

Land Rights Controversy: The Case of the Australian Aborigines

*"And when the white man came
We welcomed him as a friend
But we never told him he could
have our land
For that would be the end"*
Galarrwuy Yungingu,
Australian aboriginal folk singer

ROBERT KAYE*

Rapidly rising oil prices have focused the attention of worldwide corporate investors on huge oil, coal, natural gas and uranium deposits

underlying lands dedicated to the preservation of endangered peoples and fragile tribal structures. In Australia, the clash between the interests of corporate energy developers and the interests of Australia's 150,000 aboriginal citizens has become acute. As a result, Australian policymakers now confront moral and economic issues of international relevance and pressing concern.

Central to the Australian "land-rights" controversy is the complex culture and religion of the aborigines. Evoking the primordial past, the aboriginal religion is marked by strong spiritual ties to ancestral territory. According to aboriginal myth, in the beginning there was the "Dream time," an age in which spirits rose miraculously from the earth and sea to bring life, language, and laws to the land. The land, therefore, is neither inanimate nor unresponsive. Its topographical features are a record of what was done during the Dream time as the mythical characters prepared the land for human habitation. These characters left their mark and their spiritual essence in places known as "Djangs." To the aboriginal communities these are especially important sites; but by an unfortunate twist of fate most of the known uranium deposits (25 percent of the world's reserves) lie close to the Djangs. The struggle over these sacred sites is at the core of conflict between aborigines and white Australians over the aboriginal lands.

Compromise will not come easily to either the aborigines or their most ardent opponents. The Harbo Djang near the Narbalek deposit, for instance, is the dreaming place of the Great Green Ant. The aboriginals believe that the one-centimeter ants that live there now are the descendants of the Great Green Ant, one of the beings that established the patterns of human existence. They further believe that if the land is desecrated, the green ants will respond and destroy the world. As anthropologist R. M. Berndt of the University of Western

* Robert Kaye, LL.B., Sydney University; LL.B., Cantab., is an Associate with the law firm of Allen Allen and Hemsley, Sydney, New South Wales, Australia.

Australia states, "Sacred sites are not negotiable as zones of economic activity."

From the developers' perspective, a substantial amount of money is at stake. In Australia's Northern Territory alone, more than \$10 billion in commercial development projects has been affected. In the state of South Australia, proposed Aboriginal Land Rights legislation would, according to the legislation's detractors, hand over approximately one-quarter of the state's area to 1,500 Pitjanjatjara scattered over 120,000 square kilometers.

The initial aboriginal attempts to obtain judicial protection of their lands have met with failure. In 1969, the aboriginal inhabitants of parts of Arnhem Land in the Northern Territory brought an action seeking to establish legal recognition of their traditional ownership of tribal lands. Blackburn, J., found (refer *Mathaman vs. Nabalco Pty. Limited* 1969 14 F.L.R. 10; *Milirrpum vs. Nabalco Pty. Limited* and *The Commonwealth of Australia* 1971 17 F.L.R. 141) that the plaintiffs had failed to show that their predecessors "had in 1788 the same links to the same areas of land (page 198 of latter case) as those which the plaintiffs were claiming." He further found that "there is so little resemblance between property, as our law . . . understands that term, and the claims of the plaintiffs for their clans, that I must hold that these claims are not in the nature of proprietary interests."

This particular concept of property, based on the English Common Law, has now been superseded by State and Federal legislation which greatly alters aboriginal rights vis-à-vis their traditional lands. This in turn has had a profound impact upon mining agreements. In fact, numerous State Acts in the Northern Territory deal with mining on aboriginal land. Apart from the aboriginal Land Trusts and Land Councils, there are specific provisions relating to agreements between Land Councils and mining groups, and indeed, State and Federal Government. That is, the granting of a mining lease is prohibited pending the conclusion of the required agreements under the Aboriginal Land Rights Act. Under the Ranger Agreement, for example, topics covered include environmental requirements, aboriginal liaison, employment and training of aboriginals, rights of traditional owners, and instruction in aboriginal culture.

The overall thrust of the Australian federal government's response to the land-rights controversy has been dual: to offer those aborigines who wish to integrate into white society the necessary education and skills, while encouraging self-determination and preservation of aboriginal cultural heritage. So far, the greatest concession to tribal culture has been the granting of rights to traditional land in the Northern Territory. The first victory in this struggle was claimed by the Gurindji tribe in August 1975, when it was awarded possession of 1,250 square miles of land at the Wave Hill Cattle Station in the Northern Territory. In October 1975, the Labor Government introduced a Bill that led to

the Aboriginal Land Rights (Northern Territory) Act, 1976. It is an Act "providing for the granting of traditional Aboriginal land in the Northern Territory for the benefit of Aboriginals, and for other purposes." The grant encompasses 134,000 square miles of land for "Aboriginal Land Trusts." The Act also creates Aboriginal Land Councils, the functions of which are (Section 23 (1)):

- (a) "to ascertain and express the wishes and the opinion of Aboriginals living in the area of the Land Council as to the management of Aboriginal land in that area and as to appropriate legislation concerning that land;
- (b) to protect the interests of traditional Aboriginal owners of, and other Aboriginals interested in, Aboriginal land in the area of the Land Council;
- (c) to consult with traditional Aboriginal owners of, and other Aboriginals interested in, Aboriginal land in the area of the Land Council with respect to any proposal relating to the use of that land;
- (d) to assist Aboriginals claiming to have a traditional land claim to an area of land within the area of the Land Council in pursuing the claim, in particular, by arranging for legal assistance for them at the expense of the Land Council."

Part IV of the Act deals with mining interests and operations. Section 40 (1) provides that a mining interest in respect of aboriginal land shall not be granted unless:

- (a) Both the Minister and the Land Council for the area in which the land is situated have consented, in writing, to the making of the grant; or
- (b) The Governor General has, by Proclamation, declared that the national interest requires that the grant be made.

The effectiveness, however, of the Aboriginal Land Rights Act is open to question. Difficulties have arisen when Land Councils, having reached agreement with various local authorities, face subsequent protests from aboriginal groups claiming that they have not been consulted during the decision-making process. Consequently, recent amendments have been made to the Northern Territory Aboriginal Land Rights laws. They provide, *inter alia*, that an agreement reached between a Land Council and miners cannot be invalidated by failure of the Council to ensure that traditional owners of the land fully understand the agreement. Nevertheless, many claim that these initiatives have gone too far, although politicians are at the same time careful to keep clear of racial issues.

The plight of the aborigines has captured not only the attention of the Australian authorities, but also of the world community. For the first time, a U.N. body (The U.N. Subcommission on the Prevention of Discrimination and the Protection of Minorities) has accepted an address by a group of aborigines. They are partially sponsored by the London-based Minority Rights Group, and the International League of Human Rights in New York.

An Aboriginal Treaty Committee has been established by persons of European descent requesting that a treaty be concluded by Australian authorities with aboriginals. Members of this committee have argued that successful agreements have been reached in New Zealand, Papua, New Guinea, Canada and the U.S.A. One example referred to is that of New Zealand where, at the Treaty of Waitangi on 6 February, 1840, the Queen's Representative, Captain Hobson, R.N., promised the Maori chiefs, "full, exclusive and undisturbed possession of their lands . . . so long as it is their wish and desire to retain the same." Although bitter disputes arose and land belonging to rebel tribes was confiscated, much of it was paid for or returned. From the 1860s, the Maoris were encouraged to sell their land privately and the result was virtual European ownership. Today, only about 4 percent of New Zealand is Maori land, but the Maori concept of group ownership has been recognized, and there is a special provision for raising mortgages on this land. Further examples cited by the committee are: King George III's proclamation of 1763 with respect to American Indians, the historic Canadian respect for native land rights, and the concepts of communal ownership of land in New Guinea.

The Treaty committee claims that any covenant should include provisions relating to the following matters:

- (i) The protection of Aboriginal identity, languages, law and culture;
 - (ii) The recognition and restoration of rights to land;
 - (iii) The conditions governing mining and exploitation of other natural resources on Aboriginal land;
 - (iv) Compensation to Aboriginal Australians for the loss of traditional lands and for damage to those lands and to their traditional way of life;
 - (v) The right of Aboriginal Australians to control their own affairs and to establish their own associations for this purpose.
- (*National Times*, 25 August, 1979).

As is often the fate of issues with combined moral and economic overtones, politics becomes a major operative factor. Three months before the Australian general elections, the Opposition Labor Party issued a "Guideline to Labor Policies in relation to Aboriginal Affairs." They argued that since certain States (e.g. Western Australia) have "insisted that State mining legislation will