

Aboriginal Dispute Resolution, A Step Towards Self-Determination and Community Autonomy

by Larissa Behrendt; Federation Press, 1995; 115 pp; \$16.95 softcover.

Larissa Behrendt is a distinguished graduate of UNSW and the first Aboriginal scholar to receive a scholarship to complete her doctorate at Harvard University. She is a Eualeyai woman whose country lies in northwest NSW. In this new work, Behrendt addresses issues about problem solving methods within Aboriginal communities and the inadequacies and injustices of imposed methods. Her focus in the book is on disputes over land.

Behrendt succinctly reviews the arrival of the British and the acquisition of sovereignty by the British Crown. She demonstrates how the imposition of the common law, with *terra nullius* as the fictional basis for its reception in Australia, rendered the laws of Aboriginal and Torres Strait Islander people invisible. Behrendt explains that the concepts of connection to land, of both the indigenous and non-indigenous systems, have no common indices, therefore there had been no accommodation in the common law for Aboriginal custodial relationship with land. The overturning of *terra nullius*, as the basis for the reception of the common law, in *Mabo v Queensland (No. 2)* revealed the common law mechanism whereby native title to land could be recognised, but it also confirmed the dispossession of their land which affects most Aboriginal people.

Aboriginal people's experience of the imposed legal system has been one of continual oppression. It was the tool whereby the invaders took their land. As such Behrendt argues convincingly, the legal system has been complicit in the socio-economic deprivations which Aboriginal people have suffered since 1788. Analysis of the criminal 'justice' system shows that Aboriginal people are treated grossly unequally by that system. The legal system has also only afforded its protection to Aboriginal people when they have conformed with its dictates. For Aboriginal people who have tried to live their lives in accordance with their traditions, the common law has provided no protection and indeed has been the tool for punishment for such commitment. Against this

background, Aboriginal people have little basis for accepting that the existing non-indigenous legal system is likely to provide them with a fair and just outcome for many of the problems with which they must deal — particularly where their interest in land is at stake.

In arriving at a community-based system for dispute resolution, there is an important distinction to be drawn between imposing problem solving from the orthodox channels of the common law system, and mechanisms which are drawn from within Aboriginal communities. Behrendt argues that alternative dispute resolution mechanisms must be developed which embody the cultural values of indigenous people and are acceptable to those communities because they have had input into their development. Such mechanisms will serve the interests and cultural integrity of the communities but will also provide a pathway to more acceptable dealings with entities which are outside the communities — such as mining companies and government agencies. Requiring these bodies to recognise such mechanisms is a less radical step than the force which has been applied compelling Aboriginal people to fall within the framework of the non-indigenous legal system.

Behrendt sets out the traditional structures within Aboriginal communities which provide dispute handling mechanisms. She explains the cultural background to these features and then demonstrates how they may be brought into play to assist a community with the broad range of issues which arise, particularly when dealing with land. She describes a model procedure which allows for full expression of grievance and interest, and the application to the particular problem of the full set of community values. Her language is direct and accessible. She is highly persuasive about the merits of her scheme. She applies the principles to a variety of different Aboriginal communities from the traditional to the urban, demonstrating that her argument may be applied across the spectrum of the very different

ways in which Aboriginal people are living.

While Behrendt focusses on the imposition of non-indigenous law there is some recognition that different aspects of this law provide a useful tool for communities in relation to their dealings with outside groups. A powerful example is the right to withhold consent to mining which is in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). In relation to negotiations which must take place due to this legislative imperative, Behrendt's model has much to recommend it — not only because the outcome is likely to be more acceptable to the community but also because it will have been arrived at with proper respect for the community with dealings based on equality between the parties. Also, the better and stronger the agreement, the more successful the partnership between the parties to any agreement will be.

For inter-community dispute resolution, the same observations may be made about Behrendt's proposals. The implementation of the *Native Title Act 1993* (Cth) has brought a new pressure to bear on communities to resolve sensitive issues of culture and connection. Many communities are composites of what are known as 'historical' people (those who were brought to an area often without choice) and traditional people (those who can show that the area in which they live has always been their country). In order to bring a native title claim, distinctions between these people, who are part of the contemporary Aboriginal community, may need to be negotiated. Ensuring Aboriginal people have input into the process by which their community self-defines when developing a native title claim, should mean that the outcome will have more legitimacy and may unify where division is already occurring.

All of these matters are important indicators of self determination for Aboriginal communities. Behrendt's book is itself a welcome contribution to the development of autonomy for Aboriginal people.

SUSAN PHILLIPS

Susan Phillips is a Sydney barrister.