may trace and follow through a mixed bank account (cf Heperu Pty Ltd v Belle (2009) 76 NSWLR 230, [143]-[153] (Allsop P, Campbell JA and Handley AJA); Russell Gould Pty Ltd v Ramangkura (2014) 87 NSWLR 552, [37] (Bathurst CJ, Barrett and Ward JJA). Regret that these ships passed in the night turns to mystification when it is noted that each statement appeared in a case involving a cause of action that the High Court is now keen to label “equitable” (money had and received was said to be a common law action in Australia & New Zealand Banking Group Ltd v Westpac Banking Corp (1988) 164 CLR 662, 673 (Mason CJ, Wilson, Deane, Toohey and Gaudron JJ).

It is unfortunate that the High Court has not visited tracing for many years. Hopefully, it will as soon as the opportunity presents itself. And, as the Supreme Court of Canada emphatically did in BMP Global Distribution Inc v Bank of Nova Scotia (2009) 1 SCR 504, [79]-[80], hopefully it will clearly endorse the reasoning of the Australian-born Atkin LJ in Banque Belge (335), where he concluded that there is no principled justification why the common law lacked equity’s capacity to examine dealings in a mixed bank account.

Hon Keith Mason AC QC

SPECIALIST COURTS FOR SENTENCING ABORIGINAL OFFENDERS: ABORIGINAL COURTS IN AUSTRALIA


Specialist courts for sentencing Aboriginal offenders do not work. That is one conclusion that a particularly narrow and pessimistic reader might reach at the conclusion of this book. It is true that, as Bennett freely admits, if the only aim of specialist courts for sentencing Aboriginal offenders is to reduce recidivism rates, then there is little empirical evidence of success. In fact, what empirical evidence there is seems to suggest that persons sentenced in these courts are as likely to re-offend as those sentenced in mainstream Anglo-Australian criminal courts (see, eg J Fitzgerald, “Does Circle Sentencing Reduce Aboriginal Offending?” (2008) 115 Crime and Justice Bulletin 1, 6-7). Yet, as has been variously recognised both legislatively and judicially, there are many other aims of specialist courts for sentencing Aboriginal offenders (see, eg County Court Amendment (Koori Court) Act 2008 (Vic), s 1; R v Grose (2014) 119 SASR 92, [97]). These include: to better inform the court of an offender’s background and offending behaviour and thus to allow the court to craft a more appropriate sentence; to facilitate more meaningful Aboriginal community engagement in the sentencing process; and to salve the fractious relationship between Aboriginal people and the institutions of Anglo-Australian law.

Before proceeding, it is worth clarifying just what Bennett is referring to when he discusses “Aboriginal courts” (the economical label is, as Bennett acknowledges, somewhat clunky). He uses the descriptor in reference to courts in the Anglo-Australian legal system that employ modified procedures and court environments tailored to Indigenous Australians (including both Aboriginal and Torres Strait Islander peoples). Such courts currently operate in Victoria, SA, NSW, WA and Queensland. While each jurisdiction has its own local variations, there are two broad categories of Aboriginal courts.

In one category there is the circle court (and its close relative, the conferencing court). This model has its origins in Canada, where the first recorded circle-sentencing of an Aboriginal offender took place in 1992 (R v Moses (1992) 71 CCC (3d) 347). The essence of this model of court – whether one calls it a “circle” or “conferencing” court – is that the sentencing of an offender is preceded by, and derives from, a wide-ranging discussion, or conference, between interested parties. Those with a seat at the table typically include the judicial officer, an Elder or Elders, the offender, the defence and prosecution lawyers, Aboriginal court workers and the victim. The conversation is just that, a conversation, and is markedly more inquisitorial than mainstream court sentencing proceedings. Courts in the second category – the Nunga or Koori courts – are essentially more streamlined iterations of the first. They look and operate more like the traditional Anglo-Australian court, although with less formality and stripped of most colonial imagery and raiments. These courts also provide
opportunities to Elders and other community members to contribute their views as to the appropriate sentence but do not always have the time and resources to conduct the same wide-ranging and more overtly collaborative sentencing discussion held in circle courts.

Bennett’s book provides a far more detailed summation than that offered above. In fact, the first half of the book is dedicated to an explanation of the structures, processes, players and governing principles of Australia’s different Aboriginal courts. While this part of the book is perhaps less immediately engaging than that which follows, it is the most thorough survey to date of Australia’s network of Aboriginal courts. The second half of the book rehearses and interrogates the various justifications and criticisms of Aboriginal courts and constitutes a substantial contribution to the store of knowledge on the subject. Here Bennett makes a persuasive case for the capacity of Aboriginal courts to fulfil most, if not all, of their stated aims. Bennett’s undisguised commitment to the cause is tempered by appropriate concessions and balanced references to the relevant literature and empirical data (or lack thereof).

If one had to find fault with this book it might be that it does not linger long enough on a tension at the core of the Aboriginal courts project: namely, that between the advancement of community interests and the demands of individualised justice. Elena Marchetti adverted to this tension when she dichotomised the aims of Aboriginal courts as being “criminal justice” or “community building” (Marchetti, “Indigenous Sentencing Courts” (2009) 5 Indigenous Justice Clearinghouse Brief 1, 5). In a similar vein, Marchetti and Kathy Daly locate the “political dimension” of Aboriginal courts in the fact that they “are concerned with group-based change to social relations … not merely change in an individual” (Marchetti and Daly, “Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model” (2007) 29 Syd LR 415, 429-430).

While it is true that the conflict between community interests and individualised justice is one that inheres in mainstream criminal sentencing, it presents itself in sharp relief in the context of Aboriginal courts. Of what legal relevance are Elders’ views as to an appropriate sentence if they point to a sentence other than one that is, according to the applicable sentencing principles, just and appropriate in the particular case? Might the processes and considerations of Aboriginal courts, exclusive as they are to Aboriginal court users, offend the principle of individualised but equal justice as expressed in Bugmy v The Queen (2013) 249 CLR 571? These pressing questions remain to be conclusively answered in the wake of Bugmy (cf R v Grose (2014) 119 SASR 97, [20]-[43]). While Bennett does touch on this issue briefly, it would have been rewarding to learn more of his views on the topic.

Having registered this one small regret it remains to say that, in this slim volume, Bennett has managed to both concisely summarise the Australian experience of Aboriginal courts and provide the most comprehensive critical appraisal of these courts to date. Given that the Aboriginal court movement in Australia is about to enter its third decade it is surprising that the topic has not been the subject of a monographic treatment until now. This book will no doubt provide an important reference point not just for Australian scholars, practitioners and policymakers but also for international institutions and figures interested in the Australian experience of Aboriginal courts.

Julian R Murphy

INTERPRETATION OF INTERNATIONAL INVESTMENT TREATIES


The explosion in investment treaties concluded around the globe has seen the rise of a virtual industry for the provision of legal advice on investment protections and scholarly treatment of the subject. One prominent aspect of this is treaty interpretation, which is an elemental part of every dispute under an investment treaty. Investment treaties create substantive rights for foreign investors that may be enforced directly against the host state. When a dispute arises between a foreign investor and a host state under an investment treaty, the task of treaty interpretation becomes critical because one must first ascertain exactly what the treaty provisions mean, to understand who and what is protected under that treaty and then when and how that protection applies. This is often easier said than done. Despite the best intentions of treaty drafters and negotiators, gaps, inconsistencies and ambiguity will arise.
Sentencing Aboriginal Offenders: Recognising Disadvantage and the Intergenerational Impacts of Colonisation. Long May You Run: Drug Crouts in the Twenty-First Century Long May You Run: Drug Crouts in the Twenty-First Century. Stemming the Tide of Aboriginal Incarceration Stemming the Tide of Aboriginal Incarceration. Punishing Women: The Promise and Perils of Contextualized Sentencing for Punishing Women: The Promise and Perils of Contextualized Sentencing for Aboriginal Women in Canada. The Nullification of Section 718.2(e): Aggravating Aboriginal Over...Â A review of Paul Bennett's recent book which presents a comprehensive analysis of Australia's Indigenous sentencing courts. James Morton â€“ Paul Bennett (2016) Specialist Courts for Sentencing Aboriginal Offenders: Aboriginal Courts in Australia. Sydney: The Federation Press. Page | 23.Â External funding 1. Australian National Research Organisation for Women's Safety â€“ An Evaluation of Circles of Support and Accountability (South Australia) and the Reintegration of Indigenous Dangerous Prisoners (Sexual Offenders) Act Perpetrators (Queensland). Dr Kelly Richards (CJRC), Dr Jodi Death (CJRC) and A/Prof Kieran McCartan, University of the West of England â€“ ($145,605.00). The High Court noted sentencing laws in Canada directed judges to give “particular attention to the circumstances of Aboriginal offenders” but this was not the law in NSW. Bar Association president Arthur Moses, SC, says the rates of Indigenous incarceration are a “national shame”. Credit:Andrew Meares.Â The government was currently trialling a Youth Koori Court and was considering a proposal for a specialist Indigenous Court for adult offenders, which would be a division of the NSW District Court. Mr Speakman said he had also announced “a series of criminal justice reforms [in May] including providing judges a broader range of community-based sentencing options, including Intensive Corrections Orders designed to directly address the causes of a person's offending”. Sentencing Trends & Issues. current and former relatives, and, in the case of an Aboriginal person or a Torres Strait Islander, part of the extended family or kin according to the Indigenous kinship system of the person's culture. In sentencing a domestic violence offender, and in particular a repeat domestic violence offender, specific and general deterrence are important factors, together with the requirement of powerful denunciation by the community of such conduct and the need for protection of the community.