

This collection arose from a workshop for anthropologists in July 2010, *Turning the Tide: Anthropology for Native Title in South-East Australia*. Held at Sydney University and co-convened by the University of Sydney and the Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, the workshop addressed issues of native title anthropology in what is often referred to as 'settled' Australia. In these areas, native title — as a form of justice and recognition for indigenous peoples — has proven a particularly frustrating experience. The title of the workshop recalled the various *Yorta Yorta* native title decisions in Victoria, and Olney J's quoting of Justice Brennan in *Mabo (No 2)* (1992, at [60]): 'when the tide of history has washed away any real acknowledgement of traditional law and any real observance of traditional customs, the foundation of native title has disappeared'.

Modelling the connection of native title claimants to their land in ways that are acceptable to the adversarial native title context is a challenge for native title anthropologists. They are faced with embedded and static notions of tradition that fly in the face of at least half a century of national and international anthropological debates and theory, but which have received little attention in the native title sector. The book includes issues such as naming of groups, the significance of descent from deceased forebears, the constitution of society, ways of approaching Aboriginal land tenure, processes of group exclusion and inclusion, changing laws and customs, and the scale of native title groups.

UNSETTLING ANTHROPOLOGY

Bauman and Macdonald

UNSETTLING ANTHROPOLOGY THE DEMANDS OF NATIVE TITLE ON WORN CONCEPTS AND CHANGING LIVES

Edited by Toni Bauman and
Gaynor Macdonald



AIATSIS

AUSTRALIAN INSTITUTE OF
ABORIGINAL AND TORRES STRAIT
ISLANDER STUDIES

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and Gaynor Macdonald



AIATSIS
Australian Institute of Aboriginal
and Torres Strait Islander Studies

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Australian Institute of Aboriginal
and Torres Strait Islander Studies.
GPO Box 553, Canberra, ACT 2601
Phone: (61 2) 6246 1183
Fax: (61 2) 6261 4288
Email: asp@aiatsis.gov.au
Web: www.aiatsis.gov.au/asp/about.html

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Notes on Contributors

Dr Sally Babidge is an anthropologist in the School of Social Science at the University of Queensland. She has undertaken native title research in Western Australia and Queensland. Her research focuses on ethnography and historical ethnography of the state and changing practices of Australian indigenous families. Research interests on the comparative politics of indigenous identity in the context of resource extraction and negotiations take her to northern Chile.

Toni Bauman is a Research Fellow in the Native Title Research Unit (NTRU) at the Australian Institute of Aboriginal and Torres Strait Islander Studies, and an anthropologist, mediator, facilitator and trainer. She has a wide range of experience in land and native title claims, agreement-making, decision-making and dispute management processes, and partnering. Between 2003 and 2006, Toni Bauman ran the Indigenous Facilitation and Mediation Project in the NTRU, and in 2008 advised the Federal Court on its indigenous dispute resolution and conflict management case study project. She also undertakes a range of speaking engagements and facilitation of workshops, including with native title holders.

Simon Blackshield is a barrister and solicitor with fifteen years' experience as a native title lawyer in New South Wales, Queensland and Western Australia. He currently divides his time between running the national legal firm, Blackshield Lawyers, and acting as In-house Counsel for the South West Aboriginal Land and Sea Council in WA.

Dr Peter Blackwood is a consultant anthropologist based in Cairns, whose practice has been predominantly in Aboriginal cultural heritage, statutory land claims and native title. He has previously held positions as senior anthropologist with the Cape York Land Council in Queensland and the Aboriginal Areas Protection Authority in Alice Springs, and has been an expert witness for native title matters.

Simon Correy is a Senior Research Anthropologist at Native Title Services Corporation (New South Wales) where, among other details, he has undertaken research contributing to the achievement of a number of native title consent determinations. He has held this position since 2002 following several years

of consultancy including work for the Indigenous Land Corporation and anthropological research on the Wiradjuri Wellington native title determination application which was the first such application in Australia lodged under the *Native Title Act* 1993. He has ongoing academic research interests in the social effects of the native title phenomenon, particularly the constitutive role of the *Native Title Act* and its contingent processes on contemporary Aboriginal social realities and modalities.

Tim Dauth has been working as a research officer specialising in native title since 1997. He has been employed by the Crown Solicitor's Office of New South Wales since 2001, and previously worked in Western Australia. He has a Graduate Diploma in Applied Anthropology and an honours degree in history from the University of Western Australia. He was part-way through a history PhD on post-apartheid South Africa and Namibia when he started working in the native title area.

Vance Hughston SC (BA, LLB, LLM (Syd)) came to the New South Wales Bar in 1982 after first working as a solicitor for 5 years, predominantly in the areas of litigation, property and commercial law. He took silk in 2001. Since the commencement of the *Native Title Act* 1993 (Cth), Mr Hughston has been involved on an almost continuous basis in advising on and in appearing at the hearing of native title claims and related matters in New South Wales, Victoria, Western Australia, South Australia, Queensland and the Northern Territory.

Tony Jefferies has worked on native title claims in Queensland at Cape York Land Council 2003–2004, Gurang Land Council 2004–2008, and Queensland South Native Title Services 2008–2009. He is currently studying for an MA at the University of Queensland. During the 1990s, he studied at the Northern Territory University and worked in indigenous schools and art co-operatives throughout the Northern Territory. Together with Kim de Rijke, he tracked down the missing papers of anthropologist Caroline Tennant-Kelly in 2009.

Diana McCarthy is an anthropologist who has worked in the native title system since 1995. She has been employed variously as a consultant, research officer at the Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, research manager of Native Title Services Victoria (NTSV) and most recently, as a senior anthropologist at NTSV. In July 2011 she began doctoral studies at the University of Sydney with the support of a scholarship awarded by the Aurora Project.

Dr Gaynor Macdonald is a Senior Lecturer in anthropology at the University of Sydney. She pioneered anthropological research with the communities collectively known as Wiradjuri in central New South Wales,

concerned to reinscribe recognition of the distinctive historical and cultural practices characterising Aboriginal peoples' lives in south-eastern Australia. Her publications on the contemporary study of Aboriginal social, cultural and political experience appear in Australian and international collections. Her native title work has focussed on south-eastern Australia. She is currently completing a manuscript on Wiradjuri political ethnohistory entitled *Promises and lies: Australian Aboriginal experiences of modernity*, and a set of texts on the pre-contact social and cultural systems of the riverine cultural bloc of south-eastern Australia.

Dr Paul Memmott is a multi-disciplinary researcher (architect/anthropologist) and the Director of the Aboriginal Environments Research Centre (AERC) at the University of Queensland. The AERC provides a focus for postgraduate research (up to twelve students) and applied research consultancy throughout Australia. The AERC field of research encompasses the cross-cultural study of the people–environment relations of Indigenous peoples with their natural and built environments. Paul Memmott has provided consultancy services to remote and urban Aboriginal groups across most states since the mid-1970s. He has been an expert witness on land claims and native title and other indigenous court matters since 1985.

Dr Ian Parry is Senior Researcher with the Native Title Unit within the Department of Justice, Victoria. He has a PhD in Anthropology from the University of Melbourne. He is a career public servant and has been with the Department of Justice for the past five years.

Dr Anthony Redmond has worked in the Kimberley region of Western Australia both in academic and applied contexts since 1994. Alongside his doctoral research this work included an extensive role in researching and preparing the Wanjina/Wunggurr/Wilinggin native title claim, then Australia's largest and amongst the most complex claims. This claim was successfully litigated through the courts, with a determination delivered in December 2003. Since that time Dr. Redmond's work has included research on native title claims in other parts of the Kimberley and in far northern and south-east Queensland. His academic research focuses on relationships between pastoralists and indigenous people living on cattle stations in the Kimberley region, the creative dynamics of traditional song composition, relationships with the state induced through the welfare economy, exchange relationships, and bodily imagery in Ngarinyin cosmology and social life.

Kim de Rijke has worked on native title claims in Western Australia and Central Queensland as anthropologist for the Kimberley Land Council from 2003 to 2005 and for the Central Queensland Land Council from 2005 to 2008. He is currently undertaking a PhD in Anthropology at the University of Queensland. In December 2009 he rediscovered, with fellow University of Queensland anthropology student Tony Jefferies, the long-lost collection of works by Caroline Tennant-Kelly, who had worked as an anthropologist at Cherbourg Aboriginal Settlement in southern Queensland in 1934 and in various other Aboriginal settlements in New South Wales during the late 1930s.

Dr Lee Sackett lectured in the Anthropology of Aboriginal Australia at Adelaide University for 20 years. Following this, he was Manager of Land Tenure at the Central Land Council for three years. There he researched and reported on three Aboriginal Land Claims. For the past 13 years he has worked as a Consultant Anthropologist, specialising in native title claim research. He has worked on native title claims in the Pilbara, the Western Desert of Western Australia and South Australia, Central Australia, northwest Victoria, the Gulf Country, the Mount Isa Region and south-central Queensland. He has reviewed claim materials for a number of representative bodies and for the states of Western Australia, South Australia, Queensland and New South Wales.

Professor David Trigger is the Head of Anthropology and Deputy Head of the School of Social Science at the University of Queensland. He has worked on Aboriginal land and negotiation matters for nearly 30 years. Professor Trigger has prepared reports for statutory land claims in the Northern Territory and native title claims in Queensland, and has provided a wide range of advice on claims in Western Australia. He was centrally involved in the right to negotiate process, which resulted in the agreement for Century Mine in north-west Queensland.

CHAPTER 1

Concepts, hegemony, and analysis: Unsettling native title anthropology

Gaynor Macdonald and Toni Bauman

This collection arose from a workshop for anthropologists in July 2010, *Turning the Tide: Anthropology for Native Title in South-East Australia*. Held at Sydney University and co-convened by the University of Sydney and the Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, the workshop addressed issues of native title anthropology in what is often referred to as ‘settled’ Australia. In these areas, native title — as a form of justice and recognition for indigenous peoples — has proven a particularly frustrating experience. The title of the workshop recalled the various *Yorta Yorta* native title decisions in Victoria,¹ and Olney J’s quoting of Justice Brennan in *Mabo (No 2)* (1992, at [60]): ‘when the tide of history has washed away any real acknowledgement of traditional law and any real observance of traditional customs, the foundation of native title has disappeared’ (*Members of the Yorta Yorta Aboriginal Community v Victoria & Ors* 1998).

This ‘tide of history’ paradigm reflects a binary discourse of urban versus traditional which was cemented by the work of Rowley in 1972 when he introduced the notions of ‘settled’ and ‘remote’ Australia to map the historicised experiences of Aboriginal peoples.² In this discourse Aboriginal people who live in settled areas (predominantly southern and coastal) are seen in terms of cultural lack, loss and deficit as opposed to those ‘traditional’ Aborigines who live in remote (desert and tropical areas) Australia. This is a perspective which continues to influence not only Australian anthropology but also the native title sector and popular imagination (see Austin-Broos 2011 for a critique of this view). Aboriginal people in settled Australia were therefore not expected to benefit from native title claims in the negotiations leading up to the *Native Title Act (Cth)* 1993 (NTA). They were seen as unable to meet the native title holder requirements of s.223 with its emphasis on traditional laws and customs and

expectations of unbroken connection back to sovereignty. Rather, as Marcia Langton pointed out at the *Turning the Tide* workshop, it was envisaged by policy makers that Aboriginal people in settled Australia might benefit from a social justice package, which did not eventuate, but that included provision for the purchase of land by the Indigenous Land Corporation (ILC) (ATSIC 1995).³

Despite the view that many native title claims in the more densely settled regions of Australia are unlikely to be successful, significant numbers of Aboriginal people in these areas continue to assert their right to claim native title and demand recognition. There have also been some native title consent determinations and negotiated settlements in these areas, particularly in New South Wales and Victoria.⁴ Such claims are making visible the distinctive modes of personhood, histories, kin-relatedness and country-based identities that characterise the consciousness and practice of the Aboriginal peoples of settled Australia.

Native title jurisprudence has been slow in reflecting the complexities of Aboriginal lives in both settled and remote areas and anthropologists working across Australia are faced with the difficult task of explaining how cultural change is commensurate with continuing tradition. Although other important post-*Yorta Yorta* decisions have applied, clarified and refined the High Court's reasoning in *Yorta Yorta* in both the Federal Court⁵ and the full court of the Federal Court on appeal,⁶ the High Court decision continues to provide the definitive benchmark for many of those involved in preparing and assessing the connection of claimants. This is despite the fact that cases in the Federal Court and particularly the Full Court of the Federal Court are binding on trial judges and parties alike.⁷ The focus on *Yorta Yorta* has resulted in interpretations of connection requirements which require claimants to prove unbroken connection to the land under claim since sovereignty, and that the native title group is part of a normative system of rights and interests derived from traditional laws and customs at that time. This requirement is particularly onerous for those from settled Australia, many of whom have suffered extreme dislocation from their traditional countries.

Native title anthropologists thus have to work with concepts such as tradition, continuity and society in ways defined by legislation and court rulings within an adversarial legal system which, in many respects, is in tension with professional anthropological debate and practice. These are concepts which have been subject to decades of critique within the discipline of anthropology, yet there appears to be unwillingness in the native title sector to engage with them outside the parameters of their legally constructed meanings which are often based on 'common sense' understandings. The adversarial nature of native title can also mean that anthropologists experience pressure to produce research reports which filter and even distort accounts of people's lives, and

which sometimes differ considerably from accounts based on fine-grained ethnography produced outside of legal strictures. The native title field, as a set of places, actors and agendas, is already staged and scripted. Native title anthropology is not an anthropology that commences from the perspective of wanting to test or develop theoretical orientations, augment previous field data, chart new territory, or develop ethnography in novel conditions which raise their own agendas. Conversely, nor can it be a simple matter of winning cases or addressing state requirements: claims processes have significant impacts on both the lives of indigenous people and on the discipline of anthropology.

To turn the tide, native title anthropologists must bridge the notional boundary between applied and academic anthropology (see Trigger 2011) and seek disciplinary engagement in reconceptualising ideas of ‘connection’, Aboriginal cultural histories, and how change takes place. There is a need for a much stronger community of practice, including collegial support and the support of the discipline as a whole. Native title anthropologists work largely in isolation from each other and from the academy due to the confidentiality provisions of adversarial processes. There are restrictions against discussing the specifics of cases and legal privilege can prevent the open dialogue and critique essential to improving practice. Unfortunately, much of the rich data that could influence theories of change, tradition and continuity in Australia remains embedded in anthropological reports which are not publicly available. While native title should be an intellectually fertile field, as McCaul (2010, 323) comments, these restrictions ‘make it frustratingly difficult for practitioners to learn from experiences elsewhere, [and] make it almost impossible to get a comparative overview of how native title is dealt with across Australia’.

Nevertheless, as the papers in this volume suggest, there is a space for native title anthropologists to influence the development of case law and policy so that they more accurately reflect claimant realities, as well as an opportunity to inform anthropology in the academy. If claims in south-eastern Australia, and other parts of settled Australia, as well as increasingly in areas labelled ‘remote’, are to be more effectively supported by anthropological engagement, anthropologists need to make greater contributions in assisting stakeholders to understand the complexities of indigenous land tenure including by reflecting those complexities in their analyses of connection. Whilst the role of anthropology should not be exaggerated in what constitutes a highly bureaucratized arena with many opposing forces, some of which wield significant power (Ritter 2009), anthropologists can still make a more significant contribution to native title outcomes. This not only means the production of more sophisticated connection reports but also offering anthropological expertise to a post-determination environment of agreement-making and the governance of native title corporations (Martin, Bauman and Neale 2011).

The practice of native title anthropology

This volume is directed to the practice of native title anthropology particularly, but not entirely, in the urban and rural areas of settled Australia. It contains diverse subject matter and covers a broad range of intersecting themes and issues which are the subject of debate not only in native title anthropology but also in the academy and the native title sector. These include the dynamics involved in the naming of groups, the significance of descent from deceased forebears and of filiation, the constitution of ‘society’, approaches to modelling Aboriginal land tenure, processes of group exclusion and inclusion, changing laws and customs, and the level of inclusivity at which native title groups are identified.

The volume is organised in three parts. Part A consists of three papers which emerged from the *Turning the Tide* workshop (Chapter 2 Dauth, Chapter 4 Macdonald, Chapter 5 Babidge) and a fourth paper which was first presented at the Australian Institute for Aboriginal and Torres Strait Islander Studies Native Title Conference, Melbourne, 2009 (Chapter 3 Correy, McCarthy and Redmond). Papers by Dauth and Correy, McCarthy and Redmond discuss issues related to conceptual and terminological clarification and the naming of groups including the dynamics of differentiation. Macdonald and Babidge consider contemporary ethnographic challenges specific to the requirements of urban native title, the ideological dimensions of cognatic descent, filiation and group membership and the proof of native title when claimants are geographically removed from claim areas. In doing so, Macdonald provides a re-analysis of Wiradjuri land-based identities, ancestry and society in New South Wales. Correy, McCarthy and Redmond also provide some theoretical reflections on the social and ideational processes of native title which compound local politics. Together with Babidge, they identify the political dimension of Aboriginal social action and relations with the state as central aspects of native title group formation.

Part B contains four papers which reflect the variety of contexts in which native title anthropology is written in practice and the ongoing need for dialogue between anthropology and the law to arrive at better mutual understandings. Chapters 6 and 7 had their genesis in the *Turning the Tide* workshop. Chapter 6 is a discussion amongst a panel of lawyers, Blackshield and Hughston, and anthropologists, Sackett and Parry, about what constitutes a ‘good, bad or ugly’ native title connection report. The discussion highlights the fact that connection reports are a curious hybrid, partly administrative, partly academic, and, as Parry points out, partly spawned by the NTA. In Chapter 7, Memmott suggest ways of modelling continuity and change in a metropolitan context for a group entering into negotiations with the Queensland government. The other two papers in Part B (Chapter 8 Trigger, Chapter 9 Blackwood) are written for

judges of the Federal Court but in different contexts. Trigger's presentation to the 2011 Federal Court's Judicial Education Forum addresses a broad range of issues about anthropology and the resolution of native title claims and demonstrates the kinds of initiatives which might facilitate improved dialogue between anthropology and the law. Chapter 9 which contains an extract from an expert report by Blackwood to the Federal Court about the nature of anthropological expertise also contributes to such a dialogue. This report was written at the request of his instructing solicitor, Blackshield, who was concerned that the Court has, at times, been dismissive of anthropological evidence, though Blackwood notes that this was not his personal experience. Although such initiatives in improving dialogue between the law and anthropology may seem unnecessary to some of us who have been working in native title over many years, there is a need and demand for ongoing dialogue because of the constant flow of newcomers to native title. This is the case whether they be lawyers, anthropologists, bureaucrats working for Commonwealth, State, or Territory governments, staff of native title representative bodies or service providers or judges in the Federal Court.

Part C consists of a research report by de Rijke and Jefferies (Chapter 10), both of whom have worked for native title representative bodies in Queensland, and were required in their duties to analyse historical materials relevant to native title claims. These materials included an article published in *Oceania* in 1935, 'Tribes on Cherbourg Settlement, Queensland' by Caroline Tennant-Kelly, an anthropologist about whom they knew little. The authors have since discovered her records and, in their paper, locate Tennant-Kelly in the anthropological discipline of the 1930s and discuss the unique relevance of her records to native title.

The tasks and expectations of the anthropologist

One issue in native title litigation has been an apparent emphasis in legal proceedings on the documentation of early ethnographers including settlers and pastoralists, rather than on fine-grained contemporary ethnographies. The discussion by Blackshield, Hughston, Sackett and Parry in Chapter 6 suggests that this is being addressed to some extent by an increasing emphasis on current practices, claimant evidence and face-to-face interactions of claimants with government including the 'on country' state connection assessment processes described by Sackett. Some state and territory governments and peer reviewers of connection reports have also been critical of anthropological reports in which the voice of the anthropologist speaks louder than the voice of claimants. Nevertheless, whilst Sackett notes that he builds his connection reports 'around the direct statements and views of named claimants', lawyer Blackshield points

out in the panel discussion that such an approach may be more acceptable in some state and territory jurisdictions than in others.

Whatever the case, any reliance on early accounts gives rise to particular dilemmas in writing connection reports in regions where there has been a paucity of anthropological interest. Native title anthropologists have to grapple not only with century-old studies full of contradictions and silences, but also with stereotypes of the times. In settled Australia, this means refusing the idea that the lives of Aboriginal people were regarded as having changed too much from the imagined primitivism of earlier times. The supposedly inevitable trajectory from 'traditional' to 'modern' meant that observations of characteristically Aboriginal practices were often portrayed as evidence of an Aboriginal failure to modernise rather than of a desire to reproduce Aboriginal values (see Reay 1949). The thesis of inevitable cultural loss filtered questions ethnographers might have asked about ongoing spatial connectedness and identity, as well as questions of adaptation and transformation, with a few possible exceptions such as Caroline Tennant-Kelly. De Rijke and Jefferies note that whilst Tennant-Kelly shared the view of her contemporaries that those she was observing would inevitably come under the influence of Western civilization and 'lose' their 'traditional' cultures, unlike many of her peers she also emphasised the resilience of Aboriginal people at Cherbourg in Queensland and their cultural capacity to adapt to new contingencies.

The work of deconstructing the paradigm of deficit really only commenced in the 1980s when anthropologists began to challenge the long-held assumption that the indigenous people of settled Australia were being more or less successfully incorporated into modernity, and were thus losing their Aboriginality (see for example, Chase 1981, Keen 1988, Langton 1981, Macdonald 1986, Morris 1989, Sansom 1980, Trigger 1981). Yet, claims that Aboriginal histories in settled Australia were distinctive and that Aboriginal people clearly understood themselves as inheritors of Aboriginal customs and traditions, continued to be met with scepticism (see for instance, Brunton 2007, Pollard 1988).

Native title claimants in settled areas, and anthropologists who work with them in compiling histories of connection, thus have the difficult task of challenging more than a century of anthropology as well as public perceptions of cultural loss. Unlike at least some areas in remote Australia, they also face a paucity of records as anthropology generally neglected people who appeared to be experiencing more change than others, preferring to work with the (apparently) less changed and more remote, exotic, traditional and authentic Aboriginal people (Austin-Broos 2011).

With some notable early exceptions (such as Barwick 1998, Beckett 2005 [1958], Koepping 1981, Worsley 1955), Aboriginal ethnographies were long

focussed on the internal dynamics of ‘traditional’ Aboriginal worlds, sometimes ignoring colonial circumstances or paying these scant attention. From the late 1980s, the focus was changing to examine lived experience rather than past worlds (for example, Austin-Broos 2009, Babidge 2010, Cowlshaw 1999 and 2004, Merlan 1998, Morris 1989). There is much to be done to build up this corpus, to theorise changing Aboriginal worlds, and develop more historicised ethnographies along the lines of anthropology elsewhere (such as Axel 2002, Comaroff, J. 1985, Comaroff, J.L. and J. 1992, Mintz 1974 and 1986, Sahlins 1985, Sider 2003 to name a few).

There is an opportunity in native title anthropology to fill such ethnographic silences with the contemporary lives of claimants, but only if sufficient resources are made available to carry out more extensive field work and opportunities are created to allow anthropologists to share their contemporary data. Blackwood (Chapter 9) notes that native title field work, often consisting of interviews and meetings rather than daily involvement in the community, offers few opportunities for acquiring comprehensive local knowledge.

Such knowledge consists of explicit ideas, thoughts and memories as well as implicit knowledge which can reveal insights relevant to native title, but which are not always immediately apparent. Explicit knowledge is conscious and able to be spoken. It is what witnesses provide in court and to anthropologists, including oral testimonies, histories, cultural mappings and other data upon which an anthropological connection report might rely. However, the sum of claimants’ explicit and sometimes diverging knowledge can never tell the whole story because each person’s experience and memory is only part of a wider context of cultural and social life over time. There may also be competing claimant interpretations. Memmott (Chapter 7), for example, describes disagreements amongst claimants about whether earlier information should be relied upon and what is truly ‘traditional’. Trigger (Chapter 8), in referring to Ray Wood’s work with the Githabul, describes contestations amongst claimants as to whether Christianity is compatible with traditional law and custom. He notes a need to allow for a ‘fluidity of opinion’ amongst claimants, and for the importance of how the ‘current content of traditional law and custom incorporates aspects of claimant group experiences with the wider society’ in what Merlan has described as an intercultural domain (Merlan 1998).

The charge of the anthropologist is to contextualise and analyse claimant accounts, explaining clearly the differences between the anthropological task and the oral history task of the claimants, and identifying the systematic, meaningful connections between variable explicit knowledge. In Chapter 9, Blackwood emphasises the role of anthropologists in the comparative analysis of existing written documentation, against ‘what informants say about that society today, what different authors have said about it either in contemporary times or

in the past, and to compare them against what is known about neighbouring or other similar Aboriginal societies'. As Trigger suggests in Chapter 8, native title work might also require more 'explicit account[s] of tradition-based norms and customs than may otherwise apply in academic writing'. This is evident in the comments of lawyer Hughston in Chapter 6 concerning the need for explicit identification of how and why certain everyday practices such as fishing reveal traditional laws and customs.

Anthropologists must also tease out implicit, often unarticulated, claimant knowledge of systems, meanings, values, protocols, and taken-for-granted, almost always by definition unknown and unexplained, but as much a part of daily life as the explicit (see also Asad 1993). Implicit knowledge is embedded in consciousness, values and experience and can be difficult to recognise and identify, including by claimants. The account of Tennant-Kelly's work by de Rijke and Jefferies reveals a tension between explicit and implicit knowledge: whilst Tennant-Kelly notes that cultural knowledge was not readily observable in daily life in a settlement controlled by white administrators and missionaries, she is able to identify specific cultural practices, such as funeral and marriage arrangements and other practices that take place away from the residential area and administrative control. Memmott's modelling of continuity in a metropolitan area also shows us how inferences about laws and customs may be made by reading between the lines of explicit statements including how knowledge is transmitted in changed circumstances.

The ability of anthropologists to convincingly account for implicit knowledge in native title is critical in avoiding what Wolfe (1999) has labelled 'repressive authenticity'. Such repressiveness expresses itself in demands for claimants to interpret and re-construct themselves in terms of a distant past and in the undermining of contemporary views about relations with land and waters. It is in the identification of implicit knowledge and its historicisation that anthropologists can counter accusations of inauthenticity. At the same time, while there is scope for anthropologists to identify and draw inferences from implicit knowledge, in litigated procedures they must nevertheless adhere to the Federal Court rules of expert evidence (Federal Court of Australia 2009) and distinguish between fact and opinion, as noted by Blackshield in Chapter 6. In doing so, they need to clarify the methods by which they make inferences or draw implications on the basis of implicit knowledge so as to make this transparent to the Court.

Implicit knowledge is increasingly important, given the changing demographics of Aboriginal societies across Australia. Aboriginal populations are generally much younger than ever before and social conditions are rapidly changing. This means that the reproduction of knowledge may not be formalised in the same ways as has occurred in the past. Cultural knowledge

may be acquired implicitly, including through changing media such as communications technology (Trigger Chapter 8), and in new contexts of transmission such as elders' groups and informal gatherings of kin, and through participation in events associated with, for instance, National Aboriginal and Islander Observance Day (NAIDOC) (Memmott Chapter 7).

The structural repositioning of Aboriginal peoples within the social field of an ongoing colonially-instituted dominant state has brought about significant change, often experienced violently, in the past and now. Yet anthropologists have long recognised that people's capacity for adaptation does not follow the social evolutionary trajectory of inevitable assimilation (see, for example, Kleinman, Das and Lock 1997, Sahlins 1985, Taussig 1987).

Historicising and the hegemony of concepts

Notwithstanding the efforts of various twentieth century ethnographers, hegemonic concepts are difficult to shift. Correy, McCarthy and Redmond argue in Chapter 3 that not only is native title a hegemonic idea in itself, it is a field replete with such ideas. Concepts have histories and genealogies and shift in meaning over time. Conceptual clarification requires critical, ongoing analysis, not simply in the terms dictated by anthropological or other disciplinary debates. Anthropologists must also take into account popular and legal uses (including those specific to native title) which will influence readings of our work. When anthropology meets the formalism of the law, anthropologists cannot remain complacent about concepts: concepts need to be unpackaged, defined and refined, historicised, and made intelligible to others including lawyers and claimants, both of whom seek certainty and confirmation (see Pilbrow 2010).

Concepts such as 'tribe', 'clan', 'descent', 'culture' and 'tradition' thus need to be interrogated in native title connection reports, including tracing out the evolution of their meanings. Earlier meanings cannot be taken at face value as if they reflected a 1788 pre-sovereignty reality. They need to be revisited in the light of contemporary knowledge, as discussed by Macdonald and Dauth in this volume. Claimants also employ terminologies and concepts in idiosyncratic ways which require analysis. Whilst some lawyers may be reluctant to include critiques of this kind in native title reports, to omit them is to produce anthropological accounts that adhere to static, seldom analysed or contextualised concepts and distorted notions of past Aboriginal practice, which cannot be sustained in evidence.

The use of ethnographically and historically unsustainable concepts is all the more confronting when dealing with poorly-recorded histories. The NTA presents classic decolonising political dilemmas: it expects conformity to

conventional Western, European-derived concepts such as ‘society’ and fixed and bounded groups which often form the constitutional basis for contemporary indigenous legal corporations, whilst at the same time insisting on essentially distinctive ‘traditional laws and customs’ since sovereignty. This means that indigenous people are expected to dehistoricise themselves and suggests that anthropologists should also dehistoricise claimants in their reports. This not only contributes to a process of delegitimising histories, but also undermines an extraordinary capacity to deal with marginality over many decades in terms that enabled people to reconstruct meaningful Aboriginal selves in continually changing circumstances.

A number of the papers in this volume (Macdonald, Babidge, and Memmott) argue that understanding the reproduction of meaning, self-knowledge and relations to place emerges through more adequate historicising. Macdonald and Babidge explore the distinction between ‘society’ and the specific ‘territory’ by which some members of a society identify themselves. Babidge draws on the notion of historical ontology to emphasise that Aboriginal social identity in south-west Queensland, a region with a long history of forced removals, is historically constituted, including in its relations with the state, and that this should be taken into account in recognition of identities and belonging to country. In doing so, she addresses issues of proving native title *in absentia*. Babidge reminds us that historicising is important and argues for a far-reaching interpretation of connection to country which includes ideological and political as well as residential and usufructory connections. Babidge, Macdonald and Memmott each demonstrate the varied histories of people in south-eastern Australia, the broader networks in which they participate, understandings of ancestors, and kinship practice. Different experiences of colonisation, removals, and social relatedness create different responses to the possibilities of native title.

The effect of state policy on group composition and laws and customs are often overlooked in the dehistoricising native title context. Drawing on Freud, Correy, McCarthy and Redmond describe a dynamics of differentiation from and fusion with the workings of the nation-state as the ‘narcissism of minor differences’. This politics of differentiation, in which terms and concepts can become highly fetishised, determines exclusion from or inclusion in claimant groups. In both inter- and intra-group Aboriginal relationships, including with close neighbours, claimant groups play with minor differences to identify with or distinguish themselves from each other according to local politics.

In Chapter 2, Dauth provides the ideal case study for Correy, McCarthy and Redmond’s politics of differentiation. He notes that there are many ‘names’ used in the old records, especially in south-eastern Australia, the meanings of which at the time of recording may be impossible to recover. They may refer to

a people, to local or regional groups, to languages, places, directions or plants, among other things, and are one of the more fragile artefacts of a group. The fact that a fetishisation of difference can take extreme forms (as Dauth describes in looking at arguments over orthographic and spelling variations of group names) might seem bizarre, even petty. However, it also indicates that the stakes of recognition are high (see Smith and Morphy 2010).

Correy, McCarthy and Redmond have provided us with an analysis which assists in better understanding processes of exclusion and inclusion as aspects of traditional processes in transformed conditions. Group construction is a process of meaning-making that suggests the viability of the group as cultural meanings and meaningful practices are always produced out of the conditions within which they are embedded (Bauman 2010). In this view, native title is one such set of conditions, out of which claimants understand their pasts and presents.

Such an analysis might be extended to examine what Trigger discusses in his presentation to Federal Court judges as a contradiction between the apparent widespread claimant tendency towards local atomism and exclusivity, and legal and anthropological advice sometimes suggesting that more inclusive higher-scale claims based on broader aggregations might best describe the native title claimant group. This is an important consideration given the current Commonwealth Government policy of broader land settlements through agreement-making (Attorney-General's Department 2009). It is particularly so for claimants who are required to negotiate the perceptions of their lives by others at sovereignty, as well as political and economic pressures pulling them in contradictory directions. The politics of differentiation, of inclusion and exclusion which might have long characterised their interactions, are distorted by the native title frames into which they are required to fit. These frames include the apparent need for named bounded groups, the idea of which runs counter to academic critiques of the 'group' as a contextual social construct (see Correy, McCarthy and Redmond, and Macdonald, in this volume).

'Descent' and 'society' as hegemonic concepts

The search for a taxonomy of social organisational forms has been for many years at the heart of anthropological analyses of pre-colonisation acephalous societies of Aboriginal Australia. There have been decades of ongoing debate over the nature of groups and the significance of group descriptors such as tribes and language names, unilineal descent groups, clans and residential and foraging groups, or bands and their respective rights in land. Throughout the nineteenth and much of the twentieth century a 'nested hierarchy' model of territorial organisation prevailed, with country seen as a

patchwork of distinctive, bounded areas with associated individuals grouped into patrilineal clans understood as subsets of tribes, which in turn were grouped at times into ‘nations’. These local/territorial organisational models attempted to encompass the apparent disorder and contingency observed in on-the-ground socio-territorial ensembles within well coordinated and differentiated categories which the natives allegedly carried in ‘their minds’.

This is also the case today. The concepts of ‘society’ and ‘descent’, as they are understood at the intersection of law and anthropology, and influenced by their common dictionary meanings are so pervasive in native title that, as Macdonald argues in Chapter 4, they can act as invisible filters when analysing ethnographies.

Descent

Despite the fact that there are a number of examples of successful non-descent based native title claims — such as those derived from specific cultural knowledge and the incorporation of non-descendant adults into groups⁸ — descent from apical ancestors has come to dominate native title discourse as characteristic of group definition. As an ideology it is also employed by many Aboriginal people, reflected in the common use of the term, ‘bloodline’, and in inquiries of one another, with questions such as ‘Who’s your apical?’.

A number of papers in this volume address this descent discourse. Correy, McCarthy and Redmond critique the dogma of descent as an organising principle, cautioning against the use of such terms as devices that can mask actual ethnographic realities. Macdonald queries whether the ideology of descent has pan-continental ethnographic support, suggesting that filiation in central New South Wales constitutes a land-owning group and is stronger than, and different from, descent as a normative rule of group formation. In contrast, Babidge argues for cognatic descent as an overriding principle, having always involved choices of identification with country, and that life histories have meant that familiarity with country have varied from one person to another without depriving a person of their right to claim connection to a country in which they do not live.

Society

Although ‘society’ has not been considered by native title law as *necessarily* synonymous with the native title claim group (see *De Rose v State of South Australia* 2003), the notion of ‘society’ has become central to identifying post-Yorta Yorta native title groups (Hiley 2008). Yorta Yorta defined ‘society’ as ‘a body of persons united in and by its acknowledgment and observance of a body of law and customs’ (*Members of the Yorta Yorta Aboriginal Community v Victoria* 2002 at [49]).

As such, the ‘society’ is not necessarily the group holding native title rights and interests, but is rather the relevant body of persons whose laws and customs are central to identifying one or more native title groups within it.⁹ That is, the ‘society’ as normative system validates land owners but the ‘society’ does not own land as a corporate group.

Noting that the term ‘society’ is not used in the NTA, Hughston in Chapter 6 suggests that it should be employed only as a conceptual tool and its interpretation left open to the discretion of judges. Macdonald and Trigger also explicitly question the equating of society with any land-holding group. Without undervaluing the extensive normative social system by which laws and customs are transmitted, Macdonald distinguishes between social and local organisation to demonstrate that it is not a ‘society’ that owns land but a discrete group (or several) within it. This argument has resonance with Babidge who addresses the rights of people who have been removed from their ‘language-territories’ but remain part of a normative Aboriginal social world in which they are still identified and self-identify in terms of their country of ancestral origin.

Influential anthropologist Marilyn Strathern (1988, 31) challenged the ‘working tenet of the comparative method in anthropology that societies everywhere do similar jobs in terms of exploiting the environment, providing nurture, reproducing their internal organization’. In doing so, as Munro (2005, 245) points out, Strathern followed a long tradition in anthropology that included Edmund Leach and others, in being concerned to help unpick how the concept of society ‘organizes so much of the way anthropologists think’. Yet, whilst there are influential anthropological critiques of the notion of bounded social groups, rendered as ‘societies’, and whilst native title case law suggests we should be more circumspect in the application of the notion of ‘society’, the concept continues to be used in many connection reports and assessment processes synonymously with the native title group.

Conclusion: Native title anthropology

The complex interactions between country, society, ancestors and groups, and the variability of belief and practice, of social organisation and ecological influence, and of historical experience across Aboriginal Australia — remote or otherwise — continue to defy consensus and remain significant questions for the discipline. Anthropology’s contribution is ideally a product of engaged and informed field work, reflection and critique. It requires analyses which revisit notions that have often been seen as past their use-by date in the academy. The structures of kinship and marriage, of filiation, cognation, clans and descent, and issues in relation to the ‘truth value’ of genealogies, for instance, are often

no longer an integral part of anthropological training, although they remain sites of theoretical and empirical contention.

At the same time, the native title sector has demanded consensus, achieved through homogenising and uncomplicated views of Aboriginal societies — though it must be noted that the Federal Court is recognising the huge diversity in claim contexts and is specifically seeking anthropological engagement through fora such as the Judicial Education Forum (see Trigger, Chapter 8). Whether there can be ‘good’ anthropology in applied realms, such as native title, has been the subject of critique by those who see applied contexts as conforming to state agendas (e.g., Morris and Lattas 2010, but see Trigger 2011 for a contrary view) rather than value-free, disinterested disciplinary engagement. While we may eschew universalising models, capable of asserting facticity as science, and based on objectivity, this means little in a court of law, where the difference between ‘fact’ and ‘opinion’ is an essential element of the Federal Court’s expert evidence requirements (Federal Court of Australia 2009).

An assumption of this volume is that native title anthropology need not be as partisan or state controlled as critics of applied or engaged anthropology suggest. Native title anthropologists do need to be actively engaged with their discipline, prepared to unsettle the taken-for-granted of an earlier anthropology, of popular discourse and of legal assumptions. These are challenges to the integrity of practice, not to a relinquishing of robust debate. Whilst native title is a complex field of law intertwined with politics, into which anthropology is coopted, native title anthropologists have a responsibility to scrutinise its various impacts on their own practice, and to be critical and reflexive about the processes of native title itself in ethnographic, theoretical and discursive terms (Morton 2010, Pilbrow 2010).

Of particular importance is the need for anthropologists to provide readily accessible accounts of differences in meaning between terms such as ‘transformation’ and ‘adaptation’, what changes, and why, and the significance of these social and cultural processes for native title. As Trigger writes in Chapter 8, ‘change is not fatal to traditional connection’. However, anthropologists have not yet successfully challenged the legal prejudice that ‘the tide of history’ can wash away a people’s experience, self-identity, lives in place, and their explicit and implicit knowledge. We have not substantially enabled sophisticated understandings of the changing lives of the Yorta Yorta people and others like them. Neither have we dispelled the misconceptions about essential differences between Aborigines in ‘remote’ and ‘settled’ Australia, when remote Australia has also undergone significant change (Martin, Bauman and Neale 2011) and there are many similarities with settled Australia, including the ways in which claimants represent themselves as native title holders, the dynamics of group

composition, and the need to reconfigure groups to meet the requirements of native title.

The onus is on anthropologists to hone our skills, challenge our thinking, and argue for the kinds of accounts and accompanying resources that we need to do justice to claimants. We must also persist in creating the conditions which will enable support for each other in the peer review processes that the discipline demands to ensure the high quality anthropology that claimants and the Court need. The contributors to this volume challenge the ways in which core concepts of the discipline are being used within the native title arena. They are involved in brokering disjunctions between anthropology and the law, and are committed to positioning themselves within their discipline. In turn, they look to the discipline to provide the critical tools and methodologies required for sound and critically engaged applied native title research.

NOTES

1. See *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002), and *Members of the Yorta Yorta Aboriginal Community v State of Victoria* (2001).
2. Charles Rowley coined the terms ‘settled’ and ‘remote’ Australia in 1972 in order to differentiate between those Aboriginal people who were largely seen as living a traditional life, and those whose lives were ‘detribalised’ because of encroachment into their lands. This was, and remains, an arbitrary if not misleading referent in the historicising of Aboriginal experiences. Nevertheless, it continues to fuel the discourse of loss of cultural meanings and spatial connectedness among those people who lived south of Rowley’s line (1972, xiv–xv, 4–5). Whilst we have employed the terms, ‘settled’ (rural and urban) and ‘remote’ Australia in this paper, we do so seeking their deconstruction and qualification. The terms have formed the basis of a discourse which not only denies the legitimacy of change in terms that make sense to Aboriginal peoples themselves but also work against them being seen as people with histories. To indicate our difficulties with the terms, we have used a single quotation mark at the first mention of ‘settled’ and ‘remote’, but omit the quotation marks in subsequent references since it becomes repetitive.
3. The Social Justice Package met its demise when the Howard Liberal Government took office in 1997.
4. See, for example, *Trevor Close on behalf of the Githabul People v Minister for Lands* (2007); *Kelly on behalf of the Byron Bay Bundjalung People v NSW Aboriginal Land Council* (2001); *Clarke on behalf of the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk Peoples v State of Victoria* (2005); *Lovett on behalf of the Gunditjmara People v State of Victoria* (2007); and *Mullett on behalf of the Gunai/Kurnai People v State of Victoria* (2010).
5. For example, *Griffiths v Northern Territory of Australia* (2006) FCA 903; *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* (2007) FCA 31; and *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland (No 2)* (2010) FCA 643.
6. For example, *Neowarra v Western Australia* (2003) 205 ALR 145; *De Rose v State of South Australia (No 2)* (2005) FCAFC 110; *Bodney v Bennell* (2008) FCAFC 63; *Northern*

Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim; Western Australia v Sebastian (2008) FCAFC 65; *Sampi on behalf of the Bardi and Jawi People v State of Western Australia* (2010) FCAFC 26.

7. There have been no appeals to the High Court on connection issues since *Yorta Yorta* and therefore no suggestion that the decisions in the Federal Court have been inconsistent with the High Court's reasoning. This point is reinforced by the fact that the only post *Yorta Yorta* application for special leave to appeal to the High Court on an issue relating to s.223 of the NTA was refused on the basis that there were insufficient prospects of success in disturbing the findings of the Full Court of the Federal Court: *Fuller v De Rose* (2006) HCATrans 49. Compare special leave applications in *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Group* (2006) HCATrans 251; *Northern Territory of Australia v Griffiths* (2008) HCATrans 123 which dealt with issues other than s.223 (Pers. comm. Nick Duff).
8. *Rex on behalf of the Akwerlpe-Waake, Iliyarne, Lyentyawel Ileparranem and Arrawatyen People v Northern Territory of Australia* (2010); *Ampetyane v Northern Territory of Australia* (2009); *Patta Warumungu People v Northern Territory of Australia* (2007); *De Rose v State of South Australia (No 2)* (2005).
9. We thank Tim Dauth for his comments on recent case law and implications of *Yorta Yorta*.

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Part A

*Analysing Anthropological Approaches to
Native Title in South-East Australia*



CHAPTER 2

Group names and native title in south-east Australia

Tim Dauth

Introduction

Referring to his research among the Northern Thai, Michael Moerman wrote of his ‘inability to give a simple answer to the simple question: “Whom did you study in the field?”’ (1965, 1215). This paper was prompted by a similar question asked by one of several disputing parties in a native title context: ‘Who do you think we are?’¹ The question of group identification is not only a complex question for anthropologists, but is also often a contentious one for the people they study.

In this paper I argue that despite a potential for flexibility and complex representation in native title case law and legislation, a simplified form of group description has become standard under the *Native Title Act 1993* (Cth) (NTA). Native title claim groups are most frequently described with set identity labels which, at least since the *Native Title Amendment Act 1998*, are clearly defined by reference to lists of apical ancestors. With the determination of native title applications in the Federal Court, these descriptions are legally formalised and, in effect, frozen in time. As Fried’s 1975 work on the notion of ‘tribe’ suggests, this process is by no means restricted to the native title regime in Australia. At the same time, the stresses of the native title process and the scrutiny under which native title claims and claimant identities are placed by governments and courts, can challenge and destabilise groups, giving rise to considerable disputation among claimants over group descriptions. In this paper I focus on group names as a site of such disputes.

Group names, as Mantziaris and Martin have noted, ‘can be subject to intense disputation over apparently inconsequential matters, such as which of the various renditions of the language name is the “right” one’ (2000, 276). In the cases I outline, a central point of contention is the validity of group labels as ‘authentic’ prior to sovereignty entities.² The ‘right’ name in this context is

that which is most ‘authentic’, and which is believed to have been used prior to sovereignty. The paper argues that in seeking to understand, explain, or resolve such disputes, attempts to reconstruct ‘authentic’ pre-sovereignty named groups will not ultimately assist. Over-reliance on such reconstructions as proof of a native title claim is also unproductive. That the name ‘X’ was recorded in relation to the claim area in the early ethnography does not in itself confirm that a group now using the same name holds native title, or that they are the ‘right people for country’ for any other purpose. Such limited forms of argument are also unhelpful when the ethnography is contradictory, or when there is a contrary position put by a group using the name ‘Y’.

Through a brief survey of some international case studies I propose that group names should not be examined as discrete, fixed and discoverable artefacts or entities, but rather as complex, historically shifting, and highly contextual. Examining native title disputes over names from the perspective of how group names are contextually constructed allows us to focus on the structural contexts and relationships that produce these disputes, and suggest ways of explaining and resolving them. The paper argues that assertions of difference and accompanying disputes over group names occur under situations of stress such as that imposed by the native title context, and arise more from the closeness of relations between sets of people than from any lack thereof.

The flexible potential of the *Native Title Act 1993*(Cth) and the drive for definition

The NTA followed the basic principles laid down in *Mabo* in establishing a legislative framework for recognising the ‘common or group rights’ (s225a) found to be possessed under the traditional laws and customs of the relevant Aboriginal peoples or Torres Strait Islanders (s223(a)). A determination of native title under the NTA is to be made in favour of those who, ‘according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed’ (s61(1)). Following this logic, the Federal Court of Australia has found that determinations of native title under the NTA (s225) can ‘cover a range of possibilities which depend upon the nature of the society said to be the repository of the traditional laws and customs’ (*Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* 2005 at [79]). The NTA does not prescribe the ways in which a native title holding group can be described, or limit determinations to language, dialect, clan or local descent groups. The NTA does not ‘require the Court to search for an anthropologically-identified form of community or group’ (*Daniel* 2003 at [334]).

There would thus appear to be considerable flexibility in the NTA as to how native title holding groups can be described. This was recognised by Rumsey in

1996 who noted that while the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALR(NT)A) contained vestiges of long discredited ‘notions of clan or “tribe” as solidary corporate groups ... there is no trace of them in the Native Title Act’ (8). Rumsey argued that ‘Aboriginal forms of socio-territorial identification ... are multiple, diverse and cross-cutting’ (2). Unlike the ALR(NT)A, the NTA had the potential to allow claimants to ‘make a virtue out of that multiplicity rather than treating it as something to be swept under the carpet in order to present an appearance of neatly bounded corporate groups’ (2).

A certain degree of legibility is, however, required for a determination of native title. Section 225(a) of the NTA requires a determination of ‘who the persons, or each group of persons, holding the common or group rights comprising the native title are’. A range of alternatives have been used. Native title holders have, for example, been described with reference to labels with no prior use as group names (e.g. the ‘Wanjina-Wunggurr Community’, *Neowarra* 2003 at [120]), with group names adopted from pastoral stations (the ‘Strathgordon mob’, *Timothy James Malachi on behalf of the Strathgordon Mob v State of Queensland* 2007), or without group names at all (for example, *De Rose* 2005, that instead uses reference to criteria under traditional laws and customs by which a person is a *nguraritja* or ‘owner/custodian’). However, these options have usually involved some form of reductive codification — descent from listed ancestors and/or a listing of other set criteria by which people hold native title. At one point or another, the codification required by the NTA intrudes on the multiplicity, flexibility, and permeability of Aboriginal land holding groups that has been noted by Australianist anthropologists since the mid-1970s (see Myers 1986, 150–52).

In most native title determinations, s225(a) has been satisfied with a description including (at least) the identification of named language, dialect, or local descent groups (*Moses* 2007 at [370]). Further definition of named groups by way of descent from listed apical ancestors is increasingly standard, at least partially as an artefact of s61(4). This section was introduced with the *Native Title Amendment Act* 1998. The section requires that a native title application either name the persons in the native title claim group, or ‘otherwise describe the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is one of those persons’. That is, there must be an objective means of determining a person’s membership of the group for the purposes of making and registering a native title application.

The simplest and most legally secure means of meeting this requirement (but not the only means) has been by adopting a simple lineal descent model and listing ancestors of the group. This model is prevalent in south-east Australia and Queensland and less so in the Northern Territory and South Australia. As well as being legally convenient, it may be argued that this model

is consistent with claimants' perceptions of group composition, particularly as these perceptions adapt to the native title context (see Correy 2006). In presenting native title claims using this model it is commonly taken for granted that a named language or dialect group is the appropriate rights and interests holding body. The task of identifying the 'persons, or each group of persons' (NTA s225(a)) that hold rights and interests under traditional laws and customs in the claim area is then commonly conflated with a discussion of the rules of membership of that named identity group (the rule invariably being assumed to be descent from apical ancestors). So, although there was, and may yet still be, some potential for flexibility in group description under the NTA,³ the prudent legal response to the 1998 amendments has for the most part favoured a model of neatly bounded and inflexible corporate groups. This model is at least not necessarily inconsistent with claimant perceptions of group composition, or with the preference for certainty on the part of respondent parties.

Native title and the construction of the group

Fried's 1975 work on the notion of 'tribe' argued that 'modern tribes' were a 'secondary phenomenon', a reactive formation brought about (in short) by the intercession of government (114; see also Suzuki 2004). To adopt Fried's analysis, it may be argued that native title claim groups are defined and shaped at various stages of the native title process. The native title claim group and their legal representatives settle on a name and description in the process of making an application, and that description is subsequently formalised and concretised by the Court in a determination. Like Fried's 'secondary tribes', the native title claim group is a 'goal-directed' political phenomenon, although the aims of the group may be 'several, at various levels of consciousness and explication' (Fried 1975, 103). As with contexts such as the Indian Claims Commission in the United States (from which Fried takes his cue), and other examples like the Schedule of Tribes in India (*Constitution (Scheduled Tribes) Order 1950*), the designation of the native title claim group 'tends to be overt and explicit':

Nothing, or at least as little as possible, is left vague. The name or names are stated and alternates may be given; the territory is specified; the membership is itemised, as are the criteria for membership. (Fried 1975, 74)

The native title claim group as a creation of the NTA bears little resemblance to groups described in more detailed earlier ethnographies. See for example Falkenberg's description of the Murin'bata of Port Keats, who were 'not tied to

the whole of their own tribal territory', had 'no common ancestor', were 'not more closely related to each other genealogically than to members of other tribes', had 'no common tribal mythology', 'no tribal organization or central leadership', and 'never organized for goal-oriented action' (1962, 16).

Settling on a name

Adopting Fried's analysis in her work on the Pintupi Luritja, Holcombe noted that a socio-political process of identity building is characteristic of the 'modern, firmed up, "tribe"' (2004, 258). While names and naming systems have always existed, such new contexts as the native title process invest assertions of identity with new significance. Native title claims are in most cases made on behalf of people grouped under identity labels. Through the native title process these identities are built, contested, transformed, consolidated, and in the end become entrenched. Similar dynamics occur in other processes in which the state engages and recognises Aboriginal groups (such as co-management arrangements, Memoranda of Understanding, and various forms of acknowledgement of country). Writing in 1824 on the derivation of tribal names, Eusebius Salverte noted that a range of group naming conventions often co-existed and were often subject to change. Salverte found that 'whenever interested motives for the definitely fixed use of a name do *not* exist, that name will be the subject of endless variations' (1864, 97). Native title brings a new political dimension to bear on what were complex, shifting and relational naming systems, promoting if not requiring the assertion and settling upon the fixed use of names.

A relevant factor in the description of native title claim groups, and in the choice by claimants of their names, is that a determination under the NTA is not, in the legal sense, the result of an inquiry process. Those claiming native title are required to 'assert and identify the native title rights and interests and the factual basis upon which they rest', and the role of the Court is 'to determine whether those assertions are established' (*Jango* 2007 at [84]). While there are increasing efforts to formulate and re-formulate at least overlapping and contested native title claims on the basis of regional research and consultation, the applicants in native title claims are members of the claim group, and it is they who retain ultimate control over the application. At least in relation to earlier native title applications (many of which are still in the system), and particularly those filed without the assistance of a native title representative body (NTRB), it has often been the case that a claim was originally formulated by, and most immediately reflected the position of, a relatively small number of individuals or families within a wider community, arrived at through limited consultation. Community politics and notions of identity, what Correy

describes as the ‘self-essentialising strategies of claimant group members’ (2006, 344), have had considerable influence on native title claim group descriptions in at least these cases. Usually this has meant promoting certain identifications (whether language, dialect, clan, family name, or other types of label) for the dual purposes of advancing a claim for native title and asserting difference from others in the Aboriginal community. At times, and arising from the NTA’s stress on tradition, much becomes invested in asserting the unique ‘authenticity’ of such labels as unchanged pre-sovereignty entities (see Maddison 2009, 119–20).

To varying degrees, the notion of named groups as discrete, timeless and ‘authentic’ entities is perpetuated in native title anthropology reports that I have read. Some reports attempt a kind of systematic account of fluidity as suggested by Sutton (2003, 229). Other reports are more wary of exposing change and indeterminacy in group identity. This is in part related to ‘the immediate and urgent demand for descriptions of the native title claim group’ in native title processes, which ‘means that the complexity which characterises Aboriginal relationships to land is compromised’ (Correy 2006, 344). Sometimes supplementary reports by the same author move from a simplified view of group identity to a more complex one as they are asked to respond to contradictions and contrary evidence. In general terms, while it may be commonsense that the ‘making and unmaking of Aboriginal social collectivities and identities’ occurs in the context of European settlement generally (and the native title context specifically), the ‘insistence on authenticity and traditionality’ in native title processes can make it difficult to say as much in a native title claim report (Merlan 2006, 180).⁴

In many cases the notion of clearly bounded and unchanging ‘authentic’ named groups may be a convenient and uncontested approach to presenting a native title claim. The NTA encourages if not requires a simple and certain description of the rights-holding group. The states and other respondents also prefer clarity and certainty in identification of the people with whom they should be negotiating and making agreements for native title purposes. This preference is matched by indigenous demands for recognition, very often in exclusive terms, and by the desire to control any potential benefits (Rose 2000, Jorgensen 2007, 57–58, citing Scott 1998). This simplified approach to group identity at least implicitly employs notions of tradition and authenticity for its validation. The relevant named entities are accepted or promoted as the ‘right people for country’ on the basis that they are, exclusively, the ‘traditional’ or ‘authentic’ groups for the area. While this approach is not always problematic, there have been a number of instances in which it has given rise to debilitating and intractable disputes. As Rose finds in her account of the ‘Wagait dispute’, there are instances when the ‘simplification which produces legibility constructs the conditions for ensuing disasters’ (2000, 69).

Identity, exclusion and 'authenticity'

The drive for certainty and legibility in group description for native title purposes can compromise the flexibility and adaptability of communities. The real or imagined prospect of benefits or status from the native title system brings into play incentives for excluding any persons outside an immediate social or family network.⁵ Lines of exclusion can be hardened, with greater potential for disputes and fragmentation. There is a tendency to splintering of native title groups when disputes arise, often ostensibly around issues of group identification. There are occasions in which an identity used by some people in a community in asserting their interests clashes with that of other people, or when identity is employed or 'invented' as an absolute exclusionary principle in spite of social practices that have long allowed for exceptions and adaptations.⁶

As illustrated by the examples below, native title disputes are at times framed in part as an argument about the 'authenticity' of one group identity over another. Just as 'authenticity' of identity is thought to be a key factor in achieving rights, status and economic benefits through the NTA, the fault lines that appear in communities with competition for such benefits can also become embroiled in authenticity disputes and divergent assertions of identity (Martin 1997, 156). It is important to note that disputation and competition not only occurs about and between named groups, but is the very context in which they frequently emerge and become articulated. As Shyrock writes in relation to collective identities in Jordan: 'Contest is part of what defines them' (1997, 8).

The problem of names: Case studies in a native title context

One example of the contested use of names in a native title context is the dispute over the use of 'Gunai' or 'Kurnai' for a group on the south coast of Victoria. 'Gunai' and 'Kurnai' are alternative spellings of the same Gippsland area word translated as 'man' in early records (Curr 1887, 552).⁷ Divisions within the community manifested in the filing of rival claims, with one using the encompassing name 'Gunai/Kurnai', and the other insisting on the sole legitimacy of 'Kurnai'. In submissions to the National Native Title Tribunal, the Kurnai group appealed to the work of Fison and Howitt ([1880] 1991) and others using their spelling of 'Kurnai' to argue that:

We the Kurnai people have not heard of a Gunai tribe prior to 1996 nor is there any support[ing] historical documentation of such a tribe. The chance of an unknown tribe residing in the Gippsland region without the local inhabitants knowing about it is quite ridiculous. (*Victorian Gold Mines* 2002 at [23])

Keen has suggested that the word 'Gunai/Kurnai' may have had a functional relevance in the pre-sovereignty system in distinguishing 'known people' (*gunai*

/kurnai = ‘man’) from ‘strangers’ (*brajerak* male and *lowajerak* female) (2004, 141; and see Fison and Howitt [1880] 1991, 187). In the contemporary situation, native title disputation created ‘strangers’ from within the same community, with these now being distinguished by a difference in spelling. Repeated attempts at mediation between the Kurnai and the Gunai/Kurnai failed. The Kurnai case was eventually heard and dismissed (*Rose* 2010), allowing the encompassing Gunai/Kurnai claim to be settled by a consent determination (*Mullett* 2010).

A similar example is noted in the distinctions in spelling between ‘Ngunnawal’ and ‘Ngunawal’ and the recent emergence of a group self-identifying as ‘Ngambri’ in Canberra and surrounds. Prior to the NTA many members of the Aboriginal community in this region were, according to Jackson-Nakano, calling themselves Wiradjuri, but were also aware of other names (2001, 186). As one person acknowledges to Jackson-Nakano: ‘We weren’t sure what to call ourselves, to tell you the truth’ (2001, 186). With the passing of the *Aboriginal Land Rights Act 1983* (NSW) (ALRA NSW) the name ‘Ngunnawal’ was adopted by the Local Aboriginal Land Council,⁸ with the spelling said to have been taken from a sign at a local park (Arnold Williams quoted in Jackson-Nakano 2001, 187). With the passing of the NTA in 1993, the name and choice of spelling became significant. Separate claims were lodged on behalf of the ‘Ngunnawal’ by the Williams/House family (Williams 1996) and the ‘Ngunawal’ by members of the Bell family (another was made on behalf of the ‘Walgalu/Ngunnawal, Wiradjuri’). Different family groups emerged to claim the same and yet different ‘Ngun(n)awal’ identity, and to compete for status and recognition from government bodies (Jackson-Nakano 2001, 187).

As Matilda House acknowledged in 2001, the names used were uncertain and, essentially, unimportant:

Back in 1985 we were still a bit lost and confused. We didn’t know what to call ourselves — we had so many choices when you think about it. Now we’re piecing everything back together and, if we want to, we might call ourselves Kamberri-Ngunnawal or something similar. It’s not what we’re called but who we are that’s important. (Jackson-Nakano 2001, 188)

However, along with issues of ancestry, what people called themselves did become a key element of the ongoing dispute over recognition in native title as well as other spheres of public policy. Differences have been marked by the spelling with a single or double ‘n’: see for example issues around the spelling used on road signage recognising the Ngun(n)awal (*Canberra Times* 29 May 2002). More recently, one section of the community has come to identify as Ngambri, an ‘ancestral identity’ said to have been ‘recovered’ in about

1996 (Ngambri Inc. c.2009a).⁹ Those now identifying as Ngambri argue that ‘Ngunnawal’ ‘refers to a language that is no longer spoken ... and is therefore a superfluous group descriptor’ (Ngambri Inc. c.2009b). They demand that:

All references to the ‘Ngunnawal’ are expunged from ACT Government documents, that all ‘Welcome to Ngunnawal Country’ signs are removed, and that the ACT Government’s ‘United Ngunnawal Elders’ Council’ be disbanded. (Ngambri Inc. c.2009b)

In this example, the group names are ‘reclaimed’ from the ethnographic record (with Jackson-Nakano’s research providing the basis for the changing discourse around Ngun(n)awal/Ngambri identity) and proclaimed as authoritative and authentic, despite what may appear minor labelling differences marking out competing claims.

Another example is disagreement concerning use of the collective regional label ‘Bundjalung’ in north coastal New South Wales. Harry Boyd, who identifies as a Ngarakwal/Githabul elder, has argued in letters to the Federal Minister for the Environment and to the United Nations Special Rapporteur on the Rights of Indigenous Peoples James Anaya that the ‘False Bundjalung Nation’ ‘eliminated’ the distinct peoples of the region (Boyd 2009). He suggests that the term ‘Bundjalung’ was ‘created from’ linguistic texts and the work of local historians. With recognition of the Bundjalung people in heritage studies and by local councils, he argues: ‘We (Ngarakwal / Githabul) and the other distinct peoples of the Northern New South Wales, South East Queensland region are being subject to forced assimilation as Bundjalung’ (Boyd 2009). Disputes over the Bundjalung label, and difficulties in choosing acceptable alternatives, have held up the erection of local council signage and other proposals for recognising Aboriginal people in the Tweed Heads area in particular (Caton 2009; Sapwell 2009).

Another dispute in this region concerns use of the name ‘Arakwal’, a term associated with native title claims and several agreements in the Byron Bay area, including one resulting in the creation of the Arakwal National Park in 2001. In the wake of these agreements the name ‘Arakwal’ has become more or less fixed, in both popular and official use for the area. The valid usage of ‘Arakwal’ has, however, been a point of contention. Members of the Boyd family objected to ‘Arakwal’ as a ‘misuse’ of the name ‘Ngaragbal’ (or Ngarak(g)wal), which they associate with their own family (*Byron Shire Echo* 2003, 6). The Arakwal native title claim was also at times partially overlapped by the Ngyabul People claim and the Gnargbaul Clan claim (Neate 2002, 136), and there have been several other differently identifying indigenous respondents involved (see also discussion in Hansard, Joint Committee 2003 at Byron Bay; and Stewart

2008, 365). One objection to the Byron Bay claim received publicity in 2007 (Lyons 2007, 5). It was reported that ‘the challengers claim that they are the real Arakwal’. The Byron Bay claimants, a spokesperson said, were ‘attempting a corporate takeover of the Arakwal name’ (Lyons 2007, 5). Although the Byron Bay claim group had by then adopted the relatively neutral term, ‘Bundjalung People of Byron Bay’ (Bundjalung of Byron Bay 2009, 16), the name Arakwal was and is still in use and remains contentious. Also, as noted above, ‘Bundjalung’ is not universally accepted as a regional collective label.

A further example of some interest is the ‘Saltwater’ dispute involving the labels ‘Kattang’, ‘Worimi’, ‘Biripai’, and ‘Pirripaayi’ (Davis-Hurst 2003; Kemp 2006, and related cases). The 2006 court decision in the ‘Saltwater’ case is of considerable significance as, in brief, it disallowed the Saltwater People Indigenous Land Use Agreement between the state of New South Wales and a claimant group because of an objection over the proper identity of the group. The Court found that ‘the appropriate forum for the resolution of the dispute between [the claimants], and [the objector,] Mr Kemp... as to the identity of the community or group which holds native title in the Saltwater land is the Federal Court’ (Kemp 2006 at [59]). An outcome of this decision is that non-litigated agreements under the NTA may face difficulties when there are disputes in the community over the ‘authenticity’ of group identity. As also illustrated by the Gunai/Kurnai example, if such disputes are not able to be settled by mediation they might need to be settled by a Court hearing before any recognition of native title over the claim area is possible.

The *Kemp* case underlines the impact that individuals and single family groups can have under the NTA when they contest the authenticity of identities used by others, or advance competing identities. In this, and the other cases noted, family groups, and at times individuals, use language and dialect group names in claims for country or in disputing the claims of others. They advance their family’s interests, or their personal points of view (which at times can be more idiosyncratic than representative), by way of claims for authenticity under broader dialect or language group names.

For purposes of both recognising the ‘right people for country’ and for native title, ‘authenticity’ of identification is, in cases such as those outlined above, said to be proved or disproved by the validity of a label as a pre-sovereignty artefact. This kind of situation is by no means unique to the Australian native title context. Fitzgerald, for example, describes a dispute between different Cherokee related groups in the United States, in which members of one officially recognised group argued that another ‘lacked authenticity because there originally was not a tribe by this name’ (2007, 216). These cases also illustrate that while the NTA encourages the assertion of discrete, defined and ‘authentic’ identities, the fragmentation inherent in the accompanying process

of ‘striving after essential identities’ (Shyrock 1997, 8) can undermine the chance of achieving recognition and outcomes through the NTA.

Problems of evidence

Disputed assertions of ‘authenticity’, either between groups or with respondent parties, often appeal to the written record for validation, as in the cases of the Ngambri and the Gunai/Kurnai above. In many regions of Australia, and certainly in south-east Australia, disputes over the ‘authenticity’ of group names can be exacerbated rather than resolved by reference to the ethnographic literature. For example, Tindale’s 1974 mapping remains a key reference for native title claimants (Mantziaris and Martin 2000, 172) despite frequent controversy in particular cases (the Arakwal case above being one example). While the widespread reliance on Tindale’s maps (and on others such as Horton’s 1994 map which adopts many of Tindale’s descriptions and boundaries) has encouraged a popularisation and consolidation of certain group names, they have also led to tensions when mappings run contrary to local understandings, or support particular local understandings over others. Tindale’s and other mappings, often being attempts to reconstruct a pre-contact situation, are unable to capture the variety and contexts of names and naming conventions, and their transformations as a result of demographic movements, social change, the loss of language and contextual significance in the post-settlement era. As reconstructions of what might have been, these mappings often clash with named groups as they are coming to be, and at the same time can also influence identity choices made by groups in the native title process.

The ethnographic literature on group identity and territoriality in Australia is strewn with mistakes, mishearings, and misapprehensions, as well as multiple renderings and valid alternatives (see Donaldson 1984 for a detailed view of this issue in central western NSW; also Pilbrow 2010). Many mistakes in the literature are perpetuated and reinforced by numerous secondary references to them over time to the point where they become accepted wisdom and are assumed to be ‘authentic’ by all parties. When claims to the authenticity of claimant self-identification are disputed, whether by other native title groups or state agencies, reliance on the ethnographic record to validate labels as unchanged pre-sovereignty artefacts can create difficulties. Closer examination of the record will often throw doubt on over-stated positions.

In my view, the ethnographic literature is ultimately sterile ground for debating the ‘authenticity’ of a group of people’s connection to country. There are always alternative ways of reading the available literature. There will always be cases in which names used by otherwise ‘right people for country’ are unsupported, or where valid names are taken up by people with a marginal or

contested connection to country. At the end of the day, attempts to reconstruct the distribution of 'authentic' pre-sovereignty named groups will not assist in resolving present day disagreements between groups. The 'authenticity' of a group name is no more likely to be at the real heart of a disagreement than are differences in spelling such as noted in the Gunai/Kurnai and Ngun(n)awal cases above. A more productive approach would in my view entail examining group names not as fixed, discoverable artefacts, but as complex, historically shifting, and highly contextual.

The problem of names: Some international notes and case studies

Along with other authors at least back to Salverte in 1824, Fried and Moerman have commented on the problematic use of group names as fixed entities. Moerman noted that 'the neat ethnic labels which we anthropologists use frequently deceive us ... one frequently encounters ethnic names with unclear referents and groups of people with no constant label' (1965, 1215). Fried argued that: 'Far from being a reliable "natural" guide to the existence and composition of tribal groups, names point the way to confusion or worse' (1975, 38).

Group names are susceptible to the shifting frames of reference that occur with colonisation and conflict. For example, previously fluid and temporal naming systems can become fixed. One such instance is the Tshidi Barolong of present day South Africa, named after their chief Tshidi in the late 1700s when the systemically subdividing and renaming Barolong were transformed by colonial engagement (Comaroff 1985, 18–21; Schapera 1994, 3).

Group labels can also considerably expand their referents in transforming historical contexts. Binsbergen, to cite one example, traces the application of the 'fluid, and expanding' Nkoya ethnonym to a relatively small group to subsequently include 'an entire cluster encompassing several mutually independent chiefdoms throughout western Zambia' from the second half of the 1800s, and from there to apply to the consolidation and identity building of this cluster in response to the colonial and client state (1985, 204).

New identifications emerge from changed aggregations, with shifts in meaning depending on context. An interesting example is the group in present day Botswana that Schapera described in 1938 as the "so-called" Tswapong' (1994, 2). This group appear to have emerged from a mix of migrating Shona and Tswana peoples and are said to have been named after the hills where they came to live (Schapera 1994, 2). Late 1970s oral history among the Tswapong, analysed by Motzafi-Haller, found 'Tswapong' to be a pejorative exonym: 'It was the Bangwato [another group in the same area] who called it [the hill]

Tswapong as a sign of looking down at [on] us or despising us' (1994, 427). The label 'Tswapong' provoked 'adamant and emotionally-charged resentment' (Motzafi-Haller 1994, 431). When returning to the area in 1993, however, Motzafi-Haller found the term to be 'now widely used by inhabitants of the region who take pride in their "Tswapong" identity' (1994, 431). The frames of reference had altered dramatically over little more than a decade to favour the 'crystallization of a more inclusive regionally-based ethnic identity' in the context of the modern nation-state (1994, 431). The inclusive potential of the term 'Tswapong' prevailed, and its negative connotations became submerged or forgotten. A similar example is that of the Reheboth Basters in Namibia, a community of people of mixed origins 'drawn together by adversity and ostracism' whose name originates in the Dutch frontier farmers' reference to them as 'Basters' or 'Bastards' (Administrator's Office 1918, 122).

Examples of the changing of naming systems and the signification of names can be found in many parts of Australia. Holcombe outlines the transformation of the term 'Luritja' from an exonym with derogatory connotations to a self-identification serving as a 'politicised assertion of local identity' emerging from a shared history of various groups aggregated at the settlements of Haasts Bluff and Papunya (2004, 260). Holcombe notes that settlement 'is a great eroder of linguistic frontiers... and conversely a great builder of new political formations that stem from this erosion' (2004, 261). Another example is that of the Bundjalung in the north east of New South Wales (referred to above). In 1978 Crowley wrote that 'with the development of a sense of tribal and linguistic unity as the European invasion caused local groups to amalgamate, this term [Bundjalung] eventually supplanted most local dialect names, such as Galibal, Minjangbal, Njangbal, Waalubal and so on' (1978, 142). As the reference to this label provided earlier suggests, the native title context has since seen the reassertion of a number of local dialect names and a rejection of the broader term by some.

As apparent in the native title context, such complex and dynamic situations not only make things difficult for anthropologists, but also for people trying to make sense of their own past, and the records of their past. While context is crucial to expressions of identity, such detail is often missing from the ethnographic record, and often forgotten by communities. As a result, the memory and application of names and naming systems in communities can become discordant. As Wallace suggests in the context of an Indian Claims Commission dispute between the Yuchi and Creek, 'complexities and dissimilarities in concepts of history and identity' can develop 'among people who participated within the same historical events' (2002, 762).

Conclusion

While the NTA did hold out some promise of the recognition of indigenous land tenure in Australia in complex and fluid terms, the desire for certainty and definition, native title jurisprudence as it has unfolded, and the manner in which the legislative requirements have been interpreted in preparing claims, have privileged native title claims represented as being made by bounded and clearly labelled groups. Insofar as native title can deliver financial and other benefits, including status and recognition, the description of the native title claim group (determining who is included and who is excluded) becomes all important. Without room to move and adapt to local politics and shifts in perspective, claim group descriptions can thus at times become a major site of disputation and fragmentation. The locus of such disputation is frequently the 'authenticity' of the name used in claim group description.

Although arguments over the 'authenticity' of names may be unhelpful, names are 'always signs which can attract powerful political emotions' (Sutton 2003, 61). Binsbergen has suggested in his Nkoya study that any research unmasking the historical transience and socially constructed nature of ethnic groups 'may at first puzzle, disappoint or infuriate the people we are writing about' (1985, 224). That is, even if, as Gewald observes, for 'many years now it has been accepted within academic circles that tribes and ethnicities are made and that traditions are similarly made, invented and imagined' (2000, 1), such observations may not always be understood by the subjects of those observations. In the native title context they may also carry an element of risk as the admittance of fluidity in anthropological representations may be interpreted to suggest that claims are inauthentic by those who are assessing native title claims. Anthropologists working in other fields have alerted us to this issue and associated ethical dilemmas. Fischer, for example, suggests in writing of pan-Maya identity politics:

This is ethically problematic ground for ethnographers who see their primary obligation as resting with the peoples with whom they work; one would hardly wish to de-legitimise the precarious political position of a marginalised group seeking progressive reforms. (2001, 116)

Forth, while finding the present use of 'Keo' in Flores to be an artefact of early 1900s colonial administration, concluded that to 'adopt any usage that appeared to deny the independence of the people the Dutch named as Keo... [could] be taken as a sign of both disrespect and disregard for a separateness championed by the people themselves' (1994, 313).

Nonetheless, anthropologists providing research for native title claims who 'adopt the language of objects' when examining named groups (Sutton 2003,

61), and do not engage with the fluidities and complexities that exist, may be faced with issues of contradictory evidence, and ultimately do a disservice to claimants. They might also at times exacerbate community conflicts over ‘authenticity’ if they are seen to ‘take sides’ in disputes by proposing one name as more legitimate than another. There are other approaches to explore: it might be possible to conceive of group identity as ‘both subtle and supple, simultaneously primordial and situational, at once fixed and fluid’ (Proschan 1997, 106). As Fischer suggests, ‘acknowledging cultural construction need not undermine claims to authenticity and legitimacy’ (2001, 116).

Most importantly in my view, group names should not be analysed discretely. The ‘authenticity’ of names is best recognised contextually and by reference to the relationships in which they are embedded. In the context of disputed native title claims, names are employed to signify or construct differentiation, and are hardly ever themselves the root cause of disputes. Examining the contexts and systems of relationships in which names are produced, reproduced, and contested can be a first step in understanding such disputes. Where group names are contested, other means of ascertaining and acknowledging the ‘right people for country’, such as referring to broader regional authority, might be developed. For native title anthropologists, this also means engaging with a more contextual understanding of the use of names within wider sets of relationships.

Clearly, names are neither sufficient signposts to, nor vessels of, ‘authenticity’. Their ‘authenticity’ is situational, not absolute. As Iakubovskii argues: ‘We must distinguish the conditions under which this or that people was formed from the history of its name’ (in Laruelle 2008, 177). Translated into native title terms, this also means distinguishing the connection of people by their laws and customs to an area of land, from the name by which they identify themselves at any given period in time.

NOTES

1. This paper is an edited section of my dissertation submitted in partial fulfilment of the requirements for a Graduate Diploma in Applied Anthropology (Native Title and Cultural Heritage) at the University of Western Australia. I would like to thank: Dr Katie Glaskin for her supervision of that dissertation; my examiners for their encouragement to publish; and the editors and anonymous peer reviewers for their comments. Although I am currently employed as a research officer at the New South Wales Crown Solicitor’s Office, the views expressed in this paper are my own and not those of the Crown Solicitor of NSW nor the New South Wales government.
2. Native title case law has stressed 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’ (*Members of the Yorta Yorta Aboriginal Community v Victoria*

2002 at [79]). Although change or adaptation in law or custom is recognised (at [82]–[83]), the situation prior to the Crown’s assertion of sovereignty is a key reference point. This logic has been taken up in arguments between disputing native title claimants (at times in more inflexible terms than I believe is reflected in the case law).

3. Noting that a good many both native title determinations and registration test decisions since 1998 in Northern Territory and South Australia have used more flexible descriptions allowing for non-descent based connections. A common factor is the criteria of acceptance by senior members of the group.
4. I would add to Merlan’s discussion on this point that a situationalist analysis of identity, which may be seen to convey notions of ‘untraditionality’ and ‘inauthenticity’, will present as much (perhaps more) difficulty for the subjects of the analysis as for the state (2006, 180).
5. See for example Weiner, who notes that fragmentational pressures on native title claim groups can be intensified ‘when there is a resource, an ILC property acquisition, consultative committee, or some other development over which indigenous people compete for control’ (2003, 108).
6. I am adapting here from Macdonald’s reference to the range of exclusionary principles that may be employed in native title disputes:

The law forced Aboriginal people to become exclusionary — but it was inevitable that this would produce conflict in a cultural world without an exclusionary principle upon which to work. People ‘invented’ their own exclusionary principles to suit them. (2006, 45)

The notion of a ‘cultural world without an exclusionary principle upon which to work’ is perhaps an unintended overstatement. Certainly there have always been principles by which people have been excluded from group membership and/or from exercising rights and interests in country. However, my understanding is that such principles were subject to exceptions and adaptations. I would also argue that the promotion of group identity as an absolute exclusionary principle does not sit well with, at very least, the access and use of country by spouses and affines, and the ceremonial rights and responsibilities of neighbours.

7. Curr has ‘Gunnai’ (1887, 552) in the same volume as he reports ‘Kani’ by Bulmer (550), ‘Garny’ by Hagenauer (554), and ‘Kurni’ by Howitt (556), all referring to Gippsland and the word recorded for ‘man’ or equivalent. See also Fison and Howitt for the spelling Kurnai: ‘the name Kurnai is that which the aborigines of Gippsland give to themselves, signifying “man”’ (1880, 187). A different word was recorded for woman (‘wrukut’ or similar in Curr 1887, 552).
8. Most of the 119 Local Aboriginal Land Councils (LALC) in New South Wales use locality names, though some LALC names (about 21) were chosen with symbolic reference points such as language names. As these names were not significant to the function or composition of land councils they have been less contested.
9. Given that the Williams family lodged their native title application as ‘Ngunnawal’ at this time, I would suggest a later date, corresponding with Jackson-Nakano’s later publications.

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CHAPTER 3

The differences which resemble: The effects of the 'narcissism of minor differences' in the constitution and maintenance of native title claimant groups in Australia

Simon Correy, Diana McCarthy and Anthony Redmond

Introduction

The process of affording recognition to indigenous people as the prior owners of land by liberal first world states is widely familiar to an anthropological audience. In Australia, the Commonwealth's *Native Title Act 1993* (NTA) provides the context within which indigenous Australian native claimant groups are expected to exhibit an ideology of both solidarity and cultural distinctiveness. Yet, from our combined observations of social interactions at native title claimant meetings over the past decade, the processes of native title group formation actually destabilise the often precarious cohesion of these groups. Destabilising forces within the indigenous polity, and at the level of relations between indigenous ensembles and the tiers of government, also mirror the conflicted requirements of the state and commonly manifest in the tension between desires for group identification/fusion and autonomy/separation.

Melanesianist anthropologist Roy Wagner reminds us of the debt we owe to Italian Marxist Antonio Gramsci 'for the notion of hegemonic ideas (1971) of concepts that have come to be taken so much for granted that they seem to be the voice of reason itself' (1991, 159). These ideas are not sub-conscious because 'they are the very form taken by our consciousness of a problem or issue' (1991, 159). The arena of native title contains hegemonic ideas and concepts. Native title as a procedure of social classification also operates as one in its own right. That the native title process is capable of recognising Aboriginal people as traditional owners of land, and that the formation of a native title claimant group is the appropriate vehicle to enable this recognition,

are part of the native title phenomenon's hegemonic logic. The category of 'traditional owner' has emerged as a social category of the natural attitude and as a structure of indigenous consciousness; one which is reproduced through an ontological mode of being in-the-world, specifically that of a native title claimant.

Despite the common expectation in the native title sector — including among native title practitioners, researchers, judges, those who administer the NTA¹ — that claimant groups should display strongly cohesive characteristics, this is seldom the case. Our combined observations of native title situations over the past decade have led us to conclude that there are processes at work which continually destabilise the often precarious cohesion of native title claimant groups. These destabilising forces manifest as a tension between conflicting desires for total identification/fusion/relatedness and autonomy/separation. The logic of native title arguably rests on a series of oppositions negotiated along inter- and intra-claimant group dimensions of sameness and difference. We have been struck by the powerful social effects of identifying, describing and maintaining these differences and by the rapidity with which particular differences become ossified and transformed into enduring social distinctions. We have observed the alacrity with which the various claimant groups with which we have worked, in New South Wales, Queensland, Victoria and Western Australia, have re-inscribed distinctions, generated by the native title process, between persons and the groups, locating these distinctions within a highly charged moral order. Ultimately the processes involved problematise an overly mechanistic approach to social categories.

In this paper, to shed explanatory light upon such processes, we introduce Freud's notion of the 'narcissism of minor differences', an analytical concept which appears a number of times in his writings, and which he initially applied to individual behaviour, before seeing its implications for extending this to group interactions. We use this concept to explore how native title claimant groups in north-western and south-eastern Australia produce and respond to the elicitation of inter- and intra-group differences in native title contexts, despite their strong assertions of commonality with their close neighbours in many other contexts. The paper also challenges the understandings of groups in native title anthropology by suggesting that the legislatively mediated constitution, maintenance, reproduction and succession of native title claimant groups create the conditions in which the narcissism of minor differences emerges both within as well as across collectivities.

Freud's notion of the narcissism of minor differences

The concept of the narcissism of minor difference appears four times in Freud's work, the initial application in his 1918 paper, 'The Taboo of Virginity'. In this

paper, he refers to a study by the anthropologist Ernest Crawley, who argued that people are separated from one another by a ‘taboo of personal isolation’, and that it is precisely the minor differences between people who are otherwise alike that form the basis of feelings of hostility between them (Freud 1991a, 272).² Freud concluded that inter-subjective and inter-group identities may be constituted through a person’s or a group’s tendency to focus on seemingly very minor differences with significant social others: differences which they discern and highlight against a background of overwhelming similarity.

Freud later deployed the same notion in ‘Group Psychology and the Analysis of the Ego’ (1921). Here Freud referred to Schopenhauer’s metaphor of a group of freezing porcupines who huddle together to keep warm, but soon feel the discomfort of each other’s quills and separate again. Freud extended the metaphor to explain the rivalry between the residents of neighbouring towns and between closely related ethnic groups. Bloc notes that here Freud largely failed ‘to recognize the importance of his discovery and even manages to reduce the heuristic value of the narcissism of minor differences by declaring immediately afterwards that we should no longer be surprised that “greater differences lead us to an almost insuperable repugnance”’ (2001, 116–17).

The third time that Freud turned his attention to the narcissism of minor differences was in his late metapsychological work, *Civilisation and its Discontents* [1930]. While re-using his earlier examples it is here, as Kolsto notes, that ‘Freud most clearly formulates the idea that the sociological function of the narcissism of minor differences is to boost in-group cohesion’ (2007, 168).

Freud’s final reference to the term is in his last essay, ‘Moses and Monotheism’ in which he attempts to explain anti-Semitism. He suggests here that the phenomenon of European hatred of Jews is fundamentally related to their lived proximity as a minority among peoples with whom they share almost everything in common while also being different ‘in an indefinable way’ (1991, 335).

Freud attributed the sometimes intense conflicts over very minor differences to the threat that differences between people who are similar in every other respect represent to processes of individuation and the sustainability of personal or group autonomy. In doing so, he prefigured by thirty odd years Levi-Strauss’ notion that ‘it is not the resemblances but the differences which resemble one another’ (1962; 1964) in the suites of social groups and the correlative contrasts between natural species that are deployed in systems of totemic classification. Freud’s observation also long preceded Bourdieu’s work on social distinction which argued that ‘(s)ocial identity lies in difference, and the difference is asserted against what is closest, which represents the greater threat’ (1984, 479). Girard developed a similar theme in his argument that it is not cultural distinctions but the loss of them that ‘gives birth to fierce rivalries and sets members of the same family or social group at one another’s throats’ (1979, 49).

The concept of the 'narcissism of minor differences' in modern anthropology

In the modern anthropological corpus, the concept of the narcissism of minor difference has been most commonly deployed to analyse violent inter-ethnic conflicts. Ignatieff (1998) and Blok (2001) for example have pointed out that the cultural differences between the warring factions in recent conflicts in Rwanda and the Balkans can be seen (from an outsider's perspective at least) as minute in comparison to their shared histories and enmeshed cultural worlds.

Simon Harrison (2002) has also argued (citing Simmel, Gluckman and Bateson), that there is a well-developed tradition in the modern social sciences in which similarities in cultural ideals and practices are seen to generate conflict rather than peaceful homogeneity. In this tradition, conflicts over personal or cultural appropriation of similar regions of 'identity space' have been treated as emblematic of a competitive politics of 'conflictual resemblance' (Friedman in Harrison 2002, 228). The protagonists are driven into conflict by their perceptions of themselves as being 'too much alike'. This perception of sameness generates a sense of danger to their own 'proprietary identities' which are, nevertheless, exactly the products of elicitation of their difference. Similarly, Simon Harrison attributed the hostility which a group or individual experiences towards a mimetic double of itself as arising from a fear that their shared goals, beliefs and values actually mask deeper differences. Harrison concluded that 'what actually differentiates such a group from others is not its perceived distinctiveness but rather its aspirations, or proprietary claims' (2002, 228) to historically shared sets of symbols.

As a heuristic device, the application of the narcissism of minor differences to situations which do not usually result in internecine killings has been less anthropologically explored. The native title process, particularly claimant group definition and claimant group solidarity, is a major site within which claimant group desires for fusion operate concurrently and continually with an acute awareness of separateness and distinctiveness. In human sociality more generally, the fantasy of being perfectly mirrored by significant others may threaten the preservation of individuality and autonomy. Nonetheless, it is precisely this tension between mirroring powerful idealised others and a simultaneous need for autonomy which is distorted and exaggerated in the definition of native title claimant groups.³ The strictures and determinisms within the legislatively instantiated and mediated native title claim process exert pressures on the flexibility of modes of incorporation/excorporation in Aboriginal social worlds. These then become strained during the definition and sustenance of claimant groups, delimiting fusion/autonomy fantasies and providing an environment in which small differences between people and groups become suffused with very powerful emotion.

Anthropological concepts of Aboriginal social categories

Anthropologists have long been concerned with forms of social differentiation in Aboriginal Australia. Indeed, the search for the taxonomy of Aboriginal social organisational forms has been at the heart of the question of how the acephalous societies of Aboriginal Australia governed themselves before colonisation. Ongoing debate has ensued over the relationship between ‘tribes’, language groups, unilineal descent groups (clans) and residential/foraging groups (bands) and their respective rights in land. Throughout the nineteenth and much of the twentieth century a ‘nested hierarchy’ model of territorial organisation prevailed: with individuals grouped into clans, and clans grouped into tribes, which were often themselves sometimes grouped into ‘nations’ (see Mathews 1898). Peterson (2006) has recently summarised the early challenges to this model that were posed by ethnographers who found that their data did not mesh comfortably with this dominant paradigm while noting that, ‘outside of native title applications and land claims, and ethnographic reconstruction, this debate is only of historical importance today’ (Peterson 2006, 16). These local/territorial organisational models are characterised by their attempt to encompass the apparent disorder and contingency observed in on-the-ground socio-territorial ensembles within well coordinated and differentiated categories which ‘the natives’ allegedly carry in ‘their minds’ Wagner (1974, 101).

What Wagner (1974, 118) called the ‘dogmas of descent’, ‘or the underlying spell of descent’ has maintained a tenacious grip in Australian Aboriginal studies, both in applied and academic anthropology. The renovation of these dogmas has been attempted many times, usually through the introduction of some kind of structured elasticity, which allows unilineal descent groups to stay at the heart of living arrangements (Blundell 1975; Stanner 1965). This is a move which Wagner (1974, 119), referring to Melanesian ethnography, called ‘having your groups theoretically and eating them pragmatically’. Wagner drew into question the heuristic assumption of the reality of social *groups* themselves, arguing that names which purport to make a distinction between social groups may be simply that: names, which contextually elicit unstable groupings through contrasting one quality with another. ‘The terms are names, rather than the things named’ and group names, rather than being designators of actual groups of people, are ‘devices for setting up boundaries’ (Wagner 1974, 106–7) and thereby creating sociality.

One of the most common forms in which native title claimant groups in Australia now coalesce with and fracture from their neighbours is as entities named for a language or dialect of a language seen to be associated with tracts of territory identified by that language label: in other words, as socially bounded ‘tribes’ with clear territorial boundaries (see Dauth and Babidge, this

volume). We suggest that Freud's notion of the narcissism of minor difference can assist the explication of the ways in which social groups, which have been bounded for native title purposes, are constituted and reconstituted through incorporating and excorporating processes.

Language names and native title claimant group descriptions

In contrast to the kind of entification of language-named social categories we refer to above, some early ethnographers of Aboriginal Australia were immediately sceptical of the notion of language-named groups as political entities. Elkin, for example, drawing on his 1927–28 fieldwork in the Kimberley region, noted that:

While the linguistic test of a tribal grouping is a sound one...in referring to a tribe as a territorial group we must remember that this aspect is not really important politically or economically. (Elkin 1964, 29)

As Elkin might have predicted, the first Kimberley land claim, (*Utemorrah & Ors* 1992) mounted in the Supreme Court of Western Australia in 1989, was made on behalf of people belonging to a vast expanse of the Kimberley region in the state's north-west, and encompassed at least a dozen different language groups that asserted their commonality on the basis of their traditional exchange network, or *wurnum*. The Western Australian Supreme Court initially ordered that the claim be broken up into more manageable sectors. When the claim was resubmitted under the NTA, it was made as a language-based one, this form of claim having quickly emerged as the convention. In this manner, a backgrounded language identity, which had long been only one aspect of social and landed identity for Kimberley Aborigines, became strongly foregrounded. The focus on language-named entities in the native title claim process quickly elicited a corresponding focus on language identity among those Kimberley Aborigines who concern themselves with native title matters. In many neighbouring claims, ongoing and preceding disputes between familial groupings and individuals rapidly morphed into arguments about which language the disputants' families were properly associated with, as claimant groups attempted to capture and exclude members into a single claimant group. Meanwhile, at the intra-group level, smaller local country-based groupings, drawing on clan- and lineage-based loyalties, have emerged as disputants for the ownership of major resource sites within the over-arching language-labelled territory.

In another case study in mid-western NSW, Tamsin Donaldson (1984) described the configuration of language groups which are named by the

different ways in which they say ‘no’. In some contexts, she says, these different language groups aggregate themselves under a single name, *Ngijaampa*. That is to say, they recognise their similarities to each other on the basis of ‘differences that resemble’, seeing themselves as constituting a single community, but differentiating themselves from each other as named groups based on the way they say ‘no’.

Along the Murray River, and in south-eastern Queensland, there are other aggregations of language-named groupings whose commonalities are made emblematic in their similar but different ways of saying ‘no’. It is probably no accident that these ways of making the negative injunction should prove to be both a distinguishing and aggregating symbol of identities, given that all psycho-social processes of differentiation are concerned with eliciting identity through making social distinctions. Since names are always an alter-centric phenomenon (something by which other people call us), the fact that these groupings are known to themselves and others as ‘the people who say “no” like this’, neatly encompasses the principle that social interactions may maintain and reproduce difference rather than attempting to transcend them. Both relatedness and autonomy, here marked by the refusal encompassed in the negative injunction, are clearly at work.

In the contemporary period labels such as Koori, Goori, Nunga, and Murri, which originally denoted ‘humans’ as opposed to ‘savages or non-humans’, have also emerged as large regional classifiers, more commonly used to mark the contrast with non-indigenes than with other indigenes.

Throughout the heavily populated region of south-eastern Australia, language and dialect group names have emerged as overt symbols of Aboriginal distinctiveness within intra-indigenous contexts. They have also emerged in those intercultural contexts in which intergroup distinctions are deployed to combat the state’s tendency to homogenise Aboriginal groups on the basis of their race and shared disadvantage. With the recent focus during the administration and management of native title claims by native title representative bodies on how claimant groups are constituted, the epistemic centrality of ‘traditional ownership’ emerging from articulations of identity and group membership has been displaced by the criterion of demonstrated descent from named apical, or foundation, ancestors. While language group names certainly retain currency in a variety of contexts, claims to membership of such groups, within the native title phenomenon, is largely coincidental with, and constituted through, what is effectively the reduction of kinship to descent (Correy 2006; Wagner 1974).

This emphasis on the primacy of public, jural descent structures over interpersonal, private and domestic kinship relations is neither a pure product of anthropology (which quite early on recognised the dialectical relationship between processual, agentive kinship processes and indigenous ideologies of

jural descent (Evans-Pritchard 1940; Myer Fortes 1953⁴), nor of interpretations of anthropological ideas about these topics. Rather, it is often elicited and solidified in response to the focus on descent structures by the state itself which seeks out well defined, bounded groups with which to negotiate claims.⁵ Even if a fore-shortened genealogical memory was culturally mandated in Aboriginal societies at sovereignty (see Sansom 2006), strongly-developed notions of descent played a role in distribution of rights and interests. The current requirement for people to ‘prove’ the descent basis of their claim to native title rights and interests, both to other claimants and to the state through the public display of documentary records, reflects a ‘descent of rights’ from the original inhabitants model (Sutton 1998). In this model, anxieties about differentiation (between claimant groups and in respect to Euro-Australians) and sameness (within claimant groups and in regard to Euro-Australians) are constantly being articulated.

The need to display descent from the autochthonous population and a very clear distinction from the colonial Other, despite generations of co-residency and inter-marriage, readily evokes the foundational human dilemma of Oedipus that Levi-Strauss (1962, 216) formulated in the question: ‘Are they born from different or born from same?’ This question continually informs the anxieties expressed in indigenous concerns about ‘too close marriage’ to ‘poison cousins’ within those Aboriginal communities where a loss of social distinctions may have led to disquieting uncertainty about degrees of relatedness. In the pre-native title era, south-eastern Australian Aboriginal social worlds included a variety of group-like ensembles predicated on territorial, residential and resource use-rights which co-existed with other kinds of social ensembles lacking territorial implications such as matritotemic clan groupings. A unit of kinsmen defined by descent from named ancestors operating as a group constituted for social action was not a self-evident structure of the lived social reality of the pre-native title era. These social worlds were not strangers to continuous gradations of difference and it is also not the case that persons were unaware of their social relations to each other.

However, the introduction of the heavily accented discontinuous world of distinction and opposition which the native title process elicits conforms less obviously with those pre-native title era social relations. While social life is always a dialectical process which involves the negotiation of apparent contradictions as an ongoing series of transformations, the native title context makes these negotiations more explicit. These earlier social relations were significantly predicated on what Christina Toren has called ‘the intentionality of kinship’ where intentionality ‘denotes an embodied consciousness of what one may take for granted’ and where kinship is lived ‘as the very medium of existence’ (1999,

266). The pre-consciousness of embodied kinship is effectively hegemonic. Claimant groups, by heuristically isolating certain modes of relation over others, delimit fusion/autonomy fantasies, thus engendering the conditions for the emergence of a strong form of narcissism of minor differences.

Fighting over country

The phenomenon of claimants 'fighting over country' has been often commented upon in the Australian native title context (Smith and Finlayson, 1997). Francesca Merlan has pointed out that this conflict is commonly interpreted by observers and interested parties in one of four ways:

The first is that conflict over land among Aborigines and claimant groups shows the continuing vitality of relations to country. The second is that conflict is endemic to, and characteristic of, small scale Aboriginal polities. The third point of view, commonly expressed in some public quarters over development issues, denies Aboriginal claims to land any moral dimension and sees them motivated only by pragmatic calculation. The fourth is that Aboriginal expressions of relationship to land have a constantly shifting, unstable quality which renders desires for certainty and finality impossible. (Merlan 1997, 1)

While in any particular claim region there may be elements of each of the dynamics which Merlan describes at work, what is largely ignored when the Aboriginal domain is imagined as a self-enclosed entity (except, in condemnatory form, in the third 'commonplace') are the dynamics of differentiation from, and fusion with, the encapsulating nation-state. Within such a context, posing a psycho-social complex such as the narcissism of minor differences as a proximate cause of enduring social effects will always have an obvious weakness from a social science point of view; namely that it potentially attributes an ahistorical dynamic, devoid of a specific social context, to the deeply historical processes of colonisation and settlement. However, the model's strength, like that of all social models, lies in its potential contribution to a general theory which can be applied in particular situations and hence may carry a trans-historical rather than ahistorical significance. In the case of native title groupings in Aboriginal Australia, this social context obviously needs to take into account indigenous relationships with the nation-state. Hence, we do not seek to use the notion of the narcissism of minor differences as an explanatory scheme in its own right to analyse conflicts between close neighbours, but rather to throw a slightly different light on this problem of 'fighting over country' (Smith and Finlayson 1997).

While conflicts between neighbouring native title claim groups may appear to be more readily accounted for in terms of competition over scarce resources, this economic view cannot account for the commonly observed phenomenon that claimant groups and individuals have been known to forgo access to claimable material resources in order to either prevent others claiming them, or to make social capital out of their own refusal to take them up (see Merlan 1997; Redmond 2006). The weakness of an economic explanation of such phenomena, as Weber's critique of Marx showed, is that it fails to account for the fact that human desires are at least as concerned with issues of prestige, identity and the convertibility of social capital, as with material resources themselves. In the native title context, if an economic gain requires public compromise, especially if the gain involves expanding the definition of the claimant group to the most inclusive level, then some claimants may decide that the goal is no longer a priority, or more simply that it is not worth the cost. At times it may seem preferable to walk away from benefits than to become aggregated into an undifferentiated group of beneficiaries.⁶ There is clearly something more at stake in such situations than immediate material interest.

Peterson's work (1998), on the centrality of 'demand sharing' in Australian Aboriginal social worlds, revealed the creative/destructive tension between the ways in which groupings of different dimensions seek to expand their webs of relatedness but also continually seek out ways of restricting the extent to which demand sharing can be appealed to, to delimit the boundaries of a generalised reciprocity. Peterson's later work with Taylor (2002) argued that the rapidly increasing frequency of marriages between indigenous and non-indigenous partners may represent one of these attempts to limit the grounds for demand sharing. Sutton's (1998) analysis of how cognatic 'families of polity' patrol their boundaries in the contemporary Aboriginal settlement context made a similar point to Elkin's, namely that kin groups attempt to find ways in which 'the kinship system can be extended throughout the whole community without becoming too diffuse to be of practical value' (Elkin 1964, 86).

During the native title application process in Australia, the state seeks out and generates iconic differences between indigenous groups as well as between the indigenous and extra-indigenous domains, attempting to make these newly differentiated groups into clearly bounded units. Representational constructions of indigenes made by non-indigenous people feed back into Aboriginal people's conceptualisation of themselves. However, as Merlan has recently noted, any acknowledgement by the claimants themselves or by the courts of the contingent nature of these domain separations is strongly discouraged in the native title process since reflexivity is seen to undermine the claimant group's cultural integrity. Bruce Kapferer (1999, 185) in a review of Merlan's 1998 book, *Caging the Rainbow*, has also made the point that 'the patterns of discourse

that Aborigines use regarding land claims and other political matters, refract the constructions of them produced by members of dominant white Australian groups. The representational constructions of whites become internal to the way Aborigines often conceptualise themselves' (1998, 185). This need not be seen as a one-way dynamic and Aboriginality is simultaneously appropriated by non-Aboriginal Australians whilst they attempt to differentiate it.

Constitution of native title claimant groups and the narcissism of minor differences

From our combined observations and analyses of the native title context, it is precisely this dialectic between the fantasy of absolute mirroring/total identification and the fantasy of absolute separation/autonomy, in ongoing conscious–unconscious projections, which operates and is manifested as intra-claimant group disputes and in relationships between Aboriginal people and the nation-state. Gabbard (1993) uses Freud's concept to analyse the development of feelings of hate in love relationships and argues that it turns on the need to find and exaggerate disappointing differences in order to maintain a sense of separateness while simultaneously needing to find oneself immersed and reflected in the loved other. Claimant group dynamics contain a similar dialectic which requires solidarity among claimants at the same time as they experience the need to find and exaggerate differences between each other in order to maintain an autonomous identity.

The native title claim process elicits projections of fusion/relatedness but, in an apparently contradictory fashion, this yearning also elicits the need to rescue autonomy and separateness. We would argue that the narcissism of minor differences is indeed a perpetual aspect of the life-world once the intersubjective accord,⁷ predicated on the dynamic equilibrium between separateness and relatedness, has been achieved. The narcissism of minor difference is present in the fantasy fusion running through claimants' self image as a group as well as in the projections of essentialised differences and sameness projected onto these groups by native title representative bodies or native title service providers and government agencies and of course anthropologists.

The construction of the claimant group in the era of governmental demands for 'properly constituted claimant groups'⁸ also contains the two attendant potentials for blissful merger and threatened autonomy. The value of the status of traditional ownership is confirmed through merger with other traditional owners but the loss of boundaries entailed in this merger threatens the loss of individuated identity. To avoid this threat of dissolution intra-group differences are elicited and exaggerated in order to preserve autonomy. The disappointing differences dissolve the fantasy of perfect mirroring. Small differences between

group members are regretted and experienced by them as narcissistic injuries to themselves but also desired and exaggerated because they preserve a sense of autonomy, the experiential position from which the creative work of building relatedness can become pleasurable rather than self-extinguishing and isolating.

In other contexts these differences are more easily repressed or displaced through informal structures for the reproduction of sociality such as local Aboriginal land councils, Aboriginal health services, Aboriginal legal services, Aboriginal housing companies, elders groups, Community Development Employment Projects and so on. While these non-native title bodies are not exempt from internecine style conflicts, these situations do not require the same level of explicit or systematic projection of the fusion fantasy as occurs within the native title context. This is because the arena in which they occur is not usually so concerned with establishing enduring categories of Aboriginal identity and traditional owner citizenship. The fusion fantasy also manifests context. It is present in the intentionality of the native title representative body/service provider staff that, having large institutional and personal investment in the outcome, holds onto the mirror fantasy and concomitantly does not experience any direct benefit from the achievement of the rescued autonomy.

A development of the post-1998 amendments to the NTA and its associated processes lies with an increasing emphasis on the composition of the claimant group. This aspect of the claim has been increasingly questioned through the introduction of the requirement for properly constituted claimant groups. These phrases refer both to the mode of definition of the claimant group and the authorisation process which culminates in the establishment of the claimant group as a social entity with a status formalised through the native title process. Recent native title examples show a tendency to privilege and prioritise descriptions of claim groups which reflect inclusiveness and representativeness and which also have to be reflected in membership definitions in the constitutions of corporations. Two native title claims which have proceeded in northern New South Wales go some way to illustrating the situations in which the narcissism of minor differences can develop, particularly in relation to the issue of the properly constituted native title claimant group. Both these claims were lodged in the pre-registration era of native title and have since been required to pass the registration test instituted as part of the 1998 amendments to the NTA.

In the first example a native title claim was lodged on behalf of a relatively discreet and cohesive socio-territorial political ensemble. The members of the claimant group also identified as members of a wider language-defined nation but their claim was not intended to be constitutive or representative of this wider congerie. Of equal importance was that other members of the wider congerie supported the smaller, less inclusive assertion of native title rights and

interests over a prescribed portion of the nation's territory. The expectation existed amongst claimants that similar smaller ensembles of the same nation would lodge native title claims over other sections of the wider national territory.

In this instance the native title claimant group was not defined solely through reference to descent from named apical ancestors. Rather, the description also contained other considerations relating to particular modes of connection to the claimed country. These other considerations reinforced that the claimant group was not attempting to be isomorphic with the wider society that in part gave rise to their native title rights and interests. Their claim was further assisted by the NSW Government's decision, for political reasons, to not pursue their own standards of credible evidence with the vigour exhibited in other native title claims.

Under this set of circumstances the narcissism of minor differences was less evident and a function of two factors. Firstly, the Crown's relatively relaxed attitude did not elicit reflexivity among the members of the claimant group. Commonly, the empirical attitude⁹ of the NSW Government requires such a high level of evidence in the form of expert reports, claimant affidavits and on-country cross-examinations that a self-reflective consciousness always has the potential to emerge within the claimant group when members become prone to interrogating their previously taken-for-granted socio-cultural world. This consciousness emerges from the evidentiary process requiring an attempt on the part of the native title claimant self to become its own object. The concern with the inclusiveness and representativeness of the claimant group is also generally more systematically pursued during the Crown's assessment and this privileges the articulations which thematise fusions/mergers over autonomies/independencies.

The second element of this claim centres on the discrete composition of the claimant group even within the surrounding wider social world which incorporates/excorporates claimant group members in different co-existent social contexts. Within this milieu the intra-claimant group fusion fantasy was more sustainable because the balance between relatedness and autonomy could continue to be achieved amongst socially significant Aboriginal Others who, due to the definition of the claimant group, were not directly part of the claimant group structure or indeed expected to be.

In the second example the circumstances were significantly different in respect to the constitution of the native title claimant group and the attitude taken by the Crown in regards to challenging the description of the claimant group. The initial description of the claim group attempted to capture a language/nation ensemble solely by way of reference to multiple named apical ancestors. The large number of apical ancestors meant that the claim group was comprised of a number of people who had not previously experienced

themselves as a social group in pre-native title era situations. Further, the relative absence of other considerations, such as ceremonial experience, birthplace, residence or site knowledge and so on, made it difficult for members to achieve autonomy from each other or to establish intra-group differentiations. This was made more evident by the Crown's focus on the relationship between current claimants and their nominated ancestors.

The claim is likely to result in a consent determination of native title and the native title service provider committed significant resources to achieving this result. A regular element of this approach involved dispute mediation aimed at maintaining intra-group solidarity that was destabilised in part by the evidentiary attitude taken by the Crown. This approach from the Crown involved significant efforts being dedicated to scrutinising the definition of the claimant group and challenging the birth information credentials of some apical ancestors and also cases of adoption and/or incorporation into the group by other means such as ceremonial alliances.

The Crown's focus on descent, and on the virtual descent mechanisms of adoption and incorporation, influenced the claimant group to develop a hyperbolised awareness of their similarities. Without recourse to the other cultural considerations, such as marriage alliances, residential affinities or ceremonial relationships, the differences appealed to were essentially very minor and often mirrored the Crown's questioning of ancestral connections. For instance, the status of adopted children was questioned by the biological children of the adopting parents in ways which had not occurred before the native title phenomenon's structuring of the significance of experience. The hegemony of native title as the mechanism to achieve recognition of traditional ownership combined with the homogenisation of the social field to its descent manifestations meant that minor differences between members of the claimant group achieved higher levels of emphasis.

The other considerations, which were built into the definition of the claimant group in the first example, enabled claimants to both limit group membership and create the conditions which fostered intra-group cohesiveness. The narcissism of minor differences then operated more against members of neighbouring claimant groups similar to the way Freud argued that 'there is a fundamental need to maintain cohesion within a community or a group by displacing aggression and contempt onto other groups who possess essentially minor differences' (Gabbard 1993, 232). Gabbard also suggested that Freud could have extended treatment of his idea 'by recognizing the fundamental narcissistic need to preserve a sense of oneself as an autonomous individual'.¹⁰ In 'properly constituted' native title claimant groups the details of differentiation occur within the claimant group and the threats to individuation affect its cohesion. The Crown is too abstract and remote to operate as an enduring

object of hate and aggression. Hence this effect is often directed either at other members of the claimant community, at the members of an adjacent claimant group, or not uncommonly at native title representative body staff.¹¹ The latter often become the on-the-ground adjuncts to de-personalised state organisations and are compelled to act as containers of their clients' rage at an intensely experienced loss of autonomy.

The long duration, sometimes more than a decade, between the submission of a claim and its determination contributes significantly to the creation of the conditions which promote the emergence of the narcissism of minor differences due to the length of time claimants groups are expected to exhibit solidarity. This long duration also provides well established native title claims and native title claimant groups with the capacity to become a feature of the social definition of situations. They effectively operate as a structure of the social world and attain a kind of currency and objectivity in relation to local Aboriginal experience. The claimant groups operate like a unit of social organisation and, as an objectified entity, can thus act back on the course of social activity, particularly on the course of interaction between relatives, and also on the course of their own development (Babidge 2010; McKinley, 1971, 408–11).

Conclusions

In its earlier anthropological usages, the concept of the narcissism of minor differences has been used to explain internecine conflicts where the state has lost its monopoly over the means of violence. In the Australian native title context, where the state has retained its authoritative role, intra-Aboriginal violence has occurred at relatively small scale interpersonal and interfamilial levels. Exclusionary concepts of descent and language identity have been deployed in extremely heated ways but nearly always in a context where the state has maintained its monopoly on the means of violence. This containment of the radical effects of intra-indigenous differentiation by the state (which has been much more concerned with feeding a narcissism of minor difference between the indigenous and non-indigenous domains to a magnitude which renders the minor major) has allowed a remarkably full efflorescence of minor differences which have been largely restricted to conflicts within the indigenous domain.

The state maintains a somewhat schizoid position on the narcissism of minor differences within Aboriginal groups, as it projects fantasies of fusion and differentiation onto claimant groups' own fantasies which often collide and collude with the claimant groups wrestling with the tension between their own desires for autonomy and relatedness. When larger and more inclusive ensembles

present themselves as a claimant group, a great deal of the respondents' energy is poured into investing minor differences with major significance. Conversely, if smaller, more exclusive groups present as the holders of native title, they face the charge that they are insufficiently differentiated from their neighbours to form either a society in their own right or an 'inclusive' group worthy of State engagement and are induced to re-constitute and co-constitute themselves as a larger grouping.¹²

This apparently contradictory situation is partly explained through Simon Harrison's influential work on conflictual resemblance that attributed the hostility that a group or individual experiences towards a mimetic double of itself as arising from participants' sense that their shared repertoire of symbols threaten to erase what are feared to be deeper, real differences. Yet the opposite may also be true: the hostility towards another self marked by minor differences can arise from the fear that these historically produced differences mask some timeless underlying identity which may annihilate the self by overwhelming it with sameness.

In concluding we consider the Narcissus myth, where Narcissus's reverie of primary wholeness was only interrupted by seeing himself reflected in the waterhole. In mistaking his own image for an Other, he gains his first awareness of otherness, of difference. He falls in love with this mimetic double, immediately provoking the fantasy of re-unification which leads him to lean over the waterhole to better admire the image of the other self, but the reflection is ultimately lacking in the otherness required to sustain desire and Narcissus perishes. Only Echo¹³ could love Narcissus but, condemned to only repeat what others say, to reflect them in the auditory rather than visual sense, she is turned to lifeless stone. Narcissus, repelled by her, becomes a vegetative narcotic, paralleling a condition where one collapses into oneself.

This is the power of the mimetic double which is operative in concepts like the human soul, which at first employs repetition as a defence against fears of annihilation of the self. However, the fear of annihilation is never expunged from this doubled image, so that having been once a defence against death, the twin becomes the 'monstrous double', a harbinger of death, radically devaluing the self by erasing difference.

While it was initially hoped that the NTA would provide a space of recognition between Anglo-Australian law and traditional Aboriginal law, there has been a clear inability on the part of the state apparatus to comprehend and recognise authentic otherness or difference — even in its own imposed terms of otherness — by according fully differentiated and shared human status to Aboriginal claimants. There has been a constant clawing back of potential rights and interests from claimants. On the one hand, claimants must assert that they are in fact 'not too much like us' to have a distinct body of extant law and custom, and that some of these laws and customs and rights and interest

are demonstrably different. On the other hand, they must seek to be recognised under Australian common law.

Within claimant groups some similar dynamics are being played out in regard to enduring difficulties in acknowledging enough sameness in shared law and custom for the minor differences to be productively articulated in a way that allows desires for both autonomy and relatedness to creatively shape the social worlds of claimant groups. This reflects Bateson's early analysis (1935) of the schizogenic developments among and between colonised groupings and the colonising state. The process Bateson describes refers to an indigenous response on the colonial frontier in which pre-existing groups form a larger unit which is defined in relation to the colonial state ('complementary differentiation') but simultaneously fragment amongst themselves ('symmetrical differentiation'). Bateson (1935, 67) pointed out that complementary differentiation reproduces and intensifies colonial relations of domination.

The native title phenomenon contains expectations of claimant group solidarity operating via the fusion fantasies of the state and native title representative bodies and service providers and, at times in the process, by claimants themselves. However, the claimants' needs to also express autonomies are always commensurable with public expressions of solidarity. Intra-group conflict is an ongoing aspect of the native title phenomenon and state legislative and administrative requirements create the conditions for this conflict to emerge.

Freud's concept of the narcissism of minor differences sheds some light on how fighting over country occurs as a function of the tension between the fantasies of total cohesion/fusion and total separation/autonomy. Further, this situation may be exacerbated in the longer term settled areas where descent manifestations are by far the most common mode of defining the description of the native title claimant group. Without other more overt cultural paraphernalia, descent-based descriptions are easy to apprehend but harder to sustain against internal attempts to articulate detailed differences. Freud's concept also holds potential relevance for the analysis of a variety of situations in which indigenous people's land ownership or status as traditional owners is recognised by the apparatuses of first-world governments. This is particularly the case in situations where the requirement for recognition is the establishment of an incorporated entity designed to reflect traditional structures but which in fact has no precedent. The establishment and existence of such an entity is bestowed with a constituting significance that has the potential to itself impact on the course of social activity including in the form of conflicts.

NOTES

1. Administrators in the sense of those who work most closely with the native title claim process such as the National Native Title Tribunal, Federal Court, native title representative bodies/native title service providers and State Governments.

2. Burstein (1999, 2) points out that Freud misquoted Crawley, who had maintained that not only minor differences but all differences are problematic. In order to find the roots of the narcissism of minor differences idea, therefore, we do not have to go back to Crawley, but may stop at Freud.
3. An idealised ego is readily projected onto a person's close social milieu to create an image of nurturant sociality. Roheim described this process as one in which 'the child is separated from the mother, but at the same time tries to effect a re-union with the mother. Therefore fission and condensation (separation and re-union) is really the mechanism that corresponds to this primal organization' (1971, 137).
4. 'If there is one thing all recent studies are agreed upon it is that lineage genealogies are not historically accurate. But they can be understood if they are seen to be the conceptualization of the existing lineage structure viewed as continuing through time and therefore projected backwards as pseudo-history' (Meyer Fortes 1953, 165).
5. John Morton (pers. comm. 2011) has pointed out to us that the dominant logic of native title as recognition of 'the descent of rights' from sovereignty plays a significant role in setting the agenda within which these differentiations achieve relevance and, increasingly, precedence.
6. This is part of the twin paradoxical aspects of native title operating as both a 'model of' and 'model for' its participants' actions. The question arises when a process becomes substantially conventionalised whether it is reflecting or predicting reality, in much the same way as the operation of political polls during election campaigns.
7. Our treatment of intersubjectivity is centred around the intersubjective accord, characterised in the thinking of the social phenomenologists (among other things Buber 1958; Schutz 1967, 1973; Berger and Luckmann 1966), and which insists on the immediacy and reciprocity of interpersonal relations and on the simultaneous genesis of both partners through the encounter. This conceptualisation contains the concrete understanding of the Other whose existence is taken for granted. This position is to be contrasted with the concern of classical transcendental phenomenology which grapples specifically with the fundamental problem of the possibility of the constitution of the Other as alter ego.
8. In 2002, in *Ben Ward and Others/Swiiflet Ltd/Northern Territory* [2002], the National Native Title Tribunal referred to a 'properly constituted native title claim group'. This referred to the communal nature of native title and that sub-groups or individuals are unable to make a separate claim or prevent a native title claim by a communal group.

In 2003, the Federal Court in *Quall v Native Title Registrar* [2003] referred to a native title claim group that was 'properly constituted'. This referred to the meaning within s 61 (1) of the *Native Title Act* and included all those people 'who, according to their traditional laws and customs, hold the common or group rights and interests comprising a particular native title claimed'. Reference was also made to s 61 (4) of the *Native Title Act*. The application must name all persons in the native title claim group or describe them sufficiently clearly to ascertain whether a particular person is part of the claim group. 'Constituted' means *described*, as per s 61(4)(b) of the NTA.

In 2004, the Federal Court in *Briggs, on behalf of the Gumbangirri People v Minister for Lands for NSW* [2004], referred to a 'properly constituted claim group'. This meant all the persons who hold native title in the area of the application.

In 2005, in *Charlie Moore & Ors (Yandruwandha/Yawarrawarrka) and David Mungeranie & Ors (Dieri)/Eagle Bay Resources NI/South Australia* [2005], the National Native Title Tribunal referred to a 'properly constituted native title claim group'. This referred to all persons who make up the registered native title claimant acting collectively as representative and agent of the wider native title claim group. This does not include individuals or sub-groups.

The 2011 Federal Court decision in *Champion v State of Western Australia (No 2)* [2011], referred to a 'properly constituted native title claim group'. This referred to the requirements under s 61 (1) of the NTA.

9. The term 'empirical attitude' refers to the problem of how evidence is produced which bestows upon the world or an object an empirical accent of reality.
10. The narcissism of minor differences is of course linked to the apparent central ironic characteristic of all forms of narcissism: the seeking of individuality at all costs, which denies our inability to live outside of fusion with another.
11. This phenomenon, akin to Sartre's (1992, 572) trenchant analysis of the treatment of the more benevolent slaveholders by the slaves in the American South, partially explains the high attrition rate in staff employed by native title representative bodies. It is just at the time when they are most at home with their own conscience that they become constituted as oppressors. Their generosity and goodwill is repaid with revolt and hate and not the tribute of recognition that the well-meaning liberal advocate is fully occupied in thinking they deserve. In going some way to humanising the colonising regime they have highlighted the unacceptability of the situation. The more professionally the native title claimant group is legally represented the more dangerous they become because their awareness of their inequality and continuing oppression is heightened. Native title is still part of the limitations of a colonial regime and, in upholding the regime by democratising it, the regime is rendered even more unpalatable.
12. See Povinelli (2006) who refers to the impact on Aborigines of incommensurable legislative schemes emerging from different state jurisdictions.
13. In Greek mythology Echo was a wood nymph who loved a youth by the name of Narcissus.

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*Territorial boundaries and society in the NSW Riverine:
A Wiradjuri analysis*

Gaynor Macdonald

What is ‘an identity’?

Practices of introduction signify more than protocol for the Wiradjuri people of the central west of New South Wales: they point to an identity embedded in both country and networks of kin relations. Their style of introduction with questions of the newcomer such as ‘Where are you from?’, ‘What’s your country?’, and ‘Who’s your mob?’ is common throughout Aboriginal Australia and quickly becomes familiar. In such meetings, the Wiradjuri employ both spatial and social (kin-oriented) referents: ‘Kate’s from Narrandera, she’s my cousin through the Browns’. Many of the ‘grassroots’¹ Wiradjuri people among whom I have worked over three decades will comment that a Koori² without country and relations (kin) is ‘nothing’. They remain wary, even cynical, about those they call ‘tick-a-box blacks’ — people who have only recently asserted their Aboriginal, or more specifically Wiradjuri, identity in the apparent belief that there is something to be gained in doing so. ‘Grassroots’ Wiradjuri do not see such people as having kin and country. While they may warmly include them in social events, they do not accept them as having the culturally-acquired rights of ‘way back’ Wiradjuri, people who have lived all their lives ‘being Wiradjuri’ and who know their immediate and distant ancestors to also have done so.

That spatial/country and social/kin identities are distinguished in Wiradjuri introductions highlights the fact that social identity is not subsumed within spatial identity nor *vice versa*. To say that a woman is ‘one of the Slades from Condo’ is not equivalent to saying that her surname is Slade and that she lives in Condobolin. She may or may not live there. The message is that Condobolin, as a part of Wiradjuri country, is that part with which this person identifies and is identified. The Slades are ‘a mob’³ associated with that place but they are

networked into other kin-based mobs such as the Greens, the Jones, the Cooks, and so on, whose names and linkages are not limited to Condobolin. Her own surname may not be Slade, but the 'Condo Slades' are her 'mob'. That is, the reference to Condobolin is made not to a town as such but to a spatial identity and the reference to the Slades is made to a social identity. Both are required to position a person within the Aboriginal world of central New South Wales.

In this paper I explore the significance of kin and country in the pre-colonial Wiradjuri world as I have come to understand it, and in the present. I argue that social and spatial identities are distinct but interrelated. This has implications for the ways in which a land-holding group is defined and in explaining why such a group is not a form of social organisation and thus does not constitute 'a society'. The Wiradjuri normative society is much larger, both geographically and socially, than a land-holding group. Once spatial and social identities are distinguished, it becomes possible to understand the illusiveness of the social entity. I argue that Wiradjuri land owners form a cultural category, to draw on Keesing's (1975, 80) distinction, rather than a social entity. To substantiate my argument, I look first at the relationship between language and territory, and then the relationship of persons to a language-territory or specific tracts within that territory. This leads me to a discussion of the importance of filiation rather than descent in the identification of land owners.

Misplaced models

The post-*Yorta Yorta* (2002) legal requirement to identify the 'normative Aboriginal society' (compare Glaskin 2003; Lavery 2003), from which laws and customs are derived and within which they are reproduced, is both a challenge and an opportunity (Burke 2010).⁴ It requires precision about one of the most confounding issues in the history of Australian anthropology: the composition of an Aboriginal tribe/group/society and whether there is a social entity to be described. It also raises issues about the extrapolation of inappropriate models from one area to another and even to the entire continent (see Steele 1984, for example)⁵ and the ethnographic homogenising and generalising in the absence of data. The latter is particularly common in south-eastern Australia, where few comprehensive ethnographic analyses have been conducted.

John Barnes (1962) in his article entitled 'African models' sought to disturb the status quo in which anthropologists had been uncritically applying models of social organisation developed in relation to Africa to Melanesia. He reminds us that our concepts and models must, no matter the context, have ethnographic integrity. Rumsey's (1993) discussion of the Jawoyn of Katherine Gorge in the Northern Territory most clearly demonstrates why and how introduced models have been persistent despite evidence to the contrary. In examining the relationship between 'tribal' affiliation and residence, Rumsey

(1993) argues that understandings of the social entities of Aboriginal Australia have been based on the European geo-political model of ‘society-as-nation’. The popularity of this model lies both in its attractive simplicity and also, as Rumsey points out (1993, 192), in its similarity to models of nation-states. He argues that the nation-state model assumes that the social entity is made up of People + Territory + Language + Culture and that none of the four commonly applied characteristics of a nation-state or society (a bounded territory within which members live, a distinctive shared language, a preference for endogamy and similarities of culture) can be used to identify ‘a society’ in the Australian Aboriginal context.

The common association of an Aboriginal language with ‘a people’, as in the European tradition which Rumsey (1993, 195) identifies and the correlation of ‘a language’ with ‘a social entity’ has stood in the way of recognising differences between and the interrelatedness of spatial and social identities. Rumsey (1993, 192ff.) notes that although a majority of Jawoyn residents might have identified with the territory within which they lived, they were not bound to live within it, and many who did live within it also identified with other territories (see also Hamilton 1982). He cites Milliken’s (1976) map showing where people who identified with a particular language actually lived, noting that it was impossible to distinguish bounded residential groups on the basis of ‘tribal’ affiliation and that affiliation with a language could not be used to identify non-overlapping social groupings. Rumsey (1993, 198) recognised that speaking a language — or conversely, not being able to speak it — was not relevant to one’s right to claim identification with the language, which he glosses as ‘language ownership’ (after Sutton 1978; Sutton and Palmer 1980). Rumsey (1993, 200) explains, ‘Jawoyn people are Jawoyn not because they speak Jawoyn but because they are linked to places to which the Jawoyn language is also linked’. Merlan (1981) had previously argued that language adheres to and defines a stretch of country: it is placed in that country by the action of creator spirits. Thus ownership of and identification with a language is ownership of and identification with territory: the right to identify with a language is the right to identify with the territory of that language and *vice versa* — this is a *spatial* identity.

My observations in the Wiradjuri and neighbouring language areas in the central Riverine area of south eastern Australia are similar to those of Merlan and Rumsey for the Jawoyn: Language + Territory does not constitute ‘a society’. The historical data and my own data collected over three decades of field work demonstrate an interconnected mappable, localised and bounded system of Territory + Language, on the one hand, and a system of People + Culture in which regionalised and unbounded social networks intersect

across a normative social/cultural world on the other hand. This leads to each person having a distinctive spatial and social identity, represented in the kinds of questioning which occurs in meeting newcomers that I describe in the introduction to this paper. Whilst spatial and social identity may be distinguished from each other, they are also inextricably intertwined and inseparable from the notion of 'being a Wiradjuri person'. A Wiradjuri person is not just 'an Aboriginal person', nor even 'a person of Wiradjuri descent.' He or she is a person embedded in spatial and social understandings, values and practices which are widely recognised by Wiradjuri and neighbours who are engaged in the normative practices characteristic of this region.

Territories and their boundaries

There is no doubt that languages serve as spatial identity referents throughout Australia. Wiradjuri people identified in the past and do so today with a 'language-territory' which is referred to by the name of the language which adheres to it: Wiradjuri, the people who say *wirad* for 'no'. They also identify more specifically with various localities within that language-territory (see below). Spatial identity refers to the belief that one's corporeal being emerges from a specific territory (and therefore its associated language) as a continuity of the creative work of the spirit world. This is what is meant when someone says, 'I'm Wiradjuri', 'I'm Wiradjuri from Cowra', 'This is my dirt', 'We go way back.' Reference to one's territory is a geo-centric *spatial-spiritual ontological referent*.

The language-territory is the highest order of Wiradjuri *spatial* organisation but it is not the highest order of *social* organisation, nor does it correspond to a polity (as described in Sutton 1998). 'Wiradjuri' is a vast language-territory of more than 200,000 square kilometres, in which differentiations are made between various localities: Condo Wiradjuri or Cowra Wiradjuri. 'Wiradjuri' refers to the ways in which people are organised *vis-à-vis* each other in terms of *place*. However, all persons who claim the same spatial identity are not a social entity. People who share a spatial identity can be expected to be participants in the wider normative society, but one's spatial identity does not require a person to live in that place or even within the normative social order within which that place is recognised. Living with a spouse in Darwin does not prevent an individual from claiming to be Wiradjuri and not all the people who live within a particular territory identify with that area. Incoming spouses as well as consanguineal kin retain their natal identity: they might be living in Griffith in Wiradjuri country, but they will continue to be known, for example, as 'from Wellington Wiradjuri'.

When I met Wiradjuri people for the first time in 1981, they would describe Wiradjuri as ‘the country of the three rivers’: the Macquarie, the Lachlan and the Murrumbidgee. Peterson (1976) in the mid-1970s identified the correlation between drainage divisions (combinations of drainage basins) and cultural areas (represented, but not accurately, in red on the Horton AIATSIS map, 1994). His drainage model has also been confirmed by a number of other anthropologists (Anderson 1983 and Wood 2010, for example).

Prior to Peterson’s account, Tindale (1974) had argued that an ecological model underlies Aboriginal territories but that it was hydrography that determined Riverine mapping. Hydrographic mapping is able to differentiate the catchments of the major rivers as well as every creek or tributary that feeds into them. These smaller catchments comprised distinct local territories (Wiradjuri *dharuwaay*, or *taurai*, *tauri*), named according to a characteristic of the local ecology (Donaldson 1984). A number of early commentators observed that a *dharuwaay* (variously referred to by them as a tribe, sub-tribe, local or family group) corresponded to the catchment of a substantial creek, a group of smaller creeks, a part of a larger tributary, or the upper creeks of a river. Key gathering places were located at the junction of the creeks and the main rivers. Each *dharuwaay* was associated with particular senior people — variously referred to in early studies as headmen, chiefs, kings and/or queens and who had the right to exclude people. Although they would rarely refuse access, it was imperative that their permission be sought to enter or pass through a *dharuwaay*. Not to do so represented a lack of acknowledgement of their authority and status and the denial of their rights over their territory. Those disregarding such fundamental etiquettes did so at their own risk as it would be assumed by the local group that they had dangerous intentions (Howitt 1904, 70):

No individual of any neighbouring family or tribe could hunt or walk over the land of another without permission from the head of the family group which owned it, and a stranger found trespassing on it might legally be put to death.

Howitt (1904) understood the residents of a *dharuwaay* as having an economic, social and jural right over the *dharuwaay* which allowed for unfettered hunting and gathering activities. In effect, he was applying the nation-state model to treat the *dharuwaay* as the territory of a distinctive social/residential ‘group’. Howitt (1904, 57) noted that the boundaries of *dharuwaay* were well known, and there are many other references to penalties and fights over ‘trespassing’ (see, for example, Meredith 1844, 100). The need for identifiable messengers (Tindale 1974, 17–20), who were painted appropriately and carried message sticks is also evidence of not only such boundaries but also the strict etiquettes

which were required when entering the *dharuwaay* of others. Nevertheless, Mathews (1898, 940) observed that, despite the fact that each tribe rigorously respected a boundary demarcation:

the ethnographic limits of the district occupied by a tribe, especially if its members be numerous, are not very clearly defined, but seem to overlap or melt into each other. There is generally a narrow strip of 'no man's land' between them, which is sometimes occupied by one people and sometimes by others.

Thus there appears to be a contradiction between the well defined boundaries about which Mathews comments and his observation of the strip of land on the ridge which falls on both sides to form distinct *dharuwaay*. However, Wiradjuri people did not intrude on the land of others. Whilst the basis of Wiradjuri relations continues to be sharing rather than exclusivity, sharing also requires a recognition of the rights of the owner to that which is being demanded (see Peterson 1993 on 'demand sharing'). It is only because people own land, material items, plant and animal life, and so on that sharing has value and objects can mediate relatedness (Macdonald 2000). Land ownership protocols were strictly observed by guests in the past, even though visiting was common and enjoyed. Ceremonies, harvests and weather extremes were occasions for trading, arranging marriages and catching up with kin. My genealogical and historical research shows that those who married beyond the region but whose spouses came to live with them in Wiradjuri areas, including non-local Wiradjuri, non-Wiradjuri Aboriginal people and non-Aboriginal people, often camped away from the main camps on government-allocated reserves, even when close local Wiradjuri kin may have lived within them. This does not imply a 'no man's land', but rather makes some sense of observers' claims to a 'shared' area, which, on the one hand, 'melted' into neighbouring territory (see also, for example, Cameron 1885, 347), and had strict boundaries on the other.

The geographic clue is water. Peterson's 1976 mapping principle applies throughout the Riverine, not only at the macro level of the drainage basins he noticed but also at the micro level of creek catchments. When water flows in a different direction from that of a creek in one's own territory, it joins another tributary and demarcates another's territory. Only some of the original *dharuwaay* maintained viable camps through the nineteenth century, particularly where their members had been incorporated into pastoral stations. Genealogies show consistent patterns of marriage between camps and along the main Wiradjuri rivers but less often beyond them (Macdonald 1987). The camps were moved off the stations under the pressure of closer settlement, which was designed to divide up the huge stations to make more land available

for increased settler migration. Towards the end of the nineteenth century, there is a discernable pattern of movement of Wiradjuri people from a number of creeks (their former *dharuwaay*) into a single centre, usually to a government reserve allocated for Aboriginal use or to a campsite on a river flat.

This process, whereby kin clustered in small village-like environments, usually on the outskirts of a country town, led to the constitution of the 'local Wiradjuri communities' of the twentieth century: those on the creeks and tributaries of the mid-Macquarie River gathered in Wellington, and those on the upper Lachlan River in Cowra, for example. In time, an individual's territory expanded from a single *dharuwaay* country to include sets of *dharuwaay*. Perhaps predictably, these new 'community' territories reflected the 'local divisions' of *dharuwaay* of which Mathews (1907) spoke, and were comprised of clusters of adjacent *dharuwaay* throughout which people were closely related. Thus *dharuwaay*, as owned local-territories, became grouped together at the end of the nineteenth century such that a 'local division' was formed which is now equivalent to the territory associated with a 'local Wiradjuri community'. These local territories collectively form Wiradjuri country today. While people identify with the broader signifier of 'Wiradjuri', their spatial identity is constituted at a more localised level. Although over the years there have been efforts to bring those who refer to themselves as Wiradjuri people together as a Wiradjuri polity (with some success in the 1980s, Macdonald 2004), rights in land have always been held at a local level and not at the level of the Wiradjuri language-territory.

The implication of my discussion thus far is that Territory = Language. As Merlan (1981) commented, language belonged to territory and not to 'a people'. For the Wiradjuri, language served as a spatial/territorial differentiator. Within the vast Wiradjuri-speaking area, each local *dharuwaay* and each of the three main river catchments could be distinguished by variants of the Wiradjuri language. Even a slight difference in vocabulary enabled others to distinguish a person's origins within the larger language territory. Some of these dialect distinctions between the Wiradjuri rivers are still evident: the goanna is known as *girrawaa* on the Lachlan and *googar* on the Bogan, for example. Territory and language are thus inextricably linked. Language does not migrate in the sense that, while it might be spoken elsewhere, it cannot be identified with any other territory. This applies at the level of language-territory, or a variant associated with a part of a territory (a local-territory).

While Wiradjuri hydrographic mapping suggests the defining characteristics of drainage basins, land tenure systems are also mediated by cultural practice. Knowledge of a catchment system can only provide guidelines and cannot be used to map land ownership definitively without additional ethnographic information. The historical ethnographic record, including myths, genealogies,

historical movements, and marriage patterns, overwhelmingly supports the use of a drainage model as an important starting point, but a *geo-cultural* model is required for mapping not just a geographic one. Sometimes catchments are split, others are combined in unusual ways, which must be identified and refined with relevant ethnography. Demographic fluctuations and ecological changes over prolonged periods of time would also have influenced any outcomes of hydrographic mapping.

The social in the Riverine

The ecology of the Riverine would have made distinctive demands on social relations. Despite having a massive river system, the region is subject to unreliable and often devastating weather patterns: droughts and floods meant a need for regional interdependence, although in good times the rivers provided a bounty. People on each *dharuwaay* were responsible for the health of their own creeks and thus responsible to others downstream. Demographic, climatic and social factors guaranteed the need and attractiveness of inter-territory relationships.

A primary mode of social organisation in the past was the system of totemic matrimoieties and ceremony which connected people across regions. Matritotemic relationships, based on classes of totem divided into two matrimoieties, were central to ritual and political life. Matrimoieties had been modified, somewhat awkwardly, by what was probably a relatively recent introduction of a four section system such that interrelationships remained matrimoiety-based in some areas but section-based in others. Marriage was still primarily arranged by totemic association. Totems were themselves divided into exogamous classes, with the range of classes found within both moieties and sections. A totemic choice could at times cut across the preference (rather than rule) for section or moiety exogamy. Marriage into the wrong totemic relationship was subject to a stronger prohibition than marriage into the 'wrong' section. Elkin (1933), in reviewing the literature on these apparent anomalies, concluded that the sections had been introduced to facilitate the regionalised ceremonial life rather than, as elsewhere, to regulate marriage. Section terms became an easy way of distinguishing people as classificatory kin and helped organise people when they came together.

Long before sections were introduced, the matrimoieties already ensured that social organisation was regionally based rather than localised. Vast kin/totemic networks linked people within and across *dharuwaay* and language-territories. No two individuals necessarily had the same spatially-distributed networks because people formed different kin-alliances through their lives. Their 'beats' were the familiar routes by which they travelled to visit kin, engage

in trade, ceremony or fighting. Language was not a barrier or deterrent to social interaction as people were multilingual within their own 'beats' (Beckett 1988, Macdonald 1986).

The belief system of the Riverine was also regional. The ancestral spirit creators included *Baiame* (whose name is slightly different in different language-territories), often referred to as the Sky God. *Baiame* had a family, usually two wives and a son, each of whom played different roles in creative acts and ceremonial engagement. Ceremonies brought together people from many different places. Attendance was not limited to those who identified with a language territory or who lived in specific *dharuwaay*. Rather, individuals were involved in regional ceremonial action because they were kin and Wiradjuri people joined with kin in other language-territories for ceremonies, often involving over a thousand people.

The distinction between social and local organisation is significant to understanding the regionalised nature of law, custom and authority across *dharuwaay* and including people from various language-territories. Just as the network of rivers and creeks connected territories across a huge terrain, so too did social and cultural practices which networked people across vast distances. At the same time, each person was identified in terms of specific *dharuwaay* and specific sites within them. The relationship between the local and the regional was as important in the river system as it was in the social system. Social identity developed out of a complex of interwoven genealogical, affinal, totemic and geographic relationships.

Thus it is not possible to place a social-geographic boundary around a normative social world of which Wiradjuri people were and are a part. This world stretches over many *dharuwaay* or clusters of *dharuwaay*, as well as over many language-territories such as Yorta Yorta, Gamilaraay, Ngyempaa, and so on. Residential groupings of Wiradjuri *dharuwaay* were not 'groups', defined as having a fixed membership (a distinction first made by Nadel in 1951). They often consisted in no predictable mix, of a core couple, at least one of whom, husband or wife, was a land-owner within that locality, and the kin of both. Others would come and go, often according to seasons or as part of their life cycle, including ceremonial obligations. Men might live in their father's, mother's or wife's country. Uxorilocal residence in a wife's or wife's parents' country was common, especially when children were being raised.

It does not appear that there were ever contiguous, distinct and bounded 'groups' or 'tribes' associated with either *dharuwaay*, a set of *dharuwaay* (a local division), or with Wiradjuri country as a whole. Those who lived together on a *dharuwaay* did not constitute a land-owning group as not all residents were owners of the *dharuwaay* or of neighbouring *dharuwaay*. Marriages were contracted along and across *dharuwaay* on the main rivers. Individuals were connected to

each other through the dyadic relations of kinship and marriage, and (in the past) the socially-connecting system of totemic allegiance, networked over wide areas, irrespective of spatial identities (see also, Keen 2004 on the Euahlayi of the Riverine north-west of Wiradjuri). Whalley (1987) similarly found no distinct, contiguous groups in south-east Queensland: people were connected across vast distances by ‘linguistic, marital, ceremonial, commercial, political and territorial links’ whose strength lessened with distance. The matrilineal moieties of the Riverine meant that people were linked into regionalised networks, in a belief system which was also regionalised rather than localised: that of the Sky Gods (Hiatt 1996).

These kinds of connections give rise to egocentric kin networks rather than groups. Wiradjuri social identity stemmed not from land or language but from kin-relatedness. Totemic relations linked specific people, objects, landforms, and their spirit creators. It was in engagement with kin, within and across *dharuwayy* and language-territories, that the laws and customs of life were learned. The acquisition of knowledge was neither limited to knowledge acquired in one’s own language-territory nor from fellow land-owners. Even though there is evidence that suggests a majority of marriages were contracted locally to enhance the local strength of matrilineal clans, it was neither possible nor desirable to spatially confine the networks to which kin relatedness gave rise.

Filiation, descent and apical ancestors

It remains for me to clarify how a spatial identity is acquired. Radcliffe-Brown’s (1952, 32–48) insistence that cognatic societies were rare and that unilineality in the form of patrilineality and the patrilocal band were ubiquitous was based on generalisation — not on sound ethnography (Shapiro 1990, 210). His influence on early Australian anthropology was considerable, leading to long-held assumptions that unilinear descent groups not only existed but that, if the ethnographer could not find them, there was something amiss with the ethnography (for example Peterson 1976, although see also Peterson 1983). The idea of the residential grouping (band) as composite was explicitly dismissed (Shapiro 1990, 211). By 1975, Keesing was arguing that anthropologists’ increasing recognition of the need for flexibility in hunter-gatherer societies was radically challenging unilinear descent models. In Australia in 1990, Shapiro pointed out that the patrilocal band model had taken no account of the ecological or demographic factors which required flexibility and manoeuvrability (compare Hamilton 1980; Myers 1986). While structures were observable, they were not rigid and had built-in mechanisms to achieve the negotiability required.

Anthropologists have insisted that patrilans must have existed in the Riverine because they are everywhere else (Peterson 1976; but see Keen 2004 who acknowledges their absence, as Jeremy Beckett has consistently done, pers. comm., 1997). Wood (2010) has argued for the widespread recognition of a patrilineal descent ideology in Australia, including in the south-east. However, there is no mention of patrilans or patri-estates throughout over a century of literature on the Riverine area. Even in the scant mentions of the choices which parents made about birthplaces, there is no indication that birth in a father's country might have been a preference. The part of a creek or river allocated to a young man on his initiation was not inherited but was a choice made by patrikin and matrikin together.

To argue that patrilans must have existed despite a lack of evidence is to underestimate the dynamics of the regionalised matrimoieties, the regionalised Sky God belief system, and the roles that men played in this system in relation to each other. A man was (ideally) in the same matriline as his father-in-law and father's father, both of whom, along with his mother's brother, provided options for augmenting power and prestige. Men often lived in their wives' country until children were raised, and sometimes throughout the rest of their lives. The available literature provides no information about the role of women in these politics. A marked pattern of uxorial residence is evident in my genealogies during the mid- to late nineteenth century, continuing through to the 1970s (and see Reay 1949). Astute marriage arrangements could keep men of a matrimoiety within adjacent *dharuwaay*, thus consolidating territorial and spiritual power in a local division (a cluster of *dharuwaay*). It did not consolidate a man's power to focus on patri- rather than matrikin. However, whilst matrimoieties were socially and ritually important, and established the networks by which the social and cultural values and practices — the normative social worlds — were transmitted, they were not vehicles for the transmission of rights to territory.

The choices one observes in post-sovereignty Wiradjuri history indicate bifiliation (a choice to claim one's primary social and/or spatial identity through either a father or mother) and that rights in Wiradjuri country stemmed from bilateral filiation and probably also from birthplace. Neither can identity claims be exercised without evidence of the basic Wiradjuri law that a person may only claim rights based on rights transmitted from his or her parent(s). Filial links are known across two generations (self to parent, parent to grandparent), allowing a person to assume that earlier ancestors' rights were also attained by filiation. A person cannot make a claim to filiation unless his or her parent is recognised by socially significant others in the wider Wiradjuri social world. There is no appeal to ancestors in affirming rights, only to parents and grandparents. The shallow genealogical memory common among Wiradjuri people in the 1980s

also supports the significance of filiation rather than any appeal, particularly by younger or newly identifying Wiradjuri, to descent from recently researched apical ancestors.⁶ Prior to the demands of native title connection, Wiradjuri ancestors beyond grandparents did not need to be named or gendered.

In the absence of unilinear clans, anthropologists have tended to draw on cognatic descent to explain the formation of land-owning groups. However, filiation, in contrast to unilinear descent, not only provides the foundation of being in spatial terms, but also promotes collaterality. Wiradjuri social organisation is focused on collateral relations rather than lineal ones, the extensive network of indirectly linked kin — uncles, aunts, cousins and so on, consanguineal and affinal. Once maintained and reproduced by the equivalence of sibling rule and the matritotemic system, these relationships remain important in Wiradjuri people's lives long after the reproduction of these classical formal structures becomes untenable.

The extensive networks, past and present, which can be observed, even when once shaped by matrilineal totemic inheritance, cannot be read as a descent system. It is filiation, not descent, which produces both country and kin. Descent and filiation are neither equivalent to nor a mirror image of each other, a distinction first made clear in anthropology by Fortes (1969). Filiation, or even serial filiation, does not translate into or equate with a system or ideology of descent because filiation is defined back in time, from a person to their parent(s) and grandparent(s).⁷ Descent is defined forward in time, assuming an ancestor, actual or mythic, from whom one is descended. Wiradjuri people's contemporary references to 'the ancestors' usually assume a range of ancestral kin and are not confined to one's own linear kin: they are 'the ancestors' rather than 'my ancestors.' These ancestors are ever-present, and should be respected. They are not projected into the past. Rather than evidence of an ideology of descent, they are evidence of a contemporaneous spirit world.

Sutton (1998) has referred to cognatic descent as evidence of changed or transformed social formations often in urban situations. Cognatic descent refers to all the descendants (cognatic kin) of an 'apical ancestor'. Depending upon the generations between a person and his or her ancestor, individuals can find themselves related to hundreds of people who share the same ancestor. While a significant percentage of such kin might be known for an ancestor two generations distant, the likelihood of knowing all or even any of them after six generations (the average genealogical depth required to reconstruct ancestry in Wiradjuri cases) is remote. While appeal to cognatic descent is a popular strategy in native title contexts, it is unhelpful, potentially misleading and, in the Wiradjuri case, ethnographically unsupportable. The compilation of a cognatic descent chart provides no information about the cultural history of choices that individuals on that chart have made in relation to (for instance)

country identified with father or mother, or marriages which open up children's choices. That is, not all descendants of a Wiradjuri apical ancestor become owners of the same area of land.

Activating one's birthright

The right to claim a spatial identity does not of itself confer other rights. The right to identify is a birth right that needs to be activated through social engagement (Macdonald 1996, 2009; see also Sutton 2003, 212) before it can translate into a right to make decisions, speak for country, or be regarded as having the status of 'elder'. The activation of social rights is a theme which permeates Wiradjuri social life: 'He's bin 'n Wagga for years and thinks he can come back here and stand over. Might come from here but he's got another thing coming.' Given the hardship of 'being Aboriginal' in previous decades, any 'coming out of the woodwork' including in making native title claims, may attract scorn. Wiradjuri people refer to the need to 'get your hands dirty' or to 'be around when it counts'. They might comment, 'Who's he? Haven't seen him in years', when referring to kin who are not actively involved in Wiradjuri life. The right to make claims of any kind including for kin or community support, or to participate and access knowledge depends upon 'doing the right thing', meeting obligations and actively participating in relevant social relationships.

Activated spatial identity is a central factor in organising and discriminating far-reaching collateral relationships, including between descendants of the same apical ancestor. Any individual has sixteen great great grandparents. To randomly select one as an apical ancestor in a native title claim makes little sense. The significant apical ancestors are those whose descendants can be seen to have identified spatially with the land with which the claimant now identifies. Filiation (or serial filiation) demonstrates this, by working from present to past through each generation to show when, why and how cultural choices were made.

Linked to the notion of activating one's rights is the role that residence plays in influencing choices and thus in identity formation. Wiradjuri people are adamant that residence alone is not sufficient to constitute spatial identity but, in practice, long-term residents may identify as Wiradjuri, especially if they are the parents of children with such rights. But when conflicts arise, it is common to hear such people denied a right to speak because 'you don't come from here'. Identity choices can also be exercised variously over a lifetime but most people make a commitment one way or another, which is influenced by residence. For those who have moved around, it may not be until they declare where they wish to be buried that their primary spatial 'home' is made clear. The efforts and costs involved in ensuring people can return to their own country

to be buried is evidence of such values. I have observed natal kin become upset when a spouse of a family member insists that their deceased partner should be buried in the country of marital residence rather than returned to that person's country of filial origin (Macdonald 2009).

Knowledge of one's rights is acquired directly and experientially. Wiradjuri people have consistently presented themselves to me in these terms: 'This is my country and it was my dad's country'; 'My gran knows the stories, she learnt them when she was a kid and she's passed them on to my mum and me'; 'They're only visitors, we go way back'; 'He doesn't come from here, he only married in'; 'She came here with her Mum when she was 13, the Welfare sent them'; 'Her kids belong 'cos of their father, but not her'; 'We might have the same ancestor but he's never been from here, his mob's at Wellington' (Macdonald 1986, 1997). These statements assert the need for a direct filial link with place. An individual whose parents do not identify with a particular locality but whose grandparents are known to have done so may be accepted by a native title group if he/she shows a willingness to incorporate into and adopt the norms of a local group, although there is often resentment expressed about people who claim ancestry but who lack a social history of spatial connection. They may have a Wiradjuri apical ancestor but they do not have 'a mob'. They are not seen as members of the normative society and are thus not people with a right to a spatial identity.

To say, 'I am Wiradjuri' is an affirmation of a realised being. To be recognised as 'Cowra Wiradjuri' is to be recognised as someone with rights based on filiation, who together with his or her parents has activated the potential of birthright choices in a demonstrable way. Wiradjuri people recognise that some people have been constrained by, for instance, government practices of removal, and are willing to re-incorporate those whose filial links are known. However, they do not, in my experience, accept those who have more recently been made aware of a Wiradjuri ancestor without such filial links. Although they are generally gracious about such an individual's desire to know more about his or her ancestry, this does not translate into social/spatial recognition, at least in the immediate future. Rights acquired by filiation refer to the experience of being, of knowing and sharing 'Koori way' (Macdonald 1986). This is not a matter of descent, genetics or ideology. Filiation focuses on the immediacy and intimacy of one's social and spatial experience of country and kin.

There is evidence that Riverine people in the past could identify by right with the locality of their birth (see Langloh-Parker 1905) but this appears to have lost its meaning once parents could no longer choose where to have their child, and women were taken to hospitals to give birth. Jeremy Beckett (pers. comm, 2011) is of the opinion that, in the far west of New South Wales, birth may have been sufficiently important that there was no inter-generational

structure to groups identifying with particular land. If place of birth did confer rights equivalent to those of filiation, such rights were more than likely not transferable over generations. Filiation is a pattern of such consistency that it suggests that, if birth played any part in land ownership, this related only to the parents' choice of place of birth inasmuch as it strengthened particular filial links to country.

Those who have been fostered or adopted and not raised by their parents do not lose filially-derived spatial identity but must still activate their birthright. Over the past three decades I know of no adoption (and these are rare, in contrast to fostering) which has conferred a spatial identity on a Wiradjuri person, even though it does confer a social identity. The absence, indeed the denial, of a tradition of adoption is linked to another commonly heard term, 'blood': 'it's in my blood'. One is connected not only to parents and grandparents by blood, but to the land of one's spatial identity. This is not blood in a biological sense, nor a reference to descent ideology. 'Blood' is a Wiradjuri reference to their life force which the living, the dead and the country share. This life-blood is something adoptees do not share — they retain that of their filial origins.

Concluding thoughts

Wiradjuri identity is comprised of both social and spatial elements. While these can be clearly distinguished as kin and country, they are not equivalent and do not suggest the problematic modelling of an oppositional duality. Rather the complementarities of country and kin, spatial and social identity are better described in terms of a reciprocal balance. Wiradjuri identity is dynamic: it requires that people engage and that they are responsive to others in the world of which these moral principles are a part. This explains why the activating of one's rights is essential to being a part of a Wiradjuri moral order (a normative society).

The identification of clear spatial boundaries, based on hydrography, does not mean a model which is rigid, precluding spatial and/or social change. Land ownership is subject to the same degree of structural classification, negotiability and historicising as everything else in the Wiradjuri world. Social organisation, and thus social identity, was and is networked and regional, not confined by or limited to a language territory or local territory, but rather based on classifiers, differentiated by kin and country such that everyone knows their relationship to everyone else. Land-ownership was (and is) precise, based on mappable boundaries between language-territories and their component local-territories. Nonetheless, in identifying boundaries which delineate rights it is equally important not to impose a social barrier. Boundaries are thresholds to cross (Williams 1982).

There is no cohesive bounded society: myriad interlinking networks of people constitute the normative social world of a Wiradjuri person, a world in which people recognise each other, share understandings, know what transgresses norms and what achieves respect and thus authority. These values and beliefs have been significantly undermined over the past four decades in particular, but they are also known in their breach. The spatial and social boundaries of the normative society, of which each tract of land and each land-owning group is a part, is identifiable by the networks of kin who, in affirming their social relatedness, also distinguish each other in spatial terms. These kin-constituted social networks are essential to the recognition of land-owners — without them there is no spatial identity to be recognised. This is a relationship of complementary balance. All claims to being a land-owner should be verifiable by neighbouring land-owners: they constitute an important part of the wider normative society in which the laws about being and becoming a land-owner are reproduced and verified. In the Wiradjuri area, the strong regional connectedness has never been severed: it is evident in genealogies as well as in oral histories.

I have argued that cognatic descent is not a useful approach to identifying land owners. This does not mean that the identification of an apical ancestor is not a useful exercise but rather that it should be understood in the native title context. Finding an apical ancestor is a legal tool related to proving connection to sovereignty and a research technique to demonstrate the validity of claims. The compilation of a land-owner's genealogy will, through serial filiation, produce an apical ancestor — neither as evidence of the cultural significance of ancestors, nor of cognatic descent — but more significantly as evidence that the Wiradjuri law of filiation has been maintained in each generation back as far as records allow. It is also evidence that what 'grassroots' Wiradjuri people say about themselves is invariably true: they are linked by filiation, generation after generation, to 'that piece of dirt' that is 'in their blood'.

The law is a living law, alive in its continual recognition and affirmation by others who are part of its normative social world. It is also alive in its refusal to recognise claims by people who have not been a part of the normative society of which that land-owning group is a part. A Wiradjuri person's mob is constituted in kin terms today in much the same ways as it always has been, reshaped by technologies of travel and governance. It is one's 'mob' (not 'clan' or 'local group') that constitutes one's social (people + culture) identity and which intersects with but is not equivalent to one's spatial (territory + language) identity. Once we let go of the European nation-state geopolitical model that assumes a people = a territory = a language = a culture, our ethnography can speak and make room for the ongoing distinctiveness and complementarity of Wiradjuri spatial and social identities.

NOTES

1. 'Grassroots' is a term Wiradjuri people often use to describe those who have grown up within Wiradjuri (or other Aboriginal) communities, alongside Wiradjuri and other Aboriginal kin. It is used to contrast those who have not grown up in the Wiradjuri normative society, and who therefore are not seen as knowing the laws and etiquettes associated with 'being Wiradjuri'. A more recent equivalent expression describes such a person as someone who can 'walk the walk and talk the talk', and who is, in other words, 'an insider'.
2. The term 'Koori' means 'person' or 'one of us' to the Wiradjuri. It originated on the north coast of New South Wales but is now widely used by Aboriginal people within central and southern New South Wales and Victoria to refer to themselves or to another Aboriginal person. The Wiradjuri language equivalent, *maayn*, was used until about 50 years ago. It is now rarely heard as the term 'Koori' has gained widespread currency.
3. The expression, 'my mob' is commonly used by Wiradjuri people to refer to those they recognise as kin: either close kin in an individual's local community, or to a much more widely distributed constellation of kin. It is interpreted in context.
4. Distinguishing a named category of land-owners from the wider social body as might occur in native title is not new in anthropological analysis (see, for example, Elkin 1938; Myers 1986).
5. Steele, an historian of south-east Queensland, describes a 'tribe' as composed of a group of discrete clans and then extrapolates this model to the whole of Australia:

In the Australian context, the word 'tribe' is used to denote a group of clans who spoke a common language or dialect, and considered themselves to be part of a distinct cultural or ceremonial group, but who did not acknowledge a common leader and did not necessarily fight on the same side in battle...As elsewhere in Australia, the basic unit of Aboriginal society was the clan or horde of perhaps 70 people, owning their homeland and governing themselves. (1984, xv-xvii)

The Wikipedia entry, *Indigenous Peoples of Australia*, provides another example of such extrapolating and homogenising.

6. An apical ancestor refers to the oldest known ancestor that a person can be linked to genealogically.
7. Rumsey (1993, 199–201), whose model I referred to above, also argues that membership of a Jawoyn land-claiming group is based on filial 'links through one or both parents'.

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The proof of native title connection in absentia

Sally Babidge

Introduction

Members of native title claim groups in south-west Queensland are spread throughout urban areas, rural towns and ex-government settlements, and only a minority of claimants live on or in the region of their traditional country. The Queensland history of extensive physical removal of people from their country creates difficulties for anthropologists in compiling evidence of Aboriginal peoples' continuity of connection to country under the requirements of the *Native Title Act 1993 (Cth)* (NTA). Despite prolonged absences of claimants, it is possible to make the case for a native title claim group connection to ancestral lands in situations where it can be shown that traditional practices have continued in absentia (see, for example, Rigsby 1995; Smith 2000). However, does this apply where few if any in a claimant group can prove an awareness of physical, religious or cultural features of the land under claim? How do anthropologists understand the Aboriginal claimant group and their attachment to 'country' in this register, and what might be expected from a legal acknowledgement of native title under these conditions?

In this paper, I examine a situation where Aboriginal people have had little physical presence 'on country' or direct knowledge of it, yet remain defined in terms of that country. Where I have encountered claims of this kind, in far south-west Queensland,¹ people articulated their definition of connection to country in terms of 'blood' and 'bloodline'. Claims to country for native title purposes were centred on the ideology of descent from an ancestor and consequent membership of a 'family group' associated with the claimed traditional country. Due to the fact that descent was figured by them in terms of 'blood' links, a person may have multiple 'lines' of potential identification.

Apical ancestors for these claimants are those who can be shown to have belonged at sovereignty to the area of country claimed. In far south-west

Queensland claims, some ‘family groups’ identify more than one apical ancestor; but in all cases this is a married couple or set of siblings. While sometimes people refer to their ‘blood’ link to these apical ancestors themselves, others assert their claim to belong to the group primarily in terms of a grandparent, and in rare cases a great-grandparent who they know was ‘from [the claimed] country’. Research in State archives uncovers links between that known ancestor and a previously unknown parent or grandparent of the known ancestor. The ideology of descent from an ancestor as primarily belonging to country is thus an assertion of personal knowledge and oral history regarding one’s ‘blood’, combined with the ‘blood’ links discovered in archives.

Kinship practice in this context problematises the notion of descent as the simple ‘rule’ of claim group and ‘family group’ membership. I have found that the processes by which people reckon the ‘blood’ line that they ‘follow’ — the processes of their identification with ancestors — including the practice of kinship more broadly over time, as well as politicking among claimants, demonstrates continuities as well as changes in group membership and associated identification with ‘country’.

I draw on the notion of ‘historical ontology’ (Hacking 2002) to examine the evidence of Aboriginal social practices relevant to ‘country’ and ‘connection’ in the native title context. Stoler (2009, 4), in her ethnographic work on colonial subjectivity based on a study of colonial Dutch–Indonesian archives, explained Hacking’s (2002) notion of ‘historical ontology’ as: ‘[t]he *ascribed* being or essence of things, the categories of things that are thought to exist or can exist in any specific domain, and the specific attributes assigned to them’. Historical ontology points us to the question (drawn from Foucault) of the constitution of the self, but looks to history rather than essentialised origins to ‘disclose new possibilities for human choice and action’ (Hacking 2002, 4). This critical approach to ontology examines the range of possible ways to *be*, accounting for the historical realities of people’s lives and assists in understanding the constitution of Aboriginal groups and selves over time. The ethnographic and historical material I outline demonstrates that Aboriginal family groups are complex social fields, with membership based on not only descent from ancestors but also on the outcomes of native title politicking and kinship practice more broadly, for example marriage choices. An understanding of historical ontology strengthens the idea that Aboriginal social identity is historically constituted.

I use the conceptual lens of historical ontology to examine the interplay of an ideology of descent with interpersonal and intergroup politicking which has become central to assertions of belonging to country. Social practices among members of ‘family groups’ (especially those relating to authority, see further below) and co-recognition of ‘right people for country’ by claimants and those

from the broader region are examples of the links between kinship ideas and connection to country. There may be limited detailed knowledge of the land itself but there is, however contested, knowledge of who belongs to country. I raise some questions as to whether descent ideology and kinship practice relating to country are sufficient evidence of connection as required by the NTA.

'Right people for country'

An oft-stated imperative in native title contexts is that there are 'right people for country': that only those with a legitimate claim to country should be recognised and receive any native title benefits. During my field research I have observed that the manner in which Aboriginal people insist on who belongs to a claim group (and according to assertion: always has, and always will) indicates that they use a notion of cognatic descent as the 'system' by which their group can be understood. It is comprised of those who can show, through any 'blood' connection, a link to one of the group's recognised apical ancestors. In far south-west Queensland (and in other parts of this State), the right people for country are those who identify and are acknowledged by others as having a 'blood' connection: for native title purposes, they identify with a named group, sometimes referred to by claimants as a 'tribe', which is made up of various named 'family groups'.

Family groups are described as consisting of all those people linked to one of the identified apical ancestors by 'blood', and who activate the potential this gives them to belong to the group. Cognatic descent is therefore part of the problematic that I examine here because a person's potential to link her or himself to the ancestor may be contested. Anthropologists have argued about whether cognatic descent is properly descent and whether non-unilineal kinship groups should be explained in terms of filiation (see Scheffler 1966; Sutton 2003, 189–94). I argue that these family groups *are* cognatic descent groups: they are corporate groups based on a notion of a named family (e.g., 'the Greens') whose members share descent from a named ancestor (e.g., 'old Nelly'). The group is sociocentric in that it will exist as long as offspring exist. Membership is activated by virtue of the 'blood line' of members to the named ancestor. Members of family groups base their claim to country on the fact that they are connected to an ancestor and by that fact to the country associated with that ancestor. However, the community of native title claimants will not necessarily consist of all those who can potentially align themselves with such a family group and claim group identity. In contrast to the restricted notion of society often demanded in the native title process, they may be part of a

broader society constituted through traditions arising from indigenous law and custom.²

Most Aboriginal individuals with whom I have spoken see themselves as having the potential to belong to a number of families and named native title groups, sometimes using the term ‘tribes’ as a function of the multiple potential of cognatic descent. This is amplified by a history of living in close settlement and intermarriage among diverse cultural groups. People who choose to be involved in the native title process thus have a choice of affiliation to a native title claim group. The society of native title claimants represents only part of the broader Aboriginal social network in which people participate.

For the purposes of native title claims that are rendered in this way, the society can be seen to consist of ‘family groups’ — and the potential of belonging to one of them is based on the ability of an individual to demonstrate his or her descent from an ancestor who can be shown to belong to that claimed tract of country.³ A number of family groups together make up the larger group of identified native title claimants. This is neither a neat nor exclusive formulation since, as noted, the potential of multiple affiliation to family groups means that people refer to being able to go, for example, their father’s way or their mother’s way. Nonetheless, the notion that certain named family groups *are* or *belong to* [x] or [y] named group or tribe is a shared one. For example, while undertaking research for one claim in far south-west Queensland, almost all of those I consulted told me to talk to the Greens since ‘*everyone knows* the Greens are [x named tribal group]’.⁴ The ideology that governs the notion of right people for right country is that in claiming connection to people and country individuals must emphasise their connection to one group only and in doing so adhere to ‘principles’ of blood and descent and not reckon connection in diverse, multiple and contemporary ways (such as recent historical association).

Aboriginal people of south-west Queensland as historical subjects

Removals of people from far south-west Queensland in the first part of the twentieth century were extensive and government measures to keep people on the missions and settlements prevented many Aboriginal traditional owners from returning to their country. The subjectivity of people who were removed from country, and often also from many of their kin, cannot be understood without an appreciation of the entanglement of individuals and families with the productive forces of the state (see Babidge 2010, Chapter 3). The most intensive era of assimilation policy under the Queensland Government was in the 1940s and 1950s. The parental generation of the current south-west Queensland elders (those who are now in their 60s) were mature adults at

that time. Traditional knowledge of language, ceremony and other details of cultural systems that are sought as evidence for proof of connection for native title in Queensland⁵ is now scarce because people of that generation were prevented from transferring knowledge to their children by authorities who controlled their lives within missions and settlements. Neither were social conditions outside the settlements favourable to the flourishing of cultural practice relevant to land ownership. Furthermore, some Aboriginal people desired to integrate into capitalist society and did not seek to retain or transfer cultural practice that would identify them, to government bureaucrats or to the wider society, with their Aboriginal background.

Extensive removal of groups of people from ancestral lands had momentous impact in terms of the loss of knowledge of the kind demanded by native title, particularly the need to demonstrate connection to country. In the early station years (1860s–1890s), people were hunted away from country as pastoral stations developed (especially from water sources reserved for the use of sheep and cattle).⁶ Throughout south-west Queensland significant numbers of people were walked or trucked away, to be kept in the missions of Durundur (near Woodford), Deebing Creek (near Ipswich), and Taroom (approximately 300 km north-east of Roma), and later transferred to settlements such as Barambah (later Cherbourg), Woorabinda (inland from Rockhampton), and Palm Island (off the coast of Townsville).

Removals occurred in three main waves. About 120 people had been removed from just one part of the south-west region by 1901, and more were removed in small groups over the following few years (Meston 1901).⁷ There is scattered evidence in government records that throughout the early part of the twentieth century men and women left the government settlements when they could and returned to their country to work or live on stations into their old age.⁸ However, in the late 1930s, there were further removals when two cattle-truck loads of people (approximately 40) were taken from the south-west to Cherbourg (McKellar and Blake 1984, 59–61).

In 1941, the Protector of Aborigines in Quilpie in south-west Queensland reported that ‘all aboriginals’ were in ‘regular employment’ in that district and that, ‘[t]here are no camps, supervised or otherwise in this district... There are no nomadic full bloods or half castes here’ (Clerk of Petty Sessions Quilpie 1939–1941). More removals of people from camps on pastoral stations and around towns occurred in the south-west of Queensland in the early 1950s. Many of these people were taken to Woorabinda settlement inland from Rockhampton (Hughes 1982). By the 1950s, Queensland Government policy and practice meant that all the larger camps on pastoral stations had been broken up, thereby removing the everyday social context of transmission of specific country-based knowledge between the generations and genders. Those

who were able to stay in the south-west region had lives that centred on their labour contribution to the cattle station economy. Women were confined to working in the station house. Oral and documentary evidence reveals that the time men in particular spent on stations — working with other men, both younger and older — gave them opportunities to take part in regional ceremonies up to the late 1920s (see Beckett 1957–58, 98), or while mustering in the 1950s and 60s and thus to monitor important places in country, taking younger men with them.⁹

However, this was not always possible or desirable for some working men, and some worked on stations a long way from their traditional country. In recent years, I have been told by a number of people that they ‘weren’t told’ about Aboriginal cultural traditions by their older relatives, and that ‘we wasn’t allowed to ask questions of them old people’.¹⁰ A reduction in the available participants, time and spaces, diminished the possibilities for transmission of Aboriginal ceremonial and other cultural practice. Small numbers of men and women did continue to live in towns in far south-west Queensland, thereby benefiting from the proximity to each other and relative proximity to traditional country. However, the native title requirement to demonstrate connection to traditional country raises significant problems for Aboriginal people from far south-west Queensland who have spent their lives a considerable distance from the region of the lands they now claim — in coastal towns, on the fringes of those towns, or on Government settlements for the past three generations as a result of government policies and factors outlined here.

Connection to country

In popular Aboriginal discourse, ‘country’ is the word that most captures the complexity of people/land relationships and covers concepts such as ‘home’, ‘heart’, ‘camp’, ‘hearth’, ‘everlasting home’, ‘life source’ and ‘spirit centre’ (Stanner 1979, 230). It is also understood in the broader anthropological literature on Aboriginal Australia in terms of ceremonial and ritual knowledge, and the concept of country has been shown to have political, economic and religious or spiritual dimensions. Stanner’s (1965) response to Hiatt’s argument about local organisation among Aboriginal groups in Arnhem Land having little relation to descent groups was an attempt to bridge the understanding of Aboriginal people’s spiritual custodianship of land and their daily subsistence use of country. However, landownership systems in pre-sovereignty far south west Queensland are not known in detail. Generations of non-access to large tracts of territory and associated knowledge loss are compounded by a lack of ethnographic material. Changes in Aboriginal territoriality were wrought by the activity of pastoral stations throughout the north of Australia (see Sutton

2008) and, as outlined above, far south-west Queensland exemplifies the extreme of such changes.

Instead of attempting a reconstruction of the pre-sovereignty system of land ownership on the basis of snippets of turn of the century accounts — which seems to have become a requirement for proof that native title exists, I argue that an examination of the concept of country in contemporary terms is needed. This entails an analysis of country as multi-dimensional: as the basis of peoples' economic relationships with land; as a gloss for the spiritual and religious basis of land ownership; and as providing the logic for an historical ontology of belonging. I do not have the space to undertake this task comprehensively here. Rather, I outline my proposition for the significance of this approach.

The economic and everyday dimensions of people's relations to country have been shown to be an important aspect of ownership. Berndt (1982), for example, insisted that the notion of country was closely linked to the nature of subsistence practice. The idea of 'my country' he wrote, implies 'the wider constellation of belonging', including rights in and to the land and its resources (Berndt 1982, 11). Berndt was interested in the concept of country in terms of the debate regarding principles of descent, the spiritual associations of clans with their estates, and the subsistence relations of a band to its range. He wrote that the 'concept of "country" [could be considered in] an expanded sense, as a broader facet of identification in socio-personal terms' because of the intimacy of person-person and person-land engagement on economic and spiritual terms (Berndt 1982, 8–9). Berndt's characterisation of country particularly brings in the realm of 'social interaction'; the inherent connection between social groups and country arising from subsistence and experience. Berndt's work, as that of Stanner (1965), made clear that people were related to tracts of land in a variety of ways, as according to differing values — spiritual, social and economic.

A phenomenological perspective on the notion of country makes a conceptual bridge between the economic and the spiritual relations to land (Peterson 2008). In simple terms, to put one's footstep on the land, to eat from it, connects individuals and groups to cosmological forces of the land, and produces narratives of the links between people and cosmological forces, as argued, for example by Povinelli (1993, 34) and Tamisari (1998). Weiner (2007, 157) has commented in a similar vein: 'A materialist anthropology of a previous era would not hesitate to assert that the religious dimension of this connection was dependent upon the actional and material dimension'. However, if we follow these theoretical positions to their logical conclusions, the spiritual dimension of connection must be significantly diminished where there is weakened or non-existent contact with traditional country. Such arguments,

focussed on the spiritual and the economic, would seem to deprive those without the experiential basis of physical presence in traditional country of any link with it. I argue that the substance of social action relevant to connection to country may happen *in another place*.

Perhaps a more useful analytic for the present context is Myers' (1986) blend of the existential and practical from his study of Pintupi in Central Australia. Myers encouraged moving away from an understanding of person/land relations in terms of the classic spiritual/economic division and toward an analysis of the dialectic between residential and territorial units, focussing on negotiation and on learning processes (1986, 73). In particular, Myers' work is central to an argument that posits knowledge of traditional country as based in experience *as well as* being 'disciplined' through learning language and the daily practice of social relationships that have bearing on custodial relations to specific tracts of land. Thus understanding country relationships (connection) principally in terms of residence or physical presence on that country precludes the possibility that social practice (elsewhere, beyond traditional country) might inculcate the ideology of traditional country and an associated spiritual attachment in individuals and particular groups of individuals. In addition, rights that pertain to traditional country, but are exercised outside it, are those that include the right to speak for it, act in relation to it, and the right to return. Myers' model allows for dimensions of ownership in physical absentia, while acknowledging that it is inevitable that elements of traditional knowledge must change (see also Myers 2000).

Proving native title in absentia

Aboriginal cultural knowledge of country does not 'disappear' in circumstances of removal from country. Recent revelations in the papers of Caroline Tennant-Kelly, especially the field notes, photographs and diaries from her fieldwork in Cherbourg in 1934 (Tennant-Kelly 1909–1987), demonstrate that cultural traditions from south-west Queensland were practised in the settlement at that time. The Tennant-Kelly records are starting to be used by researchers and Cherbourg residents to talk about social practices that continue 'in absentia' to the present. As noted, native title has been demonstrated and recognised by the Court in native title cases in the absence of physical presence on country (for example, see Strelein 2009, 93).¹¹ Anthropological studies of non-resident associations to country in Queensland have discussed these matters in terms of the 'diaspora' concept (Rigsby 1995; Smith 2000). Smith (2000) recounts contention among 'local', 'diaspora' and 'stranger' people from central Cape York Peninsula, especially regarding people's claims to country and group membership. The 'diaspora' refers to those who 'maintain a sense of..

connection and knowledge of forebears and country' that substantiates their identity as belonging to those forebears and country, despite being 'at a physical remove from [that] area or region'. 'Stranger people' may have a connection through descent but are unknown to those who remain in the region ('locals') of which the claim is a part (Smith 2000, 3). 'Diaspora people' and 'strangers' are incorporated in a native title claimant group differentially according to the extent to which they have maintained personal and familial connections, and in terms of their etiquette of approach when returning (Smith 2000, 4, 7). In my experience among those from far south-west Queensland, where the 'diaspora' constitutes the majority of claim group members, knowledge of family connections and demonstration of 'respect' for long standing group members distinguishes those who are accepted or challenged when making efforts to join (or re-join) a claim group.¹²

Recent work on rural Aboriginal families and societies has emphasised the impacts of native title processes on indigenous self/group conceptions and on the reckoning of descent (e.g. Correy 2006). Rather than being recent phenomena, the impact of the state (of which native title processes are only one) on Aboriginal sociality are historically embedded in Aboriginal notions of self and social relations.¹³ An example is that many of those who identify with an ancestor and claim country in far south-west Queensland also speak about belonging to and being 'from' (the town of) Toowoomba, (the Brisbane suburb of) Inala, Cherbourg or Woorabinda. Identity is always contextual, and these particular identities have been produced by the history of removal and the pressures of government policies outlined above.

In the native title era, assertions about descent being the *essence* of connection to country, elide other forms of identity and belonging that have developed throughout the twentieth century. The state has an impact on contemporary notions of Aboriginal kinship and sociality. Discourses of recognition and authenticity — of blood, descent and genealogy — are apparent in claimants' statements of ownership and belonging to country and in contests among claimants over proving descent from ancestors. Such arguments, made by claimants about the essence of a person's identity, are normative statements that assert the rule. As normative statements they alert us to the need for a more nuanced study of social practice and historical change (see Rigsby 2001). The broader region in which a claim area is located must be considered in discerning social and cultural systems and determining the nature of the claim group and its membership.

Like many other parts of Australia, groups in far south-west Queensland, have referred to Tindale's (1974) 'tribal' names and used other published sources (for example, Horton 1994, and McKellar and Blake 1984) to assist

in the identification of landed groups and country for native title purposes. However, these named groups have not been at all static as identifiers of ‘tribes’ (see Dauth, this volume). For example, one group name, which is now used to identify a specific native title claim group, seems to have been used in a government settlement to refer more broadly to all those who had been taken from the south-west region (or whose forebears had been removed from there). A large proportion of marriages were organised or occurred among people who broadly identified with that regional identifier and some contemporary claimants were told by their older relatives to use kin terms to address all people from the region. Earlier incarnations of a native title claim lodged in this name (mid 1990s) reflected the regionalised understanding of the identifier. The membership of the claim group was extensive and the area of country claimed covered much of the far south-west. A number of those I have spoken to about this grouping have told me they ‘always thought we was [that group], until we did some research’ and found records that identified them as descended from ancestors with a different language group or ‘tribe’ name.

We might analyse these matters in terms of transformations in social and local identifiers that occurred in response to being incarcerated in settlements and also in terms of uneven acquisition of knowledge about cultural or territorial group particularities over generations. However, both the earlier regional form of identity and the later ‘tribal’ identity potentially reflect forms of social organisation from pre-sovereignty times. A range of matters of social and cultural importance were shared across this region.¹⁴ Furthermore, the individuals I was told to speak to during my research were those broadly recognised by others as knowledgeable in regard to far south-west Queensland people and places. Across these individuals I found consistent identification of particular ‘family groups’ with a named area of country, and at the same time, particular individuals within those family groups were identified as having the potential to count their belonging to a number of different claim groups in the same region, according to their ancestry.

It may be profitable for Aboriginal people, their lawyers and anthropologists alike to consider regional ties in the process of proving connection to country in *absentia*. Such an approach might take into account the shifts, multiple contextual elements of identity and possible systems of country ownership that are more broadly and regionally shared. Certainly, in terms of demonstrating the continuous nature of social practices in relation to connection to country where many members of the claim group are absent and there are few ethnographic studies of any detail, regional affiliations appear to be strong indicators of connection for native title purposes.

The practice of contemporary family groups as demonstrating belonging

Where people have lived for some generations away from lands that make up their claimed traditional country, Aboriginal tradition that carries the weightiest evidence for connection to country, is the kinship practice and politicking concerning reckoning membership of the claim group. The historical ontology of country for those from far south-west Queensland can also be understood in terms of the central role played by the ideology of descent from one or two known ancestors among people who see themselves as a 'family group', and who are thus (along with other family groups) associated with the named group under whose moniker a claim is made. Where claimants' principal normative statements about their claim group identity are about the importance of descent — as discussed above with regard to the insistence on 'bloodlines' — anthropologists need to examine these statements in relation to social practice.

The patrilineal clan is often argued to be the underlying formation of Australian Aboriginal 'classical' landholding units (Morphy 1997; Sutton 2003, 156; Williams 1986; but see Keen 2000). In urban and rural Aboriginal society some scholars have found parallels in the 'family' (Bell 1998, 212, 245 n.6; Berndt, Berndt and Stanton 1993). The 'integration of politics, landed identity and kinship' in family groups among rural and urban Aboriginal people has led Sutton to consider these groups in terms of their parallels with pre-sovereignty or 'classical' land tenure systems (2003, 212–13). He writes that 'families' '... form powerful reference points in determining how their living descendants establish rights and interests in traditional forms of cultural property, including country [and are] key stepping stones to tribal affiliation and the customary rights and duties of care that that affiliation entails' (Sutton 2003, 210–11). Like clans, Sutton's 'families of polity' are corporate. However, unlike the notion of patrilineal clans, members of these kinds of 'families' know about and assert their potential rights to more than one possible line of descent from ancestors and thus more than one possible country and family group affiliation.¹⁵

'Family' is far more complex than unilinear descent. Like Hiatt's (1965, 135) insistence on the political import of a 'community of people who regularly lived together' in everyday economic and social life among those I have worked with in rural Queensland, family, as those who regularly lived together, includes people who have affinal ties and ties based on shared history *and* those who do not live together but are in regular close contact. Such lateral (as differentiated from lineal) relations are important in socio-political and economic relations and are a key to understanding broader moral authority in native title politicking. Indeed, the social history of affinal ties and the extent of knowledge people have of their lateral kinship ties, influences *how* people reckon their descent to one or another family group, which 'side' (mother's or father's) they follow, or which ancestor they emphasise for the purposes of native title claims. This

means a focus on the 'local' in social organisation, where in many cases what is local — where people live, eat, and sleep — is different from their country, but is politically and experientially formative of their choice of family group.

The potential to uncover new members of family groups, and for a person to shift from one to another family group as a result of new oral historical, genealogical, and archival records coming to light, means that the active members of such groups can change over time. In my experience, especially if individuals are not already aligned with another claimant group, new members may be accepted as claimants.¹⁶ Sutton (2003, 212) argues that 'unactivated membership hinders potential members from exercising group rights other than residual ones of identification'. However, there are gradations in being able to exercise these rights — from simple identification to full exercise of representative rights (i.e., becoming an applicant on the group's native title claim and speaking for country). For example, a person well known to other claimants in one south-west Queensland claim, recently discovered genealogical ties to an ancestor of another family group and has attempted to be recognised as a member of that claim, with some success. However, individuals are sometimes referred to as 'claim jumpers': people who affiliate themselves with more than one claim at a time on the basis that they are emphasising, for example, *both* mother's and father's side.¹⁷ The moral pressure that is exerted on such individuals, from broad-reaching lateral kinship connections is, however, a check on multiple claims by one person to more than one of their possible 'blood' links, and they are limited in their ability to make multiple claims by such pressure. As discussed above, widespread lateral connections among Aboriginal families throughout Queensland can be traced in part to the history of removal from country, internment and more recent mobility, but are paired with the social ties continued among those from the south-west region who still reside in the ex-settlements.

I have argued that blood ties are highly significant in Aboriginal corporate aggregation for the purposes of claiming land but this also means they are key points of conflict. The concept of descent and the associated cognatic descent groups, discussed above, have ideological force within the concept of connection to country. However, for native title purposes, anthropologists would do well to divert our ethnographic attention toward the culturally acceptable negotiations around reckoning belonging to family groups. In this context, society can be effectively considered as including all those who defer to the norms of reckoning descent to a claimant group, and who are active in exerting moral pressure on those to whom they are so related as the principal basis of ownership of a particular tract of land.

For an anthropologist in the ethnographic encounters of native title, the common occurrence of claims and counter-claims can give rise to the strong

impression of both the pervasiveness and negative impact of native title processes on peoples' lives. For Aboriginal people, the experience of negative impacts may differ, including focussing on an apparent lack of progress in their claim after more than a decade of being interviewed and researched, and going to meetings where there is 'too much fighting'. However, among the issues of contention is the nature of 'choice' in cognatic descent groups, where each person has a range of possibilities in terms of group affiliation. Claimants may back away from their alignment with one native title group or another if they so choose, and my experience is that they tend to do so if they have experienced opposition in their own or in others' assertions of membership.

A detailed study of how people align themselves with ancestors and family groups, partly through examining marriage practices through time, may provide good evidence of connection and continuities in the practice of social relationships based on contemporary, historical and traditional knowledge. Matters of choice about reckoning descent, the limits on such choices and respect for elders and family are tenets around which the practices of Aboriginal socialities in far south-west Queensland revolve.

Concluding comments

I have sought to analyse contemporary Aboriginal social practice in situations in which the majority of the members of a claim group have been isolated from their traditional country for generations, and their experiential and detailed knowledge of that country is diminished. An analysis of Aboriginal tradition which sees Aboriginal people as historical subjects extends our understanding of the importance of descent and belonging in relation to country. In order to demonstrate connection to country when physical connections have been attenuated, I have suggested that social processes among and between certain people through time, may provide significant connection material for a native title claim. In such cases, the practice of relationships among family group members, the knowledge held by members of a claim group of each other and their ties to one another, continues to assert the salience of country in their self and group identification. Nevertheless such data may not be sufficient for the Federal Court or the state and territory governments to recognise native title rights, without evidence that relates to detailed knowledge of and presence on country.

It seems to me that Aboriginal people's desire to be involved in the native title process, even where they have limited knowledge of its limitations for them, is at the very least the desire to be recognised as the 'right people for that country'. Importantly, this gives the right to be involved in negotiations over activities on their country and potential resources. This involves other

Aboriginal people from the region accepting them as the ‘right people’ for an area on the grounds that they are known as descendents of particular ancestors also seen to have been associated with the country. This flows on to the right people necessarily being employed in cultural heritage walks and therefore gaining the associated resources that flow from negotiations with miners and other developers. The ‘right people for country’ are involved in making decisions about land purchases, recognised by Shire councils and in signage, have tourism possibilities, and other such opportunities. These are significant forms of recognition for a people who have been dispossessed, displaced and not accorded recognition. Such histories are also based on Aboriginal law and custom, even in their limited expressions, and should not be dismissed in studies of connection to country.

I have sought here to examine the ideology of descent along with politicking about family group membership among claimants in far south-west Queensland as central to their assertions of belonging to country. Broader kinship ties and practices than those of any single family group — as evident with regard to notions of respect and moral authority — are keys to understanding the laws that govern people’s activation of their membership of a claim group. In the native title era, descent as the essence of connection to country tends to obscure other forms of Aboriginal identity and belonging that have developed throughout time. Nonetheless, an historicised ontology and an analysis of the ideology of descent and associated social practices shows that connection is significant in the lives of people who hold their country *in absentia*.

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NOTES

1. In this paper I am relying on research undertaken since late 2009 in far south-west Queensland, consulting to Queensland South Native Title Services. All of the groups in this area use ‘language group’ or ‘tribal’ names such as those found in Tindale (1974) and Horton (1994). While this is the focus of the paper, my insights into the nature of the Aboriginal family are also drawn from longer term research in the region around the rural town of Charters Towers in northern Queensland. Generalisations I make in this paper should be assumed only to apply to the far south-west Queensland situation.

2. Paul Burke (2010) argues that despite widespread legal requirements for finding proof of a 'society' since *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002), the concept of society 'was not intended to add additional elements to the definition of native title' (60).
3. These formulations are similar to Sutton's (2003), especially his notion of 'families of polity', but I explain below some divergence from his model.
4. Not a real surname for this area. Of course, an individual may not have the surname 'Green' to be considered 'a Green' (Babidge 2010, 120–21). See also Sutton (2003, 225–6).
5. See, for example, the Queensland Government's 'Guide to Compiling a Connection Report' (Department of Natural Resources and Mines, 2003, 8).
6. There is a difference between those who left their traditional country for pastoral station camps, towns and settlements relatively close by and within the region, and those who were forcibly removed to places far from that region (as in the cases of removal I outline here).
7. Severe drought at this time was causing some station owners (e.g. on Thylungra) to ask the government either to send rations to assist them in feeding people or to remove Aboriginal people from their stations where they were unable to compete in the station and stock competition over water and food. The Aboriginal Protector, Archibald Meston, reported that Aboriginal people were 'happy' to leave with him (Meston 1901). It cannot be said with any certainty whether people were *happy*, nor whether they knew they were to be taken far away and would have few chances of returning.
8. Individuals listed in census material for government settlements (e.g., Meston 1900, 1901) were later listed in Police reports on station workers in the south-west region (e.g., Clerk of Petty Sessions, Quilpie 1920–1938; Clerk of Petty Sessions, Eromanga 1927–1956).
9. Author's field notes, December 2009 (KF001,7).
10. This is a direct quote from a research participant in her sixties, but I have heard variations of this comment from many others. Such comments point to nonverbal and practical communication as a preferred mode of knowledge transmission in many Aboriginal societies.
11. Relevant cases include; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002), *De Rose v State of South Australia [No.1]* (2003), and *Western Australia v Ward* (2002).
12. Thus, while anyone who can show their descent from an apical ancestor of the claim group is notionally accepted, I have noticed some difference among those who are asked to 'show their documents' and those who are immediately accepted as members. In the latter it is often the case that a person is *known* – there is oral history knowledge of the person's antecedents. In other cases a history of interpersonal dispute or antagonism might have shifted the claimants' interpretation of the identity of those antecedents. There is more research to be done on this point.
13. Here I am concerned with the historical evidence of the powerful effects of the state on concepts of self. Bourdieu's (1996) notion of family as a 'realised category' can also be drawn on to discuss other state effects.
14. For example, the work of Luise Hercus and Jeremy Beckett shows that there were a range of shared ceremonial contexts in the south-west Queensland and northern NSW area referred to as 'Corner Country' (Beckett and Hercus 2009). The

ethno-historical literature also indicates shared system of social organisation and some shared ceremonial practice in the region (Howitt 1996 [1904], 113–4, 226–7; Mathews 1900a; Mathews 1900b).

15. While there is evidence that in systems of local organisation where patrilineal descent predominates people may honour matrilineal links for different kinds of rights, the patrilineal clan dominates as primary membership of the land holding group in many Aboriginal societies (see, for example Williams, 1986). This is different from the apparent ‘choice’ available to individuals who use cognatic descent principles.
16. I thank David Trigger (pers comm. 28 September 2011) for pointing out that this was not the case at all in a Waanyi example (see also Trigger 2010, 158 fn. 7).
17. In discussing the system of descent with people as part of the process of research dialogue, I noted the potential for up to four lines someone might follow (MM, MF, FF, FM). A middle aged person corrected me: ‘more like 8 or, nah [no] 16, ay?’ pointing to the possibility that a person might have sixteen possible descent lines.

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Part B

Native Title Practice Papers



Good, bad and ugly connection reports: A panel discussion at the Turning the Tide: Anthropology for Native Title in South-East Australia workshop, Sydney 2010

Simon Blackshield, Lee Sackett, Vance Hughston and Ian Parry

Simon Blackshield: Although what I am saying is primarily addressing reports prepared for court, I have noticed that a number of briefs to anthropologists for connection reports to be submitted to state and territory governments often provide the Federal Court's practice note for expert witnesses (Practice Note CM 7 2009). The briefs also often suggest that the practice note be complied with so the documents can provide the basis of reports to be used in litigation later if mediation or negotiations break down. The practice note comprises general guidelines which apply to all forms of expert evidence, not just expert evidence in native title proceedings. That is, the same rules are being applied to the social sciences as to any other branch of science.

Paragraph 1 of the practice note emphasises the expert witness's duty to the court to be an impartial truthful witness, as opposed to an advocate for a party. Having said that, the judges are well aware that anthropologists who do intensive fieldwork develop close relationships with claimants.

In the *Sampi* case (2005) which is cited in the practice note with respect to the proposition that an expert witness 'is not an advocate for a party even when giving testimony that is necessarily evaluative rather than influential' (*Sampi* at [1, 2]), Justice French (as he then was) noted that:

[T]he Court can recognise the reality of the relationship that may develop between an anthropologist and his or her clients and scrutinise the opinions accordingly. [The Court] will give greater credence to those anthropologists who show that they have used their best endeavours to offer the Court a picture of the group or society concerned that takes into account all factors relevant to the opinions being advanced.

This includes factors which might indicate an adverse hypothesis. Inconsistencies should not be glossed over or omitted (at [794]).

With respect to paragraph [2.1] of the practice note, an expert's written report must give details of the expert's qualifications (I am paraphrasing here). This raises the issue of specialised knowledge. It is necessary to address not just the qualifications of the anthropologist but also his or her relevant experience because this is the part of the anthropological report that provides the basis for the court accepting that an anthropologist has specialised knowledge on the matters under discussion, which qualifies him or her to be giving expert evidence.

If 'Joe Schmuck' from across the road comes into court and gives an opinion that 'X' is the case, that is evidence only that Joe Schmuck holds that opinion. By contrast, the opinion of an anthropologist who has been accepted as an expert on matters relating to a native title case, that 'X' is the case, will be evidence that 'X' is the case. For example, in native title proceedings, the only source of admissible evidence directly addressing what the laws and customs of a group were in 1788 will be the opinions of an anthropologist or perhaps of an historian. In the absence of such opinions, it is open for a judge to draw some inferences from what was recorded around the time of early contact. However, ideally, this is the task of the anthropologist, not a judge. Anthropologist should present the view that is consistent with the case being advanced and consistent with the thesis that they hold.

Talking about the good, bad and the ugly, one thing anthropologists don't have is specialised knowledge of native title law. I have often seen statements in connection reports like: 'the High Court decided in *Yorta Yorta* blah blah blah'. In the context of connection report writing, the view of anthropologists about what they think the High Court decided in *Yorta Yorta* or in any other case is of no interest. It is not the area of anthropological specialised knowledge.

I take the view that, at the beginning of a report, when an anthropologist is discussing their specialised knowledge, they should provide an explanation of what anthropology is. I say this because I know of some conservative barristers working in native title law who regard anthropology as just a form of voodoo, and I suspect that there are conservative judges who are of the same mind. Background discussion explaining what anthropology is and how it works, pitched to the layperson, can be very helpful. Peter Blackwood's report in the Waanyi case (2009) provides a good generic discussion of the specialised knowledge the native title anthropologist has. Of course, it is also important to describe in detail any long-term work conducted in a particular area that is relevant to the case in order to establish the authority of the anthropologist. In the Waanyi case, there was no question that Professor Trigger was an expert

on Waanyi matters (see Alpin [2010] at, for example, [21] to [24]). Rather, it was a question of what kind of inferences might be drawn from what he had observed.

Paragraph [2.2] of the practice note requires that ‘all assumptions of fact made by the expert ... be clearly and fully stated’. This is a critical rule to observe for two reasons. Firstly, in order for the opinions of an expert on any issue to be admissible, it is necessary to clearly set out the basis for reaching that opinion. Assertions which appear to come from ‘out of the blue’ will be ruled inadmissible. If something is ruled inadmissible, it will be as if it never happened and was never stated. This also means avoiding a conversational style of writing, and being very precise. This will mean that a good report will inevitably be a bit clunky, e.g. *‘on the basis of XXXX, it is my opinion that YYYY’*. I have had the experience of letting a form of words slip through where an opinion was ruled inadmissible because the words that preceded it were too vague. Examples of the sort of language which needs to be avoided are: ‘if, as it seems reasonable to assume, blah blah blah’ or ‘which I believe to mean that blah blah blah’. So there is a need to be precise.

A better form of words, if an expert is strongly inclined to believe that X is the case, but doesn’t feel comfortable expressing a certain opinion, might be, ‘it is more probable than not that X is the case’. The Court’s standard of proof is that if the judge is satisfied that it is more probable than not that ‘X’ is the case, the judge will then make the finding that ‘X’ is the case. If an expert really doesn’t feel safe expressing a firm opinion, they should simply say so, and explain why they are not able to express a firm opinion. Also keep in mind that what may seem to ‘go without saying’ may well not be the case for a judge. When the film star Jane Wyman divorced Ronald Reagan, she was asked why the marriage broke down, and she said: ‘Well, you’d ask him for the time, and he’d tell you how a clock works’. I would suggest with anthropological reports for courts or a non-anthropologist audience, experts should be doing the anthropological equivalent of explaining how a clock works, and giving very clear background to their opinions.

The second reason why it is very important to set out very clearly the assumptions of fact upon which an expert is basing opinions is that there is a legal loophole. Where an expert’s report recites the factual assumptions on which the opinions have been based, the report is admissible evidence of those assumed facts. So in situations where it may be impossible or impracticable to bring a certain witness to court to give evidence, an anthropologist’s account of what that person says, if they explain why they found the person credible, and the inferences they drew from those statements, can be admissible. There will of course be questions of weight in terms of how the Court will weigh inconsistent evidence on a relevant issue, for the purpose of reaching a conclusion.

I have heard participants earlier today complaining about difficulties they have experienced in producing reports for ‘black-letter lawyers’. There are only two types of lawyers: black-letter lawyers and bad lawyers. The problem with native title is not with black-letter lawyers, but with ignorant lawyers. Many of the frustrations you are facing in dealing with native title lawyers may well stem from the limitations inherent in native title law, as opposed to any lack of cultural understanding, or understanding of your discipline, on the part of the lawyers themselves.

In preparing a comprehensive connection report which actually addresses the legal requirements for establishing native title, there is no way of avoiding the exercise of identifying what the laws and customs of the relevant group were at sovereignty in relation to holding rights in land, and there is no way to avoid going through the further exercise of tracking the changes to those relevant laws and customs from each generation to the next from 1788 to the present.

It is, however, possible to present the necessary analysis in a context where your thesis of cultural continuity is consistent with the *Yorta Yorta* exercise (summarised in the preceding paragraph), and not blatantly in conflict with that exercise.

Of course, anthropologists can tackle any misconceptions that judges or government lawyers might have regarding the inferences that should be drawn from the fact that more exotic practices that were identified at the time of contact have disappeared. You can put such a change in its proper context, in terms of the significance which should or should not be given to it.



Lee Sackett: Each claim is a unique adventure: new people, new countryside, new challenges. This said, in researching a claim I keep as my focus the issues and topics highlighted in the relevant state guidelines or my native title representative body brief.

Setting out

In my experience, it is helpful to meet with representatives of the relevant state office early on in the connection report process. Doing so can alert you to particular questions or issues that the state may have regarding the claim area or claim group, such as those relating to society, when some claimants live on the claim area and others are descendants of people removed from the claim area in the early 1900s, or connection, when the great bulk of claimants left the claim area some 50 years ago, etc. As well, people working for the state at times can point you in the direction of sources of information you otherwise might miss.

Researching

In some claims I've been involved in, substantial blocks of research have taken place on country, while bouncing about the bush. In south-eastern Australia, much research takes place in claimants' kitchens and lounge rooms, over cups of tea. In many ways, these latter settings make it somewhat easier to address the desire of the various states to hear not the voices of researchers, but the voices of the claimants.

In this latter regard, the Queensland Guidelines to producing a connection report note:

The State believes that members of the native title claim group themselves may provide the best evidence of connection to traditional land and sea country. Every opportunity should be used to present such potentially compelling evidence in the connection report. (Department of Natural Resources and Mines 2003, 2)

The Western Australia Guidelines to producing a connection report indicate:

It is the information of Aboriginal people themselves that is the most important information in determining the continued existence of native title rights and interests and the traditional laws and customs from which they flow. It is important that the Government create opportunities for Aboriginal people to tell their stories as part of the process of providing material in support of their claims....The Government expects that connection reports will include information provided by Aboriginal people that directly addresses the basis of the claims made within an application....Connection reports should clearly identify the information that has been supplied by Aboriginal people, and identify those people, such that the reports distinguish between the expert opinions contained in them and the basis upon which those opinions are expressed. (Office of Native Title 2004:4)

I take all this to mean that rather than a connection report author declaring 'Descent from an ancestor is the cornerstone mechanism for arguing rights and interests in the country of that ancestor', they might more profitably quote a named claimant asserting 'I am an owner for this country...because my mother and my grandfather owned this country, and they got the country from their ancestors...It's always been that way'.

This in mind, I have taken to building reports on and around the direct statements and views of named claimants. During the course of claim research, among other things, I seek to record word for word what claimants

and relevant others say about themselves, the claim area, law and custom, rights and interests, connection, and so on. Where possible, I do this by keying what they tell me directly into my computer. This ensures I have substantial material in the way of claimant voices and views to feed into my report. So, for any given claim, I always have at least two notebooks: the electronic one and one or more sets of handwritten record when it isn't practical or feasible to use my computer.

Writing up

Having read a number of connection reports, I can see why the states are keen to hear the views of claimants rather than the bold statements of researchers. Too often, researchers assert things instead of grounding them in data. For example, in one report an author — without any supporting material that I could see — indicated that 'An elder is a person...who shows a strong level of commitment to contemporary...affairs, and who is a male of mature years that is respected within the...community'. The author went on, again without any apparent supporting material, to say that the listing of female elders in such things as native title matters 'may be only in response to modern European–Australian calls for gender equality'.

In another report, an author said, based on goodness knows what, that 'Someone who has never set foot in the claim area would be accepted by the group if they had the appropriate family pedigree — but it would be very clear that they would have to take a back seat and had a lot to learn'. On the face of it, statements such as these tell us what the researchers possibly see as being the case; they do not necessarily tell us what claimants see as being the case. Indeed, they leave the reader in the dark as to claimant views.

This is not to say that simply feeding in the views of claimants will, in and of itself, remedy things. Claimants' views may well be, indeed they generally are, at odds with one another, at odds with the views of claimants in neighbouring groups, at odds with the earlier ethnography, and so forth. In my view, claimants' views need themselves to be examined and explained.

Not long ago I read a report wherein the author presented evidence from claimants to the effect that they were a matrilineal people, and that their rights and interests in country flowed along matrilineal lines. That is, as the author put it, matrilineality was not just an organising principle, but was also the way in which claimants lawfully claimed country. Further, it was put forth by claimants that their ancestors likewise had taken country through matrilineal descent.

In line with these views, and they were views that the researcher unquestioningly accepted and adopted, the researcher presented some examples wherein claimants claimed the country of their mothers, rather than their

fathers, and their mother's mothers, rather than any of their other grandparents. This instance of a researcher simply recording and replaying the views of claimants is by no means an exceptional one.

In relation to the claims of matrilineality, other evidence, both in the connection report and in the accompanying genealogies, suggested that if the rule was that claimants took country along such matriline, a number of people supposedly in the group could, according to the group's law and custom, neither identify as, nor be considered to be, claimants. In particular, by the stated law and custom, none of the descendants of the male apicals, of which there were some, could or should identify as members of the group, or make claims to the country in question. Likewise, none of the children of any sons of females in a matriline, that is, the children of brothers of female claimants, could or should identify as claimants, or make claims to the country in question. In short, left unexamined as they were, the claimants' claims regarding matrilineality did severe damage to the group *and* to the connection report.

As it happens, though, a closer examination suggests that what we likely have is not matrilineality, at least as regards country, but (1) a continuance of a stress on matriline stemming from an earlier system of matrimoieties, possibly coupled with (2) a misconstruing of earlier ethnographic evidence relating to matrimoieties as evidence of earlier matrilineally based country groups.

Regarding matrilineal descent and country groups, Sutton (2003:200) observes:

Patrification [being the recognized child of a man], serial or otherwise, is often the normative or privileged basis of recruitment to groups that are corporate with respect to land and waters as property in classical Aboriginal Australia...Neither serial patrification [being the recognized child of a woman] nor matrilineal descent, by contrast, forms the normative basis of any kind of country-holding group in classical or even post-classical Aboriginal Australia at all, as far as I am aware. Radcliffe-Brown, Elkin, the Berndts, Maddock, and Peterson came to this conclusion and there is no reliable evidence to call these views into question. (Sutton 2003:200)

While it is highly unlikely that either the claimants or their ancestors practiced serial patrification or matrilineal descent in relation to the taking of country, claimants' ancestors and some of their neighbours most definitely are reported as having had a system of matrimoieties. Importantly, though, these moieties were social categories, not social groupings. They seem at times to have been prominent in marriage arrangements, in ceremonial contexts, and such; they did not, however, figure in holding country.

In the case at hand, if some claimants assert that their society is a matrilineal one, whilst also asserting that the descendants of male apicals and the children of males of families seemingly are recognised as members of the groups, this suggests that cognation was and is at play. This, in turn, suggests that the researcher in question should give serious reconsideration to the data and its analysis.

Anthropologists researching and writing connections reports must do much more than serve as conduits for, and stamps of authority of, claimant statements (or any other sources for that matter). We need to assemble relevant materials — from earlier researchers, from archival sources, from claimants, from claimants' neighbours, etc — analyse the materials, and arrive at considered opinions on them. This can only be done through considering all the materials, including claimant information, in a critical light.



Vance Hughston: The requirement to demonstrate that members of the claimant group are part of a society and that that society has continued to exist since sovereignty united by its acknowledgement and observance of the laws and customs under which the rights and interests claimed is possessed is central to the law of native title. It is central to state and territory government connection guidelines and central to what the courts require. Strangely, the word 'society' is not a word which appears in the *Native Title Act 1993* at all; it is what the courts describe as a conceptual tool for use in its application (*Northern Territory v Alyawarr* 2005, at [78]). The courts have arrived at this view because the definition of native title in s.223 centres on laws and customs, and laws and customs clearly do not exist in a vacuum. They are the laws and customs of a particular people and in important respects they will identify and define those people (*Members of the Yorta Yorta Aboriginal Community v Victoria* 2002, at [49]) The first step in preparing connection reports is to identify the relevant society, because that is the first thing that the state government will want to know. Who is your society? Then all of the connection evidence will be assessed against the historical existence and continuity of that particular society. The difficulty of course is that 'society' is a somewhat fluid term. It may be applied at various levels of aggregation.

I will give you an example. The members of a language group may have and probably do have the same laws and customs under which the members of that group possess rights and interests within the area of that language group's land. So, if you look at the language group and look at their land, it would seem that the answer is obvious that they are the society. But then if you look at a broader picture and you look perhaps at the adjoining linguistic groups or language groups you might see that they have very similar if not identical

laws and customs to the language group in question. At that broader level of aggregation then, you can see that two, three, four or more neighbouring linguistic or language groups may be seen as a single society.

The Courts have recognised that a single society can consist of members of more than one language group in a number of cases now: *Neowarra* (*Neowarra v Western Australia* 2003), *Sebastian* (*Western Australia v Sebastian* 2008), and *Bardi-Jawi* (*Sampi v Western Australia* 2010), for example. That is, a single society can acknowledge and observe the same laws and customs despite the fact that there are differences in language or dialect, the use of different self-referents and the existence of separate territories provided that the laws and customs under which the members of that broader society hold rights and interests in land can be seen to be fundamentally or essentially the same.

It would have been important in cases like *Sebastian* (*Western Australia v Sebastian* 2008), to show that the Yawuru, who are a distinct language group with a distinct territory and a distinct law, were in fact part of a larger or broader society. It was important because the northern section of the land they were claiming belonged (at sovereignty) to a people called the Djugan, who had either become extinct or reduced in size to such an extent that they had become incorporated as part of the Yawuru. Legally, the Yawuru could claim traditional Yawuru country, that is country which was associated with the Yawuru at sovereignty, but if they venture outside of what was historically Yawuru country that may raise succession issues. On the current state of the law, the likelihood is that succession will only be recognised by the courts if it is intra-societal, that is, if it is within the one society. The courts have shown a distinct reluctance to accept that the members of one society can succeed to the country of another society (*Dale v Moses* 2007 at [120]). So, in *Sebastian*, the claimants had to demonstrate that the Djugan were part of the same society as the Yawuru, despite different languages, distinct territories, separate self-referents and somewhat different legal traditions — one called the northern tradition and the other called the southern tradition.

The trial judge in *Sebastian* concluded that the laws of the Yawuru and the Djugan were fundamentally the same. Although the two groups practiced different traditions, (the southern and the northern traditions), many of their traditional laws and customs were either the same or substantially the same and both had a common source in the *Bugarrigarra* (Dreaming). There were other extensive commonalities and connections between the Yawuru and the Djugan. The Full Court upheld the trial judge's finding on the existence of a single society and said that in circumstances where there was always only one society, the question of the succession to rights and interests simply did not arise (*Western Australia v Sebastian* 2008, at [100]).

Again, it is important to note that determining the relevant society is evaluative in character. By evaluative I mean that it will depend on the evidence that is presented to the Court, and upon what the individual judge makes of the evidence. Whilst one judge might think there's sufficient commonality amongst particular laws and customs to say there is a single society, another might not think there is sufficient commonality. In other words, there is a great deal of discretion that is left to the trial judge in terms of those ultimate conclusions of fact. Ultimately, whether or not the existence of a particular society has been established, and whether or not there has been substantial continuity in the acknowledgment and observance of that society's laws and customs, are conclusions of fact which will depend upon the whole of the evidence that is led. In this respect, anthropological and historical evidence play an important part.

Judges are human beings, and evidence can be good or bad, depending on who is giving the evidence and also on who is presenting it. It is difficult to say in many cases that there is only ever going to be one answer to the question of what is the relevant society.

There have been cases, *Lardil* for example, where the judge accepted that each of four language groups (who were collectively the native title claim group) was a separate society with its own specific laws and customs (*Lardil Peoples v State of Queensland* 2004, at [69], [140]). *Alyawarr* (*Northern Territory v Alyawarr* 2005), by way of contrast, is another case where, despite the fact that the claim group was made up of people from separate language groups and who had distinct or separate territories, the court concluded that they constituted a single society.

Much depends upon the way lawyers choose to present the case, and what they see as important in constituting a society in order to succeed. That is not a dishonest or an unethical approach. As I said, this concept of a society is simply a conceptual tool. Aboriginal people, depending on context, can belong to many societies, as can non-Aboriginal people. A person can be a member of the wider Australian society and of the NSW society as well as, for example, an Australian or NSW Islamic society. Depending on context, there are various levels of societies to which people can belong at the same time.

I cannot see a problem in proposing a number of alternative levels of society to state governments — in having a bet each way. There is room for anthropologists, like judges, to come to differential conclusions on the same evidence. That is, one anthropologist might be of the view that Group A is the relevant society and the state's assessor might come to the view that it is Group B. The case can be lost over this difference of opinion. You should be able to say, arguably: 'It is Group A or it is Group B. We think it is probably more likely A, but we do not discount the fact that it might be B'. A preference might be

expressed, but so should an acceptance of the alternative. It is better to do it that way than to miss out altogether because the state has decided upon Society B and the applicants' anthropologist's report supports only Society A.

Because laws and customs are at the heart of the definition of native title, it is necessary to distinguish between utilitarian behaviour and rule-based behaviour. We all need to eat, sleep, drink and the like but by simply eating, sleeping or drinking we are not engaging in rule-based behaviour. Hunting, camping and foraging may similarly be seen as nothing more than utilitarian activity. But it can also be rule-based behaviour. I am seeing a number of connection reports where the researcher will list the various activities that members of a group engage in terms of hunting and cooking kangaroos and goannas, camping and visiting sites and the like, and the researcher will say that that behaviour demonstrates the continuity of traditional law and custom: but it does not (see *Members of the Yorta Yorta Aboriginal Community v Victoria* 2002, at [42]).

It may demonstrate a continuity of conduct, but you have to prove that the conduct is rule based to show that it is normative conduct, as opposed to simply being observable patterns of behaviour (*Members of the Yorta Yorta Aboriginal Community v Victoria* 2002, at [42]). For example, I ask my clients to say *why* it is that they hunt or gather at a particular place rather than somewhere else, and then the rules will emerge: 'Well, this is my country, I am safe here. The ancestral spirits know me. If I was to hunt somewhere other than on my own country, it would not be safe'. Accordingly, what can appear to be simply utilitarian behaviour is often rule based. People do not readily objectify rules in this way, but by asking a few simple questions, it can become apparent that utilitarian activities are in fact rule based. For example, people may hunt at a particular place because, according to their traditional law and custom, they are entitled to hunt there. If other people want to hunt there, they have to ask permission. It is a simple enough thing but it is critical. So often it is ignored in reports where some researchers seem to think that if they can get evidence that the claimants still hunt and camp and fish and have that physical connection with the claim area, the claim will be successful. However, there is another layer that is required.

It also has to be realised that native title rights and interests are rights and interests in relation to land and waters. They relate to rights to access land, to use land, to control the use and the access of others. Sometimes the type of rights and interests which are described in some connection reports go well beyond the rights to use or to control the use of land. Although under Aboriginal law people may well have a right to, for example, protect the integrity of their stories, prevent other people from reproducing their designs,

and their markings, those aspects of Aboriginal law are not recognised in the *Native Title Act*. There are other areas of the law where those rights may be recognised, but there is a need to identify in connection reports those rights and interests which relate to the use of land and waters and the assertion of control over that use.



Ian Parry: When I saw the title of this particular session I thought I'd better do some homework, so I went and watched *The Good, the Bad and the Ugly* movie. Halfway through, Clint Eastwood growls: 'Every gun makes its own tune', and it struck me that connection reports might well have the same thing said about them.

They are, in practice, a peculiar creature. They are part government report, part academic paper and part something else entirely that is spawned by the needs of land rights claims and the *Native Title Act* (NTA) itself. In Victoria as with elsewhere in south-east Australia, they need to be approached a little differently from other reports. The reason for that is firstly that the state of Victoria mediates claims with an eye very firmly fixed on section 87 of the NTA. That means that connection reports have to convince the state government directly and the Federal Court only indirectly as to the merits of the case. In Gunditjmara and the case that's currently in mediation in Gippsland, the court under the control of Justice North is studiously not looking at the evidence. It trusts the state to look at the evidence. Secondly, the degree of dislocation and dispossession inflicted on indigenous people in Victoria means that few if any groups would meet the native title legal requirements if taken to the usual logical absurdity in a litigious setting. Put simply, connection reports in Victoria need to look to the state as well as to the court, and they need to look for innovative approaches to issues such as the nature of a society and the continuity of connection.

Notwithstanding the comments of the previous two lawyers, we have to address the concerns, if not opposition, of black-letter lawyers. We can have a situation where anthropologists from all directions of the native title landscape agree that a given concept is coherent and is cogent, that it has an acceptable anthropological lineage and is consistent with indigenous law and understanding, but if it seems inconsistent with legal precedent, if it defines social matters anthropologically instead of legally, and if it's generally legally 'offensive', then it can get consigned to a sort of theoretical limbo. Paradoxically, this represents a special difficulty where cases are settled by consent rather than litigation because instead of the appropriateness of a concept being decided by a judge in an open court with the anthropologist speaking to his or her report, these sorts of matters are decided behind the curtains of mediation.

The state of Victoria gets connection reports from applicants, it gets them from independent reviewers from whom it commissions comments on the connection reports from applicants, and it often asks for contributions from researchers whom it commissions for its own purposes. In each of those cases, the state is always going to be reliant on the skill and the good sense of the author no matter who commissioned it. In terms of commissions from applicants, Victoria has its 2001 Connection Guidelines (Native Title Unit), but they don't dictate too formally the style or the content of a report. They make some suggestions but leave the shape and content of the report to the applicants.

The problem is often a legal one: the anthropologist may have prepared a connection report, but it is then filtered by lawyers, or it may be written to too narrow a brief, or it might be influenced by intra-indigenous politics. Such issues tend to create a report to the state which is not exactly reflecting the intent of the author. When the state commissions a peer review of a report like that, the reviewer is asked whether the author is reporting as an expert witness in the discipline of anthropology for the purpose of preparing a critical anthropological appraisal of the connection materials. The NTA isn't referred to because the discipline of anthropology is not a legal one and rarely do anthropological courses include legal subjects. We are not asking the anthropologist to offer a legal observation; rather we seek an anthropological observation.

Where the state looks to a connection report to further its own aims, in furthering agreement-making processes for example, we try to be as flexible as possible. In such contexts, we might seek modification of the report prior to its finalising, but we can run into a difficulty with such a process, since the report cannot be presented as an independent report.

In general, 'good' connection reports begin with discussions with the state to identify issues; they are not prepared without consideration of the state's issues and simply dropped on our doorstep. They answer the state's concerns, usually beginning with Yorta Yorta questions because we recognise that these are the questions we have to satisfy in a general sense. In particular, 'good' connection reports address issues which are specific to the particular claim or group upfront, so the state does not have to request additional material. Information should be based on sound anthropological methodology, and make use of all available evidence in the possession of the applicants so the state does not have to ask for extra material.

'Bad' connection reports are rarely a matter of bad or inferior scholarship. I think I have only ever seen one 'bad' report in that respect. Bad reports are mirrors of the good ones. They don't address the questions. They presume some things are self evident, which they may well be, but that doesn't mean that the state should fill in the blanks.

The reports we have real difficulty with are the ‘ugly’ ones. They are ugly not because they are bad, but because they contain flaws that damage the case that they offer. Sometimes they are so even-handed it is hard to know what case is being offered. Some are so disorganised that they create extra work for internal and external reviewers which means additional cost and longer time frames for the state to arrive at an opinion. Some provide more bulk than evidence. Others have obviously been produced to satisfy a number of different tasks, only one of which may be to address the native title claim. Still others contain material that is irrelevant to native title matters.

Discussion

Participant: One of the cornerstones of anthropology is the methodology of participant observation, yet in native title work there is no time for this. In some instances the groups are also much dispersed and it is time consuming to contact people. Real participant observation involves watching people in action, which can give a completely different set of impressions and responses from asking people to reflect about what happened. Should such limitations be spelt out in a connection report?

Simon Blackshield: I would be inclined to be up-front about this. If there are limitations on the depth of the study you have done, you should be acknowledging that. However, I would also think about how participant observation may happen informally. There was one anthropologist in Western Australia who was giving a very entertaining paper at a conference about her day-to-day job duties with a native title representative body who inadvertently revealed the potential for representative body anthropologists to carry out participant observation in the course of providing tea and coffee and driving people around. Living in communities, day in day out, driving people around, dealing with mileage claims, whatever, can provide opportunities to engage in highly-relevant observation. One of my favourite illustrations of participant observation involves an anthropologist asking an Aboriginal teenage girl: ‘What does it mean to be a member of the ‘X’ people?’ Being a typical teenager, she replied: ‘Oh, it means nothing, it’s rubbish’. At the same time, the anthropologist was able to observe that [the girl] was fiercely policing who her younger sister was dating, to ensure that she was acting in compliance with the marriage laws of the ‘X’ people.

Anthropologists don’t have to put on a pith helmet and head off to the islands for a certain period of time in order to collect meaningful data. Spending time with people in quite informal settings can ensure the observation of quality interactions, particularly in native title representative bodies where people have worked for long periods of time.

Participant: You are raising important questions about the professional development of anthropologists in representative bodies. What is their role? They may well end up knowing far more about a claimant group than the so-called experts. It is important that we start seriously considering this. We have already had some comments about the ineffectiveness of ‘fly-in fly-out’ researchers and lawyers. That is not the fault of the anthropologists, I have to say. We sometimes get very short contracts to carry out an enormous amount of work.

Participant: On the society question, I think it is arguable that in many parts of the world societies are always layered in some way. You can immediately see it in Europe where Belgium, for example, is partly Dutch and partly French and its population split on those lines to some extent, with dual affiliations to France and Holland. Yet Belgium is still a society in the sense that it is a single jurisdiction. Belgium, Holland and France are also part of the wider European society which is also a coherent society, sharing many values and much of its legal culture. In a couple of cases recently I have just tried to explain this layering where you can identify more or less inclusive societies. What is your assessment of how receptive lawyers, including judges, would be to that kind of modelling?

Vance Hughston: I gave the example earlier of the Lardil case in northern Queensland where the case was presented as four small neighbouring language groups as four separate societies, although clearly on the evidence there they could have put them in a single society. The laws and customs were pretty much identical and there was an enormous amount of interaction between the groups. There is a fair bit of freedom and discretion left to the anthropologists and the lawyers in consultation with their clients to work out what the relevant society might be. It will often depend upon how big or how small the claim is. If you want to put in a very large claim, it is best to consider a society as consisting of maybe a half a dozen language groups. But if you have a very small claim, it may be better to stick with just the language group or even a smaller entity within that language group, because the claimants themselves won’t want to have any acknowledgement of a larger group. The courts will allow a lot of discretion.

Participant: I am required to tell the truth in court, and in some cases I have had to disagree with the claimants. They’ve been acting on the presumption that the society must be coterminous, isomorphic with the claim group, as have their lawyers, but I have had to say, that is not sustainable.

Vance Hughston: No it’s not. A good example is the De Rose decision (*De Rose v South Australia* 2003) where the whole of the Western Desert cultural bloc was considered to be a single society. That didn’t mean that every person in

the Western Desert has rights and interests in De Rose Station, but they are the people under whose laws and customs those claimants in De Rose did have their rights and interests in De Rose Station. I generally like to look to the bigger picture in terms of society, and look at what is the larger entity, the cultural bloc if you like, to which they all belong.

Participant: The claimant group is the site of the rights and interests in a particular parcel of land, but the society is the site of the laws and customs, and is always bigger. There is a myth going around that if you identify the society then the claim has to be everyone in the society but that is not necessarily correct.

Participant: My question is about precedent. Imagine a case where a claim has been finalised on the basis of a particular society, and you work on a neighbouring claim and you come to the view that really the society as you want to portray it is a larger, perhaps cultural bloc, which includes the claim which has been finalised but not founded on this notion. Do you proceed with a cultural bloc argument? Would that have consequences for the claim already finalised?

Vance Hughston: As I've said, you can have a society at different levels of aggregation and the fact that people have had their claims recognised as a member of one society doesn't mean that they can't also be members of a broader society. I don't see a particular problem with what you are putting forward.

Participant: Why should a precedent from the Kimberley influence decisions about the nature of society and cultural values in, say, New South Wales? Historically they've got nothing in common. Native title is highly fact-specific. It is different in every case.

Participant: I'll take the converse position and put the proposition that you could model all of Australia as an Aboriginal society. If we go to the edge of the Western Desert and look at its interface with the Kimberley or the Central Desert or the Noongar area we will find there are a sufficient commonality of laws to create an argument. Then, if we go to a book like the Berndt's *The world of the first Australians*, we will find a set of organising abstract principles and laws with a lot of diversity in the model, but which is still an overview of Aboriginal Australia as a whole. So what would be your legal response to that kind of approach in a native title context, because it is obviously a distraction to start putting these lines around societies?

Vance Hughston: I think its abstracting a bit too far. I don't think the whole of Aboriginal Australia can be considered to be a cultural bloc or a society. Laws and customs do have a limit. If we look at the Western Desert, large as

that is, people don't talk about being bound by Australia-wide Aboriginal law; they talk about the *Jukurrpa* that goes through the Western Desert. That's a physical locus if you like, or a focus for their laws or customs. Their laws and customs arise out of the *Jukurrpa* which travels through those particular areas. I think you will find that replicated in many other parts of Australia, where particular Dreamings laid down the laws and the boundaries. I can, however, also see the argument for Australia-wide since there are broad commonalities.

Participant: We can produce examples: the red-band initiation groups which travel from Alice Springs from the Western Desert up into the Kimberley, for example. Mapping the distribution of certain traits to demonstrate there is a cultural region gets problematic because it produces a set of overlapping circles that don't actually line up. It is more a system of overlapping sets of laws and customs which continue across the continent. It's because of that overlapping that it is difficult to come up with a single answer for a society. Aboriginal people belong to several societies at least.

Participant: As it has been mentioned, anthropologists are not experts in legal matters. Yet, I have sometimes been asked to include in reports some form of legal consideration. I have always said, not my expertise, not my business. However, I have another report at the moment with historical issues requiring the search in government and non-government archives. Yet I am not a professional historian?

Simon Blackshield: Native title anthropologists have had of necessity to employ the skills of genealogists and historians and they will accordingly be qualified to give expert opinion evidence that goes beyond the classic confines of anthropology.

Participant: My feeling about this is that the skills of anthropologists in these areas differ greatly. I know when I am talking to skilled historians, their ways of questioning documents invokes far greater depth than anthropologists who haven't had an historical background, who don't understand the aspects of Australian history, can reach. I wonder if it isn't more productive to engage expert historical witnesses in some contexts rather than expecting anthropologists to also be expert in these areas. If an anthropologist does have to give such evidence, what kind of admissions of their level of skill should they be making?

Simon Blackshield: Always admit the limitations on your abilities. I agree that if it is viable to engage the ideal expert, then that should be done, but it is not always possible. This relates to the importance of engaging with your terms of reference from lawyers, particularly when there may be terms which have a specialised legal meaning or may have a different meaning in anthropology. It

is very important to be spelling out what you understand a term to mean. This demonstrates that you are interpreting the terms in the way the questions are being asked. If there is a breakdown in communication between lawyers and anthropologists, spelling out what you understand the terms to mean will flag that as an issue to be addressed. Some of these loaded terms like ‘normative system’ are often bandied about by anthropologists without their making any effort to explain what the term is intended to mean.

Participant: I want to take up the earlier discussion about coterminous claims and the nature of societies. The discussion about society and concentric circles and overlapping circles is one that we are all struggling with but about which I don’t think we have clear direction in the court decisions so far. I find myself much more concerned often with continua in those sorts of situations. You might for example have a situation where people of a single language group may have more in common with coterminous groups of a different language group and regard themselves as a quite distinct society. There are probably influences of law and custom that extend out either end of that.

Participant: The code of ethics for anthropologists is quite different from the legal code of ethics. Who are lawyers accountable to?

Vance Hughston: If lawyers act in matters where they lack appropriate experience or expertise that would be a breach of their duties. They should not act in matters where they don’t have expertise and it is no excuse saying they are doing it *pro bono*. They would be accountable to the Law Society or the Bar Association, depending on whether they are a solicitor or barrister. Native title is very difficult law. One of the reasons there have been so many problems is that many of the lawyers involved in native title representative bodies are junior or lacking in experience and expect the anthropologist to be the expert. They really think the anthropologist will answer everything. All they’ve got to do is get an anthropologist and then they think they can relax.

Participant: I was wondering if you could expand a bit on the difference between an assumed fact and an opinion.

Simon Blackshield: It is not easy to distinguish between a fact and an opinion. An opinion is an inference based upon other facts. So you get facts a, b, c, and d, and infer from their existence the existence of this new fact. That is an opinion. It isn’t itself a fact but it is a conclusion you arrive at from inference based upon other facts.

Participant: So if I was to say, that according to Howitt, Mathews, and Cameron, matri-totemic clans are found in an area, therefore I believe that matri-totemic clans were found in this area, is that an opinion or an assumed fact?

Vance Hughston: That is an opinion because the factual basis is that there have been reputable ethnographers who in the past have written about the place and they have said it was matrilineal moieties or whatever. You, as an anthropologist, know the quality of their work and on the basis that all three mention matri-totemic clans, conclude that there must have been matri-totemic clans. So you are giving an opinion, you are not just parroting what those anthropologists might have said, and you are not assuming it to be true.

Simon Blackshield: If you had area A about which earlier writers say had matrimoiety, that's the assumed fact. If you are looking at area B and saying: 'Well, there is this factor present here that was observed by the earlier writers for area A, therefore there is a matrimoiety system here', that would be the opinion. You can have a couple of useful motherhood statements in the earlier parts of the report. For example, a chemist giving an expert report used wording like: 'When I cite a publication in this report without negative comment I am assuming that the data or principle for which I am citing the work is factually correct'. Also, you can have a motherhood statement listing any detailed experience, particularly fieldwork in the area where you are commenting. You could say: 'I relied in general on this experience that I have discussed for the opinions that I have expressed in this report'.

Participant: You need to watch your assertions and do not think of connection reports as a conduit for untested claimant voices, but rather examine those voices in context, the context being the voices of previous ethnographers, historians and so forth.

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CHAPTER 7

Modelling the continuity of Aboriginal Law in urban native title claims: A practice example

Paul Memmott

Introduction

This paper addresses how an anthropologist might present contemporary evidence to demonstrate that there is an observance of traditional laws and customs according to the *Native Title Act 1993 (Cth)* (NTA) in describing a 1996 model which was developed for an urban metropolitan native title claim.¹ The model is potentially useful in presenting native title cases whether for connection reports prepared for submission to a State or Territory Government, or to the Federal Court according to the expert rules of evidence.

The paper considers how the continuity of observance of traditional laws and customs can be demonstrated in the post-contact era by a claim group when there is evidence of sharing and unifying practices, but simultaneously substantial cultural change. Some relevant theoretical constructs are outlined, including a transformational model of tradition to support evidence of cultural reproduction and adaptation to imposed changes. The paper looks to questions raised by the findings in *Yorta Yorta (Members of the Yorta Yorta Aboriginal Community v. State of Victoria and others)* (2002) in attempting to understand the complex evidentiary relationship between the idea of ‘tradition’ as it is encoded in the NTA and cultural change as an anthropological theoretical construct. The *Yorta Yorta* case, which has continued as a benchmark to inform approaches to change and continuity in native title cases, has provided a challenging finding in that a claimant group’s system of laws and customs must be evidenced as having substantial continuity from the pre- and early contact periods. These findings have reinforced the popular idea that eastern and southern Aboriginal people of mixed descent are detribalised, assimilated, alienated from their land and ‘divorced from their cultural roots’ (Rigsby 2010, 58; Tonkinson 1997, 8).

The *Yorta Yorta* claim raises challenging research questions in relation to establishing continuity of Aboriginal culture and law in an urban context. Have cultural changes caused irreversible damage to the Aboriginal system of laws, traditions and customs and to mechanisms of social control and forms of identity? Is the system so broken that it is no longer useful in maintaining internal social meaning and order? If not, has the Aboriginal society transformed its structures and system of laws, traditions and customs in response to the imposed changes? How can such a system, transforming through time, be characterized through evidence in an anthropological report today?

In responding to these questions, I outline in this paper how an anthropologist might compile available evidence to present a model of a system of Aboriginal laws and customs for an urban native title claim that includes: a) the spirits of the country, b) the land and seas of the country, and their resources, c) the descendants of the country, and d) the laws of the country, with these elements being interlinked. In understanding Aboriginal law as a system of laws and customs for all indigenous beings including persons, animals, plants, and spiritual entities, the model needs to explain how the laws are transmitted from: a) country to person, b) spirit to person, and c) group to person or person to person, as well as describing the various forms of punishments concerning the breaking of laws, which in turn assist to maintain the system. The model also needs to address how the adaptation of the system of laws and customs occurs, how the system generates inter-cultural syntheses or syncretisms, at times in unusually creative ways in urban settings, and how it dynamically draws on global values and new technologies.²

Understanding Aboriginal Law

I define Aboriginal Law here as the Aboriginal belief in a system of prescribed rules and customs for all animate beings (including persons, animals, plants and other perceived animate entities such as planetary and meteorological phenomena and spiritual beings). Aboriginal Law, or simply 'the Law' as it is often used in Aboriginal English, guides Aboriginal society in its daily practices (social, economic, ritual, political), its authority being spiritually or religiously³ derived and partly maintained from within the environment. In addition to Aboriginal Law being a belief, it is therefore also a set of moral and social imperatives and responsibilities. Its character varies from one Aboriginal group to another or from one Aboriginal society to another.

For many Aboriginal groups or societies, the Law is believed to have been prescribed by ancestral beings in the ancient era known in Aboriginal English as the 'Dreaming' (or the 'Dreamtime'). The construct of the 'Dreaming',

although adapted widely as a popular pan-Aboriginal English term in contemporary Australia, like Aboriginal Law, is conceptualized and articulated variously from group to group. However, in general, these ancestral beings created the landscape, leaving their sacred energies at sites, and their sacred histories (often encoded in songs and signs) which told of their experiences and adventures, and defined rules and moral codes for humans and other living species to observe in their everyday life cycles. These rules and codes became known to Aboriginal people as ‘the Law’:

The Law governs the world of all creation. It encompasses not only the rules and regulations by which people live, but also the laws of nature. Without the Law, nothing would exist or persist. In that sense, the Law is the Constitution, a charter of all that was, is, and shall be. By the same token, the Law is everywhere, binding the whole world together in a systematic way. (Morton 2000, 11)

According to classical Aboriginal beliefs, the sacred energies imbued in sites during the early creation period still remain at those sites, and the Law remains written in the landscape (in itself, an example of continuity in belief): hence the Aboriginal belief that country can punish humans for violating the Law and that acts of inappropriate behaviour in a particular part of a country can result in retribution by local Dreamings. An urban-dwelling Queensland Aboriginal elder, Mary Graham (cited in Rose 2005, 7), for example, refers to an Aboriginal axiom that ‘the land is law’ which ‘requires humanity to work with rather than against nature. The purpose of law is the purpose of Dreaming: to sustain a world in which life flourishes’.

Sutton’s work (2003, 112–13) explores regional variants in how Aboriginal ‘Law is expressed and conceptualized in both Aboriginal languages and in English’. Drawing on Maddock (1984), Sutton identifies the expansive nature of the rules and customs usually constituting the Law, from ceremonial practices such as initiation, to marriage rules, kinship obligations and etiquettes, butchering procedures, and fire-making techniques to land tenure and land identity practices that provide local entitlements (or rights). Importantly Sutton comments on the transmission of the Law:

It is always integral and common to these concepts that the Law is something derived from ancestral people or Dreamings and is passed down the generations in a continuous line...Although transformations between ancient and modern practices are recognised by people such as the Wiradjuri of ‘settled’ Australia, their customary land law still

has the same essential feature of being something that derives much of its authority and sanctity by being conceived as a body of principles transmitted down the generations from elders to younger people. (Sutton 2003, 113)

Continuity, change and tradition in native title

Within the study of cultural change, anthropologists have addressed processes of adaptation, acculturation and syncretism, contributing to an understanding of cross-cultural exchanges, borrowings and appropriations which result in blended patterns and transformations of forms, structures, meanings and other properties. Any anthropological consideration of cultural change must address the construct of tradition. For fifteen years in Australia, anthropologists have been revisiting in forensic manner the definition of tradition in response to intense programs of native title claim litigation. For discussion purposes, I start with the definition provided to the Federal Court by the expert witness Bruce Rigsby.

In Standard English, the term *tradition* has, I submit, the core sense of signifying the process(es) of the transmission or passing on of culture across the generations. In this sense, tradition is no more or less than the normal process of cultural change, as Kroeber...recognised when he wrote of 'the passing on of culture to the younger generation' and said that 'the internal handing on through time is called *tradition*. (Rigsby 2002, 10)

Here Rigsby introduces a dynamic property of tradition that is epistemically conceived as an enculturative process rather than as a specific practice or object. Rigsby is also using the term 'culture' abstractly as a collective of many attributes, not as a commodity in a reified sense. Rigsby continues:

Tradition has a second (metonymic) sense of signifying the product or products of this process, so that we can identify those elements of culture, e.g., customs or whatever, which have a history of inter-generational transmission to be traditions as well. Note then that the term tradition has two senses: a process and the product of the process. For their part, customs are simply patterns of behavior which are shared by members of a social group, i.e., they are social, not individual phenomena. In plain English, traditions (as products of the process of tradition) seem simply to be old customs, handed down across the generations from the past. (Rigsby 2002, 10)

Rigsby's emphasis on cultural transmission between generations implies concepts of enculturation, conceptual encoding and decoding of meanings, as well as adaptation to environmental and socio-economic contexts, and to group needs (Rigsby 2006, 118). In this sense, traditions display another dynamic set of properties as a process of cultural change.

Handler and Linnekin (1984, 273–4) point out that the anthropological literature on tradition reveals two competing theoretical paradigms. The first and earlier paradigm considers tradition naturalistically, as a bounded entity made up of constituent parts that are themselves defined properties. In this atomistic paradigm, the many constituent elements of a culture are regarded as discrete entities having a characteristic essence apart from or independent of any interpretation of them. Anthropologists who once relied on this paradigm prior to the 1970s might have prescribed, for example, which traits were old, which were innovations, and showed how such traits fitted together to make up what they called a 'tradition' and a 'culture' (see arguments in Handler and Linnekin 1984, 273–6; Rigsby 2002, 10–14). Then they might make a conclusion as to which traits have been retained and which have been lost in a normative sense. Despite subsequent theoretical progress in anthropology, this 'frozen in time' approach prevailed to some extent in the legal interpretation of the *Yorta Yorta* evidence. The judgement in the *Yorta Yorta* appeal case did, however, concede that 'significant evolutionary or adaptive change' may occur in traditional law and custom (see Rigsby 2010, 65; Sutton 2003, 136).

If we return to Rigsby's critical point about change occurring to traditions within the processes of intergenerational transmission and enculturation (Rigsby 2006, 118), we note that a key reason for this is, as Edward Shils has pointed out, that 'interpretations are made of the tradition presented' (Shils 1981, 13). An alternative paradigm (Handler and Linnekin 1984, 273–4), then, is that tradition is an interpretive process, continually reinterpreted and thereby transformed. Because all cultural systems change regularly, there can only be what is contemporary, whether or not it is also understood as 'new'. As Handler and Linnekin have argued (1984, 273), what is new can take on symbolic value as 'traditional' in reference to what is perceived as being 'old'. However, Rigsby (2006, 130–8) also provides a useful differentiation of the everyday drawing on one's experience in conventional recurrent behaviour from the conscious interpretation of past customs or behavioural prototypes that may result in the innovation of contemporary traditions. Indeed, the development of understandings of the dynamic properties of tradition has been well consolidated in anthropological literature over the last three decades (for example, see Keesing and Tonkinson 1982; Linnekin 1992; Rigsby 2010; Tonkinson 1993, 1997). Anthropologists have become united in agreeing that the earlier static models of tradition in social and cultural life were erroneous.

Rigsby writes that Australianist anthropologists recognise that tradition is a universal social process, and Tonkinson similarly states:

When reporting on the dynamism inherent in 'tradition'... anthropologists need to emphasise that re-readings of the past have long been recognised as a universal aspect of social life... Furthermore, they should make clear that such re-readings of the past need not entail any conscious fabrication or manipulation of fact, since filtering effects, distortions and disremembering are intrinsic to the process. (Tonkinson 1997, 12)

My view is that both paradigms of tradition can be usefully referenced and explained in a theoretical review, but that the expert anthropologist's central task is to explain tradition as a 'process' to the Courts and to understand the interpretative styles and methods of creative cultural production for particular cases. One reason for making reference to parallel understandings is to be adept at providing advice to the Court under legal examination, a process which can be intimidating at times and designed to seek legitimisation of the conservative paradigm. Thus, during cross-examination in court, one should be seeking to explain the transformative nature of tradition based on the ethnographic facts and supported by current anthropological theory, rather than just falling into the trap of the atomistic paradigm by simply eliciting those traits which apparently have or have not changed.

Another reason to be adept at understanding these paradigms is that both may co-exist in Aboriginal intellectual practice since meaning is always contested and negotiated. For example, one of my early lessons as an ethnographer came from engagement with a dozen or so elders at Mornington Island in the early 1970s. Some only accepted the truth value of purported knowledge if it was seen to be obtained from respected patrilineally-related ancestors in the pre- or early contact period, or obtained from spirits in dreams at sacred sites, knowledge obtained in this way being perceived as being ordained by ancestral authorities. Others, however, were creative by taking this knowledge base and then extrapolating propositions on missing pieces of cosmological knowledge with their own hypotheses. The latter were nevertheless severely chastened (at least to me in private) by the conservative elders for this perceived perversion of traditional knowledge.

There were thus two positions presented to me in the field, one promoting the transformation of tradition and the other less inclined to do so and there was a constant intellectual debate between the two (Memmott 1979, 199–201). I do not intend any evaluative judgement here on whether either category is more or less useful as evidence. Certainly, younger generations at Mornington Island today seem willing to accept the legacy of tradition received from those

creative elders who have now passed away. What is important is that there is a politics of cultural change which needs to be contextualised in documenting related evidence in native title claims including an understanding of how social meaning is not only transmitted, but is also defended, filtered and negotiated out of the conditions in which it is embedded (see Bauman 2010, 6).

This process of negotiation from the past is reflected in Mick Dodson's 1994 Wentworth lecture, in which he argued for a sovereign right to maintain Aboriginal political control over the definition of Aboriginality, allowing for variation and transformation, with the recognition of the need for the prevention of colonial and post-colonial authorities statically reifying such Aboriginality (1994, 19). As for tradition, he states: 'The past cannot be limiting because we are always transforming it...we repossess our past, and [thereby] ourselves'. Dodson continues, 'we recreate Aboriginality into the context of all our experiences, pre-colonial and post-colonial. The past therefore becomes a resource that can be creatively moulded and manipulated...the past is dynamic, active and potentially revolutionary...in which we can root our autonomy, our sense of ownership of ourselves and our resistance against assimilation' (Dodson 1994, 21). Here we see tradition as a process used at its most purposive and forceful; being adapted as a resource for the modernisation of cultural identity.

Tonkinson (1993, 599; 1997, 12) argues that, as a theoretical tool, tradition is most effectively conceptualised as a resource employed strategically by certain (but not all) of a community's people. The emergence of prevalent beliefs is initially likely to be advanced and contested only by particular individuals, with the ultimate widespread adoption of social meaning being connected to power relations. The members of a given social group are seldom likely to be equally situated in their response to processes of interpretation of tradition. Tonkinson (1997, 11–12) also provides a caveat: '[that] it is essential to differentiate between idiosyncratic, highly personal beliefs and activities that are not adopted by sufficient numbers of other people to constitute "customary" behaviour, and those bodies of knowledge that survive an inevitable testing period and eventually attain the status of "traditions"'. Tonkinson's comments inform the need to present evidence built on a foundation of a dynamic model of the construction of tradition, as well as one which demonstrates that the system of laws and customs of the native title group is a normative one.

A central challenge for the anthropologist, then, is informing the native title parties in the connection report phase, and potentially in the Federal Court, of the theoretical validity of a dynamic model of tradition in explaining the evidence of the claimants. Such a model would represent the system of social organisation and cultural reproduction, whilst it may have undergone transformation independently in the classical (or pre-colonial) era, as an adaptive response to socio-political, economic and cultural conditions imposed

by colonisation and post-colonial changes, which can have self-correcting, self-directing and self-sustaining mechanisms (such as encompassed within Aboriginal Law). An assemblage of laws, customs, beliefs and practices must be shown to be held in common by the claimant group as ‘a whole system underpinning a communal title, rather than merely an accidental set of principles or practices found across a population’ (Sutton 2003, 113). The model needs to have identifiable coherence and durability despite whatever stress-lines, dissonance, contradictions and conflicts that may occur, and despite the recurring vulnerabilities in the system arising from forces of directed cultural change (see Keesing 1987, 372).

This is not an easy task. Too frequently, claimant knowledge is fragmented, unevenly distributed, poorly authorised, and at times draws on conflicting literature sources. Claimants may also be suffering from the effects of various social problems including widespread substance abuse, and a lack of ability to exercise authority by elders over many young and older people. It is counter-productive for the anthropologist to ignore contemporary conditions, for invariably there will be differences in values, practices and beliefs which inform intra-group and inter-family conflicts and which may be manifest in the public arena — including in cultural heritage processes, at native title meetings or during court challenges.

Example of a model of Aboriginal Law for a metropolitan claim

The following model was constructed by the author in 1996 for a metropolitan native title claim, in the understanding that the claim may have been referred to the Federal Court, though the claim was largely resolved through a consent determination. That is, the model has not been subjected to adversarial processes or tested in the court.

The first axiom of the model was that the claimant group resided in a cultural landscape of sacred sites imbued with perpetual energies and sacred knowledge, even though a significant part of this landscape was in a metropolitan setting. The second axiom was that the spirits of the lands and seas at times informed the claimants on appropriate behaviour, or the Law, as established in the ancestral past. Only a portion of the Law may be known to be accessed by and held by all members of the Aboriginal society⁴ at any one time, particularly ‘secret-sacred knowledge’.

This reality will challenge anthropologists to describe ethnographically how members of the society form a relatively coherent worldview with a system of rules, codes and beliefs. In this they should be guided by their field data and what the claimants have to say. It is here that the processes of negotiation and contestation of meaning among the claimants needs to be ethnographically

described and critically assessed as to how they might constitute tradition, and reflect a normative social process in what is inevitably a heterogeneous social and cultural field.

The 1996 model then presented evidence that the process of transmission of the various attributes and elements of the Law could occur in different ways: a) through knowledge passed orally from generation to generation encoded in sacred histories or stories; b) through knowledge given to humans from spirits, and interpreted through signs in the environment; c) through spirits talking to people directly, either from within the environment or through dreams; and d) from ethnographic, anthropological and biographic texts. The evidentiary status of the processes in b) and c), where knowledge is obtained from spiritual sources, was reinforced by ethnographic sources which recognised such traditional processes of knowledge transmission at the time of sovereignty. Where knowledge is obtained through the spiritual revelation of a recent dream, it can be asserted to be of older origin if the donor is believed to be the spirit of an ancestor (Elkin 1977, 77–8; Memmott 1979, 193–8; 1983, 41; compare Tonkinson 1997, 11).

Processes where transmission can occur through ethnographic and anthropological texts clearly raise issues concerning the nature of legally acceptable evidence as to the meaning of ‘adaptation of a tradition’ and its relationship to what has been described as ‘re-invention’ (see Handler and Linnekin 1984; Hobsbawn 2000; Linnekin 1991; Thomas 1992). Nevertheless, this form of transmission is as valid as and complements the others listed above, and should be made transparent in the evidence: it is an unavoidable and acceptable cultural adaptation of ‘tradition’.⁵ Contemporary Aboriginal cultures must be recognised as including textual and digital media, which constitute part of the process of negotiating meaning out of the current socio-economic and cultural circumstances. In the claim under consideration there were several famous deceased ancestors who were artists, authors and ethno-scientists who had left behind written records (some published) of their customary knowledge to be accessed by their descendants. The adaptation here is the shift from the oral to the written medium, which should not be seen as causing a deficit to traditional knowledge, but rather as an augmentation of the oral medium.

Nevertheless, one should proceed cautiously in evaluating the practice of reference to texts. For example, Liberman (2008, 110) has written of the tautology that arises when a cultural practitioner draws on texts to justify or authenticate the very practices that led to the establishing of the rules or standards in the text.⁶ This tautology is evident in the native title context, when native title claimants argue against an expert model based on their own interpretation of ethnographic texts as opposed to their oral tradition. A central point then is that transmission of custom by oral tradition, especially from a recognised Aboriginal authority figure, should be given due weight in

a model (and a corollary is that the ethnographic method should be directed at recording such practice).⁷ It is an inevitable part of the cultural process that there will be contestation, dispute and negotiation with respect to various forms of authoritative sources. Methods of dispute resolution enacted by claimants, particularly over matters regarding land or sea related issues are another cultural process that can provide evidence for the Court of laws and customs (for example, see Blackwood and Memmott 2003).

The 1996 model, through all of the listed mechanisms of transmission, presented opportunities for the individual to gain rights, knowledge and skills concerning the Law and appropriate customary behaviour. However, individuals had to respond appropriately to the opportunity; once a younger adult in the community had gained the rights to hold the knowledge, he or she was obliged to be responsible with the knowledge, and there was a further right to be gained and exercised of passing such knowledge on. In the case under discussion, this was partly done through ‘culture classes’ in the local school by recognised Aboriginal teachers of the claim group, but also through other methods such as weekend camps and excursions organised by cultural leaders. The system was thus able to be continually reproduced and transformed from one generation to the next.⁸

Within the model, the descendants of the country were born with rights, but the potential of those rights were unrealised until such individuals acquired the necessary knowledge and earned authority to socially use the knowledge. The more common contemporary method of acquiring knowledge was by personal instruction from elders. Gaining authority to exercise one’s rights did not diminish the ongoing obligation to maintain the Law, but rather increased it. Another way for this bestowal of authority to occur in the past was through regional processes of initiation, which had not been undertaken by this particular urban group for many decades (compare Burke 2010, 64). Nevertheless, a group of claimant men were attempting to resurrect initiation by regular visitation, communion and camping at one of their *bora* rings, taking some of their own elders with them, at times engaging elders from other groups, and seeking signs and knowledge from spirits at this sacred ground. This would have been a challenging ethnographic task to record and set before the Court as continuity of custom, but it demonstrated the cultural durability of the group and their efforts to negotiate their identity within their own social processes and to maintain their system of laws and customs.

Another key element of the model was that there were punishments for people who failed to observe appropriate laws and customs (as well as positive recognition for those who did). In the case study group, there was evidence that these punishments might be imposed by responsible adults, by an elders’ council, a men’s or women’s council, a justice group,⁹ or by the spirits themselves from within the environment. It was thus both the spirits and the elders who

were the main authorities in policing the Law. The spirits of the lands and seas were believed to be familiar with the smell of those persons who had descended from those lands and seas, but it was still necessary when visiting country to identify oneself to the spirits in that country to ensure protection. The spirit of the country could also call people back to the country through dreams and signs even where they had been absent from the country for some time.

According to the model, it was the spirits who provided natural resources in the environment, but humans had to take or use those resources in a way that conformed to the local laws and customs. These laws varied from place to place. Thus, for example, in this claim there was evidence of dugong laws, fish laws, crab laws and freshwater versus saltwater laws. There were also social laws controlling relationships between humans.

A further element of the model was that similar concepts, beliefs, laws and customs were shared and observed with neighbouring Aboriginal groups in the region. When visiting such neighbours, all social transactions needed to be predicated upon a contextualised knowledge of the ancestral connections to the particular countries of affiliation of both the traveller and the host group.

Anthropological models of indigenous worldviews and practices will not necessarily conform to the ways in which indigenous people see themselves. As Dwyer and Minnegal have suggested, ‘understandings of agency may not be congruent with those of analysts’, including those of court barristers and judges, and ‘may extend the reach of agentive capacities to objects and beings that the analyst judges to be either devoid of agency, lacking material substance, or both’ (2010, 638).¹⁰ The anthropologist’s most useful role for the Court is to provide accounts of processes that acknowledge and accommodate in an explanatory way the claimants’ understandings of tradition, continuity and change, including those aspects of agency that lawyers may regard as unfounded belief.

Expanding the 1996 model

Since the approach discussed in this paper was formulated in 1996, some anthropologists have built normative models of culture and continuity of tradition, based on a set of core principles and values of urban indigenous social life that have been received favourably in consent determinations and in the court,¹¹ including those principles outlined in Sutton’s *Native Title in Australia* (2003). Sutton’s constructs (2003, 210–12) include persistent ‘families of polity’ being ‘surnamed descent groups’, structured along the principles of ‘cognatic descent’ with continuity across a number of generations who reference back to communally-recognised ancestors and display shared family history and politics of kinships.

The 1996 model can be extended through the idea of ‘families of polity’ so as to identify elders in families of polity who are authority figures in maintaining jural values and in decision-making under the group’s Law to demonstrate a consensus of views by which families of polity are regarded as unquestionably belonging to the claimant group. In the urban context, the exercise of authority by elders may also be by way of justice groups, and/or elders’ groups who meet regularly. The communal action of these elders can often be noted at funerals and other urban events such as sporting fixtures and National Aborigines and Islanders Day Observance Committee (NAIDOC) Week, as well as in active participation in ‘Welcome to Country’ rituals.

The 1996 approach might also be extended and amplified by what has been described in the literature as ‘demand sharing’ (Peterson 1993) and its relationship to various other aspects of Aboriginal social order including the economic. Discussing demand sharing among the Wiradjuri of New South Wales, Macdonald writes (2000, 90–1) that the ‘system of social relationships within which goods and services are circulated’ is an economic system (an economy of kinship) that continues in the contemporary Aboriginal world despite partial reliance on the market economy¹² and the loss of most hunter-gatherer practice options within urban precincts. Contemporary Aboriginal kinship is increasingly described in terms of distinct values and rules such as family membership by ‘blood-line’ descent, the use of socio-centric, kin-based, honorific terms of address (‘aunty’, ‘uncle’, ‘granny’),¹³ endogamous sanctions against marrying close kin (although these are often relativistic rather than specific — cousins are said to be ‘too close’), and the values of respect, shame, jealousy, and demand-sharing behaviours. The integration of social organisation and demand-sharing values may be manifested within the urban residential mobility patterns employed among kin especially by young single people travelling between rental houses. Elder authority figures in Aboriginal descent groups may also figure in counselling young Aboriginal adults about distinct Aboriginal norms and values, as they advise about matters such as ‘too close’ sexual relationships and issues of disrespect.

Other ideas which would inform and embellish the 1996 model include the valuing of sacred sites or story places despite the fact that there may be limited knowledge of such places and that what knowledge there is has been obtained by way of and in reference to ethnographic texts. Contemporary urban groups may have strengthened values of attachment around archaeological sites, seeing them as providing both spiritual and material links to one’s ancestors, with consequent active participation in cultural heritage clearances and other land and sea-management activities. The belief in the capacity of the environment to punish for wrongdoing also is usually a potent feature.

Efforts to record and preserve Aboriginal language may be demonstrable as some people practise limited phrases or vocabulary in public speech-making and everyday discourse. These limited words and phrases may take on imbued symbolic significance to the descendants of the group. Distinctive dialects or lexical sets of Aboriginal English can also be documented as evidence, as well as naming systems including practices relating to the attribution of nicknames to mark Aboriginality. For urban groups, customary economic practises may be restricted to fishing practices and craft material sourcing. As noted earlier, the economic significance of demand sharing needs to be explored in evidence, including the relationships between hunting and gathering practices and kinship and social organisation as aspects of law and custom. Knowledge of laws and customs relating to hunting and gathering procedures that are no longer practiced may also take on enhanced symbolic meaning in the contemporary context, such as the recounting of how ancestors herded mullet schools with the assistance of dolphins, as in my 1996 case study.

‘Witnessing’ by elders from surrounding language or tribal groups is also a powerful form of evidence. Through this process, the elders validate the identity and membership of the claimant families. They ensure that the claimants are claiming the correct country, that the appropriate authority figures are acknowledged and respected, and that the Law, which is part of a wider regional system of Aboriginal ‘law’ manifest in regional decision-making on land management issues and patterns of inter-group exogamy, is also respected.

Any analysis of seats of authority and responsibility, as well as modes of punishment, shaming and sanctioning for particular sets of laws and customs, leads us into considering a complex model of widening and overlapping domains of jural publics, making up nested and concentric spatial rings in the socio-territorial organisation of Aboriginal society (Burke 2010). Burke has argued that identification of those ‘responsible for applying social sanctions for the breach of...laws and customs...[relating to land, cannot be reduced to] a single unproblematic grouping...[but must] 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’ (Burke 2010, 67).

The importance of ethnography: A conversation by two metropolitan elders with students in 2010

While it might not be possible to observe the practice of certain exotic pre-contact customs in evidencing a native title claim, the systematic ethnography of contemporary urban societies can reveal much that is relevant. In March 2010, for example, I arranged for an elder of the Yagara language group of

Brisbane, Uncle Des Sandy, to give a talk to a visiting group of students from the University of Auckland with their Maori teacher. The talk took place at the Talking Circle (*Kuril Dhagun*), a designed, open-air setting beside the Queensland State Library in view of the Brisbane River and the Brisbane CBD. We were unexpectedly joined by an elder of a Moreton Bay language group from the immediate east, Uncle Bob Anderson of the Ngugi people, who had been a claimant in the metropolitan claim to which the 1996 model under discussion applied.

By examining selected excerpts from their spontaneous speeches to the visiting students, I am able to make key points illustrating the shared regional system of laws and customs. Uncle Des Sandy commenced the presentation by saying ‘From here to the Gabba [Woolloongabba] is *Kurilpa*; the bend in the river from Highgate Hill to the Gabba is a locality. *Yagara* is the whole lot, spelt Y-u-g-g-e-r-a, the whole area. There are lots of clans inside this...Jagera, Turrbul. *Yagara* was one tribe. It went to the coast 20,000 years ago’. Evoking the ancient sense of the land and seas of his country, a cultural landscape with sub-units of geography, he went on: ‘This place is *kurilpa*; *kuril* is the native rat, a spiritual totem; it looks after this place; it is a spiritual ancestor’.

Uncle Des thus introduced one of the spirits of the country and identified not only its ongoing presence in the environment but hinted at its authority to look after country (and implicitly to punish for environmental misdemeanours). After describing more local totems and their sacred sites, Uncle Des pointed to the CBD area and said ‘that’s women’s business area’, and then alluded to the gender divisions of knowledge, social roles, and associated ritual and places:

Women teach children footprints in ground, when bark falls off trees, when fish getting fat, when flowers producing fruit [i.e. seasonal signs]. They’re taught places where they cannot go — taboo. Some men are not allowed to go with some women...skin or moiety rules. If take woman [who is] wrong skin — either death, or told to ‘get on the pathway’ — the pathways go all over Australia — you are in exile. Children are taught sex — so they know the Law from a young age — but we only have one Law! If we have a by-election, we cannot change things... [the Law] stands forever.

Here he refers to the integrated model of environmental order and change and then switches to various rules of behaviour and to the external authority of the Law; also to the notion of punishment for breaking the Law, as well as the post-sovereignty continuity of the Law. He then introduces the idea that the Law as practised in his society only extends outwards a certain geographical distance before it transforms into fundamentally different (and foreign) forms of the Law as well as reflecting different symbols of material culture.

If I go to Cunnamulla, I might as well be on another planet; they speak a different language. There is a protocol of sending a message stick to ask them if we can pass through their country. The didgeridoo is not from here. I have no say in it [i.e. it is an Arnhem Land artefact].

Uncle Bob Anderson then qualified his relation to Uncle Des's people and country, situating himself in the regional society and geography, including through arranged inter-marriage:

I was born at Woolloongabba so I have a secondary affiliation, [meaning a little bit of say or some limited rights in Uncle Des's country], but no bloodline to here. In my family, there was one marriage to Des's people — arranged at Musgrave Park'.

He thus touches on the traditional complexity of secondary or tertiary rights held in neighbours' countries and hints how agnatic ties between groups can generate them. Continuing, Uncle Bob alluded to adaptations of Aboriginal tradition in the urban environment of the mid-nineteenth century and an ultimate recognition of traditional authority in recent times:

In the early days of Brisbane there was a curfew on black people. Thus the name Boundary Street at West End and another one in the city [a territorial exclusion zone]. I grew up in East Brisbane with my mother — she said 'always be home by dark'. It didn't connect when I was young. Some years ago we [Aboriginal people] gathered at Musgrave Park — a ceremonial gathering place — and we marched from the Park into town where the Lord Mayor handed us the keys of the city and pronounced the curfew over; finished.

Uncle Bob continued, 'The red-bellied black snake is my sign on Moreton Island; for Kath Walker of the *Nunakal*, it was carpet snake, *Kabal-cha*. And here, *Kiril-paa*, place of rats'. Like Uncle Des, he thus identifies his totem and positions himself in the cultural landscape, again hinting at the regional system of Law and custom operating in the wider Brisbane metropolitan area.

Uncle Des then took over the presentation, referring to inter-tribal Law, the need to seek permissions for regional travel across different groups' countries, and the complexities of regional communications:

We had a festival called *bunya*; people also came for mullet season...If come from Cunnamulla, travel on pathways and ask permission... There is another way of communicating. If invited to a meeting and cannot

make the meeting 300kms away, you send a proxy...later he comes back. But people here already know [the outcome]. Another sphere [of communication].

Uncle Bob Anderson picked up on this point, alluding to technological cultural adaptations: 'And it's mental telepathy that Des is referring to [compare Elkin 1977, 42–5, 61–4]; Aboriginal radio is now using the same, air waves'. Uncle Bob then cites a behavioural rule (part of the Law) for fishing by younger generations in talking about the mullet season:

Three or four species of mullet: diamond scale, deep sea, goldie gills, hard gut. They migrate north and make a left-hand turn at Point Lookout and pass between *Munjerribah* and *Malgampin* [Stradbroke and Moreton Islands respectively]. The rule is never net the lead fish. They bring the schools into the bay before they disperse up rivers and creeks etc.

The presentations concluded with Uncle Des asserting his authority as a traditional owner: '[We're] given a place to look after — this place is mine. When you leave, you take part of the Spirit from here.'

These few excerpts demonstrate what Sutton has referred to as an 'assemblage of things which are somehow correlated or coordinated among themselves, and in which there is an ordered complexity of some degree' (Sutton 2003, 139). The two elders from two contiguous language groups, although speaking spontaneously and in unison to a group of visitors, were clearly employing shared concepts drawn from tradition, thereby providing an excellent illustration of the type of native title evidence that may be useful in a metropolitan setting. It is possible to model a continuity of a system of Aboriginal Law in these kinds of contemporary circumstances, providing that there is a demonstrable sharing and unifying function of these customs and practices throughout the claim group. This is notwithstanding ongoing processes of interpretation and contestation over the meanings of tradition as well as the inevitable socio-economic heterogeneity of the native title groups residing in an urban setting.

Conclusion

A series of questions was posed at the beginning of this paper as to whether and how, for a particular urban native title society undergoing processes of cultural change in the post-colonial era, an Aboriginal system of laws, traditions and customs can be anthropologically modelled to evidence the continuity of the Aboriginal Law. For such an urban or metropolitan claim, the anthropologist

can address how the native title of the applicants inheres in Aboriginal Law by asking: ‘How, for this urban group, can a body of transmitted knowledge and social practice and behaviour be assembled that can be labelled as a system of traditional belief constituting the Law? How can this be modelled as including elements of knowledge, authority figures who hold such knowledge, rules of behaviour for everyday life, rules for ritual life, punishments for misdemeanours, forms of social and cultural identity, as well as local and social organisation components? How can it be evidenced that although some customary elements described in the early ethnographic literature have been lost, there is still a relatively substantial and cohesive social system of the Law?’. While addressing such questions with sound ethnographic evidence can be a professional challenge, it is an approach which in my view can be useful to the court.

In this paper, I have outlined a possible model of such a system that can be constructed from such evidence, if it is available. The model comprises: a) the spirits of the country; b) the land and seas of the country, and their resources; c) the descendants of the country; and d) the laws of the country. These elements need to be interlinked in various ways. Aboriginal laws are transmitted from: a) country to person, b) spirit to person, and c) group to person or person to person. Punishments concerning the breaking of laws might be elicited, which in turn maintains the system. Adaptation of the system of laws and customs occurs, generating inter-cultural syntheses or syncretisms. These may be unusually creative in urban settings, drawing on new technologies in unexpected ways, but nevertheless necessary to present as evidence and explain to the legal profession and the Court.

It is inevitable that in an urban claim claimants share the spatio-temporal world with other city dwellers. Neither can they be expected to deny modern technologies and commodities. The task contains many professional challenges for native title anthropologists, specifically ‘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’ (Bauman 2010, 2–3). The evidence that needs to be brought forward is not of the denial of modernism but of the claimant group’s adaptation of their identified traditions and the integration and syncretisation of such into the fabric of modernity in a systematic and normative way that demonstrates some continuity in the notions of Aboriginal Law and authority.

NOTES

1. An earlier version of this paper was presented at the *Turning the Tide: Anthropology for Native Title in South-East Australia* workshop in Sydney 2010 in a panel titled Continuity, Change, Tradition, Society and Transformation, on Friday 2 July 2010. I am indebted to the organisers of this workshop, Toni Bauman and Gaynor Macdonald, for numerous critical comments on my earlier draft.

2. See Sutton (2003, Ch. 6) for a detailed exposition of the use of the term 'system' in relation to native title evidence.
3. Here I utilise an operational definition of 'religion' from *The Encyclopedia of Religion and Nature* (Taylor and Kaplan 2005, x) that draws on Chidester (1987): 'that dimension of human experience engaged with sacred norms, which are related to transformative forces and powers and which people consider to be dangerous and/or beneficent and/or meaningful in some ultimate way'.
4. In this claim the Aboriginal society extended beyond the native title claimants to encompass a number of surrounding language groups.
5. See Rigsby (2006, 114, 129–30) for further discussion on this aspect of reliance on texts in evidence, including its rejection by High Court judges in *Yorta Yorta (Members of the Yorta Yorta Aboriginal Community v. State of Victoria and others* [2002]).
6. Also see Smith (2008, 140, 141) on the circular relationship between the experience of practice and supposedly authoritative texts about practice.
7. In contrast, for example, to exclusively relying on a questionnaire survey conducted amongst all claimants as is practised in certain jurisdictions.
8. Another challenge for the anthropologist is that it is not uncommon to find some descent groups whose members concede they were taught little about their culture, and others who profess to hold extensive traditional knowledge. The challenge is to identify an appropriate normative level which reflects the ethnographic facts but which will make sense to lawyers in the Court. This is a subject for a separate paper.
9. This may be in the form of Circle Sentencing in New South Wales.
10. 'Agency' is used here in the more general sense as 'a mode of exerting power' or 'an instrumentality for producing effects'.
11. For example, consent determinations for the Gunditjmarra and Gunai/Kurnai claims in Victoria and Quandamooka in Queensland (National Native Title Tribunal 2007, 2010, 2011).
12. Macdonald (2000, 103) has argued that, due to this prevalence of kinship in Aboriginal economy, the incompatibility of the demand-sharing economy with the market economy requires a degree of theoretical separateness and that they are better conceptualised as co-existent or dual economies rather than structurally integrated.
13. See Sutton on this (2003, 227).

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CHAPTER 8

Anthropology and the resolution of native title claims: Presentation to the Federal Court Judicial Education Forum, Sydney 2011

David Trigger

Introduction

On 14 April 2011 the Federal Court held a Judicial Education Forum in Sydney where, together with anthropologists Gaynor Macdonald and David Martin, I made a presentation to 28 judges including the Chief Justice and seven Registrars. Participants were from across all State and Territory jurisdictions and discussed a range of issues. The following is an edited and expanded version of my presentation at this forum. It was prepared for an audience with a keen interest in the discipline of anthropology's role in native title cases.

Background to anthropology's contribution to native title claims research

Before addressing substantive issues it is relevant, especially for those less familiar with anthropology, to make several background points.

Anthropology in Australia over the past 100 years has developed an extensive body of research concerning Aboriginal and Torres Strait Islander culture. A portion of this work has focused on traditional relationships with land and waters. Spiritual beliefs have been central to the subject matter written about over the years but there has also been considerable study of material and economic aspects of the relationship with physical environments.

Increasingly, developing particularly since the early 1970s, anthropological work has also included investigation of the relationship of Aboriginal people with the wider Australian society, seeking to avoid any artificial separation of Aboriginal traditions from the influences of broader beliefs and practices.

While not diminishing the significance of research on indigenous law and custom as such, it is important to note that for decades now anthropologists have sought to recognise the realities of cultural change. Much research has documented creative adaptation to change consistent with the continuity of aspects of traditional beliefs and practices.

Most anthropologists based in Australian universities do not work with Aboriginal or Torres Strait Islander people. Our colleagues and PhD students travel to other countries and also study a wide range of subject matter across the diverse Australian society. In some ways anthropological work in settings other than indigenous Australia is more attractive, in part due to ambiguity about whether the researcher will necessarily be welcomed or accommodated among Aboriginal groups and also to the generally highly politicised context of indigenous affairs.

Furthermore, students who do carry out academic projects in indigenous Australia are aware of views among some senior members of the profession that applied work such as native title research does not facilitate ‘real’ analysis that can be independent of a client’s interests, or at least of constraints flowing from legal parameters that the research must address (see Martin 2004). Criticisms of the native title process from some influential indigenous leaders are of further concern.

Having made these short points, I should say that my own aim, together with quite a number of those working both from the universities and private practice, is to encourage contributions from the profession, including making a more effective case in litigation and mediation to assist understanding of continuities and changes in traditional law and custom. Anthropology brings expert opinion to one of the key issues in native title cases that I will address today — namely, the importance of avoiding unrealistic expectations about what constitutes culturally authentic traditional law. This leads me to my first substantive theme.

Continuity and change in traditional laws and customs, rights and interests

From an anthropologist’s perspective the elephant in the room in native title research is the question of cultural change. Uppermost in researchers’ minds is necessarily the legal requirement for a ‘continuing acknowledgement of traditional laws and continuing observance of traditional customs’ (Burke 2010, 56). While documenting people’s everyday beliefs and behaviours that arise routinely from indigenous cultural traditions, the researcher will commonly also encounter a deliberate politics of cultural revival, in the context of claimants’ desire to prove tradition-based rights to the Australian legal system. Thus, interweaved with unreflective cultural continuities there may

also be a determined traditionalism focused on proud attempts to recuperate aspects of culture. While it is hardly surprising that the matters germane to proving native title can be highly politicised, and in anthropological terms this is consistent with forms of cultural continuity, it is worth noting how the researcher is commonly faced with an intense mix of everyday expression of cultural traditions and concentrated political strategies for asserting cherished rights and interests.

Hence, the anthropologist has to exhibit empathy with claimants' self-conscious aspirations, while maintaining rigour in the investigation of what constitutes change. A question which often arises in the native title legal context concerns which aspects of current norms and customs are based on those inherited from indigenous forebears and from continuing traditions. It should go without saying that the best work will deal openly with this matter, acknowledging where necessary any strategic traditionalism involved. The research task is to negotiate beyond the politics, to clarify customary changes that are within the contemplation of traditional law and custom, in that the relevant beliefs and practices retain a link to their origin in traditions sourced from an earlier time. Deciding when a law or custom is 'new', and that there is no apparent link with the past, is not an easy matter. To take an obvious example, the same young people keen on African-American music and clothing styles, and perhaps not particularly interested in or knowledgeable about the details of songlines sung in the past by their elders, may nevertheless assert vigorously that the country they inherit from Aboriginal forebears is full of spiritual significance. The embracing of aspects of African-American style and associated merchandise need not detract from their continuing inherited connections with country.

It should also be noted that anthropology assumes that not all law and custom will be consciously articulated among claimants, at least not as a set of listed principles for belief or action. Furthermore, there will typically be the flux of personal interpretations. To use the language of contemporary theory in anthropology, 'socialized and embodied routines are [not] ... seen as a static set of rule-like behaviours' (Miller 2010, 419). Societal rules or norms are negotiable and change over time. Unless 'law' is a particular focus of study, it is sufficient in anthropologists' general academic work to imply rather than explicitly identify 'the sanctions, promises, or pressures that may be applied against those who fail to properly accord with group norms' (Miller 2010, 418). This is an example of how work in the native title area can require a more systematic and explicit account of tradition-based norms and customs than may otherwise apply in academic writing, though whether that requirement flows from the *Native Title Act 1993 (Cth)* (NTA) or parties' assumptions and expectations about the demonstration of 'tradition' is an open question.

The anthropologist has to avoid naivety in the investigation of traditions, that is, avoid any expectation that current norms and values will too closely match what may have been recorded from much earlier historical periods. This is simply to emphasise the importance of proper recognition of the extent to which the current content of traditional law and custom incorporates aspects of claimant group experiences with the wider society. It is useful to refer to some examples.

A first point is to illustrate how change was occurring prior to European arrival. Patrick McConvell's (1985) map shows how the system of subsections, eight classes dividing people, species and Dreamings on country, had diffused and expanded from a likely location in the Top End of the Northern Territory. McConvell has reconstructed this expansion from analysis of the historical relationships between subsection terms. In the Gulf Country of north Queensland, for example, only the male subsection terms had reached Mornington Island, none had reached Bentinck Island, but both the male and female terms for the eight 'skin' categories were operating on the mainland up to the Leichhardt River which was a cultural boundary. To the east of the Leichhardt a different four-section system operated, but this was at the time of European arrival, and it seems likely further change would have seen the eight-subsection system continuing to move eastwards.

A second example is noted in the southern Gulf system, which like those to the west and south-west distinguishes in what we might term classic law and custom, the terms *junggayi* and *mingaringgi*. A person may be *junggayi* for their mother's father's and father's mother's countries and *mingaringgi* for their father's father's and mother's mother's countries (see Figures 1 and 2). However, in recent times both terms are becoming generalised to refer to roles a person can perform for country they inherit through any of these links; at Doomadgee in north-west Queensland, for example, the term *junggayi* is used increasingly in a general way to describe how a person can 'speak for' or 'make decisions about' or be a general custodian of any country inherited as part of the traditional system of law and custom. This lack of precision about the role is somewhat contested by those to the west at Robinson River and Borroloola in the Northern Territory for whom the more specific understanding of the role of *junggayi* remains significant.

Taking an example indicative of broader change, employment in the mining industry may lead to modified views about large-scale open-cut pits being consistent with spiritual beliefs whereas in the past such dramatic transformations to the land may have been rejected because of 'traditional law'. An illustrative case is Century Mine in the Gulf Country where arrangements have been made to handle culturally significant red ochre dug up in the pit as a by-product of excavation by transporting it to a private location and restricting

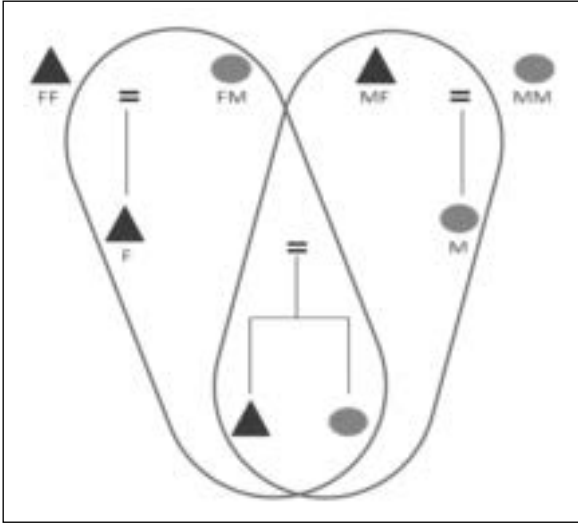


Figure 1:
A person is *junggayi* for their mother's father's and father's mother's country.

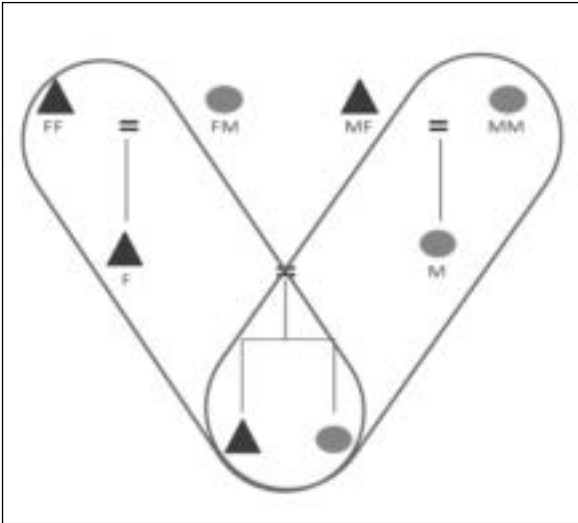


Figure 2:
A person is *mingaringgi* for their father's father's and mother's mother's country.

female engagement with the material.¹ The excavated ochre remains culturally significant but does not lead indigenous employees to jettison their interest in working at the mine. Further illustrations of change include how other materials may also be substituted for such ochre — in the Gulf Country, chalk 'raddle' for marking cattle was reported as used in similar ways to signal ritual significance, and these days it is not unheard of for red oxide to be purchased from hardware stores for the purpose of body and object decoration when visiting significant sites.²

Religious and spiritual beliefs can be influenced by Christianity (and in some cases aspects of the New Age subculture or, perhaps more rarely, by the religion of Islam) resulting in modification of traditional knowledge recorded from earlier periods; the anthropologist can analyse a continuing yet changing spiritual relationship with land and waters, commensurate with normative expectations about tradition-based rights and interests. Of course, there is no necessary single view among claimants on this sort of issue. In the Githabul claim in northern New South Wales, anthropologist Ray Wood reported some claimants asserting incompatibility between personal totemic connections to sites on the land and a Christian worldview; however, he then discusses other beliefs and practices based on the two traditions being quite compatible — as with a woman who understands her Christian faith, specifically intimations from God, to facilitate her capacity to deal with malevolent spiritual forces in the bush. Her belief in the latter derives from autochthonous Githabul traditions (Wood 2003; see also Sutton 2010; Trigger and Asche 2010).

A further example of change evident in the context of traditional law and custom is emerging modes of environmental management, involving claimants working increasingly with scientific knowledge, in a way that influences traditional practices of fishing, hunting and the taking of other bush resources (Altman, Buchanan and Larsen 2007). Ultimately the point here is that we ought have no conceptual difficulty with the proposition that Aboriginal people can embrace aspects of natural science (or indeed become scientists themselves) while continuing to practise and observe aspects of their traditions regarding land and waters.

We can also note engagement with communication technologies, for example, e-mail and Facebook, which is growing across many indigenous communities. Such digital interactions between the vicinity of claimed country and persons living geographically distant can serve to maintain social relations — and thereby collective knowledge of law and custom — without necessary co-residence near traditional lands. These technologies being adopted among young adults will likely prompt considerable social change in regard to how traditional law and customs are lived out through social action.³

Perhaps the example of cultural change most immediately relevant to legal proceedings arises from my recent expert witness work in a magistrate's court matter in Broome, Western Australia, where two Karajarri men sought to use a native title defence to charges of assault against two non-Aboriginal employees of Bidyadanga Community Council (Magistrate's Court of Western Australia 2010).⁴ The defence argued that the two victims were intruders into an area containing a ritual ground (albeit one not used for many years) and hence customary law demanded a violent response. Kingsley Palmer, the anthropologist engaged by the Kimberley Land Council which represented the

two accused, gave the opinion that, according to Karajarri customary practice, unauthorised entry into the area of a restricted ritual site mandates physical punishment. There was, in his view, an indication that this punishment might not now be as severe as in times past.⁵ However, Palmer also formed the opinion based on information from those he questioned that Karajarri customary belief continues to direct that a failure to protect such a sensitive site against persons regarded as trespassers and to physically punish offenders may have dire consequences for those who have failed in their duty to exact retribution. It was left somewhat unclear in the defence case as to whether the consequences for the accused would have involved physical assault against them, verbal chastisement, or spiritual aggression such as sorcery. Understandably, given the sensitivities surrounding this type of foreshadowed hostility towards those failing to punish offenders, it was also ambiguous as to who were the persons who would likely carry out such actions.

My own opinion in the case, having been engaged by the prosecution, was that an anthropologist investigating the place of violence in contemporary Karajarri law needs to probe the mix of values and beliefs that are likely to have been encountered and developed over many years of engagement with aspects of the wider Australian society, including the legal system, police, education institutions, churches and so on. This is not the place to provide a lengthy discussion of the factual details of the Broome case; however, its relevance here is as a dramatic example of the importance of addressing complex change when seeking understanding of traditional law and custom.

The case led both my colleague engaged by the defence and me to acknowledge anthropological research concerning tolerated levels of violence in many Aboriginal communities (Martin 2008; Sutton 2009). However, the literature also indicates that any substantial levels of violence in present times needs to consider that such behaviour does not arise from indigenous cultural traditions alone. David Martin's work explicitly points out that 'nowhere in Australia do (or indeed can) Aboriginal people live in self-defining and self-reproducing domains of meaning and practices' (Martin 2008, 51). While he comments that aggression and violence 'may well resonate with certain deeply sedimented cultural views', these are also 'entirely contemporary phenomena', deriving from such structural factors of Australian society as poverty and marginalisation among Aboriginal people. The Broome case is instructive because it shows how the anthropologist needs to go beyond oral traditions reporting customary incidents and practices from an earlier time to make an assessment of current norms and values. This is brought vividly into focus when the issue is the place of acceptable or mandated violence according to customary law in 2010.

Our research on traditional law and custom particularly needs to take into account the contemporary worlds of young people as they relate to such matters as native title. Marcia Langton has commented that ‘the gerontocratic Aboriginal world’ once documented by anthropologists has been changing enormously in the past four or five decades; her suggestion is that tradition-based authority from elders ‘is of little relevance to the Aboriginal world in which a high proportion of the population consists of children or youth’ (Langton 2010, 95). The implication is that researchers develop a sophisticated approach to cultural continuity in the broader context of such great demographic and cultural change.

The burden of my point is that, particularly among younger people, future native title research will need to avoid the risk of enforcing what some writers have termed a ‘repressive authenticity’ (Sissons 2005; Wolfe 1994), that is, any rigid expectation that the cultural knowledge and practices of previous generations will be somehow reproduced in an unchanged form. Furthermore, in the practical context of native title claims, we can note that the language of advice to those writing connection reports is not always helpful. The Western Australian guidelines, for example, advise researchers that they are ‘required to ground all changes to the native title *society* since sovereignty in traditional laws and customs’ (State of Western Australia 2004, 20; see also Burke 2010, 58). While, in principle, this should not mean change is fatal to traditional connection, in my view we need to make that point much more clearly, to avoid researchers feeling the task is unrealistic, and claimants thinking they need to fudge or pretend their lives are driven solely by such ‘traditional laws and customs’ as they operated in the past. In the context of negotiations for consent determinations, unwarranted assumptions by respondent parties that certain changes in Aboriginal life are ‘impermissible’ in terms of native title law, can bog down chances of a mediated outcome. Toni Bauman (2010) has referred to the need for a ‘presumption of transformation’, whereas too often it appears that parties assume the opposite, namely that the less change the more culturally authentic is the system of traditional law and custom.

The matter is further complicated by the language of change among Aboriginal people themselves. It is common enough for some claimants (often relatively senior individuals) to suggest that Aboriginal customary law never changes. To quote an example from a witness in the recent Broome area assault case: the evidence of Joe Brown, a senior Walmajarra man assisted by an interpreter, regarding traditional law was: ‘It’s got to be kept — like undergo no change. White man law changes every week. This lore has been there from the beginning; it’s never been changed’ (Magistrate’s Court of Western Australia 2010, 38). Yet it is common enough in anthropological writing to

note that this type of statement should be understood as an ideology of non-change in Aboriginal societies that nevertheless have encompassed substantial changes to tradition over time (Myers 1986, 52–4; Tonkinson 1991, 20, 133, 136). The pace of change has of course ramified through the periods of Euro-Australian colonisation. Instructively for native title anthropology research, in the context of contemporary indigenous communities, Francesca Merlan (2009) has pointed out that it is ‘relatively easy’ to elicit statements, especially from senior people, ‘of the superior constancy and groundedness of their culture’.⁶ Merlan goes on to warn that researchers should be ‘wary of stopping with these normative perspectives’ and careful to ‘develop critical awareness about how they relate to *what actually goes on*’ (Merlan 2009 [my emphasis]). This is particularly relevant where there is considerable intergenerational change in observance of traditional norms in social interaction and in the operationalising of customs concerning land and waters.

In native title research, a good illustration of the fact that researchers must delve beyond the consciously stated views of particular individuals lies in the variation between the analyst’s and claimants’ understandings of inter-group succession. Sutton has discussed succession that involves ‘whole language groups’ taking over lawful connection and rights in adjacent country with the demise of previous occupants (Sutton 2003, 5–8). Importantly, he points out that we cannot exclude the possibility that this type of collective language (or other) group succession may have occurred prior to European disruption; while perhaps unusual, parallel ‘similar population losses’ to those following colonisation, ‘may have occurred before the colonial era, where epidemics could have wiped people out in big numbers from time to time’ (Sutton 2003, 6). Similarly, we should hardly assume that pre-contact regional politics left geographic and social boundaries among language (or other) groups fixed forever without the usual changes of ebb and flow we would expect in any society. However, in contemporary native title contexts, if succession has completed or reached broad acceptance among members of the relevant Aboriginal jural public, the anthropologist may well encounter strategic amnesia — as Sansom (2001) has put it — meaning that the ideology of non-change suggests the successors have for time immemorial held rights in the land and waters. From the analyst’s point of view, based on documentary sources and earlier ethnographic research, demographic and geographic change in the distribution of traditional rights in land and waters is clear enough, but many or all claimants may well deny its existence, or significance. This type of example makes clear the anthropologist’s role as analyst rather than as solely a recorder of current claimant views, an issue at times arising between researchers and some legal representatives, who may prefer an expert’s report that mirrors in all respects the statements gleaned from the Aboriginal people with whom they are working.

The issue of succession takes us to matters of society, identity and claim group membership as these arise in native title research.

Society, identity and claim group membership

Another of the ‘elephants in the room’ of anthropological research is arguably the degree of finality with which the researcher can arrive at conclusions about claim group membership. One way of considering the issue is in terms of the social dimensions of the ‘society’ relevant to the native title process. It seems that this issue has received insufficient attention with attribution of the idea of a discrete ‘society’ predominantly to relatively small groups or at least to single entities commonly taking a language name (often referred to these days among Aboriginal people as a ‘tribal’ name). Early in the native title era, Sutton (1995, 1996) wrote of the ‘underlying’ title in traditional law that underpins and facilitates what he termed more ‘proximate’ titles as articulated by such named groups. The key idea here, and one which in my view has been insufficiently explored for many current claims, is that the robustness of traditional connections with land and waters follows not so much from localism as from ‘an underlying title held within the relevant *regional* jural and cultural system, which underpins proximate entitlements enjoyed by small groups of individuals’ (Sutton 2003, 111 [my emphasis]).

More recently, Burke has proposed, in part responding to Graham Hiley’s (2008) argument for keeping the boundaries of the relevant ‘society’ fairly local, that ‘the best approximation of the relevant society...is the language group under consideration *plus its traditional neighbouring language groups*’ (Burke 2010, 64 [my emphasis]). Burke points out the necessarily inter-group shared nature of establishing and operationalising boundaries between claim groups. The relevant ‘jural public’ for many issues of customary law dealing with rights in land and waters is by this view closer to Sutton’s regional ‘society’ than to individual named claim groups, at least in what is often enough their current form. Similarly, Palmer reviews a number of usages of terms in anthropology that may be suitable for the social dimensions of a ‘society’ in a native title claim; the notion of ‘cultural blocs’, aggregations of groups with ‘substantial cultural commonalities’, perhaps making the most sense intuitively (Palmer 2009, 7–8). We can note that such cultural blocs may contain languages (commonly nowadays significant more as identity labels than modes of communication) that are quite different and not mutually intelligible.

It would seem the biggest hurdle to more fluid resolution of claims on this sort of basis is not so much any conceptual difficulties with the analytical construct of a broader grouping, nor any anthropological problem with the proposition that geographically linked pre-contact language groups commonly shared a regional system of law and custom, but the apparent disinclination

among contemporary claimants to join together. Sutton referred to a 'tension between atomism and collectivism' (Sutton 1995, 1), and my own experience in cases over the past few years indicates that it is the imperative towards 'atomism' that appears on the rise. Despite apparent commonalities of both tradition and experience since colonisation, as well as kinship and marriage ties across geographic and social domains of considerable scale, it is now common for groups to eschew collectivism and take a more- rather than less-exclusive position on who can be a member of their claim group. Bauman, discussing a town in the Northern Territory, suggests that the *Native Title Act* provides a vehicle for indigenous codification of cultural identities as people 'compete for scarce resources and seek recognition in meeting eligibility criteria' (Bauman 2006, 323, 333). Hence reasons for the trend may include a claimant view that local-level interests are more effectively achieved by promoting particular family alliances as singular claim groups, though the significance of a traditional stress on the social value of cultural differentiation also emerges from Bauman's research.

Respondent parties at times appear to have their own reasons for a 'smaller is better' view about the dimensions of the native title 'society', seeking to restrict legal recognition to the scale of earlier recorded clans or 'estate groups', whose memberships were previously sustained through small-scale interaction in a hunter-gatherer subsistence lifestyle.⁷ In the context of contemporary native title research, Palmer's corrective is that 'it is not necessary for all members of a society to know all other members ... or to expect to interact with all others' (Palmer 2009, 13). While this is doubtless a reasonable analytical point, where there is disinterest in broader claim group membership, it is likely in part underpinned by a tradition of privileging and valuing highly oral face-to-face communication and associated first-hand social relationships. In this vein, among reasons given by Waanyi people (with whom I worked on native title) for opposing the inclusion of a particular large family among claimants was the comment that 'we don't know them', meaning 'we don't have routine social relations with them and cannot fit them into kinship categories'.

As emerged in the course of the trial which ultimately dealt with the Waanyi matter, there was no unanimity on this view (see *Aplin on behalf of the Waanyi Peoples* [2010]); however, the trend towards scepticism about including families not well known through social relationships was clear enough. The difficulty was underscored when genealogical research found disagreement about the family group's deceased forebear from whom Waanyi identity was said by some descendants to be inherited. In such cases, the anthropologist can be expected to give an authoritative view about contradictory versions of the genealogical details of the group. My opinion in the Waanyi case was that, according to traditional law and custom, assertions of membership required a

reasonable degree of acceptance across the relevant jurial public, such level of agreement being evident when there is no longer a significant number of senior people prepared to argue overtly against the assertion. Clearly, where there are relevant documentary sources, these should also be examined thoroughly, and potentially contribute to an expert's opinion.

It is not feasible here to consider in detail the complex anthropological arguments in the Waanyi case. What is worth stating is the perhaps obvious point that the research process itself, in such cases, brings into existence documents that subsequently become highly valuable as Aboriginal people seek to negotiate native title rights. Genealogies produced from anthropological research have over the past few decades become 'like gold', as one claimant recently mentioned to me; that is, as with site maps showing cultural information, once encoded in written form, genealogical charts can rigidify orally transmitted knowledge about claim group membership. While this may have some positive benefits, if it assists a settled version coming to prevail, the anthropologist is typically aware of how research serves to authorise matters that have, in an oral tradition, historically accommodated flexibility of personal interpretation and tolerance of different versions of individuals' ancestry (Morgan and Wilmot 2010). Our challenge is to ensure that such fluidity of opinion about the social and geographic dimensions of the relevant traditional 'society' retains a place in the legally driven negotiations over recognition of native title rights and interests. In my view, one way of addressing this issue would be for claim groups to assert their cases on a broader rather than narrower scale of territorial and cultural definition of the native title society.

Given the difficulties arising about precise genealogical histories, and whether particular deceased forebears (or apical ancestors) were (and are now) known to be of adjacent language groups or 'tribes' A, B or C, there would appear to be value in encouraging separate claim groups to combine to form larger collectivities constituting the 'societies' required by the NTA. There is no in principle anthropological difficulty with such aggregations potentially addressing the requirements of the legislation. Indeed, one of the most ambitious models on this issue was framed before land rights and native title. This was an analysis of 'drainage basin' regions proposed by Nic Peterson in 1976, the idea being of pre-contact populations occupying such regions with similar ecological conditions and environments. Peterson's work raised the question, rather than asserted a firm proposition, that language groups within these regions may share cultural commonalities. The divisions were then developed by others to characterise broad cultural regions across the continent as shown in the map produced by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) as a companion to its *Encyclopaedia of Aboriginal Australia* (Horton 1996).⁸

Over the years, there have also been sets of constantly changing administrative boundaries that have influenced the constitution of Aboriginal identity groups. The native title representative bodies regions (and such indigenous administrative areas as the former Aboriginal and Torres Strait Islander Council electorates), for example, were drawn with reference to state and territory boundaries and only very generally follow the sort of cultural regions we see on the AIATSIS map. This is to illustrate how, for many years, there have been a range of regional spatial logics influencing identity formation among Aboriginal and Islander people. Indigenous cultural traditions and law and custom have been influenced by the need to form corporations that manage relations with government and industry. Thus, it is understandable that traditional geographic and social boundaries overlap with and are at times potentially confounded by cadastral lines defining administrative areas, pastoral leases, national parks and other tenures. As I have suggested, the anthropologist faces the task of holding discussions with claimants that arrive at clarity about boundaries and memberships that are based in traditional law and custom, while not ignoring the likely adaptations that have occurred amidst the realities of indigenous engagement with the wider society.

Drainage basin areas and the very broad cultural regions which are based partly on them are likely to be unrealistic and inappropriate as native title 'societies', at least in regions such as southern and eastern Queensland or the Western Australian Goldfields where the current realities of politics across identity groups appears far from what would encourage collectivist claims. However, sub-regions within those suggested by Peterson and others might well be plausible; this is to ask whether the native title process can do more to encourage broad rather than narrow recognition of the social and geographic dimensions of the asserted 'societies' continuing their system of land law from pre-contact times. As I understand it, the Court has found a Western Desert 'society' across a very broad region, as well as a native title society operative across all Torres Strait Island communities north of Thursday Island.⁹ A further case of note is the northern Kimberley claim, *Neowarra vs. Western Australia and others* [2003], where three language groups (Ngarinyin, Worrorra and Wunambul) claimed as a single society. Tony Redmond, the anthropologist engaged by the claimants in that matter, puts it this way:

The claimants collectively...spoke of themselves as members of a single society in many contexts and drew contrasts between the laws and customs of neighbouring cultural blocs and their own. In the post settlement era, they had lived together in neighbouring settlements connected by strong interactive patterns as people moved back and forth between the cattle station camps and missions in the region. (Redmond in press)

Finally, in the Wellesley sea claim in Queensland, where I and other anthropologists authored reports, four named language groups claimed jointly but as separate ‘societies’ (*Lardil Peoples v Queensland* [2004]). In all of these cases, it seems to me likely that what was avoided were disputes between individual claim groups that might have been defined more narrowly, or without reference to the law and custom commonalities that are shared.

Concluding comments

In summarising and connecting a number of my points, I note firstly that achieving greater clarity about continuity and legally permissible change in law and custom, and rights and interests, is possibly the most urgent conceptual task in native title research. I have sought to emphasise the need for sophistication in terms of avoiding any enforcement of inappropriate forms of cultural authenticity through expectations that claimants will reproduce earlier versions of their traditions rather than adaptations of them.

I have further sought to discuss an apparent increase in factionalism among claimants in relation to territorial boundaries, group membership and related matters. I have foreshadowed benefits potentially linked to more collaboration across existing claim groups, one implication being that currently separate research activities on adjacent and nearby claims could be profitably brought into greater alignment. Native title research would in my view benefit from and be strengthened by a greater focus on possibilities for joint work by researchers destined to be experts in the legal process.¹⁰ However, in closing, it is no doubt prudent to revisit the difficulties with achieving such developments.

Localism in Aboriginal life. Martin has discussed how cultural and geographic localism are frequently linked among Aboriginal people, and that in part this flows from the kinship basis of relations to country at the most intimate level. While kinship relations can bind groups wider than what Sutton has termed specific ‘families of polity’, Martin points out how such intensely experienced kin connections ‘provide the *fault lines* along which conflict over divergent interests can take place, within the group and between it and others’ (Mantziaris and Martin 2000, 283 [my emphasis]). Kinship is thus ‘a driving force for localism’ (2000, 283). If so, it may be that the legal process could usefully provide a competing force for collectivism in terms of encouraging quicker and less fraught outcomes. At the least this is an issue that legal advisors might address more explicitly in consultation with researchers commissioned to prepare reports aimed at progressing the claims.

The difficulty that legal representatives may have in advising of potential benefits in aggregating rather than splitting groups of claimants. The point here is that it may be

appropriate in some cases to provide advice that goes against initially framed claimant desires for localism, on the basis of foreshadowing benefits of a more collective approach. For example, it may be reasonable to argue that claimants leave internal issues of contest to be sorted out following a determination rather than disputes being made central to the claim process itself.¹¹ The further obvious point is that lawyers should not assume that initially articulated preferences for localism are unshakeable in light of advice about obtaining outcomes sooner through a different approach.

The entrenched idea that separate and clearly bounded named 'tribes' are the core land holding units of contemporary Aboriginal life. This presumption in some respects can derive from Euro-Australian romanticism about bounded tribal units.¹² A final illustration from my own research experience is from the Gulf Country of northern Australia. Early in my work beginning in the late 1970s I witnessed the names of languages used among Aboriginal people as adjectives describing a key aspect of persons' identities; hence there were 'Waanyi people', 'Garawa people', 'Ganggalida people', 'Lardil people' and so on. This usage was transformed among those working for land councils and other assisting organisations so that language names became nouns; visiting advisors referred to 'the Waanyi', 'the Ganggalida' or 'the Lardil', indicating their assumption that the persons sharing these identities formed key groups for social and political action in Aboriginal life. However, given the history of intermarriage between people with these identities, and offspring with multiple adjacent linguistic territory connections, it was clear that the language names did not represent bounded groups that somehow existed outside of and separate from the relationships between their members (Trigger 1987). Certainly, there is a sense in which persons chose to identify predominantly with one set of rights to land and waters over other possible links. However, this is not the only possible choice arising out of traditional law and custom. Given encouragement from legal advisors, there is no reason in many regions why adjacent language-named groups could not choose to assert a collective native title claim rather than a number of separate ones. That is to foreshadow a collective claim encompassing the reality of a complex network of everyday social relationships operating across rather than within particular named linguistic identities and territories. A determination based on such broader groupings could of course leave open questions of further change, succession, disputation and so on among Aboriginal people of the region, in accordance with the continuing operation of relevant tradition-based laws and customs.

NOTES

1. My data derive here from my own research. See also an account of this matter having prompted initial dissatisfaction and protest action in 2002 until resolved in this way: Scambury (2007, 237).
2. I thank Robert Blowes SC for bringing this example to my attention in relation to his experience in the Western Desert region.
3. Similarly to what I have observed at Doomadgee, Burketown, Robinson River and Borroloola in the Gulf Country over recent years, University of Queensland PhD scholars, Cameo Dalley and David Thompson report from their research at Mornington Island and Lockhart River, respectively, a substantial and increasing use of such technologies. See also Prout (2008), Tangentyere Council and Central Land Council (2007).
4. The Karajarri men were found guilty in April 2011.
5. See for example Strehlow (1970, 114) who records for Central Australia accounts of 'capital punishment for unauthorised entry onto sacred and restricted grounds'. The incidents recounted involve: 'gate crashing' or 'spying' on a sacred traditional ceremony; approaching (either deliberately or unwittingly) 'the storage places of the sacred tjuranga', including an account of a woman being killed for that perceived offence; and another woman (an Aranda person) being pack raped because she ventured into an area and saw a 'ceremonial stone'.
6. See also Langton (2010, 100).
7. In the Wellesley Sea Claim, I was cross examined by the barrister for the Commonwealth Government, this respondent's argument being that 'at best, there existed at sovereignty various unaffiliated clan groups' rather than any broader society, and that subsequent changes to the scale of society were impermissible in terms of the *Native Title Act*. See Cooper, J's Reasons for Judgement (*Lardil Peoples v Queensland* (2004), Paragraph 56 and following).
8. We should note the map carries an annotation stating: 'Not suitable for use in native title and other land claims'. Nevertheless, it suggests schematically the possibility of regional cultural similarities across named language groups.
9. For the Desert, see *De Rose v State of South Australia* (2003), [279] and following and *Harrington Smith on behalf of the Wongatha People v State of Western Australia (No 9)* (2007), [1003] and material starting at [495]. For the Torres Strait, see *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland (No 2)* (2010), [441] and [492] (and the paragraphs in between). Thanks to barrister Robert Blowes for these sources.
10. A matter I have not dealt with in detail directly is how claim 'groups' do not necessarily equate to 'societies' regardless of their chosen social or geographic dimensions. There is no reason anthropologically why a claim group might prefer not to join with adjacent groups for purposes of a claim yet make reference to a shared 'society' in common across multiple named groups in the region.

11. A relevant qualification here is that members of native title 'societies' will not necessarily live 'in perpetual peace and harmony, since the sharing of laws and customs does not mandate concord' (Palmer 2009, 13). Nevertheless, while internal disputation should not lead us to find a lack of shared law and custom, nor should it provide the kinds of major distractions from claim resolution that appears to be the case in an increasing number of regions.
12. Correy (2006) addresses the influence of native title research on group formation among claimants.

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CHAPTER 9

Anthropological expertise and native title: An extract from an expert report to the Federal Court in the Waanyi native title application

Peter Blackwood

Introduction

In 2009 I was asked to act as an expert witness for the family of Mr Greg Phillips, an indigenous respondent party to the Waanyi native title claim, in a trial in the Federal Court over the acceptance of members of his family into the native title claim group. Mr. Phillips' family comprise a cognatic descent group descended from a woman born on country in the 1870s whose family members believe to have been Waanyi. I had previously prepared a preliminary anthropology report for this same group in relation to a claim they had lodged for the Lawn Hill National Park under the Queensland *Aboriginal Land Act* (ALA). The genesis of their ALA claim was the same as that for the native title trial, namely that Mr Phillips' family had been excluded from an ALA claim lodged by the Waanyi people, essentially the same claim group as for the native title claim. My research for the ALA report was based upon a relatively brief period of fieldwork which comprised interviews with members of the descent group and some senior members of the Waanyi and neighbouring tribes in the Gulf region in Queensland, undertaken over about 20 days in 2004. Further fieldwork had been planned, but for various reasons never undertaken; likewise, a final anthropology report and 'claim book' for the ALA claim had never been completed.

I was requested by the instructing solicitor to include as part of my expert report a section addressing the relevance of anthropological expertise to native title claims. The reason for this was that he was concerned that the court in the past has been somewhat dismissive of anthropological evidence, though in the event this was not my experience as a witness in this case.

In preparing my report I particularly considered a potential vulnerability in my position. This was that, while intensive participatory observation is commonly put forward as one of the main (even the principal) pillars supporting the specialist expertise of the anthropologist, in this instance I could claim only limited contact with 'my group'.

This situation is not unusual among native title practitioners more generally. Most of us working in the native title field at one time or another in our careers find ourselves preparing expert reports for governments and courts based upon limited fieldwork consisting in the main of interviews and meetings, rather than the deep knowledge developed through long-term observation. For those of us whose practice is outside academia, this is the norm, not the exception.

In my view the particular expertise that the anthropologist brings to the task, which compensates for any lack of field-work exposure, is that other pillar of the discipline, comparative analysis. In fact it may be that for native title purposes, where there is significant reliance on inference for establishing group continuity, this may be of greater importance than long-term immersion in the society.

Below is an extract from my expert report, *Minnie Myboogundji Family Group Anthropological Report, Report Prepared for Mr Gregory Phillips and the Federal Court in Relation to the Waanyi Native Title Application*, June 2009. It concerns the relevance of anthropology to native title enquiries.

Relevance of anthropological expertise to native title enquiries

Social anthropology is the systematic study of social systems and related social and cultural phenomena. Applied anthropology is the application of the skills and expertise of the anthropologist to real-world situations which require the analysis and explanation of matters that arise from or are embedded in systems of belief and behaviour that are predominantly of a social or cultural nature. That is, they are phenomena which cannot adequately be understood through the application of other forms of analysis, such as theological or scientific or legal. Anthropologists are not the only professionals who analyse social and cultural phenomena; others which come to mind are economists, sociologists, linguists and historians, each of which brings their own particular expertise to particular aspects of social belief and behaviour.

Anthropology differs from these other forms of social enquiry in four main ways: its participant observation method of data gathering, the small scale of the societies it generally studies, the types of analysis it employs, and its comparative methodology. With the possible exception of its data gathering method, none of these are exclusive to anthropology, but it is unique in combining them. The boundaries between some of the other social disciplines and anthropology are permeable. Two examples which occur in the native

title context are linguistics and anthropology, and history and anthropology; applied anthropologists working in this field must also develop some of the skills and knowledge required for these disciplines. In my experience, there is a particular requirement to apply historical research methods in the native title sphere. However, as Professor Trigger's research in the Gulf community of Doomadgee in north-west Queensland demonstrates, applying an historical perspective to anthropological analysis is not confined to native title or other areas of applied research (Trigger 1987, 1992). It is one of a number of analytic elements which anthropologists typically apply, whether in academic research or applied research.

The character of anthropology has been formed by its ideal fieldwork method of intensive, participatory observation and the fact that it has generally studied small-scale, often non-literate societies. The types of analysis and theories which anthropologists apply have developed in response to both these features of its practice, in large part because the analytic tools and theories of the other social sciences, developed to understand the institutions of post-industrial societies, are not suited to those of the non-literate, pre-industrial societies classically studied by anthropologists.

Anthropology is a comparative and generalising discipline. Like analysts in other fields, anthropologists build explanatory models which distil from the complex and seemingly unsystematic activities of people's daily lives systematic descriptions which aid understanding and which provide a basis for comparison with other societies. From such comparisons, anthropologists are able to generate generalising models and explanations which, in an iterative cycle, can in turn be applied to particular, comparable societies. Much debate that takes place in anthropology is not about facts but about which model best explains those facts.

Although anthropology has diversified considerably since the Second World War and its practitioners have extended the bounds of these four foundations, they nonetheless continue to define anthropology and to be the professional framework within which anthropologists are trained and practice.

Because their subject matter is 'other' societies, and their method of analysis is comparative, since colonial times anthropologists have been employed to 'translate' between societies, particularly between literate Western and non-literate pre-industrial societies in such things as the formulation and implementation of government policies.

Aboriginal societies are exactly the sort of small-scale, non-literate societies to which anthropological analysis is suited, and legal/policy areas such as native title, aboriginal land claims and cultural heritage are exactly the sorts of real-world inter-cultural situations where the expertise of anthropologists may be applied to analyse, describe and 'translate'.

There have been a number of anthropologists who have undertaken deep, participatory field work with Aboriginal communities and who have been subsequently engaged to write claim books and provide expert opinion for statutory and native title claims for the communities they have studied, going back to the mid 1970s. Just as importantly, nonetheless, many of these have written about the Aboriginal societies they have worked in, and incorporated this in their teaching of the discipline, so that there is now an established corpus of ethnographic knowledge which can be drawn upon by other anthropologists who may not have had the opportunity to engage in classic anthropological field work. This body of work, combined with the analytic tools of anthropology, enable us to provide expertise for groups not previously studied, or where, as in this case, controversy requires independent analysts.

There are many anthropological research and analytic skills required for documenting native title and statutory land claims. A sub-set of these that I employed for the Waanyi respondent's report are:

- *Genealogical research.* Genealogical research is necessary to document the continuity of group membership over time and the social structure of groups. This involves detailed interviewing of group members and the collection of oral histories, as well as interviewing knowledgeable informants from outside the group. It also entails searches of government and non-government archives, and state and local registers such as births, deaths, marriages and cemeteries. Genealogical data may also be contained in published sources, such as local histories and biographies, and unpublished reports by other anthropologists and fieldworkers.
- *Research into group identity, territory, language, and social organisation.* This is a necessary foundation for an understanding of native title issues. This research likewise relies upon the oral testimony of knowledgeable informants, both within the group and from outside it. Local histories and archival material may also provide information relevant to such questions. Of greater import, however, are such things as scholarly works by early ethnographic observers, such as Roth, Mathews, Curr and Howitt, as well as contemporary reports, theses and publications by anthropologists, where these are available.
- *Comparative analysis.* An important part of an anthropological analysis of contemporary Aboriginal society is to critically review such works and to assess them against what informants say about that society today, what different authors have said about it either in contemporary times or in the past, and to compare them against what is known about neighbouring or other similar Aboriginal societies, whether from the anthropologist's own research or from what they know from the literature.

It is the comparative aspect of anthropological analysis which, together with fieldwork and small-scale societies as the subjects of its study, particularly distinguishes anthropology from its near neighbours: sociology, linguistics and history. In my view the salient qualities anthropology brings to native title and similar fields of enquiry are its deep knowledge of Aboriginal societies and its ability to develop and apply general explanatory models through the comparative analysis of societies and their institutions. In my opinion, this can be done by no other discipline.

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Part C

Research Report



*Caroline Tennant-Kelly, activist and anthropologist:
Field work accounts of Australian Aboriginal culture
in the 1930s*

Kim de Rijke and Tony Jefferies

Introduction

This paper discusses the recently recovered collection of anthropological field work materials from the 1930s assembled by Caroline Tennant-Kelly and its relevance to native title.¹ Tennant-Kelly's seminal work in the Aboriginal communities of eastern Queensland and New South Wales offers valuable insights into Aboriginal culture in the 'settled' regions of Australia at this period.

Before assessing the value of the Tennant-Kelly ethnographic records for current native title claims it is necessary to consider the conditions in which they were produced and to account for the personal qualities Tennant-Kelly brought to her field work, including her political activism (see, for example, Palmer 2010 on the contextual analysis and use of early texts in native title proceedings). A reading of her records also requires an understanding of her unsung role in the history of early Australian anthropology at the University of Sydney in the 1930s, shortly after the Department of Anthropology was established.

The paper considers concepts important to native title research such as 'society', 'tradition', 'continuity' and 'change', and the contribution of the collection to information about classical social organisation. Tennant-Kelly spent four and a half months at Cherbourg Aboriginal Settlement in 1934, this period comprising the most significant, but by no means only, anthropological field work she conducted.² We conclude with a critique of the limitations of the collection: the value of the collection, however, has already to some degree been borne out by its application in current south-east Queensland native title research.

The collection contains much additional material relevant to debates only marginally addressed here, such as those regarding the living conditions and treatment of Aboriginal people in the 1930s by the Queensland and New South Wales governments. We do not explore its relevance to discussions about applied anthropological issues relating to the role of anthropologists in public socio-political debates at the University of Sydney during the tenure of A.P. Elkin (see, for instance, Peter Sutton's recent biographical discussion of Ursula McConnel, a contemporary of Tennant-Kelly, including the recovery of McConnel's 'tin trunk' (2010) and Sutton's review (2009a) of Gray's *A cautious silence: The politics of Australian anthropology*).³ It is anticipated that Tennant-Kelly's unfettered views, as revealed in her field notes and private correspondence, will contribute much to an understanding of this period in Australian anthropology.

Tennant-Kelly, the anthropologist

The Tennant-Kelly who arrived at Cherbourg in 1934 possessed, in today's terms, no more than an undergraduate grounding in anthropology, although her education had included intimate contact with Margaret Mead, Raymond Firth, Reo Fortune, Gregory Bateson and Radcliffe-Brown, among others. She brought to her field work some significant natural talents: her considerable powers of observation; a natural empathy with people, particularly those she considered downtrodden; and finally, but not least, her exceptional literary skills. Although only in her mid-thirties at the time of her arrival at Cherbourg, she was already the producer of seventy one-act and five full-length theatrical plays (Radi, n.d.), and had a sharp and penetrating power of character analysis (as some fellow white Australians at Cherbourg were to find to their cost).⁴

Another of Tennant-Kelly's extracurricular skills was a talent for self-promotion — by 1934 she had already had a decade-long career of promoting and establishing community theatres in Brisbane and Sydney. Coincidentally, these activities cemented her position in Sydney society. Tennant-Kelly never missed a chance to grab some column space, which, in its anthropological incantation, included everything from indigenous cooking, child-care, birthing practices, herbal remedies, mythology, through to frank assessments of what she regarded as white Australia's congenital xenophobia.⁵

She evidently gained the confidence and trust of Aboriginal people and formed relationships with them based on mutual respect. Part of her acceptability to Aboriginal people must undoubtedly have been her willingness to challenge the powerful on their behalf, for, as Kidd (1997) also documented in her history *The way we civilize*, there is little ambiguity about her self-conscious role as advocate for Aboriginal people. Kidd (1997, 129) described her presentation to the Australian and New Zealand Association for the Advancement of Science

Congress in Melbourne in January 1935, some six months after the completion of her Cherbourg work, as ‘a bombshell’. This ‘provoked a discussion during which criticism was levelled against the Queensland Government in regard to Aboriginal savings’.⁶ As Kidd (1997, 132–5) later documented, the Queensland Government systematically misappropriated Aboriginal wages, to the tune of some 300,000 pounds, over many years. Tennant-Kelly clearly justified the faith put in her by her Cherbourg informants.

The origin of Tennant-Kelly’s extraordinary confidence in engaging with the highest levels of political authority is still a mystery. Our unproven assumption is that the Tennant name — her mother’s maiden name — made her part of the Industrial Revolution dynasty that included Lady Asquith, wife of British Prime Minister, Herbert Henry Asquith,⁷ among many other notables. However acquired, Tennant-Kelly certainly behaved as though she possessed *noblesse oblige*.⁸ Correspondence in the collection shows, for example, that her complaint regarding the treatment of Cherbourg girls as ‘domestics’ on cattle station properties and their frequent return to Cherbourg with unacknowledged pregnancies was taken directly, and personally, to the Governor of Queensland, Leslie Wilson, who happened to be visiting Cherbourg, and later to the Home Secretary E.M. Hanlon and the Leader of the Opposition Arthur Moore (compare Kidd 1997, 125–6).⁹ This was not atypical; there was nothing superficial or transitory about Tennant-Kelly’s disgust with the conditions at Cherbourg.¹⁰ It was a political commitment that led directly to her permanent exclusion from Queensland Government Aboriginal settlements (Gray 2007, 126–7; Kidd 1997, 135).

Her relationship with her nominal mentor Elkin was complex. As an activist, one perhaps more adept in the world of politics and society than many of her peers, she was Elkin’s ally — albeit in a sometimes uneasy, but equal, alliance. She belonged to an extraordinary generation of female anthropologists that circled around Elkin’s Sydney University Department of Anthropology in the 1920s and 30s (see Marcus 1993) including Phyllis Kaberry, Olive Pink, Ursula McConnel and Camilla Wedgwood. Although Elkin had the advantage of academic seniority over Tennant-Kelly, she was central to his political endeavours.¹¹ While Elkin found her poise and *savoir faire* useful politically (as demonstrated in Tennant-Kelly’s polished representation of Sydney University’s Anthropology Department and the Association for the Protection of Native Races during the Select Committee Hearing for the Administration of the Aborigines Protection Board in 1938),¹² as with his other protégés, there was often a price to pay: the personal attacks and consequences of challenging local authority, when, as frequently occurred, injustice was met (see Gray 2007; for the exclusion of Tennant-Kelly from Queensland Reserves, see Kidd 1997).

In summary, this tension between politics and academia best describes Tennant-Kelly's field work at Cherbourg: on the one hand her fight against the injustice and oppression she encountered; on the other, her effort to not only collect data but to understand it with a keen intelligence.

Some implications for native title research of Tennant-Kelly's notes

Methodology and research interests

As an anthropologist Tennant-Kelly typifies the participant-observation methodology; which is fortunate because it plays into the hands of her greatest strengths: her powers of observation and her ability to describe her experiences and impressions in concise and lucid English. Her field notes contain accounts of interviews and observations, with analyses largely confined to draft articles and correspondence.

Apart from direct references to the vitality of language and culture in 1934, the documentation of sections, totems, kinship terms and mythology, amongst much else, done at the behest of Elkin and very much in line with the anthropological concerns of the day, points to enduring cultural richness, albeit adapted under the manifold impositions of white Australian domination at Cherbourg Settlement. Her field notes, at least as we found them, were often ordered, though not always, into tribal categories.¹³ Much of her work is a scattered mix of information including wordlists, names of informants, tribal boundaries, genealogical information, kinship terminology and structure, mythology — grist for the mill to the native title anthropologist.

Tennant-Kelly also took an active interest in female perspectives. Apart from some occasional observations scattered throughout the ethnographic literature to that time, women's roles in Aboriginal societies had largely been ignored. This was to change with the generation of female anthropologists, one whose lasting literary legacy is Phyllis Kaberry's work in the Kimberley, *Aboriginal woman, sacred and profane* (1939). Feminism was part and parcel of Tennant-Kelly's intellectual development, as it was to many female artists and intellectuals of her generation (and as is apparent in her work in drama of the 1920s; see also, for example, Banner 2003). Tennant-Kelly met Margaret Mead in Sydney in about 1928 during Mead's stopover en route to her groundbreaking work in New Guinea, a meeting that was the beginning of a lifelong friendship (see Banner 2003, Thomas 2009). Tennant-Kelly's feminist views were already well developed but it seems likely Mead awoke in Tennant-Kelly their applicability to her new interest in anthropology (see Radi n.d.).

Tennant-Kelly used Mead's line of enquiry to great effect in her *Bajjala* work undertaken during a holiday at Urangan opposite Fraser Island, Queensland,

in 1932, her first foray into field work. In her correspondence to Mead she described as one of the motivations for her field work the collection of material on social organisation that Radcliffe-Brown had missed in his eastern Australian fieldtrips, including the role of women.¹⁴ This material she thought would be of particular interest to Elkin and not harmful to her own career prospects either. The result is a searching enquiry into many aspect of the traditional Batjala woman's life: the conduct of social relations including marriage, child-birth, in-laws, initiation, ceremony, taboos and totems, economy, place, myth, sickness, death and spirituality. The quality of Tennant-Kelly's *Batjala* data is further improved during her research at Cherbourg two years later.

It is interesting to compare her work to that of Tindale (1940, 1974), who visited Cherbourg four years after Tennant-Kelly, stayed for only ten days, but subjected the community to his well-practised data-gathering drill. Tindale gathered much the same amount and quality of data as Tennant-Kelly, often from the same informants. Undoubtedly their materials complement each other. Perhaps Tennant-Kelly had accustomed the Cherbourg community to the idea of what anthropologists were all about, and therefore in some way prepared them for Tindale's inquisition. Certainly, some of Tindale's informants had discussed the issue of socio-geographic boundaries with Tennant-Kelly previously:

They tend to live in groups which are referred to as the 'Mitchell lot', the 'Cooktown mob' etc. etc...I am taking down the boundaries of different people. They remember these most clearly and it is useless to try and trip them up on their local geography. Rivers appear to have been the most popular boundary...¹⁵

'Tribal' groups, regional alliances and boundaries

Throughout Tennant-Kelly's field notes instances of regional allegiances are spelled out by informants. Like the well-known and oft-quoted shortcomings of Tindale's work (e.g. Jefferies 2006; Sutton 1995), the material ranges in quality from the precise descriptions of country, such as those by one of her senior informants, Sonny Sunflower, of his country north of the Fitzroy River, to the more diffuse, larger scale ascriptions of country, sometimes without the locus of the informant's country being specified. Some regional alliances, which might indicate the kinds of cultural similarities which some anthropologists have referred to as defining a 'cultural bloc' (e.g. Sutton 2002), are named. One informant, for example, referred to a cluster of named groups in central Queensland as '*Wribpid*, like British'.¹⁶ In contrast, Sonny Sunflower described

the country neighbouring the *Dharambal* with highly precise boundaries at small creeks and noted the various relationships with people from contiguous countries:

Herbert's Creek, a salt creek divides us from the Nalyne, (we could speak and marry them). They would travel up and down to Marlborough, Broad Sound. We would mix for corroboree and travel to Duaringa and Mackay...Kanangabul, Kangalu, Wunabul, Kungmal: [we] used to fight, although we understand them.¹⁷

Tennant-Kelly's understanding of Aboriginal local organisation is at best implicit, with the erasure in her field notes of the word 'tribe' in favour of 'language group' on one occasion indicating some uncertainty. She intended to research each 'tribe' for any signs of 'horde groupings'¹⁸ but she did not offer, either in her notes or published works, the details of any such groupings, indicating she either did not find them or decided not to pursue the subject.

Tennant-Kelly (1944, 143) observed changes in group composition into what she called 'a more corporate whole', arguing that Aboriginal people 'closed ranks ... in the face of common difficulty' (1944, 143-44), giving a sense of survival in the making of such cultural adaptations. Her notes also indicate an apparent willingness of her informants to adopt aspects of social organisation which emphasised more regional relationships. She referred for instance to the adoption of section terms previously used only by the local group around Cherbourg.

Linguistics

The Tennant-Kelly collection contains a moderate amount of linguistic material, some grammatical paradigms (short sentences) and some wordlists scattered unevenly across various language groups. Despite indications that Tennant-Kelly must have received some linguistic education prior to her field work (the occasional and inconsistent use of the engma (/ng/), for example), this could not have been extensive. Her linguistic work can be considered only as a modest advance on that of her predecessors. When we consider Tennant-Kelly was undertaking a Diploma in Anthropology, thrown in at the deep end so to speak, we cannot be too surprised if we find no great level of sophistication in her language elicitation.¹⁹

In spite of these reservations, Tennant-Kelly's field notes provide invaluable material for the study of languages that in this region, all too often, are data-impooverished. Linguists will find small details that contribute to these slender knowledge bases, as has already occurred.²⁰

Aboriginal laws and customs since sovereignty

Although Tennant-Kelly's materials relate to Aboriginal groups at Cherbourg in 1934, many of her senior informants, born presumably around the 1860s, were 'fresh from living outback, mostly from living on the river banks, where they had lived, for the most part, according to the "old way"' (Kelly 1944, 144). The materials may assist anthropologists and historians involved in native title research in writing what some State and Territory governments have begun to refer to as a 'sovereignty report', which seek to describe claim-based cultural histories of change and continuity since the acquisition of sovereignty (see Palmer 2010, 72–3). Inferences about cultural practices and changes since sovereignty may be made on the basis of her references to people maintaining the 'old ways' during her work with identifiable groups at Cherbourg in 1934:

[An] old man is taking me camping and has promised to show me all the places where increase ceremonies took place. In fact I believe they still take place but one has to be tactful and not ask too much. On this expedition which will last a week or so I am also to see other things, such as special coroborees [sic] that they will not do at the mission, and the snaring and cooking of animals etc. This should be worthwhile I think.²¹

Religious life had a particular attraction for Tennant-Kelly. In her published media statements she makes reference to religious beliefs and the intense spirituality of Aboriginal culture.²² This interest, rather obliquely, led Tennant-Kelly to investigate issues of ownership and inheritance of land: where the soul returns to upon death, the significance of birthplace and the on-going relationship to it, and totemic identification and alliances across the landscape (see also Wood 2010). It also led to pertinent observations of religious practice and continuing laws and customs:

People who assure me they had been with the whites too long to remember anything are now bringing out pointing bones and other bits of magic and sorcery that show every sign of recent usage.²³

That traditional laws and customs continued to be observed and acknowledged at Cherbourg Settlement in 1934 can be concluded from numerous statements collected by Tennant-Kelly from informants. References to the continuation of spiritual beliefs and the vitality of Aboriginal Law are also embedded in reactions to Christian practice, which she recorded, for example, with regard to the role of young female missionaries in matters of religion (Kelly 1944, 148–9):

Long before White man come we had the Father — He make all these feller and animals too...Now this white feller he got message all mixed up I think. Father, He no tell us we sinners, Father knows about us all the time. He know we follow Rule, get married right, don't eat wrong animal, just like He tell us long time ago. Father He know us real well. This feller (the woman missionary) he too young, he no get message right, he no get Rule.

Similar references to cultural continuity can be found in her observations of Fraser Island's *Bajjala* in 1932, where she noted:

All of the Fraser's Island people I met at Cherburg [sic] still conversed with each other in their own language. There is still faith in the power of the medicine-man and I was told of many quite successful cures of recent date. The observance of not walking in front of one's elders, or stepping over their recumbent bodies is rigidly adhered to and I saw several examples of its operation and of the training of younger children in this rule. The old-time habit of the family unit sleeping on the ground around a fire is still favoured. Thus at Cherburg one sees the regulation cottages built by Authority, with a kitchen, living-room and bed-room, but in the back-yard a space is cleared for the night's fire around which the family gathers and curls up in blankets, although, naturally, European tools are the only ones used nowadays, yet the form of the implement has not been changed. The tomahawk conforms more nearly to the implement used before white contact. When making gifts and tomahawks were asked for, and I suggested an axe, as being more suitable, my offer was rejected by both men and women, they all agreeing that the tomahawk was to be infinitely preferred...²⁴

Likewise, she described with amazement in her published account (1935, 471–2) the extent to which totemic affiliations had been maintained:

It is of interest to note the extent to which totemism is retained in the life of the Settlement. Both full-blood and half-caste, providing they were reared in the native camp as children, have a very real belief and interest in the totemic ancestors. This may be choked under missionary influence, but it is never very far from the surface. Contact with the official and the missionary have made them chary of openly discussing these matters. They fear the ridicule of the white man, but at the time of death one can observe how deep-rooted is this belief and in their grief

mourners who previously seemed completely under mission influence, return to the older forms as if they had never ceased to practice them. This is all the more remarkable seeing that all funerals are conducted by the missionaries.

Reflections on culture contact and 'breakdown'

The proposition that a good part of the anthropologist's calling was the rescue of information on traditional culture and language before it became consigned to oblivion by the march of modern times was one of the primary motivations of the early twentieth century discipline.²⁵ This position appears to be at least to some extent counterpoised by Tennant-Kelly's findings on 'culture contact', which indicated that Aboriginal people 'were carefully taking those crumbs from the rich man's table which they could digest' (Kelly 1944, 153), and by her understanding of anthropology as a social duty to facilitate cultural understanding, to clean 'the slime of ignorance on our boots and the blood of war on our hands', 'a grave task'.²⁶ Nevertheless, Tennant-Kelly both introduced and concluded her 1935 article with statements that reflected the commonly held view that it was increasingly difficult 'at this eleventh hour to form some idea of the ritual and social life which obtained before the breakdown of their culture' (Tennant-Kelly 1935, 461). At Cherbourg, she concluded:

The older people guard their religious secrets very jealously from the young men and women who have been reared since birth with white people. The young men are not initiated and therefore are not suitable recipients of the tribal lore and totemic secrets. (1935, 472-3)

Putting aside the reservations we might have about Tennant-Kelly's expressed concerns at the demise of Aboriginal culture in the 1935 article, as was common to her time, the article suggests adaptations of classical cultural practices, hidden from official view but permeating daily (and particularly night) life. Pious references by senior Aboriginal people to the secret-sacred plane of their religion were often made in contrast to what they experienced as the profane practices of Christianity (Kelly 1944, 152-3):

An old man said, 'We know you well and we trust you; we give you the name of God our way...for we know you will not sing it out or laugh, but we would never tell that name to young ones. Them feller don't understand and they laugh out loud. Now white feller let everybody sing out name, everybody shout and laugh. That not good way.

He was referring to certain hymns which are sung with gusto and sometimes call for the clapping of hands as well.

An assessment of the vitality of traditional culture in 1934 runs up against a contradiction inherent in Tennant-Kelly's stated position and her observations. On one hand, the conviction of her time was that Aboriginal people were at the dawn of a new era, one in which they would have to adapt to the overriding realities of modern life. On the other, the many first-hand accounts, often from the elderly it is true, testify to the continuing power and resilience of traditional culture.²⁷

Conclusion

Tennant-Kelly was a woman of her times. The methodology and aims that are familiar to us from Radcliffe-Brown, Elkin and others guided Tennant-Kelly as well. Tennant-Kelly's field work was a heuristic exercise — her knowledge, her methodology, all undoubtedly improved during her stay. While we may rue the omissions of that generation we might also celebrate the interests and inquisitiveness they had. While native title anthropology has progressed beyond the ideological assumptions of the 1930s, Tennant-Kelly's questions are of major importance to the discipline and of particular interest to Aboriginal people today. The qualities Tennant-Kelly brought to Aboriginal studies were all her own: her intelligence, sensitivity, her application and diligence. Her legacy is rich in ethnographic detail and provides a portrait of 1930s Cherbourg society and culture that stands unique.

For those pursuing the ethnography of particular groups the amount and quality of useful material in the Tennant-Kelly collection varies. We argue that the material is most valuable for native title purposes when the collection is considered as a whole. For southern Queensland, the materials are a significant addition to a limited anthropological and ethnographic record. In terms of the native title research brief to address forms of cultural continuity and change since sovereignty, the collection takes us no further than 1934. That task is dependent on more recent materials, and, particularly, on detailed contemporary research with claimants.

In conclusion, we have sought to do justice in this paper not only to a very talented anthropologist whose reputation has too long suffered in eclipse, but also to the wide implications of her papers and field work that we were fortunate to recover. Inevitably, this task must take the form more of a guide than of the thorough description and analysis it deserves. Almost all aspects of native title research are touched on somewhere in these papers. Moreover, for anthropologists seeking information not only about Cherbourg, but also

about Aboriginal culture and communities in other parts of eastern Australia, about post-war immigration, small town Australian society, urban planning and much else covered by the wide purview of this extraordinary woman's career; the Tennant-Kelly papers housed in the Fryer Library of the University of Queensland will prove a valuable resource.²⁸

NOTES

1. We have described the collection and the process that led to its rediscovery in December 2009 elsewhere (see de Rijke and Jefferies 2010). The collection has been donated to the Fryer Library (FL) at the University of Queensland in Brisbane, where it is accessible to the public.
2. She also undertook research at Burnt Bridge, Kempsey, Wreck Bay and Tilba/Tilba/Wallaga Lake in New South Wales.
3. The recent e-mail debates on the Australian Anthropological Society's discussion site *AASNet* surrounding Peter Sutton's book *The politics of suffering: Indigenous Australia and the end of the liberal consensus* (2009b) and the socio-political practices of anthropologists in light of the Commonwealth Government's 'Intervention' in remote Aboriginal communities are also relevant to this discussion.
4. The following might be considered a typical example:

The whites here are frightful + I am having a ghastly time with them — keeping clear of their nasty little intrigues — the men think every white woman on the place wish[es] to seduce them and one has to be constantly on the alert — the natives know all about it — 940 natives and 20 whites — mostly what you would call white trash. The superintendent is a fairly cultured nice thing — with a wife whose hobby is Christian Science — the rest of them are too awful with minds like rubbish carts...It is a very wretched settlement not one official knows what natives are about and cares less. (Letter Caroline Tennant-Kelly (CTK) to Margaret Mead (MM) 4 June 1934, Box B9 Folder 5, Library of Congress (LOC), Washington DC)

5. CTK Collection, Aboriginal Domestic Life, *Wireless Weekly* 2 November 1934, 'White Should Learn to Think Native', n.d., FL.
6. CTK Collection, 'Blacks Bank Accounts: Criticism of Government. Is money available to owners?' unsourced newspaper cutting, 22 January 1935, FL.
7. (Margaret) Lady Asquith née Tennant (1864–1945), Countess of Oxford and Asquith, wife of British Prime Minister Herbert Henry Asquith (1852–1928). See, for example, *Oxford Dictionary of National Biography*.
8. Camilla Wedgwood is perhaps a parallel case, although Wedgwood's rights to Industrial Revolution aristocracy are both more direct and undisputed than Tennant-Kelly's. Wetherell and Carr-Gregg (1990, 86) well describe the background and some of Wedgwood's hereditary attitudes which could not have been unlike those shared by Tennant-Kelly: 'she came from a family who "for generations had been characterised by its independence and freedom in thought, politically and in religion...and who had developed a reputation for honesty, as well as a sense

- of social responsibility” (her father’s *Memoirs of a Fighting Life* (Wedgwood, J.C., 1940: 29)).
9. See also CTK Collection, Letter CTK to Timothy Kelly, undated ‘Tuesday’ and ‘Thursday’, FL.
 10. ‘Add to this the most appalling situation among the white officials and the fact that I am constantly sidestepping a shocking quagmire that lies beneath a smooth official surface and you have a picture of life here...The whites ponder whether I am mad or a spy and this is what makes the whole thing Gilbert and Sullivan...There are some incredible happenings just under the surface but I am careful not to stir up any mud till my job is done’ (Letter CTK to MM, 1934, Box B9 Folder 5, LOC).
 11. Tennant-Kelly’s value to Elkin as a political operator is well-exemplified in this account of her rapport with high officials in the Queensland Government: ‘[Elkin] asked me to get something ready for publication as soon as possible as he wanted, of course, to get the ear of the Qld Government. He is anxious to get back the Q.G.’s support to the chair, about £250 a year which they withdrew during Raymond’s [Firth] reign. When I was in Qld I did a lot of political work for Elkin: saw the Governor and had interviews with various heads of depts. The Home Sec. said: “It’s all very well listening to you Anthropologists etc etc. but...have you any concrete scheme? That’s what we want.” So I went straight ahead and suggested to him that if he got in touch with Elkin he would no doubt be ready to send up a lecturer who would confer with the white officials on each settlement and give them some idea what their particular people were about. At present it is ludicrous how little the officials know or care about the natives. Then the supervisor of each Settlement could be put in touch with Elkin by correspondence incidentally providing the dept. with any amount of free material. Also the apathy of the officials would naturally disappear if they had some interest in their work and understood it and this would lead to far more efficient administration’ (Letter CTK to Margaret Mead (MM), 1935, Box B9 Folder 5, LOC).
 12. In a letter to her husband, Tennant-Kelly reflected on her conduct: ‘As I walked in I paused at the door. Immaculate and correct — well pressed best blue suit — no gloves — no hat (lovely hair do!) — no fussy bag only a purse — the pause was effective; every man sprang to his feet — a damn good entrance — and Haylen found himself introducing me and I solemnly shook hands with everyone — we were pleased to greet our subjects. It was the best psychological hit I have put over in years. Jessie [Street] looked flabbergasted and smoked cigarettes furiously thru a gold holder. They started...’ (CTK Collection, undated letter CTK to Timothy Kelly ‘Wednesday night’, FL.)
 13. Tennant-Kelly used the term ‘tribe’ and her folders for such groups were named *Badjela*, *Bidjera*, *Biri* and *Wierdi*, *Dharambul*, *Dungibura* & *Dunkijow*, *Goongerri* (*St. George*), *Gurang Gurang*, *Irendely*, *Kabi Kabi*, *Kalali*, *Kambuwil*, *Kangalu*, *Kuam*, *Kungabula*, *Kwoa* and *Waka Waka*.
 14. Letter CTK to MM, dated [ca. 1930?] but likely 1932, pp. 2–3. Box B9, Folder 5, LOC.
 15. CTK Collection, undated letter CTK to Elkin, p.2, FL; CTK Collection, undated letter CTK to Elkin, fragment, FL.
 16. CTK Collection, Folder ‘Tribal Boundaries’, FL.

17. CTK Collection, Folder 'Tribal Boundaries', FL.
18. CTK Collection, undated, 'Social Org and Elkin Totemism', p. 2, FL.
19. The British School of Anthropology, unlike the American dominated by Boas and Sapir, was less interested in linguistics for its own sake (despite Malinowski, for example, declaring that command of the native language was an essential element for field workers). Capell, the first Australianist, was still the best part of a decade away from beginning his work at the University of Sydney. The wide knowledge of phonemics, the use of the International Phonetic Alphabet, and so on, were still a generation away. Elkin (1941) was to write 'Native Languages and the Field Worker in Australia' in which he expressed the view: 'The preparation of a phrase book and vocabulary concerning kinship, social organisation, totemism, etc. has always been my first step — a most obvious one, and more linguistic knowledge has followed, but I have never cared to think of this as a linguistic accomplishment, even to a limited degree. The reason for this may lie in my aversion to the idea of language as a 'tool', seeing that it is just as integral, formative and expressive an element with which it is interrelated...?'
20. Steve Morelli (pers. comm. 6 June 2010), for example, acknowledges 'some useful tit-bits of Gumbayngirr', namely the addition of the word /mindulum/ 'kingfisher' to the lexicon, and the more accurate identification of others, /balagan/ 'skate' rather than 'flying fish', as well as several others.
21. Letter CTK to AP Elkin from Cherbourg, 1934, FL.
22. For example: CTK Collection, newspaper clippings: 'Whites Should Learn to Think Native' (u.s.); 'Problem of the Aboriginal: Woman Anthropologist's Study' (u.s.); 'Old Emu Guarding the Young: Woman Who Was "Adopted" by Aborigines' (*Courier-Mail* 28 August 1934). The latter provides a quote that may be regarded as typifying Tennant-Kelly's views: 'They had a very beautiful religion, with faith in an all-powerful Father, and they had their own "spirit centres" in the land, to which they believed that their spirits returned after death. It is terribly important to them that they should die near one of these centres, and it seems dreadful to take old people to live far away from them'.
23. Letter CTK to MM, 22 June 1934, Box B9 Folder 5, LOC.
24. CTK Collection, Fraser Island 1932 research field notebook, FL.
25. Caroline's friend Margaret Mead (1972, 151) in her memoir *Blackberry winter*: 'I had responded to the sense of urgency that had been conveyed to me by Professor Boas and Ruth Benedict. Even in remote parts of the world ways of life about which nothing was known were vanishing before the onslaught of modern civilization. The work of recording these unknown ways of life had to be done now — now — or they would be lost forever. Other things could wait, but not this most urgent task...?'
26. CTK Collection, untitled and undated lecture [late 1940s?], FL.
27. 'When discussing the life on a reserve it is not possible to ignore the way in which the old native custom marches parallel to the introduced European way of life and how seldom these two modes of life blend as a whole'. CTK Collection, 'The Queensland Reserve', undated draft paper, p. 3, FL.
28. The relevant ethnographic records have been digitised and indexed to make them available for native title researchers and Aboriginal communities. The DVD which contains these records, produced by Professor David Trigger, Kim de Rijke, Tony

Jefferies, Charmaine Jones and Michael Williams (2011), is entitled *The Caroline Tennant-Kelly ethnographic collection: Fieldwork accounts of Aboriginal culture in the 1930s* (a project by The University of Queensland, funded by the Australian Government Attorney-General's Department (Social Inclusion Division) under agreement number 10/11344. Copies will be distributed to relevant Aboriginal communities, native title representative bodies, and organisations such as the National Native Title Tribunal and the Australian Institute of Aboriginal and Torres Strait Island Studies.

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