

REVIEW ARTICLE

PERSPECTIVES ON LAND RIGHTS¹

Brad Morse

Although the anthropological literature has been rich in local and regional descriptions and studies of the original inhabitants in Australia for several decades, relatively little existed in print in any discipline concerning the modern era of Aboriginal land rights. This situation has now significantly changed in the 1980s. The two volumes under consideration in this review have made a particularly dramatic impact on filling a critical void in our knowledge base, which has been subsequently enhanced by *Aborigines and the Law* (edited by Peter Hanks and Bryan Keon-Cohen), although most of the latter's contents relate to Aboriginal legal issues other than land rights.

Aboriginal Land Rights: A Handbook consists of selected edited 'background papers' which were originally presented at a land rights conference in Canberra in May of 1980 sponsored by the Australian Institute of Aboriginal Studies. Nicolas Peterson describes the purpose of the book in the Preface as 'a handbook in the sense of an informational guide rather than an instructional text'. The book meets this modest objective very well. It contains separate chapters on every State and Territory with various papers in each outlining the legislative system in existence at that moment and movements then under debate. The collection also includes several useful historical overviews; those by Chris Anderson (Queensland) and Philip Felton (Victoria) are particularly worthy of mention in this regard. Finally, this edited work includes an excellent insider's description of the Aboriginal Land Fund Commission (and its many frustrating limitations imposed by the former Commonwealth Government) by its chairman, Professor Rowley.

The editor also prepared a bibliography (which is only partially complete) and a relatively thin introduction. Such a geographically disparate yet obviously related collection truly needed a comprehensive introductory essay to draw together the major themes from the subsequent specialised papers for the reader so as to indicate the common experiences, learning processes and cross-fertilisation that have occurred. Unfortunately, Dr Peterson chose not to seize the opportunity as editor to develop such a contemplative and insightful analysis to reflect the shared lessons generated by this mammoth conference.

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¹ *Aboriginal Land Rights: A Handbook*, Edited by Nicolas Peterson, Australian Institute of Aboriginal Studies, Canberra, 1981. Pp. 304, maps, tables. p.b. \$9.90 and *Aborigines, Land and Land Rights*. Edited by Nicolas Peterson and Marcia Langton. Australian Institute of Aboriginal Studies, Canberra, 1983. Pp. 476, maps, tables, index. h.c. \$21.50. p.b. \$14.90.

Although these papers are naturally dated after five years (subject to a few touches of updating, e.g., Peterson's paper on South Australia refers to the passage of the *Pitjantjatjara Land Rights Act* ten months after the conference), many nevertheless retain their vigour and utility. This book is the only source where one can readily find in print detailed analyses of each state's experience with the land trust model initiated by the Dunstan Government in South Australia in 1966. Even though that system has been criticised, and largely discredited by the 1980s, there are many important lessons to be learned from that experiment, as well as its assistance in obtaining a fuller understanding of why the land rights movement has taken the turns, and met the successes, that it has. The land trust 'experiment' continues directly to affect the lives of Aborigines in some parts of Australia and have an effect on patterns of thinking regarding regimes to administer title to land by the Aboriginal Development Commission or under land rights legislation.

Aborigines, Land and Land Rights contains a further twenty nine papers (out of a possible forty three) from the same AIAS conference in May 1980, which were originally grouped together under the headings 'Traditional Rights in Land'; 'Alternatives and Perspectives'; and 'Northern Territory Legislation and the Future'. This is a far more diverse compilation of essays than *Aboriginal Land Rights: A Handbook*. Rather than using a region-by-region descriptive approach, this second volume attempts to categorise the papers according to five themes.

Part One, entitled 'Traditional principles', consists of six anthropological studies, five of which concern specific Aboriginal groups. A particularly useful overview essay by Nicolas Peterson concludes this portion of the book. It is immediately followed by eight papers under the title, 'Interactions and adjustments: Aborigines, law and anthropology'. The first four of these comprise essays primarily focussing upon attitudes of particular Aboriginal groups towards land usage and ownership in traditional and fringe-dwelling situations. The latter four tend to utilise more of a multi-disciplinary methodology in the sense of analysing anthropological knowledge within the context of Aboriginal land legislation in Queensland (David S. Trigger and Jeremy Beckett), South Australia (Robert Layton) and the Northern Territory (Kenneth Maddock). The latter piece is especially insightful, perhaps due to Professor Maddock's training both in law and in anthropology as well as his personal involvement in land claims under the *Aboriginal Land Rights (N.T.) Act 1976 (Cth.)*. As someone actively involved in land rights in Canada coming from a legal background, this reviewer found Professor Maddock's comments on the misunderstandings between lawyers and anthropologists, regarding their differing objectives and expectations within the context of the statutory directions at play in the Northern Territory, both fascinating and illuminating. The failure to have a 'meeting of the minds' in this situation is readily translatable to the conflicts and confusions which have existed in Canada and the U.S.A. among historians, sociologists, anthropologists and lawyers in litigation involving indigenous land rights.

Part Three groups together six papers under the rubric 'Modern structures'. This is presumably designed to indicate a common theme concerning the entities presently in operation engaged in meeting Aboriginal needs in relation to land. This possible theme is not apparent in all the papers.

The first essay by Bette Moore, who also contributed a very informative piece to

the first volume, is 'The Victorian Aboriginal Land Council 1975-77'. It is a good background piece explaining the importance of the Woodward Commission Report in triggering state-wide Aboriginal activism on land rights in Victoria (instead of just in Lake Tyers and Framlingham). It is disappointing only in its shortness of scope. This reviewer would wish that it continued its review past 1977. The second paper, by Colin Bourke, is also on Victoria and also suffers both from its brevity and a decision to limit the discussion to the period largely before the mid-1970s.

The latter four papers of Part Three are very good indeed. After reviewing a number of specific claims in the Northern Territory, Meredith Powell asks a number of critical questions concerning male domination of claims, why this is changing, and what the implications of this may be on Aboriginal society beyond claims. Geoff Eames follows with an insider's view, from the standpoint of a white lawyer actively involved yet attempting to avoid the politics, of the rebirth of the Central Land Council in 1975 until his resignation in June of 1978. This was a tumultuous era for land rights in the Northern Territory and the excitement, plus frustration, of the author is readily conveyed in a most interesting account. It is one with which this reviewer can easily identify and enjoy.

The next essay also provides an insider's perspective, but with a difference. Diane Bell writes of sacred sites legislation in force in the Northern Territory from the standpoint of an anthropologist with extensive fieldwork in The Centre and as one who was a senior administrator of the Aboriginal Sacred Sites Protection Authority. By using a specific case she clearly illustrates the conflict in expectations of what legislation is to do and the difference in perceptions of how sites need to be protected. This excellent article by Bell, which was later updated to early 1982, is followed by another by Bill Edwards. Somewhat akin to Geoff Eames' essay, he traces the Pitjantjatjara land rights struggle, in which he was involved as an interpreter, from 1976 to early 1980. It is particularly unfortunate that this article was also not updated to carry the story through the passage of the *Pitjantjatjara Land Rights Act* in 1981.

Part Four, which is exclusively on mining, opens with a joint article by two more individuals active in the land rights field, namely, Daniel Vachon and Phillip Toyne. Not only do they analyse the 1981 Act of South Australia, but they also accomplish what many of the papers omit. That is, they consider the political, practical and legal processes at play in a new form of competition for territory (with the wealth that it implies for white society) that Aboriginal land rights generates. The Noonkanbah dispute (which is later described in greater depth by Philip Vincent) is compared with the experience of the Pitjantjatjara in South Australia and the Central Land Council. It is the blending of disciplinary perspectives and the use of a comparative approach which particularly raises this chapter above the merely descriptive into the realm of the analytical. For a non-Australian, this essay is especially useful. It also demonstrates the degree to which the mining issue has and will continue to plague Aboriginal claimants in a manner similar to petroleum development in northern Canada. Nevertheless, the paper has an air of optimism in that acceptable resolutions of such conflicts have been achieved by the Pitjantjatjara once the people got title to the land. Multinationals are amazingly adaptable so long as profits can be made.

The balance of this Part is also very strong. Peter Carroll provides a very thorough overview of the Alligator Rivers conflict between Aboriginal land interests and the

uranium mining industry as well as summaries of major agreements. Sue Kesteven analyses the social costs for Aboriginal communities of success in the sense of royalties and payments resulting from land rights victories and subsequent developments. Marcia Langton confronts the issue of the impact of mining throughout Australia upon Aboriginal peoples and lands by proffering a national strategy to address the problem. This is a particularly creative and thought-provoking essay worthy of further reconsideration in the future.

The final section consists of four essays designed to present 'Canadian perspectives'. Two of these papers, both by Harvey Feit, are focussed upon the James Bay Agreement in Northern Quebec. These should be especially informative for Australian readers in illustrating the significantly different orientation of land claims agreements in Canada. The first paper describes the history of the claim and the negotiation process. Parallels between the pressures of hydro-electric development in northern Quebec with the Ranger Uranium project are readily apparent by comparing this essay to several of the earlier ones. Professor Feit's second paper concentrates on a unique element of the James Bay Agreement, namely, the creation of an income security plan for those indigenous people who wish to maintain their traditional economy of hunting, fishing and trapping. The only drawback to these two excellent papers is that Professor Feit has not described the full contents of the Agreement in detail. This would be useful for Australians in identifying the differences in land claims settlements. The Canadian approach is to emphasise cash compensation, guarantees of traditional economic foraging rights, regimes of self-government within the lands reserved for traditional owners, and special arrangements to regulate the interface between aboriginal and immigrant societies in areas of health, education, justice, culture and social services at the expense of large land areas being confirmed in aboriginal hands.

A further paper, by Noel Dyck, describes the successful negotiations in Saskatchewan among federal and provincial governments and the Federation of Saskatchewan Indian Nations to implement in full the land entitlement provisions contained in treaties signed in the 1870s. Approximately one million acres is in the process of being set aside as additional Indian reserve land in the province. The agreement outlined by Dyck is still slowly being implemented on a community-by-community basis today.

The last Canadian paper, and probably the most interesting from an Australian vantage point, is Constance Hunt's analysis of the *Aboriginal Land Rights, (Northern Territory) Act 1976*. It is very difficult for a complete outsider to critique any agreement made in a completely different context. This is especially so in an extremely short essay. Nevertheless, it contains the basic observations that most Canadian experts can offer from our experience.

The Canadian situation has changed dramatically since this conference in 1980. Our new constitution, proclaimed in force on April 17, 1982, contains express provisions recognising and affirming the 'existing aboriginal and treaty rights' of the Indian, Metis and Inuit peoples of Canada in section 35 (1). These rights are also exempt from attack for violating any provisions within the Charter of Rights and Freedoms contained in Part I of the *Constitution Act, 1982*. All land claim settlements previously signed or negotiated in the future receive constitutional recognition and entrenchment as 'treaty rights' within S. 35 (1) by virtue of an amendment to the constitution proclaimed in 1984 as well as exemption from an attack under the Charter (by virtue of

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SS. 35 (3) and 25 (b) respectively). Sexual equality amongst aboriginal male and female persons in regard to these guaranteed rights is also assured through a further constitutional amendment (S. 35 (4)). The effect of these provisions is that these rights are part of the constitution, the supreme law of the land, and cannot be infringed by federal or provincial legislation. The exact scope of these rights has yet to be determined by the courts.

First Ministers Conferences (FMC), consisting of the Prime Minister, the ten provincial Premiers, the two territorial leaders, and representatives of the Aboriginal peoples (through four national political organisations) are required to be held in 1983, 1984, 1985 and 1987. The 1983 FMC led to the aforementioned amendments while the 1984 FMC focussed on the issue of aboriginal self-government and further equality issues (both sexual and among different classes of the aboriginal people, namely, the Indians, Metis and Inuit) without consensus being achieved. These issues are on the agenda for the 1985 FMC.

In addition, many small land claims have been settled as well as a massive land claim of the Inuit (the Inuvialuit group) to the Western Arctic. Other substantial land claims in the Yukon Territory, the Mackenzie Valley region of the Northwest Territories, and the Eastern Arctic are progressing towards a negotiated agreement-in-principle. An independent review of the federal claims policy will commence shortly.

Lest the foregoing description of the flurry of activity occurring in Canada paint too rosy a picture from afar, the 'progress' has been difficult, frustrating, slow and, sometimes, non-existent. We are increasingly looking to the Australian experience for inspiration and suggestions. The reverse is equally true, as each country is simultaneously well ahead and well behind the other in diverse fields affecting Aboriginal People. Books like these help promote that valuable information exchange.

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