OPINION

Aboriginal Law in Australian Courts 'Black History on White Paper'

(attrib. Doreen Kartinyeri, Ngarrindjeri Woman)

Having survived attempted genocide and ethnocide, Aboriginal and Islander peoples in Australia now have a range of opportunities to assert their inherent community rights and reclaim and protect their cultural heritage. Land rights and native title legislation provides avenues for the reclamation of traditional lands and the exercise of (sometimes severely limited) control over outsider access. Heritage legislation permits the declaration and protection of sites and objects of religious/cultural significance.

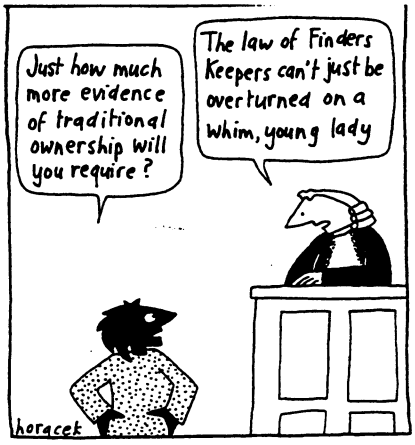
But at what cost?

This is the question which inspired the theme for this issue of the journal. This belated offer of protection, recognition and reclamation does not represent an unalloyed good. Indigenous peoples are cast as supplicants; they must submit a claim for the recognition of their heritage. The claim must be formulated as determined by the imposed legal regime and dealt with according to that regime's notions of fairness and due process. The existence of a traditional link between the claimant and the land or site must be established, by them, to the satisfaction of a non-Aboriginal tribunal.

Can the evidence for that link be fully appreciated by the tribunal? Archie Zariski's article questions the ability of one culture to appreciate and evaluate appropriately the traditions of an 'other'. Andrew Turk's article proposes the use of Geographical Information Systems to convey the richness of meaning in Aboriginal native title claims.

Another concern about evidence of traditional ownership or interest and responsibility is that some or all of it may be restricted information. This issue has recently been raised dramatically and controversially by the Hindmarsh Island Bridge conflict in South Australia, the subject of Maureen Tehan's article. Revealing secrets and sacred knowledge may risk desecration or even destruction of the very sites whose protection is being sought and may undermine the Law itself. The obligation to reveal it, therefore, is antithetical to the stated aim of protecting traditional cultures. To succeed in a native title or heritage protection claim would be a Pyrrhic victory if the cost is the destruction of the Law of that place.

Thus a difficult choice is posed for traditional custodians: to allow breach of Dreaming/Law by destruction of a sacred site, or to seek to protect it by explaining its special nature and, in so doing, run the risk of breaching that



Dreaming/Law themselves by revealing secret information. This is a decision which is not always taken in favour of seeking legal protection, contrary to the claims of the mining industry and others. Custodians have taken their secret knowledge to the grave rather than risk destruction of the Law by their own hand.

Michael Dodson, in the lead article in this issue, argues that a proper interpretation of the High Court's decision in *Mabo (No. 2)* would not impose full disclosure requirements on native title claimants. In his article on the Commonwealth's heritage legislation, Nathan Hancock proposes a reinterpretation to protect the confidentiality of secret/sacred information.

Mark Harris's article takes us beyond the procedural and evidentiary demands, inviting us to question the very attributions of meaning by the Australian legal system as contrasted with the indigenous Law. What is the interest that is the subject of native title and heritage disputes (as they too often become)? In the context of land claims the meaning of the land is so different between the two cultures that non-indigenous Australians struggle to express its significance to Aboriginal peoples. We typically rely on such contrasts as: land belongs to Europeans but indigenous peoples *belong* to the land; that traditional custodians have *responsibilities* to their land and to sites in particular. We might similarly say that interests opposing land and heritage claims are concerned to *exploit* the land at stake while the indigenous claimants are concerned to protect the land from *desecration*. Harris raises questions such as these about significance and meaning in the context of 'artefacts', contrasting the meaning given to them by scientists with their meaning to indigenous people. The general theme is also raised in the introduction to McKee and Hartley's article (which also serves as a companion piece to Tehan's, introducing an alternative perspective on the Hindmarsh Island Bridge affair).

What we hoped to do in this issue was to challenge ourselves and our readers to question the prevailing liberal approach to indigenous cultural rights; to recognise the continuing insidious relegation of Aboriginal heritage to supplicant status, reinforcing the power and ultimate victory of the invading system and risking the ultimate destruction of the original peoples.

Meredith Wilkie and Mark Gregory
Co-Editors

Meredith Wilkie teaches law at Murdoch University, Perth.

Mark Gregory is a lawyer with the Aboriginal Legal Service of Western Australia (Inc.) in Kununurra.