Party platform on land rights and to cut across the work being done by a panel of lawyers and Aborigines under the auspices of the Federal Minister for Aboriginal Affairs on national land rights legislation.

Over recent months a number of meetings have been held involving the Prime Minister, Mr Hawke, the Premier of Western Australia, the Federal Aboriginal Affairs Minister and other Federal Ministers in an attempt to resolve differences. The Western Australian concern is that if a Federal Land Rights Act is passed it may override any State legislation already in place. From the Commonwealth's view, there would be no need for the proposed federal legislation to apply in Western Australia provided the Western Australian legislation did not conflict with the general principles which Mr Holding has stated will form the basis of his national legislation.

Mr Holding released an up-to-date statement of these principles on 20 February 1985. A principal feature of this statement is the compromise proposal of a tribunal to resolve disputes over mining rather than a full veto power in Aboriginal hands. This is a significant change which drew strong comment from Aboriginal spokesmen. Northern Territory Aboriginal organisations are concerned that the Northern Territory Land Rights legislation which currently contains veto powers may be amended. It was reported in *The Australian* on 8 February 1985 that the Northern Land Council was planning a wide-ranging campaign to keep the Northern Territory legislation intact. Mr Rob Riley, the Chairman of the National Aboriginal Conference has also strongly condemned the proposed Western Australian legislation (*The Age*, 22 November 1984) and what he sees as a weakening of the Commonwealth position (*Sydney Morning Herald*, 25 January 1985, *The Australian*, 25 January 1985). He called together an emergency summit of Aboriginal groups to protest the Western Australian legislation and to plan strategy on the national legislation. The Western Australian Government has gone ahead and introduced legislation on 12 March 1985 but it would appear that the issue is far from settled.

compensation report

Those who have some means think that the most important thing in the world is love. The poor know that it is money.

Gerald Brenan

transcare conceived. While Medicare continues to fight for its young life, a sibling scheme, tentatively entitled 'Transcare', has been formally proposed by the New South Wales Law Reform Commission. In the noisy aftermath of the December Federal election, the release of the Commission's *Report On a Transport Accident Scheme for New South Wales* received a quiet reception from the media. Those who have followed the fierce controversy aroused by the consultative documents published earlier (see eg [1983] *Reform* 105) will be aware of the salient features of the 'Transcare' Scheme. The Commission recommends that, instead of being able to sue for damages at common law, victims of transport accidents should receive benefits from a government-run Accident Compensation Corporation on a 'no-fault' basis: that is, they should receive the benefits without having to prove that somebody else was at the fault in causing their injuries. The proposed benefits are chiefly in the form of periodical payments, which compensate the victim for loss of earnings up to a prescribed statutory ceiling – or (up to a point) for loss of the capacity to work where there are no pre-accident earnings that can legitimately be used as the basis for assessment – and provide for medical, hospital, nursing and other related expenses and for the cost of hired help in the home. In addition, a victim who suffers permanent incapacity as a result of the accident receives a lump sum payment to compensate for impairment of bodily faculties. Where the victim is killed in the accident, it is proposed that benefits, again comprising a mixture of periodical payments and a lump sum, should be paid to dependent family members. All payments under the proposed Scheme are index-linked. The Scheme is bureaucratic in the sense that all first instance decisions are made by staff of the proposed Accidents Compensation Corporation, but rights

of appeal to a tribunal chaired by a judge are suggested. The chief arguments advanced in support of Transcare are that:

- it assures compensation to everyone injured on the roads, and to the dependants of everyone killed on the roads;
- the compensation is mainly assessed on a continuing basis, so that the guesswork associated with a single lump-sum award is averted and there is a built-in protection against inflation; and
- the scheme is more economical to run than the system of common law compensation.

finishing touches. The proposed compensation Scheme has had a number of finishing touches put to it in the Commission's final Report. A change of major significance is that, in contrast to the earlier proposals that accidents to which the transport scheme should apply should not attract compensation at common law or under any other statutory scheme, it is now recommended that claims under the Workers' Compensation Act and workers' common law claims for compensation from their employers should not be affected. This represents a significant concession to transport workers. They are given the option, if injured while driving on the job, to apply for compensation under Transcare, or for compensation under the workers' compensation scheme coupled with such damages as they may be able to recover from their employer on the ground that due care for their safety has not been taken. The decision as to which is the more advantageous option will depend on the particular circumstances of each case. The other group of accident victims who appear to fare better as a result of changes in the Commission's thinking during the later stages of the Reference are those who suffer a long-term incapacity, such as blindness or loss of a limb. It is recommended that these people should obtain additional compensation for loss of 'potential for advancement' (that is, likely increases in earning capacity if the accident had not occurred), and that this extra compensation should be available irrespective of whether they were in employment at the time of the accident. Furthermore, long-term incapacitated victims who were unemployed at the time of the accident would be entitled under the recommendations to assert a notional minimum earning capacity. This sets them aside from victims who were unemployed at the time of the accident and who suffered a short-term incapacity: in this situation, there is no compensation for loss of earning capacity, though all the other benefits recommended in the Scheme can be claimed. The Report confirms, as was tentatively suggested in the consultative documents, that victims who did a substantial amount of housework before the accident (whether only for themselves or for other members of their household as well) should be provided with replacement household services or the cost of obtaining these during the period of their disability. Rehabilitation also receives greater emphasis than before: it is proposed that victims be given a statutory right to rehabilitation and that the Accident Compensation Corporation play a prominent role in ensuring that this right is of some worth. In other respects, the scheme proposed in the final Report is, generally speaking, along the lines forecast earlier, with the actual levels of benefit fixed as follows:

- compensation for loss of earning capacity to be normally paid at 80 percent of the gross earnings foregone, though this figure may rise to a 100 percent as an incentive to resumption of employment, if the victim undertakes part-time employment;
- maximum loss allowed for compensation to be 150% of average weekly earnings ($630 at June 1984 – this date is adopted for all such figures), so that maximum compensation normally payable is $504 (80 percent of $630);
- notional minimum earning capacity for long-term incapacitated victims to be assessed at 50 percent of average weekly earnings ($210);
- lump sum compensation for permanent disability to have a maximum of 208 times average weekly earnings ($87360);
- compensation on death to take the form

> of a lump sum equivalent of 130 times average weekly earnings ($54600) to be paid to dependent families, together with additional periodic compensation of 8 percent of average weekly earnings ($33.60) to each child and additional periodic compensation, where appropriate, to an earner's surviving spouse who has child care responsibilities or is unable to resume or undertake employment (fixed at 50 percent of average weekly earnings – $210).

more sparks flying. As stated earlier, the release of the New South Wales Law Reform Commission's Report attracted relatively little publicity, because the media in early December were preoccupied with other matters. But the timing of the release was enough of itself to draw the fire of one of the scheme's opponents, the Law Society of New South Wales. Its President, Mr Fred Herron, said that the Report had been 'deliberately kept secret until after the Federal election because its recommendations would be unpopular with the public'. He castigated the recommendations for 'robbing' the public of its common law right to sue for damages and of the 'tax-free lump sum payments it now enjoys'. The existing system would be demolished and replaced with a 'bureaucratic nightmare which in the long term would be far too costly for the State' (*Sydney Morning Herald*, 4 December 1984). Several hundred kilometres away, the President of the South West Slopes Law Society, Mr Abbott, also attacked the Report, describing it as discriminatory, arbitrary, full of inequalities and guilty of abolishing judicial impartiality in favour of bureaucratic discretion. In particular, it would create 'two classes of people before the law; certain workers retain their rights to sue for damages, but in most cases you have to face the bureaucracy'. The result was that accident compensation would become a 'farcical lucky dip' (*Advertiser*, Wagga, December 7 1984). In support of the scheme, an Editorial in the Sydney *Sun* (December 6 1984) asserted that the Commission had made out a strong case for no-fault accident compensation, on the basis that compensation would be taken 'out of the competitive legal arena where some accident victims win huge settlements and others can claim nothing'. (The Report itself estimates that the category of victims who receive nothing may be as high as one third). The Editorial also praised the scheme for emphasising guaranteed income, medical care and rehabilitation and for cutting administration costs.

'bemused' law reformers. Ironically, although the New South Wales Law Reform Commission's Report recommended the preservation of workers' compensation as a distinct alternative for injured transport workers, proposals released by the New South Wales Premier on New Year's Day implied that some of the measures suggested by the Commission might be incorporated into the workers' compensation system itself, as part of a series of reforms to come into operation on July 1. One of the most important changes being considered was the establishment of a single government-run office handling all workers' compensation insurance. According to the *Financial Review* (3 January 1985), this proposal for a single insurer was not however endorsed by the Minister of Industrial Relations. The matters on which the reformed workers' compensation scheme might borrow from the Transcare system would include, according to the *Financial Review*, 'the emphasis on rehabilitation of the injured, increased attention to safety, periodic rather than lump sum compensation, and the avoidance of drawn out litigation over claims'. But the *Financial Review* described the Commission as being

> somewhat bemused yesterday at being mentioned as a major contributor to the workers' compensation issue, since, a spokesman said, it has at no stage been invited to make a submission on the specific subject of workers' compensation.

In Victoria, proposals for reforming workers' compensation, to operate also from July 1, include administration of the system by an Accident Compensation Commission, which would invite private insurers to tender for the right to sell insurance on terms set by the Government. Despite assertions by the Victorian Treasurer, Mr Jolly, that the Government had consulted

everybody involved in workers' compensation, including the legal profession, the proposals have been attacked by the Victorian Law Institute (amongst others) as 'lightweight', 'drawn up hastily to suit the timing of the next election', unsympathetic to 'the needs of small business' and marred by 'blatantly contradictory figures' (*Age*, 13 December 1984). Battles over compensation reform are not, it seems, confined to the 'premier State'.

crime and punishment

The three never-failing accompaniments of advancing civilisation are a racecourse, a public house and a gaol.
John Dunmore Lang

prisons for the ACT. In the report of the Review of Welfare Services and Policies in the ACT, chaired by Professor Tony Vinson, it is recommended that a prison system catering for all but maximum security adult prisoners should be created in the ACT. This would involve construction of new remand and detention facilities for juveniles and a new remand centre for adult male and female offenders. The existing remand prison at Belconnen would be converted into a medium to low security prison for convicted offenders. Although there has been no official response, there appears to be widespread support for correctional facilities in the ACT. The matter will also be considered by the ALRC in its final report on the reference relating to Federal and ACT offenders.

new sentencing option for the ACT. The sentencing options of ACT Courts will soon be expanded to include a system where adult offenders can be ordered to perform community-service work as an alternative to short-term jail sentences. The House of Assembly recently agreed to amendments to the ACT Crimes Ordinance which will enable Courts to impose community-service orders of up to 208 hours. At the same time, it agreed to a Supervision of Offenders (Community-Service Orders) Ordinance which will establish the machinery to administer the scheme. The scheme will be extended at some stage to include juvenile offenders, but it is not known when this will occur or when the adult scheme will begin to operate. Judges and Magistrates in the ACT have for years been criticising the lack of sentencing options available to them compared with those in other jurisdictions. The option will be open to consenting offenders convicted of an offence punishable by a jail sentence, or liable to jail for the non-payment of a fine. The operation of the scheme will be one of the matters considered in the general review of non-custodial sentencing options conducted as part of the ALRC's reference on the sentencing of Federal and ACT Offenders.

how committed do you have to be? Until recently, it was thought that the existence of a prima facie case in committal proceedings in NSW did not necessarily entail that the defendant be committed for jury trial. The Magistrate, it was thought, had a power to dismiss the matter on the basis that notwithstanding the prima facie case, no reasonable jury properly instructed would convict on the evidence. Late last year the NSW Court of Criminal Appeal in the case of *Wentworth v Rogers* held that no such additional power existed. In a flurry of activity which many would-be law reformers sometimes wish they could emulate, the NSW Government introduced legislation with the intention of restoring the perceived status quo ante. The NSW Law Reform Commission is presently examining a wider range of issues related to committal proceedings as part of its reference on Criminal Procedure. It is anticipated that a working paper will be published towards the middle of this year.

tasmanian law reform commission seminar on fines. Tasmania is the latest in a number of jurisdictions to turn its attention to the problems of fines and fine default. A comprehensive research paper on fines prepared for the Tasmanian Law Reform Commission by Ms CA Warner of the University of Tasmania Law School, was considered at a Seminar on 15 March 1985. The seminar was addressed by Professor Richard Fox of Monash University Law School who reviewed the Victorian situation and Mr George Zdenkowski of the Australian Law Reform Commission who commented on ALRC proposals and NSW developments.