

# *International Law and Aboriginal Human Rights*

Edited by  
Barbara Hocking

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There can be few issues of greater social importance and of consequent relevance to the law in Australia today than the treatment of the indigenous population. The relationship of domestic and international law to this issue — and, for that matter, their relationship to each other — is a crucial area of consideration. It is a rich vein for study which has been largely left untapped.

This slim but important volume attempts to redress this omission. It consists of papers presented to, and discussion held at, a conference on the rights of indigenous peoples in international and Australian law held by the Aboriginal Treaty Committee in 1983. The papers and comments have been edited and (to some extent) updated by Barbara Hocking.

The structure of the book consists of an almost exact division into two parts: the first dealing with the international legal aspects of the topic, and the second with Australian historical, political and policy matters. While the division is logical it creates a weakness in the overall impact of the work, for while each individual contribution is internally coherent, without a sufficient bridge between the two parts (which might have been attempted by a new essay creating an overview) the book has to struggle to become more than merely the sum of its individual chapters.

Most of those individual contributions, however, make for valuable reading.

The first three chapters provide an indication (and indictment) of the uncritical acceptance of inappropriate British legal fictions which has characterised Australian jurisprudence in this area.

Chapter 1, written by the editor, raises the vexed issue of aboriginal title to land and reveals the confusion of the constitutional law and the property law aspects of it. The essay also proposes an interesting argument against the traditional use of the concept of *terra nullius* in the Australian context. While, in this reviewer's opinion, this argument involves a somewhat creative use of the International Court of Justice decision in the *Western Sahara Case* (1975), the fact that the argument is raised at all makes the essay valuable.

The second chapter, by Dr Rosalie Balkin, is a lucid discussion of the legal and political doctrine relevant to acts of state and the notion of sovereignty. It contains a good appraisal of the application of intertemporal law when faced with the issue of mistake of fact (i.e., the erroneous belief in 1788 that the aborigines were not socially organised). Many Australians, including judges and the Senate Committee on the Makarrata, have avoided or misinterpreted these issues.

Chapter 3 is written by Professor James Crawford and is apparently the only contribution updated (in 1985) by its own author for publication. In his incisive yet comprehensive style, Crawford discusses the work of the Commonwealth Law Reform Commission on the recognition of Aboriginal customary law. He tackles the difficult issue of a legal system's attempting to cope with equality and discrimination on one hand, and simultaneously tolerating pluralism on the other. His paper adopts a commendable comparative approach which is generally absent in most of the other essays in the volume.

The issue of self-determination cannot be avoided in a book dealing with international law and aborigines, and it is dealt with in Chapter 4 by Russel Barsh. Unfortunately, the treatment here is superficial and over-generalised. A statement about the application of self-determination such as: "no new international legislation should be necessary; all that

is required is the consistent application of existing norms to indigenous situations” (at 69) blurs the distinction between peoples and indigenous minorities which, whether one likes it or not, is crucial to this area of the law. Even if there were such a thing as “international legislation”, the presumption on which this essay is based is too glib to allow it to be the truly good contribution it might have been.

The final chapter in the first part is written by Marcia Langton. Unlike the preceding chapters, its approach is personal (almost anecdotal) rather than being juridically oriented. The author recounts, through her own experiences and observation, the work of the UN Working Group on Indigenous Populations. This approach is interesting and refreshing. It also provides a useful insight into the motivating factors behind the decisions of UN committees, imparting a flavour of the process instead of the mere mechanics of decision-making at the international level.

The second part of the book, dealing as it does with policy issues and historical background, has a decidedly different character from the first. Chapter 8, which contains a *pot pourri* of attitudes of aboriginal leaders and their advisers, is by its nature less scholarly than the other contributions, but no less valuable for that. Although some of these contributions suffer from a lack of balance or from (understandable) bias, this reviewer was impressed by the quiet dignity and honest indignation of the contribution by Mr. Mick Miller (at 143-4).

The contributions by Bob Reese (Chapter 7) and Frank Brennan SJ (Chapter 9) provide a useful historical dimension, which emphasise the urgency of the concerns in the entire book. The latter essay, particularly, is an eloquent contribution to this vital issue, which can sometimes suffer from overly strident advocacy.

In his second contribution to the volume, Russel Barsh in Chapter 6 provides a good comparison of indigenous policy in Australia and North America.

The final chapter was written by (or for) the Hon. Clyde Holding, who was then the federal Minister for Aboriginal Affairs. It is a survey of the then government policy on aboriginal sovereignty, and the 1983 rhetoric makes an interesting comparison with the 1988 rhetoric (written by the current minister, the Hon. Gerry Hand, for the book’s Foreword). Together, they make an interesting comparison of government action then and since.

The book therefore provides a succinct coverage of the legal and political issues, and also of attitudes, an appreciation of which is essential to an informed debate on the question of the rights and sovereignty of Australia’s indigenous peoples.

The principal drawback of the book, however, is the fact that the contributions are up to five years old. In other areas, this might not matter, but given the fluidity of an issue like indigenous people’s rights — which is easily and rapidly affected by political as well as jurisprudential cross-currents — it produces a major weakness.

The editor has attempted to overcome this problem by including updated editorial commentary with the contributions. Unfortunately, this is buried in the footnotes where it not only loses its impact but tends to highlight the way in which some of the central focus of the issues has shifted in the last five years. This gives some of the contributions an antique quality which, while it does not diminish one’s interest in them, does make one question whether the book would have been vastly improved by their re-writing.

For example, the 1988 Report of the UN Working Group on Indigenous Populations is given a passing mention in the final footnote of the entire book (at 188). This report is the most devastating comment ever made by any international organization about Australia’s treatment of its indigenous population. It states bluntly that Australia is in breach of its international obligations in this regard. Such a significant statement is an important piece of supporting evidence relevant to the very arguments made throughout the book. It should have prompted revision of some of the contributions rather than a patchy repair job.

A similar criticism could be made in relation to the re-opening of nearly every issue in the book by the *Mabo* case currently before the High Court. Although this is referred to in its 1983 context by Greg McIntyre (at 144-6), in a half-page editorial update (at 146) and in cursory footnotes scattered throughout the book (see at 18, 27, 80, 147, 188), this is insufficient coverage of such an important matter.

In addition, there are some significant recent developments which the editorial additions do not cover at all: for example, the work of the state Anti-Discrimination Boards and of the restructured (in 1986) Human Rights and Equal Opportunity Commission, and the developing jurisprudence from their decisions. There is also no mention of the significant Toomelah Inquiry held by the latter Commission, nor even any treatment of the *Racial Discrimination Act*, which, considering that that Act is based on a treaty, would have been a worthwhile addition to a book bearing the title of this one.

In Chapter 4, the discussion of self-determination has no editorial mention of the most significant act of self-determination to affect Australia in recent times: the reference by the Cocos Islanders to integrate with Australia. Indeed, the entire issue as to whether this was a valid act of self-determination at all, which this reviewer considers to be controversial (see Tahmindjis: 'Australia, the Cocos Islands and Self-Determination', (1985) 1 QITLJ 177) and which therefore has direct application to the concerns of this chapter, is not even envisaged.

Arguments, no matter how valid, lose their punch when they appear to be dated. This book is a good one, but the pity of it is that it should have been a great one. It might have been a seminal work allowing for what rarely seems to happen in Australian legal publishing: the creation of a law book which is in fact right at the cutting edge of social change. Analyses from half a decade ago do not allow it to be so, regardless of the perceptive treatment within each.

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