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AUSTRALIAN INSTITUTE OF ABORIGINAL AFFAIRS

ABORIGINES AND THE LAW: A DIGEST

BY JOHN McCORQUODALE

FOREWORD

AUSTRALIAN INSTITUTE OF ABORIGINAL STUDIES

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The Hon. Justice Michael Kirby, CMG

Anniversary time

The year of the publication of this book is the 20th anniversary of the constitutional amendment which excised two scars from the Australian Constitution. The most important of these was the provision by which people of the "aboriginal race in any State" had been omitted from the class of persons for whom the Australian Parliament might make "special laws".[1] Next year is the 10th anniversary of the decision of Justice Mason, now Chief Justice of Australia, dismissing a statement of claim filed in the High Court of Australia seeking declarations and relief on behalf of the Aboriginal people of Australia in respect of the "occupation, settlement and continuing dealing in the lands comprising the Australian continent."[2] The appeal from that decision resulted in a holding by a statutory majority of that Court[3] that Australia became a British possession by settlement and not by conquest, the continent being *terra nullius*[4] before the arrival of the First Fleet. That event is the other anniversary which looms on the horizon, like the sails of the extraordinary band of ships, with their

doubtful human cargo, approaching Botany Bay 200 years ago.

If the celebration of the Bicentenary of European settlement on the Australian continent in January 1788 is to have any meaning, it must be to focus the attention of the present inhabitants of Australia upon the extraordinary meeting which then took place between two quite different civilisations. I stated this obvious opinion in an essay invited by the Australian Bicentennial Authority in 1986. The Authority subsequently declined to print my opinion.[5] What a distorted view this showed of the conception of the Bicentenary, I must leave it to readers to judge. Fortunately, one of the better features of the civilisation developed in Australia since 1788 is a media which (for all its other faults) is vigilant in its criticism of government and its agencies. As a result of the Authority's rejection of my views they were published widely in the media in Australia and beyond. Indeed, they were printed in full in the major dailies of several capital cities. They reached out to an audience they might otherwise not have touched. Such are the curious ways of this country where Aboriginal issues are concerned

For some Aboriginals, their friends and supporters, the Bicentenary is an occasion for lamentation not celebration. Distinguished Australians have indicated that they will boycott the celebrations because of the offence it does to the Aboriginal people. It should never be forgotten that the first words recorded in the dialogue between Governor Phillip and his party reconnoitering Botany Bay, and a group of Aboriginals seeing the colonists for the first time were "Warra Warra!".

This means "go away!".[6] But away they did not go. It is neither feasible, nor just, now that the 16 million successors to that reconnoitering band of redcoats should go away, leaving the Great South Land again exclusively to the descendants of the shouting, hostile party with their rude but unheeded instruction. I know of no Aboriginals who seriously expect the non-Aboriginal majority now to pick up their goods and chattels and move off. We must come to terms with each other, living together in a multicultural society of increasing diversity.

On the other hand, the majority must come to understand the despoilation that has been wrought upon a unique cultural inheritance, and the injustices which are still daily done to the descendants of the indigenous people of this continent. They lived together in general harmony with themselves and with their environment for thousands of years before January 1788. Reflecting on the special position of the Aboriginals as a "People of the Land" (to use the phrase adopted in New Zealand in respect of the Maoris) is a worthy objective for the Bicentenary. Understanding the perspective of the descendants of this quite different civilisation will not be any easier for the majority in the future than apparently it has proved in the past. But gateways to understanding, there are. They can be found amongst the small but courageous band of intellectuals and helpers who ceaselessly speak out, with the object of advancing the interests of Aboriginal people. They can be found amongst the increasingly vocal leaders of the Aboriginal community itself. They are few in number. But their efforts gnaw away at the moral conscience of the people and their

representatives in Parliament, the courts and the bureaucracy. Left "tongueless and earless"

In Parliament some progress has been made, though accompanied by many disappointments. The records of each are to be found in the collection of statutes catalogued in this Digest. In the bureaucracy of the Executive Government, the achievements are patchy. There have been lost opportunities. There has been inefficiency and many ill targetted programs.

In the courts there have been some important achievements. They shine like jewels from the digest of cases in this book. They include R v Anunga[7], where the Chief Judge of the Northern Territory laid down a number of sensitive rules for the admission into evidence of confessions allegedly made by Aboriginal accused. They probably also include Onus and Frankland v Alcoa of Australia Limited[8]. In that case the High Court of Australia held that members of the Gournditch-Jmara Aboriginal community in Victoria who claimed to be custodians, according to the laws and customs of their community, of its ancestral relics had sufficient interest to institute proceedings to enforce the Archeological and Aboriginal Relics Preservation Act 1972 (Vic) when certain of the relics were found on the land at Portland belonging to Alcoa. The same sensitivity can be found in a later judgment of that Court in Re Toohey & Anor; ex parte Meneling Station Pty Limited & Ors[9]. There the Court upheld as correct the decision of Justice Toohey, then Aboriginal Land Commissioner, that land in the Northern Territory which was the subject of grazing licences was "unalienated Crown land". The grazier had only personal

rights and not rights of a proprietory nature. It was in that case that Justice Brennan drew a stark contrast between the attitudes to land ownership taken by Anglo-Australian law and the attitudes of traditional Aboriginals to land. Drawing on Professor W.E.H. Stanner's Boyer Lectures "After the Dreaming", reproduced in his book of essays White Man Got No Dreaming, Justice Brennan summed it up:

> "[T]he connection of the group with the land does not consist in the communal holding of rights with respect to the land, but in the group's spiritual affiliations to a site on the land and the group's spiritual responsibility for the site and for the land. Aboriginal ownership is primarily a spiritual affair rather than a bundle of rights. ... To ascertain the existence and identity of "traditional Aboriginal owners" of land it is necessary to enquire into the spiritual affiliation with sites and spiritual responsibility for sites and land, a daunting task for one whose tradition, if unexpanded by experience or research, would leave him "tongueless and earless" towards this other world of meaning and significance."[10]

The guiding star

This, then, is the guiding star which the reader should take on picking up this Digest. It should be to him or her as the Southern Cross was to millennia of Aboriginals and to that First Fleet and the hardy band that followed, establishing a new and different legal system in this country. Here is portrayed a mighty confluence of civilisations, where the power and force of the one almost completely swamped and overwhelmed the other until just before it was too late. Fortunately, at the very last moment, the tide turned. It will be for future generations of Australians - Aboriginal and non-Aboriginal - to address the many wrongs that are collected in the early, and not so early, entries in this Digest. From the constitutional

disparagement of 1900, through the State Coloured Races Restriction and Regulation Act 1896, through the Invalid and Old Age Pensions Act 1908 (Cth) (which disentitled "Aboriginal natives" of Australia from the pension) the cases of discrimination that came to the courts and the cases of injustice that were never heard and wrongs unrequited. It is not a tale of unrelieved horror and wickedness. By their lights, the early colonists sometimes endeavoured in this continent to avoid the worst excesses which had earlier occurred in the American plantations. Phillip adopted as one of his principal objectives the avoidance of slavery throughout the new continent. But whilst political and civil rights were sometimes observed, on paper, it was not always so. And often the economic and social reality (as the entries in the early pages show) saw a community hardened against the native people.[11] Only belatedly, and sometimes inadequately and half-heartedly, has a change occurred. It has not gone far enough. Most of the achievements still lie ahead. But the process has begun. And the beginning of wisdom is knowledge about the past.

A people of law

This is where John McCorquodale's Digest will be so important. It is a labour of devotion which brings great credit on at least this Australian lawyer and those who encouraged and helped him. I do not pretend to have read every book note, case review or statutory summary which he has included. I do not imagine that he would claim that every case, book or statute of relevance has been included. Scarcely a day now passes but new

cases are decided[12], new legislation is enacted or books or reviews are published dealing with this or that aspect of Aboriginal Australians and the law. At this time of writing, the latest national concern, of the deaths of Aboriginals in police custody, has led to the announcement of a Royal Commission. Charges of riotous assembly have been brought against many Aboriginals arising out of a disturbance in Brewarrina. The second edition will doubtless have an entirely new classification of the Digest for official reports - of Royal Commissions, law reform commissions, committees of inquiry and the like. I hope that there may also be growing evidence of attention to the recommendations that are made. Otherwise cynicism will increasingly turn to despair and anger. The third edition will doubtless be comprehensive, instantaneous and on line. Keeping the service up to date will be imperative to its utility. For this, above all, is a fast moving body of jurisprudence which must not ossify. Perhaps future editions will also include references to Aboriginal law. The Aboriginal people are a people of law.[13] And recommendations for the recognition of some aspects of their law has now been made.[14]

One of the first things I did after my appointment as Chairman of the Law Reform Commission, was to initiate the project that led to the Law Reform Digest.[15] The objective was similar to that which motivated John McCorquodale and his colleagues. It was to provide a tool for efficient future research, a reminder of the errors and of the occasional wisdom which had gone before and a stimulus to the large task which

lay ahead. This Digest will doubtless fulfil the same aims, and more. And if it also stings the present members of the Australian legal profession, or some of them, to a closer attention to the relationship between their discipline and the indigenous people of our country, that will be no bad thing.

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COURT OF APPEAL, SYDNEY

FOOTNOTES

1. Australian Constitution, s 51 (xxvi). See also s 127. The Constitutional amendments were effected by the Constitution Alteration (Aboriginal) 1967, No 55 of 1967.
2. (1978) 52 ALJR 334; 18 ALR 592.
3. Coe v The Commonwealth of Australia and Anor (1979) 53 ALJR 403; Gibbs and Aickin JJ; Jacobs and Murphy JJ contra.
4. See eg Gibbs CJ in Coe, above, at (1979) 53 ALJR 403, 408.
5. M.D. Kirby, Aboriginal Bicentenary? mimeo, 1986.
6. Glenelg-Bourke, 30 November 1855, H.R.A. 18; 208 cited R.J. King "Terra Australis: Terra Nullius Aut Terra Aboriginum?" (1986) 72 JRA Hist. Soc. 75. The words said to have been uttered on 21 January 1788.
7. (1976) 11 ALR 412.
8. (1981) 149 CLR 27; 36 ALR 425.
9. (1982) 44 ALR 63.
10. See ibid, 87-88.
11. H.Reynolds, Frontier, Allen & Unwin, Sydney, 1987, 58 ff.
12. See eg Minister for Natural Resources v New South Wales Aboriginal Land Council & Anor, unreported, CA, (NSW) 29 May 1987; (1987) NSWJB 106.
13. Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141, 18.
14. Australian Law Reform Commission, Recognition of Aboriginal Customary Laws (ALRC 31), AGPS, Canberra, 1986.
15. Australian Law Reform Commission, The Law Reform Digest, AGPS, Canberra, 1983.