BOOK REVIEWS

NATIVE TITLE IN AUSTRALIA by Richard Bartlett (Butterworths, 2000)*

The concept of native title in Australia is founded in the common law following the *Mabo*[1] decision. Richard Bartlett in his book *Native Title in Australia* seeks to provide a comprehensive treatment of the law of native title in Australia. In doing so Bartlett has concentrated heavily on analysing the influences of the Supreme Courts of Canada and the United States of America and to a lesser extent the Privy Council.

The structure of Bartlett's lengthy book traces the historic, political and legal background to native title and is up to date to October, 1999. The book is very well researched and cross-referenced. It covers the development of native title in Australia from a historical perspective and through a comparison with the rest of the common law world. It extends to the process for making claims and to proposals for future legislation as provided in the *Native Title Amendment Act* 1998 (Cth). For a non professional reader the very breadth and detail of coverage tends to reduce its readability, but for a professional in the field of indigenous land rights the book gives invaluable insight and a commendable depth of coverage of the subject matter.

In his opening paragraph, the author sets the scene for the interpretation of native title that prevails throughout the book:

> 'Native Title consists of the rights of indigenous people to their traditional land and waters recognised at common law... The dispossession of indigenous people without their consent or without the provision of any compensation entails the denial of equality before the law.'[2]

In explaining that judicial decisions have watered down these rights, the author quotes Chief Justice Marshall in *Johnson v McIntosh*[3] as having been 'tempered by a regard for pragmatic considerations'. 'The Chief Justice thereby recognised but also diminished indigenous rights to traditional land in the course of reconciling indigenous rights with title in the Crown'.

The author comments that the title of the "colonist" is founded on the taking of the land irrespective of any moral or legal right to do so. The passage of history is always open to interpretation, but it is the author's interpretation as to what is or is not moral that seems to set the tone for his presentation of the legal history of native title. The author criticises colonial governments as being responsible for the dispossession of Aboriginal peoples from their lands. However, he fails to attribute any responsibility to the particular religious denominations who were so influential in attracting Aboriginal peoples away from their traditional lands in many parts of Australia.

The author contends in paragraph 1.22 that Blackburn J misunderstood the nature of native title at common law in *Milirrpum v Nabalco Pty Ltd*[4]. That Blackburn J was so interpreted by the author may be

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1 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

2 Paragraph 1.1.

3 See paragraph 1.7.

4 (1971) 17 FLR 141.

because the evidence accepted by the Court led Blackburn J to conclude that the connection to the land was 'of obligation to the land' rather than of ownership of the land. Thus the system of law he recognised did not amount to proprietary interest in the land, rather the Aboriginal people were seen as belonging to the land.[5]

The author comments that 'belated preparedness to impose the standard of equality before the law on legislation' and 'the late passage of the *Racial Discrimination Act* 1975 (Cth)[6] denied any remedy to Aboriginal people for the taking of their land under legislative authority before that time'. Whilst these assertions evidence Bartlett's empathy with frustrations felt by indigenous people at the slow development of legislation in Australia, they do not necessarily provide constructive commentary taking into account the current status of the systems of land tenure in Australia.

The author asserts that the focus of the post *Mabo* debate was on the implications for non-Aboriginal people of giving effect to equality before the law for Aboriginal people between 1975 and 1992.[7] He then goes on to argue the response of Governments and industry was to seek legislation overriding native title and to a greater or lesser extent dispense with the protection of equality before the law for Aboriginal people under the *Racial Discrimination Act* 1975 (Cth). His statement that the 1998 amendments to the *Native Title Act* 1993 (Cth) had the effect of abandoning the principles of the *Racial Discrimination Act* 1975 (Cth)[8] cannot be left to lie without acknowledging that legal advice reportedly held by the Federal Government, State and Territory Governments and commercial interests provided contrary interpretation. Indeed, in his second reading speech for the Bill for the Native Title Act, then Prime Minister Keating stated "The legislation complies with Australia's international obligations, ...the legislation constitutes a special measure under the *Racial Discrimination Act* for the benefit of Aboriginal and Torres Strait Islander people - providing as it does significant benefits...".[9]

Native Title in Australia is undoubtedly an extremely well researched and documented analysis of the development and application of laws relating to native title in Australia. Although the author provides soundly based criticism of what he views as the legislation being read down by both the Federal Court and the National Native Title Tribunal,[10] the book is technical and legalistic. The reliance on United States and Canadian law as providing authority for Australian law may be overstated. Whilst the judicial decisions in these countries assist in interpretation of Australian statutes, the laws do differ. At most they should be seen simply as guiding the development of systems unique to Australia.

The author's presumption that the High Court's order in *Mabo v Queensland (No 2)* included commercial exploitation of minerals and petroleum[11] attempts to stretch the interpretive boundaries. The author fails to provide a basis for this presumption and I would suggest that current Australian legal interpretation does not support such a presumption. Bartlett appears to let his own preferences influence his interpretation of the law and his recounting of the passage of legislation through the House of Parliament. His emphasis on the Federal Government's *Ten Point Plan* in the passage of the 1997 amendments to the

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5 Supra at 270-1.
6 Paragraph 2.40.
7 Paragraph 2.41.
8 Paragraph 5.4.
9 Tuesday, 16 November 1993.
10 Chapters 18 and 19.
11 Paragraph 22.1.

Native Title Act 1993 (Cth), means that the legislation finally passed is given little credence, despite the fact that it differed markedly from the *Ten Point Plan*. For this reason, the book at times appears to fail to deal objectively with the implications of native title for future dealings in land and water and for resource exploration and development.

As a reference or a post-graduate text covering the breadth of native title in Australia, the book is well targeted, but it is unlikely to appeal widely beyond that. Despite covering one interpretation of requirements of proof, the content of native title, and extinguishment of native title, I believe the book suffers from the lack of presentation of alternate viewpoints to those of the author. These issues are driven by each new judicial decision. I suggest it will be of limited use to readers who may be seeking a lay person's understanding of what are very complex processes. Native title constitutes a revolutionary change to the law of real property in Australia. These changes will continue to develop and the law is far from settled. The politics of native title are also far from settled despite the author's assumption that this is a closed chapter. However it will remain a valuable book on which to base the following editions as the dynamics of native title change following judicial decisions. Ultimately Bartlett's interpretation of history and legislative development may be accepted. Until then, he has expanded the boundaries of the concept of native title in Australia and given the reader food for thought.