

# THE DISPOSSESSED AUSTRALIANS

The recently awakened interest in Aboriginal affairs indicates a maturing public conscience which should now be directed to the question of aboriginal rights to the land of Australia, says the REV. FRANK G. ENGEL.

*(This article summarises a paper delivered to the 1965 annual meeting of the Australian Council of Churches)*

One sign of the rising concern in the Australian community for the Aborigines is the fact that a few people are asking questions about their land rights. This has rarely happened before. One result of the neglect of this subject is that the present situation can be briefly, and fairly accurately, described by three negatives: the Aborigines have no land, no title to land, and no secure tenure of land. There are only two small qualifications to the truth of this statement. They are that Aborigines have some limited rights to hunt over and gather other natural foods from land leased by the Crown to pastoralists and miners, and in the Northern Territory they can now lease up to 160 acres. These minor rights relating to the use of land do not alter the basic fact that they have no fundamental rights in regard to land.

It cannot be said too strongly that they are a people who have been entirely dispossessed of all their lands. In this regard there is no similarity between their situation and that of the Maoris or the Indians of North America, or almost any other conquered native race. Most peoples who have suffered conquest, whether at the hands of expanding Europeans or Asians (e.g. the Indian invasion of Indonesia, the Ainu race in Japan), have been dispossessed of part of their land; but, at the worst, have been left to possess (not merely occupy) remoter areas. In the case of the Aborigines, the land was taken from them completely. This was done by both private and public action. That is, they were dispossessed in practice by advancing settlers and they were dispossessed in law by the proclamation of all land as belonging to the Crown. Therefore, there rests a double responsibility on Australians—for the private and commercial actions of citizens and for the public acts of governments.

One of the most illuminating incidents occurred in Victoria in 1835. John Batman, on 6th June, 1835, signed a treaty with eight Aboriginal chiefs for the purchase of 100,000 acres of land, in the vicinity of Port Phillip Bay, called by him Indented Head, and by the Aborigines, Geelong. The treaty was carefully drawn and was interpreted "fully and properly" to the chiefs. It was signed, witnessed and delivered. The tract of land was delineated and marked out by the Aborigines, according to the custom of their tribe, "by certain marks made upon the trees". A price or deposit was paid and a "yearly rent or tribute" was agreed upon. The nature and amount of these payments appear ridiculous to us now, but at least they represent an attempt to provide something

in exchange for the right to "occupy and possess the said tract of land, and place thereon sheep and cattle". Here was a piece of negotiation in place of the more usual dispossession. (For the text of the treaty see "On Aboriginal Affairs", No. 12, July-August, 1964.)

However, on 26th August, 1835, Governor Bourke repudiated this treaty, declaring that only the Crown could make treaties, or contract for the possession of land. This was, no doubt, necessary policy in order to prevent uncontrolled exploitation of the situation. It would have become wise policy if the Crown itself had entered into treaties with the Aborigines. But that does not appear to have been done. So, by the simple device of taking possession in the name of the King of Great Britain, the Aborigines were dispossessed. This was in sharp contrast with British practice in North America and New Zealand.

On a deeper level, it meant an overriding of the people themselves. More than that, it involved an assumption that the Aborigines had no rights at all, either of property or of consent. And yet only 67 years earlier, the instructions issued to Lt. James Cook by the Admiralty included the words: "You are also **with the Consent of the Natives** to take possession of Convenient Situations in the Country in the name of the King of Great Britain". (Quoted in "On Aboriginal Affairs", No. 12, July-August, 1964, from "Captain James Cook in the Pacific", selected extracts from his journals 1768-1779, edited by A. Grenfell Price.) Under the influence of men like Sir George Grey in the 1830s and 40s, British policy was based on regard for the welfare of the Maoris and Aborigines. Unfortunately, in Australia, the local pressures and greed for land proved too strong for enlightened imperial policy. The strongest battle occurred in Western Australia, where the Imperial Government refused to grant responsible government until protection was assured for the Aborigines. On January 3, 1888, Sir H. T. Holland wrote to Governor Broome that "protection should be assured to the natives by the establishment of an Aboriginal Protection Board on the lines laid down by the Governor." (Battye, J. S., "Western Australia: a History from Discovery to Inauguration.") So, in spite of strong local resistance to the idea, the Enabling Act of 1890 provided for the payment of £5,000 p.a. to an Aboriginal Protection Board for amelioration of conditions of the Aborigines, the amount to become 1% of the gross revenue when such revenue advanced beyond £500,000 sterling. In 1891 the Board was set up and given £5,000. But

in 1894 the W.A. Parliament abolished the Board. The revenue by this time had reached £500,000 and the 1% clause became operative. Much was made of it being undesirable to hand over large sums to a Board not under the direction of a Minister. However, the provision had been insisted on, in view of the poor record in Western Australia in relation to the Aborigines. The Crown, therefore, vetoed the action. But when, in 1897, a new Act was passed, the Crown capitulated and the royal assent was given. So an official attempt to maintain adequate care for the Aborigines was soon got rid of by Sir John Forrest, even although it was a condition of responsible government. He and his colleagues put strict limits on responsibility as it applied to "natives". Some protection, at a minimum price, was unavoidable. There was no recognition of any responsibility in regard to their land rights.

The best that can be said of any of the Australian colonies is that at least there was no pious pretence. It was open-handed plunder based on superior force over the Aborigines and unconcern for the principles and qualms of the Imperial Government.

### LEGAL ENTITLEMENT TO LAND

This simple, or direct, approach to the solution of a problem found fullest expression in the total destruction of the Tasmanian Aborigines. It has been used in the rest of Australia in relation to land rights by taking the uncomplicated view that the Aborigines had, and have, no legal entitlement to the land.

The early settlers observed that the Aborigines had no fenced or cultivated land. To an Englishman these were the only outward signs, other than a legal document, which indicated ownership. They did not know, or pause to find out, that in fact the land was divided between tribes and was under continuous utilization for hunting and other food-gathering. We now know that Aboriginal clans have territorial rights which, as Dr. Donald Thomson has said, "are zealously guarded" and are vested in the clans ("Walkabout", August 1946). But to the English settlers of the 19th Century, no fences and no gamekeepers spelt no ownership. Possession was easy and became ten-tenths of the law. After that there were only the choices of destroying, of ignoring, or of providing a minimum handout of land or provisions. In some cases, serious attention was given to their need of land. For example, between 1848 and 1850 there was an exchange of correspondence between Earl Grey, the Secretary of State, and Sir C. A. Fitz Roy, the Governor of New South Wales, with a view to providing suitable reserves before all land was settled, and of securing the right of wandering in quest of food on land leased by the Crown to settlers. Earl Grey proposed small reserves on which there should be schools and training in agriculture so that the Aborigines could cultivate the land "for their own advantage", producing food for sale as well as for themselves. The Surveyor-General was asked to recommend from time to time places "along the coast or rivers where Aborigines fished or camped . . . so that the expediency of reserving them might be decided" by the Executive Council. (Great Britain and Imperial Colonial Office Papers relative to Crown

Lands in the Australian Colonies — July 1847 to August 1850.) There was, however, no suggestion of any legal entitlement to land on the part of the Aborigines, nor of any legal compensation for dispossession. What was proposed was a practical compensation which sprang from humanitarian considerations.

The South Australian Company made provision for a small contribution from settlers towards a fund to benefit the Aborigines. However, this was rarely collected and we chiefly know of it because of a letter from an honest Quaker remitting his contribution. It is mentioned here as probably being the only legal, or quasi-legal, recognition of Aboriginal land rights in Australian history.

Possibly the only occasion the matter was hinted at in a colonial or state parliament was in 1890 in the Queensland Legislative Council, when, at the end of a long debate on the Aboriginal Protection Act, a member asked whether it was proposed to grant to Aborigines the right to lease Crown land. The Minister replied by suggesting that the matter be not raised at that stage, and the debate ended.

The Aboriginal reserves in the Northern Territory and in the States are Crown lands reserved for the use (and protection) of Aborigines. In no sense do they belong to the Aborigines. They are reserved by proclamation. They can be resumed in whole or in part by proclamation. That is, they can be revoked at will by the governments concerned. This has happened on numbers of occasions in the past. And since there are six governments involved there can be six degrees of conviction about the "inviolability" of the reserves and six variations in the method of revoking or altering the reserves, and six different points at which pressure can be exerted by those interested in obtaining pastoral or mining rights in the reserves; which means that those concerned by the preservation of Aboriginal rights in the reserves have to be vigilant, not once nor doubly, but in six directions. Similarly, not one but six sets of acts relating to land and six relating to mining have to be amended if better laws are to be obtained. And they all have to be watched in case inroads are made into what meagre rights exist.

Until recently, Australia has been relatively unworried about world opinion. The Aborigines didn't really matter and that was that. Now, however, other people are our judges in these matters. The Commonwealth Government has been somewhat sensitive to this and has been something of a pace-setter; and certainly the States are influenced by the standards and achievements of the Department of Territories. Nevertheless, the fact remains that Australia has not yet ratified Convention 107 of the International Labour Organisation. Articles 11-14 of Part 2 deal with aboriginal land questions and state that the right of ownership shall be recognised. Admittedly, there are difficulties in the Commonwealth ratifying the Convention because five State governments are also involved. But it is surprising that in the years since the I.L.O. adopted the Convention in June, 1957, the Government appears to have done nothing about it. Nor has

there been any major discussion of its application to Australian policies and practices in relation to the Aborigines. Is it because it advocates land titles and a policy of integrating tribal or semi-tribal people as a people rather than absorbing them as individuals?

### **RIGHTS IN REGARD TO LEASED LAND**

Although Aborigines have no title to land and no permanently secure tenure of the reserves, they do have some minor rights in regard to leased Crown lands. The most important of these is the right to lease 160 acres in the Northern Territory. The Crown Land Ordinance 1931-1959 provides in Part VII, Section 112 that "the Governor-General may grant to any aboriginal native, or the descendant of any aboriginal native, a lease of any Crown lands, not exceeding one hundred and sixty acres in area, for any term of years upon such terms and conditions as he thinks fit". This is a clear legal right to lease land, and the Northern Territory is to be commended for its inclusion.

However, its presence in the Ordinance raises certain questions. Does this mean that the rest of the Ordinance does not apply to Aborigines in the sense in which it applies to other Australians? For example, Section 34 states that a lease "may be granted to any person of the age of eighteen years or over". Section 68 provides for the allotment by the Administrator of any town land, offered but not sold at public auction, to any person who applies for it at the rental fixed. Does the granting of full citizenship to Aborigines in the Northern Territory in 1964 mean that they do come within the meaning of "any person", in spite of the special provision of Section 112? Why is there a limit of 160 acres in Section 112, when the limit on the size of pastoral leases is 5,000 square miles (Section 38A) and on mixed farming and grazing leases varies from 12,800 to 38,400 acres, and on cultivation farms ranges from 1,280 acres to 2,560 acres (Section 61)? Does the difference in size, and the fact that the lease is to be granted by the Governor-General, instead of the Minister or the Administrator as in other parts of the Ordinance, mean that Section 112 is simply special provision for special cases, and that Aborigines generally come within the meaning of "any person" in the rest of the Ordinance?

In addition to the provision under Section 112, the Ordinance safeguards the food-gathering rights of Aborigines on lands leased by the Crown. This was provided for in Section 24(e), which was amended in 1964 (No. 38 of 1964, Section 4). Section 24 defines the reservation of rights in regard to leases, e.g. the reservation of mineral rights to the Crown. The amended paragraph (e) reads:

"a reservation in favour of the aboriginal inhabitants of the Northern Territory shall be read as a reservation permitting aborigines—

- (i) to enter and be on the leased land;
- (ii) to use the natural waters and springs on the leased land;
- (iii) to kill upon the leased land and use for food birds and animals *ferae naturae*".

It should be noted that the amendment is not merely a simpler form of words. It omits any reference to the descendants of all the Aboriginal inhabitants who are

specifically mentioned in the original. It also omits reference to the right "to make and erect thereon such wurlies and other dwellings as those aboriginal inhabitants are, from time to time, accustomed to make and erect". The latter appears to be a significant reduction of right in favour of pastoralists. Or is it an example of pressure towards assimilation?

The water and food rights are secondary rights in comparison to the primary rights of title and tenure, but they are, nevertheless, important for those Aborigines who are still nomadic. The problem relating to them is not so much one of legal safeguard as of policing the law. The leases to which they refer are usually in remote areas and it is difficult to ensure that pastoralists, miners and others respect the rights of the Aborigines under such laws as the Crown Land Ordinance or State Land, Mining and Fauna Conservation Acts. Even our recent history has many instances of the denial of these rights. On the other hand, some greater effort appears to be being made to police them, especially in the Northern Territory. What is not provided for, of course, is the deprivation which takes place when cattle or sheep are placed on the land. In dry country, the stock belonging to one pastoralist, which after all are his means of bread and butter, can quickly deprive several dozen or a hundred Aborigines of theirs. The hungrier the pastoralist and the more he overstocks, the quicker the land becomes barren of those wild root plants which provide some of the sustenance of Aborigines, as well as of its natural bird and animal life. It should be noted that Section 24 makes no mention of wild plant life, in either its original or amended forms. This suggests that it is the pastoralist rather than the Aborigine who is being "protected" in this case.

### **A MATTER OF HONOUR**

Even a brief survey of the land question in Australia makes it clear that there is such a question and that it involves our national honour. Until recently, the question about Aboriginal right to land was rarely thought of and even more rarely asked. Now, it is being asked quite clearly and firmly why the Aborigines should not have title to land and why they should not be compensated for the loss of their lands. It is a matter of honour as to whether Australian Governments and people are willing to accept, as a national responsibility, the double reaction of granting title and providing compensation.

### **TITLE A BASIC FACTOR**

Land is a basic factor of all human life. It is basic, not in the sense of private ownership of a parcel of it, but in the sense that each individual belongs to a people who belong to a defined area of land which legally and permanently belongs to them. It is in this general sense which applies to all human beings as human beings that it is, first of all, important to the Aborigines that there is land which is theirs, by right, as a people.

Secondly, land which has been occupied for generations has important psychological, social and cultural associations for individuals and the race. These are not dispensable extras of life itself. So to be deprived of land is to be deprived also of these things connected with the land which give meaning, stability, security

and motive force to individual and group existence. The truth of this is demonstrated in the life of every exile and of every refugee of whatever race, including a good number of naturalised Australians. It is also true for the natural-born Australian, even though he is unaware of it. It is not, and cannot be, less true of Australian Aborigines whose relationship to the land has always been direct and immediate, unfiltered by urban existence. This natural relationship of all men to the land is intensified for the Aborigines by the closely-woven inter-relation between the land and their religious beliefs and practices.

Land is also basic in the economic sense. It is by exploitation of land that men live and acquire wealth. Dispossessed of land, the Aborigine is dispossessed also of the means of economic progress through farming, mining or industrial development. It is, then, not good enough to say "Let them be assimilated and get security, inspiration and profit from the land in the way other Australians do." The fact is that they are different historically and racially and different in their relationship to this physical continent by virtue of their inheritance, culture and religion. Their relationship to the land needs to have some secure and permanent legal basis. This should include secure, permanent title to certain lands.

It is not suggested that all individual Aborigines have title to a piece of land; but that the people as a people have a corporate title. In practice this would mean that Aborigines would, as tribes, clans or local councils, have entitlement to, and permanent rights of occupancy of, certain lands with which they have an historic or spiritual connection. In general these would be the existing reserves; but there would need to be a careful examination of the reserves and of other Crown lands to ensure that justice was being done.

Another factor to be considered is that land may be important to Aborigines even although they do not appear to be residing on it or making much use of it. Drs. R. M. and C. H. Berndt have made the point that when Aborigines are absent, residing at a mission station, they do not surrender their hereditary rights over their own country but continue to exercise these through hunting, food-collecting and holding ceremonies at sacred sites. ("Summary Report, the University of Western Australia Anthropological Survey of the Eastern Goldfields, Warburton Range and Jigalong Regions, January 26th - March 2nd, 1957", page 6).

The question of the best use of land needs thorough study, not simply from the point of view of the national economy or international need of food or minerals, but also from the point of view that the Aborigines have few material assets other than their land (even if, in law, they have no title to this asset). It may be necessary initially, after the granting of title to land, to make provision for public or governmental trusteeship until such time as Aboriginal tribal or local councils are ready to take full legal and administrative responsibility. Any such unpreparedness should not be used as an excuse for delay, especially as trusteeship is a normal procedure, e.g. the Northern Territory Crown Lands Ordinance provides for it in relation to public parks, although not in relation to Aboriginal reserves.

In any Act granting title to land, there should be a clause which prevents the alienation of that land to non-Aborigines.

## THE COMPENSATION QUESTION *Ordinary*

In the U.S.A., it has been possible for American Indians to take legal action to obtain financial compensation for the loss of land. This is not possible in Australia, because the Crown claimed all land by proclamation and did not make any treaties with Aboriginal tribes. There does not appear to be any known contract, undertaking or incident which could serve as the basis for a claim for compensation in a court of law. There is no point then in considering the establishment of a land claims commission or a land court.

The problem was created by the Crown originally. It is, therefore, for the Crown to take steps to put the matter right. This involves, first of all, an attitude that is new to Australia but accepted in the United States—an attitude of corporate responsibility as a people for injustice done to a minority. In the Indian Reorganization Act of 1934, the United States Congress approved "an annual authorization of 2,000,000 dollars for the purchase of lands, such purchases to be held under trust and exempt from taxation"; and it gave "authority for a revolving credit fund of 10,000,000 dollars from which loans might be made to tribes". This was later enlarged to 12,000,000 dollars. By 1941, 4,000,000 acres had been added to the Indian land base (Harold E. Fey and D'Arcy McNickle, "Indians and Other Americans", pp. 96, 100). Here was a public recognition and acceptance of responsibility for the loss of land and of obligation to restore land. Australia has yet to give a similar sign of a mature approach to a moral problem. We have dodged the issue by providing "protection" and "welfare" and talking of "assimilation". But good deeds and good words can never be a substitute for acres and funds.

It should not be overlooked that the provisions of the Indian Organization Act are quite separate from the millions of dollars awarded to particular tribes in courts of law.

The National Missionary Council of Australia has appealed for the setting up of a national Aborigines Capital Fund. This would be provided by annual contributions from Federal and State Governments. It would be administered by a Grants Commission, similar to the Universities' Commission, which would be empowered to make grants to recognised groups of Aborigines and to individuals. The grants would be for the purchase of land, the development of land settlement schemes, the establishment of industries, and the training of Aborigines for rural and industrial work, and in local self-government. The working out and implementation of such a scheme is urgently necessary in order to bring new hope and dignity to a people whom we have stripped not only of their land but also of those fundamental qualities which give meaning and character to human life.

If the Australian people and governments were to take seriously these two matters of title to land and land compensation and were to act constructively and generously in relation to them, there could be a

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