

DILEMMAS IN APPLIED NATIVE TITLE ANTHROPOLOGY IN AUSTRALIA

Edited by Toni Bauman



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Contents

Acknowledgments	v
Contributors	vi
1. Dilemmas in applied native title anthropology in Australia: An introduction <i>Toni Bauman</i>	1
2. Working with, for and against the Act: Anti-anti-positivism and native title anthropology <i>John Morton</i>	14
3. Litigating native title: Anthropology in the Court <i>Katie Glaskin</i>	35
4. Overlapping jural publics: A model for dealing with the ‘society’ question in native title <i>Paul Burke</i>	55
5. Understanding another ethnography: The use of early texts in native title inquiries <i>Kingsley Palmer</i>	72
6. Embracing our hallmark latencies: On centring anthropological practice <i>Tim Pilbrow</i>	97
7. ‘Competing narratives’ versus ‘interest-based negotiations’ and the bar of evidence <i>Kim McCaul</i>	109
8. Serendipity is not enough! State and territory native title connection processes <i>Toni Bauman</i>	124
9. Anthropology and native title: Issues of method, claim group membership and research capacity <i>David Trigger</i>	147
Selected reading	160

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CHAPTER 1

Dilemmas in applied native title anthropology in Australia: An introduction

Toni Bauman¹

Native title in Australia raises a number of dilemmas for anthropologists who work in a variety of in-house and consultancy roles and form a key sector in the native title industry. Anthropologists are employed by Native Title Representative Bodies (NTRBs) and Native Title Service Providers (NTSPs), which represent the interests of native title applicants, as well as by the Federal Court of Australia, Commonwealth, state and territory governments, industry groups, other respondent parties and sometimes directly by claimants. Some native title anthropologists work in teaching or research institutions and also undertake consultancies.

Much of their work is directed at gathering, interpreting, analysing or assessing evidence to address section (s) 223 of the *Native Title Act 1993* (Cth) (NTA). This section requires native title claimants to prove their ongoing connection to land at sovereignty according to traditional laws and customs which give rise to their native title rights and interests. Anthropologists can thus be employed as independent experts and involved in preparing and peer reviewing connection reports submitted to state and territory governments for consent determinations and to the Federal Court under its practice direction for litigated determinations. The role of independent expert may also require their participation in conferences with other anthropologists, a process which is sometimes called ‘hot tubs’² or more commonly, a ‘conference of experts’. Reports prepared for potential litigation are often scrutinised by a range of professionals, including judges, lawyers, and other anthropologists and researchers. Should the application go to trial, an anthropologist is likely to face rigorous cross-examination.

In addition to their roles as independent experts, anthropologists may be asked to write reports to support native title applications, or to inform mediations (sometimes conducted by the National Native Title Tribunal) and to

support other forms of agreement-making. They may also undertake tasks that go beyond researching matters of traditional connection to land and waters, and which relate to the governance of claimant corporations and agreement-making issues. Native Title anthropologists may be faced with a complex and at times contested research environment as well as with tight time frames which make the conduct of their work both difficult and stressful.

The papers in this collection, which have evolved from three sessions at the 2009 Australian Anthropological Society (AAS) Conference, The Ethics and Politics of Engagement, testify to the complexities of applied native title anthropology.³ In working with the NTA, anthropologists face a number of ethical issues, as Glaskin points out in this collection in her discussion of the roles, methodologies and ethics of anthropologists in native title litigation (Chapter 3, see also Trigger, Chapter 9). Moreover, native title anthropology is constrained quite explicitly by the need for anthropologists to continually rework their approaches in response to changing Federal and High Court judgments and legal procedures. This has particularly been the case, as Glaskin points out, since the 1998 amendments to the NTA, and the High Court's *Wik*, *Ward* and *Yorta Yorta* decisions.⁴

Native title anthropology is also located at the uneasy and multi-faceted intersections of a number of other competing and contested discourses and fields of power, which are, like legal discourse, also contested within. They include the policies of Commonwealth, state and territory governments and of NTRBs/NTSPs; alternative dispute resolution theory and practice; claimant ideas about what native title should mean; and academic theories and practices to be found in other disciplines, particularly history, linguistics and archaeology.

Implicit in the intersections of these discourses is the need for anthropologists to 'translate' Indigenous cultural practices⁵ into native title frameworks in what some have described as a recognition space.⁶ In this space, Indigenous law, cultural categories and Indigenous property rights are often described as dominated and codified by Australian property law, and native title law is understood as enforcing a state-mandated and resourced project of traditionalism.⁷

Yet, Indigenous meanings, including laws and customs, like all meanings, are produced and negotiated out of the conditions in which they are embedded. These conditions include the native title arena but are not exclusive to it (Bauman, Chapter 8). Native title is thus a 'total social fact',⁸ as the process of native title recognition itself transforms Indigenous practices and beliefs that are part of traditional law and custom.

Native title anthropologists might be said to be involved not so much in an act of 'translation', but in reflecting and facilitating the requirements of the law and policy in relation to continually transforming and reconfiguring

Indigenous cultural meanings, which are subject to a range of influences. Like claimants, they, too, are located in a number of competing fields of power and institutional relationships, including between and among NTRBs and NTSPs, research institutions, government departments, the National Native Title Tribunal, the Federal Court and legal firms. Notwithstanding, the influences of these relationships on anthropologists are relieved, at least to some extent, when their role is one of independent expert witness.

Applied anthropology and native title law

The papers in this collection provide understandings across the disciplines that inform native title, particularly those of anthropology and the law. Given the negotiable quality of social meanings, it is inevitable that there will be some challenging inter-subjective moments between anthropologists and lawyers when lawyers seek concrete ‘facts’ upon which to base their cases.

As Morton’s paper (Chapter 2) suggests, anthropologists should work with, for and against the NTA — *with* the Act, because that is the only legitimate source for the basic parameters of what we do; *for* the Act, insofar as it utilises ordinary English terms, which he argues are more flexible than is often assumed; and *against* the Act, whose misconstrual (legal or otherwise) may sometimes foreclose on authentic anthropological understanding.⁹ That is, anthropologists do not have to be deterred by competing meanings in the discourses of law and anthropology. As Morton comments, the two may not be as separate and distinct as we might think. He provides a case for anthropologists avoiding simplistic and oppositional rejections of what is often described as the ‘positivism’ of the law in native title. He sees legal positivism as closely allied to anthropological cultural relativism and epistemology, as relativism informs ‘facts’ in both anthropology and the law. Given the sharing and negotiability of the meanings of ordinary English words, he sees a flexibility in legal metaphors which might allow findings of fact to be arrived at by agreement rather than through a judgment on the merits of a social fact (though some would argue legal facts are based on legal precedent).

This potential for commonality between the law and anthropology, that Morton highlights, is not surprising. As Glaskin pointed out in her panel presentation at the 2009 AAS Conference, law and society historically emerged through an interaction that was constitutive of each. Rather than seeing law as only to be found in codified rules of some kind, she commented that the norms and customs that regulate human behaviour are an important part of this dialectic. In a parallel vein, Burke, a lawyer and anthropologist, points, in Chapter 4 in this collection, to a circularity in the native title inquiry, where the existence of a society is proven by reference to its constitutive laws and

customs and vice versa. Looking for common ground, he notes that lawyers, anthropologists, judges and Indigenous people are all operating from within the ‘cage’ of native title, and that anthropologists have to try to meet the legal doctrine half way. Perhaps controversially, he also comments that the *Yorta Yorta* judgment,¹⁰ which has sent researchers, judges, lawyers and policy makers looking for definitions of normative societies to include in pleadings, should not be seen as a burden. Rather, he suggests that the judgment can be seen as a helpful ‘restatement’ and ‘elaboration’ of Brennan J’s formulation in *Mabo (No. 2)* about the need for continuing observance of traditional laws and customs.¹¹ That is, that native title must be a system of ‘real, felt obligations to act in certain ways’.¹²

Burke engages with a recent paper, written by Graham Hiley, a Queen’s Counsel who specialises in native title. Hiley’s paper emphasises that ‘society’ has a particular meaning in native title legal doctrine and sets out a process for identifying the relevant society.¹³ In questioning Hiley’s methodology, Burke notes that some native title practitioners find in Hiley’s emphasis on local rights and interests implies an ‘inflexible bias towards smaller social units which may not have been very robust over the course of post-contact history’.¹⁴ He suggests that an alternative way of identifying where native title rights reside may be to equate normative systems with social obligations for which there exist social sanctions — obligations to abide by decision-making processes and laws and customs, to learn about country, and to adhere to laws and customs, for example.¹⁵ As he notes, it is possible for different laws and sanctions to apply to different parts and different levels of any society, as does the authority to enforce such sanctions. Rather than identifying a single society as the relevant normative society for native title, he suggests that the relevant society comprises a series of overlapping jural publics that extend outwards, and which are arrived at by considering the kinds of sanctions and associated authorities that apply to each of them. A range of alternatives can be put to the Court, leaving it to judges, who are accustomed to assessing arguments and evidence in complex contexts, to decide the level of the relevant group.

Native title anthropology in the public policy arena

A number of papers in this collection may be described as being located at the intersection of public policy and anthropology. After all, legal statutes originate in the policy arena, and judges and lawyers interpret what was originally the outcome of policy negotiations.

Such negotiations take place in what Burke describes as the ‘shadowlands’, where things happen in the ‘shadow of formal judicial statements of legal doctrine and Court processes’.¹⁶ Here, policies are formulated such as state

and territory connection guidelines and lawyers influence mediation and negotiation processes and the form of anthropological reports. It is also in the shadowlands that policies informing political announcements such as the Commonwealth Attorney-General's recent call for more flexible and non-technical approaches to negotiating broader land settlements are developed.¹⁷

In the shadowlands there is thus much room for negotiation, and approaches can be as flexible and non-technical as policy interpretations and goodwill permit. Here, as Bauman points out, the subjectivities of the bureaucrats, lawyers and researchers who prepare and assess connection materials — including their propensities to certain views of the 'right' native title holder model, their personalities, personal politics and idiosyncrasies — can have significant impacts.

Both Bauman and McCaul (Chapter 7) consider how beneficial outcomes might be achieved in non-adversarial, interest-based negotiation processes. Principled interest-based negotiation processes should be problem-solving processes that promote trust and long-term relationships and build lasting solutions based on mutual interests.¹⁸ Interest-based processes are often distinguished from positional approaches, which involve 'the successive taking and then giving up a sequence of positions, with the tendency to lock into positions with little interest in meeting the underlying concerns of other parties'.¹⁹

McCaul's approach, in the context of South Australia, is one in which connection requirements are limited to some basic criteria, such as descent from the original land occupiers, knowledge of country, and transmission of that knowledge; and where interest-based negotiations are conducted with a commitment to cooperation and open communication. Bauman suggests that, if 'translation' is to be more than what Smith and Morphy refer to as 'enforced commensurability',²⁰ in state and territory government assessments of connection, there is a need to generate goodwill through skilful interest-based negotiation processes in a national framework approach. Such an approach would set out minimum thresholds of proof, avenues of complaint and appeal, recourse to the independent management of connection assessment processes (where such processes are not proceeding effectively and constructively) and a set of micro-engagement negotiation principles.

Neither Bauman nor McCaul are naive about the efficacies of interest-based processes.²¹ As McCaul points out, the principles and best practice approaches to inform interest-based negotiation approaches are not well articulated. Neither are they well articulated in state and territory connection assessment processes. As Bauman describes, these processes are a hybrid mix of evaluative and arbitratative processes and interest-based and positional negotiations in which decisions are made ultimately by Cabinet Ministers, who may also have

interests in the outcome. Moreover, although connection assessments have been taking place within the referral by the Federal Court to the National Native Title Tribunal for mediation, they are not managed as interest-based mediations or negotiations.

McCaul also notes the potential for the carryover into negotiations of positional adversarial ‘memes’ which he defines as ‘a unit of cultural ideas, symbols or practices that can be transmitted from one mind to another through speech, gestures, rituals or other imitable phenomena’.²² As he and Glaskin identify, lawyers on both sides are out to win, to undermine the credibility of witnesses and to relentlessly pursue their cases with sometimes damaging consequences for both anthropologists and claimants. Moreover, the legal system is built, as McCaul describes, on a system in which each party interprets ‘facts’ to construct an account that benefits its position and damages that of the other party. This means that in native title, anthropological ‘facts’ become themselves disputed and the subject of negotiation, and the manner in which ethnography is interpreted is dependent upon whether parties take positional or interest-based approaches.

When positionality is combined with a lack of ability to apply informed critical analysis, including to the meanings of terms such as continuity and change, and in the interpretation of early ethnographies (see Palmer, Chapter 5, and Pilbrow, Chapter 6), the flexibility and technicality, which the Attorney-General has called for, is unachievable. Bauman notes that it is the negotiability of meaning among relevant native title groups that is continuous and that, in one sense, change is the only constant. She suggests that a ‘presumption of transformation’ paradigm, combined with Noel Pearson’s suggestion that anthropologists should be seeking the ‘descent of entitlement’ rather than of people,²³ might be more beneficial public policy and might more accurately reflect claimants’ realities and their histories.

Native title anthropology, ethnography and the academic anthropology

The range of approaches to connection, continuity, laws and customs, early ethnographies and group composition in this collection makes a substantial contribution to the discipline of anthropology. Yet, there is still a debate in some quarters, as Martin noted in his panel presentation at the 2009 AAS Conference, and as Glaskin comments in her paper, as to whether native title anthropology is compromised by the restrictions placed on it by the law and is therefore less valid than academic anthropology. Trigger also refers to this in Chapter 9 of this collection as a possible reason for anthropological graduates not being attracted to native title work.

Academic anthropology and applied anthropology do not exist in binary opposition; they inform each other. Land claim and native title anthropology have made a significant contribution to academic anthropology, as Glaskin points out, providing a corpus of documentation and analysis about Indigenous land tenure in Australia that would otherwise not exist. Issues that preoccupy the academy such as epistemology and representation also preoccupy native title anthropologists (Glaskin, Chapter 3). Morton uses classical texts such as Durkheim and Comte to analyse relationships between legal and anthropological native title discourses. Palmer and Pilbrow in their chapters, draw on the traditional tools of anthropology, such as genealogies, studies of land tenure systems, kinship and language in analysing what Palmer calls ‘foundation ethnographies’. Both identify the importance of contextualising, situating and positioning early texts and the people who produced them. Although developed in a native title context, their chapters are illustrative of the kinds of analyses that should be undertaken discipline wide. Pilbrow’s chapter also points out the need for self-reflexivity in situating and analysing our own contemporary texts and text writing practices.

Palmer examines three texts from different periods of ethnographic interest in the colonial encounter — an account from a settler in the Swan River colony (in Perth, 1836); the notes of Daisy Bates, which record material she collected some 76 years later at Eucla (on the South Australian – Western Australian border); and an article by Elkin about totemism and landed groups in the north of Western Australia some 20 years later. Palmer’s work should put to rest a number of ill-conceived ‘truths’ in native title connection, which are sometimes also promoted in academic literature: that there is necessarily a consistency in totemic attachments always demarcating relationships to specific tracts of ancestral land in the conflation of totemic and local organisation. It also shows us that analysing the unorganised data in the fieldnotes of early authors can potentially provide greater insights than those to be found in the synthesised models which are often found in their published accounts and which are not always substantiated by this primary data.

In considering Sansom’s view in relation to Western Desert ethnographic materials — that later research materials reflect a changed system and that the earlier ones (Roth, Mathews, Bates, Elkin, Berndt, Tindale, for example) had it ‘right’²⁴ — Palmer concludes that the diversity of the ethnography, its variable quality, and the predispositions and paradigms of its collectors are so variable that they can only be understood ‘as provisional, interpretative and, to some extent, speculative’.²⁵ This has significant implications for those involved in assessing and preparing connection materials as well as for claimants. All need to understand that early texts are not always reliable and that they are

contextualised and situated in terms of the foibles and proclivities of the writers themselves, the conditions of their production and their partiality. The strategic (mis)use of such texts, not only by claimants but also by lawyers and others involved in assessing connection, can give rise to or provide fodder for disputes among Indigenous people, as well as to misconceived ideas about who the native title holders are. Like McCaul in his chapter, Palmer concludes that the comparison of contemporary ethnographies with reconstructed foundational ethnographies may be irrelevant in proving continuity and connection when they are employed to identify absences. Rather, both argue that the focus should be on the laws and customs of the contemporary group and on identifying those elements that are continuous today.

Pilbrow discusses the need for contextualising early ethnographic source materials by examining Tindale's description of the Jaara (Lewuru) in central Victoria by reference to one of Tindale's sources, R. H. Mathew's article on the Tyeddyuwurru language. He queries Mathew's assertions about language similarities, his training in linguistic analysis, and his reliance on a 'somewhat eclectic collection of European language grammars'.²⁶ Pilbrow notes that it is a 'hallmark of the discipline'²⁷ to explain particular life worlds, hidden meanings and symbols, and to articulate these in systematic language and models. He highlights the importance of understanding the theories, paradigms and methodologies of the discipline of anthropology current at the time of production of a text in analysing both contemporary and early accounts. He also notes the need for native title anthropologists to clearly articulate their methodologies, including their practices of writing and argumentation. This should involve the clear articulation of the relationships between 'positions argued and data presented',²⁸ the theoretical perspectives that inform conclusions and the bases for drawing any reasonable inferences.

Pilbrow's and Palmer's questioning of the reliability of early accounts, and Pilbrow's suggestion that we should be openly reflexive of, and articulate our own practices, also open, of course (as one participant at the native title session at the 2009 AAS Conference pointed out), the work of contemporary scholars to criticisms of unsubstantiated assumptions. However, such reflexivity in interpreting alternative interpretations and approaches, in Pilbrow's view, can only be seen as strengthening any analysis of native title connection issues through a more disciplined and critical approach. Pilbrow also argues that contemporary anthropologists have a 'more extensive toolkit' and more developed 'disciplinary traditions' than did our predecessors from early periods of post-settlement Australian history.²⁹

Native title anthropologists are thus located in a single discipline of anthropology in which, it might be said, there are many anthropologies, and in which ideas are debated, contested and influenced not only within the discipline but in a range of other contexts, including the law. Multi-positioned researchers

provide a range of perspectives that enhance the discipline by bringing to it expertise and ideas from the legal, social, cultural, historical and political contexts in which they work.³⁰ The kinds of anthropology that it might be said that lawyers and judges undertake provide yet another dimension to the discipline.

Ways forward

Whilst research is not always seen as a policy issue in the native title regime, native title anthropological research is critical to the formulation of policy wherever the dynamics of native title groups are relevant. This includes policy decisions around possible changes to s 223 of the NTA, connection processes, agreement making approaches and corporate governance issues. Researchers themselves have also become a policy issue, most recently, in a survey concerning issues related to the retention of anthropologists in the native title system which was conducted by the Commonwealth Department of Attorney-General.

Trigger's paper in this collection reflects this interest as it addresses the training, recruitment and retention needs of graduates as professional researchers. He identifies a range of remedies, including the need for clearly defined career paths, apprenticeships and mentoring. Both he and Bauman comment that the blanket confidentiality provisions often negotiated around connection reports are problematic in accessing these reports for the professional development of early career anthropologists.³¹

In considering the careers of anthropologists in native title, it has been suggested that native title anthropology has been viewed too restrictively. As Martin recommended in his panel presentation at the 2009 AAS Conference, more anthropologists should be considering the anthropology of agreement making and of corporate governance, including decision making and dispute management processes and the structures and development of prescribed bodies corporate and other incorporated entities and trusts. He commented that working in such areas will mean working with issues of change and contemporary Indigenous politics and social transformation in a way in which, unfortunately, many current connection assessment processes do not appear to allow.³² Anthropologists, in identifying the heterogeneous and hierarchical matrices of rights and interests that characterise native title groups, can also play significant roles in facilitating more effective approaches to managing and negotiating disputes between Indigenous people which better reflect these rights and interests.

In order to attract anthropologists to native title, there is also a need to engender broader respect for and understanding of the discipline of anthropology including applied native title anthropology, across the full range of native title stakeholders. Trigger's chapter alerts us to the fact that the disci-

pline of anthropology has a significant opportunity for a substantial dialogue with legal practitioners and judicial officers around professional practice issues. His paper was prompted by a request from the convenors of the Queensland Native Title Forum, held at the Commonwealth Law Courts in Brisbane in August 2009, to address anthropological practice issues. With this readership in mind, the paper is practically oriented to clarifying specific methodologies and practice issues, such as timelines for preparing anthropological material to support applications and approaches to resolving disputes.

There is also a need for greater cross-disciplinary collaboration and understanding between lawyers, anthropologists, historians, archaeologists and linguists.³³ A significant number of researchers involved in assessing connection for state and territory governments and in preparing connection information in NTRBs and NTSPs are historians, and, as Pilbrow reminds us, anthropologists and historians should learn from each other.

Most significantly, there is a need to engender a more informed appreciation of anthropology among Indigenous people themselves. Significant numbers of Australian Indigenous people think that anthropology is only about studying 'natives'. Changing this perception will mean not only that applied and academic anthropologists and those associated with the broader discipline of Indigenous studies engage in a more critical and rigorous analysis around the meanings of Indigenous knowledge and intellectual property. It will also require sustained community education processes with the Indigenous people with whom anthropologists work in the native title field. Such processes could be spearheaded by the Department of Attorney-General in its responsibilities for the native title system as a whole, and might be undertaken by the National Native Title Tribunal and NTRBs and NTSPs.

Ultimately, anthropologists will only be attracted to native title anthropology and the native title sector to anthropologists, when the discipline asserts itself with confidence in its analysis, forcefully and fearlessly contributing to debates to ensure that native title discourses are more disciplined and informed. This will require the support of the native title sector as a whole to enable a greater exchange of ideas amongst the range of stakeholders involved, including researchers, claimants, lawyers, policy makers, and NTRBs and NTSPs.

Conclusion

Native title is an issue of justice and Indigenous property rights, as well as a fundamentally transforming process for claimants, and has long-lasting social consequences. In the processes in which anthropologists are involved, as Glaskin points out, rights are being determined and some claimants, at least, will continue to engage with native title. Despite certain suggestions,

described by Glaskin, that native title anthropologists may be duplicating the work of lawyers, anthropologists — whether in the academy or otherwise — have much to contribute. Not only do they offer practical assistance to NTRBs and NTSPs and claimants in preparing native title claims, they also promote epistemological understandings in the native title regime, understandings that they have gained not only via the discipline of anthropology but also through a range of engagements (rare in the rest of Australian society, including among judges and lawyers) with Indigenous people.³⁴

The papers in this collection demonstrate a growing awareness of the significance of anthropology in influencing law and policy, a greater sophistication in dealing with the law of native title as professionals, and a growing understanding of the role of expert witness. However, the native title regime urgently needs new ethnographies to enable greater reflexivity on the part of all involved. Such accounts might include ethnographies of the shadowlands, including policy formation and connection assessment processes; of the inter-institutional relationships and politics which can have a major bearing on native title outcomes; of connection preparation processes, including the legal instructions given to anthropologists and of the relationships between lawyers and anthropologists in a range of contexts.

In the native title regime, however, the gaze of all rests on Indigenous people. The mirror is rarely, if ever, held up to those who make decisions about them, who design and control the processes with which they expect Indigenous people to engage and who write about and research them — except, of course, when anthropologists act as expert witnesses.

NOTES

1. I wish to thank Fiona Skyring, James Weiner and the contributors to this volume for their comments. The ideas expressed are, of course, my own.
2. See Ron Brunton & Lee Sackett, 'Anthropologists in the Hot Tub', *Native Title News* vol. 6, no. 6, pp. 8–88, 2003; Rita Farrell, 'Hot Tubbing' *Anthropological Evidence in Native Title Mediations*, National Native Title Tribunal, Perth, 2007; Caroline Edwards, Louise Anderson & Siobhan McKeering, 'Anthropologists, lawyers and native title cases in Australia', *Anthropological Forum* vol. 16, no. 2, 2006, pp. 153–71.
3. The papers emerged from a stream of three sessions, titled 'Applied anthropology in native title in Australia: Dilemmas in "proving" connection and continuity in normative systems', on 10 December 2009 at the annual AAS Conference at Macquarie University in Sydney. The two sessions and a panel discussion were co-convened by Toni Bauman, Research Fellow at the Native Title Research Unit (NTRU) at AIATSIS, and Kingsley Palmer, a member of the AIATSIS NTRU Advisory Committee. The papers build on a body of legal and anthropological literature arising out of workshops dating back to the introduction of the NTA, a

number of which were sponsored by the NTRU at AIATSIS in conjunction with the AAS, and on occasion with a university. See the selected reading list at the conclusion of this collection.

4. *Wik peoples v Queensland* (1996) 187 CLR 1; *Western Australia v Ward* (2002) 213 CLR 1; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.
5. Benjamin Smith & Frances Morphy (eds), *The Social Effects of Native Title: Recognition, Translation, Coexistence*, Research Monograph No. 27, Centre for Aboriginal Economic Policy Research, Canberra, 2007.
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8. James Weiner, 'Eliciting customary law', *Asia Pacific Journal of Anthropology* vol. 7, no. 1, 2006, pp. 15–25.
9. See also James Weiner & Katie Glaskin, 'Customary land tenure and registration in Papua New Guinea and Australia: Anthropological perspectives', in James Weiner & Katie Glaskin (eds), *Customary Land Tenure and Registration in Australia and Papua New Guinea: Anthropological Perspectives*, Asia-Pacific Environment Monograph 3, ANU E Press, Canberra, 2007.
10. *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.
11. *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, Brennan J, pp. 58–63, 69–71.
12. Paul Burke, this collection, Ch. 4, p. 56.
13. Graham Hiley, 'What is the relevant 'society' for native title purposes? Will any society do?', *Native Title News* vol. 8, no. 9, 2008, pp. 143–7.
14. Burke, above, n 14, p 58.
15. See Peter Sutton, *Native Title in Australia*, Cambridge University Press, Cambridge, 2003.
16. Burke, above n 14, p. 57.
17. Robert McClelland MP, Attorney-General, 'Negotiating native title forum', paper presented to the Negotiating Native Title Forum, Brisbane, 29 February 2009, viewed 6 May 2010, <http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2008_FirstQuarter_29February2008-NegotiatingNativeTitleForum>.
18. Christopher Moore, *The Mediation Process*, 3rd edn, Jossey-Bass, San Francisco, CA, 2003.
19. Toni Bauman & Rhiân Williams, *The Business of Process*, Indigenous Facilitation and Mediation Project, Report No. 1, NTRU, AIATSIS, Canberra, 2004, p.11.
20. Frances Morphy, 'Performing law: The Yolngu of Blue Mud Bay meet the native title process', in Benjamin Smith & Frances Morphy (eds), *The Social Effects of Native Title: Recognition, Translation, Coexistence*, Research Monograph No. 27, Centre for Aboriginal Economic Policy Research, Canberra, 2007, p. 54.

1. Dilemmas in applied native title anthropology: Introduction

21. See also David Ritter, *Contesting Native Title*, Allen & Unwin, Crows Nest, 2009, especially Ch. 6.
22. Kim McCaul, this collection, Ch. 7, p. 113.
23. Noel Pearson, discussion comments at S 223 the Native Title Act Workshop, Agreements, Treaties and Negotiated Settlements (ATNS) Project, University of Melbourne, 4 June 2009.
24. Basil Sansom, 'Yulara and future expert reports in native title cases', *Anthropological Forum* vol. 17, no. 2, 2007, pp. 71–92.
25. Kingsley Palmer, this collection, Ch. 5, p. 90.
26. Tim Pilbrow, this collection, Ch. 6, p. 103.
27. Pilbrow, above n 26, pp. 97–98.
28. Pilbrow, above n 26, p. 98.
29. Pilbrow, above n 26, p. 98.
30. See John Morton, 'I-witnessing the witness: Courtly truth and native title anthropology', *Asia Pacific Journal of Anthropology* vol. 3, no. 2, 2002, p. 12.
31. See Geoffrey Bagshaw, *The Karajarri Claim: A Case-study in Native Title Anthropology*, Oceania Monograph 53, Oceania Publications, Sydney, 2003, for the only connection report of which I am aware that has been published to date, though I note that the South West Land and Sea Council in Western Australia is also in the process of publishing a revised version of the Noongar native title connection report.
32. David Martin & Toni Bauman, forthcoming, tentative title, 'Anthropological contributions to Aboriginal agreement-making', NTRU Issues Paper, AIATSIS, Canberra.
33. See Henderson & Nash, above n 4; Paul & Gray, above n 4; Toussaint, above n 4; Choo & Hollbach, above n 4.
34. Glaskin points out that there is an emerging body of judicial commentary on the role of anthropology and on anthropologists themselves. She notes that while some judges may have expressed reservations about whether anthropologists should be involved in native title, others have been grateful for their assistance. See also Patrick Sullivan, 'Don't educate the judge: Court experts and Court expertise in the social disciplines', paper presented to the AIATSIS Native Title Conference: Outcomes and Possibilities, Geraldton, 4 September 2002.

CHAPTER 2

Working with, for and against the Act: Anti-anti-positivism and native title anthropology

John Morton

As witnesses in courts of law, anthropologists are sworn to tell the truth, the whole truth and nothing but the truth. As *expert* witnesses, anthropologists are also enjoined to assist courts impartially on matters relevant to their expertise. Yet it is more than 20 years since James Clifford popularised the idea that anthropologists deal only in ‘partial truths’,¹ and a whole generation of anthropologists has been raised to be suspicious of positivist assumptions about discourse and the capacity of language to reflect objective situations. Thus, for example, a recent collection of papers on political violence included among its major themes the way in which institutional sites ‘ostensibly created for speaking...instead constrain speech’, particularly through ‘instrumental reasoning’ and ‘the positivism and forensic approach to truth contained within legal institutions and discourses’.² Such sentiments are commonplace and it would be surprising if they were not often voiced amongst anthropologists walking the corridors of Native Title Representative Bodies and various allied institutions.

While appearing as a witness in a Stolen Generations case,³ I was initially asked by respondent counsel if anthropology is a ‘science’. Thinking of the complexity involved in any thoughtful answer to that question and of the great diversity of opinion in the discipline, I merely stated that the question was not settled. On reflection, I could have simply said that it *is* a science, but that it is also an *art*. This is the matter that I wish to explore in this paper, specifically with reference to anthropology’s role in relation to the *Native Title Act 1993* (Cth) and the discipline’s degree of mistrust of institutional positivism. More specifically, I want to address the question of the relationships between positivism, evidence and partiality, in line with the original call for papers for sessions at the annual Australian Anthropological Conference 2009, which asked contributors to consider ‘dilemmas for anthropologists’ in native title’s

‘legal requirements for “positivist” approaches to the “proof”’ and in the fact that ‘all ethnographies are “partial”’ — including the early ‘positivist’ ones which have proved to be so critical in native title cases. Hence, my cue is taken from the scare quotes surrounding the terms ‘positivism’, ‘proof’ and ‘partial’, which appear to signal doubt and/or suspicion. In clarifying the relationships between positivism, evidence and partiality, I aim to suggest that anthropologists should be less doubtful and less suspicious in native title and other forensic contexts than might generally be the case after more than two decades of the forced conjunction of ‘poetics’ and ‘politics’, especially in relation to the claim that anthropology might in some sense be a ‘positive science’.

Positivism

When anthropologists consider positivism, they are most likely thinking about certain allied forms of epistemology, but in law there is also something called ‘legal positivism’. These two positivisms are not quite the same. Legal positivism is a relativist thesis about law being based on public convention rather than morality — ‘the thesis that the existence and content of law depends on social facts and not on its merits’.⁴ Legal positivism is particularly reflected in post-*Yorta Yorta*⁵ native title, since the definition of a ‘society’ as ‘laws and customs’ with ‘normative’ force is precisely the kind of ‘positivist’ language which makes no judgment about the merit or values of any particular legal system, while simultaneously assuming that this language is universally applicable to the ‘real world’. However, legal positivism and anthropology do significantly overlap, since the very same relativism informs the classical ‘social fact’ formulations of social order bequeathed to us by Marx, Durkheim and Weber.⁶ Legal positivism similarly emphasises clarity of exposition, precise definition and entification, which is why the language of *Yorta Yorta sometimes* reads like Durkheim’s *The Rules of Sociological Method*.⁷

However, positivism in anthropology does not generally refer to this definitional terrain, but rather to a particular form of epistemology relating to the importance of sense experience. While the idea of positivism was originally coined by Auguste Comte,⁸ and from there found its way into Durkheim’s system, this is not the robust form of empiricism which was to later gain the same name in the earlier part of the 20th century, only to be roundly denounced during the so-called ‘post-positivist’ turn of more recent decades.⁹ The species of positivism with which anthropologists are most familiar sets criteria for judging the universal adequacy of systems of knowledge, whereas legal positivism says nothing about standards by which ideas and practices can be judged as ‘true’ or ‘false’, ‘right’ or ‘wrong’. Such systems exist in their own right and are *sui generis* — the term which Durkheim applied to social facts and

which in 1997 was also applied to describe Canadian native title ('Aboriginal title') in *Delgamuukw*¹⁰ (although this was subsequently ignored in Australian jurisprudence).

As anthropologists of the early 21st century, we are usually only concerned with early 20th century positivism, on which it is often thought we have completely turned our back. This is an ideological position characteristic of late modern social science, which, as Clifford Geertz famously put it, should see itself as 'interpretive' and 'in search of meaning' rather than 'experimental' and 'in search of 'law''.¹¹ It may not be that we all subscribe precisely to such a view, but it would be few who would these days stand up and declare themselves to be even part-positivists.

In fact, however, as an explicit epistemology, positivism went on a long roller-coaster ride after it was 'invented' by Comte, modified by Durkheim and appropriated by Radcliffe-Brown.¹² My sense is that positivism is generally a loose charge we fling to separate ourselves from such past masters and so define ourselves as 'modern' (or perhaps *post*-modern). But as Don Gardner has shown,¹³ the 'scary' quality of positivism, while quite systematic in anthropology, tends to be taken far too seriously, so that positivism is treated as if it could only be a threat to interpretivism. Or, to paraphrase him more accurately, we are apt to portray the opposition between positivism and interpretivism as a kind of historical face-off in which positivism blinked first, turned its back and left hermeneutics to rule the roost. But this isn't really how it happened — at least, not for those who, for example, followed critics like Richard Rorty¹⁴ and came to be satisfied with a more pragmatic or provisional view of knowledge which dispensed with the metaphor of the mind as mirror to the world, privileging neither map nor territory, yet also acknowledging that truth or falsehood could only be in the model, not in reality itself. These points touched on certain classical themes in anthropology, such as Evans-Pritchard's criticism of Lévy-Bruhl's understanding of logic¹⁵ and Lévi-Strauss's attacks on the empiricism of Radcliffe-Brown,¹⁶ neither of which discounted the need for both coherence and empirical observation in anthropological work.

Ideological anti-positivism tends to engage what Lakoff and Johnson call 'the myths of objectivism and subjectivism',¹⁷ where objectivism and subjectivism are regarded as the handmaidens of positivism and interpretivism respectively. Objectivists tend to think that giving up on some idea of absolute truth is to give into 'arbitrariness', while subjectivists tend to identify with the notion that reality is constructed 'free of any constraints',¹⁸ so that objectivity and subjectivity are also polarised as a 'face-off'. Lakoff and Johnson do not reject binarism — they say that it reflects the dual nature of experience. But as they say, from an 'experientialist' point of view:

2. Working with, for and against the Act

Truth is always relative to understanding, which is based on a non-universal [sic] conceptual system. But this does not preclude satisfying the legitimate concerns about knowledge and impartiality that have motivated the myth of objectivism for centuries. Objectivity is still possible, but it takes on a new meaning. Objectivity still involves rising above individual bias, whether in matters of knowledge or value. But where objectivity is reasonable, it does not require an absolute, universally valid point of view. Being objective is always relative to a conceptual system and a set of cultural values. Reasonable objectivity may be impossible when there are conflicting conceptual schemes or conflicting cultural values, and it is important to be able to admit this and to recognize when it occurs.¹⁹

‘Making sense’ and ‘reality testing’ are really all positivism was ever about, although certain positivist doctrines may have misconstrued the relationship between the two. In principle, and very largely in practice, anthropology as a science continues to stand or fall in relation to both demands, even when practitioners see themselves as being anti-positivist. The problem reminds me of the exchange between Clifford Geertz and Edmund Leach, when Geertz sneeringly accused Leach of ‘vulgar positivism’ and Leach replied that he was happy enough with the label because ‘positivists, vulgar or otherwise, usually show signs of knowing what they were talking about’.²⁰ Crude as this exchange was, it does illustrate the positivist aspiration to be confident that one is cogently in touch with objective reality. On the other hand, it also perhaps points to the fact that over-confidence is not only arrogant, but also risky; it is always dangerous to think that one has a tight hold on reality or that one possesses *the* version rather than *a* version of the truth. Following Pierre Bourdieu,²¹ I am tempted to say that any manifestation of extreme objectivism is really a kind of largely unreflexive, and therefore generally unrevisable, ‘just so story’.²²

The quite long history of epistemological positivism shows that extreme objectivism is not particularly scientific, since science proceeds through the pragmatics of both routine and revolutionary problem solving,²³ a key aspect of which is the dynamic use of both conventional and novel metaphors.²⁴ Science is never an entire set piece. As the history of native title in Australia shows well enough, the legal system works in parallel ways — in fact, sometimes quite strictly parallel ways, because new paradigms in disciplinary knowledge often lead to new versions of law. Australia’s recognition of native title, for example, would not have come about without certain epistemological breaks in history and anthropology, which suggests that positivism *per se* should not be a major worry in the crossover between law and anthropology. Anthropologists may have not

so much abandoned positivism as generally surpassed it by acknowledging that truth is always relative to some ‘way of life’ — which ironically leads directly back not only to the relativist doctrines of legal positivism, but also to Comte’s original demand that positive science be the autonomous, yet subordinate, handmaiden to society as a politico-juridical domain.²⁵ It is also ironic that legal relativism leading to forms of, and struggles for, recognition (as in native title) should be commonly construed in terms of exclusive imposition rather than mutual adjustment conditioned by some sense of *realpolitik*.²⁶

Evidence

All of which raises questions about proof and evidence. Facts are things *found* in both anthropology and the law, while opinions are things *expressed* in both anthropology and the law. The boundary between facts and opinions is not always obvious, since facts are facts by dint of agreement. There are substantial differences between anthropology and the law, but there is common ground in relation to the use of reason and evidence in assessing what is likely to be true or false. Of course, what is generally at stake in the academy is different from what is generally at stake in the law, but the common ground is precisely what allows anthropologists to act as experts in forensic contexts.

I am not at all familiar with the legal meanings and applications of phrases like ‘beyond a reasonable doubt’, ‘preponderance of the evidence’ or ‘clear and convincing proof’, but such phrases are indicative of the way in which positive standards are applied in trying to arrive at the truth. It seems to me that none of the phrases should be alien to anthropologists and that they are, for example, exactly what we are supposed to have in mind every time we mark an essay or referee an article, although I am, of course, aware that this is not always the case and that such academic regulation may sometimes fall far short of adequate social scientific standards.

It also seems to me that the phrases signal a further point: the other side of believing that something is ‘beyond a reasonable doubt’ is to recognise that one might still be wrong — in other words, that doubt has not wholly taken flight, that new evidence could conceivably alter the weight given to earlier evidence, and that something taken as proven at one point in time could later be regarded as much more doubtful. It is one of the paradoxes of positivist thinking, at least in this context, that its certainties are provisional. If they are not provisional, they can never be shown to be wrong. Again, however, I am aware that, depending on disposition, relative certainties have a way of turning into dogmas, whether in law or anthropology and in spite of procedures in both for minimising unreason.

The recent *Jango* case ('Yulara')²⁷ has proved to be an arena where lots of concerns about the relationship between reason and evidence have been expressed. One of the things I noted about the case in the *Anthropological Forum* discussion of a paper by Basil Sansom²⁸ was that there was great irony in the charge against Peter Sutton that he had failed in the anthropology report to adequately distinguish fact from opinion, given that his report (jointly penned with Petronella Vaarzon-Morel) was highly empiricist in nature.²⁹ Sutton himself was to say in the same *Anthropological Forum* discussion:

Legal culture is not anything like as empiricist in approach as it is often assumed or pretended to be. It is ironically almost as phenomenological in temperament as Western Desert thought. It can find itself in anxious competition with the much younger intellectual tradition of scientific method, playing a jealous Rex to an aspiring Oedipus. Yet its discourse is far more powerful than that of scientific method, because it creates enforceable outcomes. Understandably, the late Ronald Berndt..., writing of the Gove land rights case, said it had made him realise that the expert evidence had been a matter of the raw and the cooked: anthropologists were the raw material there to be cooked by lawyers. Yulara was litigation, not an administrative inquiry into the facts, so it had to follow the Byzantine and stultifying rules of evidence that were designed for utterly different forensic contexts. Yulara was a case in which law and anthropology were somehow made to join each other in competition. The predilections of the law, not social science method, won.³⁰

This conclusion was somewhat in line with my criticism of Sansom's suggestion that, when writing in forensic contexts, anthropologists need to shed 'academic habitude',³¹ since it seemed to me that we need instead to refine that 'habitude' so that we can construct more convincing narratives that can be accommodated within the law's peculiar *habitus*.³² In other words, I suggested that anthropologists, rather than relying too heavily on an empiricist conception of the law, should also consider that they are required to produce texts which will be placed and understood in an arena marked by its characteristic suite of durable and generally fastidious dispositions.

The Yulara discussions in *Anthropological Forum* generally illustrate that most anthropologists would agree that Sackville J does not understand anthropology, and probably sees no requirement to understand it — an odd and unreasonable situation for someone who sometimes has to listen to expert evidence from anthropologists, but one reflected in sometimes cautious

instructions to anthropologists to not ‘educate the judge’.³³ The point I want to make, however, is that I believe we don’t think often enough or clearly enough about the problem in reverse, which is the law’s requirement to be understood by anthropologists. By this I am not thinking about anthropologists’ need to understand things such as the *Evidence Act 1995* (Cth) or the Federal Court’s guidelines for expert witnesses. I am thinking about the whole matter of the legal *habitus* — the ways of perceiving, thinking and acting more or less distinctive to the legal profession. If we really are in a time of experientialist epistemology, why would we not want to project ourselves more fully and ‘positively’ into the law’s inherent qualities of mind and character in order to more effectively communicate anthropology? This is what I have in mind when speaking of ‘refining’ what Sansom calls ‘academic habitude’, since it may well be that some of the communication problems we experience (and which were writ large in *Jango*) inhere less in the law’s appreciation of academic theory and method as in the academy’s relative ignorance of legal theory and method, both formal and informal.

Aside from the Evidence Act and the Federal Court’s guidelines for expert witnesses, the main area where anthropologists generally might encounter legalese is in a brief. As far as native title is concerned, a brief is likely to contain references to terms which are part of s 223 of the *Native Title Act 1993* (Cth) and those terms as they have been elaborated upon in *Yorta Yorta*. For example, the first brief I received after *Yorta Yorta* asked me to address a number of matters involving the following terms or phrases, which were both italicised and placed in bold type: ‘society’, ‘the body of laws acknowledged and customs observed’, ‘traditional’, ‘continued’ and ‘substantially uninterrupted’ — all of which have now become the applied anthropologist’s stock-in-trade. Each of the emphasised terms or phrases carried a footnote drawing my attention to relevant passages and definitions from *Yorta Yorta* — for example, “‘society’ is to be understood as a body of persons united in and by its acknowledgement and observance of its laws and customs”; ‘Traditional...reflects the fundamental nature of the native title rights and interests with which the Act deals as rights and interests rooted in pre-sovereignty traditional laws and customs’ in a ‘normative system’ which has ‘had a continuous existence and vitality since sovereignty’; and ‘The native title rights and interests must...find their source in the traditional law and custom’.

The brief asked me to ‘pay particular attention to the definitions’, on the assumption that ‘they correctly state the effect of the legal definition of the terms’. It added: ‘Where such a legal definition differs from the understanding of the same term or an equivalent concept in the discourse of anthropology, you should identify the anthropological understanding(s) of the concept.’ I have not seen this requirement in any other brief since and I suspect that it is not a

common demand made upon us. However, it is a demand which intrigued me then and continues to do so, even though anthropologists are sometimes told to vacate the premises where concepts such as ‘society’ are defined at law.³⁴

I do not think it is possible to vacate these premises when writing connection reports or other documents which are constrained by this definitional landscape. In the report generated by the aforementioned brief, I wrote:

I make particular note of that part of the original brief that asks me to be explicit about the anthropological meaning of particular terms in relation to their legal definition. My view of this matter is that anthropological terminology, while sometimes technical and/or universally assented to by anthropologists, is more often a matter of the recognition of the currency of a more or less common stock of [what Ian Keen calls] ‘terms of art’...These terms are, like the terms used in legal documentation, usually ordinary words whose meaning is closely related to everyday usage. In anthropology, the terms are often revisable — and indeed, to the extent that they work as models of reality, they are intrinsically revisable in the light of empirical findings and theoretical reflection. Keen...maintains that this revisability is both similar and dissimilar to the ways in which the legal fraternity interprets the law. Without going into details about any possible relationship between anthropology and the law, I take the view that, while anthropological use of terminology and legal use of similar or related terminology are to be distinguished in certain respects, the two are related by the common thread of being grounded in ordinary language. To that extent, anthropological usage and legal usage can be mutually informing. In the case at hand, since I am briefed to consider anthropologically the applicability of specific legal concepts in a particular ethnographic context, it may not always be a simple matter to fully separate ‘legal definition’ from ‘same terms’ or ‘equivalent concepts’ in ‘the discourse of anthropology’...However, I understand that my role is to ‘identify the anthropological understanding(s)’ of particular concepts rather than to redefine what has already been defined or interpreted in law. In that sense, any explicit discussion of terminology in this report is an attempt to shed specifically anthropological light on words that have established meanings in a legal framework. I do not regard my role as one of taking issue with those meanings.³⁵

I have not found it necessary to be so explicit about this matter in any document written since I penned this passage, but I have never written anything about ‘society’ or the other key terms and phrases without having it at or near the

front of my mind. There is, I believe, a place for ‘same terms’ or ‘equivalent concepts’ in ‘the discourse of anthropology’ within whatever it is we write about normativity and connection — and not simply in the sense that one would generally like to contrast current interpretivist or even ‘power/discourse’ understandings of ‘society’ with those allegedly characteristic of some high-positivist era of anthropology but which seem to find parallel contemporary expression in *Yorta Yorta*. Rather, as suggested above, I underline the fact that legal and anthropological discourses in Australia are both simply part of the English language. As such, they contain the same potential for the normal ‘play’ of language, including its so-called ‘poetics and politics’. Naturally, my statement about not taking issue with meanings defined at law is a gesture of obeisance to that law, but the stress on the ‘common thread’ linking legal and anthropological terminologies is also a statement about the anthropologist’s freedom and agency in legal processes. The fact that anthropologists are bound by legal definitions does not mean that, as experts, they have little or no freedom of movement. A common language is not a straightjacket — it is a structure which intrinsically permits some degree of free expression.

David Ritter’s analysis of Olney J’s use of the phrase ‘washed away by the tide of history’³⁶ in *Yorta Yorta* is a good example of how ‘poetics and politics’ are embedded in a discourse which stretches far beyond the legal horizon. Ritter’s article begins with the two epigraphs: Alain Robbe-Grillet’s ‘metaphor, in fact, is never an innocent figure of speech’ and Henry Taylor’s ‘discontinuity in history is an illusion’. He then goes on to indicate the partiality of the phrase ‘tide of history’, its recent origins in Brennan J’s *Mabo* judgment,³⁷ the earlier use of cognate phrases and its transubstantiation into ‘half-dead’ metaphor signifying colonialism as an invincible and ‘immutable force’ comparable to the ‘Last Judgement’ — a kind of grand ‘just so story’, as assertions of sovereignty always seem to be (including Aboriginal Dreamings). Ritter’s point here is not that Olney J’s deployment of the phrase endorses the fairness and legitimacy of colonial history — as he says, ‘native title is deaf to historical injustice as a basis for contemporary redress’ and is ‘not of its nature remedial’; rather, a ‘native title claim merely gives rise to an *inter pares* dispute which can be resolved by mediation or by litigation in a declaration of proprietary rights’.³⁸ The point is to draw attention to the construction of Yorta Yorta history as being ‘unnecessarily imbued with a rhetorical apologia that removed from the colonisers any agency in the process of dispossession’ and Olney J’s ‘characterisation of present-day Yorta Yorta society...[being] redolent of earlier understandings of post-classical society as being decayed’.³⁹ Ritter’s object, then, is to simply frame and explicate the role which metaphor played in Olney J’s view of Yorta Yorta society as an extinguished object and to suggest that, ‘if certain kinds of groups of Aboriginal people are not to be

permitted to obtain native title, then that decision should be made openly, and not cloaked under a figure of speech'.⁴⁰

There are obvious lessons here about how to anthropologically model Aboriginal societies and I assume that any anthropologist who believes the evidence points to a particular Aboriginal group's continuity of connection might well steer clear of this particular metaphor, although, as Ritter states, the:

critique of Justice Olney's conceptualisation of history does not require a faith that 'traditional activities' never really 'disappeared' or were 'washed away' but 'maintained some hidden subterranean existence during the Dark Ages of Indigenous deprivation'.⁴¹

There is, in fact, no need to turn Aboriginal societies into wannabe King Canutes and it would obviously be poor anthropology to do so by refusing to model what those societies might have lost since colonisation — although we should also not underestimate the degree to which Aboriginal groups have, in fact, dissembled their practices and beliefs.⁴² To that extent, and depending on one's view of the facts, one might only be concerned to *limit* the metaphor rather than completely avoid it — so the more general point is that poetics simply need to be carefully and pragmatically deployed.

It is always important to consider the distinction between text and subtext when writing in forensic contexts. As Ritter notes, the High Court in *Yorta Yorta* did not itself employ the idea of the tide of history, but its judgment can certainly be read in the spirit of the phrase.⁴³ Part of this relates to the contradiction between continuity and change, with a great deal depending on the phrase 'substantial interruption'. After *Yorta Yorta*, we know that a normative system has to have had 'a continuous existence and vitality since sovereignty' and to that extent it has to be the *same* system; on the other hand, 'change or adaptation' of the laws and customs is permissible, so long as they remain 'traditional',⁴⁴ so that it is acknowledged that the system can contain *difference*. But how does one conceive of something changing while remaining the same?

Since the High Court upheld Olney J's judgment, there is a sense in which it favoured sameness over difference, continuity over change — and I think it probable that lawyers working on behalf of claimants invariably look in the same direction when searching for the strengths of a case. While *Yorta Yorta* allowed for change and adaptation, it also seemed to make it more difficult to recognise the continuous histories of Aboriginal societies, which might be understood as the subtext of the words from the bench. Yet in spite of this, the High Court also provided a code with which to model change — one which has spurred anthropologists to look harder at ways to adequately model what they

understand to be the facts of continuity and discontinuity in the more settled regions of Australia. To some extent the effort predated the High Court's ruling on *Yorta Yorta*, which is unsurprising, since the ruling itself was not built *ex nihilo*, but rather out of an understanding, however controversial, of the *Native Title Act 1993* (Cth). For example, in 2001 Gaynor Macdonald gave lengthy and careful consideration to the relationship between 'culture' and 'history' with direct reference to problems posed by the Act,⁴⁵ and by 2006 Francesca Merlan had mounted a broader constructive critique of the idea of tradition deployed in native title and allied institutional sites in Australia.⁴⁶ However, the actual terms of the Act and their subsequent transmutations received little attention in terms of their potential for adequate anthropological modelling of continuity and discontinuity.

In that regard, I note that the High Court's code for modelling change was profoundly metaphorical in nature. This, I suspect, reflects something systematic about the use of dead metaphors in both the law and language more generally. The High Court said that the society must be a *body* united by its laws and customs; that a contemporary normative system had to be *rooted* in the original society; and that the contemporary rights and interests have to have their *source* in the original society (which is what makes them fundamentally traditional). 'Bodies', 'roots' and 'sources' — these are metaphors a lot more dead than 'the tide of history', but they are profoundly metaphorical nonetheless. They evoke limbs, torsos and internal organs; they evoke plants reaching up to the sky at the same time that they nourish themselves deeper in the ground; and they evoke springs, streams, rivers, tributaries, flows, eddies and backwaters. In other words, they evoke a rich, if largely implicit, poetics pertaining to 'traditional societies', which, depending on what it is we wish to say, we can use either explicitly as open metaphor or as quiet inspiration for modelling — in Lakoff and Johnson's terms, as 'metaphors we live by', or as 'metaphors Aboriginal societies live by', for example, through ideas about 'bloodlines' and 'family trees'.⁴⁷

Merlan cites Noel Pearson's view that native title is, or should be, 'inherent in continuous occupation without need for demonstration of its (changing) socio-cultural bases, which are held to be a matter *inter se*'; she then queries what 'continuous occupation' could possibly mean, 'if not also specific practices of inter-generational transmission', although Pearson himself suggests that 'the fact that Indigenous people are present should allow continuity to be inferred', so bypassing 'the need for specific inquiry into it'.⁴⁸ It is not an anthropologist's job to question the law, at least not while acting as an expert; our job is simply to deal in law's terms as they stand. But Merlan's question about 'inter-generational transmission' is important because, in my experience, it reflects

the fundamental character of claims to native title made by groups acting as a 'body of persons' descended from original occupiers of the land. What counts as continuity or 'intergenerational transmission' in such regimes is very much a function of the way one puts the case and deploys the relevant tropes — 'body', 'root', 'source', etcetera.

For example, one option would be to take the idea of 'family trees' more seriously and hitch it to Sutton's elaboration of the idea of 'families of polity'.⁴⁹ We do, of course, routinely deal in genealogies, but we are apt to treat them as handy non-indigenous reference points rather than as Indigenous cultural artefacts from which certain inferences might be made. Diane Bell, for example, suggests that genealogies are often treated as sacred texts⁵⁰ and it strikes me that, as documents, they are often treated by Aborigines as incontrovertible proof of connection to place in much the same way as more classical sacred objects were in the past. Naturally, one needs to invest a good deal of anthropological labour in arguing for a convincing conjunction between past and present in circumstances like these, but the language in which to couch it comes readymade. The social 'body' or 'body of persons' reproduces itself in precisely the way which genealogy implies — in classically anthropological terms as an entity which persists as individuals continue to pass through it.

Moreover, family trees have points of origin which are both the 'roots' and the 'sources' of the contemporary society, which by definition is formed as 'branches' or as the repositories of 'flows'. Assuming we have good evidence of the robustness of some particular contemporary Aboriginal society, particularly in a case where this society has in many respects visibly modified its form, difficulties may arise in any attempt to demonstrate continuity. But the question might be posed in reverse: what would count as *discontinuity*, particularly in view of Merlan's remark about 'continuous occupation' and 'specific practices of inter-generational transmission'? We may, in these circumstances, have reasonably good data with which to model the original (at sovereignty) society, but it is unlikely that we will have anything like detailed ethnography to guide us through the transition from the deep past to the ongoing present. Nor will we be able to rely on oral evidence uninformed by written records, due to the normal 'limitation of recall' characteristic of Aboriginal societies.⁵¹

On the other hand, there are the genealogies themselves, in all likelihood critically informed by both oral history and documentary records, which function like self-evident propositions about continuity to claimants, but which frustratingly simplify history for anthropologists. Much depends on the circumstances of the legal process, be it in or out of Court, when it is agreed that there is a society now and that there was a society then (at sovereignty). I submit that, so long as other evidence does not point in a different direction, the only inference that an anthropologist can make in such circumstances is

that the society has *probably* continued from the past to the present through ‘specific practices of inter-generational transmission’ — that it is ‘rooted’ in the deep past, originally ‘founded’ there and has since ‘flowed’ from its source. Although this account is hypothetically framed, it follows, in a much simplified way, a concrete situation which led to a consent determination in Victoria.⁵² There are, of course, other constructions which could have been, and in fact were, placed on the data, but the pragmatics of the situation led to an acceptance of the inference outlined above. The example does not outline a template which can be applied in other circumstances; it simply illustrates the usefulness of thinking ‘con-figuratively’, which can be particularly applied in relation to ideas about tradition which emphasise context, incorporation and configuration. Although Merlan particularly relates such ideas to scholars such as Raymond Williams and Robert Nisbet,⁵³ they have a far deeper anthropological provenance in classical Boasian anthropology⁵⁴ and surfaced again in the post-1990s literature on ‘hybridity’.⁵⁵

Partiality and the Native Title Act

The ‘writing culture’ movement,⁵⁶ while critical of anthropology’s use of tropes, nevertheless rightly insisted that they were unavoidable. But a pragmatic or experiential approach to knowledge also suggests that this necessity involves the collapse of that famous distinction which Geertz once made between ‘models of’ and ‘models for’,⁵⁷ particularly in the context of native title. The model which we build *of* a society in native title cannot be distinguished from the model which we build *for* that society, a matter which we are perhaps aware of when we argue about both the partiality of ethnographic representations and the impact which these representations have on the people represented.

In mid-2008, for example, there was a flurry of activity on the Australian Anthropological Society email network (AASNet) about the partiality of descent models and whether they were ‘true’ to Aboriginal social reality or distorted it. Similarly, there have been a number of publications concerning the destructive and constructive social impacts of native title and other settler institutional processes.⁵⁸ I often find it hard to tell the difference between ‘models of’ and ‘models for’ in these discussions, although exactly what the models *are* for is something of a moveable feast, often depending on the political persuasions of the authors and their takes on indigeneity, colonial history and governance. For example, I am not persuaded by the view that modernity contains a particular ‘proclivity to boundary fetishism’,⁵⁹ which is routinely but inappropriately applied to colonised groups like Aborigines, whose social reality is more appropriately modelled by strings and networks⁶⁰ — not because these strings and networks are not appropriate, but because they

are not necessarily incompatible with countervailing tendencies to close ranks. Similarly, I do not think that anthropology's involvement with state apparatuses is entirely responsible for 'reified demarcations of Aboriginal identity'⁶¹ (or 'tribes'), even if they (we) serve as partial conditioners of transformation. To go only with some form of 'invention' thesis not only surrenders comparison in favour of contrast, but also ignores what is especially critical in native title itself; namely, that it too easily makes Aboriginal traditions appear 'phoney' or lacking any origins in Indigenous domains. This form of partiality is what Sahlins calls 'explanation by way of elimination'⁶² — that is, by way of masking 'the *inventiveness* of tradition'.⁶³

This brings me to the 'partial' early ethnographies mentioned in the call for papers, about which I want to make a related point. In the Sansom exchange in *Anthropological Forum*, not a few of us rightly baulked at Sansom's apparent endorsement of the idea that early ethnographies are the best guide to tradition.⁶⁴ For example, we have very sound reasons, based on a welter of facts, for rejecting Radcliffe-Brown's⁶⁵ or Tindale's⁶⁶ model of territorial organisation, even if, as Yulara showed, it sometimes proves impossible to get our point across. But rejecting Radcliffe-Brown or Tindale on empirical grounds is not to be confused with a wholesale rejection of their positivist dispositions or, in Radcliffe-Brown's case, his grounding in structural functionalism or — what might be a somewhat different beast — Durkheimian sociology.

My own view is that, while Radcliffe-Brown and Tindale require sufficient qualification for us to be able to say that they were partial in the sense of being wrong — that what they said about a uniform rule of patrilineal descent was not true — we cannot nearly so cogently dismiss Durkheimian ideas about the unity of society or the fact that societies are, in some sense, constituted for a 'commons' around which one needs to draw a line defining a sphere of jurisdiction. If, as Nancy Williams says, 'boundaries are to cross',⁶⁷ that is one thing; but the fact of there being boundaries in the first place is a different, if obviously related, matter. For reasons that need not be explored here, we have in recent decades shifted from viewing Indigenous groups as bounded to viewing them as open-ended, at the same time shifting our view of modernity from 'open' to 'closed'. Either way, we seem to insist on Indigenous polities as being wholly 'other', unbalanced by any idea that this 'other' might also contain 'elementary' forms or structures with which to compare likenesses — without any idea that dynamic networks might have nodes around which things tend to cohere and solidify. As Sahlins states, 'Apologies for structure are now necessary.'⁶⁸

One thing which is very apparent after *Yorta Yorta* is that, in spite of, or maybe because of, the relativism inherent in legal positivism, native title requires likenesses to be found between Indigenous legal systems and our own. For

some, this is ‘the *cunning* of recognition’⁶⁹ or even ‘bad faith’.⁷⁰ For others, it is the *extension* of recognition or social inclusion.⁷¹ It is probably just the ongoing *struggle* for recognition, with all that that entails in terms of both painful and liberating adjustments, as well as anthropological agency vis-à-vis emergent forms of law and custom in both blackfella and whitefella domains. As James Weiner has argued, ‘eliciting customary law’ is a function of the individualisation of cultures across a larger relational field — in this case defined by the national boundaries within which the *Native Title Act 1993* (Cth) applies — without, for all that, meaning that the laws and customs so recognised appear as having their source and agentive scope outside of Indigenous life worlds.⁷²

One thing is for sure, we cannot afford to lose sight of Durkheim’s organic analogy — originally Herbert Spencer’s⁷³ — since this metaphorical axis is one of those enshrined in native title law. We need to run with it, dealing with its potentialities, qualifying them by pointing to limitations and calibrating the paradigm against other ways of seeing which might be equally intelligible to the law. Hence, acknowledging the partiality of the organic analogy is not necessarily inconsistent with acknowledging its applicability. Different perspectives can and often are accommodated in legal processes, so long as they do not conflict — and we need to be extremely careful in the way we measure conflict and contradiction. Things which look inconsistent from one point of view can look quite compatible or reconcilable from another angle — for example, change and continuity. I am not who I was 30 years ago, yet I am also manifestly the same person — a contradiction which I am sure any lawyer or judge can understand as well as I do. That contradiction is the stuff of life — ‘dialectics’ — should hardly be surprising to social scientists. What may be more surprising in the currently dominant intellectual climate in anthropology is that a hypercritical stance towards state power neither necessarily serves the aims and interests abroad in Aboriginal societies, nor completely reflects those societies’ actual workings.

This, then, is what I mean by working with, for and against the Act. We have to work *with* the Act (in all its rambling developments) because it is imposed from on high and is the only permissible discursive frame. So we need to pay close attention to it and it is not much use complaining about its positivist presuppositions, which are, in any case, often misunderstood.

And we have to work *for* the Act because it represents a discursive field which, like other cultural fields, is structured in such a way as to make it generative — remembering that Bourdieu’s notion of *habitus* was partly borrowed from Durkheim’s nephew, Marcel Mauss,⁷⁴ who was inspired by his uncle’s ‘positivist’ notions that ‘active force’ (his famous idea of ‘constraint’) is ‘productive’⁷⁵ and that ‘human volitions are connected to external events’.⁷⁶ Whatever one thinks

of what has happened to s 223 since 1993, the relevant discourse manifestly remains an open and competitive field.

Finally, we also have to work against the Act when we believe on good grounds that it misleads. We cannot, of course, challenge what is defined at law, but, since text and subtext are not the same, we need to keep in mind the ways in which the text can be ‘miscarried’. But it isn’t just the law where we have to be vigilant — there are subtexts in anthropology, too. One might seek one every time positivism is positioned as ‘old hat’.

Post-presentation discussion

Participant: Is there a version of what you have said that you would like the legal profession to read? Who do you see as the audience, readership or receptors of these types of commentaries?

John Morton: This paper is primarily addressed to anthropologists who are interested in this particular type of work. I don’t see any reason, given the fact that we all speak English, that we shouldn’t be able to make ourselves understandable by using reasonable and intelligible language to communicate this information to lawyers. This can be accomplished particularly by using examples and illustrations to explain the nature of contributions and their role in transformations.

Participant: It is important that we are aware of the overwhelming pragmatics of many legal professionals who are holding their own committees to discuss the future. We need to situate our commentaries with illustrative material relating to the kinds of practical processes that they might be addressing. I don’t see a great deal of interest amongst legal practitioners working in this area in sitting back and speculating about theory and positivism. For us to gain an audience and to get purchase for some of the ideas that we debate at our anthropology conferences, we have to be as pragmatic as possible.

John Morton: This paper is not written with the legal profession in mind. However, there are contexts where it would be necessary to identify the appropriate language for having discussions with lawyers about issues other than those relating to simplified notions of empirical facts, but which model those facts in a reasonable and credible way. I think that I can transpose this understanding, though difficult, to those contexts. For example, I was asked in an expert’s conference with three other anthropologists to make a case for why I agreed with two of the anthropologists and not with the third. I was asked to put these considerations into a form that could be used for the state government to get a consent determination. The document eventually went to the Commonwealth in its entirety.

Participant: There are a number of us who bemoan the lack of classics training in contemporary anthropology and you mentioned the idea of artisans in your preamble to the presentation. Artisans used to have apprentices and I want to know what you think about how we are to train our successors to do this sort of thing, given that your paper goes all the way back to Comte.

John Morton: It is of central importance to ground these sorts of topics in the classics, which we should be teaching as core topics for first-year university students. The idea that somehow we have gone beyond the classics with new cutting-edge ideas is not useful. We are still looking for the same metaphors in locating the legally based ‘roots’ in native title. If we understand continuity and change in our own anthropological traditions, then we have a fair chance of being able to apply these understandings to the native title field.

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2. Working with, for and against the Act

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2. Working with, for and against the Act

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CHAPTER 3

Litigating native title: Anthropology in the Court

Katie Glaskin¹

Introduction

Australian native title law provides for the possibility that Indigenous Australians' property rights, as based on their laws and customs, may be legally recognised. Since this recognition is predicated on establishing a 'traditional connection', it requires Indigenous claimants to demonstrate continuity between those laws and customs that they currently acknowledge and observe and the laws and customs exercised by their forbears when the British declared sovereignty over their land. Native title legislation therefore requires applicants to show continuity of a system of human–land relationships over time. Morphy has argued that:

The primary reason for using...[anthropologists in native title cases] is their expertise in the holistic study of human social and cultural systems, in particular, the institutional structure of society, systems of kinship and social organization and belief and practices. More specifically, anthropologists have specialised in studying these aspects of Australian Aboriginal societies.²

Notwithstanding this expertise 'in the holistic study of human social and cultural systems',³ many Australian anthropologists have reservations about native title: about the native title legislation and its judicial interpretation; about various aspects of native title claim processes; or about the outcomes that Indigenous Australians really gain, once the whole protracted process of resolving a claim is finally over. Some anthropologists have expressed concerns, more generally, about applied anthropology, about what doing anthropology in this marketplace does to the discipline of anthropology more broadly.

These concerns appear in the midst of wider debates and concerns about anthropology in the academy and beyond, many of which find their expression in the Australian Anthropological Society's email discussion forum.⁴

This paper is concerned with the challenges anthropology as a discipline faces with respect to engaging with native title in Australia in the context of litigation. In particular, I discuss methodological issues (fieldnotes and fieldwork) and evaluative issues (questions of advocacy and objectivity, the 'empirical' or 'scientific' basis of anthropology, and issues of essentialism in relation to the objectification and juridification of Indigenous relations to land). I conclude by looking at the contribution of anthropology in native title, as against critiques of anthropological engagement in land rights⁵ and native title cases.

The context of my discussion is the *Native Title Act 1993* (Cth) and the evolution of native title jurisprudence that has occurred since. My focus is on anthropological work undertaken on behalf of Indigenous groups in litigated native title cases. Since the 1998 amendments to the Native Title Act, following the High Court's *Wik* decision,⁶ other High Court decisions, especially *Ward* and *Yorta Yorta*,⁷ have significantly shaped the character of native title law and its judicial application. These High Court decisions, along with amendments to the Native Title Act, are such that many would argue that they have seriously diminished the original character and intent of the *Mabo* decision,⁸ making even a limited recognition of native title increasingly difficult to gain.⁹ Some commentators have suggested that native title promises, at best, 'minimal possibilities'¹⁰ for most Indigenous Australians; others that it is not always certain whether the conditions of these possibilities outweigh their benefits.¹¹ There are many issues, legal and otherwise, that Indigenous Australians confront as they pursue native title recognition.¹² Anthropologists who work in native title also find that the forensic issues and challenges to anthropology in this context are numerous.

When anthropologists appear as expert witnesses in the Federal Court of Australia, their knowledge is referred to as 'specialised', meaning 'for which he or she is trained and in relation to which study has been undertaken and expertise gained'.¹³ Giving expert evidence as an anthropologist working on behalf of applicants typically involves providing evidence in chief and being cross-examined by respondent parties. Amongst other things, cross-examination will be concerned with what constitutes specialised anthropological knowledge and expertise, and whether the anthropologist can be considered a credible witness in these terms. Contemporarily, many native title cases are negotiated through consent determinations (agreed native title outcomes) ratified by the Federal Court, rather than through litigation, so not all anthropologists working in native title will necessarily become involved in litigation. Should

3. Litigating native title

negotiation and mediation fail, however, any native title claim can be referred to the Federal Court for litigation, and anthropologists who have been working on behalf of applicant groups may find themselves in Court. Given this ever-present possibility, my focus here is primarily on anthropologists engaged by Indigenous groups in the litigated native title context.

Among the many issues related to working in the native title realm are the politics concerned with who works for which party (the party bringing the claim or the party that contests it);¹⁴ legal constraints impacting anthropological report writing, including the distinctions between opinion, fact and hearsay;¹⁵ the use of theoretical models in Indigenous claims;¹⁶ and issues about ownership and control of fieldnotes and reports. These issues are related to those that occur in anthropology more broadly, such as those of epistemology, representation, ownership and ethics. Once in the native title environment, though, they are likely to fall on complicated political and legal ground. Positioning oneself as solely working for Indigenous concerns does not ameliorate these. Notwithstanding the difficulties involved in working as an anthropologist in native title, it is important for anthropologists to remain involved in this field. I say this both in consideration of the kinds of outcomes that some Indigenous Australians may ultimately gain through native title, and because of the potential contributions that applied engagements can make to anthropology more generally. It is important to note that outside the academy, native title is arguably the field in which anthropology in Australia is at its most visible today.

The distinction between applied and academic anthropology is one that continues to be made within the discipline. In Australia, at its most pronounced, this division is expressed in the following terms: applied anthropologists maintain that they are the people 'at the coalface', having to apply their anthropology to real world issues; academic anthropologists, that what applied anthropologists do is not real anthropology. I emphasise that such statements represent extreme ends of the divide, yet they are utterances that are fairly routinely expressed. A scan of anthropologists working in the area of Indigenous Australia within the academy shows, however, that this 'divide' is less marked than such statements would indicate: many academic anthropologists have done, or still do, applied anthropology, while others who now work solely in applied anthropology, mainly as consultants, were once firmly ensconced in the academy. While the flow between the academy and the applied field is not always in motion, it is important to consider that many anthropologists have done, or are doing, both applied and academic anthropological work. This is an apt point to consider what it is that anthropologists do differently, or not so differently, in the applied anthropological field of native title.

Fieldwork

Very little anthropological fieldwork today could be said to concentrate on ‘the totality of all social, cultural and psychological aspects of the community’.¹⁷ More common is ‘problem-oriented ethnography’ directed towards a particular problem, ‘pioneered’ by Mead ‘early in her career’.¹⁸ Regardless of whether fieldwork is undertaken for applied or academic research, it involves interaction, dialogue and discussion: the emphasis in fieldwork is more on participating than on some kind of distanced observation. Anthropological knowledge is not just a question of recording what people have to say, but is dialectically constituted through interaction.¹⁹

Much academic anthropology is oriented towards particular problems: the question that may inform a research project, a thesis or a paper. Methodologically, applied anthropology is an intensified version of this, but it has practical ‘applied’ ends and is usually constrained by them. For anthropologists working in native title, the ‘problems’ are framed contractually and by the legal requirements of proving native title, with the amount of work that can be undertaken being limited by ‘time and money’.²⁰ Such limitations can manifest as ‘unrealistically short timeframes being imposed by commissioning organisations’,²¹ with other constraints including the practice directions issued by ‘the relevant tribunal or court’.²²

Research for native title claims is usually undertaken within prescribed fieldwork periods. These are often of shorter duration than the participant observation fieldwork typically carried out for a doctoral dissertation.²³ In applied work, these time constraints often result in a greater emphasis on the anthropologist directly eliciting information from Indigenous informants than on ‘participation’ (although native title research may, in fact, involve a good deal of ‘participation’: in bush meetings, in ceremonies, in hunting and fishing while mapping country, in travelling and so on). It should be noted, too, that an emphasis on direct elicitation of information, in this regard, is not all that dissimilar to how anthropologist A P Elkin conducted his fieldwork in the Kimberleys in 1927–28 (Elkin largely stationed himself at various missions and pastoral stations and had the ‘natives’ brought to him for interview and recording of genealogies, although he did get to take part in some ceremonies, too). The point is, that in making these distinctions between how applied and academic anthropologists ‘do’ anthropology, the ways in which some earlier and influential academic work has been done is not always considered. The emphasis in current anthropology, though, is on long-term fieldwork involving participant observation as its primary methodology. In native title litigation, then, the time anthropologists spend in the field is consequential for the testing of their conclusions in the courts, and may affect the ‘weight’ that the judge

3. Litigating native title

gives to the anthropological evidence and, indeed, the outcome of the case itself.²⁴

The objective of lawyers in litigation is to undermine the credibility of the expert witnesses who appear for parties with whom they are in contention. Respondent parties also contract anthropologists to provide written comments on expert reports and other advice during native title litigation. (They may be called for cross-examination in relation to reports they have written, but this does not always occur.) Lawyers have drawn on their growing knowledge of anthropology to cross-examine expert witnesses about methodological matters: did they consult widely enough? How many notes did they take? What kinds of questions did they ask? Were they using leading questions that foreclosed other kinds of answers? How much fieldwork did they do, and how ‘empirical’ and ‘objective’ were they in their approach? One strategy respondent parties have used is to seek to undermine anthropological evidence on the basis of how much fieldwork was done. The following is an example of this from the *Wongatha* case:

Lawyer: I've added up all the days you've interviewed people and gone on site visits, it's about 46 days...

Anthropologist: I'll take your word for it...

Lawyer: that's hardly the degree of research that would be required for long-term fieldwork, is it?

Anthropologist: no, but I come to this task with fairly extensive experience in the Western Desert.

Lawyer: isn't in-depth participant observation the distinguishing feature of anthropology?

Anthropologist: yes.²⁵

This was a case in which the anthropologist had undertaken substantial previous research in the region within which the claim area was located, as he indicated. In a number of cases anthropologists are sought out to do native title research with groups for the very reason that they have already worked with the group or in that region over a significant period of time. The advantage for such anthropologists is that even if their previous research did not specifically focus on matters relevant to native title, such as land tenure, they do come to the research context with solid ethnographic background and established relationships. In cross-examination in adversarial proceedings, though, lawyers will seek to discredit the anthropologists' work, regardless of how much fieldwork they have done. A long-term involvement with a group of people would, in usual anthropological terms, suggest a greater capacity for ethnographic veracity. In the Court, though, such involvement can and

will be used to question the anthropologists' objectivity and the empiricism of their research, with suggestions that they may have become 'too close' to the applicants (I return to this issue later). One way anthropological knowledge is tested in litigation is with reference to an anthropologist's fieldnotes.

Fieldnotes

The subject of fieldnotes turns out to be fraught with emotion for virtually all anthropologists, both in the field and later on.²⁶

Still, the majority of interviewees do say that fieldnotes are unique to anthropology, even if they disagree as to why. It is in their own varied definitions of fieldnotes that we find clues about how fieldnotes are seen as unique to anthropology and therefore emblematic of it.²⁷

Fieldnotes are a representation of the way we see or hear things, that anthropologists usually only write as mnemonics for themselves, but which often become public in litigated native title proceedings. The way the courts will view anthropological reports will be based on how reliable they consider the empirical data on which they are based, and whether they view the anthropologist concerned as an objective and rigorous social science researcher or as an advocate. Their understanding of the basis on which anthropology makes its claim to being a social science, and of its methodology, will also affect their assessment of anthropological evidence (both written reports and oral testimony). Even outside of litigation, in many connection reports submitted to state governments, it has now become common for anthropologists to reference every ethnographic statement made on the basis of fieldwork back to a dated and paginated fieldnote entry.

Fieldnotes are of primary significance in anthropological research, as Sanjek's edited volume, *Fieldnotes: The Makings of Anthropology*,²⁸ aptly indicates. Jackson's contribution to the volume draws on her interviews with 70 anthropologists about their fieldnotes.²⁹ The sentiments expressed by many of her interviewees do not appear to be all that unusual: many spoke of the private, unshared world of fieldnotes;³⁰ some regretted never having seen another anthropologist's fieldnotes;³¹ others said that they would be 'reluctant to share notes'.³² These sentiments are indicative of the private and personal nature of fieldnotes.

In litigated native title cases, though, an anthropologist's fieldnotes do not remain private. They will usually be legally 'discovered', whether through subpoena or by agreement. For lawyers, fieldnotes provide a means to test that the opinions of the anthropologist are based on empirical (recorded) evidence,

3. Litigating native title

and the fieldnotes are seen as a way of making the connection between empirical evidence and the anthropologist's opinion 'transparent'. Given the adversarial nature of litigation, fieldnotes are also desirable artefacts that respondent parties use to attempt to undermine the credibility of the anthropologist (and thus the claimants' case).

In the early days of native title, especially, many anthropologists were reluctant to provide their fieldnotes to the Court, and attempted to resist Court orders, albeit with little success. There are numerous reasons for the reluctance to hand over fieldnotes to legal personnel within an adversarial, litigated context, quite apart from their personal nature that Jackson identified above. Most anthropologists involved in litigated cases now expect that their fieldnotes will be used in their own cross-examination. The use of these same fieldnotes to cross-examine Indigenous witnesses (as sometimes occurs), though, accentuates concerns anthropologists have about breaching informant confidentiality and anthropological codes of ethics. Nor are fieldnotes necessarily interpretable by laypersons, or even other anthropologists, so there is the possibility that one's fieldnotes will be misunderstood.³³ In litigation, lawyers are likely to read fieldnotes quite literally and without contextualisation, using them selectively as empirical evidence akin to 'facts'. A literal interpretation of fieldnotes cannot account for ethnographic and other contexts that anthropologists have in interpreting their own notes. (Some examples of this might include the effect of community politics on an individual's response, or the idiosyncrasies of a particular individual's way of constructing sentences.) Nor can a literal and acontextual use of fieldnotes take account of how anthropological knowledge grows through every successive interaction, as information is checked, cross-checked and expanded among different persons.

Where fieldnotes contain information about gender-restricted or secret business, an anthropologist's concerns about confidentiality are intensified. It is the case that judges have sought to accommodate such concerns, and usually issue Court orders to the effect that only counsel of the relevant gender can access those portions of the notes. Given the difficulty of restricting only portions of fieldnotes, though, this may not necessarily prevent such information being accessed by others. While it is true that such situations could be avoided if the information was not recorded, that same information may be integral to understanding important aspects of the cosmological basis underlying the system of Indigenous land tenure involved. Then there is the question of the legal 'weight' a judge may or may not give to an anthropologist's opinion, where it is based on data that has not been recorded.

One of the implications of fieldnote 'discovery' is that an anthropologist cannot guarantee that their notes will not enter into the public domain of the

Court (which is likely in these cases). This means that it is not possible for the anthropologist to provide undertakings regarding fieldnote confidentiality to Indigenous informants. This in turn has the potential to impact on the kinds of information applicants may be willing to convey to the anthropologist, who might become more reticent to record certain kinds of information. Where there is a perception that some information could be hurtful to individuals once it becomes public, there is an increased possibility that anthropologists will self-censor the things they record. This said, it is evident that many anthropologists (and those relying on the results of anthropological work) would regard such self-censorship as compromising ‘objectivity’ — which I discuss further below — and would not consider modifying their practice in this respect.

Then there is the question of what may be considered harmful to the case, and in whose view. For example, conflict is an important aspect of social process that can reveal much about how societies operate. As one anthropologist told me, though, lawyers he worked with were dismayed that he had recorded aspects of a conflict occurring at a native title meeting, evidently concerned that this might be exploited by respondent parties once in the Court.³⁴ This question of how much or how little to record in our fieldnotes is not particular to native title or applied anthropology.³⁵ The issue does take on particular significance in native title, though, since what is recorded may well become public in litigation.

Despite the legitimacy of such concerns, respondent parties will normally construe an anthropologist’s reluctance to hand over their fieldnotes negatively. The suggestion is that if an anthropologist’s reports have a clearly recorded empirical basis, then there is nothing to ‘hide’. Any resistance to the idea of handing over one’s fieldnotes is construed as obstructionist and evasive, at odds with the role of an expert witness, whose first duty is to the Court. A concern for anthropologists, though, is what fieldnotes actually represent. As Robinson says, fieldnotes are (only) ‘a pathway towards synthesis and the construction of anthropological models of the social world’, rather than ‘an independent record of the truth’.³⁶ Most anthropologists would agree that we rely on more than written fieldnotes when forming our analyses and conclusions.³⁷ Ottenberg used the term ‘headnotes’ to describe the information that anthropologists carry in their heads.³⁸ Fieldnotes, then, are an ‘aide-mémoire’, standing in a ‘dialectical relationship’ with our experience,³⁹ ‘a set of mnemonic devices that stimulate the recall of those experiences allowing the anthropologist to reconstruct situations and order facts into an explanatory frame’.⁴⁰

Speaking of her interviews with anthropologists on this topic, Jackson says that ‘some respondents consider themselves to be a kind of fieldnote, speaking of both written notes and memory in a similar fashion’.⁴¹ While an anthropologist’s elicitation can impact upon the ways that Indigenous claimants

3. Litigating native title

come to articulate facets of their social world, equally our participation in these interactions, like other human experiences, are also constitutive of our understandings of that social world. This is the dialogical, dialectic aspect of fieldwork. In this sense, we are fieldnotes ourselves, and not all the information we draw upon is ever contained solely in written form. This ‘headnote’ aspect of fieldwork cannot be tested in the courts against some written form, and is one of the difficulties anthropologists will face once in the forensic context. Persons conducting fieldwork, engaging with people in everyday situations, are themselves the primary instrument of anthropological knowledge. Thus, another issue that anthropologists working for claimants tend to be confronted with is the issue of objectivity, their capacity to ‘stand back’ from the interpersonal relationships from which they have drawn their ethnographic knowledge. The issues of ‘objectivity’ as a social science researcher, versus that of ‘closeness’ and advocacy, gain particular significance for anthropologists when they appear as expert witnesses in Court.

Advocacy, objectivity and social science research

Federal Court guidelines specify that the expert witnesses’ first duty is to the Federal Court of Australia. Judges have made it clear that anthropologists need to perform their role as expert witnesses with impartiality and objectivity, not as advocates for the party that contracts them. In cases where judges conclude that the anthropologist’s evidence displays advocacy, the anthropologist’s evidence will be given less weight. Thus, one of the ploys of respondent parties in these cases is to argue that the anthropologist’s evidence is unreliable in these terms. For example, in the *Neowarra* case, respondent parties submitted that the anthropologists who gave evidence on behalf of the applicant group ‘displayed a complete lack of objectivity’, but despite these submissions, Sundberg J found otherwise.⁴² Rather, he found that ‘their closeness to members of the claimant group has not affected their professional judgement or resulted in their becoming advocates for the claimants’.⁴³

This question of objectivity relates to issues the discipline of anthropology has consistently encountered, regarding its ‘empiricism’ and accompanying notions of ‘science’. Keen says from the 18th century on, ‘those who tried to develop the social sciences... modelled them after the image of the natural sciences, hoping for sciences of social life with a form and transformative capacity similar to physics and chemistry’.⁴⁴ Tensions between the scientific and the humanistic have been present in anthropology for considerable time.⁴⁵ In the late 1970s the ‘interpretive challenge’ to scientism in anthropology failed to depict anything other than ‘a hazy, poorly focussed picture of how wide-ranging fieldnotes are utilized in the writing of ethnography’.⁴⁶ Hermeneutic and

epistemological considerations concerning discursive and textual production, questions of power relations in anthropological work and representation, and the emergence of oppositional discourses, often expressed in essentialist terms, led Marcus and Fisher, in 1986, to identify a ‘crisis’ of moral legitimacy emerging in anthropology.⁴⁷ Commentators such as Ron Brunton have argued that there is a ‘lack of candour and objectivity’⁴⁸ in applied anthropology, and see this postmodern turn as being partly responsible:

Claims that all knowledge is political, post-modernist concerns with the ‘privileging’ of the anthropologist and the production and multiple meanings of texts, the willingness of some anthropologists to identify themselves uncritically with radical indigenous and minority groups... have all corroded a commitment to truth and objectivity.⁴⁹

Thus, one of Brunton’s arguments has been that ‘moves to atone for the sins of the past are jeopardizing standards of scholarship’, and he links this to ‘growing calls for the control of research by “Aboriginal communities”’.⁵⁰ This is a claim that Keen,⁵¹ among others, has contested.

While critique is part of academic research and writing, academic researchers are unlikely to be subject to the accusations frequently levelled at those who undertake native title research (nor are they likely to have to produce their fieldnotes to demonstrate the empirical basis of their work). Criticisms about the objectivity of their research, about their anthropological integrity being compromised by working for Indigenous interests, such as their work is necessarily partisan, are particularly directed at those who work on behalf of Indigenous groups in the applied anthropological field.⁵² Yet it is also the case that where anthropologists who do work with Indigenous communities do not get involved in issues that are of significance to those communities, they will be criticised by them for not engaging in their political struggles and instead using their knowledge solely to advance their academic reputations.⁵³ While the whole notion of objectivity raises complex philosophical questions, as Bagshaw⁵⁴ has argued, ‘objective research does not — and should not — require an ethical disengagement from the world. What it does require is the fearless and impartial application of intellectual rigour.’

The place of native title anthropology

As native title is fundamentally an issue of property, anthropology conducted in these cases requires a focus on matters that, in these postmodern days, might be seen as old-fashioned: recording genealogies, working out kinship, principles of

3. Litigating native title

land tenure, descent and inheritance. Given the positivism of the law, which has little place for indeterminacy, these principles may be transformed into reified 'rules', or an 'absoluteness and systematicity'⁵⁵ once in a forensic setting. Such 'fixed, formal and constant objectifications of Aboriginal identity and culture' are unlikely to adequately reflect 'dynamic systems of laws and customs which determine how such rights are realised and which emerge from the material conditions in which they are embedded'.⁵⁶ These aspects of the law are most problematic for Indigenous claimants, whose claims can only be made in the 'language of the jurisprudence and property-rights regime of those responsible for their plight in the first place'.⁵⁷ With respect to Indigenous land claims under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), Merlan says that:

A good deal of reification goes on in the presentation of claims, not only on behalf of claimants to make a clear and tenable case, but also by parties opposing claims, sometimes to argue the inadequacy of Aboriginal relationships to country in these 'traditional' terms.⁵⁸

All anthropological representation is locked in a descriptive moment, the 'ethnographic present'. Like other kinds of anthropological description, native title anthropology could be criticised for being unable to capture the indeterminacies of everyday social life, for reifying aspects of 'culture' in a given moment of time. More consequentially, though, anthropologists engaged in native title are involved in processes where people's legal rights are being determined. Yet, to single out anthropology as the most powerful force above all others in this process of juridification of Indigenous property rights is, in my view, misplaced. Sutton has said that:

Historically, in indigenous land cases in Australia, judges and tribunals have typically chosen to give the greatest weight to what the claimants say rather than to what anthropologists say, which I believe is only proper. It is clear that decisions of this kind are based heavily on claimant evidence...The alleged 'power' of anthropologists in these circumstances is therefore greatly exaggerated, usually by those who know little or nothing about the process.⁵⁹

Given that judges and lawyers have consistently said that the evidence of Indigenous claimants themselves is the most significant in determining native title, the obvious question remains: why use anthropologists at all? Some Indigenous claimants take the view that anthropologists are unnecessary, since they themselves are the experts in law and culture. Some lawyers also

believe that they don't require anthropological assistance: that they can find out what they need to know by simply asking Indigenous people. Sutton has observed that:

there is variable opinion on the extent to which anthropologists are necessary...given that claimants are typically called, in contested cases, to give evidence about themselves. But there are good reasons why expert evidence is normally called as well, and may be relied upon in court.⁶⁰

These 'good reasons' are not always apparent to people without anthropological training or background, especially where they presuppose that what anthropologists do is simply to record the things said to them.

The information contained in anthropological reports is elicited, painstakingly, in a dialogic interaction with claimants over time, checked and re-checked. It contains a synthesis of information coming from numerous members of the claimant group, who often have multiple conflicting views and perspectives. While claimants' statements 'are highly important guides as to how people consciously formulate relevant principles', they do not 'alone account for or predict how people relate systematically to places or how they in practice allocate rights and interests in them'.⁶¹ One of the things anthropologists do in native title cases, then, is to elicit matters which may not be 'fully conscious' with respect to Indigenous property relations. How this information is elicited, synthesised and analysed is the (often) invisible aspect of the fieldwork and report-writing process. Thus an anthropological report — which will also consider all the relevant previous ethnography of that area, including unpublished fieldnotes, along with archaeological, historical and linguistic information where it is relevant to ethnographic understanding — is the product of anthropological fieldwork, research, analysis and writing, not mere reportage.⁶²

Bauman makes the important point, often forgotten in criticisms levelled at anthropologists involved in native title cases, that 'Aborigines are not powerless actors: neither are anthropologists all powerful'.⁶³ Additionally, native title cases are, ultimately, legal cases, as lawyers are fond of reminding anthropologists. It is lawyers who decide how to run cases: it is they who must draw out the evidence from Indigenous claimants, which is given the greatest weight in the Court. From a legal perspective (although I am not suggesting that all lawyers are solely confined to this view), cases are about winning or losing, not what happens afterward. It is Indigenous Australians, though, who will have to live with the form in which their native title determination is made, and if that does not accurately reflect principles underlying their social reality, it will create numerous difficulties for people who must live with it. Some lawyers work

3. Litigating native title

closely with anthropologists. Some have been known to ignore anthropological advice in presenting cases: some may not seek anthropological assistance at all. In my view, the latter is an especially risky way to run a case, particularly where the lawyer concerned has little understanding of the ethnography.

How cases are run, and how they are processed, is very much a legal matter. Notwithstanding this, anthropological involvement in native title cases is important, and can have more or less significance for the outcome of a case. Where cases achieve negotiated consent determinations outside of litigation, the anthropologists' 'connection report' may be the main source of information upon which the claimant's case is assessed,⁶⁴ highlighting the importance of competent (and better-than-competent) anthropological work, and the responsibilities some anthropologists carry in relation to these cases. Even then, though, the form such determinations take will be hammered out by lawyers acting for the parties to the agreement, not by the anthropologists. Finally, in litigated cases, it is the judge who will make the decision that will bind the applicants, which may be beneficial or detrimental, or lie in some hazy ground between.

As the body of native title cases litigated in the Federal Court of Australia grows, an emergent body of judicial commentary on the role of anthropology in native title is developing. Although I cannot say how broadly the view is held, some anthropologists, at least, like myself, feel that anthropology is increasingly being constricted within this legal context. In a recent native title case, it was stated that when the basis for 'the expression of an opinion is not explored', it will not be 'clear whether the opinion is based on...specialised knowledge'.⁶⁵ The 'specialised knowledge' of anthropologists is something that the courts are prepared to adjudicate, and anthropologists appearing in Court may be told what it is they are qualified to comment upon. In the Yulara case, the judge hearing that case also made comments regarding how the anthropologists should have conducted their research, expressing the view that he was not at all sure why the anthropologists needed to 'carry out such extensive interviews', and suggesting that this might 'duplicate' the work of lawyers.⁶⁶ This reflects a fundamental misunderstanding of anthropology. Additionally, the distinctions made between what the law refers to as fact, opinion and hearsay means that anthropologists will need to craft their reports very carefully, and will require the assistance of a lawyer to arbitrate on some of these legal distinctions for their reports to be admissible.⁶⁷

Jeremy Beckett, the anthropologist involved in the original *Mabo* case, has suggested that anthropologists would 'do well' to 'begin working out a future for themselves beyond working for native title'.⁶⁸ Beckett also suggested that he had 'some misgivings' about anthropological involvement in matters broadly related to aspects of Indigenous policy that had an advocacy element, 'in particular...

about a discipline that is focused on native title research'.⁶⁹ He elaborated on his misgivings, arguing that 'we are in a general sense complicit in what I would call a post-colonial situation'.⁷⁰ This is a comment that underscores many anthropologists' concerns about the way native title is evolving.

Against such concerns, though, important questions remain: should anthropologists decline to be involved in Indigenous Australians' political and legal struggles? Should we not be involved in Indigenous attempts to have their land ownership recognised, and resile because we don't want to be complicit, or because it is too difficult, too complicated, the outcomes uncertain? What about where claims are successfully determined, where Indigenous groups do receive some legal recognition of their property rights?

At present, native title represents the only means by which some Indigenous groups can secure some rights over country for which they hold customary attachment and responsibility. While I think it is fair to say that most anthropologists who have consistently engaged in native title processes, like Beckett, have some misgivings about them, the problem is that the legislation, and even our 'complicity' in it, does not lend itself so easily to evaluation in dichotomous terms, beneficial or detrimental. Writing of the complexity of 'contemporary colonial domination' in the land rights situation, Rose says that land rights offer Indigenous groups 'zones of empowerment and synergistic accommodation within the structure of restriction and coercion'.⁷¹ One way of illustrating this is with reference to major resource developments. While Indigenous groups that have gained land rights or native title recognition may still not be in a position to prevent mining on their land, they will usually be in a position to negotiate an agreement with the mining company that will include such matters as monetary compensation, employment and protection of important sites. A legally sanctioned ability to negotiate about what happens on their country, amidst significant pressures to do so, simultaneously contains the seeds of empowerment and coercion that Rose describes. In general terms, my own view is that the question of what native title requires of Indigenous Australians, as against its possibilities, is one that can only be meaningfully addressed on a case-by-case basis.

Conclusion

In her keynote address delivered to the Australian Anthropological Society's annual conference in 2002, Hamilton argued that anthropology in Australia was in something of a crisis. By way of evidence for this evaluation, she cited diminishing enrolments in the discipline and the attrition in the number of academic positions Australia-wide.⁷² One of her conclusions was that

3. Litigating native title

anthropologists had to make a better case for the relevance of anthropological knowledge: ‘above all, anthropology should demystify itself and its practices... People quite rightly want to know: where is your data? What is your methodology?’⁷³ It is noteworthy here that for anthropology honours graduates, working in native title and associated areas (for example, Indigenous land management issues arising post-determination) is one of the primary areas of anthropological employment currently available to graduates. With respect to methodology, it is also significant that Hamilton’s question raises precisely the kinds of questions that anthropologists involved in native title cases are required to confront and respond to, as I have described above.

As stated in my introduction to this paper, a number of anthropologists have also raised concerns regarding the relationship between this kind of applied anthropological work and the discipline of anthropology more broadly. Maddock, for example, has argued that:

Another view of the advancement of science is that it consists in the expansion of theories...rather than in the mere accumulation of more and more facts...The involvement of anthropologists in land claims does not appear to have brought about any advance in this sense.⁷⁴

He continues that this is hardly surprising, given ‘that emphasis in litigation falls on facts, problems, and concepts...not on theories as most social scientists would understand them’.⁷⁵ Austin-Broos also criticises anthropological involvement in land claims for similar reasons: she says that ‘radical interrogations of Aboriginal ontology...are very much in order and *have* been stymied in Australia by the land claims process’.⁷⁶

Anthropology has contributed to land claims brought by Indigenous Australians since statutory land rights cases began in the 1970s. Contrary to Austin-Broos’s views above, some would argue that anthropological involvement in these claims has also contributed to anthropology. Given his stated critique of what land rights anthropology has contributed to the discipline, it is somewhat paradoxical that Maddock should also argue that:

A recognition of the importance of rights, conceptual clarification, and a great accumulation of data — these have gone hand in hand. They not only enable anthropologists to play their legal roles more effectively but also spill over into a more purely scientific domain where inquiry and analysis are free from anthropologically irrelevant legal constraints. It is most unlikely that anthropology would be making this progress if anthropologists had been held back from furthering the interests of Aborigines through claims.⁷⁷

Despite the fraught nature of the native title process and the uncertain nature of its outcomes, Indigenous Australians will continue to engage with native title as a means of having their proprietary rights in country legally recognised. Given the important role that anthropological work plays in this process, it is my view that anthropologists should be involved in native title cases. For, as Bagshaw has said,

As I see it, the principal purpose of anthropological expertise in native title proceedings is to explicate, or at least to render more comprehensible than it otherwise might be, modalities of cultural logic and practice which lie entirely outside the parameters of Western epistemology, and which therefore *cannot* be known to, let alone understood by, lawyers and judges.⁷⁸

Whether anthropologists are involved or not, Indigenous groups who choose to claim native title have their rights determined and codified. Taken at face value (since how these determinations ultimately ‘translate’ into real benefits may vary enormously), determinations range from apparently beneficial ones (such as exclusive possession determinations) through to less beneficial determinations (for example, where native title is found not to exist). Where anthropologists conduct their work assiduously, taking care to render complex social phenomena as accurately as possible, it is my view that Indigenous claimants are better aided in gaining native title determinations that reflect their connections to country with such anthropological assistance than without it.⁷⁹ In the *Rubibi No.5* native title case, Merkel J described the anthropological evidence as being ‘important in three respects’; the foremost of these, that it ‘provided a conceptual framework within which the Indigenous evidence of traditional laws and customs was to be considered’, goes some way towards identifying the importance of sound anthropological work in native title cases.⁸⁰

NOTES

1. A version of this paper called ‘Anthropology on trial: Australian anthropology and native title litigation’ was first drafted for an American Anthropology Association panel convened by Gabriela Vargas-Cetina and Stacy Lathrop in 2004, and subsequently updated for a forthcoming volume edited by Vargas-Cetina. Given the time that had elapsed, contributors to this volume were given editorial permission to publish amended versions of their papers elsewhere. I am most grateful to James F Weiner, Geoffrey Bagshaw, David Trigger, Mike Robinson and Richard Davis for their comments on earlier drafts of this version.
2. Howard Morphy, ‘The practice of an expert: Anthropology in native title’, *Anthropological Forum* vol. 16, no. 2, 2006, pp. 135–51, reference to p. 136.

3. Litigating native title

3. Morphy, above n 2, p.136.
4. This forum is called AASNet.
5. Some beneficial statutory regimes preceding the nationwide *Native Title Act 1993* (Cth) operate in various states of Australia (such as the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)) and have allowed Aboriginal groups to make claims to certain categories of land on the basis of particular criteria of ‘traditional ownership’.
6. *Wik Peoples v Queensland* (1996) 187 CLR 1.
7. *Western Australia v Ward* (2002) 213 CLR 1; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.
8. *Mabo v Queensland (No. 2)* (1992) 175 CLR 1.
9. For example, Noel Pearson, ‘The High Court’s abandonment of “the time-honoured methodology of the common law” in its interpretation of native title in *Mirruwung Gajerrong* and *Yorta Yorta*’, speech delivered at the Sir Ninian Stephen Annual Lecture, University of Newcastle Law School, 17 March 2003.
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CHAPTER 4

Overlapping jural publics: A model for dealing with the 'society' question in native title

Paul Burke

Introduction

This paper is an attempt to solve a problem that confronts anthropologists in their applied work in native title — how to respond to that part of legal doctrine which requires proof of a continuing normative system and society. The present paper needs to be distinguished from my doctoral research, which took a sociological view of the interaction of the social fields of law and anthropology in native title, in particular the nature of anthropological and judicial agency.¹ In that research I was able to stand outside the case studies I had chosen to examine. But having subsequently returned to native title work as an anthropologist, the question of how to respond to the ambiguities of native title legal doctrine took on a more immediate and practical intensity.

Difficulties of understanding the legal doctrine

Even though this paper is an exercise in applied anthropology, I do not think we need to take a naïve view or even a respectful view of the way native title doctrine has developed — at least, not in this forum. In our report writing, it is a different matter. There, we are in the same cage of legal doctrine as the judges, lawyers and Indigenous people trying to cope with its demands, albeit from different positions in the cage. We have to acknowledge the legal doctrine and try to meet it halfway. While I sympathise with the efforts of those like Kingsley Palmer who have pointed out the relative incompatibility of legal and anthropological approaches to the meaning of society,² I think we can go further in mapping out the ambiguities of the legal doctrine and finding ways of responding positively to them.

It is uncertain why the majority of High Court judges in the *Yorta Yorta* case introduced the idea of ‘normative system’ and ‘society’ and, given the confusion the ideas have caused, I wonder if they regret it.³ I suspect they were trying to be helpful; to explain why the circumstances of the *Yorta Yorta* did not justify a positive finding of native title. If one is to believe the findings of fact by the trial judge, the High Court was faced with a long gap in traditional connection with the claim area. This would seem to explain why they would emphasise aspects of the Brennan formulation of native title about the need for a continuing acknowledgment of traditional laws and continuing observance of traditional customs — and its explicit prohibition on any latter-day recreation of laws and customs — which ceased to be acknowledged or observed at some point in post-contact history.⁴ In other words, native title must be more than an impulse to preserve something that has been lost; it must be a system of real, felt obligations to act in certain ways which are substantially continuous with the pre-contact era. Similarly, the *Yorta Yorta* idea that traditional laws and customs must arise out of a society united in its acknowledgment and observance of the body of laws and customs could be seen as a restatement or elaboration of Brennan’s insistence upon the communal nature of native title, as well as reinforcing the idea of broad continuity of traditional connection.

However, once the ink dried on the High Court’s *Yorta Yorta* judgment, other inevitable processes took over: some of the combatants in the adversarial process gained a new weapon in the form of the new words and trial judges were forced to make their own interpretations of the significance of the new words. My impression is that the interpretation I have favoured — that *Yorta Yorta* was a restatement and elaboration, not an additional burden on claimants — seems to be on the losing side (although I still wonder what the High Court will make of the developing jurisprudence if it ever reconsiders the issue). Advocates for tightening up the proof of native title have largely been successful in transforming the *Yorta Yorta* idea of ‘society’ into an additional matter to be pleaded and proved in a native title hearing. The strict application of doctrines of procedural fairness in adversarial hearings has the potential to transform pleading errors into sudden death for the native title claimants; for example, if a regional grouping is proposed as the relevant ‘society’ and the judge finds that the regional grouping did not exist in the pre-contact era. Justice French’s mysterious decision in the *Bardi and Jawi* native title claim illustrates this point.⁵ The *Jawi* and *Bardi* were presented as a combined group but French J refused to make a determination of native title to islands that in the past belonged to the *Jawi* alone. He found them to have been a separate society, notwithstanding a remarkable degree of linguistic and cultural commonalities and longstanding intermarriage.⁶

Some conceptual consistency has returned to legal doctrine since the Full Federal Court recently overturned French J's decision on this issue.⁷ In essence, the Full Court stated that the decisive matters which led French J to the conclusion of two separate 'societies' (separate identity names of Bardi and Jawi, separate dialects, separate territories) were not differences in traditional laws and customs, all of which they shared.

The legal shadowlands of native title

Apart from the formal legal system, there is a vast legal shadowland in which even stranger things happen and ambiguities in legal doctrine must be resolved in different ways. By 'shadowland', I mean things that happen in the shadow of formal judicial statements of legal doctrine and Court processes: state government guidelines for consent determinations, advice from Crown Solicitor's offices, legal arguments put to state governments, the input of lawyers into mediation, and discussions between lawyers and anthropologists about the form of anthropological reports. I suppose the legal shadowlands could be summarised as 'legal commentary'. But it is more than that. It is embodied and contextual. In some contexts, such as Crown Law Offices advising on the acceptance of a connection report or senior counsel advising an anthropologist on the form of a connection report, the legal commentary has more or less the force of law.

In different corners of the shadowlands, idiosyncratic views can hold sway unchecked — such as the supposed need to prove contemporary estate groups to satisfy continuity requirements and the complete disavowal of traditional succession. I suspect what happens in the shadowlands is that an excess of professional caution amongst lawyers leads to a lowest (or should it be highest?) common denominator approach to the interpretation of ambiguous aspects of native title legal doctrine. What happens in the shadowlands is deserving of more attention in its own right. For the moment, it is enough to recognise that the shadowlands are diverse and this is reflected in the differing emphases given to 'society' in connection report guidelines in different jurisdictions. For example, the Queensland guidelines, which appear to have been formulated the year after the *Yorta Yorta* decision, mention 'society' only once and in a way that seems to imply it is part of the description of the native title group.⁸ The Western Australian practical guide has a separate subheading for 'society', which states in part:

In your report, provide information that establishes whether the claimant group is a society or as part of a broader society. If possible,

present the views of neighbouring groups — acknowledgement by other indigenous groups is an important factor in identifying a group. It helps our understanding of the claimant group if you clearly state the regional context in which the claim area is located. You should pay particular attention to developing case law on the issue of ‘society’ and the claimant group, you are required to ground all changes to the native title society since sovereignty in traditional laws and customs.⁹

At the heart of our difficulties as anthropologists engaged in native title work are deeply engrained assumptions that try to impose a constitutional order on small-scale societies, which, instead, emphasise the autonomy of individuals and small groups, where the relationships between individuals are networks extending in many different directions and where the relationships between groups is more of a patchwork of variable mutual recognition. This tends to be fundamentally different to a nested hierarchy in which the bigger, overarching group subordinates its constituent smaller groups by virtue of its position in the hierarchy like Commonwealth, state and local government.

Hiley’s suggested corrective

With this in mind, this paper attempts to make an anthropological response to Graham Hiley’s recent legal review of the emerging jurisprudence on the question of the relevant ‘society’ in native title legal doctrine.¹⁰ In fixing upon Hiley’s view, I do not wish to imply that his view is universally accepted in legal circles. His paper, his position as a Queen’s Counsel specialising in native title and his editorship of the newsletter in which the paper was published all exemplify structures of the legal shadowlands in native title. In the absence of clarity from the High Court, a particular view of the legal doctrine can gain prominence because of an existing hierarchy within the legal profession and publication of those views in what might be called the trade paper of the specialisation.

Other senior counsel take the view I started with in this paper, namely, questioning whether any additional, technical requirement of proof was intended to be added in *Yorta Yorta*.¹¹ They would say that until the High Court clarifies what it meant in the *Yorta Yorta* decision, the meaning of ‘society’ in native title legal doctrine is still an open question. In particular, they would reject Hiley’s attempt to read down ‘society’ by reference to local rights and interests in land. This they see as containing an inflexible bias towards smaller social units which may not have been very robust over the course of post-contact history. They would take heart from the recent Full Federal Court decision in *Bardi and Jawi* which, in effect, refused to read down ‘society’ in

the way suggested by Hiley and, instead, emphasised the commonalities of traditional laws and customs.

Hiley's views do, however, continue to represent one of the strong currents in the shadowlands and they are a reasonable starting point for analysis as long as they are not given any definitive status. The definitive statements will hopefully come from the High Court in due course.

In his review, Hiley saw the need to re-emphasise the point that 'society' in native title legal doctrine has a particular meaning. It is not just a group of Aboriginal people who share the same attributes or beliefs about various aspects of behaviour. It is the group of Aboriginal people who are defined by and responsible for the laws and customs which gives rise to native title rights and interests. Thus he saw the need for a corrective to a broad cultural commonalities approach to identifying the relevant society for native title purposes.

Another way to describe his concerns is to quote the relevant passage from the High Court's *Yorta Yorta* decision:

Law and custom arise out of and, in important respects, go to define a particular society. In this context, 'society' is to be understood as a body of persons united in and by its acknowledgement and observance of a body of laws and customs.¹²

Hiley's critics would agree with the centrality of this statement. But the implications for them are that typically there are a variety of 'societies' generated by such a formula and each of these could be the relevant 'society' for native title purposes. Hiley, on the other hand, insists that there is a way of further delineating the relevant society by confining one's attention to only those traditional laws and customs out of which rights and interests arise. If Hiley is right, it is timely to reconsider anthropological approaches to this issue which have tended to emphasise different levels of inclusiveness of social groups and land tenure groups. At the end of this paper, I will return to a consideration of the alternative view.

Hiley suggested the following process for identifying the relevant society:

1. Identify the laws and customs which define or regulate rights and interests in land;
2. Ascertain whether those laws and customs, together with other laws and customs, constitute a 'body of laws and customs' that evidences the existence of a 'normative system'; and
3. Identify the 'body of persons' that is defined by and is responsible for those laws and customs — namely the relevant 'society'.¹³

While this process will be broadly followed in this part of the paper, some of the aspects of legal idealism inherent in this formulation need to be identified. In practice, as I will demonstrate, it is difficult to clearly demarcate where responsibility begins and ends for particular laws and customs, and it is difficult to clearly delineate between land-focused and non-land-focused traditional laws and customs. Ultimately, this means that the inherent assumptions of singular, neat boundaries must give way to some evaluation of the various alternative ways of formulating what the relevant society is. But I will come to that later.

Explanation of the central idea of the paper

What I propose to do is to follow Hiley's proposed methodology in relation to a hypothetical ethnographic situation which combines elements from various different Aboriginal groups I have encountered over the years in land rights and native title contexts. I realise this obscuring of actual locations causes problems for commenting upon ethnographic accuracy and interpretation, but unfortunately it is necessary, since some of the native title claims of the groups involved have not yet been finalised.

As suggested, the starting point will be the identification of laws and customs which define or regulate rights and interests in land, but with some modifications. For simplicity, I will conflate 'traditional laws acknowledged and customs observed' and 'normative rules' and describe them in terms of social obligations. I think this conflation is justified by legal doctrine outlined in the *Yorta Yorta* decision, which also adopts a meaning of 'normative' as more or less equivalent to a social obligation for which there are social sanctions for its breach. In addition, for a degree of realism, I will explore some variation in the degree of seriousness of some breaches of traditional obligations relating to land. Finally, examining who is responsible for each of these traditional obligations should generate an overview of the relevant 'society'.

Hypothetical historical and ethnographic background

The list of traditional obligations I am about to outline may be applied to many areas of Australia that have had a long contact period, but obviously not all areas. Generally, the areas I have in mind are characterised by the early devastation of the immediate contact period, followed by relative peace of the pastoral era in which relatively large Aboriginal camps associated with pastoral stations enabled the continuity of aspects of Aboriginal culture and ritual. Many of the Aboriginal people in such regions have a long history of intermarriage between different language groups and similar experiences of the pastoral era and of the migration to urban centres in the late 1960s and

'70s. One published example of this general process is Francesca Merlan's account of the Katherine region.¹⁴ Through this long history of intermarriage and co-residence in a few urban centres, the Aboriginal people in the region became densely interrelated and knowledgeable about each other. This makes the catchment area for the major cultural events of funerals and initiation ceremonies, if they continue, quite large. This familiarity and the capacity for mutual surveillance are significant because they are the basic preconditions for monitoring traditional obligations and applying social sanctions.

List of traditional laws and customs

Despite these and other factors tending towards regional aggregation, fundamental ideas persist about the division of traditional responsibility for country into separate groups typically identified by the name of a language variety which was traditionally associated with a broad tract of country. Underpinning this arrangement are the fundamental obligations, which could be codified as follows:

- an Aboriginal person should only assert traditional rights to their own traditional country;
- an Aboriginal person should seek the permission of senior owners of traditional country that is not their own before entering it for any traditional purpose or activity that will have significant consequences for the land; and consequently
- an Aboriginal person should never claim or purport to make important decisions about the traditional country of another group.

The second fundamental obligation is about membership of the language group. As traditional rights to country derived from descent from ancestors who are acknowledged as belonging to a particular language group, Aboriginal people should ensure that the members of their language group satisfy this basic prerequisite.

In many areas, there is an associated rule that:

- if an Aboriginal person has multiple possible traditional countries through different ancestors, that person should choose to follow one primary country identity.

Next, there are a number of obligations that could be summarised as obligations to behave in respectful ways on country:

- certain places still imbued with the powerful essence of ancestral beings should be approached in a cautious way with due deference to the living spirit of the country;
- old initiation grounds, increase sites, landforms representing foundational stories, burial sites, rock engravings and the artefacts of the old Aboriginal inhabitants should be respected and not disturbed; and

- senior knowledgeable owners should take responsibility for ensuring that less knowledgeable people do not come to harm by approaching dangerous places in the wrong way or by interfering with important places.

The next group of obligations relates to care for traditional country:

- culturally significant and historically significant sites in one's traditional country should be identified and preserved; and
- the appearance and natural resources of the traditional country should be preserved as far as possible so that the landscape of the old people is still identifiable and so that traditional practices, such as the hunting and gathering of traditional foods and the gathering of bush medicine, can continue.

Obligations to abide by traditional decision-making processes could be summarised as follows:

- decisions about land are not made by individuals but by the group of Aboriginal people who have traditional authority for the land; and
- within that group, elders, defined by their level of traditional knowledge, have the primary responsibility for decision making.

Finally:

- a person should learn about their traditional country and teach the younger generation about it.

It will be assumed for the purposes of Hiley's methodology for arriving at the relevant society that this list of obligations does have the required degree of coherence and completeness to be described as a 'body of laws and customs' or 'normative system'. Now it remains to be discovered who is the body of persons that is defined by and is responsible for this body of laws and customs. This is where it becomes interesting, since approaching 'society' in this way enables questions to be asked of informants who are capable of relatively precise answers.

Some difficulties do arise in obtaining information on these topics within the constraints of short-term fieldwork. The fundamental obligations about the integrity of language group areas, membership of language groups and the protection of significant sites are generally so well followed it is sometimes difficult to quickly discover who might actually enforce such laws if they were breached. One way to elicit such information is to use provocative hypothetical examples of breaches of obligations. These could be of the form:

- who would be concerned if your group admitted as members people who had no genealogical connection to relevant ancestors? What form would this concern take?; and
- who would be concerned if your group were about to allow mining to damage a significant site such as an old initiation ground (or some other regionally significant site)? What form would this concern take?

4. Overlapping jural publics

Another communication difficulty, which reflects the deep mismatch between legal formulations and ethnography, is the belief that transgressions of traditional obligations, particularly about respectful behaviour on country, will be punished directly by the angered spirits of the country.¹⁵ Accordingly, one could question in an open-ended way, for example, about the consequences of not approaching significant sites in the manner required by traditional custom, hoping to elicit information about the application of social sanctions. Instead, informants may respond in terms of supernatural sanctions which they believe will be effective in causing mysterious illness or even the death of the transgressor. Some ingenuity is then required to reorient the discussion towards the group who shares those beliefs and the less dramatic social sanctions that may be applied in the case of a breach.

Despite these difficulties, it has usually been possible to gain further details of who is responsible for the traditional obligations outlined above. While the starting point for most discussion of responsibility assumes a mutual recognition of the autonomy of each language group and a hesitancy to interfere with the matters considered to be internal to another group, there are limits to non-interference. The most significant of these are:

- maintaining the integrity of the boundaries of each language group area; and
- the protection of significant sites that relate to historic or contemporary regional initiation ceremonies or sites relating to dreaming tracks that pass through more than one language group area.

Before discussing these in some detail, it should be noted that there is not a sharp distinction between these two matters and the other obligations that would appear to be internal responsibilities, such as ensuring members have the appropriate genealogical connection to a recognised ancestor and teaching the younger generation. Even with these obligations, people feel the pressure of neighbouring groups whom they fear would harshly criticise them (or ‘rubbish’ them) if, for example, they were not diligent in carefully assessing the claims for membership of people who had been away from the country for many generations or if they made no efforts to take younger people out on the country to teach them about it. Similarly, any attempt to remove a recognised elder from a decision-making process may soon become a cause for anxiety and criticism from neighbouring groups.

In relation to regionally significant sites, the responsibility for protecting them could involve a very large group of people throughout the region and beyond, depending on the nature of the site and the degree of threat — a point made by Peter Sutton at the very beginning of the native title era.¹⁶ A number of the indicators of significance sometimes come together and become a focal point for opposition to large infrastructure projects like dams or large-scale mining

projects. In one instance in the Pilbara area of Western Australia, a dam was proposed on a major watercourse, the Fortescue River. The watercourse went through a number of language group areas and was associated with the travels of Dreaming ancestors, whose exploits are recorded in songs used in initiation ceremonies. Thus, the proposal generated widespread opposition and a large group of people took on responsibility for protection of the site.¹⁷

Similarly, any threat to contemporary initiation grounds would immediately generate a wide group of senior lawmen who use the ground and who would be responsible for protecting the integrity of the ground, notwithstanding that it is located within the country of a particular language group. Such is the contemporary preoccupation with initiation practice that similar concerns may apply to historic law grounds and one can imagine similar regional responses to threats to historic *bora* grounds of south-east Queensland and northern New South Wales.¹⁸

In relation to the boundaries of language group areas, it seems to me axiomatic that the responsibility for boundaries and, in fact, for the whole patchwork of language group areas is a shared responsibility between the different language groups in a region. In theory, such responsibility could extend to the whole of Australia but for widespread cultural mores which make Aboriginal people reluctant to be seen to speak about country they do not know and have no traditional authority for. But these considerations would not apply to cases of disputed succession and the more frequent boundary disputes that arise in the transitional zones between language group areas.

In summary then, the body of persons defined by and responsible for the normative system is something of a grotesque body which rapidly expands or contracts depending upon the particular traditional obligation involved and the seriousness with which potential breaches are considered in the region.¹⁹ In other words, the jural publics for different traditional obligations are overlapping, but quite different in scope. It is to be expected that the ethnographic reality would not match the unity of the legal formulations. It never does. But that still leaves the question of how to describe the relevant society for native title purposes. It seems to me there is no alternative but to make the best approximation possible and openly discuss the pluses and minuses of such an approximation. Particular claim contexts will vary and so will ideas of the best approximation. But I am attracted to the idea that the best approximation of the relevant society in the circumstances I have described is the language group under consideration plus its traditional neighbouring language groups. This means that the relevant society is always a movable feast which depends upon the starting point. The analysis would, of course, not be applicable if the starting point was near the edge of a distinct cultural bloc. It would only work within a culturally similar region.

On the plus side, the formulation, language group plus its traditional neighbours, recognises an ethnographic reality that the group who are responsible and actively involved in maintaining the integrity of particular boundaries are the immediate neighbours. It also takes some account of regionally significant sites. Nominating the single language group as the relevant society would not achieve this. On the minus side, the formulation can never truly represent the extent of responsibility for regionally significant sites, which, depending on the level of threat, may extend well beyond the country of the neighbouring language groups.

The presentation of the pros and cons of the description of the relevant 'society' would also need to be accompanied by an explanation of the relevant 'society' in the pre-contact era and how it evolved over the course of colonial history up to the present. Typically, there is only fragmentary evidence available out of which to reconstruct such an explanation. In many areas, the relevant title holding groups in the pre-contact era were probably smaller than language groups, even though there is usually evidence of a parallel system of identification of large tracts of country with language varieties. It is likely that the decline in the significance of smaller areas, such as clan group areas, combined with rapid population decline and an increasing incidence of inter-language group marriage, would mean that the relevant 'society' would expand in scope over time. In other words, the group of Aboriginal people likely to bring social pressure to bear to follow particular traditional laws and customs relating to land is likely to broaden in scope. While receiving greater emphasis in the contemporary era, the broad mutual recognition of language group areas seems to have been present in some form over the whole period.

Summary and conclusion

This paper has been an attempt to find a practical way for anthropologists to respond to one of the ambiguities introduced into native title legal doctrine in the *Yorta Yorta* decision. On one view, the introduction of the phraseology 'normative system' and 'society' by the High Court was not intended to add additional elements to the definition of native title or additional evidentiary burdens on claimants. Following this view, if claimants prove that they, as a group, have been following a coherent body of traditional laws and customs relating to land that is substantially continuous with the pre-contact era, they would have, *ipso facto*, established that there had been and continues to be a relevant society out of which such laws and customs arose. In other words, if the claimant group demonstrates the continuity of a body of traditional laws and customs, it will have demonstrated that it forms a 'society' or that it is part of a 'society'. On this view, 'society' is not conceptually distinct, but overlapping

with other elements of native title legal doctrine, and there should not be a need to address it separately. In practice, it does need to be addressed. This could be done by identifying the variety of social groups (from least inclusive to most inclusive) that share a body of traditional laws and customs relating to land and evaluating the pros and cons of identifying each group as the relevant 'society'. My suggestion in this paper is that one way to evaluate the variety of possible social groupings is to ask the questions: who is responsible for enforcing traditional laws and customs and who will bring social pressure to bear for the breach of traditional laws and customs (glossed as traditional obligations)?

On the other view, 'normative system' and 'society' are newly clarified elements of the legal doctrine of native title which must be specifically identified in pleadings and specifically proved in a native title hearing. Graham Hiley's review of the developing jurisprudence of 'society' is consistent with this view. While he agrees that 'society' is the group that gives rise to and is defined by a body of laws and customs, he thinks it is possible to further refine the scope of the relevant society by focusing on only those laws and customs that give rise to rights and interests in land.

In native title hearings, the range of possible interpretations can be managed by pleading the possible interpretations as alternatives and by addressing the alternative interpretations in final submissions. This approach, combined with alternative possible identification of the various relevant 'societies', should overcome the potential problem of 'sudden death' at the end of a long and expensive hearing. In writing their reasons for decision, judges tend to compartmentalise the statement of the applicable law, which generally closely follows the leading High Court judgments, including *Yorta Yorta*. In this way, ambiguity about the interpretation of such concepts as the relevant 'society' tends to be subsumed in the fact-finding exercise, so that the facts are said to support one interpretation of 'society' rather than another. By and large, this does not matter, since the judgment brings finality (subject to appeal).

In the shadowlands, dealing with the ambiguities of native title legal doctrine is more difficult to resolve. In theory, I suppose, anthropologists engaged in writing connection reports can seek a detailed statement of native title legal doctrine from the lawyers working on the claim and simply address themselves to that statement. Such statements typically leave unresolved ambiguous metaphors, such as something 'arising out of and being defined by' something else. I have attempted to resolve some of the ambiguous metaphors by translating the idea of 'society' in native title legal doctrine as comprising the group that applies some social sanction for the breach of traditional laws and customs relating to land. I have argued that this translation or extension of the legal doctrine is justified by the emphasis in *Yorta Yorta* on normative as obligatory. More importantly, such a translation is ethnographically tractable.

4. Overlapping jural publics

Patiently listing the particular laws and customs relating to land that are typically relied upon, it is then possible to gather evidence about the scope of a group responsible for applying social sanctions for the breach of each of those laws and customs. Any expectation that this would lead to a single, unproblematic grouping has to yield to the ethnographic reality of the gradual shading of degrees of responsibility and variation in the significance of the breach of a particular traditional law or custom. In the end, the relevant 'society' can only be justified pragmatically as the best fit in the circumstances. This conclusion is somewhat at odds with what seems to be Hiley's expectation that by starting with only those traditional laws and customs relevant to rights and interests in land, one would be able to confine the relevant 'society' to quite a narrow group.

Finally, I realise that by invoking 'social sanction' I have ignored the richness of the various ways in which sociology and anthropology have attempted to grapple with the idea of society and I have returned to more simple structural functionalist theorising as exemplified by Radcliffe-Brown's various contributions.²⁰ This is a deliberate choice and arises from my assessment of the relative imperviousness of the juridical field to academic critique of legal doctrine.

ACKNOWLEDGMENT

I would like to acknowledge the feedback received from some of the participants in the panel at the 2009 Australian Anthropological Society conference at which this paper was presented, in particular Katie Glaskin and Senior Counsel Robert Blowes. As a result of that feedback I have made some substantial changes to the paper as delivered, principally to leave open the possibility that the High Court may in future clarify what it meant by 'society' so that all current efforts to refine the distinctive conceptual contribution that 'society' makes to native title legal doctrine should be seen as provisional. In naming Katie Glaskin and Robert Blowes, I do not wish to imply that they necessarily support the arguments in this revised paper.

Post-presentation discussion

Participant: It is heartening to see the beginnings of a deconstruction of the Hiley doctrine, which is commonly attached to consultants' contracts in Queensland and to the elements of proof of native title. His reduction of the definition of society to a group of people who share a common land tenure system is severe and raises a number of case law findings which indicate that the question of the wider regional society is totally irrelevant to any evidence about the continuity of the society. Many of us have agonised over the question of how far to pitch the societal model. Your notion of language group plus

Aboriginal neighbours is one that makes a lot of intuitive sense when you look at the data.

However, we might also have been agonising over a false problem. In recent discussions with other consultants, it has become clear to me that we may be adding a level of definition which is not required by the Native Title Act. In fact, any group of people can be said to be united in a body of law and customs — a group of families, a single family, a language group or the wider regional society. Maybe it does not behove us to add any extra complicating factors to a definition of a society.

Paul Burke: I don't know if I totally agree with that because I think we need to try to be helpful. We have to give alternatives and go the next step. Hiley's suggestion gives us a justifiable way of going that next step, where we can gather information about who enforces and reinforces those extra obligations and present a range of alternatives. This has the positive effect of placing the responsibility for choosing the 'relevant' society back onto the judge. There are difficult questions here about pleadings, and after the *Yulara* case,²¹ the wisdom is that we have to also plead alternative societies so that we don't get caught out by the way the evidence unfolds in the Court context. We may need to follow that type of approach in our reports, as well.

Participant: From a legal perspective, the Hiley proposition is dangerous in its subtext and the way it is being applied, particularly in Queensland, to connection reports. What it really seeks to do is to equate the notion of society with the smallest or most exclusive land holding group as the native title holding group rather than with the society. I think it is important to resist this because in the 'shadowlands' of negotiation, it is not for the state to unilaterally dictate as a party to a negotiation the propositions which are sought to be negotiated. I agree that the relevant society is generally much larger than the Queensland Government and the Graham Hiley propositions would have us believe.

From an anthropological point of view, I think it is important to always look at the range of scales to which any definitions might be applied. It may be a matter for the lawyers and the courts to determine how the pleadings will be drawn and what the final decision is going to be, but anthropologists should not get caught up in pursuing the lowest common denominator on the basis of the Hiley proposition and connection report guidelines.

Paul Burke: The methodology I have proposed and the links I have made to deal with an ethnographically tractable group which enforces the boundaries of laws and customs would enable an insightful ethnographical argument to be made.

Participant: While anthropologists see the construction of society as a hurdle and an element of the law that inhibits us, it is also something that we need to take into account. For example, there are situations where a claim has been lodged by a claimant group where much law and custom has been greatly diminished in that group, though it is strongly held in neighbouring groups and our analysis shows that they are a part of the same society and may have had some sort of custodianship. Also, the broader regional notion of society is really important where there are phenomena such as increase sites, which we cannot understand without taking into consideration the regional context. I think there are cases where it is crucial to focus on a wider regional notion of the relevant society, even though it is constrained and moulded by certain types of legal understandings that can be problematic.

Participant: You have suggested that the relevant society is the language group plus its immediate neighbours. This represents an attempt to capture that broader general jural public which Peter Sutton also talks about.²² My question relates to whether this becomes a problem for other native title claims in the immediate district. Would a society conceived as such in one claim have repercussions for claims — not so much for immediate neighbours but perhaps those adjacent to them? Will they be held to the same concepts of society?

Marilyn Strathern argues that to think of a society is to think of it as a discrete entity.²³ The theoretical task then becomes one of elucidating the relationship between it and other entities. This is a mathematic if you will that sees the world as divided into units. Its corollary is that relationships appear extrinsic to such units. They appear as secondary ways of connecting things up. So if we think of the way that the concept of society is used in native title jurisprudence, then I think we see some of the mathematics which Strathern refers to here. So, for example, in the *Samipi* case,²⁴ it became a legal question about whether Bardi and Jawi were one or two societies at the time of colonisation and what they are today. He found that whilst they were once two societies, today they represent only one.²⁵

Paul Burke: I think we have to distinguish between conceptions of society in the discourse of legal doctrine and the discourse of anthropology. Understanding this is the first practical step in writing native title connection and other anthropological reports for native title.

We have to look at what legal doctrine is saying and what the word ‘society’ means in legal doctrine, acknowledging that it is a different discourse. We cannot just go into the law library and cut the word ‘society’ out of a book and return to the social science library and think it is going to have the same resonances as it does in the social sciences. We need to be orientated in native

title work to this different discourse of legal doctrine. The problem in legal doctrine is the question of its indeterminate nature.

The point of my paper is that there are some things in the jurisprudence of society which may help us to arrive at more ethnographically justifiable answers. If ‘society’ in native title and in legal doctrine is about the group of people who are responsible for enforcing social obligations, then that is a tractable thing about which we can obtain answers and justify an opinion about the relevant society. I wasn’t meaning to imply that language group and society and neighbours are the universal solution to all native title claims. It is a moveable feast that needs to be examined in relation to each particular claim. But I would say that the group responsible for the enforcement of social obligations is the key thing to be specified in each particular circumstance.

NOTES

1. Paul Burke, *Law’s anthropology: From ethnography to expert testimony in three native title claims*, D Phil Thesis, Australian National University, Canberra, 2005.
2. Kingsley Palmer, ‘Societies, communities and native title’, *Land, Rights, Laws: Issues of Native Title* vol. 4, no. 1, 2009,
3. *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.
4. *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, Brennan J, pp. 58–63, 69–71.
5. *Sampi v Western Australia* [2005] FCA 777; *Sampi v Western Australia (No. 2)* [2005] FCA 1567; *Sampi v Western Australia (No. 3)* [2005] FCA 1716.
6. For a legal analysis, see Lisa Strelein, ‘Native title holding groups and native title societies: *Sampi v State of Western Australia [2005]*’, *Land, Rights, Laws: Issues of Native Title* vol. 3, no. 4, 2005. Some of the ethnographic background is outlined in various works by Katie Glaskin, see for example, Katie Glaskin, *A case study in historical legacy and transition in the native title context*, D Phil Thesis, Australian National University, Canberra, 2002; Katie Glaskin, ‘Claim, culture and effect: Property relations and the native title process’, in Benjamin Smith & Frances Morphy (eds), *The Social Effects of Native Title: Recognition, Translation, Coexistence*, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, 2007; Katie Glaskin, ‘Outstation incorporation as a precursor to a prescribed body corporate’, in James Weiner & Katie Glaskin (eds), *Contemporary Land Tenure and Registration in Australia and Papua and New Guinea: Anthropological Perspectives*, Asia-Pacific Environment Monograph 3, ANU E Press, Canberra, 2007.
7. *Sampi on behalf of the Bardi and Jawi people v Western Australia* [2010] FCAFC 26.
8. State of Queensland (Department of Natural Resources and Mines), *Guide to Compiling a Connection Report for Native Title Claims in Queensland*, Brisbane, 2003.
9. State of Western Australia (Office of Native Title), *Preparing Connection Material: A Practical Guide*, Perth, 2006. See also State of Western Australia (Department of Prime Minister and Cabinet, Office of Native Title), *Guidelines for the Provision of Evidentiary Material in Support of Applications for a Determination of Native Title*, p. 20, Perth, 2004.

4. Overlapping jural publics

10. Graham Hiley, 'What is the relevant 'society' for native title purposes? Will any society do?', *Native Title News* vol. 8, no. 9, 2008, pp. 143–7.
11. In asserting that there are contrary views, I am not relying on published material but on an interview with Bryan Keon-Cohen SC conducted as part of my doctoral research (7 November 2003) and an interview with Robert Blowes SC (22 March 2010) conducted for this paper.
12. *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, at [49].
13. Hiley, above n 10, p. 146.
14. Francesca Merlan, *Caging the Rainbow: Place, Politics and Aborigines in a North Australian Town*, University of Hawai'i Press, Honolulu, HI, 1998.
15. See Marcia Langton, 'The estate as duration: "Being in place" and Aboriginal property relations in the areas of Cape York Peninsular in north Australia', in Lee Godden & Maureen Tehan (eds), *Comparative Perspectives on Communal Lands and Individual Ownership: Sustainable Futures*, Routledge-Cavendish, Abingdon, 2010.
16. Peter Sutton, 'Atomism versus collectivism: The problem of group definition in native title cases', in Jim Fingleton & Julie Finlayson (eds), *Anthropology in the Native Title Era: Proceedings of a Workshop*, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 1995. See also Peter Sutton, 'The robustness of Aboriginal land tenure systems: Underlying and proximate customary titles', *Oceania* vol. 67, no. 1, 1996.
17. See Kingsley Palmer, 'Aborigines and the Fortescue River', *Department of Aboriginal Affairs (WA) Newsletter* vol. 2, no. 5, pp. 4–7, 1976; B Neech, 'Millstream', *Department of Aboriginal Affairs (WA) Newsletter* vol. 2, no. 5, pp. 8–12, 1976; J Turner, *We womens really know a lot: Aboriginal gender relations in contemporary organisational negotiations Roebourne, Western Australia*, MA Thesis, University of Western Australia, Perth, 1990, Ch. 6.
18. The literature on *bora* grounds in New South Wales and Queensland is vast, but see, for example, E N Marks, 'The preservation of the Samford bora grounds', *Journal of the Royal Historical Society of Queensland* vol. 8, no. 3, pp. 568–76, 1968; 'Caring for bora rings', *Aboriginal Quarterly* vol. 1, no. 2, pp. 18–19, 1978; J G Steele, *Aboriginal Pathways in Southeast Queensland and the Richmond River*, University of Queensland Press, Brisbane, 1983.
19. In relation to the idea of the grotesque body as a challenge to assumptions of impermeable separation, see M Bakhtin, *Rabelais and His World*, Indiana University Press, Bloomington, IN, 1984.
20. See chapters on social sanction and primitive law in Alfred Radcliffe-Brown, *Structure and Function in Primitive Society*, Cohen and West, London, 1952.
21. *Jango v Northern Territory of Australia* (2006) 152 FCR 150.
22. Sutton, above n 16.
23. Marilyn Strathern, 'Cutting the network', *Journal of the Royal Australian Anthropological Institute* vol. 2, no. 3, pp. 517–35, 1996.
24. *Sampi v Western Australia* [2001] FCA 619; *Sampi v Western Australia* [2005] FCA 777; *Sampi v Western Australia (No. 2)* [2005] FCA 1567; *Sampi v Western Australia (No. 3)* [2005] FCA 1716; *Sampi v Western Australia (No. 4)* [2006] FCA 760.
25. Note that since the Australian Anthropological Society conference, this finding was overturned in *Sampi on behalf of the Bardi and Jawi people v Western Australia* [2010] FCAFC 26.

CHAPTER 5

Understanding another ethnography: The use of early texts in native title inquiries

Kingsley Palmer

Introduction

Proof of native title requires demonstration of a continuity of customary laws and practices. The duration of this continuity is that period from the date of sovereignty by the British Crown over the application area to the present. The date of sovereignty varies across Australia but can be as far back as 1788. One state, at least, has accepted that laws and customs are likely to have changed little between the date of legal sovereignty and the date of the settlement of the land by Europeans.¹ This acceptance of a difference between legal sovereignty and what I term ‘effective sovereignty’ is helpful in that it advances the date, sometimes by many decades, of that time judged to be the benchmark of the incidence of a customary system.

Despite this advance, there remains a methodological difficulty in how to establish the likely system of laws and customs relevant to claimants, unless it can be argued that little has changed since effective sovereignty. For most, if not all, of the ethnography relevant to a native title inquiry, the fact of some form of change is uncontested. It is the degree and measure of the change against customary systems that is subject to contestation. Generally, there were no ethnographic records dating from a time prior to the date of effective sovereignty. Consequently, the only way to proceed is to extrapolate from the records of early colonial writers. These include diarists, settlers and correspondents who provided data from the frontier to collectors such as E M Curr and A W Howitt. In the absence of early writers, later writers have to be relied upon. These pioneering anthropologists, some of whom undertook postgraduate research in Australia, represent some of the first professional ethnographic accounts collected in Australia.

5. Understanding another ethnography

A presentation and consideration of the early ethnography, sometimes labelled in the connection assessment processes a 'sovereignty report', has a purpose in native title dealings. It may be used to judge whether or not the contemporary data match it to a sufficient extent to allow the conclusion that enough of the laws and customs have survived to enable the recognition of native title. This 'before and after' equation and the corresponding calculations are complex and obscure. They are beyond the scope of this paper. However regarded, the examination of foundation ethnography remains a central component in the native title process.

The reconstruction of an ethnography from early texts is no simple task. One of the reasons for this is that the quality and reliability of the early accounts are immensely variable. The manner in which the data were collected, the selectivity exercised by those who did so, their preoccupations, predilections and, perhaps most importantly, their prejudices and assumptions, make the data difficult to judge in terms of their overall reliability. Many of the early accounts are impossible to assess with respect to specific issues that might affect their reliability because they include no account of the collectors, or of their preoccupations, assumptions and prejudices.

There has been a debate recently, following the Yulara native title case,² about the quality of the account provided by the comparatively late work of Norman Tindale. Professor Sansom argued that when judging early texts, the rule was 'earliest sources are best'.³ He concluded that at least some later texts reflected post-sovereignty changes and no longer mirrored the system likely to have been found at the time of either sovereignty or effective sovereignty.⁴ Birdsell made a similar point in 1970, arguing that after 1930 there were only two small areas of Australia that were untouched by 'the expanding frontier of colonial occupancy', which converted 'the Aborigines into dependent, second class human beings'.⁵ He therefore dismissed the accounts of other anthropologists with respect to local organisation because their data were collected from the period after 1930.

Not all anthropologists agree with Professor Sansom's propositions.⁶ Glaskin points out the inconsistency in Sansom's account of the authority of the early writers.⁷ Sackett examines the earlier ethnography and shows that earlier writers developed conclusions about patrilineality when their data indicated otherwise.⁸ While I do not find the notion of 'earliest sources are best' particularly helpful in this debate, I accept that the issues raise a number of questions about how foundation ethnographies may be constructed and understood.

In this paper I examine three examples of early ethnographies from very different chapters of Australia's colonial history, although the accounts all

originate from Western Australia. They were written by three individuals with diverse backgrounds, education and training. The first had no training in anthropology or in ethnographic studies; the second had some informal training, but was largely self-taught; and the third was a man eminent in his field and, to some extent, a father of the anthropology of Indigenous Australia. Each writer and their accounts raise particular problems relevant to the issues I have noted above.

Perth, 1836

Francis Armstrong arrived in Perth, Western Australia, with his family on the ship *Gilmore* in 1829.⁹ Five years later he was appointed to be in charge of an institution for Aboriginal people established on the banks of the Swan River. He subsequently held a number of public offices in which he had direct dealings with Aboriginal people over the next 30 years.¹⁰ According to the historian Neville Green, Armstrong was fluent in ‘at least’ five dialects of the Noongar language.¹¹ While Armstrong appears to have developed a keen interest in Noongar culture, assisted no doubt by his knowledge of their language, he was bemused at their lack of knowledge of a ‘Supreme Being’, their apparent inability to understand and provide for the future, and their entrenched belief in spirits.¹² Armstrong was particularly damning of those with whom he worked, accusing them of making up information for the price of a meal or a ‘few pence’ and then laughing at the settlers for their gullibility.¹³ His attitudes are characteristic of many educated European men at this time and they should be taken into account when assessing his materials.

Armstrong was one of several early settlers to report on the nature of land ownership amongst the Noongar people.¹⁴ He tells us that certain individuals as members of a family group held areas of land upon which they mostly lived. He attempted to identify these areas, noting that people also moved about freely over the land of other families.¹⁵

Armstrong provides details of the names of senior members of the family groups and the land that they held in sufficient detail for the historian Neville Green to map it.¹⁶ Armstrong wrote of the land-owning groups:

Nandaree, Elal and Yalgonga¹⁷, claim between them all the land between Mount Eliza and Fremantle, and from the river towards Mr Trigg’s limekiln. Bogaberry¹⁸, Meclup and Bonberry, own a tract eastward from Yalgonga’s for a considerable distance round the lakes. From near Monger’s Lake to as far as Bassindean, and for a breadth of four or five miles inland from the Swan, is Munday’s territory.¹⁹ To the north of Munday’s, are Warang’s, Miago’s, and Moorungo’s land.²⁰

5. Understanding another ethnography

Armstrong was also aware that ‘tribes’ relied upon one another in times of difficulty.

They say that when a tribe is pressed by a common enemy, they retire, if the pursuit be very hot, to the nearest swamp that offers concealment; otherwise to some neighbouring tribe, in which they have relatives, who are bound to defend them, right or wrong. The latter course has been adopted by the Swan tribe, when pursued by the whites; they have always retreated to a northern tribe, about a day’s journey off. Yagan’s tribe used always to fall back upon We-up’s.²¹ But they would not, they say, retire upon a tribe in which they have no relatives. They themselves would not afford refuge, or, at least, protection to any stranger fugitives. The Swan tribes are in the habit of communicating with at least ten surrounding tribes, - viz, three to the northward, two to the north-east, two to the eastward, beside the Canning, Mangles Bay, and Murray tribes.²²

Armstrong tells us that people travelled across their own countries and across the countries of others over a distance of a hundred miles, or sometimes less. This was a much greater distance than the relatively small ‘territories’ or ‘districts’ mapped out by Green,²³ though it is evident that people were free to move across a wider range of country than their own ‘territories’ or ‘districts’, access being either by virtue of kinship ties or ‘invitation’ (see below) or possibly a combination of the two.

A whole tribe does not, as a custom, migrate beyond its own district; but sometimes a whole tribe pays a visit of a few weeks to a neighbouring tribe, but this is always on a previous invitation, which is sometimes sent to its neighbours by a tribe that has had extraordinary good luck in hunting, or has had a whale cast on its coast. There is good reason to believe that few, if any, of the Swan men have been further from the Swan than 80 to 90 miles, unless with settlers. They move about their own districts according to the season and the consequent variety of food. In winter they separate a good deal and live apart by families, and become stationary for a month or six weeks at the place where they have built their huts, provided the food of the season continues plentiful there.²⁴

Armstrong also wrote that trespass was a punishable act: ‘if any native strangers had settled amongst them they would have done all in their power to destroy them’.²⁵ He also noted patrilineal inheritance of land and strong defence of country.

These co proprietors appear equally interested in their respective districts, and are equally ready to revenge trespass, which may be committed, not only by unauthorised hunting, but by taking swans' nests etc. Land is beyond doubt an inheritable property amongst them, and they boast of having received it from their fathers' fathers, etc., to an unknown period back. All the sons appear to succeed equally to their fathers' lands.²⁶

Armstrong collected the names of the members of residential groups. Green has reproduced Armstrong's list of the membership of Yellowgonga's group, which was collected in 1836.²⁷ An analysis of Armstrong's account of the membership of Yellowgonga's residential groups reveals the dynamics of the relationships that existed between group members and their attachments and affiliations to a number of different areas of country. Some of the relationships between the members of the group are recoverable and can be stated for 11 of the 28 examples on Armstrong's list. Relationships for an additional four names can be derived through an examination of affinal relationships. A summary of Armstrong's data which he collected on Yellowgonga's group is set out in Table 1. Figure 1 is a chart showing the relationships which can be derived from his data.

Table 1: Members of Yellowgonga's group²⁸

Name	Relationship to ego	Sex/age	Other relationship	Other territorial affiliation	Hallam and Tilbrook ref
Yellowgonga	Ego	m, adult			348ff.
Windan	w	f, adult			320
Yangan	w	f, adult		Brother's country Lake Monger (343).	343
Nander (Nandra)	S	m, adult			253
Elal	S	m, child			109
Dued (Dower)	S	m, adult	'Close relationship' to Ningana, Domera and Edar; Ningana is his ZH (90).		90
Elup	S	m, adult?			110
Nignana	DH	m, adult	B to Edar and Domera; wives were Daleer and Gayup.	'Clarence tribe' (271).	270ff.

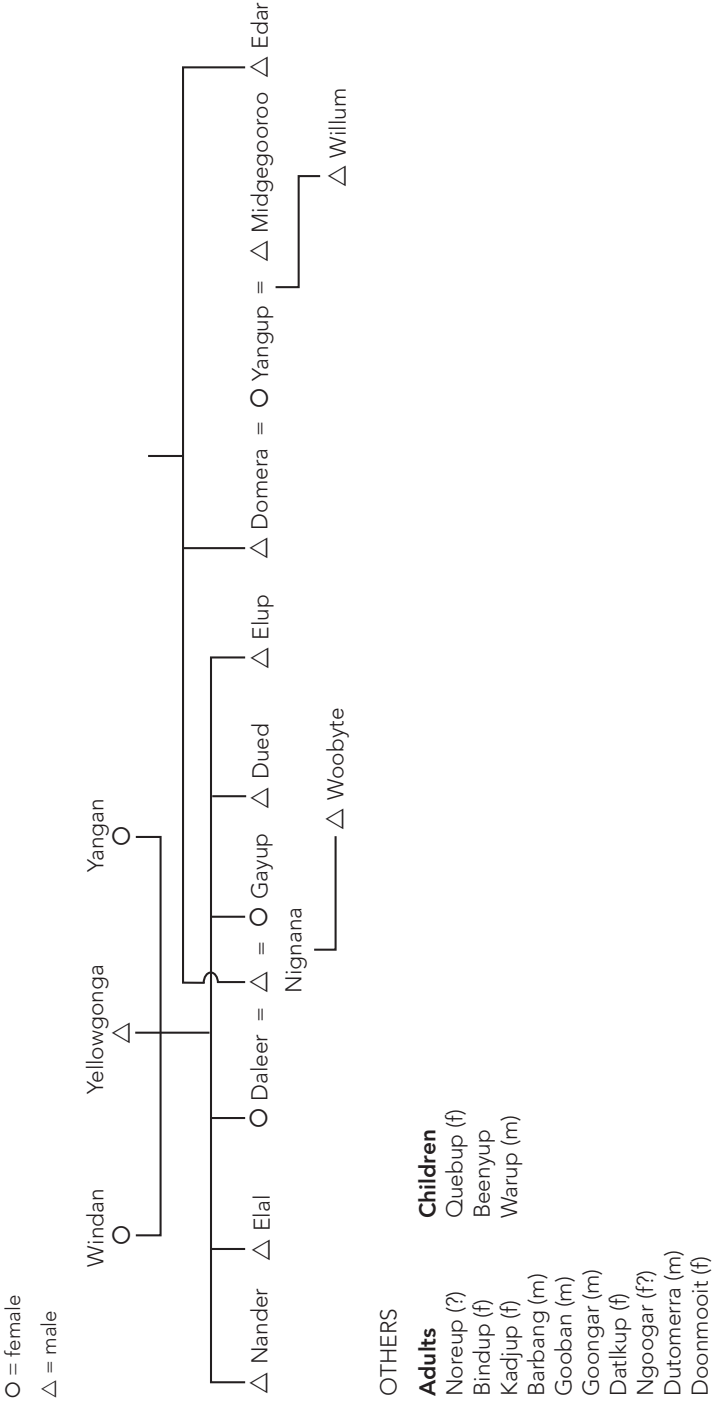
Table cont.

5. Understanding another ethnography

Table cont.

Name	Relationship to ego	Sex/age	Other relationship	Other territorial affiliation	Hallam and Tilbrook ref
Daleer	d	f, adult	W of Nignana.		55
Gayup (Gargup)	d	f, adult	W of Nignana.		123
Woobyte	DS	m	S of Gayup.		326
Domera	DHB	m, adult	B to Edar and Nignana. Married to Midgegooroo's widow, Yanyup.	'Father a Murray man' (73).	73
Edar	DHB	m, adult	B to Nignana and Domera.	'Father a Murray man'.	105
Yangup (Yanyup or Ganiup)	dhbw	f, adult	Midgegooroo's widow; married to Domera.		120
Willum or Dalbur	DHBWS	m, teenager	S of Midgegooroo.	'Monday's tribe', 'First tribe north' (319); F's country 'south of Swan River' (209).	319
Noreup (Ngorap?)	?	?			266
Bindup	?	f, adult?			24
Quebup	?	f, child			285
Beenyup	?	m, child			11
Warup	?	m, teenager			301
Kadjup	?	f, adult?			173
Barbang	?	m, adult		Father from 'South of York' (345).	6
Gooban (Giban)	?	m			132
Goongar	?	m,			142
Datlkup (Dakkup)	?	f, adult	W to Goongar?		55
Ngoogar	?	f ?, adult	W to Goongar?		264
Dutomerra	?	m, adult		Wiap's tribe (101).	101
Doonmooit	?	f, adult			87

Figure 1: Yellowgonga's group, 1836²⁹



The principal person in this account is the man called Yellowgonga. His four sons appear to be unmarried. His two daughters, Daleer and Gayup, were both married to Nignana, whose country seems to have been 'Clarence'.³⁰ Nignana's two brothers, Domera and Edar, also formed a part of Yellowgonga's group, and the three brothers were living outside their own country 'Clarence'. Apart from Nignana's affinal links to Yellowgonga through his daughters, Hallam and Tilbrook record that the brothers had a 'close relationship' with Dued, Yellowgonga's son.³¹ We know nothing of the nature of this relationship but it presumably was the basis of a bond between the men, manifest in the recruitment of the unmarried brothers to Yellowgonga's group and their residence outside of their own father's country. There is, however, an additional affinal tie which influenced residential choice.

Nignana's brother Domera had married Yanyup, who was widow to a man named Midgegooroo, who was executed by European authorities in 1833. Midgegooroo's teenage son by another marriage, Willum, also lived with his stepmother³² and Domera as a member of Yellowgonga's group. The relationship that existed between Dued (Yellowgonga's son) and his sister's husband (Nignana) and Nignana's brothers (Domera and Edar) extended to the wife of one of those brothers (Yanyup, the widow of Midgegooroo) and her son Willum, the child of Midgegooroo.

This residential arrangement reflects the close relationships that existed between members of neighbouring groups (Yellowgonga and Midgegooroo, see above). It supports a view that residential groups were closely allied and had interchangeability of membership, depending on circumstance and the realisation of kinship, marriage and other alliances that were the basis of the relationships that underpinned group cohesiveness. In this case, the deaths of Midgegooroo and perhaps Yagan (his son, who was also murdered by European settlers) may well have been a cause for the realisation of these links in practice, evidenced in the composition of 'Yellowgonga's group' as recorded by Armstrong.

The remaining names on Armstrong's list cannot be related with any certainty to Yellowgonga and his family, and they may or may not have been affinally or consanguineally related. They may represent several families, and it is possible that Goongar was married to Dakkup and Ngoogar, but nothing more is known about these individuals.

The members of Yellowgonga's group represented several different territorial areas. Yellowgonga himself is recorded as regarding the area north of the Swan River as his own.³³ One of his wives was Yangan, and Yangan's brother had the country round Lake Monger. Nignana and his brothers belonged to the area round Rockingham and probably south to the River Murray. Willum, Midgegooroo's son, was associated with the land south of the Swan River, but

was also of 'Monday's tribe' (between the Canning and the Swan),³⁴ as well as 'the first tribe north'.³⁵ A man called Barbang (see 'Others' listed in Figure 1) may have been associated with land south of York,³⁶ while Dutomerra was also described as a part of 'Wiap's tribe',³⁷ an area in the hills to the east of Perth.³⁸

Armstrong's material shows that 'family' groups were founded upon a complex web of relationships and alliances which reflected bonds of kinship, affinal relations, and alliances forged through social and ritual processes. Yellowgonga's group had a nuclear family at its core, but included individuals with affinal relations and, as far as can be ascertained from the data, his group probably included others who were relatively distantly related or who saw their relationships with other group members in classificatory or social terms. The group included representatives of a number of different geographic and territorial interests, which, together with the bonds that bound them as a residential group, were likely to have facilitated how the members of the group together accessed and exploited the areas that comprised their traditional range. This extended well beyond the area within which they primarily identified. As noted above, there also appears to have been an expectation that in extraordinary circumstances a group might seek refuge beyond its normal range and that such refuge could not be denied.

Whilst we can learn much from analysing Armstrong's data, we also need to understand its limitations. It is unclear from the account whether there was a distinction between rights in an individual's principal area and rights in other areas where access and use appear to have been sanctioned. Armstrong writes of 'co-owners' rather than single owners, but there is no indication of how rights were exercised and prosecuted in practice. Rights to country were by his account 'inherited' in the male line, although rights also appear to be exercised through other relationships, including matrification. Trespass appears to have been a violation occasioned by strangers — presumably those not known to the owners or not within their sphere of social knowledge. Finally, the exact extent of the 'countries' is sometimes made by reference to imprecise geographical features, or is expressed in vague terms by reference to a general compass direction. This raises questions relating to the definability of boundaries and the processes whereby they were sustained and validated.

Eucla, 1901

Daisy Bates was little more than a journalist and somewhat less than an anthropologist. While she had no formal training as an anthropologist, she was influenced by eminent researchers of her time, including Andrew Lang, John Mathew and A W Howitt.³⁹ She attempted to compile a collection of data, where classification, particularly in relation to totemic affiliations or social

categories, was a preoccupation. Given the intellectual thinking of her time,⁴⁰ it is likely that she was influenced by a desire to understand ‘primitive’ religions within the context of post-Darwinian evolutionary thinking. Such thinking sought to place institutions like mythology, totemism, exogamy, and social and religious structures within the context of the evolution of social phenomena from ‘primitive’ to ‘modern’.⁴¹ The Australian Aboriginal people were seen by some scholars (including J G Frazer) as ideal fields of study for furthering Darwinian intellectual endeavours.

Like Armstrong, Bates generated much of her material from first-hand observation and close association with Aboriginal people. The anthropologist A P Elkin considered that there was value in her ethnographies, as have some others.⁴² Nevertheless, Bates remains a controversial figure and the reliability of her ethnography is subject to debate.⁴³ Reece points out that she was dishonest about her own origins and life history and that this might cast doubt on the credibility of her other accounts.⁴⁴ Her views about cannibalism were not only controversial at the time but were perhaps the result of her own morbid preoccupations.⁴⁵ Reece remarks that her letters reveal her as ‘anti-feminist, anti-socialist, anti-Catholic, anti-German and so on’.⁴⁶ Her manuscripts are at times difficult to interpret due to the permissive annotations which constitute her fieldnotes. My own reading of her manuscripts leads me to the view that she believed in the pre-eminence of the British and the inferiority of other races, particularly those that were not white-skinned.⁴⁷

Bates’s encounters with the anthropological thinking of her time led her to employ lines of inquiry that directed her ethnography into a preconceived mould. Like many ethnographers of her time, she was interested in ‘totemic’ systems which articulated relationships between people and the natural world. She sought to classify and systematise, looking for evidence of an underpinning operating system. Assumptions in her writing were not always borne out by her original field data, as the following analyses illustrate.

Bates and totemic groups

Bates called the people living round Eucla, on the South Australia – Western Australia border, the ‘Jinyila nation’ after the local name for Eucla.⁴⁸ According to the account Bates prepared for publication,⁴⁹ the Jinyila nation comprised groups of individuals named either by reference to their *wamu*, the name of their principal ‘fire, camp, shelter home’, or by the use of the suffix *-um* qualified by the name of the totemic species that characterised the group.⁵⁰ Thus, *mulgar-um* was the wild cherry totemic clan, as *mulgar* meant ‘cherry’ and the suffix denoted ‘those belonging to’ or the ‘people of’.⁵¹ Names were also derived by reference to geographical localities where small groups of people

customarily resided and were identified by sets of rockholes.⁵² These clusters of people she called 'totemic groups'. Some groups shared the same country⁵³ and some totems were paired.⁵⁴ The account of the 'totemic groups' to be found in her manuscripts is rich in detail.⁵⁵

Bates annotated a 1909 geological map showing what is likely to be a mixture of area or place names, and names she used to identify 'totemic groups' of people who were associated with specific areas of the country.⁵⁶ Some names which are noted on the back of the map are the personal names of those who were associated with an area of country. Other names reflect her view that there were 'totemic groups' and Bates attributed a specific natural resource (animal, bird, plant) to groups she identified on the map. For example, the map shows the 'Sea coast people' associated with the 'Great Diver or sea bird'.⁵⁷

Some of the annotations in Bates's notes and maps identify an individual's totem. For example, in one set of notes (folio 9/7), Bates lists, as a handwritten addition to her genealogies, the names of 'totem clans', which she indicates are identified by the use of the suffix *-um* attached to the name of the natural species with which she considered the group to be associated.⁵⁸

On the following page Bates lists the approximate geographic locations of areas 'which clans inhabit' (folio 9/8). While Bates states that this was a list of the 'above clans' (that is, those listed on folio 9/7), she introduced some new names and omitted others.⁵⁹ In the first three entries under the heading 'country which above clans inhabit' (folio 9/8), Bates provides the names of members of the 'totemic clans'. Some of these names can be found in her accompanying genealogies.

Taken together, then, folios 9/7 and 8 give details of a number of groups, including the area with which each was associated, their 'totemic' affiliations and, in a few cases, the personal names of members of these groups. Thus, in some cases we can learn the totem, area of country and relationship to others for named people. I have set out these data in Table 2, showing an individual's totem, country and relationship to others who are also noted by Bates in her manuscripts. I have included reference to a genealogy in the right-hand column, under 'Gen ref', a matter I will discuss below.

Bates collected genealogies for the Eucla people. These she annotated, including, amongst other details, totemic affiliations in some cases. I have extracted her totemic data from the relevant genealogies (listed in Table 2 in the right-hand column under 'Gen ref') for those individuals for whom I have found a genealogy. It is then possible to compare the data on totemism for specific individuals which she provided in her notes (as set out in Table 2) with that set out in her genealogies (see Table 3). Bates, however, does not differentiate between totemic names and place names, making it impossible to ensure that the list of totems does not include some place names.

5. Understanding another ethnography

Table 2: Totemic and other relations within Bates's 'clans'⁶⁰

No.	Person's name	Totem	Area ⁶¹	Relationship ⁶²	Gen ref
1	Yargo	Ngura (wild grape)	Munderbila	H to 3. ⁶³	9/35
2	Lucy	Ngura	Munderbila	Z to 5 and 6, w to 8	9/47
3	Ngungalea	Ngura	Munderbila	w to 1.	9/35
4	Ngajjida	Ngura	Munderbila	No data.	No ref
5	Yaji	Guyana (wild fruit)	Jinyila	B to 6 and 2; H to 11.	9/47
6	Peter Maramunga	Guyana	Jinyila	B to 5 and 2.	9/47
7	Yaler	Guyana	Jinyila	No data.	No ref
8	Yalguru	Guyana	Jinyila	H to 2; ⁶⁴ 5 and 6 are WBs	9/53, 9/29, 9/47
9	Freddy Wadija	Ngabia (termite)	Jiala	No data.	No ref
10	Wardunda Bob	Ngabia	Jiala	'only relations' were 11 & 12.	9/49
11	Jirawirding	Ngabia	Jiala	W of 5; 12 & 13 are bsw; HB is 6; hz is 2.	9/12, 9/47
12	Wardulea	Ngabia	Jiala	co-wife is 13; 11 is hfz.	9/12
13	Jirabuldhara	Ngabia	Jiala	co-wife is 12; 11 is hfz.	9/12

Note: Kin terms are referred to by conventional abbreviations, where F = father, MF = mother's father, mm = mother's mother, z = sister, S = son, H = husband, w = wife and so on. Male take upper case; female, lower case. The relationship column refers to relationships between those identified as 1–13 in column 1. Bold text indicates a relationship which is **not** traced via filiation.

A comparison of Bates's data on an individual's totem drawn from two different sources reveals that in seven of ten cases there is no correspondence between the totems of individuals as shown by Bates on folios 9/7–8 and totemic affiliations shown in her genealogical accounts (Table 3, numbers 1, 2, 3, 5, 6, 8 and 10). There are three cases where there is some correspondence, Bates providing multiple totemic references in her genealogies, one of which matches that recorded by her in her folio 9/8. In addition, there is no consistency as to the manner whereby a totem is acquired, affinal links being as well represented as those based on filiative links. In short, there is neither consistency as to the totemic affiliations recorded, nor data that would indicate how totems were acquired or perpetuated.

Bates’s account of ‘totemic clans’ did not end here. In another manuscript (folio 20) she provides a list of ‘totem clans and localities’ (20/129–30), which shows some similarities with the data considered above (in Table 2), but also some differences.⁶⁵ For example, Bates includes the *ngura* (wild grape), *guyana* (wild fruit) and *ngabia* (termite), noted above from folio 9 in Table 2. As with her earlier account, Bates does not restrict a totem to one area. However, Mundrabilla is now associated with *ngura*, as well as with *boordi* (marsupial rat): Jinyila is associated both with *ngura* and *guyana*. These overlaps are drawn by Bates on two maps which show some of the different groups and their totems, although the geographic positioning is likely to be approximate, since Bates probably did her mapping work remotely from her camp at Eucla (20/133, 138).

Table 3: Totemic affiliations after Bates⁶⁶

No.	Person’s name	Totem country ⁶⁷	Totems in genealogy	Gen ref	Descent of totem ⁶⁸
1	Yargo	Ngura	Madhuru ⁶⁹	9/35	From F; F has probable totemic names.
2	Lucy Gubin	Guyana	Nguram	9/47	From mother and father.
3	Ngungalea	Ngura	Bongoorgoo (turkey)	9/35	No ancestors listed.
5	Yaji	Guyana	Nguram	9/47	From mother and father.
6	Peter Maramunga	Guyana	Nguram	9/47	From mother and father.
8	Yalguru	Guyana	Nalgum (duck?), ngura, noonoorr, (country name associated with wallaby); noongardija (unidentified)	9/53	No ancestors listed.
10	Wardunda Bob	Ngabia	Kailgum (lizard) and wogeam	9/49	From neither m or F.
11	Jirawirding	Ngabia	Ngabia, nalgum, ngabbiam, moonoorr	9/47, 9/22	Two from m; one same as H.
12	Wardulea	Ngabia	Kaldaum, kailgum and ngabbiam	9/12, 9/9	None evident in genealogy.
13	Jirabuldhara	Ngabia	Ngabbium, Ngain, Wadarn	9/30, 9/12	Two from father, one from step father.

In folio 20, Bates sets out a list of people associated with the same totems, presumably comprising what she considered to be a ‘totem clan’. This list is similar to those in earlier pages of this folio and summarised above in Tables 2 and 3. Some additional differences can be identified where the names can be cross-matched (see also folio 24/149). For example, Yargo (number 1 in Tables 2 and 3) is now of the *kailgum* (lizard) totem (formerly *ngura* — wild grape) and Jirawirding (number 11 in Tables 2 and 3) also *kailgum* (formerly *ngabia* — termite). Lucy Gubin (number 2) is *wilbaum* (formerly *ngura* or *guyana*). Freddy Wadija (whom I do not record in Table 3, but see folio 9/8) was designated by Bates to *ngabia*, whereas at folio 20/146 he is *kailgum*. Ngungalea (number 3), now rendered Ngailgulia, is *malgarum* (formerly *ngura*). Bates notes at the foot of the chart that Freddy (number 9) and Jirawirding (number 11) were ‘*kailgum* and *ngabbian*’ (folio 20/146), so this could be understood as an addition. Wardulea and Jirabuldhara (numbers 12 and 13) are likewise allocated these two totems, providing an addition to the single totem (*ngabia*) identified formerly in folio 9/8.

Understanding Daisy

Bates’s data are problematic in both their diversity and inconsistency. Her notes contain diverse, sundry and repetitive accounts of the same subject which show themselves to be contradictory and inconsistent. It is hard to know how such inconsistencies could have been worked up into the relatively neat texts that she presented in her manuscript for publication. Bates’s manuscript account of local organisation, which found its way into her proposed book, neglects all of the complexity of her fieldnotes. She had it that the ‘Jinyila nation’ was comprised of local totemic clans, named for their species of spiritual equivalence, presumably recruited via filiation, associated with defined areas — an interpretation which is not evidenced in her data.⁷⁰

Rather, Bates’s data show there to be no consistency over the allocation of a totem, and that totemic attachments were multiple, identified both by reference to person and place and derived according to more than one governing principle. Filiative principles relating to the descent of totems are lacking, so the means whereby the totem came to be associated with a person is not evident and there is no consistency in the rule of descent (see Tables 2 and 3). Some wives appear to share the totem of the husband (totemic endogamy), while it appears that a man could take the totem of either his mother or father or both. A rule of descent is to be expected in a totemic patri-clan system, where a son gains the totem of the father and the totem was attached to the estate, but no such system is supported by Bates’s data. In contrast, a person appears able to have a totemic attachment to a species that is not the species identified with country with which he or she had filiative links.

Finally, the formation which Bates calls a ‘totemic group’ (or ‘clan’) appears to have been a residential group rather than a descent group comprising those who traced common ancestry. It is possible that an area of the country itself was deemed to be associated with a particular natural species, perhaps because it was particularly plentiful there.⁷¹ As a consequence, the usual residents of that area were also associated and perhaps named for that species. Thus totemic attachment may have been a function of physical presence (perhaps habitual) rather than a means to articulate a mode of descent and concomitant proprietary rights within an estate. This leads to the conclusion that for the Jinyila, totemic affiliations may have been multiple, as later writers were to understand.⁷² Indeed, the inconsistencies in Bates’s totemic data and her view that there was commonality between some totems support this conclusion.

Bates sought (and believed she had found) ‘totemic clans’. This analysis of her primary field data throws doubt on what she did find and her interpretation of it. Understanding Daisy Bates is then a matter of recognising the limitations of her primary field data, since it is, to say the least, confusing because of its diversity and is oft-times contradictory. To understand Daisy Bates also requires recognition that in her attempts to formulate a system consistent with contemporary thinking on the subject, she reaches conclusions that are not supported by the ethnography. Bates was sometimes physically close to those she studied. She collected her data from Eucla within the first 40 or so years of initial European settlement in the region. Despite her ‘early’ ethnography, she proves unreliable for those seeking to understand the local organisation of the people whom she studied in the Eucla region of Western and South Australia and elsewhere.

A P Elkin

Adolphus Peter Elkin, professor of anthropology at the University of Sydney, visited the Kimberley between October 1927 and October 1928. He spent six months in the western Kimberley (Lagrange⁷³ and Dampier Land), two months at Forrest River, two and a half in the Walcott Inlet district, and ‘about a month’ travelling from Wyndham to Derby.⁷⁴ He also visited Halls Creek in 1929 in company with the Chief Protector of Aborigines.⁷⁵

Based on his fieldwork, Elkin published a lengthy article on totemism, comprising two parts in three editions of the journal *Oceania*.⁷⁶ Like Bates, for Elkin, an account of totemism was also an account of local organisation. The link between a person and their land was understood by Elkin to be totemic; a term he used in a variety of ways.⁷⁷ His summary account of the local organisation of the Karajari from the Lagrange area ran as follows:

5. Understanding another ethnography

Karadjjarri territory is divided into a number of horde-countries called *ngura* which are, and were, for the most part patrilineal and patrilocal... A person belongs to the horde of his father and has free access to the horde-countries of his mother and father's mother.⁷⁸

Elkin understood the term *ngura* to have an ambiguity which he found unsettling.⁷⁹

The term *ngura*, however, is also applied to a person's spirit-home, the place in which he was 'found' by his father; this is usually a part of the horde-country, but the use of the one term in the two senses adds to the difficulty of defining the boundary of the horde territory if it cannot be visited, though it does add to the significance of this country as a person's home.⁸⁰

Elkin seeks to mediate the difference between the two uses of the term *ngura*, and the difficulties that this creates for his analysis, by assuming that they represent different aspects of the same totemic principle. He stated that each country group was associated with 'one or more totems'. These totems linked a member of that group to the mythical and spiritual time long past (the 'dreamtime') and 'gives him his share in it'.⁸¹ The totems were 'local' in that they 'are definitively associated with particular horde-countries or localities'.⁸² The child spirit totem would 'normally' be found in the father's estate and if this were not the case, for any reason, then he asserts that it 'is arranged to be' so.⁸³ Such an arrangement, coupled with a father's desire to ensure a son follows his ritual and totemic commitments and patrilocal marriage, engenders, according to Elkin, a patrilineal system.⁸⁴

Elkin found a number of exceptions to this model.⁸⁵ For example, two brothers had different country, one derived via patrification, the other through place of birth. Another man gained his country through his birth and his status within that country from his mother's brother. A third gained his country through birth.⁸⁶ He also found that a person's totem was not necessarily the same as that of his father⁸⁷ or that, while the totem was the same as the father's, the man's country was different by appeal to birth place.⁸⁸ Siblings could have different totems, a daughter's totem was not the same as that of her father's and some people had multiple totems.⁸⁹ Elkin found that a person did not marry someone who had the same totem.⁹⁰ His data relating to whether a person should eat their own totem was inconclusive.⁹¹ Finally, he listed the names of a number of different places, some of which comprised together *ngura* or estates.⁹²

These data indicate complexity and variety. They show that the relationship between a person and an area of country was more complex than Elkin had

initially suggested. Patrilineage was an operative principle in the descent of rights to country, but it was not the only one. There was no neat fit between an individual's totemic affiliations and his or her father or father's estate. A singular patrilineal totemic principle did not govern the descent of rights in an estate. Birth was cited as a legitimating factor in asserting rights to country, as were both patri- and matri-filiative relationships.

In starting with totemism, Elkin recognised that the basis for a person's relationship with country was fundamentally spiritual. In attempting an analysis which was based on a singularly patrilineal system of descent, he erred in neglecting the diversity of the system, which his data revealed. This was that *ngura* (country, estate) could be gained via descent and birth. He attempted a concatenation of these two avenues by arguing that the two could be accommodated in an oral account constructed after the fact that sought to align place of birth with father's country — by some re-ordering of the circumstances that 'arranged' it to be so. In fact, his data show that the two means of gaining rights to country provided different mechanisms for the attribution of totemic attachment and for the claiming of rights in country. This was only a problem because Elkin was wedded to the idea that a person had rights in the one patrilineal estate.

However, Elkin had found that in some cases a person asserted spiritual affiliations with more than one area of country (or to places within more than one area), a fact that he records for another area of the Kimberley.⁹³ He had also stated that a man enjoyed rights ('free access') to the horde-countries of his mother and father's mother.⁹⁴ Elkin's own data did not support the implicit basis of his text, which is, as noted above, that a person only had rights to the patrilineal horde-country.

Elkin's orthodoxy led him to challenge the work of Ralph and Marjorie Piddington,⁹⁵ both of whom worked at Lagrange after his own visit there.⁹⁶ The Piddingtons had published their report of fieldwork the year before Elkin's paper on totemism. Elkin's paper described local organisation in the context of the work of his predecessor, Professor Radcliffe-Brown, according to whom, the 'normal' Australian type of local organisation comprised a horde⁹⁷ whose members had rights to a defined area of country. Members of other hordes were required to seek permission to use another horde's country, or be invited into it.⁹⁸

In contrast, the Piddingtons stated that among the coastal Nadja Karajari:

this rule does not exist. Certain small exogamous groups exist, but they lack the solidarity which characterises the normal Australian horde; small parties composed of less than a dozen individuals from any horde may go on hunting expeditions lasting several months, over the territory

5. Understanding another ethnography

of any other horde, without asking permission of the owners, who would not object.⁹⁹

They found that whilst the horde was exogamous:

the Karadjeri never possessed a rigid clan associated with their local groups, but that there was a general tendency for the majority of men of one locality to belong to one or other of the two moieties, a state of affairs which was probably preserved by the predominance of patrilocal marriages.¹⁰⁰

Elkin took issue with the Piddingtons in his 1933 article, commenting that the inconsistencies they raised did not qualify his analysis. He wrote that drawing conclusions about clan structures, given that the Karajari had been ‘under white influence for some sixty years’, made reconstruction ‘difficult’.¹⁰¹ He considered that the failure to ask permission to which they referred was due to the ‘decadent condition of this part of the tribe’.¹⁰²

The Piddingtons recognised that there were countries (‘estates’) that had ‘owners’. Their field experiences taught them, however, that rights to country were not exclusively held and that members of foraging groups (residential groups) had rights of access to a number of areas beyond their own estates. This layering of multiple rights is, in fact, consistent with Elkin’s own field data, although, as I have shown, he was reluctant to accept the possibility of a more open and flexible system over the narrow system of patrilineal estates, totemically defined, which appears to have represented his ideal.

Conclusion

Deborah Rose has discussed the use of Curr’s early accounts in the *Yorta Yorta* case.¹⁰³ She considers that the judge in *Yorta Yorta* (Olney J) ‘relied very heavily’ on Curr’s document,¹⁰⁴ failing to question the credibility of the latter’s account. Curr, she argues, should have been interpreted in the context of his time and his prejudicial attitudes, whereby he ‘contextualised his observations within the imperial genre of the gentlemanly account of the native’.¹⁰⁵ She concluded that such an account should be read with caution, using ‘informed ethnographic reading’ of Curr’s observations.¹⁰⁶

The examples given in this paper show the importance of understanding the intellectual and social context of an early account when constructing foundation ethnography. Despite Armstrong’s prejudices about the Noongar people with whom he worked, his account is relatively uncompromised ethnography. He mostly described and recorded what he saw, at least in the

examples I have set out above. Both Bates and Elkin, on the other hand, came to their data with a number of preconceptions and ideas that they had adopted *a priori*, which resulted in their interpreting their data in particular ways. For Bates there was a structure of local organisation that was based upon totemic clans. For Elkin there were patrilineal local groups whose members could strategically accommodate totemic attachments and so align them with his prescribed patrilineal principles.

The measure of the potential worth of early ethnographies is not to be tabled in a chronology that ascribes merit inversely as a function of its temporal distance from the European frontier, as Sansom suggests. Rather, the value of early ethnographies lies in working to an understanding of the systems that may have been in operation through a close study of the texts, the conditions in which they were produced and the predilections of their authors. This requires considerable work and inquiry, particularly in the case of early ethnographers such as Bates, whose fieldnotes and genealogies are gargantuan.

Foundation ethnography must thus be understood as provisional, interpretative and, to some extent, speculative. It is not possible to extract the reality of the laws and customs at the time of either sovereignty or effective sovereignty neatly and elegantly from early texts. Rather, these texts need to be treated as meta-data. They should be approached critically and with caution, interpreted with care and diligence and in the context of their writing, with due consideration of the author's preoccupations and assumptions and the conditions and parameters that may have shaped their ends.

This discussion rather begs the question as to the relevance of some aspects of foundation ethnography in native title inquiries. Early ethnography is, of course, only relevant to the extent that it illuminates and validates the continuity of current laws and practices. When facing an inquiry where parcels of belief and practice are no longer in evidence (for example, where rituals of circumcision are no longer practiced, or where the categorical system is now unknown), I wonder at the relevance of detailed discussion of these topics as reconstructed foundation ethnography. In a native title context, the relevant subject for detailed study and exposition in the foundation ethnography should be those aspects that are found in the contemporary ethnography rather than those that are not. Discontinuities and diminutions must be admitted and acknowledged. However, absences and attenuation in the contemporary account are unlikely to be a matter for contestation by those who oppose or judge the claim. It is proof of the continuation of laws and customs that should be the principal focus in the assessment of early ethnographies and the subsequent reconstruction of the possible laws and customs of the relevant society at sovereignty.

Post-presentation discussion

Participant: How do you think an argument to persuade lawyers or judges should be constructed, given their propensity for seeing documentary evidence as the main source of truth?

Kingsley Palmer: It lies in the ways that the evidence is presented to the Court and has to be placed in the context of its time. While I understand that lawyers and judges like documentary evidence — ‘the truth is in the paper’ — there is also weight that is given to other contextual issues. So if a person is known to have lied, their testimony is going to be subject to some doubt. I think that early ethnographers have been treated too kindly in some instances, and that it is only now, in closer examination of their texts, that some of the flaws in their analyses are coming out. Lawyers and judges will reach their conclusions based on the evidence presented to them. The issue at Yulara, for example, was about Tindale, who is now getting bad press but who, in my opinion, should have been taken to task some time ago, particularly in relation to native title.¹⁰⁷ When I am writing a report dealing with Daisy Bates, I also make it clear at the outset that her research findings need to be treated with caution.

Participant: I think in the minds of judges and lawyers, the questioning of the reliability of early ethnographies inevitably raises the question of the standing of current ethnography. An issue we’ve all faced over the years is the extent to which another researcher can inspect our notes and field materials and find a precise relationship of support between the concrete data and our interpretations. How, then, do we present our anthropological conclusions in relation to these data so that they will be understood by the courts?

Kingsley Palmer: It is imperative that the native title branch of the anthropological discipline espouses a science, which, while not refuting ideas of relativism and conclusions which may be variable according to context, nonetheless provides a view that is based on real data that the Court can deal with appropriately.

Participant: I want to go to the matter of truths and lies. As anthropologists, we are in an interpretative realm, notwithstanding our grasp for science and the facts. You’ve left out contested truths and where they fit in your schema.

Kingsley Palmer: I agree that there will be contested interpretations in a Court where there is advocacy on two sides and we need to present the best case based upon a reasoned view. I am not saying there is God’s truth out there, but rather that we have to treat these early texts for what they are, as products of their context.

Participant: I've recently worked a lot with Howitt's material and previously with Radcliffe-Brown's. Howitt's large volume of published works lacks a systematic style and is contradictory. The only way to sort out the contradictions is by modelling what might have been the case. That is, the issue is not so much about the empirical clash of the two pieces of data but, rather, about the modelling itself.

Kingsley Palmer: A lot of the early anthropologists, Curr included, were relying upon information that was provided to them by correspondence. This provides another layer of difficulty in interpreting these earlier texts, which needs to be recognised.

Participant: Is there emerging native title case law that shows that the claimant is more likely to be successful if the historical data is rich and contestable versus that which is very sparse and incontestable? If it is the latter, then aren't claimants better off if there is no historical material?

Kingsley Palmer: It is curious that there is a process that goes on in some jurisdictions which scores 'what it was like then' relative to 'what it is like now', with claimant groups, as it were, being allocated a notional score out of 'ten'. The weighting given to such scores seems to vary: in one state, for example, a claimant group might need to score, say, eight out of ten, whilst, in another, they may only need to score three to four out of ten to be successful. Not only is this unjust, but the processes behind making such strange calculations are obscure, including who makes them and their capacity to do so. Can bureaucrats in dark corridors of Crown Law Offices make these decisions, for example? In such circumstances, the best claims may be the ones where there isn't anything historical to examine.

NOTES

1. State of Queensland (Department of Natural Resources and Mines), *Guide to Compiling a Connection Report for Native Title Claims in Queensland*, Brisbane, 2003, p. 5.
2. *Jango v Northern Territory of Australia* (2007) 159 FCR 531.
3. Basil Sansom, 'Yulara and future expert reports in native title cases', *Anthropological Forum* vol. 17, no. 2, 2007, pp. 71–92, reference to p. 79.
4. Sansom above 3, p. 74.
5. Joseph Benjamin Birdsell, 'Local group composition among Australian Aborigines: A critique of the evidence from fieldwork conducted since 1930', *Current Anthropology* vol. 11, no. 2, 1970, pp. 115–42, reference to p. 115.
6. See, for example, Paul Burke, 'The problem when flexibility is the system', *Anthropology Forum* vol. 17, no. 2, 2007, pp. 163–92, reference to p. 164; Katie Glaskin, 'Manifesting the latent in native title litigation', *Anthropological Forum* vol.

5. Understanding another ethnography

- 17, no. 2, 2007; Lee Sackett, 'A potential pathway', *Anthropological Forum* vol. 17, no. 2, 2007.
7. Glaskin, above n 6, p. 167.
 8. Sackett, above n 6, pp. 173–5.
 9. Neville Green (ed.), *Njungar — The People: Aboriginal Customs in the South West of Australia*, Creative Research and Mt Lawley College, Perth, 1979, p. 181.
 10. Green, above n 9.
 11. Green, above n 9, pp. 181–2.
 12. Green, above n 9, pp. 186–7.
 13. Francis Armstrong, 'Manners and habits of the Aborigines of Western Australia, from information collected by Mr. F. Armstrong, Interpreter', 1836, in Neville Green (ed.), *Njungar — The People: Aboriginal Customs in the South West of Australia*, Creative Research and Mt Lawley College, Perth, 1979, pp. 205–06.
 14. Green, above n 9.
 15. Armstrong, above n 13, pp. 193–4, 199.
 16. Green, above n 9, p.192.
 17. Yellowgonga and two sons. The spelling of the personal names in this account varies depending on the source used. Thus Yalgonga is sometimes Yellowgonga, Munday is sometimes spelt Monday and We-up variously Weecip or Wiap. I have sought to standardise the spelling in my discussion but retain the spelling used in the source cited.
 18. Brother to Yellowgonga's wife, Yangan. It is not known what the relationship was between these three; see Sylvia Hallam & Lois Tilbrook, *Aborigines of the Southwest Region 1829–1840: Bicentennial Dictionary of Western Australia: Volume VIII*, University of Western Australia, Nedlands, 1990, p. 27.
 19. See Hallam & Tilbrook, above n 18, p. 234 for Symmonds's account of Monday's country, which is not dissimilar.
 20. Armstrong, above n 13, pp. 193–4.
 21. Weecip was head of inland group; the 'mountain tribe'. See Hallam & Tilbrook, above n 19, p. 307.
 22. Armstrong, above n 13, pp. 197–8.
 23. Green, above n 9, pp. 174, 180, 192.
 24. Armstrong, above n 13, p. 199.
 25. Armstrong, above n 13, p. 188.
 26. Armstrong, above n 13, p. 194.
 27. Neville Green, *Broken Spears: Aborigines and Europeans in the Southwest of Australia*, Focus Education Services, Cottesloe, 1984, p. 52.
 28. Page references in the two right-hand columns are from Hallam & Tilbrook, above n 18. The relationship to ego, where known, is indicated by kinship abbreviations, where S = son, d = daughter and so on. A question mark indicates either that information is unavailable or it would appear to be doubtful from the source. I have re-arranged Armstrong's original order to place all of Yellowgonga's immediate family together.
 29. Data derived from Green, above n 27, p. 52, after F. Armstrong C.S.O. 58.163, Battye Library, Perth.

30. Now the suburb of Rockingham, see Hallam & Tilbrook, above n 18, p. 137.
31. Hallam & Tilbrook, above n 18, p. 90.
32. The term 'stepmother' is used for the sake of clarity in this exposition. It is unlikely that such a distinction would have been made between a birth mother and a social mother in Noongar society, any more than it is today.
33. See, for example, R M Lyon, 'A glance at the manners and language of the Aboriginal inhabitants of Western Australia, with a short vocabulary', 1833, in Green, above n 9, p. 173; maps by Green, pp. 174, 180.
34. Hallam & Tilbrook, above n 18, p. 319.
35. Hallam & Tilbrook, above n 18, p. 319.
36. Hallam & Tilbrook, above n 18, p. 345.
37. Hallam & Tilbrook, above n 18, p. 101.
38. Hallam & Tilbrook, above n 18, p. 307.
39. Isobel White (ed.), *Daisy Bates: The Native Tribes of Western Australia*, National Library of Australia, Canberra, 1985, pp. 14–16.
40. For example, Andrew Lang. See Robert Ackerman, *J G Frazer: His Life and Work*, Cambridge University Press, Cambridge, 1987, pp. 149–60.
41. Ackerman, above n 40, pp. 153–7.
42. Bob Reece, "'You would have loved her for her lore': The letters of Daisy Bates", *Australian Aboriginal Studies*, no. 1, 2007, pp. 51–70, reference to p. 53; Bob Reece, *Daisy Bates: Great Dame of the Desert*, National Library of Australia, Canberra, 2007, pp. 8–12. Reece cites the source for Elkin's comment as E Salter, Letter to Professor A A Abbie, 28 July 1969, Salter Papers, NLA MS6481, Box 3, 2/4.
43. See White, above n 39, pp. 7–8, 14–28; Peter Gifford, *Black and White and in Between: Arthur Dimer and the Nullarbor*, Hesperian Press, Perth, 2002, p. 18; Reece, "'You would have loved her for her lore': The letters of Daisy Bates", above n 42, p 51–2; Reece, *Daisy Bates: Great Dame of the Desert*, above n 42, pp.1–12.
44. Reece, "'You would have loved her for her lore': The letters of Daisy Bates", above n 42, p 51.
45. Reece, "'You would have loved her for her lore': The letters of Daisy Bates", above n 42, p. 52; White, above n 39, p. 116; Gifford, above n 43, pp. 18, 21.
46. Reece, "'You would have loved her for her lore': The letters of Daisy Bates", above n 42, p. 52.
47. See, for example, Daisy Bates, *Notebook 6c*, unpublished, p. 70 ('The strongest and most enduring quality of the English is their moral puritanism'... 'there is no other nation in the world better worth copying'), National Library of Australia, Canberra.
48. Daisy Bates, *The Native Tribes of Western Australia*, edited by Isobel White, National Library of Australia, Canberra, 1985, p. 39.
49. Bates, above n 48, pp. 40–6.
50. Bates, above n 48, pp. 40–1.
51. Bates, above n 48, p. 40. Bates explains the suffix as, 'um', a contraction of 'wammu', meaning 'fire', 'hearth', 'home' or 'belonging to'; Daisy Bates, 'A native burial ceremony', *The Australasian*, Sydney, 1 March 1919.
52. Bates, above n 48, p. 43. Coastal groups together were called 'Wilyaru', while the inland groups were known variously as 'Kaiala-um' (northern people), 'Kundana-um' (sand plains people), 'Wini-um' (saltbush plains people) and 'Kobbarl-ija', which Bates thought might mean 'northern or inland'.

5. Understanding another ethnography

53. Bates, above n 48, p. 41.
54. Bates, above n 48, p. 42.
55. Bates, above n 48.
56. Daisy Bates, *Tribal Areas of the S. District*, National Library of Australia, Canberra, 1914.
57. Bates, above n 56.
58. See Bates, above n 48, p. 40, for Bates's own translation.
59. For example, her list on folio 9/8 includes reference to the 'Ngura wamu' who inhabit 'Munderbila'. This group is not mentioned on folio 9/7.
60. Data derived from Bates's manuscript folio 9, pages 7 and 8 and at the pages noted, unpublished, MS 365, National Library of Australia, various dates.
61. Munderbila = Mundrabilla; Jinyila = Eucla; Jiala = Kangaroo (Roe) Plains.
62. Relationship between those identified as 1–13 in column 1. Bold text indicates a relationship which is **not** traced via filiation.
63. Kin terms are referred to by conventional abbreviations, where F = father, MF = mother's father, mm = mother's mother, z = sister, S = son, H = husband, w = wife and so on. Male take upper case; female, lower case.
64. Bates gives the wife of Yalguru in her folio 9/53 as 'Goobin', whose parents are different to those of 'Gubin' on folio 9/47. Consequently, I cannot be certain that 'Goobin' and 'Gubin' are one and the same.
65. There are also some additional materials in this manuscript. For example, Wilyaru (the coast, not an area noted in Table 2) has associated with it three totems (a vegetable, dog and bark of mallee root) and each is associated within particular coastal areas, which Bates lists. Bates appears to have refined this list (presumably later; 20/141–2), reducing some of the country names in some cases and expanding them in others.
66. Data derived from Bates's manuscript folio 9 at the pages noted, unpublished, MS 365, National Library of Australia, various dates.
67. Daisy Bates, Folio 9/8, unpublished.
68. Bold text indicates a relationship which is not traced via filiation.
69. *Maduru* (without the 'h') is given by Bates to mean kangaroo (39/84). It is possible that the term refers to the place Madura.
70. Bates, above n 48, pp. 40–6.
71. A view Bates herself supported at times; see 5/102 and Bates, above n 48, p. 87.
72. See A P Elkin, *The Australian Aborigines: How to Understand Them*, Angus & Robertson, Sydney, 1945, pp. 129–33.
73. Now Bidyidanga, on the coast south-east of Broome.
74. A P Elkin, 'Social organisation in the Kimberley division, North-Western Australia', *Oceania* vol. 2, no. 3, 1932, p. 299, footnote 1.
75. Elkin, above n 74, p. 54, footnote 30.
76. Adolphus Peter Elkin, 'Totemism in north-western Australia (the Kimberley division)', *Oceania* vol. 3, 1933.
77. Elkin, above n 76, pp. 257–8.
78. Elkin, above n 76, p. 265.
79. See Elkin, above n 76, pp. 276, 280.
80. Elkin, above n 76.
81. Elkin, above n 76, p. 265

82. Elkin, above n 76, p. 266.
83. Elkin, above n 76.
84. Elkin, above n 76.
85. Elkin, above n 76, p. 267.
86. Elkin, above n 76.
87. Elkin, above n 76, p. 268.
88. Elkin, above n 76.
89. Elkin, above n 76, p. 269.
90. Elkin, above n 76, p. 270.
91. Elkin, above n 76, pp. 270–1.
92. Elkin, above n 76, pp. 271–9.
93. ‘Amongst the Forrest River natives the child who is “found” outside his father’s “country” has the right of residence in the latter, as well as in that of his spirit-home. They are both his “countries”’: Elkin, above n 76, p. 268.
94. Elkin, above n 76, p. 265.
95. Elkin, above n 72.
96. 1927–1928.
97. Radcliffe-Brown defined a horde as ‘a body of persons who jointly possess, occupy and exploit a certain defined area of country’, in Alfred Radcliffe Brown, *Structure and Function in Primitive Society*, Cohen and West, London, 1952, p. 33. For a discussion of the history and use of Radcliffe-Brown’s concept of the horde in Australian anthropology, see N Peterson, “‘I can’t follow you on this horde-clan business at all’: Donald Thompson, Radcliffe-Brown and a final note on the horde’, *Oceania* vol. 76, no. 1, 2006, pp. 16–26.
98. Marjorie & Ralph Piddington, ‘Report on fieldwork in northwestern Australia’, *Oceania* vol.2, no. 3, 1932, p. 351; Alfred Radcliffe-Brown, *The Social Organisation of Australian Tribes*, Oceania Monographs No. 1, Macmillan, Melbourne, 1930–1, pp. 35–6.
99. Piddington, above n 98, p. 351. See also Ralph Piddington, *An Introduction to Social Anthropology*, Oliver and Boyd, Edinburgh and London, 1950, p. 80.
100. Piddington, above n 98, p. 351.
101. Elkin, above n 74, p. 279.
102. Elkin, above n 74, p. 280.
103. Deborah Bird Rose, ‘Reflections on the use of historical evidence in the *Yorta Yorta* case’, in Mandy Paul & Geoffrey Gray (eds), *Through a Smoky Mirror: History and Native Title*, Aboriginal Studies Press, Canberra, 2002.
104. Rose, above n 103, pp. 38–9.
105. Rose, above n 103, p. 44.
106. Rose, above n 103.
107. For a comprehensive account relevant to this comment, see, Peter Sutton, ‘Norms, statistics and the *Jango* case at Yulara’, *Anthropological Forum* vol. 17, no. 2, 2007, pp. 175–92.

Embracing our hallmark latencies: On centring anthropological practice

Tim Pilbrow¹

Introduction

The key issue identified by Sansom in his critique of the Yulara judgment² and echoed in subsequent peer critiques of Sansom's position³ is the problem of 'translating' anthropological expertise and the particular insights it affords into terms and modes of expression acceptable in native title jurisprudence. This paper outlines ways in which a critical, reflexive articulation of anthropologists' own latent practices of reading and writing can enhance both anthropological practice and the respect accorded to anthropological research within the native title arena. Moreover, such an articulation of disciplinary practices will contribute to the small but growing body of methodological resources that anthropologists depend on for documenting and justifying anthropological research methods.

In this paper I reflect on and examine these aspects of anthropological practice as an applied anthropologist concerned both with enhancing my own research toolkit and with participating in shaping anthropology's role in the native title arena. In exploring these concerns, I am guided by my experience as a staff anthropologist at Native Title Services Victoria, which provides services to claimants under the *Native Title Act 1993* (Cth). Any insights I have may differ from those of consultant anthropologists or of staff anthropologists at native title service providers and representative bodies in other parts of Australia.

Positioning and reflexivity in native title anthropology

Uncovering latent aspects of social and cultural systems and explaining their relationships to consciously articulated rules is a hallmark of the discipline of anthropology. It distinguishes ethnography from mere descriptive writing.

Anthropological disciplinary practices have taken shape through debate within and between schools of thought and practice, and the work of anthropological practitioners is necessarily framed in relation to that disciplinary history. Attention to situatedness in relation to disciplinary traditions is a key element in academic scholarship. A more reflexive attention to that situatedness,⁴ I suggest, can be especially valuable when the writing of anthropologists is aimed across disciplinary boundaries — as it is in the native title context — where readers do not have the disciplinary background that informs the presuppositions, inferences and arguments that anthropologists make.

Anthropological training entails, among other things, schooling in particular ways of reading and writing. As a discipline, anthropology has highly developed practices for crafting and assessing arguments. A reflexive documentation of these disciplinary practices is well worth foregrounding in our writing. This is particularly important in relation to how we read and evaluate early ethnographic writings in our native title work.⁵ Clearly laying out the disciplinary basis for a studied ethnohistorical critique requires both the historical contextualisation of disciplinary trends and an informed discussion of the fit between positions argued and data presented.

As a discipline, we have undergone periods of deep-reaching reflexive critique of our practice and have emerged from that with both profound admiration for the endeavours of early anthropologists and serious and grounded misgivings about aspects of their representational practices. We also have a more extensive toolkit and comparative base than our early predecessors. It is important for us to acknowledge this in our presentation of arguments in favour of a particular reading of early materials, particularly as we can and should make strong cases for re-evaluation of such materials in the light of our discipline's methodological and theoretical developments.

In our approach to early ethnographic materials we, as anthropologists, are informed and guided by the disciplinary traditions within which we are situated as professional practitioners. Our own contemporary field data should also be approached in this way, since it, too, is informed by our disciplinary training and the ways in which we are positioned in the discipline of anthropology. Moreover, I argue, it is our responsibility as professionals in an applied cross-disciplinary context to articulate clearly the disciplinary presuppositions which underlie and inform our reading and evaluation of anthropological and ethnographic materials.

Towards a native title anthropological methodology

In our practice to date in Victoria, connection reports have tended to be outsourced to consultants, with in-house support by way of fieldwork, pre-

analysis preparation of ethnographic and archival materials, and preparation of genealogies. This is likely to change as we move towards negotiated settlements under the Victorian Native Title Settlement Framework (the Framework), which was finalised in 2009 and is awaiting the drafting of legislation. The Framework, when implemented, should provide greater certainty for Traditional Owner groups seeking alternative non-native title resolution of their claims, and requires a less onerous burden of proof for native title claimants. It is likely that anthropological research under the Framework will be more reliant on in-house resources in the negotiated settlement processes which are proposed.

In my work I am asked to provide views in relation to a range of evidence: for instance, evidence to support a claim boundary, or the ways in which group composition could be described. It is not, in my experience, easy to convey to claim lawyers the intricacies of the material. This is especially the case when in forming conclusions I have drawn on several sources, none of which on their own provide straightforward answers. Providing lawyers with research-based views requires careful attention to the ways in which I, as an anthropologist, evaluate material. This includes drawing on, where necessary, comparative examples and clarifying the relationships between pieces of information from different parts of a source document or from different source documents themselves, that, taken together, have formed the basis for my views. Some reflexive consideration of how we, as anthropologists, construct our arguments and what we consider to be reasonable bases for drawing inferences is clearly of value in communicating the bases of our findings to our legal colleagues (and to Traditional Owners).

When my colleagues and I utilise early ethnographic materials, our approach to these materials is largely driven by the need to collect information — towards describing a set of cultural practices, for instance, or piecing together ethnographically informed understandings of the extent of country, as well as locating evidence of the presence on country of the ancestors of our contemporary informants. That is, we approach early ethnographic materials primarily as a resource for gleaning information useful in describing the Aboriginal social systems and land tenure at the time of sovereignty, or at least during the early period of colonisation. While we do not undertake this uncritically — that is, we evaluate the information provided by one source against that provided by other sources — such a ‘data mining’ approach tends to focus on textual fragments rather than textual wholes. This fragmentary approach runs the risk of underplaying the role that disciplinary conventions and trends of the day played in shaping what was considered observation worthy. Because of this, I also consider the broader social and historical context within which our forebears wrote, so as not to prejudice my reading with contemporary moral and ethical concerns. In this regard, we can also

learn much from our historian colleagues, who have a specific expertise in contextualising historical materials through critical historiography.⁶

However, aside from the impact of social conventions and ethnocentrism of the day on the writing of early ethnographers, there are equally formative effects of disciplinary conventions and fetishes that shaped their observations and interpretations. Anthropologists are well aware that what is being described in ethnographic accounts (both those of early ethnographers and contemporary accounts) is far from the sum total of what is observed. Inevitably, our forebears' disciplinary training, their social conventions, the disciplinary priorities of the day and their own personal priorities would have directed their research, rather than the critical issues in proving connection in the native title context today.

Articulating clearly the specific grounds that underlie a cautionary reading of early materials is an important component of providing a professional anthropological assessment of these materials. This involves probing into the underlying grounding of the observations of the early ethnographic materials we rely on. Closer attention to the disciplinary conventions and focuses of the day, and thus the motivations and theoretical paradigms of our forebears, can be of assistance in evaluating their contribution. What, for instance, was the impact of cultural-evolutionary paradigms on the choice of research topics? Was there systematic neglect of certain areas of investigation (for example, land tenure) in favour of other areas that more readily engaged 19th-century European perceptions of cultural difference (for example, kinship and marriage, social organisation)?

Given that in native title research the focus is on finding concrete data, interest in the theoretical paradigms informing early ethnographic work tends to be limited. Early ethnographers' theoretical interests and the paradigms informing their work are sometimes bracketed out as mildly interesting but outmoded (for example, A W Howitt's association with Morgan's evolutionary paradigm) or omitted altogether.

I suggest that anthropologists should more consistently articulate a concern for why our forebears were asking the kinds of questions they did, writing the notes they wrote and choosing to foreground particular kinds of information in their writings. While we do investigate where possible the identity of their informants, and how closely they worked with Aboriginal informants (often looking at their manuscript notes to glean such information), there are further questions we should ask in our native title work. What motivated early ethnographers' generalising or particularising tendencies? What is the relationship between their published and unpublished works? Where did their understanding of the relationship between language and culture come from? And how does consideration of these questions stand to enhance our use of their materials for our contemporary native title purposes?

Below I briefly discuss an example that illustrates how difficult it can be to convey clearly an argument that draws together dispersed pieces of information. The discussion points to the importance of digging further into the conventions and motivations lying behind the early ethnographic material we rely upon.

Reading and contextualising: Tindale and Mathews

While there is considerable scepticism in the anthropological discipline about the use of Norman Tindale's descriptions of tribes and boundaries as definitive, Tindale remains a useful resource for identifying source materials, even though his referencing can, at times, be frustratingly obscure. In his group and area descriptions, for example, he does not specify which information derives from which cited source. Fortunately, in Victoria we also have access to other early ethnographic work and descriptive material (such as settlers' memoirs) with which Tindale's data can be compared and which assist in tempering the notion that group boundaries can be depicted as hard lines on cold maps, as Tindale's practice suggests. This includes the work of R H Mathews, to which Tindale refers in his group and country descriptions and which, on analysis, appears to have informed Tindale's drawing of boundary maps in Victoria.

In Tindale's description of the boundary of a group he names Jaara (Lewuru) in central Victoria⁷ (the boundary area being located about 150 kilometres north-west of Melbourne), he refers to R H Mathews's article (published in German) on the Tyeddyuwurru language.⁸ However, rather than Mathews's data corroborating Tindale's boundary description, my reading is that it calls Tindale's conclusions into question and raises questions about the contextualisation of Mathews's information. In the article Tindale refers to, Mathews states that:

Die Tyed'-dyu-wur-ru-Sprache wird an den oberen Teilen der Flüsse Lodden [sic], Avoca und Wimmera und auch am Richardson River und seinen Nebenflüssen, im Staaten Victoria, gesprochen. [The Tyed'-dyu-wur-ru language is spoken at the upper reaches of the Loddon, Avoca and Wimmera rivers and also at the Richardson River and its tributaries, in the state of Victoria.]⁹

Mathews's language notebook provides nine short pages on the 'Tyeddyuwurrung language'¹⁰ and appears to name an informant (Sergeant Major). On the beginning page of this section, Mathews also provides a description of 'Lewurrung' country as situated on the 'Upper Loddon, Upper Avoca, Upper Wimmera, west to Warracknabeal'.¹¹

Mathews elsewhere states that ‘the Lewurru dialect prevails about St Arnaud and surrounding country, and is somewhat similar to the Tyattyalli Language reported by me in 1902’.¹² He states further that ‘Lewurru and Tyedyuwurru are sister tongues’¹³ and that the Lewurru dialect ‘is somewhat similar in grammatical structure to the ‘Tyattyalli Language’ reported by me in 1902, although differing more or less in vocabulary’.¹⁴

Tyeddyuwurru(ng) and Lewurru(ng) are identified by later commentators (Tindale in the 1970s and Clark, in an historical atlas, in the 1990s) as alternate names for Dja Dja Wurrung, and as being language/dialect names.¹⁵ However, it is not clear to what extent the identification of this equivalence relies on Mathews’s data, whether Clark simply uncritically accepted Tindale’s identification, or whether either Tindale or Clark carried out any independent assessment of the language data (of either Mathews’s own data or other extant data).

This is unfortunate, since Mathews’s assertions regarding language similarities need to be treated with some caution, as he often provides little or no evidence in support of his assertions. Indeed, the assertion that Lewurru ‘is somewhat similar in grammatical structure’ to Tyatyalli tells us very little. We don’t know whether this is Mathews’s assessment of similarity or that of his informants, and we don’t know the nature or extent of the similarity. Without other corroborating evidence, the extent of territory within which a common language is described does not provide sufficient grounds for attributing that territory to a particular local group or society. Mathews’s materials in this instance provide little more than a means to question the placement of boundaries by other commentators, such as Tindale and Clark.

I have considerable respect for some of Mathews’s work, particularly given the contextualisation and partial vindication of Mathews’s work by Elkin¹⁶ and, more recently, by Thomas.¹⁷ Elkin shows, for instance, how Mathews’s descriptions of kinship and marriage systems in coastal New South Wales, which were heavily criticised by contemporaries such as Radcliffe-Brown for not fitting with prevailing theoretical assumptions, were, indeed, accurate descriptions. In doing so, he demonstrates that rather than Mathews being wrong, it was Radcliffe-Brown and Mathews’s other critics who were unable to think outside of their pet theoretical models.¹⁸

Mathews clearly had some facility with Aboriginal languages, yet his published linguistic descriptions of Victorian languages, while presented in a way that suggests a basic familiarity with linguistic conventions, are short and shallow, often including only two to three pages of linguistic description. These amount to little more than limited notes on specific grammatical features in isolation, with no larger study to supplement them. Indeed, although Mathews refers any interested reader of his article on the Lewurru dialect to an earlier

article on the Tyatyalli language,¹⁹ this article is not comprehensive and provides little, if any, additional information. Moreover, despite the detail and insight Mathews provides on some grammatical elements (for example, verbal number and pronouns),²⁰ his descriptions are seriously lacking in relation to other elements that one would expect to find described in a linguistic study or a grammar book (such as phonology, a more comprehensive survey of parts of speech). While his manuscript material does provide a slightly broader selection of data, it still falls far short of a comprehensive linguistic description or grammar, and, in the case of his Tyeddyuwurru(ng) language notes, consists of a short selection of vocabulary and a few phrases and sentences.²¹

If we are to employ Mathews's material in qualifying our understanding of Tindale's boundaries in this area, we need to develop a better understanding of Mathew's positionality in regard to linguistic theories of his day, and of his methodology. We could begin by looking at Thomas's incisive biography and appraisal of Mathews's work, which goes some way towards highlighting Mathews's general eschewal of theoretical engagement.²² Thomas pointed out Mathews's reliance on a somewhat eclectic collection of European language grammars that enabled him certain insights (and presumably limited his ability to perceive other elements of the languages he was in contact with), and his reliance on the inexact linguistic notational conventions of the Royal Geographic Society.²³ Nevertheless, Thomas also notes that some of Mathews's more controversial grammatical descriptions, though treated with caution initially by linguists, were vindicated by later research.²⁴ Thomas also reminds us that Mathews's linguistic investigations were motivated by a desire to provide comparative survey data for use by philologists in relation to tracing the peopling of Australia. To this end, Mathews used a consistent, if restrictive, format in his presentation of linguistic data, and did not intend his descriptions to be comprehensive.²⁵

In order to analyse Tindale's use of boundaries, we thus need to contextualise not only Tindale's work but also the sources upon which he relied, such as Mathews, and, in turn, the sources and data upon which Mathews relied. Clearly, in order to contextualise the work of Mathews or any other writer more completely, I would need to draw on wider resources than I have done in my illustrative example above.

Broadening the context

The aim of this paper has not been to provide an exhaustive analysis of a particular example. Rather, the paper draws attention to the usefulness of examining reflexively how native title anthropologists can construct arguments by focusing on one area of practice, in this instance, the contextual reading of early ethnographic materials.

The kinds of resources other than those I have touched on in relation to Mathews and Tindale might include further early and/or later ethnographic materials relating to the area or group in question; reconstructions of group boundaries based on early ethnographic materials; comparative materials from elsewhere that provide models for interpreting data relating to the group in question; and theoretical and methodological approaches that might assist in critiquing or re-evaluating early ethnographic materials.

Tindale lists over 20 sources he consulted in relation to the group he calls Jaara and additional archival and manuscript materials have also become available.²⁶ A similar process as I have used in examining Mathews's data can be followed with each of these sources, in relation not only to linguistic evidence, but also to other potential markers of cultural identity and group boundaries. Such markers might include the presence or absence of particular social organisational forms; kinship categories; ceremonial practices; and evidence of where a specific group utilised resources, explicitly claimed country, or engaged in trade or other relations with other groups. Comparative material for surrounding areas and groups is also of value in identifying potential markers of group identity and boundaries, as is other reconstructive analyses of early ethnographic materials²⁷ in identifying further source materials and suggesting lines of inquiry to follow in analysing source materials. However, such reconstructions (as with Tindale's) need to be carefully examined to isolate and investigate the basis of the authors' interpretations.

The early ethnographic record in Victoria is uneven in its coverage of Aboriginal groups, and it can be helpful to draw on a methodological tool that has long been central to anthropological research: the comparative method.²⁸ Cultural comparison is a central methodological tool in anthropological research concerned with the variety and distribution of human social phenomena. Where there are gaps in the description of a given group, more complete ethnographic descriptions from neighbouring (or more distant) groups may provide a basis for making inferences about that group. For instance, if we know that many groups in a given area had a preferential marriage system marked by a particular set of kinship terms, we might reasonably infer the existence of such a preferential marriage system in a neighbouring group when we find that the same set of kinship terms is recorded for the group.

It is also possible to gain insights through the re-analysis of early ethnographers' data using methodologies and theoretical perspectives developed more recently. For instance, advances in kinship theory or insights arising from heightened awareness of gender as a factor in relationships between anthropological observer and research subjects might enable a re-analysis of early ethnographers' conclusions.²⁹ This can be particularly valuable in cases where significant amounts of 'raw' data are available in early ethnographies

or where the ethnographer's manuscript notes are available. It is the method employed by linguists Blake and Reid in their analysis of Victorian Aboriginal language data.³⁰ Data consistency and patterning (or distinctions) across a variety of sources can be analysed readily with modern computing technology, as spreadsheets and databases simplify the sorting and processing of data.

Conclusion

In this brief paper, I have set out to articulate some of the concerns I bring to my professional engagement with early ethnographic materials, by documenting these concerns and discussing how they might influence my research practice. Applied native title anthropologists need a substantial body of practical resources to assist in developing our methodologies, negotiating the kinds of outputs we produce and refining our communications across disciplinary boundaries. In drawing from an example based on the work of Mathews and Tindale, I have illustrated the kind of analysis and argument that I have found useful in undertaking native title research and in reporting on my findings across disciplinary boundaries. In the inter-disciplinary context, it is particularly important to be able to articulate clearly disciplinary-specific common assumptions, presuppositions and inferential processes that might otherwise remain a somewhat unexamined aspect of anthropological practice.

There is a need for a heightened reflexivity in our methodologies to support our ongoing negotiations of respect as a professional discipline in the native title arena. Documenting what anthropologists do is useful, both as a means to validating anthropological research methodologies (developing a corpus of methodological resources that can be relied on for justifying anthropological research methodologies, which has particular utility in communicating across disciplinary boundaries) and prompting methodological critique and innovation.

Post-presentation discussion

Participant: We may need a note of caution when we reflect upon inspecting the intellectual foundations of previous scholarship outside of the academy and away from a setting like this at an anthropological conference. Firstly, if I inspect the intellectual foundations of any of my colleagues or any of you here, then we don't want to pretend that the intellectual foundation of our own scholarship is by definition going to be understood as anything more sophisticated than earlier accounts. When I began work, I am sure cross-examining barristers asked me about assumptions I took into the field with me and possibly still hold, and any work can be inspected in this way.

Secondly, and in relation to the Yulara case, in particular, we need to give considerable intellectual energy to acknowledging the probability of massive change since earlier descriptions were made in order to convince the courts and the legal system that we can understand change. The core issue might not be whether Tindale was right or wrong. Let us assume, for example, that in the Western Desert, Tindale was right. The case we would need to make, in my view, is to put intellectual energy into explaining to the judge that there has been a lot of change and that anthropology offers an explanation of change, which ought not preclude the recognition or the determination of the existence of certain rights.

Tim Pilbrow: On your second point, I wholeheartedly agree. I would like to see my thoughts as one step in the process of clarifying what ethnography is and what ethnographic understandings can show and do, which would be part of that process of coming to terms with change and transformation.

On your first point, I would not like to privilege our intellectual position. What I am proposing is that we need reflexivity. We need to lay out the grounds upon which we make our analytical issues in a way that assists the legal profession to come to terms with our writings and research processes. I think we need to extend that same practice of reflective engagement with intellectual positions to those early ethnographers, where that is possible. Furthermore, we need to be very clear in our contemporary world about how we read early ethnographers and how we come to our understandings about what we see as valuable and how we assess one source against another. I think the intellectual position that highlights contextualisation is valid and that we also need to reflect upon our ability to position ourselves as researchers.

Participant: I think that if we are going to try to understand change and model change, then we need to have a baseline. If you look at the Yulara case, the question was about whether Tindale was accurate or not. The case was presented on the basis that Tindale was not accurate but the judge found that he was. Being able to make a proper case about accuracy is fundamental because it influences arguments about change and whether an argument is for a lot of change or about change being static over a period of time. My view is that we should always be working from the present to the past, not the past to the present. We should be looking to what the situation is today in relation to the territory under claim because this is the key issue in identifying a relevant 'society' with specific jurisdiction. Hence, how do we then work backwards from the present-day society to try to understand it in terms of its foundation in the past?

Tim Pilbrow: How we work back from the present to the past does pose very thorny questions. In Victoria we work in a two-pronged way: we do a very

thorough analysis of the early material as a kind of underlay against which present concerns have to be articulated.

NOTES

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2. Basil Sansom, 'Yulara and future expert reports in native title cases', *Anthropological Forum* vol. 17, no. 1, 2007, pp. 71–92; *Jango v Northern Territory of Australia* [2006] FCA 318, often referred to as the Yulara case.
3. Paul Burke, 'The Problem When Flexibility Is the System', *Anthropological Forum* vol. 17, no. 2, 2007, pp. 163–65; Katie Glaskin, 'Manifesting the Latent in Native Title Litigation', *Anthropological Forum* vol. 17, no. 2, 2007, pp. 165–68; Ian Keen, 'Sansom's Misreading of "The Western Desert vs. the Rest"', *Anthropological Forum* vol. 17, no. 2, 2007, pp. 168–70; John Morton, 'Sansom, Sutton and Sackville: Three Expert Anthropologists?', *Anthropological Forum* vol. 17, no. 2, 2007, pp. 170–73; Lee Sackett, 'A Potential Pathway', *Anthropological Forum* vol. 17, no. 2, 2007, pp. 173–75; Peter Sutton, 'Norms, Statistics and the Jango Case at Yulara', *Anthropological Forum* vol. 17, no. 2, 2007, pp. 175–92.
4. See, for instance, Michael M J Fischer, 'Culture and cultural analysis as experimental systems', *Cultural Anthropology* vol. 22, no. 1, 2007, pp. 1–65.
5. See Tim Pilbrow, 'Reading early ethnographic texts anthropologically: One of the challenges of native title research', paper presented at the National Native Title Conference, Melbourne, 4 June 2009.
6. See Fiona Skyring, 'History wars: Debates about history in the native title process', in Christine Choo & Shawn Hollbach (eds), *History and Native Title*, Studies in Western Australian History No. 23, University of Western Australia, Perth, 2003, pp. 71–82.
7. Norman Barnett Tindale, *Aboriginal Tribes of Australia: Their Terrain, Environment Controls, Distribution, Limits and Proper Names*, University of California Press, Berkeley, CA, 1974, p. 204.
8. Robert Hamilton Mathews, 'Die Sprache des Tyeddywurru-Stammes der Eingebornen von Victoria', *Mitteilungen der Anthropologischen Gesellschaft in Wien*, vol. 34, 1904, pp. 71–76.
9. Mathews, above n 8, p.71. Translation by Tim Pilbrow.
10. Robert Hamilton Mathews, 'Notebooks 1872–1910: Aboriginal languages of Victoria', National Library of Australia Manuscript 8006, series 3, folder 4, p. 93.
11. Mathews, above n 10.
12. Robert Hamilton Mathews, 'Notes on some native dialects in Victoria', *Journal and Proceedings of the Royal Geographical Society of New South Wales*, vol. 37, 1903, p. 246.
13. Mathews, above n 12, p. 248.
14. Mathews, above n 12, p. 246.
15. Tindale, above n 7, p. 140; Ian D Clark, *Aboriginal Languages and Clans: An Historical Atlas of Western and Central Victoria*, Monash Publications in Geography No. 37, Monash University, Melbourne, 1990, p. 151.

16. Adolphus Peter Elkin, 'R. H. Mathews: His contribution to Aboriginal studies', *Oceania* vol. 46, no. 3, 1976, pp. 206-34.
17. Martin Thomas, 'A very human survey: The cross-cultural inquiries of R. H. Mathews', *Public History Review* vol. 12, 2006, pp. 12-26; Martin Thomas, 'R H Mathews and anthropological warfare: On writing the biography of a "self-contained man"', *Aboriginal History* vol. 28, 2004, pp. 1-32.
18. Elkin, above n 16, p. 212.
19. Robert Hamilton Mathews, 'The Aboriginal languages of Victoria', *Royal Society of New South Wales, Journal and Proceedings*, vol. 36, 1902, pp. 71-106.
20. Mathews, above n 19.
21. Mathews, above n 10, pp. 93ff.
22. Thomas, 'A very human survey: The cross-cultural inquiries of R. H. Mathews', above n 17; Thomas, 'RH Mathews and anthropological warfare: On writing the biography of a "self-contained man"', above n 17.
23. Martin Thomas, 'Word territory: Recording Aboriginal language with R. H. Mathews', *History Australia* vol. 5, no. 1, 2008, pp. 1-18.
24. Thomas, above n 23, p. 12.
25. Thomas, above n 23, pp. 8-9.
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27. For example, Diane E Barwick, 'Mapping the past: An atlas of Victorian clans 1835-1904', *Aboriginal History* vol. 8, 1984, pp. 100-31; Barry J Blake & Julie Reid, 'Classifying Victorian languages', in Barry J Blake (ed.), *Wathawurrung and the Colac Language of Southern Victoria*, Pacific Linguistics, Series C, no. 147, Australian National University, Canberra, 1998, pp. 1-58; Clark, above n 15; Clark, above n 26; Louise A Hercus, *Languages of Victoria: A Late Survey*, Pacific Linguistics, Series B, no. 77, 1986.
28. For example, see Alfred R Radcliffe-Brown, 'The comparative method in social anthropology', *Journal of the Royal Anthropological Institute of Great Britain and Ireland* vol. 81, nos. 1-2, 1951, pp. 15-22; Fred Eggan, 'Social anthropology and the method of controlled comparison', *American Anthropologist* vol. 56, no. 5, 1954, pp. 743-63.
29. The former is exemplified in Elkin's re-evaluation of Mathews's and Radcliffe-Brown's kinship studies: see Elkin, above n 16, p. 212; the latter is exemplified in Annette Weiner's re-analysis of kinship and exchange networks in the Trobriand Islands: Annette B Weiner, *Women of Value, Men of Renown*, University of Texas Press, Austin, TX, 1976.
30. Blake & Reid, above n 27, pp. 1-3.

*‘Competing narratives’ versus ‘interest-based negotiation’
and the bar of evidence*

Kim McCaul¹

Introduction

Litigation dominated the resolution of native title claims for some time after Eddie Mabo took his case to the High Court,² and many of today’s seasoned anthropologists in the land rights field have developed their practice in this contested arena. Litigation is built on what could be described as a competing narrative system. Each party interprets ‘facts’ to construct a narrative that benefits its position and damages that of the other party. In native title claims, anthropological ‘facts’ are drawn into this mix and become, themselves, points of dispute.

Over the past seven years, however, the manner in which parties approach the settlement of native title claims has changed considerably. All states now express a preference to settle claims by negotiation rather than litigation. Queensland, South Australia and Western Australia have all developed explicit frameworks by which to settle claims without going to trial. All three states have published guidelines setting out these non-litigation frameworks.³ But while these guidelines set out a process, they are silent on the way that evidence is approached and, in particular, on the principles that might inform the assessment of any evidence.

This is not surprising. The move from litigation to negotiated settlements has been an organic process. In most jurisdictions the two are actually operating in parallel; that is, while some matters are being negotiated, others are being litigated for various reasons, and often the same lawyers and anthropologists are involved in both activities.

Shifting the rhetoric from litigation to negotiation was a big step for governments and other respondents. Part of that step was to provide an indication as to the kind of evidence governments were looking for before they would

consent to a determination in favour of the claimants, which was achieved by the publication of the guidelines referred to above. This was a significant shift, because, previously, claimants had to pursue their case in a vacuum, knowing that they would be challenged on just about every point, but not knowing what the respondents actually thought the law with regard to ‘connection’ was.

While I think the processes by which native title claims are being managed have improved considerably over the past seven years or so, I think it would be appropriate to start considering more explicitly whether there are implications for the *legal tests* and the *anthropological facts* according to whether a matter is being negotiated or litigated. In this paper I explore the differences that arise when taking a ‘competing narrative’ approach in litigation or an ‘interest-based negotiation’ approach by exploring two related questions.

- How do the features of a trial-based relationship influence negotiations?
- Does interest-based negotiation have an impact on the ethnographic information needed for native title?

Before turning to these questions, it is worth pointing out that native title is a unique legal space. This is because (among many other reasons) one of the negotiating parties (that is, the state or territory government) is also considered responsible for safeguarding the interests of the public (that is, all other land users) and for ensuring the appropriateness of Federal Court orders of native title *in rem* (that is, as against the whole world) through a proper legal assessment of the cogency of the evidence.

The distinguishing structural features of native title settlement negotiations

All lawyers I have ever heard commenting on native title note, in one way or another, that native title is not like other areas of law. In saying this they may be referring to many things; the fact that Court timetables are routinely ignored; the way in which rules of evidence are routinely ignored; the number of issues that need to be considered and the number of witnesses called; the cross-cultural communication issues that impact on almost every aspect of the process; or the way in which politics and history are so closely entwined with the legal proceedings.

Here I am concerned with another distinguishing feature of native title processes; the dynamics between the parties. An experienced barrister once suggested in a working group that states should treat native title negotiations like any other commercial negotiations.⁴ By this I understood him to mean that parties focus on their interests and, weighing up the costs of a trial and the uncertainty of the outcome, seek to arrive at a deal that satisfies both parties’ interests as much as possible.

In a native title context, this type of negotiation would mean limited attention to so-called 'connection evidence' as stipulated in s 223 of the *Native Title Act 1993* (Cth). Instead, the focus would be on compensation, extinguishment, land access protocols and other issues regarding mutual co-existence that either states or applicants may wish to settle before agreeing to a determination of native title. In such a 'commercial' approach to native title, it would be a defensible argument that a sufficient connection test would simply require proof of the existence of an identifiable Aboriginal community whose members can show descent from those who owned the land in question at the time of sovereignty, rather than a full treatise on the system of law and custom of the contemporary community.

Such a 'commercial' approach seems appealing from a moral, historical and social perspective. Importantly, it avoids adding insult to injury, as can occur when, following the past 200 years of colonisation and all that it has entailed, respondents challenge the 'authenticity' of contemporary claims of Aboriginal identity and connection to land in a native title trial. There are numerous examples where the adaptability of Aboriginal people to the changes wrought by colonisation has been held against them as signs of 'loss of connection' in the courts.⁵ Rather than polarising parties and focusing energy on negative arguments, a 'commercial' approach could provide a mechanism for achieving a range of positive social outcomes for Indigenous communities and for community relations generally. For example, rather than spending extensive energy and resources on connection, such resources could be expended on developing sound governance structures and processes for the harmonious co-existence of Indigenous and non-Indigenous rights and interests.

There are a number of reasons why such an approach has not been widely adopted. The main reason I want to focus on in this paper is based on judicial statements that highlight the unique position of state and territory governments in the native title process, and which mean that the latter cannot simply adopt a commercial negotiation approach to native title claims, at least not in any straightforward way.

Governments are not just parties that can simply act in their own interests. The Federal Court has made it very clear that states and territories are expected to have the interests of all other respondent parties in mind and must ensure that they consent to determinations only when they have given appropriate consideration to the evidence:

The Court may need to be satisfied that the State has in fact taken a real interest in the proceeding in the interests of the community generally. That may involve the Court being satisfied that the State has given *appropriate* [my emphasis] consideration to the evidence that has been

adduced, or intended to be adduced, in order to reach the compromise that is proposed. The Court, in my view, needs to be satisfied at least that the State, through competent legal representation, is satisfied as to the *cogency* [my emphasis] of the evidence upon which the applicants rely.⁶

There is a certain ambiguity here that needs exploring if we want to understand where the bar to the proof of native title sits in negotiated resolutions of claims; what may be seen to be *appropriate* and *cogent* in one case may not be considered as such in another. ‘Appropriateness’ is not an objective category but depends on numerous factors, such as, for example, the other respondent interests, historical circumstances, intra-Indigenous disputes and the legal personalities involved. All of that goes well beyond *evidence*, which itself is not an objective category, as can be seen, for example, in the way that the opinions of anthropologists from the 1950s are treated as ‘facts’ by many lawyers and in the disputes that can surround the interpretation of claimant evidence. A key factor influencing what is seen as ‘appropriate’ and ‘cogent’ is whether the context is one of litigation or of negotiation.⁷

Litigation: Competing narratives

It is easy for outsiders to be critical of the litigious Court process. There is a range of reasons why litigation is not ideal for dealing with cross-cultural matters such as native title claims⁸ and there are fundamental questions about the ability of an adversarial system to generate positive outcomes in such a complex context.

It is useful, however, to be aware of the historical and cultural context of the adversarial system and its emic logic. It is worth noting that this system of law arose to protect people from being falsely sentenced and from arbitrary punishment by royal or church powers, and to provide each party with a competent advocate to argue its case to the best of his or her ability before an impartial arbiter.⁹

Some legal textbooks spell out the attitude a good advocate should adopt: ‘Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client’s case’;¹⁰ ‘Ultimately you are there in the interests of the client and you are paid...to represent that client’s interests unashamedly, firmly, vigorously, persuasively and relentlessly.’¹¹

In reading these and other accounts of the principles of advocacy, I have gained a much better understanding of the logic underpinning the barrister’s approach to cross-examination of anthropologists I observed in *De Rose Hill*¹²

and heard about in cases like *Jango*.¹³ In doling out a verbal and psychological battering to expert anthropological witnesses, barristers are merely fulfilling their professional role as confirmed by the High Court, which expressed the view that 'confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial'.¹⁴

The dynamic of the courtroom, with evidence in chief followed by cross-examination, is based on what I call the competing narrative approach. Lawyers representing claimants will try to provide all the reasons why claimants have native title, while the state and other respondents will provide all the reasons why they do not. I have heard expert anthropologists (and others) complain that the cross-examining barristers simply did not seem to understand the arguments they were making. The litigation environment, however, is not about understanding. The point is that cross-examining barristers are not trying to understand. If the anthropologist's arguments support the claimants' case, the opposing barristers will try to distort and undermine the credibility of those arguments, challenge the anthropologist's credibility or question the overall relevance of the anthropological contributions. Agreement is not a part of the litigious conversation.¹⁵

Leaving this adversarial dynamic behind is one of the great benefits of resolving claims by negotiation. There are, however, certain interactional dynamics that can carry over from the litigation context into negotiations. In the following comparison between litigation and negotiation, I draw on classic texts by Fisher and Ury¹⁶ and Fisher and Brown¹⁷ concerning interest-based negotiations, focusing on communication and positioning.

Interactional dynamics in negotiation and litigation

We can conceptualise an interactional dynamic as consisting of a bundle of interrelated memes, a concept proposed by biologist Richard Dawkins as a cultural equivalent to biological genes.¹⁸ A meme denotes a unit of cultural ideas, symbols or practices that can be transmitted from one mind to another through speech, gestures, rituals or other imitable phenomena. Some of the memes developed in and useful to litigation lose their evolutionary value when the dynamic shifts to negotiation. However, because these memes are carried by individuals who often operate in both the litigation and negotiation context, redundant litigation memes may persist, tainting the negotiations with old patterns and potentially contaminating negotiations with a 'litigation vibe'. I will look in particular at the impact this can have on communication and positioning.

Communication in litigation and interest-based negotiations

Communication during litigation is formal at best, and can easily deteriorate to become aggressive, snide or rude. Statements are often interpreted in the worst possible light (for example, ‘they are having a go’ or ‘they are trying it on’). Little attempt is made to clarify meaning. Communication in litigation is strategic, usually minimalist and at times deliberately designed to antagonise.

In interest-based negotiations, communication should be regular, courteous and frank. I am not suggesting people communicate just for the sake of it, but rather that there is much to be gained in terms of mutual understanding, enhanced mutual acceptance, building working relationships and dispelling negative stereotypes of ‘the other side’ through regular, personal (that is, voice to voice rather than written) communication. Communication in negotiations does not mean having to agree, but it is precisely when parties do not agree that frank and courteous communication is important. A key challenge to a successful negotiation process and one that is easily cast aside during litigation (and even in debates on the Australian Anthropological Society email network) is the ability of stakeholders to operate from positions of mutual respect even where there is disagreement.

Positioning in litigation and interest-based negotiations

In litigation, parties are often operating from unarticulated or semi-articulated positions. For example, lawyers and anthropologists working on behalf of claimants often share the sentiment of their clients that the state is continuing colonial repression through the native title process. Connection inquiries are seen as continuing the history of the state prying into the private lives of Aboriginal people, and the fact that claimants must prove their connection is perceived as yet another example of the colonising state challenging the traditional owners of this land. While rarely stated outright, these sentiments can manifest as mistrust of the state’s motives (‘they are trying to do the Aboriginal people over once again’) and, in the extreme, give rise to conspiracy theories.

This perception of state and territory governments, common among anthropologists and lawyers who are employed by the Native Title Representative Bodies who represent claimants, results not only in careful information management, such as the withholding of family details and the extremely limited release of cultural information. In extreme cases it can lead anthropologists, influenced by their theoretical predilections (including, at times, a fundamental dislike of particular early ethnographers), to share the factual myopia of legal advocates and hinder alternative interpretations of data. At its worst it leads to

obtuse, arcane and irrelevant arguments (boxing at shadows) and reluctance to see alternative points of view.

States and territories and other respondents also can have preconceived ideas about claimants, including that claimants are making cynical land grabs and are exaggerating their connections to land. They may be fundamentally cynical about the persistence of traditions in an area that has seen substantial Europeanisation of the countryside, perceiving claimants to be engaging in a (re)creation of tradition (that is, a reviving of traditional customs that were considered lost), which is inauthentic. Anthropologists working for states and territory governments may also be basing their approach on unstated, theoretical underpinnings that lend rigidity to their arguments, but are not necessarily explicit.

Finally, lawyers representing claimants and those representing the states and territories may remain resentful of each other because of previous altercations and positions taken in other cases. Litigation is an ideal environment for this sort of positioning, but the poor communication patterns and unarticulated positions produced in litigation can be memes that are carried into the negotiation process. These such underlying interests, positions and motives may bubble along unarticulated, giving rise to miscommunications and, potentially, to conflicts that can detract from the actual interests being pursued; that is, an agreed outcome to a native title negotiation.

In contrast, negotiation requires open communication, including a commitment to self-aware positioning. In the first instance, this involves parties becoming clear about their own, until now unarticulated underlying positions. Ideally, these underlying drivers are articulated during negotiations so that they can be addressed or at least clearly understood. In some cases, a skilled mediator could play a very valuable role at the early stages of the negotiation process by creating an environment that allows these underlying issues to be brought to the fore without confrontation.

Possible impacts on ethnographic evidence of interest-based negotiations

Having considered the impact of litigation and negotiation on relationships, I now turn to the question of whether interest-based negotiation has an impact on the ethnographic information needed for native title. The native title inquiry can be seen as an inquiry into cultural change or, more aptly, into cultural continuity in the face of change. A classic cartoon, produced in response to the 2002 *Yorta Yorta* High Court decision,¹⁹ is a useful reminder of the kind of exercise in traditionalism²⁰ that is a native title inquiry.

In the litigation context we usually see representatives for the claimants arguing for cultural continuity and respondents arguing against it. Arguments



Figure 1: Mabo native title Yorta case fails big ask, cartoon by Nicholson from *The Australian* newspaper (reproduced courtesy of Peter Nicholson, <www.nicholsoncartoons.com.au>)

against cultural continuity are likely to include references to any one of the following, all of which have a clear focus on *breakdown*, *cessation* and *loss*:

- claimants' involvement in the workforce;
- the cessation of a mobile lifestyle and development of permanent settlements constituted of non-traditional residential units;
- the impact of white settlement, including alteration of the natural environment and alienation from land;
- the impact of Christian beliefs;
- cessation or reduction of ceremonial life;
- cessation of rules surrounding marriage and other rules governing kin relationships;
- breakdown of rules regulating hunting and gathering;
- breakdown of rules regulating rights and interests in land;
- loss of language;
- loss of site-based knowledge and traditional names for country;
- the recreation or invention of site-based and other ritual traditions;
- the physical absence from some or all of the claim area; and
- the opportunistic basis of a claim.

During litigation, these arguments may be constructed by the respondents into a narrative in which the contemporary Aboriginal society is portrayed as substantially *assimilated* or at least so alienated from the society of its ancestors that it can no longer be considered *traditional* for native title legal purposes.

Meanwhile, the anthropologist working with the claimants will commonly seek to draw out the continuities and distinctly Aboriginal behaviours, interactions and relationships with the land.

So what differences are there if a matter is settled by negotiation rather than by litigation? The first fundamental difference is that the respondent parties, ideally, would not be constructing a negative narrative, in the sense of negating the claimants' case. In a negotiated process, there is no need for governments to assume that any of the factors used in litigation to emphasise breakdown and cessation raise *prima facie* doubts of cultural continuity.

The quest for a 'Yorta Yorta moment', a distinct point in time at which 'tradition ceased',²¹ has no place in a negotiation process, if the desired outcome is an open exploration of whether a positive determination of native title is possible. The focus should be on the continuities in the present and this has a significant impact on the management of evidence or what I refer to as the directionality of evidence. By this I mean the question of whether the historical inquiry in native title starts in the present and works backwards, or starts in the past and works towards the present.

Black CJ eloquently discussed this issue in his dissenting *Yorta Yorta* Full Court reasons, where he reasoned that evidence should begin with the present, by looking at the kinds of behaviours that could be interpreted as traditional today.²² The majority view differed and since then it has become established practice in trials to start the inquiry in the past; that is, by defining the traditional system of laws and customs, and then tracing its continuity to the present. This approach easily emphasises disruption rather than continuity.

The minority view of Black CJ arguably offers a better approach to inquiries made as part of negotiation rather than litigation. A past to present approach may be required when there are doubts about the historical connection of the claimants to the land in question. In that case the early historical ethnographic literature will be crucial. However, whilst such early accounts will, of course, also play a role in negotiations, it is possible in negotiations that the lines of inquiry can and should be determined by the present situations of the claimants rather than their history. It is then possible to trace backwards and find the historical manifestations for contemporary behaviours, thereby anchoring them in tradition. If claimants no longer practice ceremonies, there is little point in spending much time on historical accounts of ceremonies. The focus should be on continuity, not cessation.

The emphasis in the High Court's *Yorta Yorta* determination on a 'society bound by its laws and customs'²³ has led to a broadening of the native title inquiry beyond the land tenure system to a wholesale inquiry into all aspects of social organisation in attempts to demonstrate a contemporary yet traditional society. Given the past 200 years of colonisation, it is self-evident that demonstrating the continuity of an Aboriginal society that has survived in

parallel to the dominant society is a very onerous task. Because in negotiations parties are not bound by the processes of the Court, negotiating connection allows parties greater freedom to determine what aspects of native title law to focus on than they would have if they were in litigation. Arguably, of the many aspects of traditional law and custom one could consider, the focus in negotiations should be on the traditional land tenure system, as it provides the basis from which native title rights and interests in land arise.

A common pattern observed across Australia is what Sutton has described as a process of ‘conjoint succession’.²⁴ Sutton coined this term to describe the process whereby the original richly patterned system of land tenure, usually with fine-grained localised interests and interlocking and complementary levels of rights and interests, evolved into regional, often language group-based land holding units. Significantly, the unit that traditional ethnography²⁵ depicts as the land owning unit, the ‘clan’ or ‘estate group’, is in many instances no longer present.

Anthropology, it seems, is well equipped to draw out parallels between what Sutton refers to as the ‘classical system’ of land tenure and contemporary occupation of and relationships to land, and can interpret and explain contemporary associations to land as arising from and reflecting the traditional relationship. The question that arises, then, is whether such adaptation is still sufficient to establish native title as understood by the law. This brings me to the last point regarding the evidentiary bar and how it might be set for negotiation purposes.

The evidentiary bar in negotiation and litigation

A number of Federal Court judges have now said that the evidence required for a negotiated determination of native title is not the same as that for a litigated one.²⁶ In the absence of more specific guidance, the vexed question for state and territory governments concerns the evidentiary threshold that they should be applying in making their decisions about moving towards consent determinations.

Without specific statements by the Federal Court about the difference in evidence between a litigated and negotiated determination, the legally logical approach to this question is to seek guidance in the precedence of trial-based Court determinations. However, the Court threshold in that context is very high and the positive determinations made after litigation have largely been confined to areas where the contemporary community is still quite clearly ‘traditional’, with obvious markers such as language, ceremony and on-country living. Taking the litigated bar as a starting point for negotiations is, therefore, not ideal for two reasons: first, because it can easily introduce litigious memes; and, second, because it creates a situation where most claims in more settled Australia are likely to flounder.

Regardless of whether the context is one of litigation or negotiation, a claim still needs to address s 223 of the Native Title Act to qualify for a determination of native title. In particular, the following requirements have to be established:

- that rights and interests are possessed under traditional laws and customs; and
- that claimants have a connection to land and waters by those laws and customs.²⁷

I believe that, outside the competing narrative context of litigation, sophisticated anthropology can establish even highly urbanised Aboriginal communities as holding rights and interests under an, albeit evolved, system of law and custom. It can also construct logical arguments for contemporary connections to country that persist, despite the absence of classical markers such as localised land holding groups, site-based rituals and detailed knowledge of songlines. For example, even in urban and regional communities Aboriginal people value the use of traditional resources, such as hunting, gathering and manufacturing traditional objects. People also often have strong beliefs about spiritual powers inherent in the land and knowledge of important places, both historical and cultural.

But what does 'connection to land and waters by [those] laws and customs' in s 223 actually mean? My view is that in a negotiated process as a minimum it means:

- a connection (whether by descent or legitimate cultural succession) to the owners of the land at sovereignty;
- an intimate, traditionally informed knowledge of the land in question; and
- that such knowledge is held by and transmitted to a cross-section of the community (vibrancy of the system as required by *Yorta Yorta*).

The latter two points are important, since the holding of native title places people in a position where they can influence future land use, and, for this to occur meaningfully, it is essential that the Aboriginal people know the country in question. With all three points established, it seems to me that respondents and the Court could be fairly certain that a determination is being made for the right people over the right area of land.

Conclusion

In this paper I considered two related issues: the potential impact of trial-based processes on negotiations and the question of whether settling native title claims by negotiation has an impact on the level of evidence required. The key point I sought to make regarding the first issue is that there is significant potential for professionals who engage in both litigation and negotiation to be influenced in the latter by processes and issues arising in the former. Avoiding this influence

requires all participants to be self-aware and to not allow deep-seated attitudes or opinions to detract from the bigger goal of reaching native title settlements.

In relation to the second issue, I have proposed that the approach to historical evidence in negotiation be different from that in litigation in terms of the directionality of evidence and have suggested that the focus of the inquiry be more limited. Rather than engage in a full-scale ‘society inquiry’, as one would in litigation, in negotiations the inquiry could be confined to the ‘connection to country’ issue. It is difficult to specify in the abstract the ‘quality’ of knowledge and the number and demographic spread of claimants who hold such knowledge that might be required to demonstrate a system of law and custom that connects people to land. However, there seems to be more room for inference in negotiation than there is in litigation.

In the end what constitutes sufficient evidence for a consent determination of native title is a policy question that depends as much on the position of government and of other respondents as on the cogency of the evidence presented in its support.

Post-presentation discussion

Participant: When we commence business with the state, we need to keep in mind that at any moment it could turn ugly, that everything is discoverable and that it may turn to litigation. I recently attended a connection conference and various anthropologists were reticent in coming to an agreement because of the thought that it might go to trial. Their concerns were that if they were prepared to compromise too much in terms of agreeing with a particular point, then they may one day be cross-examined in Court and challenged to explain why they had conceded a certain point. Therefore, it is sometimes difficult to sort out where you are in terms of negotiation in that continuum of negotiation and litigation.

Kim McCaul: Yes, it is a difficult situation. In South Australia, in theory at least, negotiation is privileged and is without prejudice. Should the negotiation fail, parties cannot be cross-examined on anything that they have said during those negotiations. I think that the leadership, both in the government and within Native Title Representative Bodies, needs to break the link between litigation and negotiation. Otherwise, the threat of litigation really destroys any possibilities in any negotiation process.

Participant: A lot of the disputes and arguments in native title cases are between Aboriginal groups rather than between the state and a claimant group: claimant groups are not always cohesive and in agreement. Therefore, there is a need for our writing to be directed towards our clients — the claimants and

the Traditional Owners — in order to allow them to understand and reshape their own narratives regarding their deep past, some of the details of which they are often unaware. So it is important to consider that the conversation must also be very much with our clients in thinking about how to resolve these matters of competing narratives.

Kim McCaul: I am aware that in writing a connection report, anthropologists are really playing to some very distinct audiences and that it is important to remain aware that claimants will also be informed by the report. From a government perspective, we would recommend that the report focus on the government as the audience, whilst having in mind that the material might be revised into something more appropriate for claimants afterwards.

Participant: It occurs to me that Aboriginal societies are more about affiliation than linear descent models. Therefore, if we use an affiliation model as a guide when we are thinking about the relationships between 'the parent culture' and 'the child culture', there is a congruent set of metaphors for the laws and customs and how tradition is related to innovation. I often use Roy Wagner's notion from *The Invention of Culture* that 'all cultures are structures, or structures are the result of the sedimentation of a failed series of innovations'.²⁸

Participant: I'd like some comment on whether, with time, we will have enough case histories to be able to look at the risk of litigation versus negotiation? Are we moving towards a third level of expertise, beyond that of the lawyer and the anthropologist, which is about risk assessment? This would require advice as to whether claimants should enter negotiation or litigation, taking into account the likelihood of a native title outcome and the nature of a determination or agreement outcome, both of which seem to be highly variable.

Kim McCaul: I don't think there will be a new category of expert because, in theory, the lawyer is supposed to be the risk assessor deciding upon questions such as how a case should be run, whether to take it to trial, how to participate in negotiations etcetera. In South Australia the emphasis of all parties is on negotiation rather than litigation. The Court Docket Judge has explicitly said that he doesn't expect to be hearing any other claims. I think litigation is a gamble and never the preferred option — unless, of course, a claimant group has been stymied and litigation is the only viable option available.

Participant: I think it is time to have a major discussion about the relationship between litigation and mediation/negotiation. There has to be some way of breaking the link between personalities and outcomes to ensure that those who are negotiating or mediating are not adopting a litigation mentality. I think there needs to be an understanding about where risk assessment falls within the negotiation process. It is something that needs to be taken into account by

the claimants and other parties as to the best alternative within a negotiated agreement — is it litigation or something else? I think a major discussion needs to happen around the language and discourse of negotiation and mediation. Perhaps the lawyers who are involved in native title claims, both in governments and in representing applicants, could be trained in principles of negotiations and mediation, which they can then bring to the settlement table whilst leaving behind their litigation skills.

NOTES

1. The opinions expressed in this paper are solely the author's and are not endorsed by the South Australian Crown Solicitor's Office, where the author is employed.
2. *Mabo v Queensland (No. 2)* (1992) 175 CLR 1.
3. Government of South Australia, *Consent Determinations in South Australia: A Guide to Preparing Native Title Reports*, Crown Solicitor's Office, Adelaide, 2004; Government of Western Australia, *Guidelines for the Provision of Information in Support of Applications for a Determination of Native Title*, Office of Native Title, Perth, 2004; Queensland Government, *Guide to Compiling a Connection Report for Native Title Claims in Queensland*, Department of Natural Resources and Mines, Brisbane, 2003.
4. This comment was made during discussions as part of a workshop organised by the Australian Institute of Aboriginal and Torres Strait Islander Studies and the National Native Title Tribunal in 2007, which resulted in the publication of Rita Farrell, John Catlin & Toni Bauman, *Getting Outcomes Sooner: Report on a Native Title Connection Workshop Barossa Valley July 2007*, National Native Title Tribunal, Perth, and Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2007.
5. See, for example, the implicit significance O'Loughlin J appears to have given to claimants being involved in Christianity in *De Rose v State of South Australia* [2002] FCA 1342 and the more explicit significance attached to a petition by Yorta Yorta people in an attempt to obtain land in the 19th century in *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58.
6. *Munn v Queensland* [2001] 115 FCR 109 at [29]; see also *Smith v State of Western Australia* [2000] 104 FCR 494 at [38] and *Thudgari People v State of Western Australia* [2009] FCA 1334 at [25] for similar comments.
7. See comments made by Barker J in *Thudgari People v State of Western Australia* [2009] FCA 1334.
8. See, for example, Frances Morphy, 'Performing law: The Yolngu of Blue Mud Bay meet the native title process', in Benjamin Smith & Frances Morphy (eds), *The Social Effects of Native Title: Recognition, Translation, Coexistence*, ANU E Press, Canberra, 2007.
9. For example, John Phillips, *Advocacy with Honour*, Law Book Company Ltd, Sydney, 1985.
10. Lord Reid in *Rondel v Worsely* [1997] 1 QB 433 in G E Dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand*, 2nd edn, LBC Information Services, Sydney, 2001, p. 445.

7. 'Competing narratives' versus 'interest-based negotiation'

11. Keith Tronc & Ian Dearden, *Advocacy Basics for Solicitors*, Law Book Company Limited, Sydney, 1993, p. 23.
12. *De Rose v State of South Australia* [2002] FCA 1342.
13. *Jango v Northern Territory of Australia* [2006] FCA 318.
14. *Lee v The Queen* (1998) 195 CLR 594 in David Ross, 'Criminal law practice: Defending Aboriginal people', *Criminal Law Journal* vol. 31, 2007, p. 340.
15. In my experience of working with barristers, an essential skill of a good barrister is to be fully convinced of the superiority of their own narrative over that of the other side. This skill can leave the barrister impermeable to any evidence that may go against their argument.
16. Roger Fisher & William Ury, *Getting to Yes: Negotiating Agreement Without Giving In*, Penguin Books, New York, 1981.
17. Roger Fisher & Scott Brown, *Getting Together: Building Relationships as We Negotiate*, Penguin Books, New York, 1988.
18. Richard Dawkins, *The Selfish Gene*, Oxford University Press, Oxford, 1976.
19. *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (Yorta Yorta HC).
20. See Francesca Merlan, *Caging the Rainbow: Places, Politics and Aborigines in a North Australian Town*, University of Hawai'i Press, Honolulu, HI, 1998.
21. In the Yorta Yorta case the trial judge and subsequent courts considered a petition of 1881 as strong evidence for the cessation of laws and customs from that point onwards. In the petition, 42 Aboriginal people, ancestors of the Yorta Yorta claimants, sought a grant of land to pursue agricultural activities. See, for example, *Members of the Yorta Yorta Aboriginal Community v State of Victoria* [2001] FCA 45 (Yorta Yorta FC), paragraphs [185]–[187].
22. Yorta Yorta FC, above n 21, paragraph [50].
23. Yorta Yorta HC, above n 19, at [49].
24. Peter Sutton, *Native Title in Australia: An Ethnographic Perspective*, Cambridge University Press, Cambridge, 2003, p. 6.
25. For example, Alfred R Radcliff-Brown, 'The social organization of Australian tribes', *Oceania* vol. 1, no. 1, 1930, pp. 206–46; William E H Stanner, 'Aboriginal territorial organization: Estate, range, domain and regime', *Oceania* vol. 36, no. 1, 1965, pp. 1–26.
26. See, for example, North J in *Lovett on Behalf of the Gunditjmarra People v State of Victoria* [2007] FCA 474 and Barker J in *Thudgari People v State of Western Australia* [2009] FCA 1334.
27. *Native Title Act 1993* (Cth), s 223.
28. Roy Wagner, *The Invention of Culture*, Prentice Hall, Englewood Cliffs, NJ, 1975.

CHAPTER 8

Serendipity is not enough! State and territory native title connection processes

Toni Bauman¹

In a speech delivered in 2009, the Australian Attorney-General, the Hon. Robert McClelland MP, asked parties to let go of ‘old attitudes’, including unduly narrow and legalistic approaches to native title, and adopt a practice of ‘good faith’ in negotiating native title outcomes.² Commenting that courts were being asked to resolve issues that were not well suited to winner-takes-all judicial processes, he stressed the need for flexible, non-technical and practical approaches.³ State and territory governments committed to this approach through a Joint Working Group, and, in August 2009, released *Guidelines for Best Practice Flexible and Sustainable Agreement-Making*.⁴ Several prominent judges, including the Chief Justice of the High Court, the Hon. Justice French, the Hon. Justice North and the Hon. Justice Wilcox, have also voiced concerns about justice, delay and expense in the system.⁵ The National Native Title Tribunal (NNTT) estimated in 2007 that, at the current rate, it will take more than 30 years to address all native title claims.⁶

Delays in the assessment of connection⁷ by state and territory governments and in the preparation of connection reports by Native Title Representative Bodies (NTRBs) and Native Title Service Providers (NTSPs), as the representatives of native title holders, are often cited as a major factor in the lack of progress.⁸ Connection reports are costly, conservatively estimated at anywhere between \$50,000 and \$350,000 and the budgets of NTRBs and NTSPs are limited. A scarcity of skilled anthropologists with experience in native title represents a serious shortfall in the system. Suggestions are also made that states and territories are causing delays by repeatedly requesting additional information and being overly pedantic and particularistic⁹ in the application of black letter law to their connection assessments. These are countered by comments that many connection reports are not well-written or argued and do not directly address the requirements of the NTA. Justice North and Tim Goodwin have also pointed out that:

8. Serendipity is not enough!

the requirements of the Yorta Yorta test, the undoubted responsibility of the state respondents to base any agreement on a solid foundation of fact, and the complexity and difficulty of the proof presently required from the applicants guarantees considerable delay and expense.¹⁰

In the meantime, many elderly and not so elderly Indigenous people have passed away before seeing any beneficial native title outcomes. This is not only another manifestation of the injustice of the gap in life chances between Indigenous and non-indigenous Australians; it also creates the further disadvantage of reducing the ability of native title groups to provide connection information. When senior members of a claim group pass away, irreplaceable knowledge goes with them. As well, there are persistent misconceptions, including among the general public and native title claimants, about native title and what it means in practical terms. Claimants continue to base decisions on often false expectations of what native title can deliver. Together with many others, they have difficulties in understanding the differences between exclusive and non-exclusive native title determinations affording various levels of recognition of rights but no proprietary interests. In this context of unrealistic expectations and the ongoing trauma of high mortality rates within claimant groups, disputes between claimants fester.

In 2007, a workshop, sponsored by the Australian Institute of Aboriginal and Torres Strait Islander Studies and the NNTT in the Barossa Valley in South Australia brought together for the first time the range of stakeholders involved in connection processes to discuss better and sooner outcomes. At the workshop, Iain Anderson, the then first assistant secretary of the native title division of the Commonwealth Attorney-General's Department, asked participants for the secret of success to better and sooner outcomes. The reply he received was, 'serendipity'.¹¹ But serendipity and waiting for the stars to align is, of course, not enough to meet the spirit and intent of the *Native Title Act 1993* (Cth) (NTA), which includes the commitment to 'provide for the recognition and protection of native title' in its preamble.

This paper discusses ways of achieving flexible and non-technical approaches to connection processes. It highlights a number of issues of procedural fairness which can work against cooperative and collaborative approaches and the generation of goodwill, all of which are essential if connection assessment processes are to be streamlined. Whilst states and territories may have productive working relationships with NTRBs and NTSPs, these relationships are often a matter of the serendipitous aligning of highly variable, subjective and political factors. The rigor of assessments can be impacted by a subtext of the interests of those involved, including: relationships with others in the processes, individual expertise and predilections; the degree of state and

territory and other respondent interests in the land; the need to fast track processes for development purposes; and whether goodwill is applied.

The admixture of Alternative Dispute Resolution (ADR) and other approaches which are employed in assessments raise fundamental best practice issues. Currently, many connection assessment processes are a policy-driven hybrid mix of interest-based and positional bi-lateral negotiations and evaluative quasi-judicial arbitrations managed by the states and territories in greater or lesser collaboration and cooperation with NTRBs and NTSPs. The ultimate decision is made by, and in accordance with, the interests of governments, usually by Cabinet, against a backdrop of the risks and threat of litigation. ADR best practice issues are also raised when connection assessments take place in the context of the referral of applications by the Federal Court to the NNTT for mediation (at least until the recent 2009 amendments to the NTA), but are often not formally managed as mediations. This is because a number of states and territories insist on being satisfied with connection prior to entering mediation, despite the fact that s 86A(1) of the NTA directs that, amongst other things, mediation by the NNTT is to be aimed at ascertaining who has native title.

Whilst a call for goodwill in connection assessments might seem naive, the dependence of claimants on the goodwill of states and territories is a major structural flaw in assessment processes. At the same time as it is acknowledged that states and territories must exercise due diligence in assessing connection, they also have a duty to exercise goodwill as an essential element in good governance. This means recognising that they act not only on behalf of other respondents and society at large, but also on behalf of Indigenous claimants as members of that society.

The paper concludes that, in the interests of procedural fairness and justice, state and territory connection assessments should take place within a framework of national standards that set out process parameters and principles, including avenues of appeal and complaint, conflict of interest procedures, options for independent management and arbitration of assessment processes, and minimum thresholds of proof. It also argues that a presumption of transformation, coupled with what Noel Pearson has described as the continuous existence of entitlement¹² — as opposed to the current emphasis on continuity and change — would provide for fairer assessments that more accurately reflect the lives of claimants and their ancestors.

Systemic variation, uncertainty and subjectivity in connection assessment processes

Connection processes are located at the uneasy intersection of a number of competing discourses that are contested not only across but also within various

native title sectors. These include Indigenous, legal and anthropological discourses of 'bloodline' and laws and customs, Commonwealth, state and territory government policy discourses, and ADR discourses. Such contestations of meaning are reflected in a number of systemic variations and uncertainties surrounding the best way to process connection and to assess the content of native title itself. They raise significant issues which concern not only the need to manage individual subjectivities, but also to address issues of institutional power and procedural fairness.

The assessment of connection by state and territory governments is not a statutory requirement. Connection reports are policy requirements imposed by the state. The finding as to whether connection documentation establishes native title rights and interests is not just a technical, legal or anthropological decision. It can also be a political decision ultimately made by Cabinets, and often administered and processed by legal bureaucrats, with professional advice from in-house and consultant researchers and lawyers. Whilst connection guidelines, where they exist, are similar across states and territories, they vary in their implementation according to policies, procedures and interests in the land under claim, effectively giving rise to multiple native title regimes.¹³ An absence of written guidelines results equally in uncertainty and variation. Guidelines are also under review and assessment outcomes are dependent upon the flexibility and non-technicality brought to bear by state and territory governments in their interrogations of connection materials according to what they understand to be the requirements of s 223 of the NTA. There is also, in some state and territory jurisdictions, a long tradition of hostility and active campaigning against any recognition of Aboriginal rights to land.

In addition to this context of constantly shifting goal posts, the legal meanings of the concepts usually associated with s 223, such as 'traditional laws and customs acknowledged and observed', 'society', 'occupancy' and 'continuing connection', remain elusive.¹⁴ When states and territories, in their interpretations of these concepts, look for guidance to Federal and High Court judgments they are faced with inconsistent and contradictory accounts. The Federal Court is not specialised and cases are allocated to a range of judges, many of whom may have little experience with Indigenous people and native title. There is also uncertainty relating to the Federal Court's requirements for a consent determination. Whilst some judges have taken a flexible approach, generally seeking not to test the evidentiary basis of native title and focussing rather on the fact of agreement between the parties,¹⁵ other judges have not, requiring detailed submissions in support of a determination.¹⁶ It is not easy to discern a developing jurisprudence and North J has recently expressed a view that judges may exercise policy choices in the 'construction of [their] expression'.¹⁷ The scope for interpretation means that it is equally possible to employ the same information in arguing for and against the existence of native title.¹⁸

The Court's interpretations can appear to compound past injustice, as claimants who have suffered the most disposessions, often those associated with urban areas,¹⁹ appear to be the least likely to meet the continuity and traditional requirements of the NTA, and the most likely to be dispossessed.²⁰ Such outcomes were spearheaded by the findings of the Federal Court for the Yorta Yorta in Victoria, where the Court found that Yorta Yorta traditions had been 'washed away with the tide of history'.²¹ The High Court's judgment on appeal introduced a new concept of 'normative societies' to native title law, sending anthropologists and lawyers back to the drawing board, as its definition has been the subject of judicial, legal and anthropological debate ever since.²²

The efficiencies of connection processes can thus be impacted by the individual subjectivities of those who are assessing and preparing connection, as well as those of claimants, all of whom can be more or less adversarial, positional, competent and assertive. Changes to staff in key decision-making roles, to in-house researchers and lawyers, and to consultants, whether in NTRBs, NTSPs or in government departments, can give rise to significant changes in organisational cultures including policy approaches to assessing and preparing connection, prioritising resources and power relations.

The relationships between and amongst connection team members in state and territory governments and in NTRBs and NTSPs also play a critical role in connection outcomes. These can be competitive and fractious, perhaps particularly so between lawyers and anthropologists who have a range of attitudes to working with each other. Not all anthropologists are amenable to taking instructions from lawyers; and lawyers may not supervise the writing of connection reports effectively or have quality control mechanisms in place.²³ The relational dynamics between claimants and NTRBs and NTSPs, as well as between claimants themselves are also crucial.

A lack of clarity as to the accountability of government staff involved in assessment processes and a lack of transparency in the ways in which state and territory decision-making occurs, including whether reasons for decisions are provided to NTRBs and NTSPs, can add to confusion and perceptions of unfairness and injustice. Bureaucratic decision-making processes are hierarchical and staff involved in assessment procedures may have greater or lesser influence on the chief executive officers, departmental heads, Ministers and Cabinet who may influence or ultimately make decisions. Within Cabinet itself, there can be a range of opinions: some Ministers may wish to move quickly to a consent determination, whilst others oppose it. As Kingsley Palmer, a consultant anthropologist commented in 2006:

It will be at least nice to know about the process...What is the basis of the decision? What is the interface between the office of native title in the States...and minister...and government? There is no separation

8. Serendipity is not enough!

of powers as in the judiciary...the government departments are the executive arm of the government. So does that mean that if the government says we want this through they are going to agree?²⁴

Further uncertainties arise in the diverging opinions within and across state and territory jurisdictions about the most appropriate activities to employ in connection assessment processes themselves.²⁵ In some cases, the NNTT has held Heads of Connection scoping meetings early in processes and mediated on-country connection assessment processes; in others, the NNTT may not be involved. Whilst on-country meetings between governments, claimants and claimant representatives and formal and informal presentations of oral evidence have become increasingly common, some lawyers question whether this relatively unfettered access of states and territories to witnesses is prejudicial to potential litigation if negotiations break down. Others proclaim the success of such on-country meetings, as providing a significant opportunity to build relationships between claimants and governments. The form that peer review processes should take is also the subject of debate: whether, for example, NTRBs, NTSPs, and the states and territories should agree upon the peer reviewer; whether the peer review process should be anonymous; whether early meetings between the author of a connection report and the government's peer reviewers should occur; and whether peer review reports should be edited before being sent to NTRBs.

The identification of multiple options, methods and processes by which the evidentiary 'burden' of connection might be managed, can only be seen as tinkering around the edges. Systemic variations and uncertainties in approaches and outcomes across states and territories lead to the inevitable conclusion that there is a need to address the significant subjective interpretative and political elements in connection assessment processes. These include uncertainties regarding the requirements for a consent determination, the ambiguity of legal interpretations of the content of native title and of crucial terms such as 'tradition' and 'laws and customs'; changing connection guidelines; how connection should be assessed; inconsistent connection outcomes across states and territories; and the need for transparency and accountability in assessment decisions. Connection outcomes are also highly dependent upon the degree of expertise, predilections and inclinations of individuals engaged in both preparing and assessing connection, and the relationships between them.

Institutionalised issues of procedural fairness

In both the preparation and assessment of connection, it is not only the content of native title which is being negotiated, but also the assessment processes themselves. These processes are structurally mutable and take place

in constantly changing political and legislative environments, which influence how they proceed and the degree of goodwill attached to them. When parties are managing processes in which they also have an interest in the outcome, issues of procedural fairness inevitably arise. This is further exacerbated by the fact that native title policy and legislation implicates states and territories and NTRBs and NTSPs in processes that can be perceived to be unfair despite the best intentions of all involved.

States and territories cross the boundaries of best practice arbitration and interest-based negotiation and mediation processes and evaluative mediation. At once, negotiators and arbitrators, they negotiate and manage connection processes and arbitrate outcomes in which they are also stakeholders. Ultimately, it is their decision whether negotiations beyond connection (in which they will often be key parties) will proceed and, if so, the nature of the group with whom they will be negotiating. The unwillingness of some states and territories to enter into mediation and agreement-making processes until connection issues are decided indicates a lack of appreciation that connection is their first substantive negotiation with claimants and as such should proceed as part of mediation. States and territories also represent sometimes conflicting interests of the Crown and other respondents in connections assessments, as well as having a duty to represent the interests of native title claimants as members of their constituencies.

NTRBs and NTSPs are also faced with uncomfortable issues of procedural fairness and potential conflict of interest. Under s 203B of the NTA, NTRBs and NTSPs 'must give priority to the protection of the interests of native title holders'. Yet they may be representing claimants prior to their formal recognition as native title holders, including claimants who are in dispute over who the native title holders are. The statutory dispute resolution and facilitation functions of NTRBs and NTSPs, under ss 203BF and 203BB respectively, may also mean that they are required to manage disputes in which they, themselves, are located. Claimants may perceive processes as unfair when, for one reason or another, they see NTRBs and NTSPs as 'taking sides'. They can feel excluded from processes; that they have been given insufficient information about research outcomes; that those with whom they are in dispute are receiving privileged treatment; or that NTRBs and NTSPs have not carried out their roles effectively. NTRB and NTSP staff may also have propensities towards one kind of native title group composition over another. Just as NTRBs and NTSPs can be in dispute with governments over assessments, the primary dispute to address in the preparation of connection may well be between claimants and the NTRB or NTSP itself.

The institutionalised conflicting roles of NTRBs and NTSPs and of the states and territories, the fact that NTRBs and NTSPs and states and territories can themselves be in dispute, and the subjective elements in assessments of the

content of native title itself, highlight the fact that, in the interests of justice to claimants, connection is a process that should benefit from independent third-party management. This is especially the case since a key issue of procedural fairness which creates a significant imbalance of power in assessment processes, is the way in which NTRBs and NTSPs, the least resourced in connection processes, have to gather all the evidence that sustains the connection assessment process. At the same time, state and territory governments can allocate significant resources into critiquing and dismantling the evidence. It may also be the case that parties lack incentive to compromise when funded by the Commonwealth in a 'no cost' jurisdiction where principles can rule.²⁶

Negotiating goodwill in connection and independent process management

Interest-based negotiations are not a panacea for all problems in the native title system and a healthy degree of scepticism about their ability to produce beneficial outcomes is wise.²⁷ However, as long as claimants remain dependent upon the goodwill of states and territories and on NTRBs and NTSPs, in fundamentally flawed processes there will be a need for measures to be taken to mitigate the effects of such processes.

Principled interest-based negotiation processes should be problem-solving processes that promote trust and long-term relationships and build lasting solutions based on mutual interests.²⁸ Interest-based processes are often distinguished from positional bargaining approaches, which involve 'the successive taking and then giving up a sequence of positions, with the tendency to lock into positions with little interest in meeting the underlying concerns of other parties'.²⁹ In connection processes, relationships are important since the interests of claimants and states and territories will continue to impact on each other, well beyond connection processes into other agreement-making and implementation processes, in which the same parties are likely to participate.

Whilst it is not possible to force individuals to change or to adopt attitudes, skilled interest-based processes can strategically challenge behaviours and attitudes for the collective good. They can recognise signs of changes in attitudes and make timely strategic interventions to create a more level playing field. The skills lie in knowing when and how to intervene without alienating parties, how to move towards agreed outcomes in the recognition of and acting upon shared interests, how to map and identify underlying interests, how to shift parties from being positional, and how to design processes in collaboration with parties which are tailored to their emotional, procedural and substantive interests.³⁰ Process managers remain alert to issues of procedural fairness which are difficult for parties to identify when they are involved in the process itself and when they have an interest in the substantive content of any negotiation. The procedural expert remains alert to miscommunications,

monitors how to manage them and acts as a ‘circuit-breaker’ without being seen as a stakeholder in particular solutions or outcomes. He or she is better placed to address any negative impacts that individual personalities, attitudes, pre-existing relationships and personal power can have on outcomes, and assist parties in negotiating interests with each other in good faith, and identify when good faith is not apparent.³¹

A critical negotiation in connection assessment processes involves arriving at a range of agreed solutions about the nature of assessment activities themselves. These might include: how the free, prior and informed consent of claimants is to be obtained to proposed activities in the light of risks and benefits; the nature of roles and responsibilities in relation to on-country visits, including the access of state and territory lawyers to claimants; access provisions for connection materials; and whether opportunities should be provided for claimants and states and territories to build relationships and, if so, the nature of any relationship-building activities.

Most, if not all of the critical factors identified at the Barossa Valley workshop for arriving at better and sooner outcomes are a matter of goodwill and relationships,³² requiring the building of mutual trust, respect and understanding, and transparency and accountability. Goodwill can gain traction and seep into negotiations through demonstration and practice, bringing flexibility and non-technicality and a desire to achieve genuine progress, hand in hand with changes to procedure and substance, including the requirements of connection. It can be demonstrated and measured through the observance of collaboration and cooperation, the building rather than the destruction of relationships, information exchange, feedback loops, frequent contact between parties, a willingness to explore options and accept the legitimacy of a divergence of views, the open exploration of issues and concessions, and a willingness to take risks and to be innovative, rather than a strict adherence to an imagined objectivity in interpreting the law.

The design of relationship building activities should be a critical skill of any process manager: whilst BBQs, sharing cups of tea and being on country together can achieve significant results, a skilled process manager can design other activities which are aimed specifically at revealing the underlying interests of all parties. The process manager can also design processes which build goodwill on the recognition of shared interests: the intent of the NTA, for example; equity in outcomes across states and territories; the need to identify ‘the right people’ and settle disputes between Indigenous parties; desire for an outcome and efficient cost-saving process; the need to account for varying degrees of third-party interests; and, potentially, whether land developments do or do not go ahead.

Notwithstanding, goodwill can also be dictated, framed and influenced by underlying and sometimes hidden substantive interests of and imbalances in

8. Serendipity is not enough!

power between and amongst governments, NTRBs and NTSPs and claimants. The assistance of a third party may go some way to addressing such imbalances, some of which relate to state and territory and NTRB/NTSP transparency and accountability. The least that a procedural expert can do is to ensure that state and territory representatives receive a clear brief from their Cabinets prior to entering connection processes through which they openly acknowledge the limits of their participation and authority. Where negotiations exceed the limits of a brief, all parties would then be aware of the need for state and territory representatives to refer back to Ministers and Cabinet for authority to proceed. Similarly, NTRBs and NTSPs also need to clearly identify their decision-making processes and associated authorities.

Two other issues arise in connection assessment processes which give rise to some uncertainty: ‘without prejudice’ and confidentiality provisions, both of which are often described as applying ‘as far as the law allows’. Whilst it is commonly agreed amongst parties that connection assessment processes are ‘without prejudice’ and that blanket confidentiality provisions apply to connection materials, there is a need for more detailed exploration of their legal implications in the range of contexts which might eventuate.

There are procedural fairness implications, for example, in ‘without prejudice’ provisions when government employees (with access to connection information) are not only engaged in assessments but are also likely to be involved in advising about, and preparing cases in, any future litigation.

There are also implications for claimants who have a significant proprietary interest in connection materials, as do their descendants, when the materials can be locked up for many years under blanket confidentiality provisions. At the same time, a lack of safeguards regarding confidentiality can lead to the unwillingness of parties to reveal connection evidence and to perceptions of a process as lacking in goodwill. Blanket confidentiality provisions can cause systemic delay in the long term, as early career anthropologists seeking professional development opportunities are denied access to connection reports, thus compounding the lack of anthropological expertise in the native title system. They can also be contradictory, as, paradoxically, claimants have a responsibility to represent others in the group and keep them informed. An effectively managed negotiation of confidentiality requirements would consider the interests of parties in each of the kinds of documents involved, their corresponding access requirements, the likely uses to which the documents might be put in the future and their storage. It may be possible for provisions to be negotiated at the outset to give claimants access to documents once a consent determination has been reached; at which time, a renegotiated set of provisions could be put in place.³³

Procedural fairness and goodwill go hand in hand with good governance, all of which are required to get better and sooner connection outcomes. It

would be simplistic to think that state and territory governments do not have a raft of underlying and obscured political interests, including pressure from other stakeholders and the desire to win forthcoming elections, which impact on connection outcomes. Transparency and accountability measures are located in power imbalances in which authority is clearly located with states and territories. Such impediments to procedural fairness highlight the need for external intervention and monitoring, and for remedies which have institutional support. Whilst there appears to be an increase in the use of NNTT mediators in connection assessment processes, the majority of processes remain as unsupervised bi-lateral negotiations between governments and claimants.

Options for addressing procedural fairness issues: Towards a national approach

Where processes are perceived to be counterproductive, unfair and protracted, there is a need for a circuit breaker to create confidence in the processes themselves. Given that the ultimate authority in consent determinations clearly rests with the Court, it would seem beneficial that the Court has some input into state and territory connection assessment processes, given its responsibilities for mediation and case management with the 2009 amendments to the NTA.

There is a need for other formal solutions, including avenues of appeal and complaint, to address the issues of procedural fairness. Introducing an option for parties to access third party independent management of connection processes as required, would give all parties greater confidence in the system, create less suspicion, remove the ill will associated with the responses of some individuals involved, and be a significant demonstration to all of goodwill and fairness.

The 2009 NTA amendments have given the Federal Court substantial powers in managing native title matters. The Court now has discretion to place parts or all of a proceeding under its management and to refer claims to a range of ADR practitioners, including, but not restricted to the NNTT and Court Registrars. Given its authority, the Federal Court has the potential, when requested by parties, to provide rigorous independent process management, intervening in an assertive and creative way, deciding strategically when claims should be sent to mediation and, in discussions with parties, appointing an appropriate mutually agreed ADR practitioner to manage the process. The Court could also provide guidance on consent determination requirements in particular cases and oversee a timetable for production of connection material. Parties might be given the opportunity to develop a range of connection assessment options and to make their own suggestions as to how to proceed in more collaborative processes, as required. The Court also has powers under s 87(4) of the NTA to deal with some matters other than native title — though

these powers remain to be tested. This might make it possible for the Court to appoint an ADR expert to manage connection processes on request in alternative agreements.

Despite the historical resistance of states and territories to national approaches, in the interests of procedural fairness, their willingness to adhere to a set of minimum national threshold of proof standards and process principles which are aimed at the recognition of native title rights — not at their extinguishment — would constitute a major gesture of goodwill and build confidence in connection processes. This could also be beneficial to states and territories in providing benchmarks upon which they might rely in responding to unfavourable comparisons, and in justifying decisions in the face of accusations that they have been too lenient or overly pedantic.

Such a national approach could be facilitated by the Joint Working Group on Indigenous Land Settlements, whose objective it is to ‘develop innovative policy options for progressing broader and/or regional land settlements that complement the *Native Title Act 1993 (Cth)* and the work of the Federal Court of Australia’.³⁴ The Joint Working Group guidelines provide a starting point for a national approach, including the development of minimum thresholds of proof of connection.³⁵ One of its policy options might involve the building of a much needed community of connection preparation and assessment practice, which would go some way to addressing the significant inequities that can arise across states and territories out of the variability in approaches. This could build on the series of procedural directions of the President of the NNTT to be taken by the Registrar, members and employees in relation to native title applications under s 123(1)(e) of the NTA.³⁶

The Victorian Native Title Settlement Framework also provides an opportunity for trialling what could be national minimum thresholds of proof and other approaches to connection processing.³⁷ Although the Framework is not directed at consent determinations, I see no reason why, in the interests of goodwill, flexibility, non-technicality, good fiscal management and beneficial outcomes, that the same minimum threshold requirements should not apply to both consent determinations and other settlements labelled as ‘alternative’. This is particularly the case in the light of North J’s comments that connection assessments should not be trials as if conducted by the Court and that connection materials should be ‘significantly less than the material necessary to justify a judicial determination’.³⁸

Each connection assessment process and its outcome are negotiated on a case by case basis, by necessity. Without a framework of procedural fairness, connection assessment processes provide too many opportunities for individuals to take positional approaches that deny the transparent exploration and negotiation of options and interests, which can sometimes give rise to

unexpected and innovative outcomes. Skilled and experienced native title ADR practitioners, including Indigenous practitioners, are an essential aspect of such a framework.

The urgent demand for experienced and skilled native title ADR practitioners

Whilst the lack of anthropologists experienced in producing connection reports has gained some attention in the native title sector,³⁹ the urgent and unmet demand for skilled and experienced native title ADR practitioners, including Indigenous practitioners, has not.⁴⁰ Native title mediations and negotiations have often gained poor reputations. The Indigenous Facilitation and Mediation Project's survey of native title mediators found that a number of questionable approaches were being employed under the rubric of 'mediation'.⁴¹ Like those involved in connection assessment processes, native title ADR practitioners are in urgent need of a community of practice, including the development of specialised training in a range of areas. The establishment of the Federal Court's ADR panel might be seen as a foundation for this, as might the work carried out by the NNTT.

A significant delay in arriving at better and sooner connection outcomes relates to the need for ADR expertise in assisting disputing Indigenous claimants in what can be intractable disputes. Many who work in native title will be familiar with the positioning of claimants who insist that they don't care if nothing comes from the agreement, 'as long as that mob get nothing or aren't included', and of the languishing of claims as a result. Whilst connection information clearly plays a role in addressing such disputes, there also comes a time when all research avenues have been exhausted and no amount of additional research will assist in addressing disputes between claimants. At this point, there is no absolute 'connection' truth to be discovered, whether deep in the archives or in the minds of people and there is a need for claimants to be assisted in negotiating with each other.⁴² This is not to say that anthropologists have no role: indeed, they have an important role in supporting ADR practitioners in identifying and assisting the negotiation of the matrices of hierarchical and heterogeneous rights and interests which characterise any native title group, and in enabling processes to account for them.

One approach to mediating intractable Indigenous disputes might involve the facilitation of an agreement amongst the parties at the outset, to have arbitration contingencies in place in the event that an agreement may not be reached (arbitration by an NTRB/NTSP executive member, a regional elder or group of elders, the NNTT, the NTRB/NTSP team working with the claimants, for example). Consensus is not always obtainable, and a formula might be agreed that identifies a minimum number of applicants who need to agree before a decision can be made.

Alison Vivian has also suggested combining facilitation and arbitration functions in an Indigenous Dispute Resolution Tribunal to deal with the native title conflict within and between Indigenous communities and the allocation of rights and interests.⁴³ Initial referral would be to an Indigenous Registrar to determine the kind of intervention needed, and subsequent referrals of legal issues would be to an arbitration panel or judge for determination. Applications for judicial review for jurisdictional error could be made to the Federal Court.⁴⁴ The Report of the Federal Court's recent case study project in Indigenous dispute resolution and conflict management⁴⁵ also recommends the establishment a national dispute resolution service, and the two proposals clearly inform each other.

In addition to the kinds of ADR process remedies I have discussed in improving connection assessment processes, there is also a need to influence the critical thinking and understandings of the content of native title itself.

Change is the only constant: The presumption of transformation

If processes are to be flexible and non-technical, there is a need to influence the substantive critical analysis around key connection terminologies, particularly continuity and change. Changing thinking around the meaning of native title is not only a matter of goodwill, procedural fairness and beneficial thinking; it is also a matter of assessors basing their analyses on informed anthropological understandings of culture and change and their implications in identifying the nature of contemporary Indigenous societies relevant to native title.

The received wisdom of native title has given rise to the translation of 'recognition' as 'originality' which is passed on by descent, and of 'origin' as 'property' that can be transmitted like a legacy, independently of *habitus*, including the vagaries of everyday lived experiences and the negative impacts of history on claimants.⁴⁶ In attempting to address such issues, Chief Justice French has suggested a presumption of continuity of the relevant society, and of placing the onus on states and territories and respondents to prove otherwise.⁴⁷ Justice North and Tim Goodwin have also suggested shifting the onus of proof to respondents to demonstrate that 'the society which existed at sovereignty has not had a continuous and vital existence since then, or that the applicants are not part of a continuously existing society'.⁴⁸ They recommend an additional subsection to s 223, where any lack of continuity or vitality which resulted from the actions of the settlers would be disregarded.⁴⁹

Despite the usefulness of these approaches, they remain predicated on the paradigm of continuity, and include the implication that change is bad, and open to non-beneficial interpretations. An emphasis on continuity and its corollary, change, also implies that history begins and ends at a particular moment, despite the fact that the assessment of connection is but a snapshot

of a moment in time. Connection materials cannot possibly reflect the many transformations and negotiations which will have taken place in arriving at that moment, are happening within the moment and will happen in the future. Disputes between native title holders will continue to flare up and the underlying reasons for them will continue to transform, since conflict is a normal part of life.

Change, like conflict, needs to be negotiated. Meanings, including the meaning of 'normative societies' with which both the legal and anthropological fraternity appear to be preoccupied, are produced through negotiation out of the conditions in which they are embedded. Contemporarily, these conditions include native title and the connection information from early ethnographies, which often now provides the rationale for contemporary Indigenous societies, the loci of (re)newed identities, and the basis for Indigenous action and decision making. Misinterpreted and de-contextualised from their conditions of production, in non-beneficial approaches, which are devoid of goodwill, such accounts can be employed in ways that represent the contemporary groupings which have formed around them as inauthentic.⁵⁰ This includes those 'Tindalesque' groups which continue to grow up amongst us and which increasingly give meaning to claimants' lives and attribute names to societies.

It is the negotiability of meaning including its accompanying social transformations which is the only continuity. It is because of this, I am suggesting that a presumption of transformation is a more realistic and fair way to proceed. By transformation, I mean little more than what can be found in the *Macquarie Dictionary*: 'change in form, appearance, nature, or character'.⁵¹ I also have in mind the kinds of social transformations referred to by Francesca Merlan as produced in contemporary conditions in a social technology of traditionalism,⁵² as well as those socio-historical transformations described by Gerald Sider in relation to the Lumbee Indian peoples in North Carolina in the United States of America. Sider comments:

culture/cultures are formed not as the property of a people...but as an aspect of a much larger social formation, where place, position, and profound inequalities are necessarily contested...[we need to] understand the production of cultures as part and parcel of processes of state formations, along with the production of race, gender, nationality, and citizenship...it may help to...look more closely at the potentials woven into the social relations, beliefs and practices of ordinary people's lives, for it is in these relations that people's capacities to grasp the forces arrayed against and for them is made and unmade.⁵³

Sider thus alludes to the fact that the everyday lives of people and the conditions of possibility in which they are embedded can produce surprising

8. Serendipity is not enough!

social transformations in the name of survival. However such transformations are often not valued in the native title system where they can be used to claimants' disadvantage. They include, for example, the effects on everyday lives of catastrophic events such as famines, floods and wide-sweeping fatal diseases, and of a range of other historical events and everyday inter-personal relationship dynamics. Those of us who have produced genealogies from the elderly some 30 years ago can identify with ease the effects on group composition of such events dating back to sovereignty. These might include the assuming of responsibilities for land by groups who are located at some distance from the land; the fissure of groups as brothers and families have fought for supremacy and estates have spilt to accommodate their interests; the 'tribal' re-identifications of individuals with the dominant linguistic groups at the missions, government settlements and pastoral stations into which they migrated or were forcibly moved; changes in kinship terms used to address others to better reflect transformed relationships arising out of shared experience; the way in which land might lie 'fallow' until processes of succession have been completed and the successors agreed; and the assuming of ceremonial responsibilities by individuals for no structurally defined cultural reason beyond that they have shown promise, interest and capability.⁵⁴

An approach based on the presumption of socio-cultural transformation would thus better represent past, present and future realities on the ground and would not carry the implication of claimants lacking in traditions. In the interests of flexibility, and working backwards from an identified contemporary society, as Noel Pearson has suggested,⁵⁵ states and territories might reasonably infer that contemporary societies have their bases in a series of transformation and negotiations which emanate from societies at sovereignty and which have been produced out of events and conditions since then — as obvious as this might seem. Such a presumption of socio-cultural transformation, combined with the reasonable inference of identified contemporary societies as 'normative', and the continuous existence and descent of title and entitlement (rather than of people) over, say, the past 40 years⁵⁶ might provide a more beneficial connection proof paradigm. It also recognises the significance of the conditions of possibility of social and cultural reproduction, and the matrix of hierarchical, heterogeneous, unbounded and often negotiable native title rights and interests associated with any native title group or society which emerges from them.⁵⁷ Denying conditions of possibility can deny the very relationships and assumed responsibilities that are essential for the reproduction of the traditional laws and customs which the NTA seeks.

A presumption of transformation approach would require those involved in preparing and assessing connection to highlight the realities of claimants' contemporary lives and the inevitable social transformations which have

occurred since sovereignty — rather than claimants feeling pressure to pretend that change has not occurred, as it does in every society, and that change is linear. It would also render futile any attempts by those assessing connection to grasp the slightest socio-cultural change as a reason for not accepting connection. Most of all, it would relieve claimants of the need to perform identity for the benefit of others in paradigms of unrealistic expected continuities in the discourse of traditionalism to which I have referred.

Other considerations which might inform any national minimum threshold approach, and in addition to those identified by Chief Justice French, Justice North and Tim Goodwin include: recognition of a core group by neighbours; authority to apply sanctions relating to breaches of law and custom;⁵⁸ and a focus on spiritual connection.

Conclusion

Difficulties in marshalling comprehensive evidence of connection and the political interests of states and territories, should not preclude a collaborative and beneficial approach in which states and territories work with claimants to establish native title.

The current political circumstances, coupled with the expanded powers of the Federal Court in managing mediation, suggest an opportunity to improve connection assessment processes which should be firmly grasped. All parties and their representatives have a duty of good governance to deliver certainty and trust through flexible and non-technical processes that exemplify goodwill. Recognition of native title should be seen as a positive outcome, giving certainty to all. The real benefit lies in gaining a seat at the negotiating table, where states and territories get certainty, claimants get financial and social benefits, respondents get recognition of their interests, and clarity can be achieved on access and heritage issues.

The assessments of connection materials by states and territories (at least in some instances) may not be seen as consistent tests of the merits of a case but, rather, as parts of political processes dictated by the value of the land under claim and the kinds of rights being asserted. I have argued that, in the interests of flexibility, non-technicality and goodwill as an essential aspect of governance, there is a need for independent process management of at least some connection assessments within a framework of national minimum threshold requirements and procedural fairness to which reasonable inference is central and in which change and socio-cultural transformation are taken for granted.

I have also suggested that the impossibility of native title lies, at least partially, in a lack of understanding in the native title system of socio-cultural

transformation and how cultural practice and traditions are always produced out of the conditions of possibility in which they are embedded, including in native title processes themselves. It also lies in futile attempts to encapsulate native title in a single and codified moment. Change is like conflict; it needs to be understood and negotiated. So, too, does goodwill. But in the imbalances of power that can characterise connection assessment processes, goodwill may also need to be generated through skilful independent third-party management with institutional backing. Regardless of the kind of agreement being sought, the process needs I have identified in this paper will remain, as long as the states and territories act as both arbitrators and negotiators in poorly defined processes.

Post-presentation discussion

Participant: I've done quite an amount of dispute work in various contexts and it is clear that the anthropologist is brought into the process far too late in native title cases. The lawyers and tribunal staff have a huge reluctance to ask anthropologists to help with mediations.

Toni Bauman: Early intervention is a critical success factor in ensuring that disputes don't fester and become intractable. Anthropologists are uniquely placed to identify such a need. They are also uniquely placed to assist ADR practitioners in identifying the matrix of substantive heterogeneous and hierarchical native title rights and interests I have discussed, together with emotional and procedural interests. This is critical in the design of effective processes to account for these interests, as well as in arriving at substantive outcomes which reflect such interests.

I have also been involved in a process where it was agreed that once all anthropological avenues had been exhausted, and if there was still no agreement amongst claimants, that some form of arbitration could take place: in this case, by the researcher and negotiating team. In a strange kind of way, this meant 'killing' the dispute with anthropology. As anthropologists, we must remain attentive to options for arbitration when it appears that disputes are intractable and could go on *ad infinitum*. Anthropologists can assist ADR practitioners by approaching connection as a facilitative tool in identifying the kinds of interests I have just referred to.

Participant: There is also an issue when contracts are made with claimant groups, rather than with NTRBs or NTSPs who mostly contract anthropologists. The representative bodies may refuse to fund a contract with the claimants as signatories. Where they are the signatories, the intellectual property rights go to them, rather than to claimants. This is a major issue for anthropologists, given

the intellectual property challenges by claimants that have been going on for so long,

Toni Bauman: I think that intellectual property rights and copyright are significant issues, along with the confidentiality provisions of supposedly ‘without prejudice’ matters in connection assessments. These should be negotiated carefully and thoughtfully on a case by case basis and in relation to particular kinds and uses of documents, rather than the application of blanket provisions.

Participant: So how do we get around the privileges associated with Court matters, so that others, apart from the ‘privileged few’, have access to them?

Toni Bauman: Provisions surrounding confidentiality and access should be negotiated at the start of any connection research or agreement making. Such negotiations might conclude that once a consent determination is reached, then connection materials can be made publicly available. Anthropologists should be integrally involved in such negotiation processes.

I also think that anthropologists have to be more aware of the policy context and how this impacts on the nature of reports they might produce. This includes the nature and extent of connection requirements relevant to particular kinds of processes; litigation, consent determinations and a range of agreement-making contexts, for example.

Participant: If the NTA reflects the political inadequacies of the system, then is there goodwill to actually enforce legislative change to s 223 within the Joint Working Party? At the rep body where I was working, we estimated it may be 80 years before native title claims are cleared.

Toni Bauman: I don’t think that changes to s 223 are going to happen quickly, but I do think that, as anthropologists, we should be seriously engaging with any discussion concerning such changes. So far, such discussions seem to involve mainly lawyers. The connection assessment process is such a problematic one because we cannot legislate for goodwill. However, the kinds of thinking that I am advocating, which could potentially influence changes to s 223, could go some way to counteracting the current discourse of ‘deficit’ and ‘lack’ and mean that claimants are not always reliant on the goodwill of others.

NOTES

1. I wish to acknowledge earlier research undertaken by Tran Tran and Natascha Spark of the Native Title Research Unit (NTRU) at the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) which has informed this paper and to thank respondents to a survey carried out by Tran Tran on behalf of

8. Serendipity is not enough!

- the NTRU in 2006. I also wish to thank Robert Blowes, Louise Anderson, Gaye Sculthorpe, Fiona Skyring, Sarah Robin and anonymous peer reviewers for their helpful comments on earlier drafts. The views expressed are, of course, my own.
2. Robert McClelland MP, Attorney-General, 'Negotiating Native Title Forum', paper presented to the Negotiating Native Title Forum, Brisbane, 29 February 2009, viewed 11 May 2010, <http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2008_FirstQuarter_29February2008-NegotiatingNativeTitleForum>.
 3. McClelland, above n 2.
 4. Attorney-General's Department, *Guidelines for Best Practice in Flexible and Sustainable Agreement Making*, Joint Working Group on Indigenous Land Settlements, Attorney General's Department, Canberra, 2009, viewed 10 May 2010, <[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3273BD3F76A7A5DEDAE36942A54D7D90\)~Guidelines_for_Best_Practice_in_Flexible_and_Sustainable_Agreement_Making.pdf/\\$file/Guidelines_for_Best_Practice_in_Flexible_and_Sustainable_Agreement_Making.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3273BD3F76A7A5DEDAE36942A54D7D90)~Guidelines_for_Best_Practice_in_Flexible_and_Sustainable_Agreement_Making.pdf/$file/Guidelines_for_Best_Practice_in_Flexible_and_Sustainable_Agreement_Making.pdf)>.
 5. Robert French CJ, 'Lifting the burden of native title: Some modest proposals for improvement', *Reform* vol. 93, 2009, p. 10; Anthony Max North J & Tim Goodwin, 'Disconnection — the gap between law and justice in native title: A proposal for reform', paper delivered to the 10th National Native Title Conference, Melbourne, 4 June 2009; Wilcox, J in 'Perth hit by native title claim', *The Australian*, 20 September 2006, viewed 22 April 2010, <<http://www.theaustralian.com.au/news/nation/perth-hit-by-native-title-claim/story-e6frg6nf-111112238815>>.
 6. Rita Farrell, John Catlin & Toni Bauman, *Getting Outcomes Sooner: Report on a Native Title Connection Workshop Barossa Valley, July 2007*, National Native Title Tribunal, Perth, and Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2007, p. 9.
 7. 'Connection' is the term used among native title practitioners to refer to the legal proof required to establish native title. 'Connection materials' refers to documentation developed to establish connection, such as anthropological materials. 'Connection processes' are the various mechanisms used by applicants, states/territories and mediators to guide agreement making on the recognition of native title.
 8. Farrell, Catlin & Bauman, above n 6, p.7.
 9. Simon Young, 'Law and custom — 'Traditional': The assembly of a legal microscope', paper presented to the 'S 223 Native Title Act Workshop', The University of Melbourne, 14 May 2009.
 10. North J & Goodwin, above n 5, p. 15.
 11. Iain Anderson, 'Federal Court National Native Title User Group', paper presented to the Native Title User Group, Adelaide, 9 July 2008, viewed 27 April 2010, <<http://www.aiatsis.gov.au/ntru/docs/researchthemes/connection/workshop/FedCourtAndersonpdf.pdf>>.
 12. Noel Pearson, comments at the 'S 223 Native Title Act Workshop', The University of Melbourne, 14 May 2009.
 13. See, for example, Queensland, Native title and Indigenous Land Services, *Guide to Compiling a Connection Report for Native Title Claims in Queensland*, Department of Natural Resources and Mines, Brisbane, 2003; Crown Solicitor's Office, *Consent*

- Determinations in South Australia: A Guide to Preparing Native Title Reports*, Government of South Australia, 2004.
14. See, for example, Paul Burke, this collection, Ch 4. See also Simon Young, *The Trouble with Tradition: Native Title and Cultural Change*, Federation Press, Annandale, NSW, 2008; Ian Keen, 'Cultural continuity and native title claims', in *Land, Rights, Laws: Issues of Native Title*, Issues Paper No. 28, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, July 1999; Kingsley Palmer, 'Societies, communities and native title', *Land, Rights, Laws: Issues of Native Title* vol. 4, Issue Paper No. 1, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2009.
 15. See *Smith v Western Australia* (2000) 104 FCR 494 at [19]–[20]; *Munn v Queensland* (2001) 115 FCR 109; *Lovett on Behalf of the Gunditjmarra People v State of Victoria* [2007] FCA 474 at [37]; *Eringa v South Australia* [2008] FCA 1370 at [33].
 16. In 2000 the Hon. Justice Drummond refused to make orders for a consent determination, despite agreement amongst the parties: *Wik Peoples (McNaught Ngallametta) v Queensland* (2000) FCA QG6001/98.
 17. North J & Goodwin, above n 5.
 18. Tran Tran, interview with Robert Blowes SC, Barrister, NTRU, Canberra, 18 April 2006.
 19. See, for example, *Risk (on behalf of Larrakia people) v Northern Territory of Australia* (2007) 240 ALR 74 for findings in relation to the Larrakia claim over the city of Darwin in the Northern Territory.
 20. North J & Goodwin, above n 5.
 21. *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.
 22. *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422. See also Paul Burke, this collection, Ch 4; Kingsley Palmer, above n 15.
 23. See Katie Glaskin, this collection, Ch 3. See also Bruce Rigsby, 'Representations of culture and expert knowledge and opinions of anthropologists', paper presented to the National Native Title Conference: Expert Evidence in Native Title Court Cases: Issues of Truth, Objectivity and Expertise, Adelaide, 6–7 July 2001, viewed 10 May 2010, <<http://www.aas.asn.au/publications/Conference%202001/Rigsby.pdf>>; John Morton, 'I-witnessing the witness: Courtly truth and native title anthropology', *Asia Pacific Journal of Anthropology* vol. 3, no. 2, 2002.
 24. Tran Tran, interview with Dr Kingsley Palmer, Anthropologist, Canberra, 5 April 2006.
 25. Numerous commentators have made suggestions as to how to improve connection assessments and the native title system. See, for example, Graeme Neate, 'Negotiating comprehensive settlements of native title claims', LexisNexis Native Title Law Summit, National Native Title Tribunal, Perth, 2009, pp. 9–10; Farrell, Catlin & Bauman, above n 6; I Anderson, above n 9.
 26. Tonkin, above n 26.
 27. David Ritter, *Contesting Native Title: From Controversy to Consensus in the Struggle over Indigenous Land Rights*, Allen & Unwin, Sydney, 2009; Ritter, David, *The Native Title Market*, University of Western Australia Press, Perth, 2009.
 28. Christopher Moore, *The Mediation Process*, 3rd edn, Jossey-Bass, San Francisco, CA, 2003.

8. Serendipity is not enough!

29. Toni Bauman & Rhiân Williams, *The Business of Process*, Indigenous Facilitation and Mediation Project, Report No. 1, NTRU, AIATSIS, Canberra, 2004, p.11.
30. Substantive interests include the content of native title and other matters being negotiated, including legal rights, policy frameworks and connection. Procedural interests are concerned with how parties talk about things, whether parties are being given a 'fair go', whether they have had the opportunity to put forward their own point of view, and whether they have confidence in information, protocols and the effectiveness of meetings. Emotional interests are concerned with how parties feel about what is being negotiated and about themselves as parties during and after the negotiations. These interests are often represented in interest-based negotiation models by what is known as the Satisfaction Triangle developed by CDR Associates, Boulder, Colorado.
31. The 2009 amendments of the NTA make provision to ensure that parties are acting in good faith in mediation under ss 94E, 94P and 94Q. These sections can be used to remind parties of behavioural requirements.
32. Farrell, Catlin & Bauman, above n 6.
33. See David Trigger, this collection, Ch 9, for comments on ways of overcoming this issue.
34. Attorney-General's Department, 'Consultation with state and territory governments', Attorney-General's Department, Canberra, 2010, viewed 3 May 2010, <http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Consultationwithstateandterritorygovernments#4>.
35. Attorney-General's Department, *Guidelines for Best Practice Flexible and Sustainable Agreement Making*, Joint Working Group on Indigenous Land Settlements, Attorney General's Department, Canberra, 2009, viewed 10 May 2010, <[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3273BD3F76A7A5DEDAE36942A54D7D90\)~Guidelines_for_Best_Practice_in_Flexible_and_Sustainable_Agreement_Making.pdf/\\$file/Guidelines_for_Best_Practice_in_Flexible_and_Sustainable_Agreement_Making.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3273BD3F76A7A5DEDAE36942A54D7D90)~Guidelines_for_Best_Practice_in_Flexible_and_Sustainable_Agreement_Making.pdf/$file/Guidelines_for_Best_Practice_in_Flexible_and_Sustainable_Agreement_Making.pdf)>.
36. Procedural Direction No 9 of 2009, Specific actions to be taken by the Registrar, members and employees of the National Native Title Tribunal in relation to native title applications, made under paragraph 123(1)(c) of the Native Title Act 1993, 23 November 2009, viewed 13 May 2010, <http://www.nntt.gov.au/Applications-And-Determinations/Procedures-and-Guidelines/Documents/Procedural%20Direction%202009/Procedural%20Direction%20No%209%20of%202009.pdf>>.
37. See Department of Justice, *Native Title Settlement Framework*, Department of Justice, Victoria, 2009, viewed 12 April 2010, <<http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Your+Rights/Indigenous+Victorians/Native+Title/JUSTICE+-+The+Native+Title+Settlement+Framework>>.
38. See *Lovett on Behalf of the Gunditjmarra People v State of Victoria* [2007] FCA 474 at [37]–[38].
39. See, for example, David Trigger, this collection, Ch 9.
40. See Toni Bauman & Juanita Pope (eds), 'Solid work you mob are doing: Case studies in Indigenous dispute resolution and conflict management in Australia', Report to the National Alternative Dispute Resolution Advisory Council by the Federal Court of Australia's Indigenous Dispute Resolution & Conflict Management Case

- Study Project, Federal Court of Australia, Melbourne, 2008, viewed 11 May 2010, <<http://www.aiatsis.gov.au/ntru/mediation.html>>.
41. Toni Bauman & Rhiân Williams, *Native Title Mediation Practice: The Commonalities, the Challenges, the Contradictions: A Survey of Native title Mediators*, Report No. 3, Indigenous Facilitation and Mediation Project, NTRU, AIATSIS, Canberra, 2005.
 42. The design of processes around identified interests is critical in such situations. The dispute may only be the property of one or two key players, while others simply fall in behind them. Ill prepared and poorly managed, 'big meetings' provide such players with a stage on which they are encouraged by their audience. They may need to be removed from their groups and subjected to formal mediation processes as individuals. There will also be instances where claimants may require other forms of assistance such as counselling.
 43. Alison Vivian, 'Conflict management in the native title system: A proposal for an Indigenous dispute resolution tribunal', *Reform* vol. 93, 2009, p. 34.
 44. Vivian, above n 55. See also Larissa Behrendt & Loretta Kelly, 'Creating conflict: Case studies in the tension between native title claims and land rights claims', *Journal of Indigenous Policy* vol. 8, 2007.
 45. Bauman and Pope, above, n 39.
 46. See, for example, Tim Ingold, *The Perception of the Environment*, Routledge, London, 2000, p. 132; Pierre Bourdieu, *Outline of a Theory of Practice*, Cambridge University Press, Cambridge, 1977.
 47. French CJ, above n 5, p. 10; see also Tony McAvoy, 'Native title litigation reform', *Reform* vol. 93, 2009, p. 31.
 48. North J & Goodwin, above n 5.
 49. North J & Goodwin, above n 5. They predict that this would alter the balance of power in negotiations, as 'applicants come to the table in a seriously weak position', p. 17.
 50. See Kingsley Palmer, this collection, Ch 5, & Tim Pilbrow, this collection, Ch 6. See also Basil Sansom, 'The brief reach of history and the limitation of recall in traditional Aboriginal societies and cultures', *Oceania* vol. 76, no. 2, 2006, pp. 150–72; Basil Sansom 'Yulara and future expert reports in native title cases', *Anthropological Forum* vol. 17, no. 1, 2007, pp. 71–92, for rejoinders to Sansom.
 51. *Macquarie Dictionary*, 3rd edn, Macquarie Library Pty Ltd, Macquarie University, Sydney, 1997, p. 2246.
 52. Francesca Merlan, *Caging the Rainbow: Places, Politics and Aborigines in a North Australian Town*, University of Hawai'i Press, Honolulu, HI, 1998.
 53. Gerald Sider, 'The walls came tumbling up', *Australian Journal of Anthropology* vol. 17, no. 3, 2006, pp. 276–90, reference to pp. 286–7.
 54. See also Peter Sutton, *Native Title in Australia: An Ethnographic Perspective*, Cambridge University Press, Cambridge, 2003.
 55. Pearson, above n 12.
 56. Pearson, above n 12.
 57. Toni Bauman, 'Whose benefits? Whose rights? Negotiating native title rights and interests amongst Indigenous native title parties', *Land, Rights, Laws: Issues of Native Title* vol. 3, Issue Paper No. 2, AIATSIS, Canberra, April/May 2005.
 58. See Paul Burke, this collection, Ch 4.

Anthropology and native title: Issues of method, claim group membership and research capacity

David Trigger

Introduction

Within the legal profession working with the *Native Title Act 1993* (Cth) (NTA), there is significant interest in anthropological expertise relevant to the writing of expert reports, management of disputes among claimant groups and associated claim boundary issues, and the question of why there are insufficient anthropologists to do native title research. The Commonwealth Attorney-General's Department has recently conducted a survey, addressed to the anthropology departments at Australian universities and to Native Title Representative Bodies (NTRBs), seeking ideas on the key challenges in attracting and retaining anthropologists. It is considering potential future initiatives in the training of professional researchers and has allocated some funds in its 2009–10 federal budget for measures to increase the quantity and quality of anthropologists working in native title.¹

The discipline of anthropology thus has a significant opportunity for a substantial dialogue with legal practitioners and judicial officers around professional practice issues. With this readership in mind, this paper is practically oriented to clarifying specific methodologies, issues and ways forward. It is addressed, in the main, to a legal and policy audience which is interested in the discipline of anthropology in the context of requirements of native title research. The paper is prompted by a request to address the following issues which were proposed for discussion by the conveners of the Queensland Native Title Forum held at the Commonwealth Law Courts in Brisbane on 21 August 2009:

- the methodology and timelines for preparing anthropological material to support applications, for resolving disputes as to membership of claim groups, boundary descriptions and overlaps, and for consent determinations and use at trial;

- the training of anthropologists in connection with native title and their recruitment and retention as professional researchers.

A number of the matters dealt with in this paper were subsequently discussed at the Australian Anthropological Society annual conference in December 2009 in the course of my participation in a panel on applied native title anthropology. The conference theme, ‘The Ethics and Politics of Engagement’, provided an apt setting in which to address both academic and applied aspects of anthropological research relating to native title claims.²

Methodology and timeframes

Significant methodological issues facing researchers in native title inquiries include the availability of documents for the researcher briefed to produce an expert anthropological report; the respective professional roles of research anthropologists and legal advocates; dealing with diverse views among claimants; a mix of research methods; and the timeframe required for anthropological report production.

Availability of documents

Anthropologists are commonly required to sign a statement attached to expert reports, which confirms that all relevant inquiries have been undertaken relating to the opinions expressed. Paragraph 2.6 of the Federal Court ‘Guidelines for expert witnesses’ states:

At the end of the report the expert should declare that “[the expert] has made all the inquiries that [the expert] believes are desirable and appropriate and that no matters of significance that [the expert] regards as relevant have, to [the expert’s] knowledge, been withheld from the Court”.³

From a standard social science perspective, the expert anthropologist’s inquiries would normally include examining the results of research carried out by other investigators. This may include unpublished documents authored by other anthropologists, at times the work of historians, linguists and archaeologists, as well as archival resources relevant to the history and culture of the native title group’s region. However, a common experience of the researcher is to be denied access to some of these documents as part of legal concerns about whether the reports should be ‘discoverable’ in any mediation or litigation proceedings. This can be a legal strategy that requires certain documents (for example, previous commissioned reports from other researchers working on particular native title claims) to remain unavailable (perhaps because a form of privilege is not to be waived).

However, from a research perspective which is oriented to an open social science inquiry, such an arrangement can appear contrary to the aim of producing the most informed, independent expert opinion. In my view, if documents are to remain unavailable to the anthropologist, this should be made clear, at the least, in the initial brief received from the relevant legal representatives. Unless anthropologists are genuinely ignorant of the existence of previous reports, in such circumstances they will be unable to confirm that all relevant materials have been examined. While they may state that all *available* materials have been consulted, this is a somewhat different outcome from one based on the most thorough examination of all materials that may have a bearing on the expert's work.

Research in the context of legal representation and advocacy

Previous legal decisions clearly have relevance to the research task, since native title investigations are directed to legal inquiry. An anthropologist's brief thus appropriately includes legal advice about matters such as key conceptual issues requiring discussion, clarity of the relationship between expert opinion and factual material relied upon, and the appropriate format for reports to be submitted to respondent parties and/or filed in the Federal Court. Anthropologists and lawyers need to work together to ensure legal advice is adequate, and that the independence of the researcher is assured.

Whilst such collaboration is necessary, it is my view that research anthropologists should avoid too much speculation about legal reasoning, and focus squarely on addressing the core issues from the perspective of social science. Legal practitioners should similarly avoid attempting to carry out anthropological or other social science inquiry themselves. There can be a risk that 'instructions' from clients, as understood by a legal representative, become confused with information provided to a researcher. This should be avoided, with the lawyer understanding that anthropologists do not seek 'instructions' from clients so much as consultations with research subjects. One example is witness statements taken by lawyers from claimants, which can include cultural information about matters such as traditional law and custom and connection to land and waters. The information in a witness statement will not necessarily match or overlap with the findings of the researcher. While there may be good reasons for the two professionals addressing such differences, it is important that they do this with a clear understanding of the distinct roles of each.

Dealing with diverse claimant views

The research task ideally involves substantial discussions, interviews and participant observation with claimants, as well as with other Aboriginal people of the region (and sometimes knowledgeable non-Aboriginal persons). There

should be no disinclination to record diverse views. Nor should there be any attempt to influence the researcher to exclude discussions with particular individuals or families. A robust approach expects that fieldnotes and other data *may* include some material that is not necessarily supportive of the claimants' case. The task of a researcher engaged by an applicant party is not to ignore information that may challenge the basis of a claim but, rather, to form conclusions drawn from what is often a complex range of diverse research materials. Similarly, an anthropologist engaged by a respondent party should also aim to avoid any influences towards adopting a particular strategy directed at a desired claim outcome. The research anthropologist is an independent social scientist and not an advocate.

Information obtained should be checked across members of the claim group; reliance on data received from a single individual is not the best option. Where the researcher is directed to a particular senior person, who may be described as an 'elder', information from that person should be discussed with a number of others, and ideally on more than one occasion. While the data may or may not be confirmed by others, and while, ultimately, the researcher may well form a view different from that of some claimants, the most reliable conclusions will emerge from a research process that entails discussions across the group's potential membership.

Informal discussions are likely to be particularly productive; formal meetings with groups of more than a few people are not the most effective setting in which to record relevant information. Ideally, inquiries regarding traditional law and custom should also involve discussions with young adults, though this can prove difficult when the emphasis of a group is on knowledge held by older people. Where necessary, the anthropologist should explain (rather than ignore) any comments from senior people about youth ambivalence or disinterest in relation to traditional law and custom.

Internal politics amongst Aboriginal people can put considerable pressure on a researcher if there are substantial disagreements within a claim group or between that group and another — in some cases, simultaneously. In my experience, this is one of the most difficult matters for NTRBs to address. Allocating such disputes to the research domain is no solution. There is a need for NTRBs to have absolute clarity at the outset about the likely impacts and negative consequences of disputes amongst their constituents on the progress of a claim and to act to address them early on.

A mix of research methods

Native title anthropological research requires a mix of methodological approaches. It is reasonably expected that the research will involve mapping of culturally significant areas of land and waters (though visiting locations will not

be feasible in all cases), documenting of relevant laws and customs, preparation of genealogies and consideration of relevant historical materials. A register of significant sites, a list of (adult) claimants and their biographies, and reportage on the expression of laws and customs form part of the anthropologist's research.

Though it is not usual for anthropologists to include quantitative research, my own view is that this can be useful, where relevant. For example, if reliable information about the regularity (or otherwise) of usage of and visitation to the claim area is available, this can assist to build the broad picture of the nature of ongoing traditional connections to the lands and waters. Similarly, if there are relevant gatherings of people (whether small groups or broader families) to consider issues relating to the traditional significance of land and waters, seeking a record of any sequence of such meetings over time can be useful. Data concerning the taking of bush resources according to traditional law and custom may also add to the relevant corpus of material.

This is not to say that findings about the regularity of expression of laws and customs can displace qualitative inquiry as to their normative content. It has been argued that it can be fatal to a native title claim to over rely on 'statistical norms' — instances of behaviour, for example — without addressing 'normative systems' that encompass 'explicit rules held in consciousness' among claimants.⁴ Equally, for an anthropologist to record only claimants' verbal expressions of ideals, which they say are derived from traditional law and custom, may prompt the argument that the laws and customs are no longer practised but, instead, merely talked about. This is a complex issue where the relevant academic debates about cultural continuity and change should be drawn upon by the research anthropologist. If 'latent or tacitly held principles for recognising rights in places' are to be 'considered "normative" for the purpose of native title findings in Australian law', the 'time-honoured ways' that anthropologists establish the nature of these principles need to be made explicit.⁵ In my view, the researcher should thus be open to the possibility of using a mix of qualitative inquiry and quantitative measures in clarifying the relationship between normative rules and their behavioural expression.

Timeframe for research

The necessary time period for an anthropologist to arrive at reliable conclusions will vary with the size of the claim and, most importantly, with the size of the claimant group and the geographical distribution of its members. The extent of agreement (or otherwise) on relevant matters across the claim group membership can greatly influence the time needed. Where a researcher does not have prior familiarity with the claimant group and/or the cultural region of the claim, a period of approximately 120 working days may be required for

a medium-sized claim area and group. Larger areas and claimant populations will require further time (up to 240 days); considerably reduced periods may be feasible when the researcher has prior familiarity with a claim group and the land claimed (or where a team of senior and junior anthropologists work together).

Native title claim group membership and boundary disputes

It is necessary to recognise that researchers can rarely, if ever, have conversations with all adult members of a claim group, so a flexible approach to claimant lists is desirable. A researcher can never guarantee that claimants other than those they have identified will not assert traditional connections after the research and/or after the claim determination is completed. Neither can a researcher know how such assertions may be handled in the future, either by native title holders and their registered Prescribed Bodies Corporate or by NTRBs.

Difficulties also arise where claim group membership and group boundaries are defined prior to substantial involvement from research anthropologists. If expectations have been raised as to who will be included in a native title group, anthropologists can find themselves in contentious situations when their research findings differ from earlier decisions. This is particularly pertinent to the naming of applicants amongst the claimants, whose responsibility it is to represent the native title group, and who, ideally, are selected in conjunction with adequate research.

It also raises the issue of legal practitioners receiving instructions from their clients in regard to group membership and claim boundaries without the benefit of advice based on relevant anthropological research. If legal instructions on these matters have been received prior to research conclusions becoming available, the investigator may enter a social 'field' where claimant expectations and views can vary from the anthropologist's findings that necessarily develop over time. Less experienced researchers, in particular, need support from senior colleagues and officers in relevant organisations (and ideally from influential senior persons among claimants) in handling what can be vigorous politicking from among claimant sub-groups and individuals. At the very least, some minimal anthropological research should be undertaken before any definitions of claim group membership or area boundaries are prepared.

Where more than one avenue for claiming native title rights exists in the traditional system of laws and customs, it is often only when legal processes begin that the need for a final resolution of this matter is prompted among claimants. For example, where individuals trace native title rights to different claim groups through each of their parents (or grandparents), the researcher should clarify whether law and custom indicates that certain claims should

take precedence over others, and what kind of primary assertions of claim are substantiated. Researchers might note that the further back a genealogy is traced, the greater is the number of ancestors from whom their descendants can trace a claim and emerge as *possible* native title holders. Yet some lineages of descendants may have long chosen a different pathway to asserting traditional rights and drawing them back into the claim group membership can risk unhelpful tensions.

In my experience, there are many regions where the exercising of *potential* (perhaps best understood as ‘secondary’) native title rights would have existed in traditional law and custom. However, there is not enough clarity about how this potentiality might meet the expectations of the legal recognition process. This would assist claimants in making binding decisions which nominate their affiliations to traditional countries as primary and secondary connections. It is not a straightforward matter, as in some regions, traditional law and custom may indicate potential ‘multiple pathways’ to a range of territorial areas.⁶ If traditional law and custom entails an expectation that persons will assert only one primary claim group membership, or even if law and custom is less than definite on this point, it may well be useful for the legal process to require clarification early in the claimants’ discussions with relevant researchers and lawyers. We should also note, however, that in some cases the matter may be far from agreed across the range of people asserting membership of particular native title claim groups.⁷

The ongoing opportunity for choice among multiple native title holding pathways of affiliation can produce what Sansom has termed ‘stochastic’ situations, namely where there is an indeterminate or random element without resolution.⁸ These circumstances may well sit comfortably enough in the context of customary ways used historically by Aboriginal families to give expression to their traditional heritage. However, in the context of a native title claim, unresolved multiple connections to ‘countries’ potentially provide the bases for a range of assertions including some that are not necessarily expressed consistently. This can make it difficult for the researcher to identify a normative system of law and custom and to translate its meaning to respondent parties and the Court so that they understand the nature of traditional Indigenous rights and interests. As Sansom notes, multiple claims can ‘defy easy description of general outcomes achieved through exercises of choices *seriatum* over time’.⁹ They can result in a lack of clarity about who precisely has customary native title rights and interests across different claim areas, as understood through the terms of the NTA.

Care should also be taken in defining the membership of a claim group to ensure that earlier generations of named apical genealogical referents are *known* to living claimants, at least among senior persons. Earlier generations of

deceased persons may be identified by the anthropologist through documentary research or through consulting the results of previous ethnographic inquiries among Aboriginal people deceased at the time of working on a native title claim. Claimants may also do their own archival research, finding names of deceased forebears who are little known, if at all, across the members of a native title claim group (especially amongst younger people).

Including such information to give genealogical depth to the claim is useful for purposes of passing the registration test, where claimants 'are obliged to construct an account of their present society and culture in terms of essentially unbroken connections to their pre-sovereignty past'.¹⁰ However, it can be problematic when the names of apical ancestors who are unfamiliar to the broad native title group are presented as the basis of claim group membership, even when they are found by researchers to be the names of the earliest known deceased forebears.

Given the well-known genealogical shallowness of oral tradition in Aboriginal cultures,¹¹ it is important that a definition of membership of a claimant group as including those descended from listed apical ancestors should be consistent with a genealogical history recognisable among the broad group membership. This is not to say that the unknown or little-known names of deceased forebears should not be included in genealogies or noted as persons from whom native title group membership is inherited. But it is possible to describe an apical ancestor, who might be located several generations prior to the most senior living generation, as Bob (father of Sally, mother's father of Bill), for example, so that the relationship to living or recently deceased persons is made clear.

Territorial boundaries and disputes

As noted above, the settling of territorial boundaries prior to at least some minimum initial research is problematic, since the investigator's findings may either confirm or deny these proposed borders. In many circumstances, it can also be expected that zones of transition between adjacent claims will emerge from the research process. The expectation of an area of shared country at boundaries could become a default position of NTRBs, other than where research finds claimants in agreement about precise sites of significance from which boundaries can be extrapolated.

In my experience, it is not uncommon to find amongst claimants a range of views about exactly where one claim group country ends and another begins. Place names which describe country located on or near boundary zones, whether drawn from Aboriginal languages or English, do not necessarily refer to precisely definable grid reference coordinates, so that some research discussion and negotiation amongst claimants is needed to clarify where boundary lines should be drawn.

It is possible for the expectation of zones of transition to coexist with a reasonable desire among some claimants for a clear delineation of separate traditional rights to be asserted among adjacent claim groups. If a preference for sharp demarcation translates to a clear cartographic line on a map, with such a line representing a compromise across the two claimant groups, this should ideally be negotiated with substantial input from legal representatives.

However, political compromise concerning group boundaries is, in my perspective, less an issue for the research anthropologist than is a fulsome depiction of the historical and cultural complexity of flexible boundaries. That is, there should be no expectation that current traditional boundaries are easily represented by a single cartographic line or series of points on a map. This is despite the obvious general value (though not necessarily in all cases) of ‘tribal’ or language maps such as that prepared by Norman Tindale for the whole continent.

Professional development of anthropologists: Recruitment, retention and training

Many of the conclusions in David Martin’s 2004 report, prepared for the National Native Title Tribunal and titled *Capacity of Anthropologists in Native Title Practice*,¹² remain relevant today. These findings highlighted the limited number of senior anthropologists actively working in native title and a substantial proportion of young NTRB anthropologists entering the work with limited research experience.

Martin’s report also referred to a degree of tension between applied anthropologists and those based in universities, which, in my view, is still the case. The status of native title work continues to be regarded with ambivalence among many students. Students are aware of the difficulty of the intellectual tasks in researching native title, particularly the risk of an enforced ‘traditionalism’ arising out of the requirements of the NTA for continuities in traditional law and custom. To the extent that the claims process can be understood as ‘a state resourced and mandated project of “traditionalism”’, requiring an idealised reconstruction of the present in terms of how it supposedly was in the past,¹³ native title work can be seen as embracing a role as ‘an agent of the State’.¹⁴ In contrast, contemporary anthropology teaches students about desires (and needs) for change and transformation among Aboriginal people, as well as their concerns to reproduce traditional beliefs and practices.

How native title work is viewed will vary with the personal political positions of anthropologists. In my view, graduates need assurances that they are taking up employment in an area that is useful and productive. This is not easy when the complexities and stresses of native title processes are clear enough, along

with considerable ambiguities concerning genuinely beneficial outcomes for claimant groups seeking to have their rights recognised in Australian law.

Nevertheless, despite the many legitimate criticisms of native title legislation and the stresses it imposes on claimant groups, my own view remains that withdrawal from native title work is not the professionally responsible route for anthropology in Australia. Students may well be taught how to critique the native title process, by academics including both those who engage with actual claim processes and those who choose not to do so, and senior Aboriginal commentators will doubtless continue to express mixed views about claims requirements and outcomes.

I believe, however, that the professional engagement of anthropologists with the realities of the native title legal framework could be promoted and mentored more effectively to increase the number of graduates working in the area. Students also need better quality training and preparation for the often onerous practical difficulties in fieldwork settings, including matters of adequate transport and accommodation, dealing with local-level frustrations among claimants, and coping with what can be a general politics of tension regarding the broad history and circumstances of Indigenous groups in Australian society. Native title anthropological work requires both intellectual and personal robustness, both of which arguably are most effectively developed through a period of intensive PhD-level research fieldwork. Yet the demand for graduates is such that they now commonly work in applied anthropology prior to, or instead of, having the opportunity for such supervised fieldwork. The profession of anthropology in Australia thus needs to find ways to mentor graduates who may only have a maximum of four years of training in the academy towards robustness in fieldwork, data gathering and analysis.

A clear public statement from a group of senior Aboriginal people as to the need for anthropologists to work in native title would be useful in encouraging young graduates. The Commonwealth Government, through the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), which funds NTRBs, may be able to facilitate such a statement to which academics could refer in teaching students. The statement could appear on websites that students access frequently. It would also be useful if one or more senior Aboriginal persons working in native title, including, perhaps, chief executive officers of NTRBs, would be prepared to field queries from young anthropologists who are in the process of deciding whether to specialise in the native title area. Alternatively, FaHCSIA could commission a senior anthropologist to be available specifically for this work.

A system of ‘apprenticeships’, perhaps better termed ‘cadetships’, in native title anthropology might be considered. One or more university departments

could be funded to mentor and train honours (that is, four year trained) anthropology graduates over a period of 12 months as they undertake work on actual native title cases. Professional services from a university's anthropology department could also be used by NTRBs and other parties as part of 'apprentices' developing research competence in the area. Independent consultants in private practice might be funded to take on an apprentice or cadet.

The greatest barrier to young anthropologists developing strong skills in native title anthropology is that there is little opportunity for them to be leveraged gradually into the work with the mentoring support of senior experienced researchers.¹⁵ More energy might be put into finding ways to supervise junior colleagues. Partnerships between junior and senior supervisory researchers can be economical and mean greater access to senior anthropologists' skills and advice for native title research. Such supervisory relationships should require the senior anthropologist to clearly record the nature of supervision of their junior colleagues, provide written advice to them when needed and jointly discuss research results at regular intervals. This kind of arrangement potentially results in the progression of younger researchers to the role of senior anthropologist.

Concluding comments

Several further points are apposite in conclusion. Firstly, it hardly needs to be said that increasing the number of qualified Indigenous people working as anthropologists in native title work is a highly worthwhile aim. However, it should also be noted that the issues I have outlined will typically affect any researcher, Indigenous or otherwise. Secondly, there is little clarity about substantial career path futures in native title anthropology. If each of the major state and territory jurisdictions managed a central pool of young professionals on a state-wide basis, this could go some way to countering the impression that volatile and unstable employment situations in particular organisations lead to the disappearance of one's job. Thirdly, apart from the politics of native title work in the wider profession, the prospect of being engaged for a Court trial, involving cross-examination, can obviously be a further disincentive for less-experienced anthropologists to work in native title. A greater understanding of legal expectations about expert anthropological opinions as used in both mediation and litigation should create greater confidence among anthropologists and may result in more junior professionals taking up the work. To reiterate an earlier point, there is a strong case for training in both the legal and anthropological professions to develop better and more sophisticated understandings of their distinct but inter-related roles.

Finally, there remains a fundamental problem in regard to the results of native title anthropology research being available for study and general circulation. Consideration should be given to enabling an assumption that research reports will be available for study, in order to use them in training anthropologists for work in native title. A special case would need to be made if reports and the results of anthropological work are to remain unavailable for such purposes. In my view, it is possible for suitable confidentiality to be maintained without restricting the availability of reports essential for the training of researchers to work in this area. Furthermore, it is possible for legal practitioners to canvass whether publication of the research (perhaps after the removal of selected personal or private details of individuals) is an outcome about which their clients may feel considerable pride, in that their continuing relationship to traditional country is thereby recognised publicly and proclaimed. There should be no assumption that claimants will necessarily desire complete restriction of their cultural histories of connection to land and waters. The benefits of both academic and wider publication currently appear to be little discussed.

NOTES

1. Attorney-General's Department, *Closing the gap — funding for the native title system (additional funding and lapsing)*, Attorney-General's Department, Canberra, 2009, viewed 28 April 2010, <[http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Budgets_Budget2009_FundingFortheNativeTitleSystem\(AdditionalFundingandLapsing\)](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Budgets_Budget2009_FundingFortheNativeTitleSystem(AdditionalFundingandLapsing))>.
2. An earlier, shorter version of this paper, prepared as an address to the mixed group of professionals and native title stakeholders at the Queensland Native Title Forum, was previously published in *Native Title News* vol. 7, no. 4, 2009, pp.1-4.
3. Federal Court of Australia, *Practice notes issued by the Chief Justice: CM 7 — Expert witnesses in proceedings in the Federal Court of Australia*, issued by the Chief Justice of the Federal Court, Federal Court of Australia, Canberra, 2009, viewed 28 April 2010, <http://www.fedcourt.gov.au/how/practice_notes_cm7.html>.
4. Basil Sansom, 'Yulara and future expert reports in native title cases', *Anthropological Forum* vol. 17, no. 1, 2007, pp. 71–92, reference to p. 81.
5. Peter Sutton, 'Norms, statistics and the *Jango* case at Yulara', *Anthropological Forum* vol. 17, no. 2, 2007, pp. 175–92, reference to p. 175.
6. Sutton's work in the Western Desert has prompted the most well-known discussion of this issue for a particular cultural region. See Sutton, above n. 5.
7. In July 2009 I was an expert witness, together with colleagues Dr David Martin and Mr Peter Blackwood, in a hearing of some questions arising in the Waanyi native title claim (Federal Court proceedings QUD6022 of 1999). A family sought a decision from the Federal Court to confirm they are members of the native title claim group and entitled to be included in the description of the native title holders

9. Anthropology and native title

in an anticipated consent determination. The claim group had not been prepared to amend its claim to include the family over some years of discussion and meetings. One issue in the matter is whether a particular named deceased forebear from whom the family members are descended had, herself, been part of the native title holding group and the Court is asked to decide this matter. The Court's decision is presently still awaited and so it is not appropriate for me to engage in discussion of the evidence.

8. Sansom, above n 4, pp. 78–90.
9. Sansom, above n 4, p. 78.
10. David Martin, 'The governance of agreements between Aboriginal people and resource developers: Principles for sustainability', in Jon Altman & David Martin (eds), *Power, Culture, Economy: Indigenous Australians and Mining*, ANU E Press, Canberra, 2009, p.108.
11. Basil Sansom, 'The brief reach of history and the limitation of recall in Aboriginal societies and cultures', *Oceania* vol. 76, no. 2, 2006, pp. 150–72.
12. See David F Martin, *Capacity of Anthropologists in Native Title Practice*, report to the National Native Title Tribunal, Anthropos Consulting Services, Canberra, 2004, viewed 31 March 2010, <<http://www.nntt.gov.au/Publications-And-Research/Tribunal-Research/Pages/Commissioned-Reports.aspx>>.
13. Martin, above n 12, p.108.
14. Dr Sally Babidge, personal communication, 1 March 2010. Babidge works in native title research, but is aware of debates as to the political positioning of this form of applied anthropology.
15. A system of 'cadetships' or 'apprenticeships' could be arranged to articulate with the Graduate Certificate/Diploma in Applied Anthropology (Native title & Cultural Heritage) taught predominantly online at The University of Western Australia. The course is generously supported by the Western Australian Government Office of Native Title, FaHCSIA and Rio Tinto.

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