



Challenges for Australian native title anthropology: practice beyond the proof of connection

David Martin, Toni Bauman and Jodi Neale



AIATSIIS

AUSTRALIAN INSTITUTE OF
ABORIGINAL AND TORRES STRAIT
ISLANDER STUDIES

www.aiatsis.gov.au

**Challenges for Australian native title anthropology:
practice beyond the proof of connection**

David Martin, Toni Bauman and Jodi Neale

AIATSIS Research Discussion Paper No. 29

Challenges for Australian native title anthropology: practice beyond the proof of connection

David Martin, Toni Bauman and Jodi Neale

Research Discussion Paper No. 29

First published in 2011 by the Native Title Research Unit
Australian Institute of Aboriginal and Torres Strait Islander Studies

GPO Box 553 Canberra ACT 2601

The views expressed in this publication are those of the authors and not necessarily those of the Australian Institute of Aboriginal and Torres Strait Islander Studies.
Copyright © AIATSIS

Apart from any fair dealing for the purpose of private study, research, criticism or review, as permitted under the Copyright Act 1968, no part of this publication may be reproduced without the written permission of the publisher.

National Library of Australia Cataloguing-in-Publication entry

Author: Martin, David.

Title: Challenges for Australian native title anthropology: practice beyond the proof of connection / David Martin, Toni Bauman and Jodi Neale.

ISBN: 9780855758066 (pbk.)

ISSN: 13239422

Series: Research discussion paper (Australian Institute of Aboriginal and Torres Strait Islander Studies); 29.

Notes: Includes bibliographical references.

Subjects: Native title (Australia).

Aboriginal Australians--Land tenure.

Anthropology--Australia.

Other Authors/Contributors:

Bauman, Toni.

Neale, Jodi.

Dewey Number: 346.94290432

Front cover: Toni Bauman facilitates a decision-making and dispute management exercise with staff of Northern Territory Parks and Wildlife Service, Northern Land Council and traditional owners at a Gregory National Park meeting in June 2008. Photo: Sean Moran. From left to right: anthropologists Carol Christophersen, David Martin and Nicolas Peterson, at a Northern Land Council anthropology seminar, April 2010. Photographer: unknown. Jodie Neale, discussion with native title claimants. Photographer: unknown.

Table of Contents

About the authors	1
Abstract	2
Introduction	3
Anthropology in the native title ‘recognition space’	4
Native title anthropology beyond the ‘recognition space’	6
‘Intercultural’ social fields	9
Socio-cultural transformation	11
Anthropological practice in developing native title agreements	12
Governance ‘arenas’ in agreements	13
Anthropological contributions to agreement design	16
The business of process: native title decision-making, dispute management and anthropological practice	18
Traditional and contemporary decision-making processes	19
Identifying the contemporary polity and interests within the group	20
Anthropology and third party management of agreement-making and dispute management processes	21
Issues in implementing a native title anthropology beyond ‘connection’	25
Conclusion	27
Notes	28
References	30

About the authors

David Martin is a consultant anthropologist as well as a School Visitor at the Australian National University in the School of Anthropology and Archaeology. His research and applied interests include welfare reform, Aboriginal economic and community development, native title, and governance. He has provided policy advice on settling native title claims and undertaken reviews of connection reports for government agencies in Western Australia, South Australia and Victoria as well as providing advice to Native Title Representative Bodies. He has undertaken research at the Centre for Aboriginal Economic Policy Research at the ANU on the capacity of mining agreements to deliver sustainable development outcomes for Aboriginal people, conducted reviews of native title agreements and assisted in their implementation, and more generally has undertaken extensive research and applied work on Aboriginal governance issues, including those relating to Prescribed Bodies Corporate.

Toni Bauman is a Research Fellow at the Native Title Research Unit and an anthropologist, mediator, facilitator and trainer. She has over thirty years experience in Indigenous matters including: land and native title claims; agreement-making; governance including decision-making and dispute management processes; cultural heritage; negotiation and partnering; National Parks and joint management; government policy; art and craft; evaluation; social impact; feasibility studies and tourism. She has worked as a staff member and consultant for a range of organisations such as Land Councils, Native Title Representative Bodies, and Government Departments. Between 2003 and 2006, Toni ran the Indigenous Facilitation and Mediation Project in the NTRU. In 2008, she advised the Federal Court on its Indigenous dispute resolution and conflict management case study project. She also undertakes a range of speaking engagements and facilitates workshops.

Jodi Neale is a Canberra-based consultant anthropologist of Aboriginal and British descent who specializes in native title and cultural heritage. Jodi was previously employed as the coordinating anthropologist at Yamatji Marlpa Aboriginal Corporation in the Pilbara region of Western Australia. During her six years in the Pilbara her work included claim research, claimant liaison, strategic planning, managing research staff, and culminated in the authorship of a successful Connection Report.

Abstract

This Discussion Paper arises from a concern that the current contributions of anthropology in the Australian native title arena are often unnecessarily confined to the production of expert reports and other materials, in accordance with legal briefs and criteria established under native title law. It argues for a broadening of the focus of anthropological work in the native title arena from roles as independent experts, to include a ‘mirror image’ of that concerned with the proof of native title. In addition to constructing legally-driven expert accounts of the present in terms of the traditions of the past as is required to prove native title, this ‘mirror image’ anthropology would be explicitly concerned with contemporary processes such as Aboriginal engagement with the wider society, development, and transformation as well as with cultural continuities. The paper provides conceptual tools for this broader anthropological focus, including the practical significance of the concept of the ‘intercultural’ in challenging essentialised constructions of Aboriginal traditions, laws, and customs in the native title arena.

This broader practice would challenge anthropologists’ own constructions of the nature of their contributions in the native title arena, and the representations and expectations of them by others. It would involve anthropologists working in multidisciplinary teams; in collaboration with Aboriginal people, developing institutions and strategies to transform Aboriginal people’s social, economic and political circumstances. The paper addresses two contexts of such a native title anthropology—the development of native title agreements, and the management of native title related decision-making and dispute management among Aboriginal people.

Introduction

Most anthropological native title practice has focused on the collection and analysis of evidence required to demonstrate the existence of native title, whether for litigated or consent determinations. A major task in this enterprise has been the production of expert reports and other materials in accordance with legal briefs and addressing criteria established under native title law (e.g. Glaskin 2003; Palmer 2007; Trigger 2010). Changes in the law (statutory and jurisprudential) have made it both more difficult for claimants to meet the requirements for proof of native title and limited the nature of the rights and interests that can be recognised (Aboriginal and Torres Strait Islander Social Justice Commissioner 2007:139ff). Consequently, there is an increasing disjunct between the contemporary worldviews and aspirations of Aboriginal people and the legal construction of native title. This disjunct, as well as that between the understandings, methodologies and writing styles of anthropology as a social science on the one hand and those required of anthropologists by the legal inquiry entailed in native title claims on the other, has been the subject of considerable critical attention by anthropologists themselves, although this is not the subject of this paper (see e.g. Burke 2001, 2005, 2007; Glaskin 2004, 2007; Maddock 1998; Morphy 2006; Morton 2002, 2007; Palmer 2009; Sansom 2007; Smith and Morphy 2007; Sutton 2005, 2007; contributors to Toussaint 2004).

This paper argues for a broadening of the focus of anthropological work in the native title arena to include what might be seen as a ‘mirror image’ practice, an expansion of anthropological roles beyond those concerned largely with the proof of native title. Drawing on anthropology’s social-scientific analytical and methodological frameworks, rather than constructing legally-driven expert accounts of the present in terms of the traditions of the past as is required to prove native title, this ‘mirror image’ anthropology would necessarily focus on socio-cultural transformations as much as on cultural continuities. It would explicitly be concerned with contemporary processes such as Aboriginal engagement with the wider non-Aboriginal society and political and economic development, and not just on the maintenance of those laws and customs from which native title derives.

We further argue that with the proliferation of corporate structures and agreements developed in relation to native title claims, there is often insufficient attention paid to the contemporary political and cultural contexts and processes that lead to and are built into their construction. This can compromise their long-term legitimacy and sustainability, and exacerbate rather than minimise the prevalence of disputation and conflict. In contrast to working as independent experts in accordance with legal briefs, this ‘mirror image’ practice would involve anthropologists working more extensively in multidisciplinary teams, in close collaboration with Aboriginal people, to develop institutions and strategies which expressly aim to transform Aboriginal people’s social, economic and political circumstances. Such a practice would challenge anthropologists’ own constructions of what they might contribute in the native title arena, and the representations and expectations of them by others working within it.

The paper first outlines certain basic issues for a broader ‘mirror image’ native title anthropology that moves beyond the requirements of the legal proof of native title. It then outlines key proposed elements and conceptual tools of this broader native title anthropology. Two interrelated areas where anthropological methodologies and insights might be brought to bear as instances of broader native title anthropology are then presented—the development of native title agreements and the management of decision-making and dispute management among Aboriginal people. The audience for this paper is envisaged as including anthropologists working in the native title arena, whether as consultants to or staff of Aboriginal organisations, government agencies, or resource developers. However, the paper also aims to inform a wider audience—critically, Aboriginal people and their advisers, but also native title lawyers, policy makers and others engaged in the native title arena.

Anthropology in the native title ‘recognition space’

As a tool of analysis, this paper differentiates what some have described as the native title ‘recognition space’ from a broader native title arena in which the kind of extended ‘mirror image’ anthropology referred to above would more appropriately reside. The recognition space refers specifically to the means by which the Australian legal system recognises native title, under Section 223 of the *Native Title Act 1993* (Cth) (‘NTA’). This occurs through processes of translation of an Aboriginal group’s relations to lands and waters arising under its traditional laws and customs, into native title rights and interests that are cognisable and enforceable under Australian law (Mantziaris and Martin 2000:9-18, drawing from Pearson 1996; also Strelein 2001:95-124). The recognition space is thus restricted to the description of a particular *legal* phenomenon, and is only one dimension of the complex field of social, cultural, political and economic interaction between Aboriginal and non-Aboriginal societies (Mantziaris and Martin 2000:10-12; Martin 2003; contributors in Smith and Morphy 2007; Weiner 2003).¹ Neither does the recognition space concept encompass the statutory rights deriving from registration of a native title claim under the NTA, such as the right to negotiate, nor contractual rights that may arise under an Indigenous Land Use Agreement (ILUA) (Mantziaris and Martin 2000:10), nor the legal and political processes by which these rights may be granted or negotiated.

The term ‘native title arena’ on the other hand is used in this paper to refer to these broader social, political, economic and legal contexts in which native title lies, and that are in part established or impacted by claims for and the recognition of native title. To date, most native title anthropological practice has taken place within the recognition space, in the context of native title claims whether resolved by litigation or by consent determinations.

It is increasingly onerous for claimants to demonstrate the existence of their native title, and accordingly more demanding for anthropologists in the preparation of expert reports. This is true of litigated cases and those where determinations are being sought by consent, because while states and territories may variously claim to adopt lower evidentiary thresholds in consent determinations, the key elements required to

demonstrate the existence of native title must still be addressed. A particular set of factors creating difficulties for the proof of native title with substantial implications for anthropological practice in the recognition space relates to the accentuated requirements in native title law post-*Yorta Yorta* for continuity at two interrelated levels. The first is the acknowledgement and observance of 'normative laws and customs', essentially unbroken since sovereignty, from which the native title of the particular Aboriginal group or society derives, and the second is continuity of the relevant society itself from that at sovereignty (see Strelein (2005:1-2) regarding these two aspects of continuity in her commentary on French J's *Sampi* decision).

Native title is a set of rights and interests in land that is vulnerable to impairment and extinguishment through the 'tide of history' (*Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 59-60 per Brennan J). This 'tide', of course, is far from an immutable force of nature. It has been driven by many forces including the actions of colonial governments and their successors through such processes as the appropriation of lands, large-scale relocations and the removal of Aboriginal populations. It has also been driven through the multifaceted engagements of Aboriginal groups and individuals, with the institutions, values and members of settler society. The consequent cultural, economic, social, demographic and other transformations in Aboriginal societies have been profound, albeit with significant local and regional differences. Furthermore, the 'tide' is not simply a feature of history, eroding the basic foundations of Aboriginal traditions, but is ongoing and in many regions perhaps even escalating (see e.g. Martin 1993 of Aurukun, Taylor 2010 of Wadeye, and Sutton 2009 more generally).

Further challenges for native title claimants, and for anthropological practice in this arena, derive from the very legal construction of native title itself. In particular, the strength and content of native title as potentially a 'right to the land itself' (Pearson 1996) has been cumulatively reduced by both jurisprudential and statutory law. The legal construction of native title as a bundle of essentially disaggregated rights and interests (Glaskin 2003), the limiting of the recognised rights and interests to those which can be inferred to have been in existence at sovereignty and to derive from specific incidents of the group's laws and customs, and the law's restriction of the scope and extent of native title rights and interests to those which pertain specifically to the relationship between the native title group and country, have all rendered native title as a relatively weak and vulnerable form of property right.

Brennan has astutely observed of the limitations of the legal construction of native title and its relevance to contemporary societies:

Freezing social structures and the essential state of traditional law and custom as at 1788 makes proof of native title extremely difficult for Aboriginal groups across Australia. More than that, it suggests that the rights which are recognised may not include those arguably best adapted to the contemporary needs of the most disadvantaged sector of the Australian population, that is those laws developed by systems of internal Aboriginal governance to cope with post-colonisation realities. (Brennan 2003:213-4)

Native title, one might say, essentially entitles Aboriginal people only to be 'native', despite the post-colonisation realities to which Brennan refers. A degree of

incommensurability between the content of any given system of Aboriginal laws and customs and that of Australian law (Mantziaris and Martin 2000:29-43) is to be expected. However, there is potentially a quite radical disjunct between the contemporary cultures, laws and customs, worldviews and aspirations of Aboriginal people on the one hand, and the restricted legal construction of native title on the other.

For Aboriginal people themselves, the meanings attributed to native title will typically encompass far more than the limited legal recognition of particular kinds of rights in country. These meanings may entail such matters as the ownership and control of traditional lands and waters, partial redress of historic wrongs and the acknowledgement of physical and cultural survival through colonisation, the public recognition of a cultural and political identity hitherto denied, ways of maintaining culture and identity into the future including protecting important sites and areas on country, and strategies for gaining a stake in local or regional economies (see contributors in Smith and Morphy 2007). Thus, for many Aboriginal people, native title is absolutely a *political* (as well as cultural, economic and social) issue not just a legal one, and one which lies at the core of relations between them and the wider Australian society (see e.g. chapters by Claudie, Smith and Morphy, Scambary, and Redmond in Smith and Morphy 2007). Native title can also act as a symbolic resource in competitive intra-Aboriginal identity politics (e.g. contributors in Smith and Finlayson 1997).

Moreover, despite a stated preference among Australian governments for negotiating rather than litigating claims, the native title determination process continues to be extremely resource-intensive, time consuming, and demanding of all parties, most particularly of the claimants and the Aboriginal organisations who represent their interests (Aboriginal and Torres Strait Islander Social Justice Commissioner 2009, esp. Chapter 3). While native title, or its assertion, can lead to the successful negotiation of ILUAs, its capacity to deliver tangible, sustainable benefits to Aboriginal groups is at best variable. As Strelein noted (2006:84), there is a significant gap between many of the contemporary aspirations of Aboriginal people and the capacity of native title to fulfil them.

Native title anthropology beyond the ‘recognition space’

It is essential that anthropologists recognise the profound import for their practice in the native title arena of the disjunct between the meanings attributed to native title by contemporary Aboriginal people and its restrictive legal construction. Indeed, for native title to be recognised by the Australian legal system, the anthropologist is obliged to construct an account of the particular Aboriginal society and its laws and customs in terms of essentially unbroken connections to the pre-sovereignty past—with change arising from processes of adaptation, rather than through significant transformation. In particular, the laws and customs of the contemporary group or society from which its native title derives must be demonstrated to have the necessary continuity from those of the pre-sovereignty society and be shown to be ‘traditional’ under the quite restrictive principles of native title law.² From this perspective, native title claims (and their associated anthropological research) constitute a state-resourced and mandated project of

‘traditionalism’—the reconstruction of an idealised representation of the present as it allegedly is, in terms of how it supposedly was in the past (Merlan 1998:231).

Characterising anthropological work within the recognition space as ‘traditionalist’ is not to claim that it is not a legitimate, and necessary undertaking in advancing the interests of Aboriginal people. It does, however, provide a useful lens through which to examine and evaluate this area of practice and its entailments and limitations, both for Aboriginal people and for the discipline of anthropology. It also assists in distinguishing the anthropological enterprise involved in the proof of native title from what might be practised in the wider native title arena, although the two are necessarily linked.³ The mirror image anthropology proposed here would draw on anthropology’s social-scientific analytical and methodological frameworks, but rather than constructing legally-driven expert accounts of the Aboriginal present in terms of the traditions of the past as is required to prove native title, it would involve working with Aboriginal people to develop understandings of their contemporary circumstances, and strategies to change those circumstances—an anthropology of ‘looking forward’ rather than ‘looking back’.

This would be a far more open-ended and practically directed anthropology than that required for the proof of native title. For example, while anthropology in the recognition space is required to establish such matters as the identity and continuity since sovereignty of the particular ‘normative society’ as native title law constructs it, a key concern for anthropology in the wider native title arena including in agreement-making would be the characteristics of the relevant *contemporary polity*. Thus, where connection anthropology typically elides diversity of perspectives, contested identities, and competition and conflict, anthropological practice in the broader native title arena would necessarily focus specifically on such issues. An anthropology of agreement-making, for instance, would inevitably be dealing with such matters through a focus on governance, including both formal and informal institutions and processes. These may include incorporated entities like representative bodies and Registered Native Title Bodies Corporate (RNTBCs), trusts where the trustee may be an Aboriginal corporation, and mechanisms for access to and distribution of financial and other benefits. The design and operation of these institutions would need to take account of diversity and contestation within the Aboriginal group concerned, develop measures to manage conflict, and more (Mantziaris and Martin 2000, Chapters 8-10; Martin 2004b, 2009). Through such means, anthropology could assist Aboriginal people in overcoming some of the limitations of the legal construction of native title identified by Brennan and discussed previously, by focussing on governance mechanisms to deal with post-colonisation realities rather than producing ‘traditionalist’ accounts of a society and its laws and customs.

This broader native title anthropology would thus be explicitly concerned with such contemporary processes as Aboriginal engagement with the wider society, development, and transformation as well as with cultural continuities, and therefore be actively involved in socio-cultural change, not only in observing and analysing it. Developing an account of the contemporary circumstances of a particular native title group, including such matters as the socio-economic status of its members, their potentially diverse development aspirations, and the complex interplay between these factors and desires for

cultural maintenance, would be central to anthropological practice in the broader native title arena, including in developing ILUAs and other native title agreements.

The anthropological focus would not just be on an imagined distinct and autonomous Aboriginal cultural domain as implied by the legal parameters of native title (a matter discussed below in the section on intercultural social fields). Rather, anthropological methodologies and analytical frameworks should also be brought to bear on the institutions, values and practices that have their ultimate origins in the wider society and which impact on and help structure the native title arena. For example, the legal and regulatory frameworks and principles under which native title corporations such as RNTBCs are established and operate, including directors' fiduciary duty or the majoritarian principles underlying corporate governance (Mantziaris and Martin 2000), are just as much cultural systems and susceptible to an applied anthropological analysis as are Aboriginal decision-making principles and practices, or the political and ethical entailments of kinship-based societies. Moreover, each informs the other and the interactions and engagements between such sets of principles and practices which take place in and structure the native title arena should also be a focus for applied anthropological analysis.

Analysis could usefully be directed to the administrative and political cultures of resource developers and of governments, for example in their involvement in negotiations over native title claims and consequent agreements (including their often unexamined assumptions and implicit values, such as those around 'development' and 'economy').⁴ It should also be brought to bear on the processes through which technical experts, including lawyers and anthropologists, translate notions of cultural and economic futures into bureaucratically and legally cognisable terms which may be contested not only between Aboriginal people and other parties to native title agreements, such as governments and resource developers (Altman 2009; Scambary 2007; Trigger 1997a, 1997b, 1998), but also among Aboriginal people themselves. Such processes of translation are subject to issues of potential misunderstandings, inadequacies and incommensurabilities, just as the translation of Aboriginal connections to country into rights and interests into legally recognised forms are (Martin 2009). While native title anthropological practice should not be reduced to translation between apparently distinct cultural systems, there is a largely unexplored but potentially significant role for anthropologists in rendering more accessible the principles, assumptions, and values underlying, for example, the pursuit by government of 'development' goals and ensuring that Aboriginal people understand them. Native title anthropologists should equally be involved '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 2010a).

Much of the work in designing and establishing Aboriginal organisations and in developing agreements has historically been undertaken by lawyers, with advice from specialists such as resource economists and accountants. While such disciplinary specialists may develop a degree of cross-cultural expertise, they are not in general trained and equipped to understand the complex engagement between Australian law as a

cultural system of rules, principles, structures and practices, and Aboriginal cultural systems. This is just as apparent in the conduct of native title hearings (Morphy 2007), as it is in the establishment and management of the corporations and trusts created to manage native title and the benefits that may derive from ILUAs and other agreements (Martin 2009). There is a risk that restricted understandings of Aboriginal people's values and practices—whether by lawyers or indeed anthropologists—can lead to codified and essentialised elements of Aboriginal political and ethical systems being incorporated into agreements and their constituent organisational structures and rules, with consequences that include compromising their sustainability.

Thus, for example, attempts to reflect the complexities of Aboriginal socio-cultural groupings and political processes are typically made through such legal devices as the representative structures of boards, establishing classes of corporate membership, involving 'elders' as advisors, and setting out mechanisms for 'traditional' decision-making. An informed applied anthropology however, would recognise that while translation strategies will be pragmatically necessary, they potentially entail processes of juridification whereby hitherto informal social processes come under the purview of the law (Mantziaris and Martin 2000:127). They also entail processes of codification through which laws and customs, social values and practices are reduced to writing and thereby relatively fixed in content (Mantziaris and Martin 2000:41-3; Glaskin 2007:71).⁵ These processes need in each instance to be carefully considered for unintended and potentially problematic consequences. This includes the possibility that they can result in the loss of control by the relevant Aboriginal people over the interpretation and content of their own laws and customs, to outside specialists such as lawyers and anthropologists—for instance in litigation between Aboriginal parties (Mantziaris and Martin *loc. cit.*).

As translations, they also entail the possibility of partial or significant incommensurability and raise issues of legitimacy and sustainability within the particular Aboriginal polity. In these and many other matters concerning governance in formal institutions such as corporate entities, anthropologists should be in a position to assist in the development of a more sophisticated evidentiary and analytical basis for advice to Aboriginal people and others about appropriate and effective corporate structures and processes that can accommodate change and better reflect the nature of contemporary Aboriginal societies.

These matters are taken up again in the governance case study below. Before presenting this, two further issues are briefly discussed which, it is proposed, are fundamental to native title anthropological practice outside the formal recognition space—intercultural social fields, and the recognition of socio-cultural transformation.

'Intercultural' social fields

While it is possible to delineate distinctive characteristics of the values and practices of Aboriginal groups and communities, these have been variously produced, reproduced and transformed through complex historical processes of engagement with those of the dominant society in what Merlan terms an 'intercultural' social field (Merlan 1998). The

notion of the intercultural involves a particular conceptualisation of the lifeworlds of Aboriginal people. While it does not provide a general theory of Aboriginal circumstances, it is an important tool for analysing aspects of those worlds in a manner which contrasts with the static accounts typically provided in response to the perceived demands of the native title recognition space.

The ‘intercultural’ should not be understood as the intersection between two distinct domains (Merlan 2005; Sullivan 2005). Aboriginal societies and cultures cannot be seen as bounded and separate entities or domains (Hinkson and Smith 2005; Merlan 1998, 2005; Sullivan 2005). Nowhere in Australia do (or indeed can) Aboriginal people live in self-defining and self-reproducing domains of meaning and practices. Rather, they draw from and contribute to complex and contested intercultural social fields (Martin 2003) albeit from often quite distinct positions (Merlan 1998:233). These processes have entailed not only Aboriginal people’s domination by and exclusion from non-Aboriginal society, but have also involved an ongoing process of Aboriginal people appropriating, incorporating and transforming many of the wider society’s values and practices into their own distinctive ways of being and acting (Martin 2003, 2005a, 2005b). Even who and what Aboriginal people consider themselves to be has been affected by the representations of Aboriginality by others (Merlan 1998).

The category of ‘Aboriginal elder’, for example, is not simply a phenomenon of Aboriginal societies with its roots solely in traditional authority structures. It has been created in part precisely through the interactions between Aboriginal and non-Aboriginal political systems (Mantziaris and Martin 2000:302–3). ‘Elders’ have become the individuals with whom governments, agencies and resource developers consult to ascertain the views of Aboriginal groups about issues ranging from the protection of heritage and culturally significant sites to the protection of children. The category has even been introduced into legislation, in the case of the *Aboriginal Land Act 1991* (Qld). Not only has who constitutes an Aboriginal elder and the nature of his or her status and authority been transformed by institutions of the wider society, but Aboriginal eldership has also in turn impacted on how those institutions interact with and understand Aboriginal groups and communities.

An understanding of the intercultural is central to an applied anthropology focused on the circumstances, values, aspirations, and potential life trajectories of Aboriginal people beyond the narrow legal constructions of ‘traditional laws and customs’ within the native title recognition space. This is because while it encompasses the realities of difference, it also challenges essentialised and ahistorical representations of contemporary Aboriginal values and practices—whether those of Aboriginal people themselves or of others, including of the legal system—in such arenas as authority and decision-making and other elements of political process. Because the concept of the intercultural fundamentally challenges the notion that there are distinct Aboriginal and mainstream domains and cultures, it also forces a critical re-evaluation of simplistic notions such as ‘cultural appropriateness’ as providing a key guiding principle for Aboriginal institutional design and management, or for Aboriginal development possibilities (Martin 2003; Sullivan 2006).

Socio-cultural transformation

Understanding the intercultural also necessarily entails a concern with notions of political, socio-cultural and economic transformation. In the state-mandated project of traditionalism we have described, attention to evidence of socio-cultural transformation is typically given only insofar as it has adverse implications for demonstrating the requisite continuity of the 'normative society' and adherence of its members to their traditional laws and customs.⁶ That is, in proving native title, evidence of significant socio-cultural transformation is a deficit to be overcome.

Yet it is abundantly clear that Aboriginal societies are undergoing profound and arguably accelerating socio-cultural changes. This is not only the case in 'urban' Aboriginal Australia but also in rural and remote areas where communities are often portrayed as more 'traditional', but social viability may be under threat (Austin Broos 2009; Martin 1993; Merlan 1998; Sutton 2009; Taylor 2010). There are also substantial demographic changes in Aboriginal populations across Australia. Taylor and Scambray have produced a major baseline study of Aboriginal participation in the Pilbara region's mining boom, which demonstrates that in the absence of substantial out-migration, the Pilbara Aboriginal population is set to expand for decades to come. The largest growth is in younger age groups and is coupled with an increasing proportion of older people (Taylor and Scambray 2005). In combination, Taylor and Scambray argue, these expanding cohorts present significant challenges for social and economic policy. They pose equal challenges for anthropology within the native title arena, as these demographic transformations also have major implications for Aboriginal social and cultural reproduction, for instance, with important aspects of enculturation into a distinctively Aboriginal social and cultural milieu potentially taking place within generational age cohorts such as peer groups rather than through transmission from senior to junior generations (Martin 2003, 2008).

There are also other major demographic changes. The majority of Aboriginal people associated with any given traditional country are now frequently living in polyglot townships where the Aboriginal populations have diverse affiliations to 'traditional' countries and are living alongside non-Aboriginal people. These townships may be situated on the country of the group concerned (as Tom Price is for its Gurama residents), on or near its periphery (as Aurukun is for its Wik Way residents), or at some remove from it (as is Mornington Island for its Waanyi residents). The Aboriginal people from a particular country are thus typically dispersed across wide regions and may have only intermittent contact with other members of the traditional land owning group (for example, at funerals and other such ceremonial occasions, native title meetings and heritage clearance surveys). They will also be living in situations where younger generations are exposed to a considerable diversity of values and worldviews. In these circumstances, connections among Aboriginal people of personal and family history, local politics and sociality, and of kinship and marriage, can assume as much day-to-day importance as the commonalities of landed identities.

Here, there are many possibilities including those of dissent and rejection, alternative life trajectories, and diverse options for establishing what it means to be Aboriginal and of engaging with the dominant society and its institutions (Altman 2009; Holcombe 2006; Martin 2005b; Scambary 2007; Trigger 1997b; 2005).⁷ In such situations, there is a complex and ongoing interplay between continuity and change, and tradition and transformation. This complexity simply cannot be encompassed by native title law's construction of 'adaptation' as an allowable mechanism by which the traditional character of laws and customs can be preserved, but it is essential to account for it in anthropological work outside the recognition space.

While the traditionalist project of proving native title in the recognition space generally elides or bypasses such features of contemporary Aboriginal groups, these features are precisely among those to which a 'mirror image' anthropology, explicitly concerned with engagement, development and change, must direct its attention. In the negotiation, design and implementation of agreements, and in the design of decision-making processes and the management of intra-Aboriginal conflict and disputation, these factors must explicitly be taken into account, not merely circumvented.

Anthropological practice in developing native title agreements⁸

Agreements—whether registered ILUAs or other types—together with their associated Aboriginal corporate entities have become significant outcomes of the Australian native title regime. There has been increasing political and policy support for agreement-making as a means to overcome the legal constraints of native title, and to avoid the resource-intensive and often painful processes of litigation. Agreements are generally portrayed as providing the possibility of addressing broader Aboriginal concerns and aspirations in more flexible, imaginative and locally appropriate ways.⁹ Nevertheless, issues have been raised as to the extent to which agreements genuinely deliver substantial and desired benefits to the Aboriginal parties (Cousins and Nieuwenhuysen 1984; O'Faircheallaigh 1988, 2006; Scambary 2009; Ritter 2009b), the lack of effective implementation and monitoring provisions (O'Faircheallaigh 2002, 2003), inequities across Aboriginal groups in outcomes (O'Faircheallaigh 2004), and the often complex, resource-intensive and unsustainable governance arrangements which particularly burden Aboriginal parties (Martin 2009).

While native title rights and interests are of themselves legally limited and vulnerable, native title in its broader sense as an 'institution' (Weiner 2003:100), including agreement-making, has arguably had a major impact on the political, economic and moral conversations regarding the position of Aboriginal people across large parts of Australia. Agreements, and Aboriginal corporate entities (Rowse 2005), hold an increasingly important position in the architecture of Australian Aboriginal affairs. They impact the lives of Aboriginal people in many areas across diverse situations, and look likely to do so into the future. They articulate and transform social, political and economic relations among Aboriginal groups, as well as between them and the wider local, regional and national societies. Agreements and their concomitant corporate entities and activities constitute significant political and social institutions in the native title arena.

Yet, there has been relatively little attention paid to agreements in the Australian anthropological literature (although see contributors in Altman and Martin 2009; Holcombe 2006; Scambary 2007; Trigger 1997b, 2005). Whether working within Native Title Representative Bodies (NTRBs) and Native Title Service Providers (NTSPs) or as consultants, few anthropologists appear to have played major roles in the development, implementation or evaluation of agreements despite the complex cultural, economic and political terrains within which agreements and their associated Aboriginal entities lie. The negotiation and design of their structures and governance systems has largely been undertaken by lawyers and other technical experts such as resource economists and accountants who, despite often developing capacity and skills through experience, are not usually trained for the cross-cultural entailments of such work. Where anthropologists have had roles in this arena, their input has largely been confined within the discourse and practice of traditionalism and to matters which reflect essentialised views of both anthropological expertise and Aboriginal culture and interests. This includes, for example, providing advice on traditional landed interests across the claim area, developing lists of ‘traditional owners’, and producing affidavits and reports relating to authorisations for lodging ILUAs under s.251B of the NTA. It has also too often been the case that the roles of anthropologists employed in NTRBs and NTSPs in agreement-making are even more limited, for example working as ‘taxi drivers’ tasked with ensuring that the appropriate Aboriginal people attend meetings, and in supporting consultant anthropologists.

Anthropologists including those working for representative bodies are well placed, however, to play ongoing and important ‘on-the-ground’ roles and bring insights to the negotiation and implementation of agreements. Establishing key characteristics of a contemporary Aboriginal polity, in contrast to those of the ‘normative society’ required in the proof of native title, is a clear example. Anthropological analysis would also assist in moving beyond essentialised representations of Aboriginal society, laws and customs and traditions through an understanding of the implications of agreements as ‘intercultural’ institutions, in incorporating analysis of the impacts and import of ongoing Aboriginal socio-cultural transformation, in the recognition of the diversity of worldviews and aspirations among the Aboriginal people concerned, and in agreement governance, as discussed in the following section.

Governance ‘arenas’ in agreements

In considering the potential contributions of a broader native title anthropology, and in facilitating an analysis of appropriate governance mechanisms for native title and other agreements and the various entities associated with them, it is useful to disaggregate agreements into their constituent entities and relationships, as illustrated in Figure 1 below. This figure does not represent the formal structures of any given agreement, but rather illustrates ‘governance arenas’ relating to classes of entity and categories of relationships invoked in agreements (Martin 2009:114-17). Such an analysis allows for Aboriginal people and those working with them in developing agreements (such as lawyers, financial experts and anthropologists), to develop a more focused and informed understanding of the differing governance mechanisms that will be the most appropriate

and sustainable for each arena. While the arenas are interlinked, each potentially draws on quite different design repertoires.¹⁰

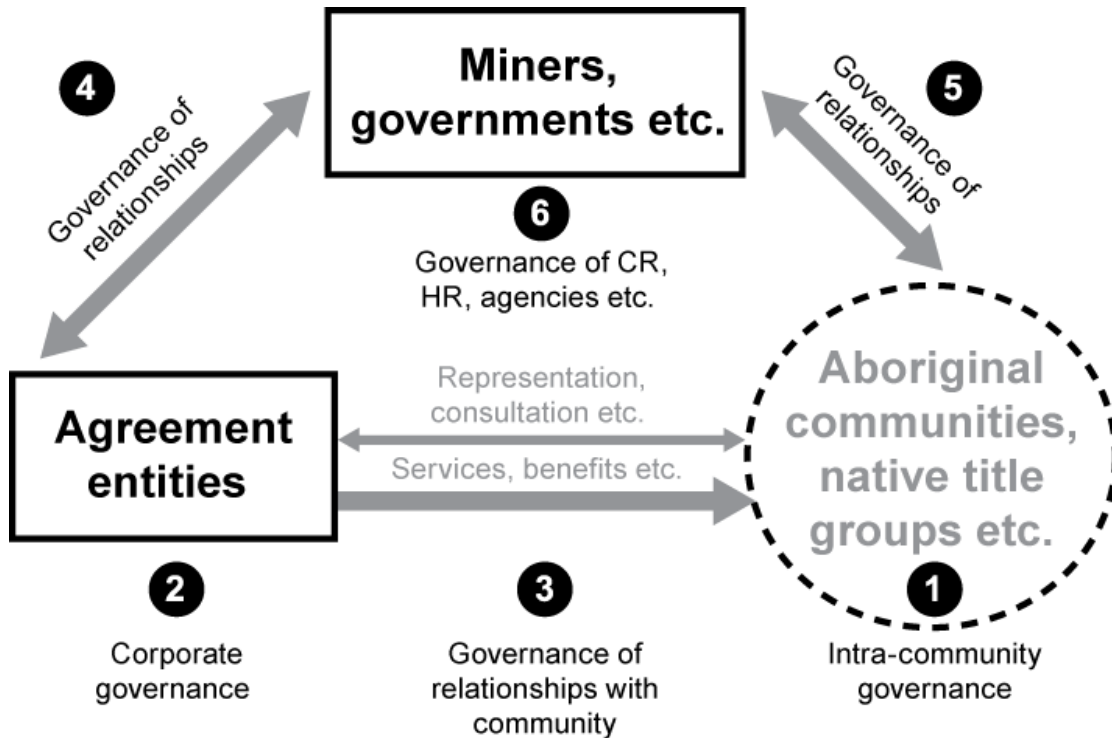


Figure 1: Governance ‘arenas’ in Native Title agreements¹¹

Different issues related to agreement design and implementation arise for each of these governance arenas and it is important to establish the following parameters:

1. *Whether the particular governance arena concerns a relationship between a formal entity and a collectivity, one between two formal entities, management of relationships within a collectivity, or concerns the governance of an entity itself.*

This is a foundational issue for governance principles. For example, the principles of governance of social and other relationships within a particular Aboriginal group or community (Arena 1 in the Figure 1 above) will proceed by principles which in large part differ from the corporate governance principles by which an Aboriginal organisation should be managed (Arena 2). These in turn will differ from those by which that organisation engages with, represents, and delivers services to the particular Aboriginal group or community (Arena 3). The principles appropriate in Arena 3 in turn will be quite different from those by which an Aboriginal organisation might best manage its relationships and interactions with a funding body (Arena 4). Equally, the corporate governance principles of an Aboriginal business set up as the result of an agreement almost certainly would need to differ significantly from those for a representative or advocacy organisation, since the principles by which the market operates differ significantly from those by which representative politics do. Likewise, the management of a representative organisation’s relationships with its Aboriginal constituency and with the broader society and economy would also

normally be conducted on different principles from those a business would adopt in its relationships with members or shareholders, and with customers.

The intercultural character of each governance arena and its entailments will also potentially differ across governance arenas. Each will incorporate values and practices which draw (in different ways in each instance) from ideational and practical repertoires within the intercultural social field, and which are simultaneously implicated in an ongoing cycle of adaptation, incorporation, and transformation (see also Smith and Hunt 2008).

2. *Whether the particular governance arena entails multiplex linkages or is relatively mono-dimensional.*

Complex and multi-dimensional relationships are more likely to be robust and sustainable and less vulnerable to destabilisation than mono-dimensional ones. Accounting for the complexity of relationships and their context in governance design is critical. For example, if the relationship between a trustee company managing and distributing agreement benefits and the beneficiaries of the trust is established mainly in the context of occasional public ‘community’ meetings, these meetings and the relationship can be highly vulnerable to destabilisation by instrumental political action by aggrieved or self-aggrandising beneficiaries. While community meetings can provide an important mechanism for internal accountability, there need to be additional means by which the trust engages with its beneficiaries—for example, adopting means for the active participation of beneficiaries at the local group level in planning their futures and the role that trust resources might play in those futures (Martin 2009:120-5).

More generally, agreement design and implementation typically pays inadequate attention to the governance of the relationships between Aboriginal corporations and their constituencies (Arena 3). Too much of the work of representing and responding to the diverse interests and expectations across the constituency is left to often poorly resourced and supported organisations’ boards (Martin 2009:120-5).

3. *Whether the entity involved has a formal, legal or administrative presence, or is a collectivity or a ‘natural social grouping’ of some kind.*

Core elements of the corporate governance of an organisation will be subject to legal requirements (established by the particular incorporating act, the organisation’s constitution, and legal precedent), and will be subject to monitoring by the relevant regulator. Other aspects of an organisation’s governance relate to such matters as ‘human resources’ management, and how workplace features like employee diversity are dealt with. Research demonstrates that while successful Aboriginal organisations have developed their own distinctive organisational cultures, they also incorporate best practice drawn from the national and international arenas (Finlayson 2007; Martin 2003; Sullivan 2006).

Agreements and associated Aboriginal organisations increasingly constitute core elements of Aboriginal polities (Mantziaris and Martin 2000; Martin 2003; Smith and Hunt 2008) and the internal governance of native title groups is intercultural. It does not constitute an autonomous Aboriginal domain. Nonetheless, there are compelling

arguments for establishing agreements and organisational governance mechanisms that leave as much distinctively Aboriginal social and political process as possible within the informal Aboriginal realm. For example, governance mechanisms should avoid unnecessary juridification of social and political processes, and should by and large minimise codification of them within corporate structures and constitutions, trust deeds, and organisational governance mechanisms (see the earlier discussion of codification and juridification above, and also Mantziaris and Martin 2000:126-8; Martin 2003:10; 2004b; 2009:121; Sullivan 2007:15-16).

4. *What the source of authority is for the relevant principles of governance (for example, to adjudicate on conflicting viewpoints, resolve disputes, or establish the rules of practice).*

In Arena 2 for example, under incorporation laws the responsibility for corporate governance and more generally organisational management lies with the board and senior management. Disputes may be handled in the first instance through dispute resolution procedures such as mediation or strategic intervention by the relevant corporate regulator, but ultimately can be referred to the courts for determination.

There is no equivalent source for the declaration of Aboriginal laws and customs within Aboriginal societies (i.e. within Arena 1), for reasons including the problems inherent in codifying laws and customs, and the absence of overarching institutions such as the courts that could provide authoritative determinations in the event of disputes (Mantziaris and Martin 2000:39-41). This is not to say that there are no authority structures in Aboriginal societies, but it is to recognise the import of a characteristic 'epistemic openness' (Merlan 1997, 1998) and fluidity of Aboriginal social and political process (Burke 2007) for gaining a final, if not necessarily agreed, determination of the content of laws and customs.

Anthropological contributions to agreement design

Few anthropologists have thus far been substantially involved in the negotiation and design of agreements and agreement structures, native title or otherwise. Yet arguably, in conjunction with other disciplines, anthropology has an important role in this area. Sustainable agreement governance requires detailed attention to the implications of the complex interplay in Aboriginal societies between the local and individual on the one hand, and the collective or community on the other—for example, in identifying the expressed interests of local groupings, families and individuals. Attention will also need to be given to the implications of the typically pervasive public dialogue among Aboriginal people emphasising collective social forms, which nonetheless takes place against the background of an intense localism with a stress on local group autonomy, and with ethical and political frameworks centred on highly localised imperatives (see e.g. Sutton 2003:85-110). A consequence is that it is likely to be problematic to assume that a small number of representatives on a board will in both political and practical terms prove either a sufficient conduit for communication between an organisation and the native title group or an adequate locus for decision-making. Another implication is that it may also be important in the negotiations and implementation of an agreement to not just focus on wider community benefits, such as resources and assistance for businesses to be

owned by the whole group, but also to have mechanisms for local groupings or families, or even individuals, to access them (Holcombe 2009; Martin 2009; Scambary 2009). We suggest that greater ethnographic attention paid to such dynamics and incorporated into contemporarily developed formal corporate structures would minimise the opportunity for and likelihood of conflict, especially given the typically strong obligations Aboriginal people hold to their family or local group.

Equally important would be a focus beyond a traditionalist concern with supposedly separate Aboriginal values and practices to include the institutions, values and practices which have their ultimate origins in the wider society, and which impact on and help structure the native title arena. Also significant would be recognition of the import of the intercultural, for native title agreements and their constituent organisations are quintessentially intercultural institutions. They arise from and in turn structure and transform the nature of the engagement of Aboriginal people and their institutions with those of the wider society, and vice versa (Doohan 2003; Martin 2009; Scambary 2007, 2009; Trebeck 2005, 2007).

Anthropologists should also play a role in alerting other specialists working in the development of agreements, and Aboriginal people themselves, to how critical it is to the long-term sustainability of agreements that cultural enclave governance principles such as the supposedly unchanging nature of tradition are not unwittingly built into agreements and their constituent organisations (Martin 2009). It is essential that the potential impacts of ongoing transformations such as those arising from demographic factors and in social, cultural, political and economic interests are considered. Equally, it is essential to not inadvertently build in obsolete traditionalist notions such as that of the authority of elders in contexts where they may demonstrably not have such authority.

The concept of governance arenas, each with a corresponding set of appropriate governance principles, is a further key insight anthropology can bring to native title agreement-making. A broader anthropological practice would assist in developing understandings of the different characteristics and principles of these governance arenas, and matching them with appropriate governance mechanisms. More generally, anthropological insights could serve to provide a focus on the complex intercultural characteristics of all activity in the native title arena, challenging presumptions (implicit or explicit) of autonomous Aboriginal social, political and economic realms of activity, and problematising a traditionalist orientation derived from the native title recognition space.

There was discussion earlier in this paper concerning problems whereby technical experts, including lawyers, translate (without acknowledging that translation is involved) potentially quite different and contested Aboriginal notions of cultural and economic futures into terms which are administratively and legally cognisable. This is a particularly significant issue in governance Arenas 1 and 3. Technically-driven negotiation processes together with standard legal methods combine to break down complex social realities and processes into defined constituent elements, and then to establish putative relationships between these elements. Martin (2009:101-108) illustrates this process in the case of the

Century Mine Agreement in north-west Queensland. Interests can get lost in the translation to formal structures and processes—themselves often already based on the kind of state-mandated traditionalist processes referred to previously. These processes of translation have the effect of limiting and in some instances essentialising contemporary interests and aspirations of Aboriginal people rather than identifying and developing responses to their complexities, as is discussed in the following section.

Through these processes, the often generalised and interconnected matters raised in negotiations by Aboriginal people are distilled and disaggregated into distinct elements for which responsibilities may be assigned to particular parties or specially established entities, and resources committed (or not) for implementation. That is, in a sense, the nature of these issues and the responsibility for them is codified into entities and management responsibilities. Thus, for example, apprehensions about the impacts of mining on country are translated into formal mechanisms for the protection of its cultural heritage and environmental values, and concerns about historic socio-economic marginality are translated into financial benefits and employment, training and business development schemes. Desires for political autonomy and self-determination are transmuted into the establishment of Aboriginal-controlled entities such as trustee corporations and representative organisations and Aboriginal representation on the raft of committees typically set up under large mining agreements (Martin 2009:102).

This is not to imply that there is an alternative and easily definable set of more culturally appropriate principles by which agreements should be structured and implemented. By their very nature, agreements are intercultural institutions that must necessarily involve processes of translation, and which therefore entail the potential for varying degrees of incommensurability, in order to have the intended *practical* effects within the dominant society's legal, political and economic systems. However, anthropology can provide relevant insights into the issues entailed in this codification of Aboriginal interests and aspirations into complex agreement governance systems, not least the considerable difficulties posed for the Aboriginal parties by the human and financial resources required for sustainable governance of such systems (Martin 2009).

A failure to take account of factors outlined above can promote among other things increased disputation. In such disputes, decisions are viewed as illegitimate and thus not binding, leading to repetition and non-functional corporations, and disengagement from such structures by their constituents. The next section of this paper discusses the importance of focussing on process to achieve sustainable outcomes, including legitimised decision-making and effective dispute management, and the ways in which anthropological skill-sets may assist in addressing such issues.

The business of process: native title decision-making, dispute management and anthropological practice

The formulation and implementation of policy in native title is grounded in principles of interest-based¹² consensual agreement-making processes.¹³ Such processes are envisaged in the NTA and in associated policy as alternative dispute resolution processes such as

mediation, negotiation and facilitation. Effective agreement-making where the interests among and between parties are diffuse and stratified requires flexibility and context-specific modes of communal engagement which employ highly specialised communication skills in ascertaining the shape and scope of party interests and in assisting parties to negotiate with each other. Principled interest-based agreement-making processes should be problem-solving processes that identify the full range of emotional, substantive and procedural rights and interests of parties (Bauman and Williams 2004),¹⁴ promote trust and long-term relationships, solidify group relationships and build lasting solutions based on mutual interests (Moore 2003).

There are, of course, important limitations to interest based processes, not least the power and resource differentials to be found among and between Aboriginal and other parties (O’Faircheallaigh 2006, Ritter 2009a, 2009b; Martin 2009, Bauman 2010c). Nonetheless, Aboriginal decision-making and dispute management processes directly impact the implementation and sustainability of agreement outcomes, and interest-based processes can be effective in ensuring sustainability. Conducted professionally, they can assist in ensuring that people feel responsible for implications of decisions they are purported to have made, that decisions are legitimate and reflective of the emotional, procedural and substantive interests among group members and that decision-making processes observe the international standard of free, prior and informed consent. Of critical importance is ensuring transparent, inclusive and accountable decision-making processes among Aboriginal people without which agreements risk only a temporary unity which may disappear on the cusp of settlement or during implementation.

Two issues of particular concern are discussed below. The first relates to the identification of decision-making processes as either ‘traditional’ or ‘contemporary’. The second concerns the need for anthropologists to identify the *full* matrix of rights and interests in any contemporary polity which should be accounted for in the design of innovative processes of decision-making and dispute management. Consideration of these two issues leads to a discussion of the roles of anthropologists in dispute resolution and management.

Traditional and contemporary decision-making processes

The distinction between ‘traditional’ and ‘contemporary’ decision-making processes in ss.251B (a) and (b) of the NTA, reflects what we described in this paper as ‘state mandated traditionalism’ and what Wolfe referred to as ‘repressive authenticity’ (Wolfe 1998). Codification of the decision-making process of a particular group for the purposes of authorising agreements or devising the rules of corporations as ‘traditional’ inevitably contains the seeds of conflict since ‘tradition’ is always contestable and changing. It also raises questions about the long-term workability of definitions as the conditions which permit the reproduction of ‘traditional’ decision-making processes as defined in authorisation processes may be quickly eroded, particularly in light of factors such as the premature death statistics already identified in this paper. It is common to classify as ‘traditional’, for example, decision-making processes that involve decisions made by senior members of patrilineal clans. This requires that patrilineal lines are extant. Yet, given the premature death statistics of Aboriginal people, key elders in a patriline may have passed

away and there may be few if any patrilineal descendants of a patrician alive. In these circumstances, the principles of 'clan' membership are often transformed, allowing recruitment to the group via other affiliations including cognatic, which may not be accurately reflected in the rules of any native title corporation.

Cognatic affiliation as a principle of membership can itself be unworkable. Anthropologists might go beyond authenticating lineage, instead, endeavouring to communicate the cultural, economic, as well as legal ramifications of any decisions concerning models of group formation. For example, unrestricted cognatic affiliation as the basis of membership of corporations can give rise to an almost infinite membership, geographically separated, undifferentiated in rights and interests and lacking reference to socio-cultural factors such as modes of enculturation among contemporarily diverse sets of cognates (see also Sutton 2003:214-16, 226-31). The dynamics which arise including expectations of those who may not recognise each other or speak the same 'cultural language' to collaborate in making decisions can be unmanageable in a legally incorporated body. Defining the decision-making group in so-called 'traditional' terms can mean that patrilineal descendants are making decisions on a diversity of issues which have no 'traditional' precedent and about which they are ill equipped to do so.¹⁵

In any case, there is a fundamental contradiction in distinguishing a 'traditional' from a 'contemporary' decision-making process when the former is employed in contemporary situations. Anthropologists might play a role in cautioning lawyers and others about the dangers of describing Indigenous decision-making processes in this way and assist in designing processes which more accurately reflect the nature of rights and interests.

Identifying the contemporary polity and interests within the group

The importance of anthropologists influencing those involved in agreement-making processes to a view of native title as a matrix of layered, negotiable, hierarchical, multi-directional rights and interests which are held by a relatively unbounded group whose rights and interests are heterogeneous (Bauman 2005:3; Glaskin 2003; Mantziaris and Martin 2000:174), and which are not always inherited by descent or 'bloodline', cannot be overstated. Peter Sutton outlined a range of potential country-related native title rights and interests (Sutton 2001 and 2003). He also suggested that a failure to distinguish rights within claimant groups from the country owned by the whole group can lead to conflict 'especially once these relationships become bureaucratized or enter into financial negotiations' (Sutton 2001:16).

However, this is only part of the story. Mapping the contemporary native title polity for agreement-making also requires a detailed and nuanced understanding of the *full* range of interests of potential native title group members and the motivations behind these interests. Such factors are not restricted to 'traditional' native title rights and interests in the recognition space of native title law. Effective agreement-making anthropology should begin with identifying: how the claimants form a contemporary group, their aspirations and how they might be achieved; where they are located; how they interact in daily activities; the nature of their authority structures; how decisions about specific

issues are to be made; the roles of individuals in making decisions (who makes decisions about what); the pragmatics of making decisions as a contemporary group; political schisms and disputes; the nature of and bases for divergent views; and the capabilities and limitations of the group.

That is, accounting for the range of interests in agreement-making and decision-making processes also means accounting for 'the size and internal structuring of the group, its geographical dispersion, and its political and social cohesiveness' (Mantziaris and Martin 2006:263) and for the fact that individuals participate in other groups and relationships across groups (Bauman 2005:3). This means that native title holders will have interests that are diffuse, derived from participation in school, housing, and health related activities and in other service delivery community interest groups, and may be positioned according to age and gender. Such interests are not necessarily co-extensive with traditional cultural practices that flow from an uncomplicated, well-structured, hierarchical line of filial descent. Rather than solely understood as vertical and inherited through descent, they also consist of lateral relationships and affiliations where social, cultural, political and economic interests are diffuse, multivariable, and not easily correlated.

Too often agreement-making is also focussed narrowly on commercial interests, mistakenly seen as 'economic development' and as unrelated to these other interests. Even when agreements involve large amounts of money, it is rarely the case that they identify funds, for example, to resolve the repeated requests by native title corporations for assistance to establish cultural heritage archives, or to fulfil roles as community facilitators and educators.

Identification of the matrix of emotional, procedural and substantive interests including underlying disputes and the complex intercultural systems in which they are embedded is the province of anthropology. Ensuring these interests are accounted for in the preparation and ongoing design of dispute management processes is essential to the success of decision-making and dispute management processes. Core anthropological skills also lie in elucidating the underlying 'grammar' of social processes, tradition, and the genealogy of conflict; analysing power relations; being alert to the importance of the symbolic including in conflict and competition; and, being attentive to the subtle cultural meanings in body language, unique gestural idioms and physical positioning, and expressions. In such observations and analyses, anthropologists can play critical roles in dispute management processes in assisting and advising third party independent process managers including facilitators and mediators. In certain circumstances, anthropologists might also play the third party role of dispute management practitioner or mediator, itself.

Anthropology and third party management of agreement-making and dispute management processes

The changed contexts of Aboriginal social life can mean that the conditions of possibility for dispute management processes which may been used in the past no longer exist. These include the demographics referred to earlier as well as the kinds of disputes which

typically arise out of native title and agreement-making, some of which involve considerable sums of money and large development projects. Many native title disputes also revolve around highly sensitive interrelated issues of identity, group membership, overlapping claims, the distribution of benefits, and competition for eligibility for scarce resources. The competing, conflicting, independent and interdependent rights and interests are not easily reconciled and disputes can be highly stressful and destructive of a disputant's sense of self (Bauman 2005:7). This is a complex field that will continue to play an integral role in shaping outcomes, and one that taxes the practical and theoretical resources of native title anthropology.

There is convincing research to demonstrate that, in promoting the interests of all parties, dispute management and agreement-making processes more broadly should be managed by third party independent procedural experts (e.g. Bauman, 2006:v).¹⁶ Attention to procedural fairness, when closely guarded at each stage of development by independent practitioners, can greatly improve outcomes. Independent process managers if properly vetted by interested parties can provide vital administrative and logistical support in the mediation process allowing parties to meet their scheduling obligations and ensuring that processes do not foreclose on relevant interests.

They can also remain alert to issues of procedural fairness including signs of conflict of interest, to whether technical information has been understood, and whether groups are providing fully informed instructions to lawyers. They can act as 'circuit-breakers' without being seen as stakeholders in particular solutions or outcomes. Independent process managers are also better placed to address any negative impacts that individual personalities, pre-existing relationships and personal power can have on outcomes, to assist parties in negotiating interests in good faith, and identify when bad faith is apparent. While it is not possible or even desirable to compel individuals to change attitudes which are inhibiting the progress of agreement-making, skilled interest-based processes can strategically challenge behaviours and attitudes for the collective good, and 'manage' conflict while also enabling the group to proceed to a sustainable outcome. Maintaining a broader, holistic view of community and case history, they can recognise signs of changes in attitudes and make timely strategic interventions to create a more level playing field. As part of the designing, tailoring, adapting and modifying of decision-making and dispute management processes to the needs and interests of parties and communities they may also incorporate the local expertise of those sometimes referred to by Indigenous mediators as 'peacemakers' into processes (Bauman 2006).

Dispute management and decision-making facilitative skills involve not only designing and preparing processes based on the identification of interests discussed above. They also involve a set of specialised communication skills and require, among other things, learning how to explore the implications of interests with all parties, how to cultivate and appraise possible solutions, how to assist parties in negotiating and how to keep all parties informed without becoming gatekeepers to the process. Many of the skills lie in knowing when and how to intervene without alienating parties, how to move towards agreed outcomes which account for shared interests, how to map and identify underlying interests, how to shift parties from being positional, and how to design processes in

collaboration with parties which are tailored to their emotional, procedural and substantive interests.

Such specialised skills extend beyond mere information gathering. They are useful not only in more traditional anthropological information gathering contexts which are often characterised by anxiety and disputes: for example, in interviews with ‘informants’ who may have little if any information about native title, who may greet anthropologists with suspicion, and who may have grudges to bear against other native title holders. They are also highly relevant in countering a common response to Aboriginal issues; the call for large public meetings which, though often untimely and ineffective, play a fundamental role in Aboriginal political systems today. Such meetings are often poorly planned and can provide a platform for distortion and destabilisation as individuals compete for influence and status. Pressure to make decisions in large meetings can be intense, and decisions in such contexts are rarely binding. Research has repeatedly shown them to be ineffective decision-making strategies (Bauman and Pope 2008; Mantziaris and Martin 2000:188). An anthropologically-informed understanding of decision-making processes would suggest that consensus be achieved outside of such meetings through more informal processes (meetings of anthropologists with family groups, for example, and the shuttling of independent process practitioners between them). Large public meetings would then be called only to ratify decisions already made.

The coupling of the elucidation and analytical skills of anthropologists with specialised facilitative communication skills can be a highly effective combination: appropriately tailored dispute management processes in the Aboriginal context require both sets of skills. In the first instance, there are many contexts where anthropologists can play significant roles advising third party process managers who can incorporate anthropological expertise into the design of any dispute management process. Anthropologists can assist process managers in drawing attention to group dynamics, histories of relationships, interests in country, underlying cultural factors, whether issues have been understood, and whether solutions are realistic and workable. They can assist in the designing of relationship building exercises which are based on the interests their research has identified. While BBQs, sharing cups of teas and being on country together can achieve significant results, a skilled process manager, informed by anthropological research, can design activities which are aimed specifically at revealing the interests of all parties and finding innovative processes which address them.

A number of anthropologists are also seeking to undergo facilitation, mediation and negotiation training to complement their anthropological skills with specialised communication skills. Beyond the role of advising and assisting process managers, and in certain circumstances discussed below, they may act as dispute management practitioners or mediators but this will not always be appropriate. The critical success factors are that disputing parties have a choice of practitioner, that they agree on the acceptability of the practitioner, and that they understand and consent to the process which is proposed (Bauman 2006). There is also a need for the separation of the process from the content of a dispute with the dispute management practitioner required ‘to stay in the process’. This means that in the native title context, anthropologists acting as third party dispute

resolution practitioners or ‘mediators’, should not provide opinions about the content of disputed anthropological interpretations. To do so is to confuse the role of ‘expert’ with that of process manager and to mix process and context.

Yet anthropologists who have been working for prolonged periods with particular groups may be asked by members of the group to perform the role of ‘mediator’ which is often perceived as involving the provision of advice about group membership and boundary disputes based on information which may have been given to them by deceased informants (see Sutton 2010 for example). This is a risky path. Anthropologists cannot negotiate this by themselves; rather, to be successful, all disputing parties must have agreed to the anthropologist acting as ‘mediator’ and to the authority of anthropological adjudication. Such agreements can only be achieved fairly via an independent third party discussing the acceptability of the anthropologist as mediator and of anthropological adjudication as an aspect of the process with all parties, not by anthropologists themselves in face-to-face discussions with the Aboriginal parties.

Anthropologists familiar with groups and communities over significant periods of time also have histories with them. Regardless of whether they perceive themselves to be trusted and respected by all parties to be impartial, they will often be seen to be aligned with one family or individual or another and to have a conflict of interest. The perception of favouritism provides parties who do not secure their desired outcome with a reason for not accepting outcomes on the basis that the process was unfair. It can also prejudice the work of the anthropologist with particular groups or communities in the future. Some parties may also be resistant to the idea of reliance on earlier information in addressing disputes. Interpretations change; knowledge and meanings are negotiable and diverse and produced out of the contemporary conditions in which they are embedded (Bauman 2010:138). The privileging of earlier information in any dispute resolution process can be seen as dismissive of contemporary transformed interpretations which are highly significant to parties and may have been so for some time. It may undermine contemporary authority structures including those adopting leadership roles and their particular versions of modes of land ownership. It is important that processes acknowledge the full range of interpretations integrating them into any negotiation framework.

The key success factor is agreement by all disputing parties to the process design. Ideally, rather than acting as mediators themselves, the role of ‘familiar’ anthropologists in Aboriginal dispute management should be defined and incorporated into the process design by a third party process manager who can ensure their fair and even handed involvement. This does not necessarily preclude those anthropologists who have long associations with communities and are respected and trusted by all parties acting as third party process managers, providing the provisions above are in place; as mentioned, however, this can be hazardous. Similarly, while local knowledge can be a significant success factor in dispute management processes, anthropologists with such knowledge when acting as independent third parties process managers or mediators should consider the incorporation of a second anthropologist into the process to fulfil the role of

anthropological ‘expert’ rather than taking on this role themselves to avoid projecting unhelpful perceptions of a lack of objectivity.

Critically, anthropologists need to be able to identify when they are not the most appropriate person to carry out third party procedural ‘mediation’ in the management of Aboriginal disputes and when further anthropological research is not the answer to settling them. Too often, we hear the cry, ‘We need an anthropologist!’ when it is often the case that anthropological research has already exhausted all possibilities and there are no answers to be found in the field notes of anthropologists or other documentary evidence. At this point, negotiation between disputing parties managed by an agreed independent third party is all that remains; there will be no absolute ‘connection’ truth to be discovered, neither deep in the archives nor sequestered in the mind.

Clearly there is an opportunity for anthropologists to bring to bear their institutional and community knowledge in advancing more thoughtful dispute management processes, whether as advisers to mediators or as dispute management practitioners themselves. They might also approach connection, not only as a form of documentation but also as a facilitative tool which promotes deeper and stronger social bonds, weaving connection into the vagaries of daily life. Anthropologists who are informed about the range of alternative dispute resolution processes which may be invoked in decision-making and dispute management can also play important roles in identifying the kind of intervention which may be most appropriate as well as the acceptability of any third party process manager.

Issues in implementing a native title anthropology beyond ‘connection’

A native title anthropology extending beyond the proof of connection for the purposes of the recognition space, as outlined in this paper, would pose challenges at a number of levels to established practice. Anthropologists themselves would have to move intellectually and philosophically (and thus politically) out of the legally and administratively constructed enclave of much of their current native title practice. They would have to engage with broader frameworks such as those of Aboriginal affairs policy and various development paradigms, while also critically evaluating and when necessary challenging them. Such forms of engaged anthropology undoubtedly have ethical entailments, and are looked at askance by some within universities who see anthropology as centrally concerned with social critique (see e.g. Cowlishaw 1990, 2010). However, while ethical considerations should constitute a central guiding concern for anthropology within the native title arena, this is true of all anthropological practice, whether conducted within universities or outside them. Indeed, it is our intention that this paper should be understood as a rejection of what we see as a false binary between anthropology as social critique and analysis on the one hand, and as socially engaged practice on the other.

As we have argued in this paper, anthropology in the broader native title arena would necessarily be explicitly and centrally concerned with socio-cultural change and transformation. Anthropologists would have to build on their capacity to elucidate the meanings and values underlying social practices, in moving to participatory engagement

with Aboriginal people in developing institutions and strategies which will variously maintain and transform those values and practices. They would have to be willing to provide advice as well as analysis, and to be practitioners and facilitators as well as scholars. This will require anthropologists (as individuals, but in dialogue with Aboriginal people, colleagues and the wider public) to establish political and ethical positions on such matters as the entailments of development—and ultimately the place of Aboriginal people in Australian society.

There would also be changes in the ways that anthropologists would need to work in their native title practice; rather than being experts preparing reports *about* native title claimants in accordance with legal briefs, the ‘mirror image’ native title practice outlined in this paper would require anthropologists to work *with* claimants in collaboration with others such as field officers, lawyers, social geographers, and financial specialists in multidisciplinary teams. Indeed, the collaboration would need to involve the often early-career anthropologists employed in NTRBs and NTSPs, whose work is typically based on small group, family and individual sessions involving considerable interpersonal interaction. This can provide insights into local histories, concerns and group dynamics distinct from those gleaned from the often politicised meetings which are the main locus of interaction for many lawyers and other native title practitioners.

In implementing this transformed practice, anthropologists would need to recognise the limitations of their professional competencies, and not claim expertise beyond their professional capacity or experience, for both pragmatic and ethical reasons. At the same time they would need to be willing to expand the arenas in which they bring anthropological analyses to bear, and to be more sophisticated in conceptualising and incorporating into their analyses and advice the implications of issues such as social change and transformation. However, not all anthropologists will be suited to the kinds of anthropology outlined in this paper and some will elect not to engage with them.

The approaches suggested in this paper would challenge not only established native title anthropological practice, but also the cultures and practices of the organisations that engage anthropologists (most particularly NTRBs and NTSPs). Cultural change will be required in these organisations to recognise that not all activities in the native title arena need be limited by the constraints of the recognition space, and to further develop the creative and multidisciplinary approaches required to achieve more sustainable outcomes for Aboriginal people. In particular, organisational cultural change will be necessary to recognise and incorporate the insights and analytical tools that anthropologists can bring to bear on a range of matters well beyond those necessary for the proof of native title, and thereby assist in bridging the disjunct between the limitations of the formal native title recognition space and the aspirations of Aboriginal people.

It has long been observed that NTRBs and NTSPs are time and resource poor (e.g. Senatore Brennan Rashid 1999, Aboriginal and Torres Strait Islander Social Justice Commissioner 2007:65-78), and thus they may be unwilling to allocate additional resources to anthropological work in arenas conventionally seen as beyond anthropological expertise. However, there can be a false efficiency in hastily expedited

processes. Poorly developed and rushed outcomes may actually exacerbate conflict and not be seen as legitimate by the Aboriginal people concerned. Such factors can lead to the repetitive resurrection of unresolved issues, creating significant time and resource imposts into the future for all parties. Other organisations, including government agencies and resource companies, for whom time restraints rather than finances may be more of a concern, also need to consider whether the kinds of anthropological input informed by the principles outlined in this paper may assist in arriving at more sustainable outcomes.

If the value of anthropological expertise in the analysis and elucidation of cultural institutions, manifestations and perspectives is recognised there are many ways, ranging from small changes in practice to deeper structural transformations in the cultures of the organisations engaging anthropologists, through which broader forms of anthropological practice could be utilised, reflecting a more active recognition of the intercultural character of the native title arena.

Conclusion

This paper argues for an applied native title anthropology expanded in its scope to incorporate broader dynamics of the native title arena in which practitioners would move beyond and between the demonstration of native title in the legally constrained recognition space and the critiquing of native title institutions to also playing a (pro) active role in them—becoming ‘practitioners’ in a real sense.

The limitations of the native title recognition space, within which most native title anthropological practice is undertaken, have been outlined and in particular the disjunct between what can be achieved within it and the aims and aspirations of Aboriginal people. The use of anthropological insights and methodologies in the broader native title arena, such as in the various forms of agreement-making and the development of associated corporate entities from which many substantive outcomes of the recognition of native title derive, and in assisting Aboriginal people to better manage conflict, can create a space in which such aspirations have greater possibility of being met. These outcomes impact on the social, political, economic and moral relationships, structures and conversations regarding the position of Aboriginal people in Australia.

Agreement structures and processes involve various constituent entities and relationships, discussed here as ‘governance arenas’, for which differing governance mechanisms are required. A broader anthropology would have much to contribute to the understandings necessary to recognise these arenas and develop participatory design, management and implementation processes. Facilitation, mediation and dispute resolution processes would also benefit from anthropological input that provides understandings of historical, socio-cultural and political factors manifest in disputes within and between claimant groups.

This broader anthropological practice would pay greater attention to socio-cultural change and transformation, issues which are realities of everyday life for all Aboriginal people but which are typically elided or seen as problematic within the native title recognition space. Such attention would reduce the use of dualistic and essentialised

notions such as traditional versus contemporary, and Aboriginal versus mainstream Australian, in favour of a deeper recognition of the complex intercultural characteristics of all aspects of Aboriginal people's lives.

The development and engagement of such a practice in the native title arena depends on the recognition of its value both by anthropologists and other parties engaged in the often time and resource poor native title arena where it may be seen to compete with other priorities. However, it has been argued, it would provide a better basis for sustainable outcomes to native title claims. This broader native title anthropological practice would incorporate a 'mirror image' orientation to the largely traditionalist concerns to which native title anthropology has been mainly limited to date by the legal construction of the recognition space. It would be an anthropological practice actively and consciously involved with issues of development. It would be a more open ended and practically driven anthropology that seeks to redress limitations of the legal construction of native title by focusing on such matters as governance mechanisms to deal with postcolonial realities and best adapted to contemporary Aboriginal needs. This would assist in attaining more sustainable outcomes, and in addressing the gap between Aboriginal aspirations and the formal native title recognition space.

Notes

-
- ¹ Weiner (2003) refers to native title as a 'total social fact', which is both shaped by and re-shapes the local and wider social contexts which it articulates.
 - ² Indeed, native title jurisprudence has developed a narrower construction of 'tradition', which is required to have its basis in the pre-sovereignty society, than is the case under other Australian statutes such as the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).
 - ³ For example, Indigenous Land Use Agreements may depend in part on the claim research which has been undertaken in regard to such matters as membership and internal structures of the native title group.
 - ⁴ See Lea (2008) and Sullivan (2008) for anthropological analyses of bureaucratic process. Cowlshaw, too, argues for the need for anthropologists to develop 'a cultural understanding of the mainstream Australian society, not only as ideology or policy but also as embodied practice' (2010:52). However, she continues to be a trenchant critic of applied anthropology in Aboriginal affairs, apparently seeing it as concerned mainly with providing advice to government.
 - ⁵ Glaskin (2007) provides an insightful consideration of such issues in relation to the establishment of a Prescribed Body Corporate by the *Bardi* and *Jawi* people of north-west Western Australia.
 - ⁶ Justice French (2009) has put forward what he terms 'modest proposals' for reducing the burden of proof of native title, including a presumption of continuity if certain conditions are satisfied. Bauman (2010c:137-140), on the other hand, has argued that State and Territory connection assessment criteria should include a presumption of socio-cultural transformation, together with what Noel Pearson (2009) has described as the continuous existence of entitlement, rather than requiring that claimants be able to demonstrate continuity from sovereignty.
 - ⁷ In the terms of French sociologist Pierre Bourdieu (1977:166), people have moved from a situation of 'doxa' in which the established order had not been perceived as one possible order among many, but as self-evident, naturalised and unquestioned, to one of 'heterodoxy'.
 - ⁸ Much of the discussion in this case study is drawn from a more extensive treatment of these issues in Martin (2009).
 - ⁹ However, see Ritter (2009b) for a cogently argued contrary view.

-
- ¹⁰ On the basis of research in a sample of Aboriginal corporations, Martin and Finlayson (1996) for example argue that organisations which demonstrate good ‘public’ accountability, that is the financial and other accountability of an organisation to funding agencies and ultimately the wider public (an aspect of Arena 4), also tended to demonstrate good ‘internal’ accountability—that of an organisation to its Aboriginal members, clients or constituency (an aspect of Arena 3).
- ¹¹ Source: Figure 5.2, Martin (2009)
- ¹² Interest-based processes are often distinguished from positional bargaining approaches, which involve ‘the successive taking and then giving up a sequence of positions, with the tendency to lock into positions with little interest in meeting the underlying concerns of other parties’ (Bauman and Williams 2004:11).
- ¹³ See for example, Robert McClelland MP, Attorney-General, ‘Negotiating Native Title Forum’, paper presented to the Negotiating Native Title Forum, Brisbane, 29 February 2009, viewed 11 May 2010, <http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2008_FirstQuarter_29February2008-NegotiatingNativeTitleForum>. Attorney-General’s Department, *Guidelines for Best Practice in Flexible and Sustainable Agreement Making*, Joint Working Group on Indigenous Land Settlements, Attorney General’s Department, Canberra, 2009, viewed 10 May 2010, <[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3273BD3F76A7A5DEDAE36942A54D7D90\)~Guidelines_for_Best_Practice_in_Flexible_and_Sustainable_Agreement_Making.pdf/\\$file/Guidelines_for_Best_Practice_in_Flexible_and_Sustainable_Agreement_Making.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3273BD3F76A7A5DEDAE36942A54D7D90)~Guidelines_for_Best_Practice_in_Flexible_and_Sustainable_Agreement_Making.pdf/$file/Guidelines_for_Best_Practice_in_Flexible_and_Sustainable_Agreement_Making.pdf)>.
- ¹⁴ Substantive interests include the content of native title and other matters being negotiated, including legal rights, policy frameworks and connection. Procedural interests are concerned with how parties talk about things, whether parties are being given a ‘fair go’, whether they have had the opportunity to put forward their own point of view, and whether they have confidence in information, protocols and the effectiveness of meetings. Emotional interests are concerned with how parties feel about what is being negotiated and about themselves as parties during and after the negotiations. These interests are often represented in interest-based negotiation models by what is known as the Satisfaction Triangle developed by CDR Associates, Boulder, Colorado.
- ¹⁵ It is unclear whether members of a patrician were ever a decision-making group in any event.
- ¹⁶ The findings of the Indigenous Facilitation and Mediation Project (IFaMP) (Bauman 2006) and of the report to the National Alternative Dispute Resolution Advisory Council (NADRAC) by the Federal Court of Australia’s Indigenous Dispute Resolution and Conflict Management Case Study Project (Bauman and Pope 2008) present a strong research argument for involving third party (particularly) Indigenous procedural experts in native title decision-making and dispute management processes, in better promoting the interests of all parties represented (Bauman, 2006:v).

References

- Aboriginal and Torres Strait Islander Social Justice Commissioner 2007 *Native Title Report 2007*, Human Rights and Equal Opportunity Commission, Sydney.
- Aboriginal and Torres Strait Islander Social Justice Commissioner 2009 *Native Title Report 2009*, Human Rights and Equal Opportunity Commission, Sydney.
- Altman, JC 2009 'Indigenous communities, miners, and the state in Australia', in *Power, Culture, Economy: Aboriginal Australians and Mining*, CAEPR Research Monograph No. 30, JC. Altman and DF. Martin (eds), ANU E Press, Canberra, pp.17-49.
- Austin-Broos, D 2009 *Arrernte Present, Arrernte Past: Invasion, Violence and Imagination in Indigenous Central Australia*, University of Chicago Press, Chicago.
- Bauman, T and R Williams 2004 *The Business of Process*, Indigenous Facilitation and Mediation Project, Report No. 1, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.
- Bauman, T 2005 'Whose Benefits? Whose Rights?: Negotiating Rights and Interests among Indigenous native title parties', *Land Rights, Laws: Issue of Native Title* vol. 3, Issues Paper no.2, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.
- Bauman, T 2006 *Final Report of the Indigenous Facilitation and Mediation Project July 2003-June 2006: research findings, recommendations and implementation*. Indigenous Facilitation and Mediation Project Report No. 6. Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.
- Bauman, T 2010a 'Introduction', in T Bauman (ed.) *Dilemmas in Applied Native Title Anthropology in Australia*, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, pp.1-13.
- Bauman, T 2010b 'Serendipity is not enough! State and Territory native title connection processes', in T Bauman (ed.) *Dilemmas in Applied Native Title Anthropology in Australia*, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, pp.124-146.
- Bauman, T 2010c 'Consensus and Contestation in Native Title in Australia: Review of David Ritter (2009) "The Native Title Market and Contesting Native Title. From Controversy to Consensus in the Struggle over Indigenous Land Rights"'. *Australian Aboriginal Studies* 2010
- Bauman, T and J Pope 2008 '*Solid Work you Mob are Doing*': *Case studies in Indigenous dispute resolution and conflict management*. Federal Court of Australia, Melbourne.
- Bourdieu, P 1977 *Outline of a Theory of Practice* (trans. R Nice), Cambridge University Press, Cambridge.
- Brennan, S 2003 'Native title in the High Court of Australia a decade after Mabo', *Public Law Review* 14(4), December 2003.

- Burke, P 2001 'The legal implications of Chapman v Luminis for anthropological practice', Australian Anthropological Society, Canberra, available at <http://www.aas.asn.au/publications/pub_aas.php>
- Burke, P 2005 'Law's anthropology: From ethnography to expert testimony in three native title claims', PhD Thesis, Australian National University, Canberra.
- Burke, P 2007 'The Problem when Flexibility is the System', *Anthropological Forum* 17(2):163-5.
- Burke, P 2010 'Overlapping jural publics: A model for dealing with the 'society' question in native title', in T Bauman (ed.) *Dilemmas in Applied Native Title Anthropology in Australia*, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, pp.55-71.
- Cousins, D and J Nieuwenhuysen 1984 *Aboriginals and the Mining Industry: Case Studies of the Australian Experience*, George Allen and Unwin, Sydney.
- Cowlshaw, G 1990 'Helping anthropologists: Cultural continuity in the constructions of Aboriginalists', *Canberra Anthropology*, 13(2):1-28.
- Cowlshaw, G 2010 'Helping anthropologists, still', in *Culture Crisis: Anthropology and Politics in Aboriginal Australia*, J Altman and M Hinkson (eds), University of New South Wales Press, Sydney, pp.435-60.
- Department of Justice, *Native Title Settlement Framework*, Department of Justice, Victoria, 2009, viewed 12 April 2010, <<http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Your+Rights/Indigenous+Victorians/Native+Title/JUSTICE++The+Native+Title+Settlement+Framework>>.
- Doohan, K 2003 'Argyle Diamonds and Wirnan: A process of incorporation and (re)negotiating relationships in the East Kimberley', Presentation to Department of Human Geography, Macquarie University, September 2003. Available at <<http://dlc.dlib.indiana.edu/dlc/handle/10535/722>> , viewed 16 September 2010.
- Finlayson, J and DE Smith (eds) 1995 *The Native Title Era: Emerging Issues for Research, Policy, and Practice*, Research Monograph No. 13, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra.
- Finlayson, J, B Rigsby and H Bek (eds) 1999 *Connections in Native Title: Genealogies, Kinship, and Groups*, Research Monograph No. 13, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra
- Finlayson, J (Australian Collaboration) 2007 *Maps to Success: Successful Strategies in Aboriginal Organisations*, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.
- French, R 2009 'Lifting the burden of native title: some modest proposals for improvement.' Edited version of a speech presented to the Native Title Users Group in Adelaide, July 2008. Condensed version available at <<http://www.austlii.edu.au/au/other/alrc/publications/reform/reform93/3.html>>, accessed 16 April 2010.

- Glaskin, K 2003 'Native title and the 'bundle of rights' model: implications for the recognition of Aboriginal relations to country', *Anthropological Forum* 13(1):67-88.
- Glaskin, K 2004 'An anthropological perspective on writing for the Court', *Land, Rights, Law, Issues of Native Title*, vol. 2, Issues Paper no. 29, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.
- Glaskin, K 2007 'Claim, culture and effect: Property relations and the native title process', in B Smith and F Morphy (eds), *The Social Effects of Native Title: Recognition, Translation, Coexistence*, ANU E Press, Canberra.
- Hinkson, M and B Smith 2005 'Introduction: Conceptual moves towards an intercultural analysis', in M Hinkson and B Smith (eds), *Figuring the Intercultural in Aboriginal Australia*, Special Issue, *Oceania* 75(3):157-66.
- Holcombe, S 2006 "'Community Benefit Packages": Development's encounter with pluralism in the case of the mining industry', in T Lea, E Kowal and G Cowlshaw (eds), *Moving Anthropology: Critical Indigenous Studies*, Charles Darwin University Press, Darwin.
- Holcombe, S 2009 'Indigenous entrepreneurialism and mining land use agreements', in JC Altman and DF Martin (eds), *Power, Culture, Economy: Aboriginal Australians and Mining*, CAEPR Research Monograph No. 30, ANU E Press, Canberra, pp.149-170.
- Lea, T 2008 *Bureaucrats and Bleeding Hearts: Indigenous Health in Northern Australia*, University of New South Wales Press, Sydney.
- Maddock, K 1998 'Anthropologists in native title claims', *Anthropological Forum* 8(1-2):85-90.
- Mantziaris, C and Martin, DF 2000 *Native Title Corporations: A Legal and Anthropological Analysis*, Federation Press, Sydney.
- Martin, DF 1993 'Autonomy and relatedness: an ethnography of Wik people of Aurukun, western Cape York peninsula', PhD thesis, Australian National University, Canberra.
- Martin, DF 2003 'Rethinking the design of Aboriginal organisations: the need for strategic engagement', *CAEPR Discussion Paper No. 248*, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra.
- Martin, DF 2004a 'Capacity of Anthropologists in Native Title Practice', Report to the National Native Title Tribunal, Anthropos Consulting Services, Canberra.
- Martin, DF 2004b 'Designing institutions in the native title recognition space', in S Toussaint (ed.), *Crossing Boundaries: Cultural, Legal and Historical Issues in Native Title*, Melbourne University Press, Melbourne, pp.244-255.
- Martin, DF 2005a 'Governance, cultural appropriateness, and accountability within the context of Indigenous self-determination', in D Austin-Broos and G Macdonald (eds), *Culture, Economy and Governance in Aboriginal Australia*, Sydney University Press, Sydney.

- Martin, DF 2005b 'Rethinking Aboriginal community governance: challenges for sustainable engagement', in P Smyth, T Reddel and A Jones (eds), *Community and Local Governance in Australia*, UNSW Press, Sydney.
- Martin, DF 2008 Expert's Affidavit to the Court on Background Socio-cultural Factors in the Case R v KU, AAC, WY, PAG, KY, KZ, BBL, WZ & YC; ex parte A–G (Qld) [2008] QCA 154 (the appeal in the matter of the 'Aurukun Nine'), June 2008.
- Martin, DF 2009 'The governance of agreements between Aboriginal people and resource developers: Principles for sustainability', in JC Altman and DF Martin (eds), *Power, Culture, Economy: Aboriginal Australians and Mining*, CAEPR Research Monograph No. 30, ANU E Press, Canberra, pp.99-126.
- Martin, D and Finlayson, J 1996 'Linking self-determination and accountability in Aboriginal organisations', *CAEPR Discussion Paper No. 116*, Centre for Aboriginal Economic Policy Research, ANU, Canberra.
- Merlan, F 1997 'Fighting over country: four commonplaces', in D Smith and J Finlayson (eds), *Fighting over country: anthropological perspectives*, Research Monograph No. 12, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, pp.1-14.
- Merlan, F 1998 *Caging the Rainbow: Place, Politics and Agency in a North Australian Town*, University of Hawaii Press, Honolulu.
- Merlan, F 2005 'Explorations towards intercultural accounts of socio-cultural reproduction and change', *Oceania* 75(3):167–182.
- Moore, C, 2003 *The Mediation Process*, 3rd edn, Jossey-Bass, San Francisco, CA.
- Morphy, H 2006 'The Practice of an Expert: Anthropology in Native Title', *Anthropological Forum* 16(2):135–51.
- Morphy, F 2007 'Performing law: The Yolngu of Blue Mud Bay meet the native title process', pp.31-57 in B.R Smith and F Morphy (eds), *The Social Effects of Native Title: Recognition, Translation, Coexistence*, Research Monograph No. 27, Centre for Aboriginal Economic Policy Research, Australian National University.
- Morton, J 2002 'I-witnessing the witness: Courtly truth and native title anthropology', *Asia Pacific Journal of Anthropology* 3(2):89–97.
- Morton, J 2007 'Sansom, Sutton and Sackville: Three expert anthropologists?', *Anthropological Forum* 7(2):170–3.
- Morton, J 2010 'Working with, for and against the Act: Anti-anti-positivism and native title anthropology', in T Bauman (ed.) *Dilemmas in Applied Native Title Anthropology in Australia*, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, pp.14-34.
- O'Faircheallaigh, C 1988 'Uranium royalties and Aboriginal economic development', in D Wade-Marshall and P Loveday (eds), *Contemporary Issues in Development*, Australian National University North Australia Research Unit, Darwin.

- O’Faircheallaigh, C 2002 ‘Implementation: The forgotten dimension of agreement making in Australia and Canada’, *Indigenous Law Bulletin*, 5 (20):14–7.
- O’Faircheallaigh, C 2003 ‘Implementing agreements between indigenous peoples and resource developers in Australia and Canada’, *Aboriginal Politics and Public Sector Management Research Paper* No. 13, Centre for Australian Public Sector Management, Griffith University, Brisbane.
- O’Faircheallaigh, C 2004 ‘Native Title and Agreement Making in the Mining Industry: Focusing on Outcomes for Indigenous Peoples’, *Land, Rights, Laws: Issues of Native Title*, vol. 2, Issues Paper no. 25, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.
- O’Faircheallaigh, C 2006 ‘Aborigines, mining companies and the State in contemporary Australia: A new political economy or ‘business as usual’?’, *Australian Journal of Political Science*, 41(1):1–22.
- Palmer, K 2007 ‘Anthropology and applications for the recognition of native title’, *Land, Rights, Laws: Issues of Native Title*, vol. 2, Issues Paper no. 29, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.
- Palmer, K 2009 ‘Societies, communities and native title’, *Land, Rights, Laws: Issues of Native Title*, vol. 4, Issues Paper no. 1, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.
- Pearson, N 1996 ‘The Concept of Native Title at Common Law’, paper presented at the conference *Land Rights – Past, Present and Future*, Canberra, 16–17 August 1996.
- Pearson, N 2002, ‘Native title’s days in the sun are over’, *The Age*, Melbourne, 28 August 2002.
- Pearson, N 2009 Comments at ‘Section 223 Native Title Workshop’, University of Melbourne, 14 May 2009.
- Ritter, D 2009a *Contesting Native Title: From controversy to consensus in the struggle over Aboriginal land rights*, Allen and Unwin, Crows Nest.
- Ritter, D 2009b *The Native Title Market*, University of Western Australia Publishing, Perth.
- Rowse, T 2005 ‘The Indigenous Sector’, in D Austin-Broos and G Macdonald (eds), *Culture, Economy and Governance in Aboriginal Australia*, Sydney University Press, Sydney.
- Sansom, B 2007 ‘Yulara and future expert reports in native title cases’, *Anthropological Forum* 17(1):71–92.
- Scamبارy, B 2007 ‘My Country, Mine Country: Indigenous People, Mining and Development Contestation in Remote Australia’, PhD Thesis, Australian National University, Canberra.
- Scamبارy, B 2009 ‘Mining agreements, development, aspirations, and livelihoods’, in *Power, Culture, Economy: Aboriginal Australians and Mining*, CAEPR Research

- Monograph No. 30, JC Altman and DF Martin (eds), ANU E Press, Canberra, pp.171-202.
- Senatore Brennan Rashid 1999 'Review of Native Title Representative Bodies', Aboriginal and Torres Strait Islander Commission, Canberra, March 1999.
- Smith, BR and F Morphy (eds) 2007 *The Social Effects of Native Title: Recognition, Translation, Coexistence*, Research Monograph No. 27, Centre for Aboriginal Economic Policy Research, Australian National University.
- Smith, D and J Finlayson (eds) 1997 *Fighting over country: anthropological perspectives*, Research Monograph No. 12, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra.
- Smith, D and Hunt, J 2008 'Understanding Indigenous Australian governance—research, theory and representations', in J Hunt, D E Smith, S Garling, and W Sanders (eds), *Contested Governance: Culture, Power and Institutions in Indigenous Australia*, CAEPR Research Monograph No. 29, ANU E Press, Canberra.
- Strelein, L 2001 'Conceptualising Native Title', *The Sydney Law Review* 23:95-124.
- Strelein, L 2005 'Native title-holding groups and native title societies: *Sampi v State of Western Australia* [2005]'. *Land, Rights, Laws: Issues of Native Title*, Vol. 3, Issues Paper No. 4, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.
- Strelein, L 2006 *Compromised Jurisprudence: native title cases since Mabo*, Aboriginal Studies Press, Canberra.
- Sullivan, P 2005 'In search of the intercultural, in search of the culture', *Oceania* 75(3):183-194.
- Sullivan, P 2006 'Indigenous Governance: the Harvard Project on Native American Economic Development and Appropriate Principles of Governance for Aboriginal Australia', *Research Program Discussion Paper No. 17*, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.
- Sullivan, P 2007 'Indigenous governance: The Harvard Project, Australian Aboriginal organisations and cultural subsidiarity', *Working Paper No. 4*, Desert Knowledge Cooperative Research Centre, Alice Springs.
- Sullivan, P 2008 'Bureaucratic process as Morris dance: An ethnographic approach to the culture of bureaucracy in Australian Aboriginal Affairs administration', *Critical Perspectives on International Business* 4(2/3):127-141.
- Sutton, P 2001 'Kinds of rights in country: Recognising customary rights as incidents of native title', *National Native Title Tribunal Occasional Papers Series No. 2*. NNTT, Perth.
- Sutton, P 2003 *Native Title in Australia: an ethnographic perspective.* Cambridge University Press, Cambridge.
- Sutton, P 2005 'Social scientists and native title cases in Australia', *Public Archaeology* 4 (2 & 3):121-126.

- Sutton, P 2007 'Norms, statistics and the Jango case at Yulara', *Anthropological Forum* 7(2):175–92.
- Sutton, P 2009 *The Politics of Suffering: Indigenous Australia and The End of the Liberal Consensus*, Melbourne University Press, Melbourne.
- Sutton, P 2010 'Mediating conflict in the age of Native Title', *Australian Aboriginal Studies* 1:4-18.
- Taylor, J 2010 'Demography as destiny: Schooling, work and Aboriginal population change at Wadeye', *Working Paper No. 64*, Centre for Aboriginal Economic Policy Research, Australian National University. Available at <www.anu.edu.au/caepr>, accessed 18 April, 2010.
- Taylor, J and Scambary, B 2005 *Indigenous People and the Pilbara Mining Boom: A Baseline for Regional Participation*, CAEPR Research Monograph No 25, ANU E Press, Canberra.
- Toussaint, S (ed.) 2005 *Crossing Boundaries: Cultural, Legal and Historical Issues in Native Title*, Melbourne University Press, Melbourne.
- Trebeck, K 2005 'Democratisation through Corporate Social Responsibility? The Case of Miners and Indigenous Australians', PhD Thesis, ANU Canberra.
- Trebeck, K 2007 'Tools for the Disempowered? Indigenous Leverage over Mining Companies', *Australian Journal of Political Science*, 42 (4):541–62.
- Trigger, D 1997a 'Mining, Landscape and the Culture of Development Ideology in Australia', *Ecumene*, 4 (2):161–80.
- Trigger, D 1997b 'Reflections on Century Mine: Preliminary thoughts on the politics of Aboriginal responses', in D E Smith and J Finlayson (eds), *Fighting Over Country: Anthropological Perspectives*, CAEPR Research Monograph No 12, CAEPR, ANU, Canberra.
- Trigger, D 1998 'Citizenship and Aboriginal responses to mining in the Gulf country', in N Peterson and W Sanders (eds), *Citizenship and Aboriginal Australians: Changing Conceptions and Possibilities*, Cambridge University Press, Cambridge.
- Trigger, D 2004 'Anthropology in native title court cases: Mere pleading, expert opinion or hearsay?', in S Toussaint (ed.), *Crossing Boundaries: Cultural, Legal and Historical Issues in Native Title*, Melbourne University Press, Melbourne, pp.24-33.
- Trigger, D 2005 'Mining projects in remote Aboriginal Australia: Sites for the articulation and contesting of economic and cultural futures', in D Austin-Broos and G Macdonald (eds), *Culture, Economy and Governance in Aboriginal Australia*, Sydney University Press, Sydney.
- Trigger, D 2010 'Anthropology and native title: Issues of method, claim group membership and capacity', in T Bauman (ed.) *Dilemmas in Applied Native Title Anthropology in Australia*, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, pp.147-159.

- Weiner, J 2000, 'The Anthropology of and for Native Title', *The Asia Pacific Journal of Anthropology* 1(2):124-132.
- Weiner, J 2003 'The Law of the Land: A review article', *The Australian Journal of Anthropology* 14(1):97-110.
- Wolfe, P 1998 *Settler Colonialism and the Transformation of Anthropology: the Politics and Poetics of an Ethnographic Event*. Continuum International, London.