

Review of H McRae, G Nettheim, L Beacroft, *Aboriginal Legal Issues: Commentary and Materials*, Sydney: Law Book Company, 1991. pp xi-xxxvii; 1-338.

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“Aboriginal Legal Issues” have always seemed to me to be amongst the most interesting problems that a lawyer can confront. They arise from the colonization by European peoples of the territory of an indigenous population who find themselves a minority in the “new” country. Issues of sovereignty, real property, self-government, administration of justice and methods of resolving disputes arise in very different contexts from those which lawyers usually encounter. But yet the issues are fundamental to the founding and history of the jurisdiction and are invariably part of the fabric of the governing legal system. These comments could be made about any of the territories colonized by European nations - Canada, New Zealand, the United States, Fiji, Mexico, etc. They are certainly applicable to Australia and yet, until now, there has been no source book for materials relevant to “Aboriginal Legal Issues”. This publication is accordingly long overdue.

The material has a fundamentally chronological organization. Chapter 1 provides the historical background to the issues presented both before and after 1788. Chapter 2 attempts to provide an introduction to the traditional relationship of aboriginal people to the land. Chapters 1 and 2 together enable the reader to have some understanding of the way of life of Aboriginal people before colonization. It is suggested that perhaps there could be more material included here so that the full range and nature of the conflict between the Aboriginal and European peoples was understood.

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Chapter 3, “Colonization, Sovereignty and the Law”, is the section of the book that addresses the fundamental question of how the conflict of peoples and legal systems is resolved. The establishment of sovereignty and the consequences for the legal system of the aboriginal peoples and their rights of government are examined. A confusing aspect of the chapter is the introduction of a partial treatment of land rights, which might have been better left to the succeeding chapter. Another concern is an obsession with the “straw” concept of terra nullius. It is often suggested that once it has been judicially recognized that Australia was not uninhabited at the time of colonization then the rights of the Aboriginal peoples are assured. It is suggested that this is an overly simplistic analysis of the causes and resolution of the conflict between aboriginal peoples and colonizing peoples. In other countries where the aboriginal peoples were dispossessed and the sovereignty of the colonizing peoples given judicial effect, the existence of the aboriginal people was recognized, but the recognition afforded minimal protection. And to the extent that Aboriginal rights were recognized it was not on account of how the lands were classified, whether the lands were terra nullius or otherwise.

Chapter 4 provides a useful analysis and collection of materials dealing with aboriginal title at common law. Every aspect of the concept is considered. A difficulty is the degree of regard accorded the leading decision of *Milirrpum v Nabalco*¹ (“*Milirrpum*”). The decision is presently under review by the High Court in *Mabo v State of Queensland* (“*Mabo*”). The materials discount the significance of the decision in *Milirrpum*. Only the handing down of the decision of the High Court in *Mabo* will reveal if that approach was correct.

Chapter 5 continues the focus on land in an examination of aboriginal land rights legislation. The legislation is reviewed in detail and the chapter provides a valuable comparative commentary on the state of land rights in the different jurisdictions in Australia.

“Recognition of Aboriginal Law” is examined in Chapter 6. This is a subject intimately related to sovereignty and self-government but has been separated from the treatment accorded that subject in Chapter 3. It is suggested that an underlying thesis of self-government or self-management could be given greater force if the material was more closely linked. Another aspect of that perspective is the emphasis on the Australian Law Reform Commission Report on “The Recognition of Aboriginal Customary Laws”.

1. (1971) 17 FLR 141.

The Report's focus is on the perpetuation of traditional laws not on the choice, adaptation and administration of those laws by Aboriginal peoples. It is an empty exercise and the antithesis of self-government or self-management.

Chapter 7, "Criminal Justice Issues", addresses an area which tends to receive inordinate emphasis in Australia. Criminal justice issues with respect to aboriginal people are essentially symptomatic of more fundamental issues reflecting the general dispossession and disadvantage of aboriginal peoples. It is trite to suggest that time and effort could be more usefully spent in providing structures that address that condition. Hopefully this collection of materials will assist the process.

The last chapter examines the legal techniques which might bring about change. It considers the roles of litigation, legislation, constitutional amendment and action in international forums. It briefly examines the issue of a treaty or compact.

The book is an extremely valuable source and guide to materials. However I am not sure it serves its primary purpose as well as it might. The preface describes the primary purpose as being the provision of a "basis for teaching in law schools". I consider that the proper approach to teaching in law schools demands a basis which allows the readers to make up their own minds as to the significance of the materials and issues that are raised. A difficulty in part of this collection is the discounting of that approach in favour of a high degree of editing. The reader is directed to and presented with the conclusions to be drawn from the materials. This detracts from the value of the reasoning and the conclusions drawn by the reader. I would favour the provision of a fuller context for the material and less direction as to the conclusions to be drawn. It must also be observed that invariably the conclusions which it is suggested should be drawn are those in furtherance of greater legal rights for Aboriginal peoples. For the reasons already given I consider that it is more valuable to the process of reasoning and understanding if the reader reaches those conclusions without such direction.

What else might the book have addressed? The most notable omission is sacred sites. The area presents a dramatic conflict between Aboriginal and Euro-Australian views, and accordingly a valuable subject for discussion and teaching purposes. I would urge its inclusion in future editions, a prospect to which the authors allude in the Preface.

In the result this book is an important addition to the literature on aboriginal peoples and the law. Its ambiguous status as a text or collection of materials may reduce its value for some purposes, but also broadens its

possible range of use. It would seem to be a book which could be readily used in disciplines other than law and read and used as a source book by many people other than students. And its ambiguous status will not prevent me from using it as the basis for teaching the "Aboriginal Peoples and the Law" course at the Law School of The University of Western Australia in 1992.