Indigenous Law Reform Update:

An Interview with Mark Harris

By Craig Burrows, Aitken Walker & Strachan and Jane Levin, Freelance Writer and Editor

Mark Harris grew up in a Victorian country town with a large Aboriginal population. After completing his law degree, he lectured at Monash University, Gippsland Campus, before commencing at La Trobe University in 1994, where he is currently a Senior Lecturer. From 1996-1998, Mark was involved as a legal researcher and lawyer with the Mirimbiak Nations Aboriginal Corporation (the native title representative body for Victorian native title claims). Within that role, Mark worked with a variety of indigenous groups, including the Wurundjeri people who are the traditional owners of the area that much of Melbourne now occupies. Mark has also been extensively involved in negotiations between government, native title holders and industry proponents in the Eastern Gas Pipeline.

In your experience, how committed to indigenous lawreform is the Australian government?

The Howard Federal Government has been faithful to the pledge of the former Deputy PM, Tim Fisher, in delivering 'bucketloads of extinguishment' and the previous State government of Jeff Kennett was dogmatic in its resolve to oppose any form of native title.

When the Bracks Government was elected, the Attorney General indicated that there would be a new approach to the resolution of native title matters. After the disappointment of the Yorta Yorta High Court decision,[1] the indigenous communities of Victoria certainly needed their faith in the native title process.

The establishment of an expert panel to assess native title claims and to avoid the possibility of litigating every native title application was certainly a positive initiative. Having said that, it would seem that the Government has baulked at giving anything substantial to indigenous Victorians if the current Wotjobaluk Agreement-In-Principle[2] is any guide... The content of the Agreement in Principle gives the Wotjobaluk little more than was gained under different legislative arrangements before native title was recognized at common law.

Where did the idea of the Koori Court system stem from?

The idea of the Koori Courts stemmed directly from the commitments made in the Victoria Aboriginal Justice Agreement between the Victorian State Government and representatives from the Victorian Aboriginal Justice Advisory Committee and the Chairpersons of the Victorian ATSIC Regional Councils. The agreement was itself an outcome from the 1997 Ministerial Summit on Indigenous Deaths in Custody that considered how the recommendations of the 1991 Royal Commission into Aboriginal Deaths in Custody could be given effect.

What is the scope of the operation of the Koori Courts?

Consistent with the operation of the Koori Courts is the requirement that the offender plead guilty. The Magistrate is assisted in determining the appropriate sentencing by Aboriginal elders or "respected persons" from the Aboriginal community. It is important to note that the Koori Courts do not deal with juvenile offenders or sexual offences/domestic violence matters.

The Victorian Koori Court model drew from the Nunga Courts (Nunga being a term used for indigenous persons from South Australia) that were initiated in the Adelaide Magistrates' Court by Magistrate Chris Vass. In NSW and Queensland, other models are used.[3]

In the wake of the Mabo decision[4], do you believe that our legal system is sufficiently structured to give adequate recognition to customary laws beyond native title rights?

In many ways it could be argued that the recognition of customary laws could fill the void or space that native title once, theoretically, could have filled. It could be seen that Mabo represented the high tide mark of indigenous rights and we have witnessed a gradual ebb in the recognition given by either government or the courts.

Now that the sui generis nature of native title has been so substantially compromised and circumscribed, it might be argued that there is a need for customary laws to be recognised in respect of things such as hunting and fishing rights, intellectual property rights and resource rights (particularly access and use of water). Whether the current political climate will allow for a revived form of customary law recognition to fill the gap left by the decline, or the demise, of native title remains to be seen.[5]

What are the dangers in giving formal recognition of customary law?

The danger of allowing for customary law to be recognised by the Australian legal system is that it risks the creation of a hybridised form of traditional law, which could actually serve to supplant the traditional forms of authority and social control. There is a vast gulf between being aware of the reality of Aboriginal customary law and knowing enough about it to be able to represent a client in a court matter.

Conclusion

It seems that in light of the recent High Court decision in the Yorta Yorta case and the Victorian Native Title negotiations with the Wotjobaluk people, we have a long way to go before our indigenous peoples can restore their faith in the substance and pace of Australian indigenous law reform. ■

1 In *Yorta Yorta Aboriginal Community v State of Victoria and Others* [2002] HCA 58, the High Court held that future claimants would have to prove they were a community with a system of laws and customs that had "a continuous existence and vitality" since white settlement. The claim made by the Yorta Yorta peoples related to land and waters covering 2,000 square kilometres along and around the Murray and Goulburn Rivers.

2 The Wotjobaluk claim was lodged in 1995 and involves over 400 parties including 300 farmers in the Wimmera Region. The 'in principle' agreement between the Wotjobaluk people and the Bracks government was signed in October 2002, allowing the Wotjobaluk people non-exclusive hunting, gathering, camping and fishing rights along the Wimmera River, without limiting public access and various types of existing licences. The Federal Court has set a September 19 deadline for all parties to the claim to indicate where they stand in relation to finalising an agreement.

3 In NSW the model that was introduced was the 'sentencing circle' sentencing scheme, that was originally utilised by First Nations peoples in the Yukon but later was adapted to a number of Provinces in Canada. The NSW Government has authorised a two-year pilot program in Nowra and there is also a trial of the sentencing circle model operating in Dubbo. In Queensland the same model of a Murri Court (Murri being a term for an Aboriginal person from Queensland) has been introduced.

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

5 There is currently a review being conducted in WA as to the possibility of recognising aspects of Aboriginal customary law. For many communities in remote parts of Australia their traditional law remains the main determinant of social responsibilities.