

REVIEW

**Aboriginal Legal Issues:
Commentary and Materials**

By Heather McRae, Garth Nettheim, & Laura Beacroft
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IN A 1986 REVIEW¹ of Bradford Morse's *Aboriginal Peoples and the Law*,² it was stated that "Canada has long had need of a set of materials for teaching Native law."³ While this gap has largely been filled in recent years,⁴ a similar need has long existed in Australia. A number of excellent volumes have dealt with various aspects of the Aboriginal 'legal experience',⁵ but until the release of *Aboriginal Legal Issues: Commentary and Materials*⁶ teachers of "Aborigines and the Law" courses have not had access to an organised collection of legal material on the topic. In this respect alone, the volume, while clearly not an exhaustive coverage of the

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¹ P. Lancaster, (1986) 2:2 *Native Stud. Rev.* 161.

² B.W. Morse, ed., *Aboriginal Peoples and the Law: Indian Metis, and Inuit Rights in Canada* (Ottawa: Carleton University Press, 1985). A revised edition of this collection was released in 1989.

³ *Supra*, note 1 at 162.

⁴ See, e.g., J. Woodward, *Native Law* (Calgary: Carswell, 1989).

⁵ See, e.g., K.M. Hazlehurst, ed., *Ivory Scales: Black Australia and the Law* (Kensington: New South Wales University Press, 1987); F. Gale, R. Bailey-Harris, & J. Wundersitz, *Aboriginal Youth and the Criminal Justice System* (Cambridge: Cambridge University Press, 1990); and B. Hocking, ed., *International Law and Aboriginal Human Rights* (Sydney: The Law Book Company, 1988).

⁶ H. McRae, G. Nettheim, & L. Beacroft, *Aboriginal Legal Issues: Commentary and Materials* (Sydney: The Law Book Co., 1991).

legal issues relevant to the Aboriginal people of Australia, represents an important addition to Australian legal literature.

What follows is not so much a critical review of the book, but a "sampler" of some of the excellent material which it contains, along with a few general comments, including an attempt to highlight those sections which may be of particular interest to Canadian readers.

Perhaps the first observation to be made about *Aboriginal Legal Issues* is that it reflects a strong awareness of the political context in which Aboriginal issues resonate in Australia. It is not simply a 'vacuum-packed' account of those federal and state laws which affect Aboriginal people.⁷ From the outset it is clear that:

The authors share a belief that the socio-economic disadvantages suffered by most Aboriginal peoples in Australia today are, in large part, the legacy of legal doctrines - or the misuse of legal doctrines - going back to the beginning of English settlement.⁸

While adopting some of the standard features of a traditional legal text (e.g. table of cases, table of statutes) the volume draws from a variety of 'non-legal' disciplines for its material — anthropology, history and media reports — as well as case reports, legislation, reports of government and public inquiries, and secondary legal materials. Extracts are generally of a manageable size, successfully reflect a range of perspectives, and are linked in a coherent fashion with commentary by the authors, along with directions to further reading on given topics.

The book opens with a brief outline of some of the historical background to the legal issues discussed in the following chapters. The most revealing part of the chapter is an outline of the evolution of government policy from 1788 until the present.⁹ After a short period of conciliation at the time of first contact, displacement and extermination soon became the dominant themes in Aboriginal-settler relations. Evidence of the brutality of this era stands in

⁷ As the title suggests, the authors are concerned with the "legal issues." In this respect, the volume represents a rather different approach to that taken in Woodward's *Native Law*, *supra*, note 4, or F. Cohen's *Handbook on Federal Indian Law*, reprint ed. (Buffalo: William S. Hein, 1988).

⁸ *Supra*, note 6 at vi.

⁹ This makes for an interesting comparison with the history of United States and Canadian policy towards the original peoples of North America: see R.W. Johnson, "Fragile Gains: Two Centuries of Canadian and United States Policy Towards Indians" (1991) 66 Wash. L. Rev. 643.

sharp distinction to the traditional account of a relatively peaceful settlement process. For example in 1816, the Governor of New South Wales, Lachlan Macquarie, issued a proclamation which stated that "any unarmed group of Aborigines of more than six in number could be shot, and that any armed Aborigine within a mile of any white habitation could also be killed."¹⁰ Extracts such as this account of early colonial policy towards Aboriginal people provide an added dimension to the discussion of more strictly 'legal' issues later in the book.

Other stages in the evolution of government policy are also outlined. By the end of the 19th century the dispossession of Aboriginal people was largely complete, prompting a change to policies of protection and segregation. This era was characterised by the appearance of reserves throughout the country. This pattern was established in 1897 when legislation was enacted in the state of Queensland which "permitted the rounding up of Aborigines, half-castes and persons who 'habitually associated' with Aborigines. All such persons could be removed and legally confined to institutions and reserves."¹¹

In 1951 the Australian Government formally adopted a policy of assimilation. Its aim was made clear by the Minister for Northern Development:

Assimilation means, in practical terms that, in the course of time, it is expected that all persons of Aboriginal birth or mixed blood in Australia will live like white Australians do.¹²

The reality of this era shares strong similarities with the experience of Aboriginal people in Canada. Indeed, throughout the book, one is struck by the parallels in terms of the impact of European colonisation on the original peoples of both countries. For example, the main extract in this section reflects what the authors describe as the "hallmark" of the push for assimilation: the removal of Aboriginal children from their families and their placement with

¹⁰ J. Roberts, *Massacres to Mining* (Blackburn: Dove Communications, 1981), quoted *supra*, note 6 at 16. One of the leaders in this revisionist account of the history of European settlement in Australia has been Henry Reynolds. See, e.g., *The Other Side of the Frontier* (Townsville: History Department, James Cook University, 1981).

¹¹ Gumbert, *Neither Justice Nor Reason* (St Lucia: University of Queensland Press, 1984), quoted *supra*, note 6 at 19.

¹² *Supra*, note 6 at 23.

non-Aboriginal families or in institutions. It is estimated that between 1883 and 1969, 5,625 children were the victims of this policy in New South Wales alone.¹³

This excellent introductory chapter concludes with a description of the current position of Aboriginal people, in terms of population, socio-economic conditions, and cultural identity. On the question of identity, Kevin Gilbert describes the difficulty of changing, by legal methods, the perception of Aboriginal people:

. . . the image of "dirty, lazy, bludging, alcoholic Jacky" will take some shifting especially as we have not yet created the images of some positive Aboriginal folk heroes. Ask white or black Australian kids to name a heroic Red Indian chief or a famous Indian tribe and most will be able to do so because of comics and films. Ask them to name an Aboriginal hero or a famous Aboriginal tribe and they will not be able to do so because Aboriginal history is either unknown or negative.¹⁴

Chapters 2 to 5 deal in considerable detail with the fundamental issue of land. Devoting almost half of the book's 300 plus pages to this topic may appear to reflect a rather unbalanced account of the many legal issues of concern to Aboriginal people; but the fact is that since the beginning of organised Aboriginal political/legal activism and 'rights' litigation in Australia, land rights has remained the pivotal issue. That is not to say that problems such as a discriminatory justice system or culturally insensitive welfare policies are any less important to the lives of Aboriginal people. However, disputes over land title and resource exploitation lie at the heart of the Aboriginal struggle to overcome the devastating impact of dispossession, particularly as Australia moves slowly towards realising the goal of self-determination for Aboriginal people. The book's emphasis on land questions is completely justified.

Consideration of the land question is prefaced with a brief description of the Aboriginal perspective. The authors' stated aims at this point are to "convey a sense of how diverse, complex, intricate, fascinating and resilient Aboriginal land laws are" and "to emphasise how fundamentally different Aboriginal perceptions of

¹³ P. Read, *The Stolen Generations. The Removal of Aboriginal Children in N.S.W. 1883 to 1969* (Sydney: N.S.W. Ministry of Aboriginal Affairs, 1982). Nationally, it is estimated that "there may be 100,000 people of Aboriginal descent who do not know their families or communities": Edwards & Read, *The Lost Children* (Sydney: Doubleday, 1989).

¹⁴ K. Gilbert, *Living Black: Blacks Talk to Kevin Gilbert* (Ringwood: Penguin, 1978).

land and land laws are from property law as developed through the European tradition."¹⁵ These aims are achieved most effectively through an extract which describes the system of "land tenure" among the southern Pitjantjatjara people of the Great Victoria Desert in South Australia. At one point Palmer relates what he has been told by a Yalata man:

When Harold Madge gave me an account of his country, he was designating locations with which, through inheritance and conception, he had a special spiritual affiliation. As a consequence of this spiritual affiliation he has the rights of an owner in respect of religious knowledge relevant to those locations. Neither he nor his patriline is the sole owner of the countryside, or even of the sites within it. While the countryman's rights with respect to the economic exploitation of his ngura are not differentiated from the rights of men whose ngura lie elsewhere, his rights with respect to the transfer of religious knowledge of that ngura are. A countryman's rights as an owner apply to a commodity which is a concomitant of a special spiritual relationship a man has with his country; that is, a mystical relationship in which he is understood as being actually a part of that country.¹⁶

This illustration of the elaborate system of land laws which operates in Aboriginal communities is juxtaposed in the following chapter with a discussion of the arrogant dismissal of Aboriginal culture and laws by the colonial settlers. The key implications of the arrival of British institutions and perceptions are considered: acquisition of territory; sovereignty; land rights; the status of Aboriginal law; and the jurisdiction of Australian courts over Aboriginal people. As the authors observe, these issues involve "fundamental questions of legal doctrine that go to the juridical foundations of the modern Australian nation."¹⁷ Each major issue is addressed effectively, but it is the author's examination of the pivotal notion of *terra nullius* - the legal fiction of unoccupied land - that is perhaps the most fascinating aspect of this section. Several extracts from Henry Reynolds' excellent work, *The Law of the Land*¹⁸ dominate this section. At one point he observes:

¹⁵ *Supra*, note 6 at 45.

¹⁶ Palmer, "Aboriginal Land Ownership Among the Southern Pitjantjatjara of the Great Victoria Desert" in Hiatt, ed., *Aboriginal Landowners: Contemporary Issues in the Determination of Traditional Aboriginal Land Ownership* (Sydney: Oceania Monograph No. 27, University of Sydney, 1984), quoted *supra*, note 6 at 54.

¹⁷ *Supra*, note 6 at 57.

¹⁸ (Ringwood: Penguin, 1987).

The truly amazing achievement of Australian jurisprudence was to deny that the Aborigines were ever in possession of their own land, robbing them of the great legal strength of that position, and of compensation which should have been paid following resumption by the Crown.¹⁹

The myth of *terra nullius* has significant implications also for the status of Aboriginal law. If Australia was 'unoccupied', then, according to Blackstone's distinction,²⁰ Australian colonies became British possessions by settlement and not by conquest. By such reasoning, a fiction has become "fundamental to [Australia's] legal system,"²¹ with devastating consequences for Aboriginal people. It 'justifies' Australia's general refusal to acknowledge Aboriginal law and the inclusion of Aboriginal people within the jurisdiction of Australia's people. In fact, it goes to the heart of those Aboriginal legal issues which are yet to be resolved, and which are the subject of discussion in the remaining chapters. The thoughtfully assembled material in Chapter 3 provides a solid basis for the more detailed analysis of specific issues which follows.

The sections on Aboriginal land rights provides an interesting contrast with the Canadian situation. While Aboriginal claimants in Canada have enjoyed a certain amount of success in 'rights' litigation,²² Australian courts and governments have shown a continued reluctance to recognise Aboriginal land rights at common law. Despite extensive criticism²³ of the decision of Blackburn J. in *Milirrpum v. Nabalco Pty Ltd*,²⁴ that "the doctrine [of aboriginal title] does not form, and never has formed, part of the law of any part of Australia,"²⁵ it is still the leading Australian authority on

¹⁹ *Supra*, note 6 at 79.

²⁰ *Ibid.* at 78.

²¹ *Coe v. Commonwealth* (1979), 53 A.L.J.R. 403 per Gibbs J.

²² Most recently, the decision of the Supreme Court of Canada in *R. v. Sparrow* (1990), 70 D.L.R. (4th) 385. The court's reasoning in *Sparrow* has been described as marking "the beginnings of a new constitutional framework for understanding aboriginal rights and Canadian sovereignty": M. Asch & P. Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991) 29 *Alta. L. Rev.* 498 at 500.

²³ In support of this criticism the authors cite several key passages from the leading Canadian authorities, including the judgment of Dickson J. in *Guerin v. R.* (1985), 13 D.L.R. (4th) 321.

²⁴ (1971), F.L.R. 141 (N.T. Supreme Court).

²⁵ *Supra*, note 6 at 166.

the doctrine of Aboriginal title. With some optimism, the authors assess the likelihood that the case will be overturned by the High Court in the near future,²⁶ describing *Milirrpum* as constituting "a formidable, but not impassable, roadblock for Aboriginal plaintiffs."²⁷

In the introduction to Chapter 5 the authors point out that:

Though Australia lags behind other common law jurisdictions in acknowledging common law land rights to its indigenous peoples it has been at the forefront in passing legislation which has granted ownership of extensive areas of land to Aboriginal groups.²⁸

As of June 1989, 10.42 per cent of Australia's total land area was held in freehold or leasehold by Aboriginal and Torres Strait Islander communities. While this figure in itself gives no indication as to the quality of the land, or whether the land is adequately distributed to all appropriate Aboriginal groups, it is nonetheless an encouraging statistic, given the many other ways in which Australian governments continue to fail Aboriginal people.

This chapter provides an excellent overview of the history, rationale and practical operation of land rights legislation in each Australian state. It offers answers to important questions like: who gets what land, and what title to the land is conferred? It also examines the important matter of mining on Aboriginal land, which has long been a key issue in the land rights struggle. It is unfortunate that major changes to the Queensland land rights legislation in 1991²⁹ could only be dealt with by way of a short postscript, but this hardly detracts from an otherwise comprehensive and well structured chapter.

Chapter 6 outlines the nature, and modern possibilities for the 'revival', of Aboriginal customary laws. As in Canada, interest in this area has centred around the value of traditional methods of

²⁶ In 1982 a group of Miriam people from the Murray Islands (in the Torres Strait) commenced proceedings against the Queensland Government (*Mabo v. Queensland*). After ten years of litigation, parties are awaiting the High Court's ruling.

²⁷ *Ibid.* at 103.

²⁸ *Ibid.* at 137.

²⁹ *Aboriginal Land Act 1991* (Qld).

dispute management as an alternative to the existing justice structure.³⁰ The first section introduces the nature of Aboriginal law and dispute management processes. The extracts describing dispute settlement processes among the Yolgnu on the Gove Peninsula in north-eastern Arnhem Land,³¹ the Warlpiri of Central Australia,³² and a community of town campers in Darwin³³ are fascinating. These accounts and the commentary that follows illustrate the ways in which traditional Aboriginal laws and methods have survived by a variety of methods including accommodation of non-Aboriginal values, and in some communities, observation of "two laws":

Aborigines on the Beswick Reserve [in the Northern Territory] . . . live after the manner neither of their ancestors nor of the white people. The understanding of their way of life is to be found in the changeable meaning and relation of what they distinguish as "blackfellow law" and "whitefellow law." . . . Blackfellow law has . . . value by virtue of its connection with The Dreaming and the world-creative powers who then shaped nature and culture; whitefellow law by virtue of the power and ingenuity with which it endows its followers.³⁴

Unfortunately, there appears to be little that the current Canadian debate over Aboriginal justice systems can learn from Australia's experience in this respect. The section on "Special Justice Mechanisms" does, however, provide a good summary of several

³⁰ In a 1991 report, the Law Reform Commission of Canada recommended that "[t]he federal government should provide funding for research into Aboriginal customary law," suggesting that "[i]nformation about Aboriginal customary law could affect many procedural decisions within the current criminal justice system": *Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* - Report No. 34 (Ottawa: Law Reform Commission of Canada, 1991). See also S. Clark, *Aboriginal Customary Law: Literature Review* (Ottawa: Research paper prepared for the Aboriginal Justice Inquiry of Manitoba, 1990).

³¹ N. Williams, *Two Laws: Managing Disputes in a Contemporary Aboriginal Community* (Canberra: Australian Institute of Aboriginal Studies, 1987).

³² The extract is from a report prepared by anthropologist Dianne Bell and presented to the court in *Limbiari's Case* (unreported, N.T. Supreme Court, 28 May 1984), a case in which the aboriginal defendant had speared and inadvertently killed a man who was being traditionally punished for forming a prohibited sexual relationship.

³³ Sansom, *The Camp at Wallaby Cross: Aboriginal Fringe Dwellers in Darwin* (Canberra: Australian Institute of Aboriginal Studies, 1980).

³⁴ Maddock, "Two Laws in One Community" in Berndt, ed., *Aborigines and Change: Australia in the 1970s* (New Jersey: Humanities Press Inc., 1977), quoted *supra*, note 6 at 219.

such 'initiatives' including Queensland's infamous Aboriginal courts — described as "instruments of oppression and control wielded by the white authorities, operating without respect for basic human rights"³⁵ — and the Justice of the Peace scheme in Western Australia.

In an examination of "overseas models," which includes a description of the successful Papua New Guinea Village Courts, the authors state that "Canada and New Zealand, like Australia, have until recently paid little attention to the needs of their indigenous populations in this area and have not developed court systems which constitute useful precedents."³⁶ While encouraging proposals for autonomous Aboriginal justice systems are now beginning to emerge in Canada, no such development is occurring in Australia. Promising proposals such as the Yirrkala scheme, which is described in some detail, have failed to attract support and adequate funding. Finally, the authors raise some important issues about the operation of separate justice mechanisms in Aboriginal communities. Questions regarding the law and procedure which an Aboriginal court would apply, the nature and extent of the court's jurisdiction, and the maintenance of due process standards and basic human rights, are all equally relevant to the Canadian context.

Chapter 7 provides an overview of the experience of Aboriginal people in terms of contact with the various agencies of criminal justice administration. The issues discussed here are strikingly similar to many of those currently attracting considerable attention in Canada.³⁷ The reasons for this attention in Australia are several, including allegations of discriminatory and racist policing, overwhelming evidence of Aboriginal over-representation in prisons, and controversy over the incidence of Aboriginal deaths in custody. As in many parts of Canada, these concerns led to the establishment of a major public inquiry. The *National Report of the Royal Commission into Aboriginal Deaths in Custody*³⁸ was formally

³⁵ *Supra*, note 6 at 229.

³⁶ *Supra*, note 6 at 231.

³⁷ See, e.g., *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1: "The Justice System and Aboriginal People" (Winnipeg: Queen's Printer, 1991); and Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta, *Justice on Trial* (Edmonton: Queen's Printer, 1991).

³⁸ (Canberra: Australian Government Publishing Service, 1991).

released in May 1991 to a mixed reaction from Aboriginal groups. Significantly, the report does not support the same level of Aboriginal autonomy in the administration of justice as has been recommended by the Aboriginal Justice Inquiry of Manitoba³⁹ and the Law Reform Commission of Canada,⁴⁰ although it does call for the implementation of a broad policy of Aboriginal self-determination.⁴¹

Following a short historical account of the imposition of the non-Aboriginal system on the Aboriginal population,⁴² several components of the justice process are discussed. In the section on "Overrepresentation and Discrimination" fundamental questions are addressed — for what types of offenses are Aborigines jailed; why are Aboriginal people over-represented; why are Aborigines targeted by police? — before a brief assessment of some of the reform measures which have been employed in recent years. Following sections explore the need for special protections for Aboriginal suspects during police interrogation,⁴³ the disadvantages faced by many Aboriginal people during formal court proceedings, and the adverse impact of culturally irrelevant substantive rules of criminal law.

The discussion of the relevance, for sentencing decisions, of Aboriginal laws, including community perceptions as to a crime's seriousness and the imposition of traditional sanctions, is thorough and thought-provoking. After discussing the considerable judicial uncertainty as to the role which such considerations should play, the authors suggest that, provided there is adequate consultation with the offender's community, taking such factors into account is a legitimate mechanism for allowing traditional dispute resolution

³⁹ The recommendations contained in this report are compared with those of the Royal Commission into Aboriginal Deaths in Custody, in L. McNamara, "Aboriginal People and Criminal Justice Reform: The Value of Autonomy-Based Solutions" [1992] 1 C.N.L.R. 1.

⁴⁰ Law Reform Commission of Canada, *Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (Ottawa: Law Reform Commission of Canada, 1991).

⁴¹ The timing of the report's release did not allow for discussed in any detail in *Aboriginal Legal Issues*, but its findings are summarised along with several short extracts in a postscript to the chapter on "Criminal Justice Issues."

⁴² *R. v. Murrell* (1836), Legge 72 (N.S.W. S. Ct.).

⁴³ *R. v. Anunga* (1976), 11 A.L.R. 412 (N.T. S. Ct.).

standards and procedures to play a role in the dominant justice system.

There are very few extracts in this part of the book, and most that do appear are taken from the more important judicial decisions. However, this does not diminish from the chapter's effectiveness because the commentary is wide-ranging, summarises many of the relevant judgments, and successfully highlights the major issues. There are also regular references to further reading.

The final chapter of *Aboriginal Legal Issues* examines the various avenues for 'resolving' Aboriginal legal issues, and so provides a fitting conclusion to the volume. It considers six such "legal techniques": parliamentary resolutions and preambles, litigation, legislation, constitutional amendment, treaties, and international action. The material in this section is probably the most directly relevant part of the book for a Canadian audience that is grappling with the question of how best to recognise and incorporate Aboriginal aspirations and rights within a federal system. Just as self-government is the focus of Aboriginal demands in Canada today, the theme which runs throughout this chapter is the search of Australia's Aboriginal people for a process by which their autonomy aspirations might be realised and their desire for land satisfied. The parallel is reinforced by several extracts which describe the Canadian struggle for resolution of Aboriginal legal issues.

The authors describe the limited impact of litigation and legislation in terms of giving effect to Aboriginal rights, before assessing the possibility for constitutional amendment. In contrast to the situation in Canada, this option has not received a great deal of attention in Australia and has failed to provide a legal environment in which Aboriginal issues can be addressed. In fact, the Australian government and Aboriginal organisations appear to be headed in almost opposite directions. On the one hand, the government has recently launched a strategy designed to produce an "instrument of reconciliation."⁴⁴ This scheme is described in an extract from the Minister for Aboriginal Affairs' second reading speech in the House of Representatives. On the other hand, organisations such as the National Aboriginal and Islander Legal Services Secretariat are currently very active in seeking international recognition of Aboriginal claims, including the indigenous right of self-determination.

The book's weaknesses are minor and largely unavoidable, having more to do with editorial restrictions and deadlines than anything

⁴⁴ *Council for Aboriginal Reconciliation Act 1991* (Cth).

else. The only real disappointment about *Aboriginal Legal Issues* is that a number of important issues are not dealt with in sufficient detail. For example, Aboriginal activity in international forums such as the United Nations Working Group on Indigenous Populations is becoming increasingly relevant to Aboriginal political aspirations and legal status in Australia, and deserves greater attention. It would be fitting if, as is suggested in the book's preface, this and other issues could be dealt with in an expanded second edition or, ideally, in a second volume. The excellent treatment given to the issues covered in this first volume certainly warrants such a follow-up.

Although *Aboriginal Legal Issues* is a book about Australia, it has much to interest the Canadian reader. It provides both an illuminating insight into the experience of Australia's Aboriginal people, and a solid basis for comparative analysis of Aboriginal legal issues in Australia and Canada.⁴⁵ It contributes to an understanding of the extent to which many of the grievances and aspirations of the world's indigenous peoples are intertwined with the legal and political cultures which both oppress them and offer them the chance of a just resolution.

⁴⁵ There is considerable precedent for this approach. See, e.g., B. Morse, "Aboriginal-Government Relations in Australia and the Implications for Canada" in J.A. Long & M. Boldt, eds., *Governments in Conflict? Provinces and Indian Nations in Canada* (Toronto: University of Toronto Press, 1988); B.A. Keon-Cohen, "Native Justice in Australia, Canada and the U.S.A.: A Comparative Analysis" (1982) 5:2 *Can. Legal Aid Bulletin* 187; and R.H. Bartlett, "Making Land Available for Native Land Claims in Australia: An Example for Canada" (1983) 13 *Man. L.J.* 73.