INDIGENOUS HISTORY, CULTURE AND RESOLUTION OF CONTEMPORARY LAND USE DISPUTES AFTER *MABO* AND *WIK*: GIVING NATIVE TITLE FORM AND SUBSTANCE*

Aboriginal Dispute Resolution by Larissa Behrendt (Sydney: The Federation Press, 1995) pages 1–115. Price $16.95 (softcover). ISBN 1 86287 178 7; *Commercial Implications of Native Title* edited by Bryan Horrigan and Simon Young (Sydney: The Federation Press, 1997) pages i–x, 1–402. Price $75 (softcover). ISBN 1 86287 218 X; *No Ordinary Judgment* by Nonie Sharp (Canberra: Aboriginal Studies Press, 1996) pages i–xxv, 1–290. Price $34.95 (softcover). ISBN 0 85575 287 4; *Invasion to Embassy: Land in Aboriginal Politics in New South Wales 1770–1972* by Heather Goodall (Sydney: Allen & Unwin, 1996) pages i–xxiv, 1–421. Price $29.95 (softcover). ISBN 1 86448 149 8.

I INTRODUCTION

The High Court's decision in *The Wik Peoples v Queensland*[1] unleashed a furious legal and political debate, in the recent past matched only by the reaction to the court's decision in *Mabo v Queensland [No 2]*,[2] the original native title case. *Mabo* provoked concern that the court had fundamentally 'changed' the common law in Australia,[3] rather than merely taken advantage of the first opportunity it had to restate the common law.[4] Either way, some thought that very little had changed.[5] Certainly, there was considerable debate about the doctrinal basis for the decision as well as a broader debate about the meanings and significance of the decision in both Indigenous and settler history, and the

* The terms Indigenous and Aboriginal are used interchangeably, reflecting, as appropriate, the language used in each publication.

1 (1996) 141 ALR 129 ('*Wik*').

2 (1992) 175 CLR 1 ('*Mabo*').

3 Gabriel Moens, '*Mabo* and Political Policy-Making by the High Court' in Margaret Stephenson and Suri Ratnapala (eds), *Mabo — A Judicial Revolution* (1993) 48; Leonard Cooray, 'The High Court in *Mabo* — Legaliste or l'egotiste' (1993) 65 *Australian Quarterly* 82.

4 Richard Bartlett, '*Mabo*: Another Triumph for the Common Law' (1993) 15 *Sydney Law Review* 178; Garth Nettheim, 'Judicial Revolution or Cautious Correction' (1993) 16 *University of New South Wales Law Journal* 1.

5 Michael Mansell, 'The Court Gives an Inch but Takes Another Mile' (1992) 2(57) *Aboriginal Law Bulletin* 4; Michael Mansell, 'Australians and Aborigines and the *Mabo* Decision: Just Who Needs Whom the Most?' (1993) 15 *Sydney Law Review* 168; Noel Pearson, '204 Years of Invisible Title' in Margaret Stephenson and Suri Ratnapala (eds), *Mabo — A Judicial Revolution* (1993) 75.

nation's psyche.[6] Since the first flush of outrage, attention has been focused on exploring the boundaries, detail, substance and protection of this thing called native title,[7] the operation of the legislative regimes established in response to *Mabo*,[8] and proposals for change to the legislation.[9]

The *Wik* case involved such an exploration, with the court finding by a four – three majority that the distinctive nature of the statutory rights granted under a pastoral lease did not necessarily extinguish native title. The vehemence of the political response to *Wik*[10] appears to have clouded the significance of the decision which, while raising some significant issues about the boundaries of extinguishment of native title at common law in Australia, also confirms the paramountcy of pastoral leaseholders' rights.[11] Legal commentary has focused on the implications of the decision and whether as a matter of practicality the legislative regime ought be amended.[12]

In this highly charged context, four books add substantial and varied intellectual and practical force to the ongoing debates surrounding native title, both in the narrow legal confines of practice and in relation to the larger public debates about native title, Indigenous–settler relations and reconciliation. Each book presents new and, in some cases, complex insights into the native title issue.

6 Tim Rowse, *After Mabo — Interpreting Indigenous Traditions* (1993); Paul Patton, 'Post-Structuralism and the *Mabo* Debate' in Margaret Wilson and Anna Yeatman (eds), *Justice & Identity — Antipodean Practices* (1995) 153; Raymond Gaita, 'Mabo' (Pt 1) (1993) 9 *Quadrant* 36; Raymond Gaita, 'Mabo' (Pt 2) (1993) 10 *Quadrant* 44; Rosemary Hunter, 'Before Cook and After Cook: Land Rights and Legal Histories in Australia' (1993) 2 *Social and Legal Studies* 487; Ian Anderson, 'Black Suffering White Wash' (1993) 5 *Arena Magazine* 23.

7 Eg *Coe v Commonwealth* (1994) 68 ALJR 110; *Western Australia v Commonwealth* (1995) 183 CLR 373; *Mason v Tritton* (1994) 34 NSWLR 572; *Sutton v Derschaw* (Supreme Court of Western Australia, Franklin, Wallwork and Murray JJ, 16 August 1996); Richard Bartlett, 'From Pragmatism to Equality Before the Law' (1995) 20 *Melbourne University Law Review* 282; Kent McNeil, 'Racial Discrimination and the Unilateral Extinguishment of Native Title' (1996) 1 *Australian Indigenous Law Reporter* 181; Graeme Neate, 'Determining Native Title Claims: Learning from Experience in Queensland and the Northern Territory' (1995) 69 *Australian Law Journal* 510.

8 See, eg, Native Title Act 1993 (Cth); Native Title Act 1993 (Qld); Land Titles Validation Act 1993 (Vic); *North Ganalanja Aboriginal Corporation (for and on behalf of the Waanyi People) v Queensland* (1996) 135 ALR 225; *Kanak v National Native Title Tribunal* (1995) 132 ALR 329; *Northern Territory v Lane* (1995) 138 ALR 544; *WMC Resources Ltd v Lane* (Federal Court of Australia, Nicholson J, 19 March 1997); Bryan Keon-Cohen, 'Applications for a Determination of Native Title to the National Native Title Tribunal: Basic Procedures and Some Problems of Proof' in Margaret Stephenson (ed), *Mabo — The Native Title Legislation* (1995) 84; Richard Bartlett, 'Dispossession by the Native Title Tribunal' (1996) 26 *University of Western Australia Law Review* 108, 133–7.

9 Native Title (Amendment) Bill 1996 (Cth).

10 See, eg, Lenore Taylor and Paul Syvret, 'Industry Dismayed by Wik Ruling', *The Australian Financial Review* (Sydney), 24 December 1996, 1; Dennis Burke, 'Judgment Adds to Delay and Expense', *The Australian* (Sydney), 7 January 1997, 11; Lenore Taylor, 'It's True — A Wik is a Long Time in Politics', *The Australian Financial Review* (Sydney), 24 January 1997, 33.

11 *Wik* (1996) 141 ALR 129, 189–90.

12 See, eg, Commonwealth Attorney-General's Department, *Legal Implications of the High Court Decision in* The Wik Peoples v Queensland, Advice to the Prime Minister (23 January 1997); Hal Wooten, 'Why Legislation is the Best Solution to Wik Deadlock', *The Australian* (Sydney), 15 April 1997, 15.

While Sharp[13] and Horrigan and Young[14] focus on specific (but very different) aspects of native title, Goodall[15] and Behrendt[16] bring significant Indigenous and academic insights into the Indigenous lives, cultures and histories that underpin aspects of native title claims, and provide possibilities for informed resolution of native title disputes.

II THE SUBSTANCE OF *MABO — NO ORDINARY JUDGMENT*

The *Mabo* case ran for ten years, culminating in the High Court decision on 4 June 1992. Central to the case were questions challenging the mono-cultural nature of Australian common law and its inability to recognise and accord value to interests in and relationships to land that were different from those emerging from English property law. First Williams,[17] and later Sharp,[18] identified this issue of difference as the heart of Blackburn J's difficulty in *Milirrpum v Nabalco Pty Ltd and Commonwealth.*[19] Both were critical of Blackburn J's differentiation between the spiritual and the economic (as if they were irreconcilable) and his Honour's focus on the spiritual as the point of departure from common law interests in land. Such a narrow approach, they argued, inevitably resulted in a diminution of Indigenous relationships to land and the non-recognition of those relationships which occurred in *Milirrpum.*

Sharp's view was aired in an article published in the immediate aftermath of the *Mabo* decision in which she provided background to some of the anthropology in the *Mabo* case and, in particular, this issue of the relationship between the land interests of the people of Mer and the common law. Sharp was able to present particularly acute observations and insights on this issue, as a result of her playing a significant role as a researcher and anthropologist during the planning stages of the case and throughout its conduct.[20] She had earlier undertaken field work in the Torres Strait for her doctorate and had published widely on Torres Strait Islander culture.[21] In the years leading up to the issue of proceedings and preparation for the hearing of the *Mabo* case, she was involved in the early informal meetings which explored the possibilities of embarking upon the case. She was later engaged in specific research in relation to the plaintiffs' relationship with land that was directed at countering Blackburn J's arguments for rejecting the Yolgnu claim in *Milirrpum,* providing both docu-

[13] Nonie Sharp, *No Ordinary Judgment* (1996).
[14] Bryan Horrigan and Simon Young (eds), *Commercial Implications of Native Title* (1997).
[15] Heather Goodall, *Invasion to Embassy: Land in Aboriginal Politics in New South Wales 1770–1972* (1996).
[16] Larissa Behrendt, *Aboriginal Dispute Resolution* (1995).
[17] Nancy Williams, *The Yolngu and Their Land — A System of Land Tenure and the Fight for its Recognition* (1986).
[18] Nonie Sharp, 'No Ordinary Case: Reflections Upon *Mabo (No 2)*' (1993) 15 *Sydney Law Review* 143.
[19] (1971) 17 FLR 141 ('*Milirrpum*').
[20] Sharp, *No Ordinary Judgment*, above n 13, xxiii.
[21] The bibliography contains a list of Sharp's relevant publications: ibid 279–80.

mentary and oral historical research, and preparing proofs of evidence for the case. She was thus extremely well placed to produce the complex work that is *No Ordinary Judgment.*

At first glance, the book is useful as an historical record of one of the most significant and fascinating cases in Australian legal history. It provides a chronology of the events in the litigation,[22] as well as some detailed discussion of the evidence and the problems raised by it for the legal system within which the case was heard.[23] There is a substantial section on the plaintiff who gave the case his name, providing insights into the complexity of his life and his struggle for land, as well as some detail about the failure of his particular claim on the basis of the status of his adoption in traditional Meriam law.[24] However the book goes beyond mere historical record as it confronts some of the broader issues raised by the case itself and for native title generally.

The book is divided into five parts, the titles of which reflect both the breadth and the utility of the work. The title of the first part, 'Interests of a Kind Unknown to English Law', borrows from a number of cases that have dealt with these issues.[25] The three chapters in this section provide an introduction to and context for the later sections in the book, as well as some preliminary observations about the nature of Meriam culture and relationship to land. The second chapter provides some information about the relationship of the Meriam people with their colonisers along with fascinating insights into the early planning for the case, revealing a suspicion of the Queensland government requiring absolute secrecy on the part of those involved in the preparation of the case. It also reveals the obstacles placed in the way of the plaintiffs by the Queensland government, most significantly, its response to the action, put by P J Killoran in evidence, that the claim was nothing 'more than a wistful nostalgia among the Meriam for the ways of their forebears'.[26] In what is a recurring theme throughout the book, Sharp describes this process as one of exclusion of one culture by another through the imposition of its own rules — in this case by the coloniser defining 'property rights' as those of the colonising system.[27]

This issue of cross-cultural systems of meaning is taken up in the following two parts of the book — 'Meriam Perspectives' and 'European Perspectives' — which describe, analyse and contrast the same set of events from the Meriam and European points of view. It is in these parts of the book that Sharp explores the different meanings of land and ownership between the two systems. Using the evidence given by Meriam witnesses before Moynihan J as the starting point of her analysis, what emerges is a complex system of beliefs, integrally related to land (and water) which provide the basis of social and spiritual relationships and

[22] Ibid xi–xii.
[23] Ibid chh 6–7.
[24] Ibid 65–8.
[25] *Milirrpum* (1971) 17 FLR 14; *Adeyinka Oyekan v Musendiku Adele* [1957] 1 WLR 876.
[26] Sharp, *No Ordinary Judgment*, above n 13, 33.
[27] Ibid.

responsibilities to land and to each other. It is an imbued system that regulates and gives meaning to existence and includes relationships to space and species.[28] The use of the term 'ownership' in evidence attracts meaning in this context which is vastly different from that of the European system.

Reference to *Milirrpum* in the third section of the book provides a sharp contrast to this paradigm, explored from the Meriam perspective and, in particular, the extent to which Blackburn J erred in attempting to equate 'Yolgnu land use with ownership and possession'.[29] Again using the transcript of the hearing before Moynihan J, Sharp attempts to unravel similar difficulties experienced by his Honour in the facts hearing before the Queensland Supreme Court in *Mabo*. The medium for this exploration is that of the conflict between the hearsay rule and oral evidence of traditions of the Meriam people, reflected in very different cultural notions of private and public rights. Sharp points out that the justification used by counsel for the Meriam people relied on the proposition that what the Meriam claimed in relation to land was very different from the 'clan or collective ownership'[30] in *Milirrpum* and was a rather more precise claim to 'specified allotments of land'[31] by individuals. This system of individual (or private) rights was nonetheless formed and framed by common 'traditional principles'.[32] While this characterisation of the rights and interests was designed to overcome the public–private distinction sought by the hearsay evidence rule,[33] Sharp suggests two further consequences. First, the familiarity of this notion of individual rights and ownership rather than communal rights enabled Moynihan J to find 'ownership' in the Meriam people.[34] However, as with the Yolgnu in *Milirrpum,* such a categorisation did not fit the form of land ownership actually enjoyed by the Meriam people.

This issue of cross-cultural meaning and understanding runs throughout the book and provides vital insights into the ways in which the dominant system constructs and thereby reinterprets meaning for Indigenous peoples. Part four of the book — 'No Ordinary Case' — brings this into sharp focus as Moynihan J's determination on the facts is explored in detail. The telling conclusion here is

> that the judge's rather limited perception of the existential world of the Meriam may have its source in the Hobbesian assumption about a human nature 'peculiarly appropriate to a possessive market society' as the *universal* state of human nature. ... [H]e then projects these social values on to the pre-Christian Meriam.[35]

[28] Ibid 85.
[29] Ibid 103.
[30] Ibid 108.
[31] Ibid.
[32] Ibid.
[33] Ibid 109.
[34] Ibid.
[35] Sharp, *No Ordinary Judgment*, above n 13, 144 citing Crawford Macpherson, *The Political Theory of Possessive Individualism — Hobbes to Locke* (1977) 271–2.

Ultimately it is this long discussion of evidence and the cross-cultural insights it provides that makes the book so compelling. The High Court decision itself is given only one chapter in this part of the book and, apart from a most enlightening analysis of the manner in which Dawson J dealt with Moynihan J's findings of fact, the discussion of the judgment is largely unremarkable. This emphasis reasserts the significance of the 'substance' of the *Mabo* case — the life and culture of the Meriam people — although the place of native title within the common law property system, its place in the hierarchy of rights and the suggestion that Indigenous rights are 'a shadow of the rights known to our law'[36] remain central themes in the book.

The scant treatment of the High Court's decision is perhaps the major limitation of the book. The book is based on Moynihan J's findings which were largely ignored by the High Court. Whether that approach was indicative of disagreement or whether it was unnecessary, remains to be explored. The issues raised by Sharp in relation to Moynihan J's treatment of the relationship of the Meriam with their land, the place of the spiritual within Australian native title jurisprudence and the extent to which substance can be given to the specifics of Indigenous custom, values and culture by the court's characterisation of native title also remain for exploration. It is unfortunate that Sharp did not extend her analysis to a more detailed examination of the High Court's treatment of these issues.

As the Meriam people's sea claim did not finally proceed for determination before the High Court,[37] and in spite of recognition of rights to water in the Native Title Act 1993 (Cth),[38] the subject has received scant attention in the literature.[39] Therefore, in the final part of the book — 'Native Title in Australia' — Sharp's chapter on the specifics of the Meriam sea claim and the issue of sea claims generally is most welcome. However, it does not seem to fit with the final chapter of the section (and the book) which provides a fitting finale to the earlier discussion about the cross-cultural context of Australian social and legal relations and the impact and force of the final recognition of Indigenous rights to land. Sharp uses the post-*Mabo* negotiations culminating in the Native Title Act 1993 (Cth) as the vehicle for this discussion. Both this and her optimistic conclusion that 'cross-cultural cooperation depends ultimately upon a reciprocal understanding of the strong stories which the cultures have to give one another'[40] are poignant reminders of the fragility of these relationships as the post-*Wik* debate and decisions seek to reinterpret both the negotiations and consequential agreements embodied in the Act.

[36] Ibid 182.
[37] Ibid 202.
[38] Native Title Act 1993 (Cth) s 223.
[39] David Allen, 'Salt-Water Dreaming' in Peter Jull *et al* (eds), *Surviving Columbus — Indigenous Peoples, Political Reform and Environmental Management in North Australia* (1994) 39; Richard Cullen, 'Rights to Offshore Resources After *Mabo* 1992 and the Native Title Act 1993 (Cth)' (1996) 18 *Sydney Law Review* 125.
[40] Sharp, *No Ordinary Judgment*, above n 13, 207.

III THE CENTRALITY OF LAND IN CULTURE AND HISTORY — *INVASION TO EMBASSY*

In contrast to the minutiae of Sharp's analysis of Meriam culture and traditions and their inter-relationship with the settler legal system, Goodall has produced an expansive examination of key land-based conflicts, and the social policies which backed European land claims from 1788 until 1972. The work is bounded by the events of the arrival of the colonising power and the Aboriginal Tent Embassy established on the lawns of Parliament House on 26 January 1972 and focuses on battles over land in New South Wales. Not surprisingly, Goodall identifies land as the central issue in her history of Indigenous–settler relations. It is land, she contends, that has been at the heart of Indigenous–settler conflicts, land being central to Indigenous peoples' lives and identity[41] and a 'central element of debate and desire for groups of white Australians ... over many years of colonial experience'.[42] Thus Indigenous demands for land did not occur in a vacuum but rather were 'interventions into that mainstream discourse about land, its values, its rightful or desirable possessors and its meanings'.[43]

Goodall explores these interventions at points 'of high Aboriginal political activity'[44] and while this does not produce a 'continuous narrative',[45] it provides substantial coverage of major events during two centuries, each part of the book dealing with a particular period. The first part of the book focuses obviously on land and briefly reviews the range of relationships Indigenous peoples throughout Australia have with land. In doing so, Goodall draws distinctions between particular groups as she focuses on the south-east of the continent. Both in this specific part of the book[46] and throughout, she emphasises the significant land relationship enjoyed both pre- and post-invasion by these groups of people, confirming the continuities of these relationships and consequently the contemporary significance of land among south-eastern Aboriginal groups. Neither the force of invasion nor the extent of resistance are minimised, but there is room for some focus on European land interests, desires and imaginings and what Goodall identifies as 'dual occupation' of land by Indigenous people and pastoralists.

The second part of the book explores the impact of growing intensive land use and the Aboriginal response to this in the form of successful land demands, the large scale creation of Aboriginal reserves and the operation of the Aborigines Protection Board. The description of strategies and actions in this period are enlightening as they reveal the development of sophisticated demands based around Indigenous cultural meanings, but reflecting an understanding of the limitations of the settler legal and political imagination. Both this and the first part resonate strongly with current native title claims, most particularly the Yorta

41 Goodall, above n 15, 1–19.
42 Ibid xx.
43 Ibid.
44 Ibid xxi.
45 Ibid.
46 Ibid 11–19.

Yorta claim through the discussion about activity on and around Cumeragunja, and the *Wik* case, with its exploration of the land and legal relationships between the Crown, pastoralists and Aboriginal people in the nineteenth century. While Henry Reynolds has provided substantial historical research and writing[47] in relation to these latter relationships, Goodall's work is more accessible and places these relationships in a broader political context. Identifying this interconnection between her work and contemporary debates gives greater force to her point that Aboriginal land interests arise from particular historical contexts as Aboriginal people engage in changing life conditions under colonialism.[48]

Parts three and four of the book describe and analyse the increasing deprivation of both land and liberty for Aboriginal people in New South Wales between 1910 and 1939. This period was characterised by bitter and almost invariably unsuccessful battles fought to prevent removal of people from both pastoral and reserve lands, created in the nineteenth century. Goodall details the emergence of political organisations as well as grass roots actions in response to these government actions, culminating in a strike by Aboriginal workers at Cumeragunja.

Part five of the book describes and analyses movements from land into towns and activities within rural communities which marginalised and segregated Aboriginal inhabitants. Goodall details community and political activity aimed at regaining land and the consequences of these campaigns. Through the use of interviews and contemporary accounts, chapter 20 provides a description of these activities in several country towns in New South Wales, one poignantly titled 'Coonamble 1960: Australia's Little Rock'.[49] The final part focuses on the 1967 referendum, the role of assimilation policies and the political movement leading to the establishment of the Tent Embassy. Both these parts and part three have added force as they rely on the personal accounts of participants in the events, revealing a history of active resistance to dispossession and removal from land, and a maintenance of relationships to place regardless of removal. Both parts five and six are characterised by Goodall's restatement of land as the recurring theme and issue, even though, on the surface the battles here appear to be about housing or liberty or some other conventional notion of 'rights' rather than 'land'. This serves to reassert the centrality of land in the ongoing negotiation of Indigenous–settler relationships.

The book is a compelling account of Aboriginal–settler relations, supported by massive and meticulous research. As with Sharp's book, Goodall provides a context for the current land-based debates following *Mabo* and *Wik*. Not only does it provide insights into land-use and relationships since 1788, but it seeks to explain those relationships and to identify the major events that have framed and formed the relationships. Thus when the High Court refers to co-existence as it

[47] Henry Reynolds, 'Native Title and Pastoral Leases' in Margaret Stephenson and Suri Ratnapala (eds), *Mabo — A Judicial Revolution* (1993) 119; Henry Reynolds and Jamie Dalziel, 'Aborigines and Pastoral Leases — Imperial and Colonial Policy 1826–1855' (1996) 19 *University of New South Wales Law Journal* 315.

[48] Goodall, above n 15, xx.

[49] Ibid 283.

did in *Wik,* the source of this idea can be readily understood. The lived, rather than the legal, reality of land tenure histories and Aboriginal–settler relations emerges dramatically in this book.

IV INDIGENOUS TRADITIONS AND LEGAL PRACTICE — *ABORIGINAL DISPUTE RESOLUTION*

While Sharp and Goodall provide insights into the substance and form that native title might assume, the remaining two books focus far more on the practicalities of native title — claiming it, using it, negotiating over it and resolving disputes arising in relation to it.

In *Aboriginal Dispute Resolution,* Behrendt explores the manner in which Indigenous peoples have resolved disputes among their own members. In particular, she focuses on the cultural values of Indigenous people which provide the basis for a very different method of dispute resolution than that practised in the European system, either formally or informally. The focus of the book is again on land, because, Behrendt says, land is 'central to Aboriginal existence and survival',[50] it is 'the basis of economic independence'[51] and it is the source of major conflict 'within the Aboriginal community and between our community and those outside it'.[52]

Behrendt explores dispute resolution in what she describes as traditional and contemporary Aboriginal society. She very briefly sketches aspects of traditional culture and identifies the dispute resolution mechanisms that emerge from it — using that as a basis for comparison with some aspects of non-Aboriginal culture,[53] as well as with the different elements that characterise Aboriginal disputes and what she describes as the 'British legal system'.[54] There is then a short section on contemporary Aboriginal values which are also contrasted with non-Aboriginal values.

The following two chapters, dealing with socio-economic and criminal justice issues, provide further background for the major discussion in the book which revolves around the use of mediation techniques for resolving disputes within Aboriginal communities and between Aboriginal and non-Aboriginal groups. These chapters bring into sharp relief the reasons why, in Behrendt's view, conventional decision-making methods are inappropriate: power differentials and cultural inappropriateness. These result in the high rate of Aboriginal imprisonment and unsuccessful negotiations between Aboriginal and non-Aboriginal parties in land-use disputes.

Behrendt then makes a strong argument for the use of alternative dispute resolution methods in intra-Aboriginal disputes, adapting mediation techniques

[50] Behrendt, above n 16, 9.
[51] Ibid.
[52] Ibid 10.
[53] Ibid 18.
[54] Ibid 22.

to suit specific cultural and community values.[55] In relation to resolution of disputes between Aboriginal and non-Aboriginal parties, Behrendt argues that the differentials of power and resources, and cultural unfamiliarity will always place Aboriginal participants at a disadvantage. As a result, merely using mediation techniques in dispute resolution will exacerbate these inequalities. The solution proposed is 'creativity and flexibility in the development of real alternatives to the present system'.[56] The rest of the book is devoted to developing frameworks and models that reflect this creativity and flexibility.

In developing her models for alternative dispute resolution, Behrendt draws a distinction between what she describes as traditional, rural and urban Aboriginal communities. She then develops models for each group, recognising the difficulties for each in its dispute settlement relationship with the non-Aboriginal community. Despite her distinction here, Behrendt continually asserts the traditional basis of the cultural values of urban communities, a crucial point in this time of native title and the need to prove continuing 'connection' with land and tradition.[57] She argues that the models can be adapted to both intra-community disputes and provide an alternative to non-Aboriginal interventions, particularly through the criminal justice system, as well as disputes between Aboriginal and non-Aboriginal parties. In the context of this review, it is the latter discussion that provides the most useful insights into the manner in which non-Aboriginal parties should approach dispute resolution with Aboriginal parties, particularly in relation to land access. The ultimate message is that communities be dealt with as self-determining entities 'with deference to their values and customs'.[58]

The book is short and limited by its generalities in describing Aboriginal cultural values and practices. However, Behrendt acknowledges this limitation and rather than providing an inflexible and prescriptive model for dispute resolution, prefers to highlight the elements that should be the focus of dispute resolution. Thus the significant factors that emerge from her analysis include acknowledgment of the appropriate Aboriginal system of decision-making, with power and status being accorded to the cultural values of the particular Aboriginal group. Perhaps a more significant difficulty with the book is its assumption that alternative dispute resolution can somehow overcome or rectify the fundamental oppression of Indigenous people reflected in the legal system but sourced in the broader dominant forces within society at large. The validity of this assumption is not examined and on its face appears at odds with her emphasis on the legal system as a source of oppression. Behrendt argues that the recognition of sovereignty of Aboriginal people will reverse this oppression but fails to link this proposition with her main argument that alternative dispute resolution is a

[55] Ibid 64.
[56] Ibid 72.
[57] Native Title Act 1993 (Cth) s 223(1).
[58] Behrendt, above n 16, 90.

significant tool in rearranging the relationship between Indigenous people and the legal system.

These shortcomings limit the utility of the book. However, the book does reinforce the centrality of recognising and respecting cultural difference and developing strategies to meet and work with these differences. As the dominant theme in the book, the issue of cultural difference is addressed in a practical and useful manner. Consequently, the book provides a useful starting point for developing strategies and protocols for resolving issues between Aboriginal and non-Aboriginal interests.

V NATIVE TITLE AND LEGAL PRACTICE — *COMMERCIAL IMPLICATIONS OF NATIVE TITLE*

Behrendt's book might be seen as an adjunct to the native title practice book *Commercial Implications of Native Title.*[59] Although Stephenson[60] produced a very useful book on native title legislation in 1995, and Butterworths produces a looseleaf service,[61] this new book appears at a time when there has now been substantial development in the operation and practice of native title legislation with some High Court[62] and many lower court decisions[63] on issues arising under or in relation to the legislation. However, it also appears at a time when the legislation is in a significant state of flux as the Commonwealth Government has introduced two sets of major amendments to the Native Title Act 1993 (Cth) and further major amendments are likely as a result of the *Wik* decision.[64] *Commercial Implications of Native Title* incorporates considerable discussion of *Wik* in the introduction and in a chapter of its own.[65] There is minimal, and in some cases, inadequate discussion of the case in other chapters. However, the book does not (and cannot) predict the extent of the proposed *Wik* amendments, nor the fate of those and other proposed amendments to the Act in the Senate.

The book reflects no Indigenous perspectives on the issues raised and is clearly aimed at professional advisers of non-Aboriginal clients whose interests may be affected by native title. As a result there is minimal consideration of the origin, nature and content of native title and its implications for Indigenous people. In this regard it stands in direct contrast to Sharp and her preoccupations.

59 Horrigan and Young, above n 14.

60 Margaret Stephenson and Suri Ratnapala (eds), *Mabo — A Judicial Revolution* (1993).

61 Butterworths, *Native Title* (1996).

62 *Western Australia v Commonwealth* (1995) 183 CLR 373; *North Ganalanja Aboriginal Corporation (for and on behalf of the Waanyi People) v Queensland* (1996) 135 ALR 225; *Wik* (1996) 141 ALR 129.

63 Eg *Kanak v National Native Title Tribunal* (1995) 132 ALR 329; *Northern Territory v Lane* (1995) 138 ALR 544; *Walley v Western Australia* (1996) 137 ALR 561; *Ward v Western Australia and United Gold NL* (Federal Court of Australia, Lee J, 14 December 1995); *Ward v Western Australia* (1996) 136 ALR 557; *WMC Resources Ltd v Lane* (Federal Court of Australia, Nicholson J, 19 March 1997).

64 Prime Minister, Commonwealth of Australia, *Amended Wik 10 Point Plan* (8 May 1997).

65 Bryan Horrigan, 'The Legal, Political and Commercial Implications of the High Court's *Wik* Decision — The Way Ahead' in Horrigan and Young, above n 14, 81–90.

That said, the book does provide the first comprehensive coverage of the Native Title Act 1993 (Cth) and its operation in a form that highlights the major issues that arise in the native title arena. As the title indicates, the book identifies as its focus the implications for commercial operations as a result of the implementation of the native title regime. Not surprisingly, the book is organised around significant commercial issues. The three parts of the book make a distinction between broad law and policy issues (Part I: Key Developments in Native Title Law and Policy), specific commercial concerns (Part II: Commercial Sector Implications) and the substance of native title such as proof and resolution of disputes (Part III: Native Title Dispute Resolution).

There are three features of the book that mark it as a useful practical resource for native title practitioners. The first is that it provides a brief and efficient overview of State and Territory native title legislative schemes and the ways in which they interact with the Commonwealth legislation.[66] The material in this section is inadequate for any major problem-solving but remains a useful resource with material accessible from one source.

The second and most significant benefit of the book is its identification of the major commercial concerns and the provision of insightful information and discussion of the issues. This is the heart of the book and it provides useful information, both backgrounding the source of concerns as well as providing practical information for their resolution. Chapter 5 deals with the commercial implications of native title for mining and resources and focuses on the key issue of security of title. Grants, renewals, extensions and their impact on bargaining are all considered. The chapter suffers from brevity and a lack of detail but does identify the main issues requiring attention.

There is a separate chapter on freshwater resources, detailing the law on the content of native title in such resources and the current law covering such resources in a variety of jurisdictions. Given the currency of the Yorta Yorta claim over major water resources, some attention to the nature of that claim might have been useful. In addition there is no consideration of the application of the Native Title Act 1993 (Cth) to waters. Despite this limitation, the chapter remains a valuable contribution to a rather unexplored area of native title.

The two most useful chapters in this part of the book, and perhaps the whole book, cover the financial accounting and auditing implications and the practical implications for financiers, land dealers, investors and professional advisers. The first of these focuses not only on the risk factors and possibility of increased costs as a result of native title, but the ways in which these impact upon accounting and reporting requirements for companies. The propositions argued rely upon particular assumptions about the impact of native title. Even if these assumptions are questioned, the chapter provides some insights into the ways in which the commercial sector views native title and the manner in which its assumptions and characterisation of the issues must be incorporated into any

[66] Horrigan and Young, above n 14, 81–90.

analysis of the impact of native title. The chapter on the implications for advisers is extremely useful. In essence it provides a checklist of factors that should be considered and dealt with in any case which is 'touched' by native title.

The third contribution of the book lies in its treatment of negotiated resource agreements. The checklist approach provides useful information with which to approach this task. In addition, the specific chapter on the point provides an effective summary of the matters that might influence such negotiations including the legal framework. It also provides some international experiences that might inform the process, as well as examples of both agreements and terms within existing Australian agreements.

Only two chapters in the book[67] focus on the substance of native title rights. The first of these presents some useful information about native title holders' access to resources with a strong focus on issues of extinguishment. The major criticism of this chapter is its almost exclusive, but not unexpected, focus on Queensland legislation. For this reason it is of less immediate utility than other parts of the book, but remains useful as an introduction to this issue. As a chapter concerned with extinguishment, it also suffers from the absence of any consideration of the broad extinguishment issues raised in the various *Wik* judgments.

The second of these chapters is extremely valuable. Drawing on his experience in land claims under the Aboriginal Land Rights Act 1976 (NT) as well as both the Commonwealth and Queensland native title legislation, Graeme Neate produces a practical and insightful discussion of the legal and cultural issues that arise in the process of proving native title, particularly in the section entitled, 'What procedures can be adopted to prove native title'. The chapter does not deal directly with abandonment, and in particular whether proof of abandonment lies with the Crown. However, this shortcoming is balanced by a detailed consideration of the complex issue of 'connection' with land and the associated issues of proof.

Some significant issues that have emerged in practice, such as the duty of states to negotiate in good faith and a whole range of decisions by the National Native Title Tribunal, are given insufficient attention. The chapter by the President of the Tribunal may well have been the appropriate vehicle for a more detailed discussion of this aspect of the Tribunal's work.[68]

The final chapter of the book attempts to suggest some appropriate responses to the *Wik* decision. In doing so, it also raises some questions about the extent and impact of the decision and the extent to which it may impact upon commercial operators. Devoting a chapter to *Wik* appears to be an attempt to overcome the problems associated with the book's timing in relation to the decision and the

[67] David Yarrow, 'Ownership and Control of Natural Resources and Their Impact on Native Title' in Horrigan and Young, above n 14, 126; Graeme Neate, 'Proof of Native Title' in Horrigan and Young, above n 14, 240.

[68] R French, 'The National Native Title Tribunal's Experience: Promise, Pain and Progress' in Horrigan and Young, above n 14, 29.

inadequacy of discussion of the issue in some of the other chapters. In spite of its limitations, the book is useful and informative.

VI CONCLUSION

The legal and cultural complexity of native title is well illustrated by each of the books reviewed. Each work produces new insights and adds to the body of knowledge in the area, albeit in very different ways. The major focus of Horrigan is the provision of practical information for commercial operators who have contact with the native title process. It succeeds in this aim. However, apart from the chapter by Neate, the book lacks insights into the central themes that underpin all native title issues so well explored and unravelled by Sharp in particular, but also by Goodall and in a different way by Behrendt.

Behrendt, in particular, provides some of the cultural substance that is lacking in Horrigan. While Horrigan focuses on resolution of disputes, such a focus is markedly inadequate unless it also provides some understanding of the complex cultural and social environment in which the disputes arise and the factors that at least one of the parties see as important. Behrendt provides a framework within which cultural difference and understanding might be negotiated as a first step in resolution of disputes. Sharp's analysis of the different cultural realities resulting in different meanings of language graphically illustrates this point of view.

The Horrigan book stands in stark contrast to the other books reviewed. While Horrigan's approach suggests that native title is ultimately reducible to its legal and commercial implications, the other books leave no doubt about the complex human, commercial and political relationships produced by the Indigenous people's land relationships in a colonial and post-colonial context. The force of the latter works is the presentation of both shared and conflictual experiences of land, land-use and co-existence, negotiated over two hundred years. It is an experience that cannot be simply or conveniently reduced, confined or adequately reconciled by the application of commercial or legal formulae.

To read and consider each of the books in isolation is perhaps to misconstrue the dramatic impact of Indigenous land interests on the settler history and contemporary psyche of Australia. Each of the books contributes to an understanding of this impact in its own way. This is not to suggest that each book does not make a significant contribution to its particular field or to the overall body of knowledge on native title. Rather, the combination of the works produces an overwhelming sense of the cultural and social complexity of relationships, the surface of which is touched by the enjoyment of native title, native title litigation and its resolution. The consequences of ignoring this complexity may be yet to emerge.

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