

# ABORIGINAL LAW IN ACTION

## A brief report of a field trip to Aboriginal sacred sites in Perth, September 1994

The rights of Australia's Aboriginal peoples is a rapidly growing branch of law, and the Murdoch law course offers students a great opportunity to get to grips with this area. *Aboriginal Legal Rights* (L364), enthusiastically and comprehensively taught by Catherine Iorns, melds a historical analysis with human rights precepts. By harvesting a vast range of legal and historical materials the course enables students to develop a perspective to understand contemporary local issues, eg exploratory oil drilling at Nookanbah (in 1980), the impact of redevelopment at the Gooninup ("Swan Brewery") site and on Aboriginal burial sites at Rottnest Island in the late 1980s and the foment from the affirmation of native title by the High Court of Australia in *Mabo (No 2)*.

As Western Australia is a State in which the foundation of economic growth rests on agricultural extractive industries and large-scale capital intensive resource development, the relationship between the dominant society and its indigenous inhabitants is a critical issue. The course sets out to demonstrate how the application of key human rights principles enables the (budding) practitioner to develop a practice framework developed by understanding the interface between the law and social and cultural values.

Wherever possible the course links conceptual materials with first-hand experience, through exposure to practitioners who have worked diligently with issues that concern Aborigines, eg land rights advocates, protection of Aboriginal cultural heritage, the entitlement of Aboriginal defendants to due process and their proper representation in the criminal justice system, the advancement of human rights concepts etc.

The study of law at university tends to be in an abstract realm, with the real-life human elements almost completely leached out, invariably leaving a tasteless diet of bare facts. The Aboriginal Legal Rights unit, to continue the nutritional analogy, recently went some way to redressing this deficiency, by putting some of the husks and wholesome parts back into the student diet, when a group of us went on an all-day field trip in the Perth metropolitan area.

The excursion involved about 200 kms in a mini-bus, to a number of Aboriginal heritage sites in the Perth metropolitan area. The three tour leaders, from the Aboriginal Affairs Planning Authority and the WA Museum's Aboriginal Sites Department, sketched out the history and significance at each of the seven sites visited. Their input underlined the importance of having good inter-relationships between historians, anthropologists, archaeologists, Aboriginal experts and consultants, local communities and legal people, to be able to effectively deal with the myriad of sectional interests.



**Aboriginal scarred tree**

Associated with each site was a complex legal and political history, often involving clashes that included local government, entrepreneurs and developers, private landowners, Aboriginal groups and organisations, statutory authorities, and reluctant, if not indifferent State and Commonwealth governments.

Each site illustrated the numerous difficulties that obstructed protection of Aboriginal sites of significance, due in large part to the dominant society's indifference and the marginalisation of Aborigines.

The observations of Richard Falk, "The rights of peoples (in particular indigenous peoples)," aptly sums this up:

*"The Australian circumstance is notable for the extent to which these pre-modern antecedents remain visible in contemporary cultural consciousness. For most societies, the relationship with indigenous peoples is virtually ignored or treated in some sentimental or distorted manner as a concluded aspect of the past. To the extent our concern is with the normative quality of life, the focus is upon the present, and the degree to which it actively represses the surviving aspects of earlier indigenous experiences, that is, the unassimilated portions of the contemporary civilisation that are asserting a variety of claims to uphold and nourish indigenous identity as a positive end in itself."*<sup>1</sup>

Many of the sites had only survived because of very determined efforts by small numbers of activists and concerned scientists who had helped to build flimsy dikes around tiny fragments of the former diverse cultural matrix that had existed throughout the metro area before British settlement in 1829. Over time, up to the present day, these remnants had been continually overwhelmed by 'progress'.



**Erosion damage at Success Hill site**

Examples of remnant sites in the northern suburbs were an Aboriginal scarred tree trunk, part of the Lake Joondalup Heritage Trail, and the Orchestra Shell Cave. The tree had evidence of bark removal many years ago and now was showing signs of termite invasion. It stood forlornly alongside a busy suburban road with its standard mix of neat lawns and exotic roadside shrubbery.

It also became apparent that as there is not a single Aboriginal community, there are not representatives with whom we might negotiate on many issues. Accordingly there tended to be quite divergent, often polarised views, from the different Aboriginal groups and organisations and this has made it difficult for government to consult, as no one group or individual can claim to represent all Aboriginal interests. (It may also be advantageous for the dominant culture if there is not a strong representative and unified Aboriginal voice, as it facilitates a 'divide and conquer' approach.)



**Bennett Creek site looking east**

With the benefit of hindsight, much of the loss of the rich Aboriginal heritage in the Perth area could have been averted if the settlement of this State had proceeded on a different basis. I acquired from the excursion an unsettling realisation that

for contemporary Aborigines this loss must be profound and enormous. This loss was acutely evident at the Success Hill and Bennett Brook sites.

The pyrrhic 'successes' embodied in these two particular locations could be characterised as largely symbolic, as large-scale destruction of the sites had already occurred by the time preservation orders were granted under s 19 of the *Aboriginal Heritage Act 1972* (AHA). At Success Hill most of the site had been developed as recreational facility on the western side, and eastern side, where the site abutted the Swan River, erosion was occurring.

The controversy in the 1980s at Bennett Brook, over the siting of a gas pipeline through a site of significance was, and probably still is, for many West Australians a difficult issue to grasp. While it is difficult to 'see anything' in terms of its heritage value, the site tells us a lot about how the dominant culture treats its environment, as the site is traversed by high voltage feeder pylons, transected by a buried gas pipeline, abuts a housing estate and is bordered on the other sides by a caravan park and main road.

At Bennett Brook, like some of the other sites we saw, property developers were a key factor in the way the disputes had been dealt with, as private landowners they were technically free to do pretty much as they pleased on and with their land, subject to town planning laws.

This was also an important factor in the Orchestra Shell Cave site, north of Wanneroo, which sat uncomfortably alongside market gardens and was accessed only by going through heaps of abandoned farm plant and machinery. Another example of the weakness of limited controls was illustrated at a site in West Swan, which had been



**West Swan Aboriginal site at rehabilitated claypits**

excavated for clay for brick making.

While the AHA has weak powers to prosecute people who destroy or damage Aboriginal sites, it empowers the Aboriginal Cultural Material Committee (ACMC) to preserve, acquire and manage sites. The ACMC also evaluates sites and advises the Museum Trustees and the Minister; the latter has the responsibility for deciding whether Aboriginal sites may be disturbed or not.

In addition to the AHA (which the present government intends to amend), there is also the Commonwealth's *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, passed in response to the Nookanbah dispute.



**Walyunga archeological site**

Yagan's unmarked grave is one such site protected under the AHA, being on private property, adjoining a river, in the upper Swan grape growing district. This particular site's significance stems from its representation of how Aboriginal people were brutally repressed by the British settlers in the 1830s, for Yagan along with other local Aborigines were hunted down and executed. Yagan's head was severed from his body, smoked to preserve it and sent overseas to a British museum, where it resides to this present day.<sup>2</sup>

I found the Walyunga archaeological site to be one of the most impressive sites on the trip. It was located on top of an old sand dune system, hundreds of metres away from the Avon River, which over thousands of years had been used by Aborigines. Normally this kind of site would be 'invisible'. But in this instance through the process of wind erosion the vegetation on part of the hill had been removed, to reveal thousands of artefacts.

All of these had been brought up from the river by Aborigines and used for a variety of purposes, such as the manufacture of small stone cutting implements, as tools to grind seeds, to construct fireplaces, for stabilising the walls of dwellings etc.

It was a very humbling experience to realise that every single rock on this sand dune had been derived from material brought here, at some considerable effort, by human hands.

We had some modest success in finding a small number of flakes, possessing characteristic convex and concave sides that formed very sharp cutting edges, that at one time had been used as cutting tools.

The Gooninnup site, which virtually all the population of Perth would have at some time passed through, was the final example of how Aboriginal heritage values are subsumed by other interests. Gooninnup is truly a site of considerable importance to Aborigines, as Patricia Vinnicombe's report, *Gooninnup - An Historical Perspective of Land use and Associations In the Old Swan Brewery Area*, published in 1989 by the WA Museum, carefully reveals.

Much of the Aboriginal mythological value of the site is not apparent to non-Aborigines, and with the partial construction of the car park, on the Kings Park side of Mounts Bay Road, the site represents yet another instance of how Aboriginal heritage values have invariably given way to dominant interests.

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### **References**

<sup>1</sup> Falk R. "The rights of peoples (in particular indigenous peoples)" In Crawford J (ed.) *The rights of peoples*, 1988, 22.

<sup>2</sup> Yagan's head was returned to Perth in early 1997.