**Book Review:** Marc Gumbert, **Neither Justice nor Reason: A Legal and Anthropological Analysis of Aboriginal Land Rights,** University of Queensland Press, Santa Lucia, 1984 Pp xvii + 215. Price $18.50

Reviewed by Lyndel V. Prott[1]

This book is as important for legal theory as it is for anthropology and for the practical realisation of land rights for Australian aborigines. The central thesis of the book is that the accepted anthropological understanding of aboriginal land-holding, developed by Radcliffe-Brown in the 1930s and represented, in a modified form, in the evidence of the anthropologist Stanner in the Gove Land Rights Case (Milirrpum v Nabalco (1971) 17 F.L.R. 141) distorts aboriginal law and works injustice where it is adopted in land rights claims. Intertwined with the arguments supporting this thesis is evidence of the impropriety of using concepts such as "ownership", "rights" and "land tenure" in attempting to describe the relationship of land to people whose concept of that relationship is totally distorted by the load of associations and meanings carried by those terms.

Gumbert points out that even in legal English the word "owner" has many meanings: technically it is the mortgagee under Old System title and the mortgagor under Torrens system title, whereas, strictly speaking, the Queen is the only owner of the land (pp. 82-83). The meaning in everyday usage clearly ignores these technical meanings. Yet another meaning is ascribed to "Aboriginal English", where aboriginal speakers have used the word as a translation of concepts of their own which are profoundly different. "Ownership", as understood by Radcliffe-Brown and Stanner clearly meant something else again The federal Land Rights (Northern Territory) Act 1976 uses the term "traditional owner" and Gumbert argues persuasively (pp. 94-95) that both the formulation of this term by Woodward J in his report on land rights in 1974 and its adoption into the legislation were based on the same mistaken view of the nature of aboriginal "ownership", i.e. that those with primary responsibility for a claimed area of land were a local patrilineal descent group. In fact, as Gumbert seeks to show by analysis of evidence in the first six land rights claims made under the Act, the aborigines in this group themselves found this too narrow a claim, ignoring the rights (or rather "relationships") of other important members of the group and leading several land rights commissioners to note that recognition of the named "traditional owners" to a parcel of land would in fact benefit a far larger group whose rights would be conceded by the legally recognised "traditional owners". The possible mischief caused by this anomaly is clear when Gumbert notes (p. 104) the growing practice by mining or

1. Faculty of Law, University of Sydney.

other interests, wishing to acquire certain rights over land, to make "up front payments" and "deal solely with privileged lineages and make exclusive (and frequently large) payments to them" (p. 159).

Gumbert's analysis seeks to show that, while a patrilineal group does have certain defined (apparently) ritual reponsibilities for sites on the claimed land, there are equally importantly responsibilities performed by children of the women of the tribe, known in Aboriginal English as "managers". The functions of "owners" and "managers" are seen by the aborigines themselves as complementary certainly not as "primary" and "secondary". "Managers" seems, in this event, to be quite as bad a translation as "owner". Indeed, the "managers" in one parcel of the claimed land are likely to be the "owners" in another parcel of the land, because of the close marriage ties between different groups, and it makes for more sense, Gumbert argues, to name the whole community as "owner", leaving, one might add, the attribution of rights and responsibilities for the different rituals and functions to be determined, as of old, by the oral aboriginal tradition.

In his analysis in the Gove Land Rights Case Blackburn J. stated that "ownership" in the Common Law denoted three things: the ability to exploit land, to exclude others from it and to alienate it. Clearly the aboriginal relationship to land differed from that in radical ways. In fact, Blackburn commented, it might be said, not that the land belonged to the aboriginals, but that they belonged to the land (Milirrpum v Nabalco (1971) 17 F.L.R. 141 at 270-1). Despite Blackburn's comments that the use of words "interest in land" and "ownership" could be used provided their special, unusual, meanings were kept in mind, the possibilities of mischief and misunderstanding illustrated by Gumbert seem to this reviewer to suggest that a more radical solution than Gumbert's is called for. Interpreting the definition "traditional owners" in the Act in line with current anthropological understanding is his proposal: but how can we be sure that the anthropologists have this time got it right? As Gumbert points out, the answers given by the aborigines are determined by the questions being asked (p. 192) - and the questions asked are determined by the theory espoused by the anthropologist.

The answer might be to use terms unpolluted by "Common Law", "ordinary English" or "statutory English" nuances, such as the terms "kirda" ("owner") and "kurdungurlu" ("manager") (p. 182). Such terms would immediately imply the genealogical qualifications quite unknown to their English counterparts, and while needing translation from one aboriginal dialect to another, it seems evident (certainly in the Northern Territory) that these terms would be much closer to existing concepts in any aboriginal land-holding system than any English

counterpart ("owner", "boss", "manager", "custodian", "trustee" or any other). Furthermore, the adoption of aboriginal terminology would put white lawyers (and anthropologists) on notice that they are dealing here with institutions sui generis, for which all their preconceptions about land-holding are inappropriate (p. 192) Why should there be any more embarrassment about adopting such words than about "boomerang" or "kangaroo"? It should be recalled that, when the Japanese adopted a Western style legal code, a new Japanese word had to be developed to describe the concept of "legal rule" for which no term existed. Since appropriate words do exist in aboriginal dialects, they can be adopted and do not have to be invented. The present practice has led to misinterpretation and mistranslation of aboriginal concepts, to a radical oversimplification of the complex aboriginal system and unjust results of the land rights legislation.

Apart from these primary jurisprudential issues, Gumbert's book is full of other interesting points. His discussion of earlier Australian policies of "segregation" and "confinement" suggests how close the philosophy behind them was to apartheid, while the later policies of "protection" and "management" are uncomfortably close to what is today called "ethnocide". His discussion of anthropologists' "empiricism" suggests the somewhat startling conclusion that lawyers have been better at addressing aboriginal evidence than anthropologists (see p. 81, on the Gove Land Rights Case; pp 185-186, on the Willowra Claim). The degree of complexity of aboriginal landholding is indicated by the differential responsibilities held towards one's father's land, grandmother's land, brother's land, aunt's land (pp. 145-146) or, in another claim, by rights over land in which one was conceived, rights over land in which one was born, rights over land where one's father was buried, rights over land where one's grandfather was buried, rights over mother's brother's land, rights over land lying over one's ceremonial track (p. 149).

There are some areas where further development is needed - the lack of discussion of the integral nature of relationship to land in Aboriginal culture is surprising for an anthropologist, especially since this has already been discussed in legal contexts (Onus v Alcoa 36 A.L.R. 425), and in view of the suggestion (by Nettheim) that the right to freedom of religion, guaranteed by the Australian Constitution and by international human rights instruments, would support land rights claims for Australian aborigines. The statement that no treaties were made with the aborigines, stated so baldly (p. 27), is wrong (cf. the "Batman Treaty"). The lack of explanation of some anthropological terms used ("patriclan", "section" and "morety" pp. 122-123) and of the different kinship systems which are named and not

described (pp 63, 122) makes the work more difficult for lawyers

Generally, the accessibility of the important material in this book is lessened by several irritating factors. No effort appears to have been made to convert it from the rigid tri-partite form required for a Sorbonne doctoral dissertation, which seems in general to have wrenched the material out of the order in which it would more appropriately be presented. This probably also accounts for the sparsity of footnotes, case citations and cross-referencing which is annoying, and the lack of a case index, which seems vital. This reviewer (and, no doubt, the publisher) feels comfortable with the social science style of citation, rather than the usual legal one, but lawyers are at least entitled to an explanation. These criticisms may sound carping, but these factors make the book less useful as a jurisprudential teaching tool and, I suspect, lessen the likelihood of its use by lawyers in the preparation of land claims.

Nonetheless this is a significant book. It provides important points of discussion of conceptual incongruity in comparative legal research and, in terms of Australian development, crucial evidence of the need for properly based legal theory for the realisation of justice. It is also a challenge to lawyers to stretch beyond the ideology of the Common Law to comprehend fundamentally different social and legal structures. Like the Gove Land Rights Case, Gumbert's book is an Australian jurisprudential landmark.