

## Reviews

*Eastern and Central Arrernte to English Dictionary.* Compiled by John Henderson and Veronica Dobson (Arandic Languages Dictionaries Program). Alice Springs: IAD Press, 1994. Pp. ix + 773. \$49.50

Arrernte, spoken in and around the Alice Springs region, is one of the principal Aboriginal languages of Central Australia. Most Arrernte speakers are now bilingual in English; yet increasingly Eastern and Central Arrernte (the variety described in the present work) is being taught in schools around Alice Springs and heard in local government and media.

The Arrernte language includes dialects (defined linguistically in terms of mutual intelligibility) that are referred to in current practise in Central Australia as the Southern, Western, Eastern and Central Arrernte *languages*, and belongs with other closely related languages—Lower Arrernte, Anmatyerre, Alyawarr, and Kaytetye—to a group called by linguists the Arandic language family. Eastern and Central Arrernte has close to 2,000 speakers, Arrernte in the broader sense between 3,000 and 4,000 speakers, and the whole Arandic language family around 6,000 speakers (R.Hoogenraad p.c.). (Older spellings of the language name include Arunta and Aranda; the spelling Arrarnta is currently being used for the western dialect in Lutheran publications.)

The Arrernte language gradually came to the attention of the scholarly world after the construction of the Overland Telegraph Line, completed in 1872, introduced a European presence into Central Australia (see Taylor 1980).

The earliest published vocabulary of Arrernte seems to be that collected by Christopher Giles at the Charlotte Waters Telegraph Station on 10 December 1875 (Taplin 1879: 89–92, 142–153, 156); the language name is there said to be "Arrinda" (pp. 91) and the tribal name "Antakerrinya" (Antikirinya is now the name of a dialect of the Western Desert language which borders on Lower Arrernte to the west). Further wordlists from the Charlotte Waters language, collected by F.J. Gillen and R.E. Warburton, were published in Curr 1886 (vol. 1, p. 418–421), along with a third wordlist in essentially the same dialect, collected by E.F. Belt from Macumba River (pp. 424–5). In the same volume were published two wordlists collected from Aboriginal people at the Alice Springs Telegraph Station by John H. London and J.F. Mueller (pp. 412–415). Curr recognised similarities between the Alice Springs data and that of Charlotte Waters. In 1888 and again in 1891 Constable Willshire published booklets which included vocabularies of the dialect of Alice Springs (Willshire 1888, 1891).

The establishment of the Finke River Mission at Hermannsburg from 1877 (Henson 1994: 9) brought into contact with the Western and Southern Arrernte people a series of Europeans who began to study the language seriously for their practical com-

municative purposes. One of the first missionaries, Hermann Kempe, in 1891 published an article on the grammar and vocabulary of the Aborigines of the Macdonnell Ranges (Kempe 1891). Other early works on Arrernte grammar, based in part or whole on the data of the missionaries, were published by Matthews (1907) and Planert (1907).

In the meantime, from the 1890s, the scientific expeditions of Horn and especially Spencer and Gillen led to the accumulation of much ethnographic information on the Arrernte people with associated terminology (a "glossary of native terms used" is included in Spencer and Gillen 1899/1969: 645–657 and 1927: 609–628). In 1907, however, in an article in which he includes an Arrernte wordlist and compares it with two Luritja vocabularies, Basedow complains that in spite of a wealth of data on the names and customs of the Arrernte people

so fehlt es doch an einem zusammenhängenden Wörterverzeichnis der Sprachen derselben ('yet there is lacking a comprehensive word index of their languages' [translation by HK]) (Basedow 1907: 207).

This lack would remain for a long time. The missionary Carl Strehlow undertook considerable ethnographic research on the Arrernte and Luritja peoples, which was published in Europe (C. Strehlow 1907–1920). He also intended to compile and eventually publish a comprehensive work on the Arrernte language:

[ich] hoffe in einiger Zeit selbst eine zusammenhängende Arbeit über die Aranda-Sprache veröffentlichen zu können. ('[I] hope some time to be able to publish myself a comprehensive work on the Aranda language.' [translation by HK] (C. Strehlow 1908: 698).

Unfortunately Carl Strehlow died in tragic circumstances (for which see T.G.H. Strehlow 1969) before he could realise this ambition. Nevertheless a 223-page manuscript containing an Aranda-Loritja vocabulary has survived his death. His son T.G.H. (Ted) Strehlow continued his father's documentation of Arrernte, especially the Western Arrernte dialect (Altuliperre). He recorded numerous mythical texts, wrote a grammar of Aranda, and wrote major works on Arandic ethnography and Arandic songs (see T.G.H. Strehlow 1934, 1944, 1947, 1971). He, too, had a large dictionary file, rumoured to contain over 30,000 entries; but he also died without having his dictionary published, and access to the dictionary card file has not been allowed. (For his biography see McNally 1981.)

In 1959–60 Ken Hale elicited a wordlist of about 400 items from ten localities within the Arandic-speaking area. Remaining unpublished, this *Arandic Word List* has only been in circulation among linguists; however the core 100 words of the list were published in Hale (1962). A 160-word list from seven Arandic dialects/languages was included in Menning and Nash (1981), with much of the data having come from Hale's notes.

From the early 1970s the Institute for Aboriginal Development in Alice Springs has conducted language courses in Arrernte and other Central Australian languages. As a support for these courses it has produced 'simple explanations' and/or 'learner's guides' for various languages (eg. Green 1984, 1994). The first Arrernte language materials produced were in the Western (Hermannsburg) dialect, which has received a certain institutionalised standing through its use in Lutheran religious contexts (preaching, liturgy, hymnody, Bible translation). In 1975 a course was begun in the East-

ern Arrernte dialect. In support of this language course a succession of wordlists was produced: *Aranda-English English-Aranda Vocabulary* (1979), *Eastern Arrernte Learner's Wordlist* (1985), *A Learner's Wordlist of Eastern and Central Arrernte* (1991). By this time the Central dialects, such as those spoken in Alice Springs and Santa Teresa, were being described in similar terms to the Eastern dialects, such as those spoken at Alcoota and Harts Range, but considerably different from Western Arrernte, which in most circles uses a different orthographic system.

In the late 1970s indigenous language programs were initiated at Yipirinya School in Alice Springs. A full grammar of Mparntwe Arrernte was produced in 1989 (Wilkins 1989). Furthermore, in 1984 the Institute for Aboriginal Development began a long-term Arandic Languages Dictionary Program (see Breen 1984). A dictionary of the north-eastern Arandic language, Alyawarr, was published in 1992 (Green 1992; cf. the review by Koch (1993)).

The present work by Henderson and Dobson (henceforth ECAED) represents by far the most comprehensive compilation of Arandic vocabulary that has been published in the 120 year history of recording Arandic languages. That absence of a comprehensive guide to Arrernte vocabulary, lamented by Basedow already in 1907, has finally been rectified.

The ECAED is aimed at Arrernte speakers learning to read and write their own language and translate it into English, as well as for aiding learners and teachers of Arrernte. The avoidance of technical linguistic terms shows that the non-literate Arrernte speaker is held in mind; while the diverse array of example sentences shows concern for the non-Arrernte speaker.

The cover illustration is of an unmistakable Central Australian landscape, taken from a painting by Arrernte contributor Therese Ryder. There is a seven-page section on how to use the dictionary, including a page of 250 Arrernte suffixes; an introduction containing information on where Arrernte is spoken, dialect differences, notes on orthography, grammar, handsigns and kinship; the main dictionary; an English word finder list consisting of 130 pages; and a table of pronouns.

One ingenious innovation of this dictionary is the use of 'flick animations' to illustrate some of the handsigns. These consist of sketch in the bottom right hand corner of a series of pages, which as you flick, illustrates the movement of the handsigns. Use of handsigns and sign language is a major part of Central Australian Aboriginal culture (for a full explanation see Kendon 1988) and it is commendable that the ECAED has highlighted this fact by including such sketches and flick animations.

The phonology of Arrernte (as of all Arandic languages) is complex; this can present a challenge to the construction of an orthography (for a discussion of some issues, cf. Koch (1993), Breen and Green (1995)). The orthography represented in the ECAED was decided upon in a meeting of Arrernte speakers and linguists in July 1978, with some adjustments being made subsequently. While many examples of alternative spellings and inconsistencies in the orthography could be pointed out, to do so would be to overlook the reasons behind these inconsistencies. In some cases the compilers of the ECAED have deliberately refrained from standardising the orthography. Deciding on an orthography and standardising it can be as much a political issue as it is a linguist-

tic one; and if an orthography is to be a practical tool for the language community concerned, then it is the speakers themselves who should make decisions on these issues.

The dictionary offers a wealth of information for semanticists. Words are cross-referenced for near synonyms, homonyms and near homonyms, antonyms, words in the same semantic field and senses in the same semantic field. Generics and classifiers are marked in an accessible way; for example, the third sense of *thipe* reads 'A general word for fleshy flying creatures which goes before a word for a particular type.'

Dialect differences, speech register (such as 'avoidance register') and literal translations (where necessary) are all marked on each entry. Place names, which are too often left out of bilingual dictionaries, are also included. Entries often have numerous example sentences; many of these are taken from texts, as can be seen from the wealth of cultural and encyclopaedic information they contain.

The ECAED is a major contribution to Australian Aboriginal linguistics; with rich information on morphology and semantics written in a user-friendly style, it will no doubt be a much used resource among Arrernte communities, language learners and language enthusiasts.

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*Benang: From the Heart*. Kim Scott, Fremantle Arts Press, Fremantle (Western Australia), 1999. pp. 500, index. \$19.95

In the transition from colonial to Western Australian government control of 'Native Welfare', from the turn of the century to the 1970s, *Benang: From the Heart*, the work by an Aborigine of southern Western Australian (WA) Nyungar descent, Kim Scott, *Benang*, is a reconstruction of his family remnant's past. It is a story of the struggle to come to terms with: legal deprivation, parsimonious and oppressive governments, white bigotry, black resignation and society-wide terror, indifference and paternalism. This review of Scott's latest book focuses on four aspects of the novel: the writer's intent, the sources, textual imagination and quality of authorship.

By way of introduction, the reconstruction of the historic and the anthropological past is difficult both for writers of fiction and scholarship. Books by non-Aboriginal writers such as Helen 'Demidenko'-Darville's *The Hand That Signed the Paper* (1994) and Eric Wilmot's *Pemulwuy* (1987) and more recently, Christopher Cyrill's *Hymns for the Dawning* (1999) have all fallen foul of the pitfalls of writing novels by giving the impression that the story is drawn from primary historical sources. Such works attempt, but generally fail, to give an impression of historical authenticity. It is even more difficult for writers of the fringe, such as some Australian Aborigines, to also tread this dangerous literary route. The main reasons are that their identity itself is so difficult to define precisely, and that it is under constant change where society itself is—paradoxically—constantly homogenising and atomising.

What are the writer's intentions? First, Scott endeavours to reconstruct his own biography and the past of his extended family placed in setting of white settler society. He does this through the use of archival material (letters, inquiry evidence and protectors' reports), other biographical writings, oral sources and his own imagination. This material is cleverly woven into a story of alienation, brutality, indifference, loss, unscrupulousness, ignorance, death and renewal. The story is told mostly from the perspective of four close relatives—Jack Chatalong, Sandy Two Mason and Will and Auntie Kathleen Coolman together with a number of other 'aunts' (one of whom is his natural mother) and carers, who are the writer's main heroes. Opposed are the villains: Ernest Solomon Scat, Tommy Scat (father), Auber Neville (Chief Protector of Aborigines) and Constable Hall.

Second, the writer's story is that Harley's grandfather Ernest Solomon Scat, a Scottish immigrant (also an employee of the Chief Protector, Neville), is to blame for most of his grandson's (Harley's) problems of identity, as well as his sexual and moral dilemmas, frustrations, self-doubts and loss of a 'glorious' past. The story begins with an exposé of the grandfather's and Harley's cultural demise. Ernest Solomon Scat has left what wealth he has to the grandson. Harley faces the Supreme Court and is acquitted of murdering his own father Tommy Scat.

Harley's reconstruction of his own and his family's past is told mostly from the three uncles' memories and a search through grandfather Ern's old records. Scott reconstructs a seemingly authentic but lost past where his great grandparents, through the ideology of eugenics ('racial improvement') believes society is capable through racial breeding of creating what Scott says is 'the-first-Whiteman'. The Aboriginal grandparents are of mixed descent but believe they are 'white'. This deception is caused because

they are free of any controlling influences from the Chief Protector of Aborigines. This person is an administrator whose actions are governed by WA's infamous 'Native Welfare' laws. The paradox is that those charged with administering the protection policies, the protectors, the police and the 'mixed-descent' relatives are all deluded into thinking that Harley's family members are not Aboriginal. Similarly, the writer is determined to expose the truth of his own identity and, apart from a series of authorial intrusions which express the grandson's hate and contempt for Ern Scat, the uncles are allowed to be the spokespersons supported by documentary archival and occasional references from the Protector's reports, letters and various evidence from Royal Commission transcripts. The grandson's true 'aboriginality' emerges, in spite of Ern Scat's delusion and relentless pursuit of the boy's economic, cultural and biological improvement. According to the writer, the fact of his identity is there for all to see and understand. But, as a mechanism for tension, it is also there to make contemporary whites feel intimidated through his presence, his intimate knowledge of his 'aboriginal' past and his articulation through his public persona as a singer.

Scott, in common with many writers dealing with historical subject matter, has to reconstruct his past in this way because he wasn't there. To give flavour to the reality of Harley's search for his identity Scott combines archival documentary and oral material with imagination and skill. The tensions are created by setting up a complex of contradictions of sexual relationships. First are the grandfather's numerous sexual liaisons, in particular with Kathleen (Ern's legal wife) and Topsy (Kathleen's daughter), whom Ern takes as his defacto, and Tommy Scat's mother—in which two races are mixed, and finally there is an ever-present hint of a homosexual relationship between Ern and Harley.

Scott also pits individual freedom against formal legalised social control of Aborigines, despite which Ern and Sammy One Mason manage to live free lives at a distance from the Protection legislation and the Protector's searching gaze. Similarly, he contrasts personal freedom with the contradictions of camp life, the Protectors' powers to enforce Aborigines' removal from wherever they might prefer to be, and the functioning of the hospital and school systems, which impose on them a 'native identity' which many deny.

Critically, Scott considers socio-economic class as a hidden motive force. Thus, Ern sees wealth as a leveller among white people whereas Harley sees it as both corrupting his relations with his pristine past of poverty and as a barrier to achieving authentic bonds with his Aboriginal relatives. Powerlessness is another such force: marginality breed it own ignorance and resignation to the State's legal oppression, white prejudice and institutional and country town bigotry.

At the same time Scott contrasts the device of 'the known' (for instance police and protector knowledge of legislation) with 'the unknowable' (for example Aboriginal camper and labourer ignorance of the law, and Aboriginal ignorance of themselves, their authentic pristine culture and the hunting-gathering skills this confers).

Finally, and perhaps most importantly, Scott brings to his task a wide range of stylistic techniques—tight sentence structure, short chapters, aphorisms, metaphrases, syllogisms and a parochial imagery to stress Aboriginal moods, Aboriginal stoicism and Aboriginal story. In addition he uses paradox, ambiguity and contradiction, tautology

and pleonasm (most obviously the purposely repetitive 'Fuck, fuck, fuck') all to excellent effect.

In my view, Scott has written one of the very best novels I have read by an Aborigine. He has skilfully compiled a work projecting the complex nature of people who partially escaped the clutches of the WA policies of 'protection' and 'assimilation' from colonial times to the 1970s. But, at the same time provides a complexity of which many people who claim Aboriginal identity in post-contact and colonial Australia could accept as real.

Two major weaknesses, however, do impose themselves on the reader. One is the length of the work—fully 500 pages—though perhaps this is forgivable in the light of some novels about Aborigines by those who are not. Xaviour Herbert's 'Aboriginal' novels spring to mind here: these extraordinarily long works traverse similar territory to that covered by *Benang*. The other fault is Scott's over-use of archival sources without placing them in their chronological context. This weakness may lead some to believe the novel is really history, but such an impression would be false, for *Benang* remains fiction despite its historiographical appurtenances. Sources of an historical nature must go through both a long critical review by historians prior to their acceptance as historic fact whereas Scott's usage makes no attempt to assess in duly critical, historiographical manner what is being written. His criticism remains bound in a personal rather than historical dimension—levelled, instead, at individuals like the grandfather, the protectors, the police and reserve carers.

Because of its complexity, and literary qualities, this work deserves to be discussed in schools and universities that teach Aboriginal studies, in media presentations attempting to probe Australian socio-historical issues and, I hope, in Aboriginal political circles for a long time to come.

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*In the Wake of First Contact: The Eliza Fraser Stories.* By K. Schaffer. Cambridge University Press, Melbourne, 1995. Pp. 320. \$35.00

I found reading the first two-thirds of this book quite a chore. I had agreed to review the book after what I interpreted as a rather desperate request from Luise Hercus, and then did not begin reading it until my deadline was uncomfortably close. It seemed too late to pass to someone else what I was finding an increasingly bitter cup. It is not that Kay Schaffer is not good at what she is doing. The book is the very model of post-modernist writing, using as it says on the back cover, 'recent post-colonial, feminist, and post-structuralist theories, as well as the ethnographic data'. It has the lot. Indeed, it could be set as a textbook for students to explore post-modernism.

Schaffer analyses the many interpretations of the Eliza Fraser story from those that appeared immediately the survivors of the *Stirling Castle*, shipwrecked in 1836,



returned via Fraser Island to colonial society, through later nineteenth century accounts, to the 'modern reconstructions' such as Michael Alexander's history, the paintings of Sidney Nolan, Patrick White's novel, *A Fringe of Leaves*, the film by Tim Burstall and David Williamson to what Schaffer refers to as the 'oppositional voices' of the *Noh Eliza* by Allen Marrett, Gillian Coote's documentary film, and the paintings of the Aboriginal artist, Fiona Foley.

I am familiar with other accounts of European colonists, male and female, who were shipwrecked and lived with Aboriginal or Torres Strait Islander people for much longer periods than the six weeks Eliza Fraser lived with the Aborigines at Fraser Island. (It was named after Eliza's sea-captain husband who did not survive his time on the Island. His death is one of the never-to-be solved mysteries.) Yet none of these survivors, for example James Morrill and Barbara Thompson, have attracted anywhere near the same attention from succeeding generations as Eliza Fraser. Kay Schaffer has done a good job of showing how the stories and creative responses have reflected the corresponding societal values and the unique personal vision of the more gifted ones, investigating the way the human condition has been depicted to represent masculinity and femininity, the powerful and the marginalised, the self and the other. Inevitably we keep examining how class, race, gender, and national identities have been manipulated in different ways to fulfil varying functions. This is hardly surprising, partly I admit because of the success of post-modernist and feminist writers.

In her preface, Schaffer makes clear her interest in the Eliza Fraser stories:

The historical dimension of the project presented an interesting set of intellectual conflicts. It tested my delight in and commitment to post-modern perspectives against my considerable affection for and skill at historical research; it tested my knowledge that there is no 'real' person to be found in the archival materials which mark a life against my keen desire to know more about the actual woman and the times in which she lived.

She notes that her 'tenacious curiosity' carried her through the five years' work that took her to many fascinating places in Australia and overseas. Feminist post-modernists clearly enjoy their work.

I am not sure why Schaffer feels she has to dichotomise 'post modern perspectives' and 'her affection for and skill at historical research'. Post-modern perspectives have been around for quite a while now and assert their influence to varying degrees throughout the profession, not only on those who define themselves as post-modernist. To me, Schaffer's exposition of her theoretical position seems unnecessarily laboured in chapter 1, 'Her Story/History: The Many Fates of Eliza Fraser' and sometimes repetitively so throughout. I really thought the academic debate was past this first principles stage. We now know why post-modernists display the scaffolding from which they have constructed their edifice, their text. Other writers also challenge their sources, understand that they are making subjective judgements to the best of their ability, and realise that their interpretations will be challenged, certainly not least by post-modernist and feminist writers. It is the tone of confident triumphalism that perhaps most irritates those historians whom post-modernists seem to see as 'the other'. And I suspect some post-modernists get great satisfaction out of that. Thus, on p.142:

Read in terms of the modern artist as a tortured genius, Mrs Fraser's betrayal of Bracefell parallels a betrayal in Nolan's own life. In terms of modern art and art

criticism, the ways in which the artist transforms the trials and traumas of his life are of interest because they became, through his creative and liberating role, exemplary models for the rest of society: his insights become our redemption; as prophet and seer, he speaks for us. It is not my intention to subscribe to these critical premises. Post-modern critique has shattered this particular set of beliefs, revealing the politically grounded nature of its 'neutral' perspective and deconstructing its universal disguise.

Well, of course, post modern critique has not swept away this sort of criticism, or this particular set of beliefs, except in post-modernist circles. In a section on 'The Role of the Modern Artist' Patrick White is found wanting with great assurance (pp.173-5). History, of course, is fiction (p.194).

Sneja Gunew asserts, on the back cover, it is 'accessibly written'. It is easy enough to read. There is a smattering of post-modernist vocabulary which my five years of Latin allowed me to take in my stride, but this was not the real problem for me—I stress *for me*—which made reading this book a chore. It was really a series of essays tied together by the theoretical analysis. So many creative responses to the Eliza Fraser stories had to be deconstructed that we had to revisit the site time after time and the conclusions reached were *reductio ad clarum*, *ad clarissimum* in fact: gender, race, and class. And finally, I did not really conclude that the Eliza Fraser stories *seriatim* could bear the weight of theory Kay Schaffer imposed upon her/them. Or if they could, I couldn't. However, post-modernist, post-colonial, feminist and post-structuralist theorists will love it.

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*One Land, One Nation: Mabo—Towards 2000*. Frank Brennan, University of Queensland Press, 1995. Pp xx + 232, index. \$18.95

The introduction states that we cannot undo all the injustices of the past but that we can 'own our history.' Owning our history involves indigenous and non-indigenous peoples accepting responsibility for each other so that life within 'one land, one nation' is attractive to all. Why history is required to justify such a position is unclear as little further reference is made to events before the decision in *Mabo v Queensland (No 2)*<sup>1</sup> ('the Mabo case'). The book covers considerable legal material but does not come to terms with the history of the common law in Australia. Readers would be unaware of the powerful way in which the law justified the taking of the land and resources of the indigenous peoples and subjected them to government by alien institutions;<sup>2</sup> nor would they be familiar with its continuing assumption that its non-indigenous values are an objective and universal point-of-viewlessness.<sup>3</sup> Its difficult legacy for indigenous peoples seeking to use it to reassert their rights is 'the problem of challenging a form of

1. (1992) 175 CLR 1.

2. See generally Williams 1990.

3. MacKinnon 1983, pp. 638-9.

power without accepting its own terms of reference and hence losing the battle before it has begun.<sup>4</sup>

Brennan ends by questioning why Australians still think it is impermissible for indigenous peoples to make decisions about their land and its use. He also suggests that the High Court's decision in the Mabo case and the *Native Title Act 1993* (Commonwealth) are the pillars for a bridge for reconciliation between the new and old inhabitants of Australia. The answer to the question is contained in the suggestion. The court and the parliament heard from, or consulted with, indigenous peoples but in the end the decisions were made by those institutions for reasons which they determined. These are not the institutions of the indigenous peoples. The policies preferred by the decisions are not the ones selected by indigenous peoples. Without accepting the existence of indigenous institutions and their government-type functions it is difficult to justify recognising the right to control such activities. That right is a right of government. The recognition of it depends on self determination. About self determination the author is equivocal. Without such recognition the High Court's decision and the legislation on native title are weak foundations on which to build reconciliation. In this context Brennan's book raises two issues of significance. To what extent can the past be used to imagine the future and what is the role of a non-indigenous person in imagining or 'dreaming of a better future' for Australia where that involves the indigenous peoples?

Brennan provides a clear and readable exposition of the complexities of the Mabo case. He is uncritical of the High Court's decision and exaggerates its significance. It is difficult to accept that it has ended the complaint by indigenous peoples that they have been denied their history. Justice Brennan, for example, blamed the crown for the dispossession of the indigenous peoples and absolved the common law. Justices Deane and Gaudron, however, accepted that the common law was at fault. That the foundation of the Australian legal system was not moved, as Brennan claims, is made clear by the effect of the decision. The common law determines whether or not native title has been extinguished by reference to what the crown did. The indigenous legal systems do not determine if 'ownership' or 'possession' was surrendered by reference to what the indigenous peoples did. He later refers to the decision as 'inherently conservative' and to the native title recognised as a 'very fragile form of title.' These descriptions are more accurate.

The book makes no comment on the justice of the High Court's choosing to create a native title able to be extinguished by the crown by executive act without legislation and without compensation. No other owner of property is subject to the first power. Where property is acquired under legislation the common law reads in a requirement for compensation unless there is a clear contrary intention. As the majority's rationale was that the common law should reflect prevailing community standards and not discriminate on the basis of race—'contemporary notions of justice and human rights'<sup>5</sup>—it is difficult to see why the court did not clearly limit the crown's powers in similar ways.

The reluctance by the majority to consider that the crown owed a fiduciary duty to indigenous peoples is also noted but not criticised. Brennan finds that the effect of the

4. Smart 1989, p. 5.

5. 175 CLR 1, Brennan J at 29.

*Racial Discrimination Act* 1975 (Commonwealth) is that there will be no need to develop a separate jurisprudence of fiduciary duty provided that there are proper processes to deal with native title and to compensate for past dispossession. This is made doubtful by two matters which he discusses: where land was dealt with by the crown before the *Racial Discrimination Act* 1975 (Commonwealth) was passed and where the crown deals with all land, including that held under native title. In both situations native title holders may seek to assert a breach of fiduciary duty. It may not matter that a process has been established. The issue may be argued if indigenous peoples suspect that the crown is not acting in good faith or if the compensation funds are put into a general pool rather than a fund to compensate individual communities for property rights which were abrogated. The first is a real possibility.<sup>6</sup> The second is the effect of the *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act* 1995 (Commonwealth). The Wik case<sup>7</sup> had already raised these issues at the time Brennan wrote. Generally indigenous peoples would benefit if the crown was constrained by a fiduciary duty, including an obligation to act in good faith.

The second chapter, on the negotiation of the *Native Title Act* 1993 (Commonwealth), is a significant source document by someone who participated in that process. It is the best and most comprehensive account of contemporary Australian legislative practice. It shows that what is identified in the United States as public choice theory, in which governments and interest groups bargain over the terms of legislation as if negotiating the terms of a commercial contract, is well established in Australia.<sup>8</sup> Brennan's narration shows how fragile is the trust required for a lasting reconciliation between indigenous and non-indigenous peoples. Aboriginal leaders, who were negotiating with the government in good faith, found themselves embarrassed by the deal arranged by the special minister of state, Walker, for mining to proceed at MacArthur River unimpeded by native title, the reduction of their position to 33 flimsy principles by bureaucrats, the continuing concessions the commonwealth government made to the states and territories and their exclusion, as they were not a government, from the Council of Australian Governments' meetings.

The book contains a clear summary of the native title legislation and its effect. Whether native title in pastoral leases has survived because of the historic reservations in favour of Aboriginal people is considered. The situation in eastern Australia—where there are no reservations in favour of Aboriginal people—may be more complex than Brennan represents because of restrictions on the powers of colonial and state parliaments only removed by the *Australia Act* (Commonwealth and UK) in 1986 although the existence of native title on Queensland pastoral leases has been rejected by the Federal Court.<sup>9</sup> He also deals with the differences between the rights over land held by native title holders and the traditional owners of land under the *Aboriginal Land Rights (NT) Act* 1976 (Commonwealth) which gives the Northern Territory government con-

6. *Attorney-General (NT) v Kearney* (1985) 150 CLR 500.

7. *The Wik Peoples v Queensland* (1994) 120 ALR 465.

8. See generally Farber & Frickey 1991.

9. Full Federal Court, Jenkinson, Hill and Lee JJ judgement No. QG34 of 1995, Brisbane, 1 November 1995 (unreported).

siderable room to argue for 'anomalies' to be corrected once it is forgotten that the *Native Title Act 1993* (Commonwealth) was a carefully negotiated agreement.

The fourth chapter deals with the events which followed the enactment of the *Native Title Act 1993* (Commonwealth) including the litigation over the *Western Australian Land (Titles and Traditional Usage) Act 1993*. It converted the property right represented by native title into a statutory licence to traditional usage. This legislation was struck down in *Western Australia v Commonwealth* as infringing the *Racial Discrimination Act 1975* (Commonwealth)<sup>10</sup> in reasoning similar to that of *Mabo v Queensland (No 1)*.<sup>11</sup>

The book then turns to the future and self determination. Brennan notes the changing meaning of this latter concept which was once thought to be the equivalent of sovereignty. In some recent formulations it becomes a synonym for reconciliation as a 'process through which indigenous peoples are able to join with all the other peoples that make up the State on mutually-agreed upon and just terms, after many years of isolation and exclusion.'<sup>12</sup> He does not note the irony, or the political power, which shift the dominant norms 'just as indigenous peoples think they are on the verge of gaining access to them.'<sup>13</sup>

Brennan sees considerable difficulties in meshing the customary laws of the indigenous peoples with the Anglo-Australian law. He refers to a 'romantic rhetoric about some monolithic and mythical Aboriginal nation which knew no conflict between ever-just elders and always compliant youngsters.' This unnecessarily diminishes the historic claims of indigenous peoples. It contrasts with alternative versions of history maintained by them. Some indigenous people claim that self-government, unrecognised by the common law, has not ceased for a number of peoples making it 'the longest surviving egalitarian system of government possibly in the world, one which balanced the rule of law with personal autonomy through a philosophy of respect for those who went before as well as those who come after us.'<sup>14</sup> If some indigenous peoples believe the rhetoric to which Brennan refers this is not very different from the myths non-indigenous Australians believe about our institutions. There are progressive intellectuals who see in pre-industrial Europe the values of a society based on production and consumption within the home which they claim reflects a more humane model of society than the market society which replaced it.<sup>15</sup> A mythical quality may underlie Brennan's belief that a human rights based jurisprudence in the hands of a common law judges may benefit indigenous peoples.

10. *Western Australia v the Commonwealth* (1995) 69 ALJR 309. This decision appears to have been given when the book was in press as, while it is mentioned on page 109, on pages 111 and 112 the issue is said to be still awaiting decision by the High Court and the Act is treated as possibly valid.

11. (1988) 166 CLR 186.

12. Daes 1993, 9.

13. Otto 1995, 73 citing in note 40 Benedict Kingsbury, 'Whose International Law? Sovereignty and Non-State Groups,' The American Society of International Law 88th Annual Meeting (1994)

14. Otto 1995, 131 citing Marcia Langton, 'Indigenous Self-Government and Self-Determination: Overlapping Jurisdictions at Cape York', in *Aboriginal Self-Determination in Australia* (Christine Fletcher ed., 1994).

15. O'Donovan 1985, pp 1 et seq.

He refers to the growing reluctance of young people to submit to such systems and the human rights issues involved. But is this just a problem of customary law or is it a generation issue present as a tension within many societies? The common law legitimises a regime of elderly male judges from privileged backgrounds punishing young people including increasingly disproportionate numbers of Aborigines. He writes that 'customary law is of little use in disciplining the young for alcohol-related property and motor vehicle offences.' The conflict between this, and a statement some pages on, that unyielding insistence on only one law may leave young people immune from the only law to which they feel accountable, are not resolved. The non-indigenous legal system is also ineffective as a deterrent because of the massive numbers of indigenous people who are processed by it. This has removed most elements of shame from it. Shame is a powerful sanction and, if internalised, produces non-criminal behaviour.<sup>16</sup> Young Aboriginal people are more likely to be both shamed and rehabilitated by their own societies' laws.

The common law has recognised for a very long time that it exists in a world where there are other legal systems. It has a body of rules and processes known as conflict of laws or private international law for integrating these other systems into itself by recognising their effect. Under these rules, for example, the High Court has enforced Indian personal Islamic law without questioning that the relevant events had taken place in Western Australia.<sup>17</sup> Brennan would require legislatures and courts to follow indigenous law in circumstances when all parties are indigenous people who consent to indigenous law applying. Emphasising the right of the individual to renounce membership of the self-determining group disempowers all individuals in the group from exercising their right to collective self-determination. There needs to be fairness but does that fairness require a personal choice? Common law courts enforce the law of a person's nationality on a person without respect to that person's wishes.<sup>18</sup> It also enforces personal religious laws whether or not a party affected consents to them or not. A divorce decree of a Jewish religious court in Hungary, mediated through Israeli law, may well end the marriage of an Australian spouse whether or not they have consented to the operation of the religious law.<sup>19</sup> So why has recognising indigenous legal systems been so problematical? The answer appears to be that Anglo-Australian law does not see them as the legal systems of communities exercising self determination. Other jurisdictions have not been so reluctant. In the United States the Congress has recently extended the criminal jurisdiction of Indian courts to all Indians in the territory of the particular Indian nation whether or not they are members of that nation. Such courts already exercise civil jurisdiction over non-Indians.<sup>20</sup>

Brennan recognises the significance of collective rights in chapter 6 where he surveys other jurisdictions but does not return to that significance. He concludes that the

16. See generally Braithwaite 1989.

17. *Haque v Haque* (No 1) (1962) 108 CLR 230.

18. *R v Brentwood Marriage Registrar* [1968] 2 QB 956.

19. *Schwebel v Ungor* (No 1) 42 DLR (2d) 622.

20. 25 USC [United States Code] 1301(2) (as amended by *Defense Appropriations Act*, Pub. L. No. 101-938, 8077(b)-(d), (1990)) overturns the decision in *Duro v. Reina*, 495 US 676 (1990) that Indian tribes do not have criminal jurisdiction over non-member Indians for crimes committed on the reservation.

boldness of the Canadian Government shows up the conservatism of Australian governments. Canada provides, he says, a useful vocabulary for those in Australia seeking some recognition of Aboriginal sovereignty. This book fails to provide justifications for such developments within Australia. He excuses the High Court for not recognising the continuing sovereignty of indigenous peoples in the Mabo case or *Isabel Coe (on behalf of the Wiradjuri Tribe) v Commonwealth*,<sup>21</sup> by stating that sovereignty cannot emerge from a court's declaration. This is inconsistent with American law in which the concept of domestic dependent sovereignty argued for in the Wiradjuri case was created by the decisions of Justice Marshall in a trilogy of cases in which the Supreme Court found that the tribal governments' authority predated, and survived, the United States' constitutional arrangements.<sup>22</sup>

In the final chapter Brennan outlines a program of constitutional change to recognise the unique position of indigenous peoples by the centenary of Federation in 2001. He suggests that 4 senate seats could be allocated to indigenous peoples and that there be indigenous representation on a possible Council of Elders to advise the President of Australia on the exercise of the reserve powers now held by the governor-general as part of the royal prerogatives. As he concedes that party discipline has made senators representatives of parties rather than states it is not clear why indigenous senators would not also succumb to such discipline. The Senate itself is not a democratic institution with which indigenous peoples committed to democratic processes may wish to be associated. The reserve powers of the crown, on the Whig view of constitutional law, may not extend beyond encouraging and warning ministers.<sup>23</sup> Indigenous peoples may also wish to steer clear of this non-indigenous imbroglio.

Brennan also suggests the entrenchment of a prohibition of discrimination on the basis of race with the proviso that it would not be breached by measures taken to overcome disadvantages arising from race. He proposes that it be in the same terms as in the *Racial Discrimination Act 1975* (Commonwealth) which implements the *International convention for the elimination of all forms of racial discrimination*. That only permits affirmative action as a temporary measure. It was on this basis that the High Court upheld *Gerhardy v Brown*.<sup>24</sup> Most indigenous peoples would be reluctant to have their rights subject to time limits. He mentions, but does not expressly support, the federal parliament being given an express power to make laws for indigenous peoples. He also mentions the possible inclusion in the constitution of indigenous individual and collective rights, self-determination and the representation of indigenous peoples as a third tier of government and an Ombudsman for Indigenous Affairs to ensure that appropriate services exist for indigenous peoples in urban areas.

The comprehension of the past should not be limited by the present neither should, as Hume recognised, the limits of the present be continued inexorably into the future.<sup>25</sup> If the future of the indigenous peoples of Australia is to be a continuation of

21. (1993) 68 ALJR 110.

22. *Johnson v M'Intosh* 21 US (8 Wheat) 543 (1823), *Cherokee Nation v Georgia* 30 US (5 Pet) 1 (1831) and *Worcester v Georgia* 31 US (6 Pet) 515 (1832)

23. Bagehot 1993, 113.

24. (1985) 159 CLR 70.

25. Hume 1777, Sect IV Part II.

their past and present they are entitled to despair. While Brennan is concerned about the present position of indigenous peoples there is no account of the effect which the disempowerment of indigenous peoples in the past continues into the present. Disease, death, dispossession, poverty and racism are assumed or understated. The life expectancy of indigenous peoples in Australia is considerably shorter than of those in New Zealand, Canada or the United States. The sole responsibility of the central government in those countries for relations with indigenous peoples may explain this difference.<sup>26</sup> In Australia the rate of imprisonment of indigenous peoples by the states and territories, which was unbelievably high, has increased at the same time as these governments claim that they are implementing the recommendations of the Royal Commission into Aboriginal Deaths in Custody. The Aboriginal and Social Justice Commission labels the policies which have produced this as racist.<sup>27</sup> Each of these people goes to prison as a result of a decision made by a magistrate or judge of the common law tradition who appears to be a willing participant in this national shame. Does reconciliation require that indigenous peoples forget the past and the present? Does down playing these issues make reconciliation more politically achievable? Archbishop Tutu of the Truth and Reconciliation Commission in South Africa has stated that reconciliation can only occur if all parties know what they are being reconciled about. 'You cannot forgive when you do not know what or whom to forgive.'<sup>28</sup> Brennan's restrained language justifies little change. Even government reports are less reticent than he is. The extraordinary resilience of indigenous peoples in the face of catastrophe does not emerge in this book.

Brennan states that a 'non-Aboriginal Australian such as myself can do little more than float suggestions which I have heard in my travels around Aboriginal communities over the years.' This is too restricted a role for a person of his background. Non-indigenous Australians have an interest in their own right that the political life of the nation reflects the claims of justice and liberty for all. A major insight which a lawyer can bring to such an inquiry derives from concepts of fairness. The past can be reconstructed, the present can be interpreted and the future can be imagined with justice. It is, of course, not enough to argue for the realisation of such rights in law. The political situation must support their emergence. However there is a dialogue between these two forces and one cannot be neglected. Brennan emphasises the limitations of the political power of indigenous peoples in achieving the recognition of their rights.

The owning of our history and our present by the reiteration of injustice and unfairness helps establish the normalcy of the claims of indigenous peoples. Their view of Australian law and politics as a result will be increasingly less marginalised. This book does not contribute to this process. In the context of the Keating government's rejection of the decision of the meeting of a wide group of indigenous peoples that any legislation on native title should be federal Brennan writes: 'Under the present Constitution and with the prevailing political ethos, the most Aborigines can achieve is to

<sup>26</sup>. See generally Kunitz 1994.

<sup>27</sup>. Paul Chamberlin 'Bureaucrats blamed for black deaths' *Sydney Morning Herald* June 28, 1994, 6.

<sup>28</sup>. Alec Russell 'Tutu to lead commission on S Africa's bloody past' *Daily Telegraph* (London) 30 November 1995, 12.



have a Commonwealth government set national standards.' A few pages further on the author tells us that he was privileged to receive the last letter Stanner ever wrote. Stanner was fascinated by the different response to his evidence as an anthropologist by a Queensland judge to that which he had received from Wells J in Darwin fifty years before. He wrote: 'How do general ideas about human conduct change so quickly?' Stanner was too modest. The fact that he had once taken seriously the doctrine of equality before the law and forced its contents on Wells J in the context of an Aborigine has made its acceptance less uncommon if not normal among the judiciary. Brennan does write in his conclusion that the indigenous perspective must enjoy equal status with those of police officers, service deliverers or developers. But service deliverers do not appear to mean the administrators of the common law. It and its values, as well as those who enforce it, seem to enjoy a privileged position which cannot be justified if we truly own our history.

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*Mabo: The Native Title Legislation: A Legislative Response to the High Court's Decision.*  
Edited by M.A. Stephenson, University of Queensland Press, 1995 Pp xxii + 209, index.  
\$19.95

This book is a sequel to *Mabo: A judicial revolution: The Aboriginal land rights decision and its impact on Australian law* edited by M.A. Stephenson and Suri Ratnapala and published in 1993. A number of the authors from that volume discuss aspects of the *Native Title Act 1993* (Commonwealth) ('the Act') and related state legislation. The ideological divisions in the previous volume remain unchanged. Authors from Queensland, and the T.C. Beirne School of Law in the University of Queensland in particular, continue to see native title as a problematic tear in the seamless web of the common law. For them

the legislation has unravelled it into a larger hole extending to other layers of the social fabric. Authors from outside Queensland remain of the view that *Mabo v Queensland (No 2)*<sup>29</sup> ('the Mabo case') was an overdue measure of social justice which the native title legislation, with its shortcomings, continues.

A piece of legislation passed in 1993 may not be of great interest to historians but a number of the articles raise significant historical issues. The volume itself shows the continuing disagreement in the Australian legal community about the extent to which the interests of indigenous peoples can, or should, be accommodated within Anglo-Australian law. This reflects the wider political divisions, both in the past and the present, over the place of indigenous peoples in the Australian state. The conservative parties have never explained why their concern for the protection of property rights, the family, religious values and of the continuity of tradition has not extended to those of the indigenous peoples.<sup>30</sup> This volume shows that number of lawyers have also not reflected on, or are unwilling to write about, this contradiction. If they had they may query the extent to which the Act overrides property rights and interferes with other indigenous traditions.

Sir Harry Gibbs, a former chief justice of the High Court, in his introduction again sets the tone for many of the Queensland writers who follow. He characterises the Mabo decision as opening a 'curious chapter' with the Act being 'no less remarkable than the decision which prompted its passage.' He reveals the opportunistic character of legal reasoning. He queries whether the Act does justice between those Aboriginal people who can establish that they hold native title and those who cannot. This is a problem deeply entrenched in all common law concepts of property. 'Property and law are born and must die together', wrote Bentham. 'Before the laws, there was no property: take away the laws, all property ceases. The organs of the law are symbiotic with property.'<sup>31</sup> Land was, and is, a source of power and inequality in Australia. Gibbs has never argued elsewhere that this justifies abandoning concepts of property to establish a more egalitarian social order. Can he really believe the corollary of his statement: that no one should have their property rights respected because others have had their property rights violated?

Lumb deplors the Act as a further erosion of the rights of the states. The Act's origin in the power to legislate for people of a particular race in the Constitution extends federal power fettering the legislative and executive powers of the states over crown land. Connolly later returns to this theme. He also constructs a model of indigenous peoples' relationship with land to demolish it. He refers to arbitral bodies which are able to make recommendations about whether a government proposal to acquire native title land should, or should not, proceed in the event of a dispute. He states that this empowers these bodies to 'frustrate the governmental proposal altogether.' He continues: 'Now on any fair view, native title is a far more limited interest than freehold or leasehold, involving, at the most, intermittent use by a nomadic people. It may reasonably be questioned whether justice to the indigenous peoples really needs to go as far as this.' This description of all the interests of indigenous peoples in Australia in land as

29. (1992) 175 CLR 1.

30. See generally Markus 1996.

31. Offer 1981, pp. 11.

'intermittent use' indicates an unawareness of the views of a number of judges since Blackburn J in the Gove Land Rights case<sup>32</sup> recognised the special relationship of the Yolgnu peoples to land. The summary of the effect of the tribunal is also misleading. The decision of the arbitral body can be overridden, pursuant to section 42 of the Act, by a territory, state or federal minister in the territory, state or national interest. This is not a power 'to frustrate...altogether.' Fraser also takes up the theme of the limitation of state rights in the specific context of commonwealth control over mining and dwells on the uncertainty the Act has introduced into mining law without mentioning other indeterminacies in mining law which may give the reader some perspective that native title is one among a number of uncertainties in mining law, many of which the mining industry is not pushing to resolve.

Forbes directs his polemics at a number of targets. Former chief justice Mason is criticised for stating that the declaratory theory of the common law is a fairy tale. The National Native Title Tribunal is attacked as a specialist tribunal, filled by 'selected enthusiasts', which destroys the standards maintained by the oldest courts of general jurisdiction, the Supreme Courts of the states. He claims its jurisdiction and procedures are unfair because parties will not get equal access to expert witnesses. Those witnesses will give evidence only for indigenous peoples. If this is a problem it is a problem before a court as well as a tribunal. The mining industry has been specifically selected for discriminatory treatment. The Act provides that a mining interest will not extinguish native title and fails to resolve whether native title to minerals has been extinguished. He fails to mention that it was the opposition's stand on the bill which led to the government's amendments, supported by mining interests, being defeated in the Senate.

Stephenson writes on the reservation in favour of Aboriginal peoples contained in pastoral leases. She considers the reasons for arguing that the reservations continued native title but concludes that the analysis by Brennan J is correct: the true nature of a lease is a grant of exclusive possession which excludes native title rights. Her analysis of Reynold's argument<sup>33</sup> for the continuation of native title hinges on whether the reservations were a 'contract, promise or engagement' made by the Crown which the colonies were unable to amend by virtue of *An Act to Repeal the Acts of Parliament now in Force Respecting the Disposal of the Waste Lands of the Crown in Her Majesty's Australian Colonies and to make other Provision in Lieu Thereof*.<sup>34</sup> This Act limited the powers of the states until the Australia Acts 1986 (Commonwealth and UK) removed them from the strictures of the *Colonial Laws Validity Act 1865* (Imperial). French J in the National Native Title Tribunal has held that the concern by the imperial government to protect the interests of the indigenous peoples in land did not fetter the power of the colony of Queensland to grant interests without reservations.<sup>35</sup> This decision is referred to in a footnote—which the index places on the previous page—but is not considered in any

32. *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

33. Reynolds 1993, p 120. Reynolds 1992, pp. 146–148.

34. 18 & 19 Vic c 56 (1855).

35. *In The Matter of the Native Title Act 1993 and In The Matter of the Waanyi Peoples Native Title Determination Application*, Application No. QN94/9 French J, President, Perth, 14 February 1995, (unreported), para 135.