided in the Sorcery Ordinance 1971. This Ordinance seeks to distinguish the two types of sorcery - 'innocent sorcery' and 'forbidden sorcery'. Sub-section 4(1) of the Ordinance defines the act of sorcery to be:

> 'any act (including a traditional ceremony or ritual) which is intended to bring, or which purports to be able or adapted to bring, powers of sorcery into action or to make them possible or carry them into effect'.

'Innocent sorcery' is defined in effect as being that kind of sorcery which is protective or curative and is not therefore calculated to bring any harm. 'Forbidden sorcery' is any sorcery which falls outside the category of 'innocent sorcery'. Therefore, by providing that innocent sorcery is lawful, certain traditional tribal rites and customs are preserved and yet the

tribes are protected from sorcery which is harmful in its effect. If, therefore, in the by-laws sorcery was defined to acknowledge the existence of the different types of sorcery and to prohibit only the forbidden or evil sorcery, then it would seem that there would not be any inconsistency with Articles 18 and 27 of the ICCPR.

62. By-law 3(b) of Chapter Twenty-four states that 'a parent of a child aged not less than six years nor more than 15 years shall cause such child to attend school on each school day'. If a parent fails to comply, a breach of the by-laws results and the penalty imposed is $40. However, section 28 of the Education Act 1964-1974 also provides for compulsory attendance at school and this section would seem to apply equally to parents of children on Aboriginal reserves. The, penalty for non-compliance provided in section 32 of this Act is $10 for a first offence and $50 for subsequent offences. Aboriginal parents on reserves are thus potentially liable to a higher penalty for a first offence than defaulting parents outside reserves. An element of discrimination is thus involved in the liability of reserve residents to penalties for not sending their children to school for which people outside reserves are not liable. Inconsistency with Principle 10 of the Declaration of the Rights of the Child is also involved, for that Principle requires each child to:

> '... be protected from practices which may foster racial, religious and any other form of discrimination'.

63. The discussion in the preceding pages has identified a number of by-laws which may be inconsistent with full recognition of human rights for Aborigines on reserves. The points made are summarised in the table below.

Human Rights Issues Raised by the Queensland By-Laws

By Law	ICCPR	Racial Discrimination Convention	Wide Discretion
All by-laws	Art.25,26	Art.5(c)	
Ch.4 by-law 1(a)	19		
Ch.4 by-law 1(h)	19,21,22		
Ch.5 by-law 1	7,17,26	Art.5	
Ch.6		Art.5	
Ch.8 by-laws 5,6	17		Yes
Ch.10 by-law 1	17,19		Yes
Ch.14 Art.5	19		
Ch.17 by-laws 3,4			Yes
Ch.18 by-law 4	12		
Ch.22 by-law 2	17		
Ch.24 by-law 1	18,27		
By-law 3(b)	26		Art.5(a)

The Position of Managers on Reserves

64. **It** will be seen from the foregoing that very wide discretionary powers are entrusted to managers of Aboriginal reserves in Queensland. Their power over the residents of reserves knows no counterpart in the wider community. Managers are appointed by the Governor-in-Council under section 15 of the Aborigines Act. That Act does not prescribe any particular qualifications or expertise for appointment to this important position. Nevertheless, the Commission is advised by the Director of the Queensland Department of Aboriginal and Islanders Advancement that managers of reserves are appointed under the Public Service Act and that Public Service procedures require particular qualifications for appointment, while appropriate personnel selection processes are followed. Nevertheless, complaints have been made to the Commission indicating that some managers have been inadequately prepared for the difficult and sensitive tasks entrusted to them, and are unable to deal satisfactorily with certain issues arising on reserves, with the result that confrontations have occurred. Perhaps such situations could be avoided if the managers were

the servants of the Councils. It would then be clear that their duty was to carry out the policy of the Councils. This is not the case at the present time. Under regulation 19 of the Aborigines Regulations 1972:

> ' an Aboriginal Council shall be responsible to the Manager for the conduct, discipline and well-being of Aborigines residing within the Reserve or Community'.

While a certain ambiguity surrounds the precise interpretation of this regulation insofar as it purports to define the relationship of Councils and managers, this regulation certainly does not support the proposition that managers are under the direction of Councils. On the other hand, it may well be that Councils have some degree of independent action and are not merely, at law, the agents or servants of managers. A lot turns on the interpretation to be given the word 'responsible'. It is clear, for example, that managers are not members of Aboriginal Councils, and that individual Councils can validly convene in the absence of the manager. It is also possibly not the case that they can prevent the manager from being present during their deliberations if he chooses to be present. The powers of the individual Councils as to meetings is set out in Chapter Two and are probably not as comprehensive as would be desirable. Whatever the precise relationship in law and practice between Councils and managers, each manager may exercise wide powers under the by-laws in an arbitrary manner and is only accountable to the Department of Aboriginal and Islander Advancement. Each community is virtually unprotected as to the way by-laws are administered on reserves. The powers of the manager are such that the scope for infringement of Article 17, protecting people from arbitrary or unlawful interference with their privacy, family, home or correspondence, is very great indeed. Conflicts are inherent in the situation where the manager is unaccountable to the Council and is, at the same time, entrusted with such wide powers.

65. The potential for conflict between managers and Councils can be seen when an examination is made of sub-section 31(3) of the Aborigines Act, inserted in 1979 which purports to entrust to each Aboriginal Council:

> ' ... the power of directing that an Aborigine shall not enter, reside on, visit or be on the Reserve or in the community if in the Council's opinion his presence on the Reserve or in the community would be detrimental to the Reserve or community or to any of the residents therein'.

A number of complaints have been made to the Commission about the use of this power which is not affected by the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act of the Commonwealth, which, in sub-section 6(3) provides that it is not to apply to directions given to Aboriginal persons by or on behalf of a Council. Nevertheless, though the power is apparently vested in Aboriginal Reserve Councils, as these are responsible to the managers then there is great scope not only for conflict between managers and Councils on the question of who should enter and reside in reserves, but also for manipulation of the Councils on this vital matter by determined and aggressive managers.

66. Admittedly, the powers of managers were even wider in the past. Professor Nettheim at page 114 of 'Victims of the Law' (which is in the form of a report to the International Commission of Jurists) criticised a provision said to be in Chapter 3 of the by-laws that:

> 'All able-bodied persons over the age of 15 years residing within the Community/Reserve shall unless otherwise determined by the Manager perform such work as is directed by the Manager or person authorised by him'.

He considered that this by-law was inconsistent with Article 8.3(a) of the International Covenant on Civil and Political Rights, which states that:

> 'No one shall be required to perform forced or compulsory labour'.

However, it would appear that this by-law has now been repealed: it did not form part of the by-laws supplied to the Commission by the Department of Aboriginal and Islander Advancement. Nevertheless, despite the removal of this particularly onerous part of the by-laws, those remaining leave substantial cause for concern not only in respect of their discriminatory aspects and infringements of human rights, but also in respect of the wide powers entrusted to managers.

Conclusion

67. As far as the future is concerned, it may be that the old system of Aboriginal reserves in Queensland will soon disappear. Nevertheless, the Aboriginal communities now living on reserves will remain where they are, hopefully under a more permanent system of land tenure. It will be necessary for these communities to have some form of social control and it is to be hoped that the present paternalistic system of by-law's applying to all Aboriginal reserves in Queensland will be replaced by systems of social control, whether enshrined in by-laws or some other form, which represent the genuinely felt needs of the communities concerned and not what outsiders think they should have imposed upon them. In particular, the temptation to adopt in one way or another the existing by-laws, even as an interim measure to avoid a legal vacuum, as reserves are replaced by other forms of tenure, should be avoided. The by-laws are peculiarly inappropriate to the needs of Aboriginal communities in Queensland and should disappear with the reserves to which they now apply.

68. The offences created by breaches of the Queensland by-laws are status offences, that is, acts which are unlawful for Aboriginal persons living on reserves but which everyone else may do without risking punishment under the by-laws, including non-Aboriginal residents or visitors to reserves. This is another way of putting in their context these frequently

petty constraints on the activities of reserve residents . Even if voluntarily adopted by the Aboriginal communities themselves, many of the provisions of the existing by-laws would still constitute a violation of human rights. There are limits to the coercion which the majority should be able to exercise over the minority.

THE REGULATION OF RESERVES IN SOUTH AUSTRALIA

69. The position in South Australia is analogous in some respects to that in New South Wales. Aboriginal reserves have disappeared and, except for the North-West Reserve, the lands formerly reserved have been placed under the control of an Aboriginal Lands Trust. No by-laws relating to the former reserve lands are in existence. Aboriginal and other people residing on formally reserved lands now administered by the Trust are subject to the ordinary laws of South Australia.

70. At the time the Aboriginal Lands Trust Act, 1966-1975 came into operation on 8 December 1966, Aboriginal reserves had been in existence in South Australia for many years. However, the conduct of people on Aboriginal reserves was governed by regulations rather than by-laws. Thus, paragraphs 38(1)(h) and (i) of the Aborigines Act, 1911 authorised the making of regulations for the control and discipline of Aboriginals on reserves. When this Act was repealed by the Aborigines Act, 1934, paragraph 42(1) (ix) of the latter Act contained a similar regulation making provision. The 1934 Act was in turn replaced by the Aboriginal Affairs Act, 1962 which conferred no by-law making power in respect of Aboriginal reserves, but, by section 40, conferred a regulation making power. This power to make regulations was extended by section 41, inserted into the Act by amendments made in 1966 and 1967. Amongst other things, section 41 authorised the making of regulations establishing Aboriginal Reserve Councils and defining their rights, duties, powers and functions. The Aboriginal Reserve Council Regulations, 1968, were made on 24 October 1968 and made provision for the establishment of Aboriginal Reserve Councils on all Aboriginal reserves. Each Council was to consist of 9 elected members, and all male and female residents on a reserve over the age of 18

were given the vote for this purpose. However, Aboriginal Reserve Councils were not authorised to make by-laws. Regulation 7 permitted them to make recommendations to the Superintendent of the Reserve, the Director of Aboriginal Affairs, and the Minister of Aboriginal Affairs, but Regulation 8 went on to say that each Council was to obey the directions of the Minister while Regulation 9 provided that any powers granted to Reserve Councils by the Regulations were to be exercised only with the approval of the Minister. The result was that Aboriginal Reserve Councils were merely advisory bodies. The control of reserves and persons living on them stayed with the Minister of Aboriginal Affairs and his department.

71. The Aboriginal Affairs Act was repealed by the Community Welfare Act, 1972, which, in Part V, made special provision for Aboriginal affairs, including the establishment and management of reserves. In 1975 a new sub.-section 85(4) was inserted into the Community Welfare Act permitting the Minister to delegate to an Aboriginal Reserve Council any of his powers. Finally, Part V of the Community Welfare Act, dealing with Aboriginal reserves, was repealed altogether by section 7 of the Community Welfare Amendment Act, 1981.

72. Meanwhile, as noted above, the Aboriginal Lands Trust Act, 1966 had come into force on 8 December of that year. Section 16. of that Act authorised the Governor, by proclamation, to transfer Crown lands and lands reserved for Aborigines to the Aboriginal Lands Trust. The effect of the proclamation was to vest an estate in fee simple in the lends in question in the Tr4st, unless the estate held by the Crown prior to the proclamation was a lesser estate, when the Trust took whatever estate the Crown possessed. In order to allow for proper consultation with the Aboriginal residents of reserves provisos were inserted in sub-section 16(1) requiring the consent of Aboriginal Reserve Councils where these were in existence before any lands reserved for Aborigines were transferred to the Trust.

The effect of this was to require community assent to the transfer of their lands to the Trust in each case.

73. Sub-section 16(5) authorises the Trust, amongst other things, to lease Trust lands with the consent of the Minister. Ministerial consent is not be be withheld unless the Minister:

> ' ... is satisfied that the ... lease ... fails to preserve to the Aboriginal people of South Australia the benefits and value of the land in question ...[I].

The policy of the Trust has been to lease reserve lands to the Aboriginal occupiers for 99 year leases at a peppercorn rental.

74. As far as the lands comprised in the North-West Reserve were concerned, sub-section 16(6) of the Aboriginal Lands Trust Act provided that, notwithstanding the powers of sale and lease contained in the previous sub-section, lands contained in the North-West Reserve could not be alienated in any way without authorisation of both Houses of Parliament by resolution. A special proviso contained in sub-section 16(1) of the Act restrained the Governor from transferring lands in the North-West Reserve to the Trust until a Council for that Reserve had been constituted and that Council had consented to the making of the proclamation.

75. The Aboriginal residents of the Reserve, and neighbouring areas originally leased to the Ernabella Mission, rejected the idea of the Land Trust holding title to their traditional lands. Ultimately, their claims were recognised by the Ritjantjatjara Land Rights Act, 1981. Section 5 of that Act established, by Statute, a body coporate entitled the 'Anangu Pitjantjatjaraku'. It went on to provide that all Pitjantjatjaras were members of the body corporate. Section 4 defined 'Pitjantjatjara' as traditional owners of the lands described in the first schedule to the Act who were members of

the Pitjantjatjara, Yungkutatjara or Ngaanatjara people. Sub-section 15(1) of the Act authorised the Governor of South Australia to:

> 'issue a land grant, in fee simple, of the whole or any part of the lands [described in the first schedule] to Anangu Pitjantjatjaraku'.

The functions of that body corporate are set out in Part II of the Act, and include administering the land vested in the Anangu Pitjantjatjaraku in accordance with the wishes and opinions of the traditional owners. Of particular interest in the context of this study is the power contained in paragraph 6(2)(i):

> ' ... to make a Constitution relating to -
>
> (i) the conduct of meetings of Anangu Pitjantjatjaraku;
>
> (ii) the procedures to be followed in resolving disputes; and
>
> (iii) any other matter that may be necessary or expedient in relation to the conduct or administration of the affairs of Anangu Pitjantjatjaraku°.

76. Section 14 of the Pitjantjatjara Land Rights Act envisages that this Constitution will be submitted to the Corporate Affairs Commission of South Australia for its approval within 12 months from the commencement of the Act. The Constitution envisaged by paragraph 6(2)(i) of the Pitjantjatjara Land Rights Act has now been lodged with the Corporate Affairs Commission of South Australia and is expressed as having been adopted at Cave Hill on 28 and 29 September 1982. It contains no by-law or rule making power, and is largely confined to the convening and conduct of general meetings of Anangu Pitjantjatjaraku and the operation of its Executive Board. Clause 10 of the Constitution, dealing with the Executive Board, is principally concerned with membership of that body, the filling of casual vacancies and the conduct of its meetings. There is no by-law or rule-making power to be found in the Constitution. It is also of interest that as early as 8 March

1977, the Constitution of the Pitjantjatjara Council Incorporated, of which 21 Aboriginal communities were members, was lodged with the Corporate Affairs Commission in South Australia. The objects of the Council, as set out in Clause 2 of its Constitution, included the development of local self-government upon the lands of the various communities forming the Council as well as the preservation of the traditional law, language and culture of its member communities. The Constitution did not contain any by-law making power. It must be emphasised, however, that the Pitjantjatjara Council is not the same as the body corporate set up by section 5 of the Pitjantjatjara Land Rights Act, nor is its Constitution the Constitution envisaged in the 1981 Statute.

THE REGULATION OF RESERVES IN WESTERN AUSTRALIA

77. There are two principal statutes relevant to this discussion, the Aboriginal Affairs Planning Authority Act, 1972, and the Aboriginal Communities Act, 1979. Sub-section 25(1)of the former Act authorises the Governor, by proclamation to

> 'declare any Crown lands to.be reserved for persons of Aboriginal descent'.

On 6 June 1973 such a proclamation was made under the Aboriginal Affairs Planning Authority Act, and published in the Government Gazette of Western Australia on 15 June. In the schedule to that proclamation are listed the various reserves to which the proclamation applied. All of them had originally been created under other Acts of Parliament, since repealed, such as the Native Administration Act, the Aborigines Act, and the Native Welfare Act.

78. The proclamation of 6 June 1973 was followed, a little over a month later, by another proclamation, this time under section 24 of the Act. It authorised the Governor, on the request of the Aboriginal Affairs Planning Authority, to place lands reserved for persons of Aboriginal descent under the control and management of the Aboriginal Lands Trust. This second proclamation, of 11 July 1973, appeared in the Government Gazette of Western Australia of 17 August of that year All of the reserves listed in the June proclamation were placed under the control and management of the Aboriginal Lands Trust, together with five other reserves the subject of earlier proclamations under section 18 of the Native Welfare Act, 1963.

79. The Aboriginal Affairs Planning Authority Act made no provision for the making of by-laws for these reserves. Neither the Aboriginal Affairs Planning Authority, the Aboriginals Lands

Trust, nor any other body had power to make by-laws. However, the Aboriginals ffairs Planning Authority Act Regulations, 1972, made under section 51 of the Aboriginal Affairs Planning Authority Act, give a wide discretion to officers of the Authority in the exercise of the powers and duties to be found in that Act within reserves.

80. Although there is no by-law making power to be found in the Aboriginals Affairs Planning Authority Act, such a power is to be found in a later Act, the Aboriginal Communities Act. The policy of the 1979 Act is well expressed in its long title, which is:

> 'An Act to assist certain Aboriginal communities to manage and control their community lands and for related purposes'.

There is nothing in this Act which expressly restricts its application to Aboriginal reserves, or prevents its application to an Aboriginal community occupying land by virtue of a freehold or leasehold title. The Aboriginal Communities Act does not automatically apply, either, to all Aboriginal reserves. Section 4 specifically provides that it applies to two Aboriginal communities, the Bidyadanga Aboriginal Community La Grange Incorporated and the Bardi Aborigines Association Inc., as well as to other communities by later proclamation. Most of the Act is devoted to the procedure whereby a Council of a community to which the Act applies may make by-laws. The combined effect of section 8 of the Aboriginal Communities Act and section 36 of the Interpretation Act, 1918-1981 is to require publication of all such by-laws in the Government Gazette of Western Australia. To date, five sets of by-laws have been published in the Gazette under the Aboriginal Communities Act. These are as follows:

(1) the Bidyadanga Aboriginal Community La Grange Incorporated By-laws, which were published in the Gazette of 15 February 1980;

(2) the Bardi Aborigines Association Inc. By-laws, published in the Gazette of 7 November 1980;

(3) the Beagle Bay Aboriginal Council Inc. By-laws, published in the Gazette of 4 June 1982;

(4) the Lombadina Community Incorporated By-laws, published in the Gazette of 4 June.1982; and

(5) the Balgo Hills Aboriginal community Incorporated By-laws, published in the Gazette of 15 October 1982..

81. The Bidyadanga and Bardi by-laws are identical inform and content. The remaining by-laws are similar to each other and also similar in content to the Bidyadanga and Bardi by-laws.

The similarity of the various by-laws suggests that they do not represent the autonomous will of the various Aboriginal communities to which they relate, whose needs may , vary according to differences in local conditions. In this sense they invite comparison with the Queensland by-laws, which are uniform in their application to, all Queensland reserves.

83. The pOwers of_Aboriginal communities to make by-laws: 44(5ex ,,,the Aboriginal 'Communities Act are restricted and controlled in a. number of waya. It the first instance, a proclamation can 6nly,be made applyingtthe Act to a particular community' if the Minister', :under sub-section 4(2):

. . .

is ofthe opinion -

(a) that there are prcvisions: in the Constitution or rules of the community under 'which the Council Of the community will have to consult with the members Of the community and take proper account of their views before making, amending or revoking by-laws pursuant to this Act;',

and that these provisions as to consultation will be complied ; with. Moreover, the Aboriginal Communities Act may, by proclamation, be directed to cease to apply to ,a community under section 5 of the Act if the Minister, amongst other things, is

of the opinion that the community constitution or rules lack proper consultation provisions in respect of the making of by-laws.

84. By-laws approved by the majority of the members of a community Council have a number of hurdles to pass before coming into operation. The Minister must be satisfied, under section 8, that they are 'necessary and desirable'. They must then be approved by the Governor, published in the Gazette and laid before both Houses of Parliament, either of which may, by resolution under section 36 of the Interpretation Act, disallow or amend all or any of them.

85. The scOpe of the by-law Making poWers is, however, very wide. Under section 7 of the Aboriginal Communities Act, by-laws may be Made "relating to entry to community lands, road traffic, the use of buildings, the Conduct of meetings, alcohol, firearms, littering, obstruction, as well as

> 'the prohibition of nuisances or any offensive, indecent or improper act, or disorderly conduct, language or behaviour,

86. The by-lawsl may also provide for certain sanctionsagainst all persons in breach of them, including non-Aboriginal Australians, in contrast to: the Queensland by-laws, which probably only apply to persons of Aboriginal descent. The Scope of the Queensland, by-laws is discussed above under the sub-heading 'The Queensland By-laws, Human Rights, and Racial Discrimination Issues'. These sanctions are various, ranging from a complaint dealt with summarily Under the Justices Act, 1902, to the removal of a person by la policeman from the community lands (subsections 7(2) and sections 10 and 11). Fines may also be imposed, presumably only by a court, but all such fines, under section 12 of the Aboriginal Communities Act, are to be:

'paid to the Council for the use of the community'.

The power given to policemen to remove persons guilty of a breach of a by-law from the community lands seems to be expressed in such a way that this sanction could be applied irrespective of whether proceedings had been begun under the Justices Act. In other words, a person could be removed from community lands without any order of a court, providing that a by-law made provision for this (sub-section 7(2)).

87. However, it should be pointed out that in the by-laws made thus far, the power given to a member of the police force to remove a person from community land for breach of the by-laws is limited. For example, in By-law 15 of the Bidyadanga By-laws, the power extends only to:

> ... apprehend and remove that person from community land for a period not longer than 24 hours or until a Court is convened to deal with the person according to law, whichever is the earlier'.

Other by-laws conferring powers on police to take persons into custody are expressed in the same, or similar, terms.

88. Though the application of by-laws made under the Aboriginal Communities Act is confined by sub-section 9(1) to the community lands, all persons within the boundaries of these lands are governed by the by-laws, irrespective of whether they are members of the community or not. Therefore, they are by no means confined in their operation to persons wholly or principally of Aboriginal descent. For example, by-law 3 of the Bidyadanga By-laws provides that those by-laws shall apply 'to all persons on community land'. It could not therefore be argued that they discriminate against persons of Aboriginal descent. The fact that all or most persons living within the boundaries are persons of Aboriginal descent does not make by-laws discriminatory if they are an expression of a comprehensive local government system, and the boundaries are not themselves arbitrary or discriminatory.

89. There is another interesting provision of the Aboriginal Communities Act relating to the making of by-laws. Sub-section 7(3) provides that

> 'Nothing in this Act affects the power of a community or its Council to make other by-laws, rules or regulations under and in accordance with the Constitution of the community'.

Recalling that the Aboriginal Communities Act envisages that the communities to which it is applied have achieved some sort of corporate identity under the statute law of Western Australia, this provision preserves any by-law making powers that may be associated with incorporation. It seems that sub-section 7(3) is not intended to confer power to make subordinate legislation in accordance with traditional custom or the like, but rather is intended to preserve by-law making and like powers associated with incorporation.

The Bidyadanga By-Laws, Human R'ghts, and Racial Discrimination Issues

90. As the purpose of this study is to examine what by-laws still exist in Aboriginal reserves in relation to the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination, the next step is to scrutinise the by-laws in relation to these instruments so that readers of this report can form their own views on these matters. As the five, sets of by-laws are similar to each other in content, the Bidyadanga by-laws have been selected as an example of the by-laws operating in Western Australia. These by-laws are set out in full in Appendix One.

91. By-laws 1 and 2 deal with definitions and other, preliminary matters and do not raise human rights issues. By-law 3 has already been discussed, and deals with the applicability of the by-laws to all persons on community land.

92. The first issue raising human rights considerations is whether the by-laws relating to the exclusion of persons from the community land in Part B are in any way inconsistent with or contrary to a provision of the instruments mentioned at the beginning of this part. It is important to note that the exclusion provisions relate only to people, irrespective of racial or ethnic origins, who are not members of the community. There is no power here to exclude members of the community from their own lands. By way of contrast, Aboriginal Councils in Queensland, pursuant to sub-section 31(3) of the Aborigines Act, 1971-1979 rather than the applicable by-laws, have an unfettered discretion to expel Aboriginal persons from reserves and this power extends to permanent residents of the reserves.

93. Permission is required to enter community lands, and the Council has a wide discretion to grant, refuse, and revoke permissions. The effect of by-laws 4 and 5 is to make trespassers liable to criminal prosecution. Whilst trespass on rural lands is, in most other contexts, a matter for civil litigation, it seems that by-laws 4 and 5 are not inconsistent with the freedom of movement provisions of the Convention or the ICCPR: Convention Article 5(d)(i) and ICCPR Article 12. There is no human right to trespass. Nor does the exclusion of a person from lands to which he has no right of entry, necessarily amount to racial discrimination. It is true that the persons enjoying possession of community lands are, by definition, of Aboriginal descent. It is also true that the vast majority of those excluded from the community lands by virtue of the by-laws are likely to be of different racial and ethnic backgrounds. This does not necessarily mean they are being discriminated against on racial grounds. The purpose of the by-laws is to protect the lawful possession or occupancy of community lands by the Bidyadanga Aboriginal Community by imposing criminal sanctions on trespassers. It would be reasonable to expect that it would be impracticable to begin a civil action for trespass against many trespassers on community lands, not only because of the delays and costs inherent in beginning civil proceedings, but

also because it would be likely that a number of trespassers would have few assets worth attaching with the result that civil proceedings would not be a deterrent.

94. A somewhat similar point can be made about by-law 7. This protects the lawful possession of householders against unwelcome visitors. The by-law provides that:

> 'Any person who, being in the home occupied by another and upon being directed by the occupier to leave refuses so to leave commits an offence against these By-laws'.

95. py-law 6 is somewhat obscure, and provides that:

> 'The Council may place signs on community land for the purpose of prohibiting entry to the part of the land on which the sign is placed or to such part of the community land indicated by the inscription on the sign'.

There is some uncertainty as to who is affected by such signs. The by-law goes on to say that

> 'An inscription on such a sign operates and has effect according to its tenor and any person who fails to obey the directions on the 'inscription on such sign commits and offence'.

Probably the intention of the by-law is to permit the Council to prevent access to particular places by community members and others. Presumably such a power could be used where it was desired to reclaim eroded land, or to prevent access to land that was being planted with _grasses, or other cereals. However, the absence of any criteria for the exercise of such an extensive power gives it the potential to be used in an arbitrary manner.

96. By-laws B. 9. and 1 0, dealing with road traffic and public health, are innocuous from a human rights and racial discrimination point of view..

97. By-laws 13 and 14, restricting the use of alcohol, are, from one point of view, discriminatory in that Western Australians outside the Bidyadanga community lands enjoy rights of use of alcohol not possessed by members of the community. On the other hand, as it is permissible to take note of the grave social problems associated with the use of alcohol in the Australian community generally, and also amongst particular groups of Aboriginal Australians. The view could be taken that these by-laws relating to the use of alcohol on community lands represent a reasonable attempt to deal with a serious problem.

98. The power to exclude members of the community from community lands is dealt with in by-law 15, and only extends to a power, given to policemen, to remove persons from community lands for a period not exceeding 24 hours. Even then, the power. can only be exercised when there is a danger of injury to persons or damage to property is likely. While, on one view, it could be argued that this is inconsistent with Article 12.1 of the ICCPR, dealing with the right to liberty of movement, on another view it could be concluded that the power, if used wisely, could prevent disorder and violence and allow tempers to cool in a potentially explosive situation. The penal provisions of the by-laws are unremarkable, save for by-law 17, which permits community custom to be used as a defence in proceedings for breaches of these by-laws. This is a provision ameliorating any rigidity and harshness in their application to community members and is to be commended.

99. Looking at the by-laws in their context, it is reasonable to conclude that they do not involve racial discrimination or any serious infringements of human rights.

A Comparison of the Western Australian and Queensland By-Laws

100. Given the paucity. of .by-laws .applicable to Aboriginal , reserves and communities in Australia at the present time, it is natural to make some comparison between the Western Australian and the Queensland by-laws. Even a cursory examination of the two sets of by-laws suggests they differ considerably. The Western Australian by-laws confine themselves to a limited range of topics involving minimum interference with the day-to-day lives of residents in the various Aboriginal communities. On the other hand, the Queensland by-laws, containing as they do a very wide range of topics coupled with open-ended discretions entrusted to the Managers and Councils, permit the most minute regulation of the day-to-day lives of Aboriginal persons on reserves in Queensland.-The Western Australian by-laws protect the possession of the community lands in the interests of the members of the various communities, and then deal briefly with traffic, malicious damage, rubbish, offensive behaviour and the use of alcohol, while the Queensland by-laws deal with topics so diverse and various as bathing dress, the closing of gates and lids on sanitary pan cabinets. The Western Australian by-laws seem based on the philosophy of minimum interference, while the Queensland by-laws seem to be a demonstration of an entirely different philosophy with the potential for the detailed control of the lives of Aboriginal persons on reserves.

101. In the Western Australian by-laws, there is no provision for an official in a situation comparable to that of Manager of a Queensland reserve to impose his will upon Aboriginal persons residing in the community. In the Western Australian Aboriginal communities the Councils are entrusted with the administration of the by-laws, whereas in the execution of the Queensland by-laws the Manager has a key role and is entrusted with a great many sweeping discretions. The Western Australian by-laws, notwithstanding their relative uniformity, are consistent with the concept that the communities are internally self-governing, while the Queensland by-laws,

applying uniformly to all reserves in Queensland, are suggestive of a philosophy of external control extending in theory to the smallest details of private life.

THE REGULATION OF RESERVES IN THE NORTHERN TERRITORY

102. The system of Aboriginal reserves in the Northern Territory which existed for many years has now been displaced with the passing of the Aboriginal Land Rights (Northern Territory) Act 1976. However, the conduct of persons living on Aboriginal reserves while they were in existence was controlled by regulations rather than by-laws. Thus, paragraphs 67(1)(j)and (k) of the Aboriginals Ordinance 1918 authorised the making of regulations for the control of Aboriginals residing upon reserves and for the maintenance of discipline and good order on reserves. Over the years, the definition of what constituted a reserve was changed. In the original Ordinance of 1918 section 3 defined a reserve as a land declared by the administrator to be a reserve for Aboriginals for purposes of that Ordinance. In 1925, section 3 was amended and a new definition of reserve was inserted to encompass:

> ' ... any area proclaimed or declared under the Northern Territory Crown Lands Act, 1980 of South Australia, the Aboriginals Ordinance 1911, the Aboriginals Ordinance 1918-1923 or the Crown Lands Ordinance 1924 to be a reserve for the Aboriginal native inhabitants of the Territory'.

In 1939 the definition of reserve in section 3 was changed again so that it meant:

> ' ... any lands which in pursuance of any Ordinance or other law ... are declared to be a reserve for Aboriginals or are reserved for the use and benefit of Aboriginal native inhabitants of the Territory or for the use and benefit of the Aboriginal inhabitants of the Territory'.

Despite the numerous amendments to the 1918 Ordinance right up to 1953 no provision was made for the making of by-laws, and, finally, it was repealed by the Welfare Ordinance 1951. The definition in section 5 of that Ordinance of reserves referred to:

> ' ... land which in accordance with provisions of a law of the Territory is declared to be a reserve for wards'.

Under the Welfare Ordinance the term 'wards' referred to Aboriginal persons. Like its predecessors however, the 1953 Ordinance contained no by-law making power.

103. The Welfare Ordinance was repealed by the Social Welfare Ordinance 1964. In this Ordinance, section 6 made comprehensive provision for the various types of reserves which were already in existence in the following terms -

> '6. (1) Where land was, at any time prior to the commencement of this Ordinance, proclaimed or declared under a law in force at that time in the Territory -
>
> (a) to be reserved for the use and benefit of the aboriginal .inhabitants of the Territory; -
>
> (b) to be reserved for the use and .benefit of the aboriginal native inhabitants of the Territory;
>
> (c) to be a reserve for aboriginals; or
>
> (d) to be reserved for the use and benefit of wards,
>
> that land is a reserve for the purposes of this Ordinance unless it ceases or has so reserved or to be such a reserve by virtue of a later proclamation or declaration made under a law in force in the Territory when the later proclamation or declaration is or was made.
>
> (2) The last preceding sub-section applies whether or not the law under. which the land was proclaimed or declared to be reserved or to be a reserve was repealed or had expired before the commencement of this Ordinance, unless that law was repealed by an Ordinance which expressly repealed or revoked the reservation of that land'.

104. The definition of reserves in its ultimate form in section 7 of the Ordinance, referred to ,

> ... land which under a law in force in the Territory is reserved for the use and benefit of the aboriginal inhabitants of the Territory'
>
> and, further
>
> ... land which was a reserve by virtue of section 6 and includes leased land within the reserve'.

105. The Social Welfare Ordinance continued the practice o omitting a by-law making power in respect of reserves.

106. The long established system of Aboriginal reserves in the Northern Territory was brought to an end as a result of the operation of the Commonwealth's Aboriginal Land .Rights (Northern Territory) Act. Sub-section 4(1) of that Act authorised the establishment of:

> Aboriginal Land Trusts to hold title to land in the Northern Territory for the benefit of groups of Aboriginals entitled by Aboriginal tradition to the use or occupation of the land concerned, whether or not the traditional entitlement is qualified as to place, time, circumstance, purpose or permission ...'.

The sub-section went on to direct the Minister to:

> ... establish .Land Trusts to hold the Crown land described in Schedule 1'.

The Crown lands described in that Schedule included all the then existing Aboriginal reserves, except the Bagot Reserve in Darwin. These reserved lands remained Crown land during the period of reservation and the establishment of z reserve under Northern Territory law did not result in any alienation from the Crown. The Aboriginal Land Rights (Northern Territory) Act, being a Commonwealth Act, had the effect of overriding any Territory Ordinance to the extent of the inconsistency. Sub-section 10(1) of that Act authorised the making of grants of freehold to the Land Trusts in respect of lands described in Schedule 1 which were not alienated, while sub-section 10(2) dealt with lands comprised in Schedule 1 which were alienated by lease-hold or otherwise, and provided that grants of such lands

were to be held in escrow until all estates and interests held by other persons have come to an end. Grants were duly made and all the reserves, except the Bagot Reserve, ceased to exist.

107. The functions of Land Trusts, as described in section 5 of the Aboriginal Land Rights (Northern Territory) Act include not only the holding of title to land, but also the exercise of the powers of ownership for the benefit of the Aboriginal groups exercising traditional rights over the lands concerned. However, Land Trusts, pursuant to sub-section 5(2), are placed under the general control of Land Councils, the functions and powers of which are described in Part III of the Act. Sub-section 21(1) envisages that there will be at least two Aboriginal Land Councils operating within the Northern Territory, while sub-section 23(1), describing their functions, requires each Land Council, amongst other things, to ascertain the wishes of the Aboriginal people within their boundaries and to protect their interests in respect of their lands. Neither Land Councils nor Land Trusts, however, have by-law making powers.

108. Meanwhile, under amendments introduced into the Northern Territory Local Government Act in 1979, community government schemes can be set up on lands, including Aboriginal lands, outside municipalities. Such local government schemes are not confined to Aboriginal communities, although they can be applied to them-. Two such schemes have been developed in respect of Aboriginal communities. On 16 May 1980 such a scheme was gazetted,in respect of Lajamanu, while on 22 August 1982 a scheme was gazetted in respect of Angurugu. Two other - communities, at Milikapati and Pularumpi, are in the process of setting up similar community government schemes, which are intended to be in operation before the end of 1983. Section 476 of the Local .Government Act authorises each community government Council to:

> . . make by-laws -
>
> (a) fixing or varying the charges that are payable to it in respect of any prescribed service provided by it;

(b) fixing the terms and conditions of supply of a service in respect of which charges may be fixed under paragraph (a);

(c) regulating the supply of those services;

(d) for or with respect to the sale, purchase, possession, presence and consumption of liquor within the meaning of the Liquor Act;

(e) for or with respect to the sale, display, possession, hire, purchase, presence and use of firearms;

(f) for or with respect to the sale, display, possession, hire, purchase, presence and use of offensive weapons;

(g) for or in relation to the exercise of its functions under the community government scheme of this Act; and

(h) providing for a penalty not exceeding $200 for an offence against the by'-laws'.

However, the making of by-laws is subject to Ministerial' intervention. Under sub-section 478(1) of the Local GOvernment Act by-laws made by community government councils do not come into force until notified in the gazette, but before they can be notified in the gazette they must be forwarded to the Minister whose responsibility it is to notify the by-laws. However', if the Minister is of the opinion that the by-laws should be amended, he may refrain from notifying them in the gazette, and, pursuant to sub-section 478(3) of the LocalGovernment Act:

> ... return them to the community government council with such amendments as he recommends'.

It is likely that if the community government council rejects the Minister's amendments and returns the by-laws to him he must then cause them to be notified in the gazette, but they are still subject to disallowance in the Legislative Assembly in any event, purauant to sub-section 478(6). By-laws which are not tabled in the Legislative Assembly by the Minister within three sitting days after notification in the gazette are, by sub-section 478(5), void and of no effect. However, at the date of writing, neither community government council mentioned above has promulgated by-laws.

THE REGULATION OF RESERVES IN TASMANIA

109. When the twentieth century began. it was generally accepted that none of the original inhabitants remained in Tasmania but it was officially recognised that a community of the descendants of the Tasmanian Aboriginals existed on Cape Barren Island in Bass Strait. What legislation there was in Tasmania in the twentieth Century relating to the Aboriginal people was therefore confined in its operation to Cape Barren Island.

110. The Cape Barren Island Reserve Act 1912 was 'An Act to provide for the Subdivision of the Cape Barren Island Reserve and for the Occupation of portions thereof by the Descendants of Aboriginal Natives'. Section 2 of the Act defined the reserve to be 'All that portion of Cape Barren Island described in the .... proclamation [of 14 February 1881]'. Section 30 provided for the making of regulations by the Minister for:

> I. The peace, good order, and good government of the Reserve;
>
> II. The care. protection and management of the Reserve;
>
> III. The control of residents upon the Reserve'.

There was no by-law making power included in the Act. The Act was later amended in 1934 and was ultimately repealed by the Cape Barren Island Reserve Act 1945. In that Act section 2 stated that the reserve was 'the Cape Barren Island Reserve being the area described in the first schedule [of the Act] and was some 6,000 acres in extent'. Section 4 provided that the Surveyor-General was to:

> '(b) manage and regulate the use and enjoyment of the Reserve; and

(c) exercise a personal supervision and care over all matters affecting the interests and welfare of the residents of the Reserve'.

Section 25 provided for the making of regulations under the Act. There was no by-law making power contained in this legislation. Furthermore, section 26 of the Act provided that the Act was to expire in five years. After this time it was considered that the Islanders could decide whether to become farmers on the island or move to the Tasmanian mainland. After the period had expired, all reserve land not granted to or selected by the Islanders was to revert to, the Crown and the reserve and laws relating to it would be defunct. In 1951 the reserve was revoked as part of the assimilation policy in Tasmania. This caused much conflict and confrontation with the Islanders who did not wish to leave. However, in 1971 the Federal Government reached a compromise and federally funded assistance was given to Cape Barren Island to assist in its redevelopment.

111. The community remains on Cape Barren Island but at the time of writing, no by-laws or other subordinate legislation applicable solely to the Aboriginal inhabitants of Cape Barren Island are in existence.

APPENDIX 1

ABORIGINAL COMMUNITIES ACT. 1979

The Bidyadanga Aboriginal Community La Grange Incorporated

PART A - GENERAL

1. These By-laws shall be called the Bidyadanga Aboriginal Community La Grange Incorporated BY-laws and shall come into operation when approved by the Governor and published in the Government Gazette.

2. In these By-laws-

"The Act" means The Aboriginal Communities Act, 1979.

"Community" means the Bidyadanga Aboriginal Community La Grange Incorporated.

"Community Land" means that land declared by the Governor under section 6 of the Aboriginal Communities Act, 1979, to be the community lands of the Bidyadanga Aboriginal Community La Grange Incorporated.

"Members of the Community" means a member for the time being of the Bidyadanga Aboriginal Community La Grange Incorporated. Whether a person is or is not a member for the time being of the Bidyadanga Community is a question of fact to be determined according to the customs of the Bidyadanga Community.

"The Council" means the council of management of the Community.

3. These By-laws shall apply-

(a) On all community land; and
(b) to all persons on community land.

PART B - LAND

4. (1) Except as provided in any Act or Regulation to the contrary, no person other than a member of the community shall come onto community land or remain on community land without the prior permission of the Council which may, in its discretion, grant permission subject to such terms and conditions and restrictions as it sees fit, or refuse permission.

(2) The permission referred to in paragraph (1) of this Clause may be given Verbally or in writing and may be revoked by the Council at any time.

5. Except as provided in any Act or Regulation to the contrary any person who comes onto community land without permission of the Council or who, having been given permission on terms and conditions to come onto community land, breaks a term or condition of that permission commits an offence.

6. (1) Subject to the provisions of any Act or Regulation tO the Contrary -

(a) The Council may place signs on community land for the purpose of prohibiting entry to the part of the land on which the sign is placed or to such part of the community land indicated by the inscription on the sign.

(b) An inscription on such a sign operates and has effect according to its tenor and any person who fails to obey the directions on the inscription on such sign commits an offence.

7. Any person who, being in the home occupied by another and upon being directed by the occupier to leave refuses so to leave commits an offence against these by-laws.

PAET C TRAFFIC,

(1) The Council may place signs called "Traffic Signs" on community land for the purpose of prohibiting, regulating, guiding or directing vehicle traffic. Provided that no prohibition, .regulation, guidance, or direction shall be contrary to any statutory provision as defined in section 13 of the Act.

(2) An inscription on a traffic sign operates and has effect according to its tenor and any person who fails, to obey the direction on the inscription on such sign commits an offence.

(3) No person shall drive a vehicle on community land in a careless or dangerous manner.

FART D - THE REGULATION OF OTHER MATTERS

9. No person shall maliciously damage any planted tree, bush, flower, lawn, building, structure, vehicle or other thing.

10. No person shall, except in rubbish bins or areas set aside by the Council for leaving rubbish, leave rubbish or litter on community. land,.

11. No person shall cause a disturbance or annoyance to other persons by using abusive language or fighting or by any other offensive or disorderly behaviour.

12. No person shall interrupt any meeting of the Council or Community or any customary meeting by noise or by any other disorderly or offensive behaviour.

13. (1) No person shall bring alcohol onto community land without permission of the Council.

(2) The Council may, in its discretion and subject to such terms, conditions and restrictions as it sees fit, permit any personto bring, possess, use or supply alochol on community land.

(3) In exercising its discretion under paragraph (2) Of this Clause, the Council shall have regard to the welfare of the Community as the paramount consideration.

(4) The permission referred to in paragraph (2) of this Clause may be given verbally or in writing and may be revoked by the Council at any time.

14. Any person who brings, possesses or uses alcohol on community land Without the permission of the Council,¯ or who supplies it to others on community land without the permission. of the Council, or who, having been given permission in relation thereto subject to terms and conditions breaks such terms or conditions commits an offence.

15. A member of the police force may-

(1) (a) Take proceedings against any person for a breach of these By-laws.

(b) Where any person has committed or is committing an offence against these By-laws and it appears likely that injury to persons or damage to property will be caused by that person, apprehend and remove that person from community land for a period not longer than 24 hours or until a Court is convened to deal with the person according to law, whichever is the earlier.

(2) Subject to the Child Welfare Act, 1947, proceedings for an Offence against a By-law shall be commenced by way of complaint and summons under

and in accordance with the Justices Act, 1902 and shall be commenced within six months after the offence was committed.

16. (1) Any person who breaks any of these By-laws is guilty of an offence and is liable to a fine or a term of imprisonment or both, but no fine so imposed shall exceed one hundred dollars and no term of imprisonment so imposed shall exceed three months.

(2) In addition to the penalties provided under 'paragraph (1) of this Clause, the Court may order any person convicted of an offence under these By-laws to pay compensation not greater than two hundred and fifty dollars to the Community or other person where, in the course of committing the offence, the pers·= convicted has caused damage to property of the Community or of that other person.

17. It is a defence to a complaint of an offence against these By-laws to show that the defendant was acting under and excused by any custom of the Community.

Dated this 19th day of October 1979.

From the Western Australia Government Gazette. 15 February, 1980, pages 461 to 463

APPENDIX 2

BY-LAWS IN ABORIGINAL RESERVES IN OUEENSLAND

PRELIMINARY

Chapter 1

1. These By-Laws may be cited as "THE BY-LAWS OF THE ABORIGINAL COUNCIL OF THE COMMUNITY/RESERVE".

2. In these By-Laws, unless the context otherwise indicates or requires, the terms defined by Section 5 of "The Aborigines Act 1971-1975 and by Regulation 2 of "The Aborigines Regulations of 1972" shall have the same meaning as is assigned to them by such section and regulation and the following terms shall have the meanings set against them respectively, that is to say:-

"Authorised person"	4 person from time to time authorised by the Council or Manager to'do the relevant act, matter of thing under these By-Laws.
"Council"	The Aboriginal Council of ..... Community/Reserve.
"Prohibited Area"	An area within which the doing of certain specified Acts is prohibited by the Council or Manager.

Chapter 2
MEETINGS AND PROCEDURES OF COUNCIL

1. Ordinary meetings of the Council shall be held once in each month on a date and hour to be decided at the previous ordinary meeting of the Council.

2. A special meeting of the Council may be called by the Chairman or by two members of the Council at any time. Notice of such special meeting and the purpose for which it was called shall be given to all members and only such matters as are set out in such notice shall be dealt with at such meeting.

3. The Chairman or in his absence the Deputy Chairman shall Preside at each meeting of the Council.

4. No business shall be transacted at any meeting unless there is a quorum consisting of at least two members of the Council, one of whom shall be the Chairman or Deputy Chairman.

5. A resolution or motion must be carried by a majority of the members present at any meeting. The Chairman shall have a vote in all cases and if the members are equally divided he shall have a second or casting vote.

6. All members present at a meeting shall vote. If .a member refuses to vote his vote shall be counted for the negative.

7. The members present at a meeting may from time to time adjourn the meeting. If a quorum is not present within half an hour after the time appointed for a meeting the members present may adjourn such meeting to a time not later than fourteen days from the date of such adjournment.

8. The Council shall keep minutes of all its proceedings, with the names of the members present at each meeting and the minutes of each meeting shall be signed by the Chairman after such minutes have been confirmed at the next meeting. If there is not a quorum present at any meeting such fact together with the names of any members present shall he recorded in the minute book.

9. The members present at each meeting of the Council shall sign their names in a book to be kept for that purpose.

Chapter 4'
CONDUCT AND BEHAVIOUR

1. A person in the Community/on the reserve Shall not:-

   (a) be under the influence of alcohol or other intoxicating substance;

   (b) wilfully and indecently expose his person;

   (c) expose or exhibit anything indecent or obscene in picture. drawing or print;

   (d) behave in a riotous, violent, disorderly, indecent, offensive, threatening or insulting manner

   (e) use profane, indecent or obscene language;

   (f) use threatening, abusive or insulting words to any person;

   (g) carry tales about any person so as to cause domestic , trouble or annoyance to such person;

   (h) conduct or take part in games of 'chance or games prohibited by the Manager.¯ Provided that the Manager may in his discretion allow any such game at such time and for such purposes¯ as he'deeMS fit.

Chapter 5
HEALTH AND MEDICAL

1. A person shall attend for medical attention or examination in cases of sickness or when so directed by the Council, the Manager or the Medical Officers.

2. Parents must bring or cause to be brought children under 16 years for medical attention or Baby Welfare attention, when so directed by the Manager or an authorised person.

3. When a person resident in a house is suffering from an infectious or contagious disease no person shall visit such house nor shall such person nor any other person resident therein absent himself from such house without the express permission of the Medical Officer, or, in his absence, the Manager.

Chapter 6
HYGIENE AND SANITATION

1. A community resident shall keep his sanitary conveniences clean.

2. A householder shall ensure that his house and yard are clean and tidy and that all rubbish and refuse is effectively cleaned up and burned by placing it in covered rubbish bins or burning it completely in an appointed incinerator.

3. An authorised person shall collect, transport and dispose of garbage and nightsoil as directed by the Council or the Manager. A person not so authorised shall not ride on the .vehicles used for this purpose, nor be at any time on the Sanitary depot area or garbage disposal area.

4. A person shall not urinate nor defecate anywhere in the main community area except in the toilets provided,

5. A person shall not expectorate on the footpath or in any building.

6. Foreign matter or rubbish shall not be placed in any septic, or drain.

7. A householder shall prevent the breeding of mosquitoes and flies in any land allotted to him.

8. A person shall not launder or bathe within 15 yards of any well or other recognised water supply area nor allow dirty water to run intO a well or recongised water supply.

9. A person who transports garbage and nightsoil shall ensure that none of it is spilt during transport.

10. A householder shall wash and drain his garbage bin after it has been emptied by the collector. If necessary, disinfection of the bin by the householder may be directed by an authorised person.

11. The occupier of any premises or tent on a camping area outside the main community area shall ensure that -

    (a) all garbage and rubbish is burned or deposited on a garbage tip provided by the Council for that purpose or buried under at least 6 inches of soil;

    (b) all excreta is immediately buried under at least 6 inches of soil;

    (c) such premises or tent and the surrounding area within 20 feet be kept and left in a clean and tidy condition.

12. A householder shall keep his garbage bin in good condition. If replacement is needed through misuse or improper care. a replacement shall be supplied at the expense of the householder.

13. A householder shall ensure that the lid and door of any sanitary pan cabinet remains closed when the closet is not in use.

14. A householder shall ensure that the drainpipes and greasetraps provided in the house and any outbuilding shall be kept clean and in good order.

15. A person shall not place any rubbish, filth, garbage, carcass, offal or putrid matter anywhere in the community area. parks or recognised water supply areas other than in places or bins specifically set aside for such purpose by the Council.

16. A person shall not cart or remove manure on, along or through any road, land, or public place unless it is securely covered and is carted or removed in such a manner as to prevent its being scattered or dropped while in transit.

17. Public conveniences shall be used only in the manner for which they are intended.

18. A person shall not enter a public convenience set apart for members of the opposite sex.

19. A person shall not interfere with or cause embarrassment to any other person who is in or who is entering a public convenience.

20. A person shall not use any paper in sewerage or septic system except toilet paper of the type that will readily disintegrate in water.

Chapter 7
ANIMALS AD BIRDS

1. Dogs

(a) The Council shall control the number of dogs permitted to be owned by each of the community residents and may from time to time by resolution require such animals to be registered and impose a Registration Fee.

(b) The owner of any dog, whether registered by the Council or not, shall ensure that such dog does not wander at large and is under his effective control at all times.

(c) Straying dogs may be seized and retained by any person so authorised by the Council.

(d) Any dog seized and detained Which is so diseased, emaciated or injured that in the opinion of the Council it's continued existence causes it to suffer may be destroyed.

(e) The owner of a dog which in the opinion of the Council is a ferocious dog shall be required by the Council to keep such dog securely tied up, leashed or muzzled between sunset and sunrise. Between sunrise and sunset such owner shall be required to prevent such dog from escaping from the premises on which it is kept.

(f) Any dog Which has attacked any person and is deemed by the Council to be dangerous may be destroyed by order of the Council.

2. Other Animals

(a) If any animal dies upon occupied land whether situated outside or within the main community area the occupier of such land shall immediately cause such animal to be burned or buried at a place, satisfactory to the Manager.

(b) A carcass of any cattle or horse, if buried, shall be covered by soil to a depth of at least four feet. Any other carcass shall, if buried, be covered by soil to a depth of at least two feet.

(c) The owner of an animal shall not allow it to stray inside a prohibited area.

(d) The Manager in his discretion may direct that-any animal shall be kept in an enclosure. Any such animal shall be kept at a sufficient distance from the closest house to prevent discomfort to the occupants thereof and the owner of such animal shall ensure that every enclosure shall be thoroughly Cleaned out at least once a week to the satisfaction of an authorised officer.

3. Poultry

(a) Without limiting the generality thereof, the term, "Poultry" shall include any species of fowl, duck, goose, turkey or guinea fowl.

(b) A person shall not keep poultry in such a manner as to be a nuisance or as to be injurious or prejudicial to the health of the Community/Reserve.

(c) All poultry houses, poultry pens and runs shall be constructed and situated to the satisfaction of an authorised officer and the owner thereof shall clean them to the satisfaction of Such officer.

4. Impounding

(a) Any animal, including a dog, found out of an enclosure wherein the Manager has directed that it be kept or straying within a prohibited area may be impounded forthwith by an authorised person-

(b) Any animal so impounded shall not be released until the owner has paid a fee to the Council as prescribed by resolution.

Chapter 8
BUILDINGS AND USE AND OCCUPATION OF BUILDINGS

1. All public buildings or constructions shall be used only for the purpose for which they are intended.

2. A person shall not deface a wall or any public building or construction by smearing it with paint or any other substance or by writing any words or letters thereon or by placing any notice thereon or by any other method.

The occupier of a building shall not use the building nor permit the building to be used for any improper, immoral or illegal purposes.

4. A person occupying a building shall not make, nor allow to be made, any alterations, additions, repairs or changes to such buildings without first having obtained permission to do so from the Manager.

5. A person shall not erect any building or construction without permission from the Manager.

6. A householder shall allow an authorised person to enter his house for the purpose of inspection.

7. If it is necessary to effect repairs to any building other than repairs necessitated through fair wear and tear, then the cost of such repairs shall be paid by the householder.

Chapter 9
FENCES

1. The Council shall determine where a domestic fence shall be constructed and erected. Such fence shall not exceed four feet in height.

2. A fence or part thereof shall not be pulled down for any purpose unless by express order of or permission from the Council.

3. A person using a gate or any other opening in a fence capable of being closed shall close it unless instructed by an authorised person to leave it open.

Chapter 10
BATHING PLACES

1. A person swimming and bathing shall be dressed in a manner approved by the Manager.

2. A person shall not carry any loaded or cocked speargun on any part of a recognised bathing place or the foreshore.

3. A person suffering from Any running or open sores or from any infectious or contagious disease shall not attend or be present on any part of a recognised bathing place or the foreshore.

4. Persons using bathing places shall keep them in clean and tidy condition.

Chapter 11
CEMETERIES

1. The cemetery shall be opened to the public everyday from 6.00 am to 7.00 pm or at such other hours as shall be determined by the Council for the purpose of visiting a grave or attending a funeral.

2. A person shall not allow any animal to depasture on or otherwise to be within a cemetery area.

3. The Council shall not be responsible for the keeping in good repair or proper condition of any grave or headstone or other surface structure.

4. The Council may secure or take down and remove any such structure which in its opinion is unsafe.

Chapter 12
ERADICATION AND DESTRUCTION OF NOXIOUS WEEDS

1. A person who occupies land or is given the use of land shall destroy and eradicate the following weeds or plants:- chinese burr. common lantana, devil's claw, flannel weed, kkaki weed, parkinsonia, pink flowered chinese burr. pricklypoppy, and any other weed or plant which has been or may be declared to be a noxious weed or plant under "The Local Government Acts, 1936 to 1965" in respect of the Local Authority Area or Areas in which the Community/Reserve is situated.

Chapter 13
ELECTRICITY

1. A person other than an authorised person shall not:

   (a) repair or attempt to repair electrical mains or reticulation, except replacement of light bulbs; or

   (b) attempt to repair any electrical equipment; or

   (c) remove any part of electric wiring or equipment; or

   (d) install any wiring.

2. In the event of any circumstances arising causing restriction of electric power to the Community, the Manager in consultation with the Council may require that persons shall not use certain electrical equipment during hours to be declared prohibited hours.

2A. An authorised person may:

(a) at any reasonable hour of the day or night enter and remain upon any works or premises to enable him to exercise his powers and perform his duties under these By-Laws;

(b) inspect and examine all electrical installation work being performed or that has been performed with respect to any electrical installation found upon such entry;

(c) call to his aid -

) any member of the police force where he has reasonable cause to anticipate any obstruction in the exercise of his powers or in the performance of his duties;

(ii) any person he may think competent to assist him in such inspection and examination.

(d) make such examination and inquiry as may be necessary to ascertain whether any electrical work is being or has been performed in manner prescribed and the identity and qualifications of the person or persons by whom the same is being or was performed;

(e) require the production of any certificate. permit or licence and of any book, notice, record, list or writing that is required to be kept or exhibited, and inspect, examine and take copies of or extracts from the same;

(f) exercise such other powers and authorities as may be prescribed.

Chapter 14
NUISANCE AND ANNOYANCE CONTROL

1. A person shall not carry on a road any offensive Weapon or instrument which is capable of being dangerous or injurious to any person or property.

2. Any person who is annoyed by the barking or howling of a dog may complain in writing to an authorised officer.

3. Whether a complaint has been received or not, if such authorised officer considers a dog is causing a nuisance or annoyance by barking or howling, he will so advise the Council and the Council may direct the owner to keep the dog outside the boundaries of the main community area or may make such other order As the circumstances require and warrant. _

4. A person shall not disturb his neighbours or other community residents- by:amplifying any sound or playing any musical instrument at such volume as to be annoying, whether in his own home or yard or anywhere within the community area.

5. A person shall so conduct himself in the community area and in any building so as not to annoy other residents.

Chapter 15
FIRE-ARMS

1. A person shall not carry, possess or discharge any fire-arm unless permission has been obtained from the Manager. Any such permission, may at any time be withdrawn by the Manager.

Chapter 16
FIRE PREVENTION AND PROTECTION

1. A person shall not within the Community/Reserve light any fire in the open or throw away Any burning 'object which is likely to cause a grass fire or bush fire.

2. A person shall not use highly inflammable liquid within 30 feet from a naked flame or fire, nor bring a naked flame or light within thirty feet of highly inflammable liquid, which is open to the air.

Chapter 17
PARKS AND ROADS

1. A person shall not damage anything exhibited or grown in a park or anything whatsoever in the Community/Reserve area.

2. A person shall not. without permission of the Manager. exhibit advertisements or distribute handbills in a park or anywhere in the Community/Reserve area.

3. A person shall not, without permission of the Manager, engage in any trade or business in a park or anywhere in the Community/Reserve area.

4. A person shall not. without the permission of the Manager, organise a game or play in a park or anywhere in the Community/Reserve area **where** places have not been set aside for the playing of games.

5. A person shall not, in a park or anywhere in the Community/Reserve area, organise or take part in anything that is likely to interfere with the safety of the residents.

6. A person shall not enter or leave a park or playground other than through gateways or openings provided by the Council for that purpose.

Chapter 18
ROADS GENERAL

1. A person shall not on any road move along such road anything that is not on wheels and likely to damage such road.

2. A person shall not damage any road or remove any of the materials of any road.

3. A person shall not cause an offensive liquid or substance to be discharged in such a manner as to cause it to come into contact with any road.

4. A person shall not travel on any road which the Manager has declared shall not be used.

Chapter 19
VEHICLES AND BICYCLES

1. A person shall not drive or move or enter any administration vehicle without the permission of the Manager or authorised person.

2. All vehicles, bicycles or other means of transport shall be subject to all rules of the road and traffic regulations for the State of Queensland and any specific regulations for the Community or Reserve which are in force.

Chapter 20
WATER SUPPLY

1. A person shall not, without permission from the Manager, enter or be upon a recognised water supply area or interfere with any dams, piping, tanks, valves, taps, supply mains or reticulation lines or equipment connected with the water supply and water filtration plan

2. A householder shall ensure that taps do not run unchecked.

3. A householder and other residents shall report leaking taps or pipes to the Officer-in-Charge of the Water Supply.

Chapter 21
HOSPITAL AND INSTITUTION

1. A person shall not visit any hospital or resident or the community institutions, except at Visiting Hours unless special permission has been obtained from the Officer-in-Charge of such hospital or institution.

2. A person employed at a Hospital or Institution shall carry out all lawful orders given by the Officer-in-Charge thereof.

Chapter 22
POLICE

1. A person shall not obstruct a policeman in the execution of his duties but shall assist him when called upon.

2. A householder or a person for the time being in charge of a building shall admit any police or authorised persons who wish to inspect such building, when it is reasonably suspected that any offence is being or has been committed therein.

Chapter 23
SOCIAL AND RECREATION

1. A person or Welfare Association shall not conduct public functions in or outside a hall or raise money at such functions, unless prior approval has been obtained from the Council after consultation with the Manager.

2. A hall or outside area used to hold such functions shall be kept in a clean and sanitary condition to the satisfaction of the Hygiene Officer and all rubbish, litter and waste matter shall be cleaned up and removed not later than the morning following each performance, entertainment or other use of the hall or outside area.

Boats and Vessels

1. A person intending to take a boat from its moorings shall inform the Council of his intended movements and time of expected return.

2. A person shall not travel on or use an administration vessel without permission from the Manager.

3. A person shall not anchor any boat on a fairway in line with leads on the approach to a jetty or allow any boat to become stranded in such a position.

4. A person shall not moor a private boat or vessel at a jetty longer than is necessary to embark or disembark passengers or load or unload goods, without the permission of the Council.

. Chapter 24

MISCELLANEOUS

1. Sorcery

A community resident shall not practice or pretend to practice any form of sorcery which for the purposes of these By-Laws includes bone-pointing, pourri-pourri or any other custom or practice which interferes with the harmony or well being of residents, nor shall a person threaten any other person with sorcery or act as an agent for a person who commits or pretends to commit sorcery.

A person found guilty of offending against this By-Law may be refused permission to remain in and may be removed from the Reserve/Community for such period as may be further determined.

2. Food Stores

A person shall not allow dogs and cats in any place where food is stored or prepared for consumption by the residents, especially in the Butcher Shop, Bakery: General Food Store and Cold Rooms. A person shall not expectorate or smoke in any place where food is prepared or kept in unpacked form.

3. Children

(a) Parents shall bring up their children with love and care and shall teach them good behaviour and conduct and shall ensure their compliance with these By-Laws. A parent or person having a child in his charge shall not ill-treat, neglect, abandon or expose him in a manner likely to cause him unnecessary suffering or to injure his physical or mental health nor suffer him to be so ill-treated, neglected, abandoned or exposed. Such parent or person shall provide adequate food clothing, medical treatment. lodging and care for such child.

(b) A parent of a child aged not less than 6 years nor more than 15 years shall cause such child to attend a school on each school .day. Provided that the Manager may exempt any parent from compliance with this By:-Law where he considers that the circumstances so warrant.

4. Penalties

A person who contravenes or fails to comply with any of these By-Laws commits a breach of these By-Laws and shall be liable to a penalty to be detbrmined by the Court not exceeding Forty Dollars ($40.00) or fourteen (14) days imprisonment. All such breaches may be prosecuted upon complaint by an Aboriginal Policeman.

5. Recovery of Expenses

(a) Whenever default is made by any person in the executidn of any work required by or pursuant to these By-Laws to be executed by such person, the Council shall have power to cause such work to be executed and for that purpose shall by its servants and agents be entitled to enter on any land, structure or premises and all costs incurred by the Council in the execution of any such work shall be payable by such person to the Council and may be recovered by the Cduncil from such person by action, as for a debt.

(b) Whenever any expense is incurred by the Council in consequence of a breach of any of these By-Laws such expense shall be payable to the Council by the person committing such breach and may be recovered from such person by the Council as for a debt.

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