

Books

ABORIGINAL LEGAL ISSUES: COMMENTARY AND MATERIALS by Heather McRae, Garth Nettheim and Laura Beacroft, Sydney, Law Book Company, 1991, xxxvii + 338pp, \$72.50, ISBN 0 455 210179.

The compilers of cases and materials books face a series of dilemmas — the balance between text and commentary, the need to provide some overall structure as against the danger of imposing divisions or concepts antithetical to the printed sources, the need to provide a wide range of sources as against the problem of fragmentation — above all the question of coverage, since there is usually too much to cover. The problems are aggravated where, as in the field of Aboriginal legal issues, there are special and inherent difficulties: the conflict between allowing Aboriginal people to speak for themselves, to “own” the issues, as against the need to present “expert” and perhaps more readily assimilable accounts; the balance between advocacy of Aboriginal rights and claims and the need to allow the material to speak for itself, and its readers to think for themselves.

This book, the first of its kind in Australia, displays remarkable grasp of a wide body of material, and a clear commitment to the issues. If it does not succeed in escaping the various dilemmas outlined, it may be that they were inescapable. That having been said, arguably the book falls between the two stools of a comprehensive textbook-style treatment and a cases and materials book allowing greater room for discussion and the presentation of alternative views. Indeed in this respect the book itself falls into two halves. The first half is much more a cases and materials book, with some longer extracts and a more opentextured structure. The second half is closer to a textbook account, referring to a wide range of sources but not really displaying the material in a way which would best provoke student reflection and discussion. In some cases mere fragments are presented (for example, the two-line quotation from *Simon's case* at p65, the only significant reference to that case). This might as well have been included as a mere reference (although even with such references there are dangers: the single sentence on self-determination from this reviewer, cited on p307, is so brief as to be deprived of context).

Cases and materials books intended to simulate discussion and reflection should as far as possible focus on primary materials, whereas here some of the more important items are presented through secondary sources. This is true for example of the discussion of the important issues raised by *Gerhardy v Brown* (ppl403). Even the rather short and very illuminating report of counsel's argument and the decision in *Jack Congo Murrell's case* in (1836) 1 Legge 72 is omitted: that case is seen entirely through twentieth century spectacles. Moreover the need to impose structure on a discussion of diverse material (more imperative in a textbook than in a cases and materials book) sometimes leads to fragmentation: for example, the Brennan and Crawford article is quoted from extensively in Chapter 8, but in no fewer than five extracts: a more connected quotation (even from another source) might have been better. In the end the textbook-like qualities of the second half, however

admirable, detract from the main purpose to which such a book should be put. Perhaps the authors, for the inevitable second edition, should produce two works, a textbook and an accompanying cases and materials book, in which the student will be given room to think.

This criticism should not detract from the very good work done in the individual chapters, and the considerable range of understanding and learning displayed. The treatment of Aboriginal land issues is particularly thorough, being the subject of three of the eight chapters. No-one could complain about that emphasis — though the subsequent decision of the High Court in *Mabo (No 2)* means that much of this discussion, focussed as it necessarily is on the now overruled decision in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 (which gets seven extracts) is out of date. But the emphasis on land has inevitably meant that other important issues are not dealt with — for example: resources other than land (except briefly in Chapter 8), heritage issues and family law.

I was also disappointed at the failure to treat the implications of *Mabo (No 1)* (1988) 166 CLR 186, which in its overall impact on Aboriginal legal issues in Australia may be more important than *Mabo (No 2)*. For example, I understand that the implications of *Mabo (No 1)* were one factor in the decision of the NSW Government not to proceed with the repeal of the Aboriginal Land Rights Act 1983 (NSW). The implications, and limitations, of the principle of non-discrimination, as revealed by *Mabo (No 1)*, are surely an essential element in any understanding of Aboriginal legal issues. The claims of Aboriginal people are not exclusively claims for equality, no matter how broadly understood, but the claim for equality was a starting point in the 1950s, and it is still an essential element. The argument against Aboriginal claims from simplistic versions of equality (for example, that of Millhouse J in *Gerhardy v Brown* (1983) 49 ALR 169, reversed on appeal (1985) 159 CLR 170 is also — like it or not — an important part of the Australian debate. It deserves more treatment than it gets.

Within the constraints of trying to handle the vast range of material, the book does well in displaying anthropological perspectives, and in allowing some Aboriginal voices to speak. On the other hand, there is almost no Aboriginal voice at the normative level, the Barunga Declaration and the Yirrkala proposal (presented via an anthropologist) perhaps excepted.

It would be wrong to end on a critical note. The authors have made a significant contribution to the study of Aboriginal legal issues in Australia. The book will be a convenient reference work, as well as a useful text for teaching purposes.

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