THE LEGAL CLASSIFICATION OF RACE IN AUSTRALIA

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An examination of legislation of the Commonwealth and the several States reveals a dichotomy based on 'blood' by which those having Aboriginal or other 'coloured' blood or strains of blood were singled out for special legislative treatment. Aborigines and 'half-castes', in particular, were subject to increasing refinement as legislative subjects in the several jurisdictions. A bewildering array of legal definitions led to inconsistent legal treatment and arbitrary, unpredictable, and capricious administrative treatment.

This paper examines the legal definitions of Aborigines and 'half-castes' from the earliest times to the present for each jurisdiction. Judicial definitions of race are next considered, and the same inconsistencies are noted. Administrative — including parliamentary — definitions are considered in the light of the modern expression of human rights. Non-Aboriginal — but 'coloured' — subjects of Australian law are then examined on an historical basis, parallels being perceived in some, but not all, jurisdictions within the Commonwealth.

It is not proposed to canvass the various theories which sociologists and political scientists have formulated to explain the process by which laws are made. My intention is to show how the same expressions to define or describe Aborigines as special subjects of special laws, or as special subjects by uneven and unequal operation of the same law, recur, but in different legislatures, different areas, and on widely differing time-scales.

In 1983 the Supreme Court of Norfolk Island in *Lewis v. Trebilco* characterised the legislative use of 'descent' as 'an entirely elliptical term'.¹ That case concerned a challenge by a Kenyan-born British subject, a naturalised citizen of Australia, to the *Immigration Ordinance* 1968 as being offensive to the *Racial Discrimination Act* 1975 ('the Act') and therefore invalid.

The challenge failed. However, its value and interest lie in its consideration of the expression 'race, colour, descent or national or ethnic origin' appearing in s.9 of the Act. The High Court's earlier decision in the *Tasmanian Dam* case² likewise required a consideration of the expression in giving to the Commonwealth the most significant potential expansion of its constitutional powers since the Second World War.

In this era of professed and proclaimed human rights, of subscription to International Conventions and protocols asserting those rights, and of political sensitivity to domestic and

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¹ *David Huw Lewis v. Raymond Edward Trebilco*, Supreme Court of Norfolk Island, Fox CJ, 30 August 1983. Reasons for judgment, p.14.

² *The Commonwealth of Australia and another v. The State of Tasmania and others* (1983) 46 ALR 625.

international feelings about those rights, a consideration of Australia's treatment of its indigenous population demonstrates the hollowness of our touted egalitarian traditions. To paraphrase Kipling Aborigines were — and still are — 'lesser breeds within the law'.

Aborigines as Special Subjects of Legislation.

It is important to understand why Aborigines were singled out for such an extraordinarily diverse range of legislation. Equally important is it to appreciate that the antecedent character, scope, application and enforcement of the legislation operated with varying intensity at different levels within society.

As will be seen, much of the legislation reposed simply upon grounds of presumed racial superiority. The first settlers from the United Kingdom, whether as an act of political expediency or justification, seized and claimed the continent, or so much of it as had then been discovered and the geographical limits determined, on the ground that what was annexed to the Crown was *terra nullius*. In other words, there was no sovereign with which they could treat, on more or less equal terms, also as sovereign.

Second, the pastoralists and other 'land developers' claimed the land as theirs on the grounds that it was not being 'used', 'developed' or 'cultivated'. From an ethnocentric viewpoint, this may have been so, but it stemmed from an abysmal ignorance, or rejection, of native practices and habits in regard to the land.

That initial impetus and self-justification found formulation and expression by which, in law, the Aborigines and their offspring were to be treated. Many of the laws were administrative in character, establishing welfare boards, appointing protectors, guardians, managers, or other forms of legal custodianship, providing determined areas — be they communities, institutions, camps, reserves — in which the subjects of legislation should be treated according to the objects of legislation.

The laws which were punitive in character originated in a formulation of the kind often associated with the notion 'separate but equal'. The egalitarian ideal, of course, operated in a negative fashion. Aborigines being strangers to the ritualised process of the law, to the concepts practised, to the adversary system, to the role of a single arbitrator invested not only with the regalia of office but with the power of life or death, to the nature and extent of punishment meted out, could not hope to compete on anything but unequal terms. In terms of knowledge and command of the language itself, and especially in terms of competing in a criminal process with the resources of the State, the contest was hopelessly lopsided.

The civil processes, too, afforded little relief, based essentially on concepts of property and protection of interests in real or personal property, be they corporeal or incorporeal. Denied interests in land from which, by operation of an alien law, they were dispossessed, and deprived of an economic base in a materialist world with which their acculturation had little in common, the processes of the common law and of equity were of little use and advantage to them. Even where it might be applicable — in terms, for example, of recognition of marriage or of children — it was yet another instrument of denial or degradation because tribal marriages and the issue of such were not recognised in English law. Accordingly, a tribal wife could be compelled to testify in criminal proceedings against the man English law denied as her husband.

The above, necessarily simplistic, recitation of the overall effect of English law as appropriate in the early days of European settlement is intended to reinforce the concept that the law, as conceived and applied, was not supportive of Aborigines as subjects equal before it

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with the European. A law having universal application had drastically unequal consequences.

The Aboriginal population were legislated for specifically in a multiplicity of subject matters. Special laws were devised and applied as for a special people. Accordingly, one of the first tasks of the law-makers and the law-management or law-enforcement agencies was to define, with as much legal precision as legal skills or human ingenuity could devise, who was an Aborigine. The antecedent characteristic of race or 'blood' might break down over generations but the negative reach of the law still could obtain with results far more devastating than for a person not categorised as Aboriginal under particular legislation. Explicit inclusion in one category all too often was implicit exclusion from another.

Allied to the legal position of the Aborigines, which defined their status and position in society, was the political aspect of power. The excessive measures as by law provided perforce were founded on notions of superiority (racial, cultural, political) and thereby legalised.

The inferiority of the Aborigine was translated in terms of powerlessness: the inability effectively to thwart, challenge, oppose or even influence at any level within the political or economic structure.

Legal Definitions.

From my analysis of 700 separate pieces of legislation dealing specifically with Aborigines or Aboriginal matters — or other seemingly non-Aboriginal matters — no less than 67 identifiable classifications, descriptions, or definitions have been used from the time of European settlement to the present.³ These classifications may be grouped under six broad headings according to anthropometric or racial identification; territorial habitation, affiliation, or attachment; blood or lineal grouping, including descent; subjective identification; exclusionary and other; and Torres Strait Islanders. Some definitions, such as 'Aborigine', have what I call 'multi-factor' references. These are categories of persons, or classes answering a legislative description, which are or are *deemed to be* within that framework. Professor Rowley in 1970 asked, and then answered, the question 'Who is an Aboriginal?' in Appendix A of his *The Destruction of Aboriginal Society*. Some of my analysis traverses the same ground, but his analysis stopped at 1967 and started at about 1905. Nearly all the nineteenth-century legislation was ignored, but historic parallels formulated under markedly different socio-political conditions persisted well into the twentieth century, a feature not sufficiently brought out by Rowley. For some States, therefore, Aboriginal policy, and its legislative expression, remained static and immured, entrenched by perceptions inapplicable to modern times and conditions.

Prior to the 1967 referendum, the Australian Constitution referred to Aborigines at two places, both in negative terms. In section 51(xxvi) the Commonwealth was given legislative power other than for 'the aboriginal race in any State'; and in section 127 'aboriginal natives' were not to be counted in reckoning the numbers of the people of the Commonwealth, or of a State. At a number of places in the Constitution 'people' is used in a quantitative sense: to determine representation (s.24), allocation of expenditure debits (s.89(ii)(b)). At other places 'person' is used for acquisition of property (s.51(xxxi), or appointment of deputies to the Governor-General (s.126). So that the fundamental machinery of governance comprehended both terms. Yet 'aboriginal natives' rather than 'the people of any race' or 'the people of the aboriginal race' was used in section 127. It is almost as if the framers of the

³ McCorquodale in press.

Constitution unconsciously rejected human attributes in contemplating 'aboriginal natives'.

The States both during the Constitutional Conventions (1891, 1897, and 1898) and at Federation were left in effective control of their Aboriginal populations, unfettered by a clear and present Commonwealth power. Secondly, it was not known how many 'aboriginal natives' existed, the enumeration in the several States and New Zealand proceeding in incomplete and inconsistent fashion. In Western Australia, for example, only 'civilized Aborigines' were included; there, and in Victoria, 'half castes' also were enumerated. In Tasmania, the last 'full-blood' male having died in 1869 and the last 'full-blood' female in 1876, only 'half-castes' were counted. All States counted their 'native' population as at 1891, except Queensland, whose base date was 1881. Thirdly, the Aborigines generally were considered a dying race, whose inclusion in the people of the Constitution was not only unnecessary but likely to create future problems of proportional representation. Finally, the Convention debates are replete with thinly-disguised expressions of contempt for non-Caucasoids, and particularly Australoids.

The birth of a supposedly free, liberal and democratic nation — all of whose inhabitants were 'subjects of the Queen' under the Constitution (s.117) — was therefore attended by illiberal sentiment, legislative prescriptions, and denial of basic democratic rights and freedoms solely on the ground of racial antecedents or association.

The dominant expression in other Commonwealth legislation was 'aboriginal native of Australia'. That reference first appeared in 1902 in the *Commonwealth Franchise Act* and was last used in 1973 in the *Aboriginal Affairs (Arrangements with the States) Act*. Curiously, it was not defined until the *National Service Act* 1951 and then the legislation left it to be defined by Regulation. Accordingly, almost from the outset, Commonwealth legislation quite deliberately refrained from providing an unambiguous, and consistent meaning to the expression. The policy motive was *laissez-faire* in relegating to administrative action the formulation of an acceptable reference. Doubtless, the absence of any direct Commonwealth constitutional responsibility for Aborigines induced such a motive. The States until 1911, and the States and Territories thereafter, had responsibility for their Aboriginal and 'half-caste' population, which relegated Commonwealth interest and responsibility to one of patronage.

A distinction based on blood first appeared in the *Sugar Bounty Act* 1905, providing a bounty for sugar cane or beet produced by 'white' and not 'coloured' labour. 'Coloured' labour was defined to include 'half-caste' and 'full-blood', but the Act excluded 'full-blood' and — with special permits — 'half-caste' Aboriginal labour from its purview. Accordingly, legislation could create artificial barriers based on blood or descent to confer or deny to third parties a benefit or privilege. The Commonwealth was prepared to accept such barriers created by individual States, even if it meant uneven results between States. The *Commonwealth Electoral Act* 1918 provided for a Commonwealth franchise if the individual Aborigine was qualified to vote by State legislation; the *Invalid and Old-age Pensions Act* 1942 provided for those pensions to be paid to 'exempt' Aborigines.

In 1964 a reference to the Aboriginal 'people of Australia' first appears in legislation establishing the Australian Institute of Aboriginal Studies, and was used in 1968, 1969 and 1975. Even so, the former reference continued in use for a further nine years. The concept of 'race' was first expressed in the *Aboriginal Enterprises (Assistance) Act* 1968, and was used again in 1975-76, 1978-79, 1980 and 1982.

At given stages, an 'Aboriginal' could be a member of a 'people', a 'race', or one of the

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'natives' or 'native inhabitants' of Australia. Further, Commonwealth regulations made under the *National Service Act* 1951 fully described Aboriginality in terms of admixture of 'blood'. Under Commonwealth law an Aborigine might acquire a legal status for some purposes but not others according to the reach of legislation.

The States, and later the Territories, defined Aborigines mainly by 'blood'. The word *Aborigine* in its primary etymological sense described the inhabitants of a country *Ab-origine* that is, from the beginning, and so means the earliest known inhabitants. A secondary meaning refers to the natives found in possession of a country by European colonists. Australia, however, has given a third popular meaning to describe the natives indigenous to it. Much of the colonial legislation described those natives by reference to habitation ('aboriginal natives of New South Wales and New Holland') but increasingly it described them in terms of admixture or preponderance of 'blood'. The proliferation of children having 'white' blood in their veins, and the decline of the 'full-blood' population, prompted a legislative response to redeem the former and protect the latter. New South Wales legislation first referred to 'half-castes' in 1839, South Australia in 1844, Victoria in 1864, Queensland in 1865, Western Australia in 1874, and Tasmania in 1912. Thereafter and until the late 1950s the definition of Aboriginality by 'blood' was the standard test. Inclusion or exclusion of persons reflected the *quantum* of 'black' blood and not individual merit, achievement, life-style or other form of endowment. Each State was free to pursue its own policies towards Aborigines, such that uniformity of expression, content and application was all but impossible. For example, an 'Aborigines Act', however described, was first enacted in New South Wales only in 1909, in Queensland in 1897, in South Australia in 1911, in Western Australia in 1886, in Victoria in 1869, and in Tasmania there was none. The Northern Territory had such legislation in 1911, and the Australian Capital Territory relied on the New South Wales Act of 1909 until its own legislation was enacted in 1954.

The Victorian *Aborigines Protection Act* 1869 is instructive. Section 8 of the Act *deemed* as Aboriginal 'every aboriginal native of Australia', every 'aboriginal half-caste' and any child of such 'half-caste' associating and living with Aborigines. A form of 'guilt by association' brought the subject within the reach of the Act. In the absence of any proof as to status, any justice of the peace could form a subjective view as to whether or not any person were an Aborigine. The first Act in Australia set the pattern for all other States. First, the notion of 'blood', however descended; second, the mode of living; third, the extended reach of legislation by use of 'deeming' provisions; and finally, the grant of broad discretionary power to a person in authority without proper legislative safeguards. All these created a legal status accorded no others in the several States.

Subsequent legislation refined the definition in a way which extended bureaucratic discretion over a wider range of subjects and minimised external or individual 'interference'. For example, the South Australian legislation of 1911 included a 'half-caste' child under 16, the Northern Territory Ordinance of the same year included not only a 'half-caste' child under 18, but a female 'half-caste' not legally married to 'a person who is substantially of European origin or descent and living with her husband'. There were no definitions of 'European' nor of 'substantially', it being left to regulation to implement. The 1924 *Aboriginals Ordinance* (N.T.) extended the definition to include 'half-caste' males below the age of 21; it was extended again in 1927 to any male 'whose age exceeds twenty-one years and who, in the opinion of the Chief Protector, is incapable of managing his own affairs and is declared by the Chief Protector to be subject to this Ordinance'. The emphasis is constantly on

extending the class of persons subject to the Ordinance, and on expanding the discretionary power of the Chief Protector or other senior official. The 1936 amendments to the Ordinance provided for a declaration of exemption of 'half-castes' and for a revocation of such declaration.⁴

Thus, an artificial status could be created, removed, and reimposed at the behest of officialdom: this was extended in 1943 to 'full-bloods' in the Northern Territory.⁵ The definition of 'half-caste' was omitted in 1953, but the status of 'part Aboriginal' created.⁶ These legislative sleights-of-hand were removed in the Northern Territory in 1957 with the commencement of the *Welfare Ordinance* 1953. That Ordinance created the legal class of 'ward', being a person declared by the Administrator to stand in need of the special care and assistance afforded by the Ordinance. The Ordinance automatically created as a class of persons not liable to be declared those who were, or would be enrolled or entitled to be enrolled as voters, or were spouses of those persons. In other words, the only classes of persons who could be declared were Aborigines. What criteria attended and presupposed a declaration? Section 14 (1) referred to that person's manner of living, his inability adequately to manage his own affairs, his standard of social habit and behaviour, and his personal associations. Appeal against declaration was possible, but the onus of proof lay on the 'ward' to demonstrate that he satisfied the criteria. In fact, the then Administrator made an *en bloc* declaration two days after the Ordinance commenced by which, in the Northern Territory, 15,211 persons were declared wards. Even though the Ordinance spoke of 'his' manner of living in terms of individuality, the High Court upheld the declaration by the Administrator in *Namatjira v. Raabe*.⁷

New South Wales legislation in 1901 defined Aborigines as 'an aboriginal native of New South Wales', but in the 1905 legislation used the definition 'aboriginal native of Australia'; that definition included not only 'full-bloods' and 'half-castes' but 'any person apparently having an admixture of aboriginal blood' and either in receipt of assistance from the Aborigines Board or resident on an Aboriginal reserve. The former definition was given in the Vagrancy Act, and the latter in and for the purposes of the Liquor Amendment Act. Accordingly, the definition of a person's status could vary for reasons and purposes other than blood: it extended to a specific legislative purpose, contained within the body of an Act otherwise having general application. Even New South Wales introduced 'exemption' provisions, in the Aborigines Protection (Amendment) Act 1943. This recitation of extant statutory provisions may seem ponderous, but its importance lies in the intent of the legislators consciously to create and sustain designated 'blood' categories for legal purposes, and to insert specificity of de-categorisation within the whole *corpus* of legislation.

Early Queensland legislation seems to have used the expressions 'aboriginal native', 'aboriginal native of Australia' and 'aboriginal' interchangeably; the aspect of habitation first comes in the 1897 *The Aborigines Protection and Restriction of the Sale of Opium Act*, but there referred to habitation in Queensland. That was extended in 1965 to 'indigenous inhabitant of the Commonwealth', although legislation that same year referred to 'Aboriginal

⁴ *Aborigines Ordinance* 1936.

⁵ *Aborigines Ordinance* 1943.

⁶ *Aborigines Ordinance* (No.2) 1953.

⁷ (1959) 100 CLR 665; LXVI ALR 690, (1959-60) 33 ALJR 24.

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inhabitant of Australia'; *The Aboriginal Relics Preservation Act* of 1967 included Torres Strait Islanders in 'the indigenous inhabitants of the Commonwealth' but they were excluded from that same reference in the *Aborigines Act* 1971 and the *Local Government (Aboriginal Lands) Act* 1978.

The Aborigines' and Torres Strait Islanders' Affairs Act of 1965 created an entirely new species of Aborigine, distinguishing in turn 'Aborigine' (being a 'full-blood'), 'Part-Aborigine', 'Assisted Aborigine', 'Islander' and 'Assisted Islander'.

Between 1874 and 1936 Western Australia distinguished between Aboriginal natives of the 'whole blood' and the 'half-blood', sometimes by reference to the 'native race' (1874)⁸ and (1883),⁹ sometimes by reference to 'aboriginal race' (1874)¹⁰ and (1943),¹¹ to the 'Aboriginal race of Western Australia' (1897),¹² to 'Aboriginal native of Australia' (1886),¹³ (1893),¹⁴ (1899),¹⁵ (1907),¹⁶ and (1934),¹⁷ until it replaced 'Aborigine' with 'Native' in the *Aborigines Act Amendment Act*, 1936. The Act created another status, that of 'quadroon' being 'one-fourth of the original full-blood'. But 'quadroons' were not subject to the legislation if they were under 21 and did not associate with or 'live substantially after the manner of Natives'; but even then such a person, and one over 21, could be classified as a 'Native' by order of a magistrate. In 1954 the *Native Administration Act Amendment Act* provided that a 'Native' could be deemed to be no longer a native for the purposes of the Act if he had served as a member of the armed forces outside the Commonwealth or for at least six months within it and was entitled to an honourable discharge. The classification of 'quadroon' was repealed in 1960.¹⁸ Accordingly, the definition of 'Native' was confined to 'full-bloods' and greater than 'one-fourth of the original full blood' until the blood test was replaced by the 'descent-identification' test in 1972.¹⁹ Even the latter test – of identification and acceptance as Aboriginal by the local community – was omitted from another Act in the same year.²⁰ Accordingly, descent is the current test in Western Australia. As early as 1939²¹ South Australia introduced the concept of descent 'from the original inhabitants of Australia', an expression used again in 1962²² and 1965.²³ That description in the

8. *Aboriginal Native Offenders Amendment Act*, 1874.

9. *The Aboriginal Offenders Act*, 1883.

10. *The Industrial Schools Act*, 1874.

11. *Commonwealth Powers Act*, 1943.

12. *Aborigines Act*, 1897.

13. *Aborigines Protection Act*, 1886.

14. *Constitution Act Amendment Act*, 1893.

15. *Constitution Acts Amendment Act*, 1899.

16. *Electoral Act*, 1907.

17. *Constitution Act Amendment Act*, 1934.

18. *Native Welfare Act Amendment Act*, 1960.

19. *Aboriginal Affairs Planning Authority Act*, 1972.

20. *Aboriginal Heritage Act*, 1972.

21. *Aborigines Act Amendment Act*, 1939.

22. *Aboriginal Affairs Act*, 1962.

23. *Aboriginal and Historic Relics Preservation Act*, 1965.

last two Acts was given to a 'person of Aboriginal blood'. The emphasis changed in 1972,²⁴ used again in 1979,²⁵ defining 'Aboriginal' as 'wholly or partly descended from those who inhabited Australia prior to European colonization'.

Tasmania's legislative references to Aborigines are sparse. The legislation constituting, continuing, and then apportioning the Cape Barren Island Reserve, for example, refers to 'half-castes' by the family names of 53 people.²⁶ The *National Parks and Wildlife Act* 1970 defined 'Aboriginal relic' by reference to its manufacture 'by any of the aboriginal inhabitants of any of the islands contained within the State'. The insertion of the reference to islands seems to predicate the total elimination of such relics elsewhere within the State. If so, the Act is eloquent testimony to the complete destruction of an entire culture on the mainland of that State. The final Act considered, the *Aboriginal Relics Act* 1975 defines a person of Aboriginal descent as 'any person who has wholly or partly descended from the original inhabitants of Australia'.

Victorian legislation defined or referred to Aborigines in a consistently variable fashion. The *Lands Acts* of 1862, 1869, 1884, 1890, 1901, 1915, 1928 and 1958 reserved Crown lands 'for the use or benefit of the aboriginal inhabitants'. The *Fisheries and Game Statutes* of 1864 and 1867, on the other hand, referred to an 'aboriginal native of Australia', the reference to Australia being dropped in the *Fisheries Acts* of 1873, 1890, 1915, 1928 and 1958. The *Police Offences Statute* 1865 provided for the punishment of vagrants 'found . . . wandering in company with any of the aboriginal natives of Victoria', but subsequent Acts deleted the territorial nexus.²⁷ The *Masters and Servants Statute* 1864 precluded the application of the Act to 'any native of any savage or uncivilized tribe', a provision repeated in the *Employers and Employees Act* 1890.

The several *Aborigines Acts* increasingly refined the meaning of 'Aboriginal'. The *Aborigines Protection Act* 1869 deemed as an 'aboriginal within the meaning of this Act' every 'aboriginal native of Australia' and any 'half-caste' or child of such habitually associating and living with 'Aboriginals'. As in the other States, a justice of the peace could decide 'on his own view and judgment' if any person should be an 'Aboriginal'. 'Half-castes' therefore did not automatically attract the provisions of the Act except by their life-style or association. The next Act, in 1886, included 'every half-caste aged 34' habitually associating and living with an Aborigine. The intent seems to have been to cut down the numbers of persons entitled to public rations and subsistence. The 1886 provisions were repeated in the *Aborigines Acts* 1890, 1915 and 1928, the *Aborigines Act* 1910 also permitting the Board for the Protection of the Aborigines to exercise in relation to 'half-castes' the same powers as for 'aboriginals'. 'Person of aboriginal descent' first appears in the *Aborigines Act* 1957 which spelled out the policy aim of assimilation. The notion of descent was continued in the *Aborigines Act* 1958 and the *Aboriginal Affairs Act* 1967. Finally the *Archaeological and Aboriginal Relics Preservation Act* 1972 defined an Aborigine as an 'inhabitant of Australia in pre-historic ages or a descendant from any such person'.

²⁴ Community Welfare Act, 1972.

²⁵ Aboriginal Heritage Act, 1979.

²⁶ Cape Barren Island Reserve Act 1912, Schedules II-IV.

²⁷ Police Offences Act 1890, 1912, 1915, 1928, 1957.

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The status of 'quarter-caste' or 'quadroon', as mentioned above, was created by Western Australia in 1936; in the *Native Welfare Act, 1963* the definition of 'native' excluded 'quarter-castes' and the whole reference to blood did not disappear until the *Aboriginal Affairs Planning Authority Act, 1972*. Queensland, on the other hand, introduced the concept of 'quarter-caste' in the *Aborigines' and Torres Strait Islanders' Affairs Act of 1965* and retained it for six years until the *Aborigines Act 1971* re-defined 'Aborigine' by descent.

The legislation of the Commonwealth and the States and Territories therefore proceeded in haphazard, inconsistent, unwieldy and far from uniform fashion to construct an edifice and thereafter maintain and extend it by means of an artifice. The concept of 'blood' required ever closer formulation either to include, exclude, or distinguish between the classifications provided. Where the legislation conferred benefits or imposed restraints and disabilities the machinery of implementation was either left to administrative or judicial discretion or, as in the case of Queensland, assumed grotesque proportions. Artificial legal status could be imposed, withdrawn, re-imposed at the behest of one person in authority. I am not suggesting that they were creatures of whim or caprice. But did they fully consider the policy, spirit and intent of the legislation? The *en bloc* 1957 declaration of over 15,000 'full-blood' Aborigines as wards in the Northern Territory suggests otherwise.

The policy aims of the legislation likewise seemed self-defeating or inconsistent. The Aborigines Protection (Amendment) Act, 1940 of New South Wales defined the duties of the newly-created Aborigines' Welfare Board as including the assimilation of Aborigines 'into the general life of the community', an expression employed in the Victorian *Aborigines Act* 17 years later. South Australia expressed its policy as 'integration' in the *Aboriginal Affairs Act, 1962*. The Northern Territory *Welfare Ordinance* 1953 stated the duties of the Director of Welfare as the promotion of social, economic and political advancement, changed in the *Social Welfare Ordinance* 1964 to 'relief from poverty or hunger . . . and legal assistance'. Queensland in the 1971 *Aborigines Act* provided regulatory machinery for, *inter alia*, 'the development, assimilation, integration, education, training and preservation of Aborigines', as if, for example, 'assimilation' and 'integration' were complementary and not antithetical. Like the Bourbons, the Queensland legislation seems to have forgotten nothing and learned nothing.

Within and between States definitions of 'Aborigine' operated differently, at different levels of subject matter, and advancing either in beneficence or in control. A new species of legal creature was created and sustained as a separate class, subject to separate laws, separately administered. This form of legal apartheid preceded that of South Africa by more than two generations, and continued on a different, but parallel, course for another three. The effluxion of time might have seen the success of government policy demonstrated with removal or dismantling of the more repressive definitions and provisions. But Victoria, for example, maintained the same legislative content for 60 years. Western Australia increased its controls by extending definitions in 1936, and Queensland did likewise as recently as 1965. For Aborigines, therefore, the vacuity or bankruptcy of policy in some States was matched only by the ingenuity of others in extending the reach of legislative control. Those who escaped through having a lesser amount of 'black' blood suddenly found themselves made subject to law; those who obtained exemption could lose it. 'Half-castes' might be placed on the same footing with 'full-bloods' for some purposes (testimony, liquor), but not others (reserves, guardianship of children). The unequal provision and treatment of law even within extended Aboriginal associations mocked the notion of equality; when considered in

the absence of any comparable law for 'whites', or even other 'colours', it evokes the Aristotelian dictum that 'injustice arises when equals are treated unequally and also when unequals are treated equally'.²⁸ But how greater is the injustice when even unequals are treated unequally!

Judicial Definitions of Race.

Surprisingly, there are few judicial pronouncements on 'race' or 'Aborigine' or 'half-caste' or even the more extreme examples of race legislation such as 'quadroon' or 'assisted Aborigine'. Surprisingly, because the effect on the individual of falling within the scope of the legislation could be calamitous. Yet there were few challenges to Acts or sections of Acts. To my knowledge, moreover, no Aboriginal administrator in Australia ever prosecuted a tortious action as legal guardian for and on behalf of his wards. Should it be inferred from this wall of silence which enveloped Aborigines that there were no injuries, no injustices or malpractices damaging them and compensable at law? The Commonwealth Court of Conciliation and Arbitration in 1924 put the lie to this aspect. In a wage claim sought to be extended to Aboriginal workers, Powers J referred to the *Aboriginals Ordinance* prescribing wages as being 'honoured in the breach — not in the observance of it — possibly because it is impossible to enforce it or because of the state of the industry'.²⁹ Certainly the lethargy of the administration in this regard could be described as monumental at best, or criminally conspiratorial at worst.

Most challenges came from non-Aborigines, particularly from Europeans charged with supply of liquor to Aborigines. In *Branch v. Sceats*, for example, the New South Wales Supreme Court in 1903 held that a son of a 'full-blood' father and a 'half-caste' mother was not 'an aboriginal native of Australia' within the meaning of the Liquor Act, 1898 (N.S.W.).³⁰ These words were applicable only to offspring of parents both of whom were themselves 'aboriginal natives', that is 'full-bloods'. Only two direct challenges to their legal status were mounted by individual Aborigines in 180 years of subjection to white law; both were from the Northern Territory and they were decided in 1961 and 1962 respectively, the latter successfully.

In *Muramats*, the High Court of Australia ruled on the expression 'aboriginal native of Australia, Asia, Africa or of the Islands of the Pacific' contained in s.17 of the *Electoral Act, 1907* (W.A.). The appellant, a Japanese born in Japan, but a naturalised citizen, claimed to be entitled to Commonwealth franchise. That franchise in turn predicated a similar right under State law. The High Court held that the word 'aboriginal' must be construed in the vernacular sense; further, that 'the present Australian Black people' are 'the aborigines of Australia from the point of view of white settlers or of Australian laws'.³¹

Judicial support for the popular or vernacular meaning can also be found in *Ofu Koloi v. The Queen*³² and *Re Bryning*.³³ In the first case, the High Court in 1956 had to construe

²⁸ Aristotle: 757.

²⁹ *The North Australian Industrial Union v. J.A. Ambrose and others* (1924) 20 CAR 507 at p.512.

³⁰ (1903) 20 WN (NSW) 41.

³¹ *Jiro Muramats v. The Commonwealth Electoral Officer for the State of Western Australia* (1923) 32 CLR 500 at p.507; 30 ALR 81 at p.84.

³² (1956) 96 CLR 172, at p.175.

³³ (1976) VR 100, at pp.103-4.

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the words 'European' and 'native' appearing in the (Papua) *Evidence and Discovery Ordinance* 1913-1952. The Court held that the words are not used in any scientific or technical sense but in a broad and vernacular sense as understood by the persons to whom they are addressed. In *Re Bryning* the Court in 1976 was called upon to interpret the deceased's bequest 'for the benefit of Aboriginal women'. The Court noted that the word 'Aboriginal' was probably much more widely used in Australia than in other English-speaking countries. It emphasised the popular meaning of the word to describe persons in groups or societies irrespective of the admixture of 'blood'.

The proper meaning of 'aboriginal native of Australia' as defined in the National Service Regulations was considered in *Spitz v. Eades*, an unreported 1971 decision of a Court of Petty Sessions in Western Australia.³⁴ The Court there considered a claim for exemption from National Service by an Aborigine, and held that a person who has an admixture of Aboriginal 'blood' does not come within the definition of that description. To claim exemption he had to establish on the balance of probabilities that he had lived as 'an Aboriginal native' or among Aborigines; the latter required either actual residence with them or the proof of a nomadic life-style. A person could not be held to be living as 'an aboriginal native' when it was shown by evidence that he was living in a house situated amongst those occupied by 'white' citizens of Australia, was generally in regular employment and had been so during the previous five years, owned his own car, travelled to Perth three times a year to visit friends and relatives, conducted himself in a manner acceptable to responsible citizens of his area, dressed well, and was able satisfactorily to speak the English language. His marriage to a *de facto* wife of even lesser 'Aboriginal blood' and their residing with their children in an ordinary non-Aboriginal community was a stronger factor negating his falling within the purview of the legislative exemption. This case demonstrates the worst aspects of legislative-based racism, assertions of apartheid, negative stereotypes, and the equation of 'white' with 'civilised'.

Does marriage outside the race, as popularly understood, alter the classification? The Supreme Court of Queensland in 1914 held that it did not. In *Dempsey v. Rigg*,³⁵ an Aboriginal woman, married to a foreigner, was employed in contravention of the *Aboriginals Protection and Restriction of the Sale of Opium Acts*, 1897 to 1901. Chubb J, with other members of the Court, dismissed the appeal against conviction, observing that 'a person can no more change his race than a leopard can change his spots'. This precise phrase was employed in 1983 in *Mandla v. Dowell Lee*, a decision of the Court of Appeal in England.³⁶

There are even fewer judicial considerations of 'race' or 'Aboriginal race'. The most recent – and the only direct – case I have found in Australia is the *Tasmanian Dam Case*,³⁷ decided on 1 July 1983. Part of the impugned legislation in that landmark case was s.8(1) of the *World Heritage Properties Conservation Act* 1983, declaring *inter alia* that s.8 was necessary 'as special laws for the people of the Aboriginal race'. Although the section was

³⁴ Court of Petty Sessions, Albany, Ryan SM, 13 December 1971 (unreported).

³⁵ (1914) QSR 245; 8 QJPR 57 and 149.

³⁶ (1983) 1 QB 1, per Kerr LJ at p.19. Taken on appeal to the House of Lords (1983) 2 WLR 620.

³⁷ *The Commonwealth of Australia and another v. The State of Tasmania and others* (1983) 46 ALR 625.

declared invalid, Brennan and Deane JJ in particular considered the proper meaning of 'race'. Firstly, it was 'not a term of art' nor 'a precise concept'; secondly, 'Membership of race imports a biological history or origin which is common to other members of the race'; thirdly, 'physical similarities, and common history, a common religion or spiritual beliefs and a common culture are factors that tend to create a sense of identity among members of a race and to which others have regard in identifying people as members of a race'. The Court accepted that the words 'the people of any race' used in the Constitution have a wide and non-technical meaning, and that 'Australian Aboriginal' likewise possessed a conventional meaning.³⁸

'Race' was considered *obiter* in 1983 by the Supreme Court of Norfolk Island.³⁹ Fox CJ held 'that one is entitled to look to the reality to see whether, in substance and effect, that is the criterion used'. Accordingly, he considered the origins of the Pitcairn Islanders, the circumstances of their relocation on Norfolk Island, the existence of 'their own traditions and their own background' and 'a dialect of their own'. The Court, in other words, embraced the same tests and criteria employed by the High Court, although it did not refer to the latter's decision in *Tasmanian Dam* given eight weeks earlier.

The word 'Aboriginal' was also considered by the High Court in the *Utopia Station Land Rights* case, decided in 1980.⁴⁰ The decision in that case turned more on the meaning of a concept of trust and less on the identity and characteristics of 'Aborigines' as defined in the *Aboriginal Land Rights (Northern Territory) Act 1976*. Argument there concentrated on the locality and not the Aboriginal antecedents of the group, who were assumed to possess them.

What these cases signify is a judicial willingness to accept the popular meaning of an expression, other than one defined by statute, and to accord it a non-technical sense and application. They also signify the paucity of challenges to the 'Aboriginal' legislation as such, and a total failure of authority to assist or prosecute any such challenge.

In so doing, institutional power was preserved virtually unchallenged; with it the integrity of government policy and programmes was not subjected to the authority and countervailing scrutiny of an impartial tribunal. The law, in other words, signally failed to ameliorate the pervasive generality of Aboriginal institutionalisation and tended to be focused on its peripheral aspects.

Administrative Definitions.

It is not always appreciated by non-lawyers that the burden of administering the plethora of legislation giving effect to Government policy is accompanied by provisions less than clear and precise not only in their meaning but in their intended application. In the absence of unequivocal statutory instructions or guidelines, bureaucratic or administrative arrangements must be made for the effectual application of legislation. Thus, between policy formulation as enunciated to and agreed by Government and administrative action giving policy force and effect, legal *lacunae* or gaps commonly occur.

³⁸ Per Murphy J at p.737; Brennan J at pp.791-2; Deane, J at p.817.

³⁹ *Lewis v. Trebilco*, n. 1 *supra*.

⁴⁰ *In re Ross; ex parte the Attorney-General for the Northern Territory of Australia* (1979) 54 ALJR 145; (1980) 28 ALR 27.

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In practice, these gaps are filled or covered by judicial or administrative innovation, the one consistent with the language employed by the statute and the concepts discerned within it, the other by knowledge of the policy and its scope possessed by those who assisted in its formulation within the bureaucracy and ultimately charged with administering it.

In 1901 the Commonwealth Attorney-General, Alfred Deakin, gave an opinion that in reckoning the population for the purposes of section 127 of the Constitution 'half-castes' were not 'aboriginal natives' within the meaning of that section and should therefore be included.⁴¹ No reason was advanced, except that based on the rule as to the construction of statutory exceptions, namely that where they are not remedial they should be construed strictly. Accordingly, for the purposes of Commonwealth law but not necessarily for any other (State or Territory) law, people with a preponderance of Aboriginal 'blood' were considered to be 'aboriginal natives' and those with less were not.

This is illustrated in another opinion which, as Attorney-General, Deakin gave in 1902.⁴² The *Excise Tariff Act* 1902 allowed a rebate of excise duties on sugar 'on all sugar cane delivered for manufacture, and in the production of which sugar cane white labour only has been employed'. The Minister for Trade and Customs asked for an opinion, *inter alia*, on the effect which the employment of persons of mixed blood might have. Deakin again adopted a 'preponderance of blood' test, although Commonwealth law in this area was silent on the point:

quadroons may reasonably be considered as white labour; persons in whom the blood of a coloured race predominates should not. Half-castes are on the border line; but in view of the affirmative and restrictive language of the provision, I think that half-castes should be excluded.

The 'preponderance of blood' test employed as a coda of construction was adopted by the Commonwealth in 1905, confirmed in 1929, and again as late as 1961. Queensland continued the test until 1971. The 1905 construction had the effect of continuing the exclusion of 'full-bloods' and those with a preponderance of 'blood' from the census of the Commonwealth, thereby denying the franchise to those persons and consequentially affecting the representation in the lower House of the Commonwealth Parliament of electors in the States.⁴³

The 1929 advice, from the Attorney-General's Department to the Chief Electoral Office, defined an 'aboriginal native' as a person in whom Aboriginal descent preponderates and 'that half-castes were "aboriginal natives" within the meaning of section 127 of the Constitution'.⁴⁴ Accordingly, by means of secondary sources, the Commonwealth Electoral Office applied the definition for all Commonwealth electoral purposes (and that of section 127 of the Constitution) between 1929 and 1961.⁴⁵ That opinion, in effect, continued the line of advice in similar terms, and for the same purposes, given to the Chief Electoral Officer of the Commonwealth at least since 1911; although, for statistical purposes in connection with section 127 and not franchise purposes, there had been a degree of consistency of opinion and uniformity of advice since Deakin's opinion in August 1901. The consequences of that

⁴¹ Brazil and Mitchell 1981 (hereinafter cited as 'Opinions of Attorneys-General'); Opinion 13, p.24.

⁴² Opinions of Attorneys-General; Opinion No.57, p.75.

⁴³ *ibid.*, Opinion No. 13, p.24, f.n.1.

⁴⁴ Australia, *Parliamentary Papers*, 1961, vol.II, p.1400.

⁴⁵ *ibid.*

advice endured for 60 years in Commonwealth legislation.

In a 1961 opinion furnished to the Select Committee on Voting Rights of Aboriginals, a former Solicitor-General, Sir Kenneth Bailey, advised that in s.51(xxvi) of the Constitution as it then stood the expression 'people of . . . the aboriginal race' applied only to persons of Aboriginal descent and to persons in whom 'aboriginal blood *preponderates*'.⁴⁶ On that view a person 'of the half-blood', or a person in whom European or other non-Aboriginal 'blood' preponderated, could not be classified as belonging to 'the Aboriginal race'. Indeed, a person of the 'half-blood' would not belong to any race at all.

Even in 1978, administrative discretion was still very wide in the administration of Commonwealth legislation for Aborigines. The Minister representing the Minister for Aboriginal Affairs answered a question on notice as to those considered 'Aboriginal' under Commonwealth law.⁴⁷

For purposes of legal aid, as then provided by the Aboriginal Legal Service in New South Wales, the definition of 'Aboriginal' was settled in consultation with the Australian Government, which funded the Service. An 'Aboriginal' was a member or descendant of the Aboriginal race, including Torres Strait Islanders, and 'where it is in the interests of justice in the circumstances of a particular case' a person living in a domestic relationship with an Aboriginal. Any degree of Aboriginality sufficed.⁴⁸

For purposes of Commonwealth law, 'Aboriginality' was not exclusively a status conferred or withdrawn by legislation; it might also be the result of administrative decision, based on application, investigation, consideration or other form of review, decision and certification then required in respect of housing loans, enterprise loans, and grants from the Aboriginal Benefit Trust Account.⁴⁹

The criteria employed by third parties or organisations enjoying recognition as bodies authorised to issue certificates which would be recognised for approved government purposes were neither stated nor known. Further, even in the absence of such certification, the particular government department or instrumentality (be it State or Commonwealth) might pursue those of differing Aboriginal organisations, or proceed according to their 'own methods of determining . . . eligibility'.⁵⁰

Such ill-defined — or, in the absence of any definition, unknown — criteria promote the prospects of individual abuse, refusal, or neglect of any application dependent upon a demonstration, to administrative satisfaction, of a sufficient degree of Aboriginality.

Non-Aborigines and the Law.

Prior to the assumption of Commonwealth legislative control of naturalisation and aliens,⁵¹ and immigration and emigration,⁵² each State had passed stringent laws severely

⁴⁶ *ibid.*, p.1440.

⁴⁷ Australia, Senate, *Debates*, 12 September 1978, p.503.

⁴⁸ *ibid.*

⁴⁹ *ibid.*

⁵⁰ *ibid.*

⁵¹ Constitution, s.51(xix).

⁵² *ibid.*, s.51(xxvii).

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restricting immigration, employment opportunities, and the franchise. Their short titles reveal the class of person who was *non grata*. Thus New South Wales in 1896 enacted the Coloured Races Restriction and Regulation Act. South Australia in 1882 enacted the Indian Immigration Act for the Northern Territory, in 1888 the Chinese Immigration Restriction Act, and in 1896 the Coloured Immigration Restriction Act, the latter extending to 'all persons of coloured race, and their descendants, inhabiting the continent of Asia or the continent of Africa, or any island adjacent thereto, or any island in the Pacific Ocean or Indian Ocean, not being natives of Australia, Tasmania, or New Zealand'. Western Australia restricted Chinese immigration to one Chinese for every 500 tons of the ship's registered weight.⁵³

One of the earliest Commonwealth Acts forbade the entry of 'native labourers of the Islands of the Pacific Ocean beyond Australia and New Zealand' after 31 March 1904, and provided for the deportation of those already in Australia.⁵⁴ The legislation was, of course, the successor to Queensland's *Pearl-Shell and Beche-de-Mer Fishery Act of 1881*, itself preceded by imperial legislation in 1872 and 1875.⁵⁵ Western Australia forbade the issue or grant of any miner's right, lease, licence or permit on any goldfield 'to any Asiatic or African alien',⁵⁶ a provision repeated in 1892⁵⁷ and, with amendments, in 1895⁵⁸ and 1904.⁵⁹ The prohibition on their employment in any mine was retained until 1973.⁶⁰

Any person 'of the Asiatic race' was denied a certificate as a dealer in poisons under Queensland's *The Sale and Use of Poisons Act of 1891*,⁶¹ Asians being associated in the popular mind as ruthless seducers of gullible blacks and breeders and proliferators of 'half-castes' and other proportionate miscegenations. Non-Europeans had to obtain certificates in order to work in Queensland dairies,⁶² and as late as 1952 'workers of any Asiatic or Pacific Islands race' were segregated from Europeans in sleeping quarters, separate buildings being provided for each.⁶³

In the Northern Territory Aboriginal females could not be employed by 'any person of any Asiatic or Negro race'.⁶⁴ Queensland legislation between 1931⁶⁵ and 1967⁶⁶ deemed a

⁵³ *The Chinese Immigration Restriction Act, 1889*, s.8.

⁵⁴ *Pacific Island Labourers Act 1901*, ss.4, 8.

⁵⁵ *Pacific Islanders Protection Act*.

⁵⁶ *The Goldfields Act, 1886* (50 Vic. No. 18), s.3.

⁵⁷ *The Mineral Lands Act, 1892* (55 Vic. No. 3), ss.4, 8, 12.

⁵⁸ *Goldfields Act, 1895* (59 Vic. No. 40), s.92.

⁵⁹ *Mining Act, 1904*.

⁶⁰ Act 1 of 1973, s.6.

⁶¹ 55 Vic. No. 31, s.7.

⁶² *The Dairy Produce Act of 1904*, s.30.

⁶³ *The Workers' Accommodation Act of 1952* (Qld.), s. 12(2)(d).

⁶⁴ *Aboriginals Ordinance 1928*, s.2, substituting s.23(5).

⁶⁵ *The Vagrants, Gaming, and Other Offences Act of 1931*, s.55(v).

⁶⁶ *The Vagrants, Gaming and Other Offences Acts Amendment Act of 1967*, s.3.

brothel any house in which 'any female of Asiatic or Polynesian race' dwelt and which was frequented 'at any time' between 9 p.m. and 6 a.m. by males not of those races. Firearm licences were denied to any 'person of Asiatic or African race' — whether a British subject or not — in Western Australia; but that legislation contained a grotesque exemption in favour of persons 'of the Jewish and Lebanese races'.⁶⁷

The legislation thus far discussed was restrictive rather than punitive, except as regards involuntary deportation.⁶⁸ But each State, and the Commonwealth, also passed legislation which abridged, curtailed, or denied even basic civil rights, solely on the ground of 'colour' or race. Thus those States which enacted old-age pension and similar legislation prior to that of the Commonwealth in 1908 denied that pension to 'Chinese or other Asiatics', whether naturalised or not.⁶⁹ The legislation of Victoria and Queensland went further than New South Wales in denying the pension even to those 'Chinese or other Asiatics' who were British subjects.⁷⁰ Victoria's Act likewise excluded 'Aboriginal natives . . . of New Zealand';⁷¹ Queensland's Act excluded them and also those 'of Africa, or the Islands of the Pacific'.⁷² The Commonwealth's *Invalid and Old-age Pensions Act* 1908 adopted the broadest and most recent restrictions of the Queensland legislation in denying both kinds of pensions to 'Asiatics (except those born in Australia), or aboriginal natives of Australia, Africa, the Islands of the Pacific, or New Zealand'.⁷³ It was modified in 1912 to deny maternity allowances to 'Asiatics' and 'aboriginal natives of Australia, Papua, or the Islands of the Pacific'.⁷⁴

Naturalisation attracted modified restrictions. 'Aboriginal natives' of 'Asia, Africa or the Islands of the Pacific, other than New Zealand' were not entitled to apply for a certificate of naturalisation unless already a British subject.⁷⁵ This 1903 legislation was repealed and replaced in 1920 by the *Nationality Act* which adopted the British Nationality and Status of Aliens Act 1914 with its distinction between 'aliens' and 'British subjects'.

However, the franchise continued to be denied even certain of the King's subjects. Queensland, Western Australia and South Australia, prior to federation, and the Commonwealth after, subjected their citizens to a variety of legal restrictions on franchise. Queensland's *The Elections Act of 1872*, for example, disqualified 'aboriginal natives' of 'China or of the South Sea Islands or of New Holland' unless possessed of a property qualification.⁷⁶ This

⁶⁷ *Firearms and Guns Act, 1931*, s.8(3).

⁶⁸ As an example of which, concerning the Commonwealth's *Pacific Islands Labourers Act 1904*, see *Robtelmes v. Brenan* (1906) 4 CLR 395; 13 ALR 168.

⁶⁹ (NSW) *Old-age Pensions Act, 1900*, s.51(c); (Vic.) *Old-age Pensions Act 1901*, s.7(c); (Qld) *The Old-age Pensions Act of 1908*, s.7(c).

⁷⁰ *ibid.*

⁷¹ *ibid.*, s.7(d).

⁷² *ibid.*, s.7(d).

⁷³ ss.16(1)(c) (old-age pensions), 21(1)(b) (invalid pensions).

⁷⁴ *Maternity Allowance Act 1912*, s.6(2).

⁷⁵ *Naturalization Act 1903*, s.5.

⁷⁶ 35 Vic. No.5, s.3.

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was extended in 1874 to include aboriginal natives of India,⁷⁷ and further refined in 1885 by restricting the property qualification to that of freehold.⁷⁸ References to India and China were replaced in 1905 by the broader reference to Asia, and even the freehold qualification was removed, thereby totally disenfranchising persons within the impugned racial category;⁷⁹ this legislative edifice was reasserted in 1915.⁸⁰ In 1930 Queensland extended the franchise to natives of British India and naturalised natives of Syria.⁸¹ This act of legislative largesse was offset by a new provision empowering the Principal Electoral Officer to remove from the electoral roll all those formerly qualified who were now not so.⁸²

Western Australia gave the franchise to those aboriginal natives 'of Australia, Asia, or Africa' possessing a freehold qualification,⁸³ a provision repeated in 1899.⁸⁴ In 1907 even the freehold qualification was removed,⁸⁵ and only in 1934 were naturalised subjects,⁸⁶ 'aboriginal natives' of British India,⁸⁷ and New Zealand,⁸⁸ qualified for enrolment as voters. A parallel provision was inserted in the *Constitution Act*.⁸⁹ South Australia disqualified all Northern Territory residents except Europeans or Americans naturalised as British subjects and natural-born British subjects.⁹⁰

Commonwealth legislation maintained the disqualifications and discriminations enshrined in State legislation. The *Commonwealth Franchise Act* 1902 disqualified from Commonwealth franchise 'aboriginal natives' of 'Australia, Asia, Africa [and] the Islands of the Pacific except New Zealand' who were not entitled to vote under State law,⁹¹ a provision restated in 1918.⁹² Natives of British India⁹³ and persons naturalised under Commonwealth or State law⁹⁴ were enfranchised in 1925.

This analysis of legislation and administrative practice reveals that a clear definition of race based on 'blood' was elusive and illusory. The focus of legislative attention was that part

⁷⁷ *The Elections Act of 1874* (38 Vic. No.6), s.7.

⁷⁸ *The Elections Act of 1885* (49 Vic. No.13), s.6(1).

⁷⁹ *The Elections Acts Amendment Act of 1905*, s.9(2).

⁸⁰ *The Elections Act of 1915*, s.11.

⁸¹ *The Elections Acts Amendment Act of 1930*, s.8.

⁸² *ibid.*

⁸³ *The Constitution Act Amendment Act, 1893* (57 Vic. No.14), s.12, proviso (a).

⁸⁴ *Constitution Acts Amendment Act, 1899*, s.15, proviso (a).

⁸⁵ *Electoral Act, 1907*, s.18.

⁸⁶ *Electoral Act Amendment Act, 1934*, s.2(c).

⁸⁷ *ibid.*, s.2(b).

⁸⁸ *ibid.*, s.2(a).

⁸⁹ *Constitution Acts Amendment Act, 1934*, s.2(a).

⁹⁰ *The Electoral Code, 1896*, s.16.

⁹¹ s.4.

⁹² *Commonwealth Electoral Act 1918*, s.39(5).

⁹³ *Commonwealth Electoral Act 1925*, s.2(b).

⁹⁴ *ibid.*, s.2(c).

of humanity having the singular misfortune to be born other-than-white. Australian legislation was predicated on a basis of white superiority, and white fear. Both 'blood' and economic factors predicated a statutory relegation of non-Caucasoids. The legislation was variable, inconsistent or arbitrary in its formulation and implementation. But it was consistent in its identification and choice of subject. The modern expectation of and demand for human rights had no place in a fledgling democracy proudly asserting egalitarian ideals. The edifice of restriction and prohibition was an expression of popular will denying those ideals in an Australia which placed a higher faith in being white than in being democratic.

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LEGAL CITATIONS

ALJR	Australian Law Journal Reports
ALR	Australian Law Reports (from 1973) formerly Australian Argus Law Reports
CAR	Commonwealth Arbitration Reports
CLR	Commonwealth Law Reports
QB	Law Reports (Queen's Bench Division)
QJPR	Queensland Justices of the Peace Reports
QSR	Queensland State Reports
VR	Victorian Reports
WLR	Weekly Law Reports
WN (NSW)	Weekly Notes (New South Wales)