Land, Rights, Laws: Issues of Native Title

Native Title Research Unit

Editor: Tran Tran **Volume 3**

September 2007 **Issues Paper No. 11**

ETHNOGRAPHIC EVIDENCE, RIGHTS AND INTERESTS, AND NATIVE TITLE CLAIM RESEARCH[1]

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ABSTRACT

Australia's native title system brings together a range of sectors and disciplines, including the legal and anthropological professions. While anthropologists' training may equip them with the relevant skills for undertaking ethnographic research in a community, it is often the anthropologist or the people they propose to carry out field work with who determine the particular issue or topic to be the subject of anthropological enquiry. However, in native title matters anthropologists undertake work in a legal context - their research questions are often set by others, and are determined with reference to the evidence required by the Commonwealth Native Title Act 1993 *and the courts to support a native title claim. This paper discusses the relevance of the native title statutory framework to ethnographic research and explores the kind of ethnographic evidence that may be relevant to anthropologists researching native title claims in light of the requirements of the Native Title Act and its interpretation by the courts.*

[1] This is a revised version of a paper originally submitted for assessment in the University of Western Australia's Graduate Certificate in Applied Anthropology (Native Title and Cultural Heritage) in 2005. I am grateful to Katie Glaskin and two anonymous reviewers for their comments on an earlier draft of this paper.

INTRODUCTION

In its historic *Mabo*[2] decision in 1992, the High Court of Australia found that the common law recognises a form of 'native title', where the native title rights and interests in relation to land or waters are founded in and arise from the traditional laws and customs of Aboriginal and Torres Strait Islander people. Following that decision Federal Parliament enacted the *Native Title Act 1993* (Cth) (NTA) to establish a mechanism by which Aboriginal and Torres Strait Islander people can bring claims in the Australian legal system to have their native title rights and interests recognised.[3] It has been argued that native title rights and interests exist in a 'recognition space',[4] in which the Australian legal system recognises the intersection between Aboriginal and Torres Strait Islander peoples' laws and customs and the common law, and "attempts to translate a selected set of indigenous relations, ordered by a particular system of traditional law and custom, into legal rights and interests".[5] Similarly, anthropology is also concerned with translation, with one of its key objectives being to gain an emic perspective of a given culture or social group and to translate this into terms understandable to those with different world-views. In the native title context this includes the courts, in which "unspecialised judges are called on to decide extraordinarily complex issues about the culture, cultural continuity and history of societies that are quite foreign to what their personal and professional lives have prepared them to do".[6] When making a native title determination application to the Federal Court, claimants must provide a description of the native title rights and interests they claim to hold.[7] The role of court is to apply known rules of law to factual situations in order to come to a decision[8], in this case, as to whether or not the rights and interests claimed can be recognised as native title. However, a "court's finding is…based only on the evidence that the parties have chosen to place before it".[9] As such, anthropologists are often called upon to assist in identifying and putting forward evidence substantiating claims to native title rights and interests[10] and ethnography, the process of recording and interpreting a group of people's way of life,[11] is central to this task.

Here I discuss the kinds of rights and interests that have been recognised in native title determinations to date, and explore the kind of ethnographic evidence anthropologists researching native title cases might

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[2] *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

[3] According to the then Prime Minister, the NTA was enacted to "do justice to the Mabo decision in protecting native title and to ensure workable, certain, land management": Prime Minister Paul Keating, Native Title Bill 1993 second reading speech, 16 November 1993.

[4] C, Mantziaris & D, Martin, *Native Title Corporations: a legal and anthropological analysis*, The Federation Press, Leichhardt, 2000, pp. 10-11. The term was first used by former Chairperson of the Cape York Land Council, Noel Pearson.

[5] Mantziaris & Martin 2000, above n 4, pp. 2-3. More recently James Weiner has queried the recognition space's conceptualisation of Aboriginal peoples traditional law and custom and the Australian legal system as distinct institutions. He suggests the categories 'indigenous' and 'non-indigenous' (which would extend to indigenous Law and non-indigenous law) only arise in the context of 'state formation', where external groups impose themselves on 'indigenous' groups, '[s]o the relation between the indigenous and non-indigenous is *internal* to the state, it is not a relation between two external entities': JF, Weiner, 'Eliciting Customary Law', in *The Asia Pacific Journal of Anthropology*, vol.7, no. 1, 2006, p. 22.

[6] H, Wootten, 'Conflicting imperatives: pursuing truth in the courts', in *Proof and Truth: The Humanist as Expert*, I, McCalman & A, McGrath (eds) Australian Academy of the Humanities, Canberra, 2003, p. 33.

[7] Paragraph 62(2)(d) of the NTA.

[8] Wootten 2003, above n 6, p. 20.

[9] Ibid, and see also R, French, 'The Evolving Law of Native Title', in *Crossing Boundaries: Cultural, legal, historical and practice issues in native title*, S, Toussaint (ed) Melbourne University Press, 2004, p. 87.

[10] For example, in *Rubibi Community (No 5) v State of Western Australia* [2005] FCA 1025 (*Rubibi (No. 5)*), Merkel J noted that the anthropological evidence was important in providing a conceptual framework for considering the claimants' evidence of traditional laws and customs at para. 252.

[11] R.M, Keesing, *Cultural Anthropology: A Contemporary Perspective*, 2nd edn, Holt, Rinehart and Winston, New York, 1981, p.7.

look for in order to substantiate claims to these kinds of rights. I address this through a discussion of the relevance of the definition of native title in the NTA, and as interpreted by the judiciary, to anthropologists, including the elements of proof that must be kept in mind when undertaking native title research. I explore the implications for anthropological research of the bundle of rights concept and the elements of proof expressed in the High Court's *Members of the Yorta Yorta Aboriginal Community v Victoria* [12] decision with reference to ethnographic examples and the use of claimant and anthropological evidence in native title determinations and related cases. I consider both the first hand ethnographic evidence available when researching a claim through fieldwork, as well as the ethnographic evidence available from other sources that would generally inform fieldwork, such as past anthropological research about the same or neighbouring groups, as well as relevant government or private records.[13] I demonstrate that anthropologists must have regard to both past and present ethnographic evidence, and look beyond observable actions to the meanings behind social action in order to identify the sometimes subtle evidence that might support claims to the kinds of rights and interests recognised in determinations to date.

'Native title' rights and interests recognised

As at 16 July 2007 there had been 68 determinations that native title exists. Descriptions of native title rights and interests claimed can range from relatively broad to quite specific,[14] and this is also reflected in determined rights and interests. For example, in *Nona on behalf of the Badulgal v State of Queensland*[15] the native title in relation to land "is a right to possession, occupation, use and enjoyment [of the determination area] to the exclusion of all others". This contrasts with the Dauan people's determination, which delineates their rights to 'possess, occupy, use and enjoy the determination area…in accordance with their traditional laws and customs' in some detail.[16] However, despite variations between the rights and interests recognised and how they are expressed in different determinations there is still a high degree of similarity. Although not exhaustive, the following list sets out some of the rights and interests typical to native title determinations to date:[17]

- the right to possession, occupation, use and enjoyment of the land and waters of the determination area;
- the right to live on the determination area;
- the right to make decisions about the use and enjoyment of the determination area;
- the right to take, use and enjoy the natural resources found on or within the land and waters of the determination area;
- the right to maintain and protect sites and areas which are of significance to the common law holders under their traditional laws and customs;
- the right to conduct social, religious, cultural and economic activities on the area;
- the right to control access to, and activities conducted by others on, the land and waters of the determination area; and

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[12] [2002] HCA 58 (12 December 2002) (*Yorta Yorta*).

[13] Bearing in mind that, at times, anthropologists may research native title claims without having carried out fieldwork with the relevant group. For example, anthropologists may be engaged to provide an expert opinion based on a review of the ethnographic literature.

[14] P, Sutton 2003, *Native Title in Australia: An Ethnographic Perspective*, Cambridge University Press, Cambridge, p. 12.

[15] [2004] FCA 1578.

[16] See *Dauan People v State of Queensland* [2000] FCA 1064 [3].

[17] See for example, *Djabugay People v State of Queensland* [2004] FCA 1652, *James on behalf of the Martu People v State of Western Australia* [2002] FCA 1208 and *Hayes v Northern Territory of Australia* [2000] FCA 671.

- the right as against any other Aboriginal group or individual to be acknowledged as the traditional Aboriginal owners of the determination area.

The Native Title Act and the common law

Apparent from the above list is that, regardless of how the rights and interests are expressed, native title is not a single right in itself to own land, although the rights and interests may confer a right of exclusive possession. The High Court's majority decision in *Western Australia v Ward* states that "it is a mistake to assume that what the NTA refers to as "native title rights and interests" is necessarily a single set of rights relating to land that is analogous to a fee simple".[18] Instead, the Court found that native title is a bundle of rights in relation to lands and waters, which are capable of being partially extinguished, and can therefore be conceptualised as 'divisible'.[19] Anthropologist Katie Glaskin suggests that as a bundle of rights "recognition of native title is increasingly looking less like a form of 'title' and more like a legal authorisation to conduct certain activities".[20]

However, this does not mean that an anthropologist conducting research in a native title case need only look for discrete evidence in relation to each right or interest claimed – it is the laws and customs of the claimant group that give rise to the rights and interests that may be recognised in native title and this is evident in the definition of native title in the NTA and at common law. Section 223 of the NTA provides, in part, that:

> (1) The expression ***native title*** or ***native title rights and interests*** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
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> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
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> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
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> (c) the rights and interests are recognised by the common law of Australia.

Consistent with the requirements of s 223(1)(a), ethnographic evidence in support of rights and interests claimed must demonstrate the existence of traditional laws and customs that give rise to those rights and interests. However, as I discuss below, 'traditional' in this context has arguably not been interpreted in the same way anthropologists understand it. The definition of 'native title' in the NTA is designed to accommodate the common law, meaning the nature and substance of native title rights and interests has continued to develop as the common law evolves. As such, the meaning of 'traditional' laws and customs and 'native title', and the evidence necessary to demonstrate their existence, have been further shaped by several High Court decisions in recent years.

In the High Court's *Yorta Yorta* decision, the primary issue was the correct interpretation of the definition of 'native title' and 'native title rights and interests' in the NTA. The Court found that subsection 223(1) of the NTA requires that proof of a continuous acknowledgement and observance of laws and customs since sovereignty is essential to establishing native title, and that those traditional laws and customs must derive from a normative system.[21] As I explain below, this has significant implications for the kinds of ethnographic evidence anthropologists might look for when researching a native title claim.

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[18] [2002] HCA 28 at [82] (*Ward*).

[19] Mantziaris & Martin 2000, above n 4, p. 58.

[20] K, Glaskin, 'Native title and the 'bundle of rights' model: implications for the recognition of Aboriginal relations to country', *Anthropological Forum*, vol. 13, no. 1, 2003, p. 73.

[21] *Yorta Yorta* at [38].

Normative system and normative rules

In *Yorta Yorta* the High Court stated that to be recognised as native title rights and interests, the rules that give rise to those rights and interests must have normative content, otherwise "there may be observable patterns of behaviour but not rights or interests in relation to lands or waters".[22] However, the Court gave little guidance as to what constitutes a normative system, and as anthropologist Peter Sutton notes, there is still no clear measure in native title law by which to determine whether the evidence supports the existence of a normative system.[23] However, based on the language used by the judges in their decision, it is generally accepted that in discussing 'normative' rules and a 'normative system', the judges are talking about customary behaviours and the system of 'traditional' laws and customs. This has important implications for the types of ethnographic evidence anthropologists researching native title cases might have regard to. As I noted above, anthropologists must not concentrate their ethnographic enquiries solely on those laws and customs that are directly relevant to particular rights and interests claimed. We must also look for evidence that demonstrates the existence of a society "united in and by its acknowledgment and observance of a body of law and customs".[24] This is not to say that the nature of Aboriginal and Torres Strait Islander peoples' relationships to land is not in itself evidence of the existence of a body of law and customs. Indeed, an overarching feature of Aboriginal people's societies is that their world-view is linked to, arises from, and is understood through what is often referred to in English as the Dreaming, a sacred but ongoing time of creation conceptualised by anthropologist W.E.H. Stanner as the "everywhen".[25] Traditional laws and customs, including those giving rise to rights in land, are related since they are derived from the same source. This is recognised by Justice Merkel in his recent interim decision in the *Rubibi* case,[26] in which he states:

> …there are few, if any, *traditional* laws and customs that have no direct or indirect connection with the rights and interests being asserted…[and] in the present case there is not a simple dichotomy between traditional laws and customs connected with the communal or group rights and interests claimed, and those that are unconnected with such rights and interests. [original emphasis]

Nevertheless, the native title rights and interests claimed must be more broadly *contextualised* within the normative system of traditional laws and customs under which they arise. Anthropological research for the purposes of native title claims must consider elements of the claim group's social organisation that extend beyond immediate grounds for claims to land. I suggest claimants' knowledge and observance of laws and customs arising from their mythological and ritual sphere is one source of ethnographic evidence that may demonstrate the existence of a normative system.

Stanner states that the Dreaming can be seen as a 'theory of how what was created became an *orderly system*'.[27] The Dreaming, as with other religious belief systems, shapes the social order, and as Geertz explains '[r]eligious concepts spread beyond their specifically metaphysical contexts to provide a framework of general ideas in terms of which a wide range of experience can be given meaningful form'.[28] In the native title context, this is demonstrated in the *Rubibi* claim, in which the court accepted the evidence from Yawuru claimants about the *Bugarrigarra*, the time in which the landscape was created and the Law was set out for the people of the land. Justice Merkel's decision in this case quotes both the evidence of claimants about the *Bugarrigarra*, and the ethnographic evidence put forward by

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[22] *Yorta Yorta* at [42].

[23] Sutton, 2003, above n 14, p. 138.

[24] *Yorta Yorta* at [49].

[25] W.E.H, Stanner 1987, The Dreaming, in *Traditional Aboriginal Society*, 2nd edition, ed. W.H. Edwards, Macmillan Education Australia, Melbourne, p. 228.

[26] *Rubibi (No.5)* at [30].

[27] Stanner, 1987, above n 25, p. 230 [emphasis added].

[28] C, Geertz, 'Religion as a Cultural System', in *Reader in Comparative Religion: An anthropological approach*, 4th edition, eds. W.A. Lessa & E.Z. Vogt, HarperCollins Publishers, New York, 1979, p. 88.

anthropologist Kingsley Palmer who explained that the *Bugarrigarra* was a time when creative beings not only created the landscape and language, but also "*brought all aspects of practice, belief, custom and observance that can be described as culture*".[29] Justice Merkel's discussion of claimant and anthropological evidence about the key elements of Yaruwu traditional laws and customs, including *rai*,[30] language, kinship rules, naming traditions and looking after and speaking for country, demonstrates the defining role of the *Bugarrigarra* in Yawuru life, such that he concludes:

> The source of the Yawuru community's traditional laws and customs, is the southern tradition, as laid down in the *Bugarrigarra*…[and] the traditional laws and customs…when considered cumulatively, demonstrate that the present Yawuru community still acknowledges and observes the traditional laws and customs which, since sovereignty, have constituted the normative system under which the native title rights and interests in issues are being claimed.[31]

This finding confirms the value of Sutton's suggested approach to considering the "system question", in which he argues that we must consider whether the 'rules and practices, in combination, form a normative system…rather than merely constituting an incoherent assemblage of opinions and activities', and demonstrates the role that evidence of the nature of a claimant groups' cosmology and associated rituals can play.[32]

However, in addition to the unifying element offered by a group's cosmological belief system, attention also needs to be given to the extent to which rules within that system have normative content. In order to determine whether particular rules are in fact the 'norm', anthropologists should consider, for example, both 'what is consciously avowed as a principle of membership, self-identification or prescription for behaviour in a community'[33] against what actually occurs in everyday life, and take note of the nature of and reasons for any inconsistencies between the two. Although writing prior to the both the *Mabo* and *Yorta Yorta* decisions, anthropologist Robert Tonkinson nevertheless relevantly observes:

> Real life, which is always less orderly, more complicated, and less predictable than the normative system would have it, is made imperfect by many factors, not the least of which are the foibles of idiosyncratic human beings…In the Aboriginal case, especially, the host of rules surrounding such basic institutions as kinship, social categories, marriage, and ritual suggest an emphasis on order and formality that strongly favors [*sic*] the collectivity over individual self-interest. Yet, nowhere can the fit be perfect, and Aboriginal societies are certainly no exception.[34]

In considering diversions from the norm, anthropologists must consider factors beyond simply recording the incidences of divergence (although that will still be relevant). As Sutton indicates in his analysis of anthropologist Ian Keen's understanding of Yolngu marriage laws, variation from the prescribed rules does not automatically disqualify those rules from being normative.[35] Although Keen found that among the Yolngu the majority of marriages were consistent with the group's relevant laws and customs about marriage, in light of a range of instances in which he observed deviations from the prescriptive rules, he concludes that the Yolgnu had "*no uniform marriage system*".[36] However, Sutton questions Keen's interpretation of the ethnographic evidence about deviations from those rules, and argues that they are not necessarily "indeterminacies" as Keen characterises them to be.[37] Sutton points out that where

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[29] *Rubibi (No. 5)* at [51].

[30] Conception spirits.

[31] *Rubibi (No. 5)* at [367].

[32] Sutton, 2003, above n 14, p.139.

[33] J. F Weiner, 'Diaspora, Materialism, Tradition: Anthropological Issues in the Recent High Court Appeal of the Yorta Yorta', in *Land, Rights, Laws: Issues of Native Title*, vol. 2, no. 18, 2002, p. 3.

[34] R, Tonkinson 1991, *The Mardu Aborigines: Living the Dream in Australia's Desert*, 2nd edn, Holt, Rinehart and Winston, Inc. Fort Worth, p. 143.

[35] Sutton, 2003, above n 14.

[36] Cited in Sutton 2003, above n 14, pp. 149-150.

[37] Sutton, 2003, above n 14, pp. 149-150.

variations occurred it was not because those in 'wrong way' marriages rejected Yolgnu marriage laws at an ideological level. Rather, in some circumstances, such as where individuals were responding to conflict or self-interest, Yolngu exercised a degree of choice or manipulation in how kinship rules were applied, for example by claiming that a marriage that was improper according to kinship rules was permissible on subsection grounds.[38] Given that the kinds of variations Keen identified are common across Australian Aboriginal societies, Sutton asks:

> If people subvert and manipulate kinship and marriage norms from time to time in ways that themselves are also subject to successful generalisations by the anthropologist, and these fudges or wrongs…[are] built precisely on the fact that some highly shared prescriptions are being flouted…then why cannot these exceptions and anomalies…also be characterised as cases of 'systematic variation'[39] rather than as 'interdeterminacies'?

Likewise, anthropologist Geoffrey Bagshaw states that, in the case of the Karajarri people, variations in marriage practices should be interpreted "as the practical 'exceptions' which go to prove the rule".[40] Anthropologist Lee Sackett also promotes a similar approach in analysing the categorisation of Aboriginal marriage systems by anthropologists.[41] He explains how a particular marriage system identified in early ethnography by Radcliffe-Brown (and dubbed the Kariera system), in which the *ideal* union is between a male ego and his MBD/FZD, came to be regarded among some anthropologists as an archetype, 'with all similar forms labelled variants'. Rather than characterising marriage models as variants where they do not perfectly fit the Kariera ideal, but still closely resemble it, Sackett argues for a broadening of the classification to include those models that are *representative* of it (as well as a broadening of models existing in relation to other forms of social organisation).[42] When providing evidence of a normative system, the argument may be made that deviation from the norm is evidence of the absence of a system. In my view, this demonstrates the need for anthropologists to carefully consider whether occasional variations from social ideals demonstrate that a group's members are free to make indiscriminate selections in relation to practices such as marriage, or whether the variations are in fact accommodated by the normative rules.

CONTINUOUS EXISTENCE SINCE SOVEREIGNTY: CULTURAL CONTINUITY

The majority in *Yorta Yorta* also found that (i) only normative rules that have existed since sovereignty can be 'traditional' for the purposes of the NTA and, (ii) the normative system must have had *continuous* existence and vitality since sovereignty.[43] In order for claims to the kinds of rights recognised in native title determinations to date to be upheld, the evidence must demonstrate that these requirements are met. In response to the first-mentioned requirement, anthropologists should have regard to both past and current ethnographic evidence in order to demonstrate, by comparison, the extent to which the present system is commensurate with that which existed at sovereignty, and to determine whether any changes are adaptations of traditional law and custom or in fact significant shifts from tradition.[44] This necessarily involves a critical assessment of past ethnographic evidence.

For example, in his report on ethnographic evidence relevant to the Karajarri people's native title claim in the north-west of Western Australia, Bagshaw demonstrates the importance of analysing both the nature and content of past ethnography about the Karajarri people. He outlines the existence of

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[38] Sutton 2003, above n 14, p. 150.

[39] Sutton states that in this context this means variation that is regular.

[40] G, Bagshaw, 'The Karajarri Claim: A Case Study in Native Title Anthropology', *Oceania Monograph*, vol. 53, 2003, p. 38.

[41] L, Sackett, 'Indirect Exchange in a Symmetrical System: Marriage Alliance in the Western Desert of Australia', in *Traditional Aboriginal Society*, 2nd edn, ed. W.H. Edwards, Macmillan Education Australia, Melbourne, 1987, pp. 129-143.

[42] Sackett 1987, above n 41, p. 132.

[43] *Yorta Yorta* at [46] - [47].

[44] *Yorta Yorta* at [83].

considerable ethnographic literature on the Karajarri and, importantly, the weight which may be reasonably attributed to it according to the amount of time spent in the field by respective researchers.[45] In his discussion of local organisation Bagshaw contends that there are no 'horde boundaries' within Karajarri territory, despite the contrary conclusions of anthropologists A.P. Elkin, Joseph Birdsell and Norman Tindale, who, based on fieldwork in the 1930s, had suggested that Karajarri country was divided into discrete local areas each belonging to a patrilineal horde. Noting that Elkin spent a 'mere 15 days', and Birdsell and Tindale a total of less than 14 days with the Karajarri, Bagshaw is able to add weight to his own findings, despite the fact that they differ from the conclusions drawn by these researchers who, significantly, carried out fieldwork closer to sovereignty.[46] In this case Bagshaw's findings on local organisation are also supported by the ethnographic evidence gathered by anthropologist Ralph Piddington who, while his fieldwork was carried out around the same time of the above-mentioned anthropologists, carried out a notable nine months fieldwork with the Karajarri. Clearly then, a critical analysis of historical ethnographic evidence is important in substantiating claims to the types of rights recognised to date.

This point is further demonstrated by *Jango v Northern Territory of Australia*,[47] in which Justice Sackville found, among other things, that the evidence supported a conclusion that under the traditional laws and customs of the Western Desert cultural bloc land holding groups were united on the basis of patrilineal descent.[48] In doing so, Sackville J rejected the expert evidence of anthropologist Peter Sutton, which suggested rights to country instead arose from multiple, accretive pathways. For a variety of reasons the Court was not convinced by Sutton's conclusions and Sackville J's judgment discusses where he considers difficulties with the anthropological analysis lie, in particular in relation to divergent conclusions between those of Sutton and researchers who came before him such as Tindale.[49] Sutton has raised serious concerns about Sackville's J's findings in relation to the anthropological evidence in this case.[50] Although on appeal the Full Federal Court upheld Sackville J's decision (*Jango v Northern Territory of Australia* [2007] FCAFC 101), it is worth noting that in its decision the Full Court did not consider the accuracy of Sackville J's findings in relation to the anthropological evidence, and instead primarily considered whether the trial judge misunderstood the applicant's case, in line with the points of appeal before it.

Given the impact of colonisation on Aboriginal and Torres Strait Islander people we will not find ethnographic evidence gathered in recent times that demonstrates that a particular group's traditional laws and customs are identical to those which existed at sovereignty, and nor will they be.[51] As anthropologists are aware, culture and 'traditions' are not static but are subject to ongoing renegotiation. Change is inevitable in all cultures, and anthropologist Roger Keesing suggests that "[i]ndividuals making choices…are a major mechanism of long-run sociocultural change and of adaptive response to the material circumstances of life".[52] While Aboriginal and Torres Strait Islander cultures are no exception, as Stanner observed, Aboriginal groups "…welcomed change *insofar as it would fit the forms permanence*" of their given way of life,[53] potentially minimising *significant* changes to the normative system. However, the arrival of British settlers has clearly resulted in significant (yet varied) degrees of adaptation on the part of Aboriginal people. From an anthropological perspective Aboriginal and Torres

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[45] Bagshaw 2003, above n 40, pp. 30-31.

[46] Bagshaw 2003, above n 40, pp. 59-61.

[47] [2006] FCA 318 (*Jango*).

[48] *Jango* at [497]

[49] *Jango* at [467-476].

[50] P, Sutton, 'Norman Tindale and native title: his appearance in the Yulara case', delivered at the 2006 *Norman B. Tindale Memorial Lecture*, Adelaide, 2006.

[51] Nor can we be certain what those laws and customs were at that time, given a lack of historical evidence in most cases.

[52] Keesing, 1981, above n 11, p. 167.

[53] Cited in Tonkinson 1991, above n 34, pp. 133-134 [emphasis added].

Strait Islander cultural practices today are no less 'traditional' than those of 200 years ago. Nevertheless, the *Yorta Yorta* decision only accommodates this perspective to a limited degree – the majority states that whilst "demonstrating some change to, or adaptation of, traditional law or custom…will not *necessarily* be fatal to a native title claim…the key question is whether the law and custom can still be seen to be 'traditional', in the sense of 'at sovereignty'".[54] This and other relevant paragraphs of the *Yorta Yorta* decision were recently referred to by the High Court in its decision to refuse special leave to appeal the Full Federal Court's decision in *De Rose v State of South Australia (No 2).*[55] The Full Court held that native title existed in parts of the determination area, and the respondent pastoralists sought to appeal that decision on a number of grounds, including that the claimants did not have a continued connection with the claimed land in the sense required under the NTA. Members of the native title group migrated to the claim area in the early 1900s and the pastoralists argued that the claimants' title over the area was newly created – not 'native' title – on the basis that it did not arise under pre-sovereign laws and customs. However, the High Court refused to grant leave to appeal on such grounds, and in doing so noted "it is important to recognise what is said by this Court in *Yorta Yorta*…paragraphs 43 and 44, and paragraphs 82 to 84".[56] Namely, the paragraphs of the judgment addressing the ability of native title law to accommodate a degree of change and adaptation.

Clearly then, the task for anthropologists is to have regard to both past and present ethnographic evidence in order to ascertain how and why traditional laws and customs have changed, and whether those changes can be regarded as a 'continuation' of the 'traditional' laws and customs existing at sovereignty. For example, in *Yanner v Eaton* the court accepted that the use of a dinghy powered by an outboard motor when hunting crocodiles was an 'evolved, or altered, form of *traditional* behaviour'.[57]

However, continuity "is not an all or nothing affair" and anthropologists must seek to demonstrate "whether what survives remains important, rather than mere folklore curiosity".[58] Bagshaw succeeds in doing this in his account of the ethnographic evidence in support of the existence of Karajarri people's native title, whereby he attributes the Karajarri with a degree of active selectivity in managing and responding to change, such that traditions core to their connection with country have been maintained.[59] For example, he suggests that although there has been general suspension in rituals such as increase rites, this can be attributed to a reduced importance or relevance of such ceremonies in the modern world, where Western economies have made food and other resources more readily available.[60] This supports his opinion that the Karajarri 'have selectively continued to maintain and practice those beliefs and rites which lie at the very core of their traditional cosmology and ontology', which is evidence towards satisfying the requirement that their traditional laws and customs have continued since sovereignty. Anthropologist Gaynor Macdonald makes similar arguments about cultural continuity in her critical analysis of theories of cultural loss in research about Aboriginal people, noting that "'traditions' could be evidence of strategic choices that Aboriginal people themselves were making, even if only reactively".[61]

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[54] *Yorta Yorta* at [83] [original emphasis].

[55] [2005] FCAFC 110.

[56] *Fuller & Anor v De Rose & Ors* [2006] HCATrans 49 (10 February 2006).

[57] *Yanner v Eaton* [1999] HCA 53 at [68]. Sackville J's decision in *Jango* at [462-464] also makes clear the need for anthropological evidence to consider the extent to which any changes in law and custom since sovereignty fall within the scope for change permitted by *Yorta Yorta* [emphasis added].

[58] J, Beckett, 'The Murray Island land case and the problem of cultural continuity', in *Mabo and native title: origins and institutional implications*, CAEPR Research Monograph no. 7, ed. W. Sanders, Centre for Aboriginal Economic Policy Research, Canberra, 1994, p.15.

[59] Bagshaw 2003, above n 40, pp. 68-71. The Karajarri people's native title was determined in *Nangkiriny v State of Western Australia* [2002] FCA 660 and *Nangkiriny v State of Western Australia* [2004] FCA 1156.

[60] Bagshaw 2003, above n 40, p.66.

[61] G, Macdonald, 'Does 'culture' have 'history'? Thinking about continuity and change in central NSW', *Aboriginal History*, vol. 25, 2001, p. 178.

CONTINUOUS EXISTENCE SINCE SOVEREIGNTY: OBSERVANCE AND INTERRUPTION

Returning now to the second requirement, the High Court said that the laws and customs must have been acknowledged and observed, substantially uninterrupted, since sovereignty. As the High Court said, ongoing use of the rights and interests which arise under the traditional laws and customs[62] is not necessarily the relevant statutory question. The issue is whether the laws and customs giving rise to native title rights and interests have been *observed*. Likewise, whilst physical absences by claimants from the land may be a factor to consider, the question is whether the claimants, by virtue of their traditional laws and customs, have maintained a *connection* with the relevant lands and waters. Anthropologists must consider factors broader than the amount of time claimants spend away from the claim area, and might also find valuable ethnographic evidence through studying claimants' behaviours and expressions in locations other than their own country. Ethnographic evidence gathered by Tonkinson during his extensive fieldwork with the Mardu is a useful illustration of this. He describes how the Mardu's belief in dream-spirits allows the performance of important rituals in relation to sites of significance, despite not being in the vicinity of the relevant site at the appropriate time. This is achieved through travelling to the site in dream-spirit form.[63] Such evidence demonstrates how the Mardu are able to maintain a connection with their country and meet their responsibilities in relation to land in accordance with traditional laws and customs despite not being physically present at all times.[64] The Federal Court accepted this evidence in its determination that native title existed in relation to the lands and waters claimed by the Mardu.[65]

Ethnographic evidence and exclusive possession

The final aspect of the definition of native title explored here is the requirement that the native title rights and interests must be *in relation to land or waters* - this requirement is apparent from the list above of rights and interests typical to native title determinations to date. 'Ownership' ('the right to possession, occupation, use and enjoyment of the land and waters of the determination area') is probably the most obvious of the rights that might exist in relation to land although, in native title, the evidence supporting rights conferring exclusive possession can sometimes be subtle and thus difficult to demonstrate. This is especially true in comparison with the more explicit ways in which property rights to land have been managed in Australia pre native title. Property or ownership is about relationships between individuals, and "involves rights, duties, powers, privileges, forbearances, etc.".[66] It is to social interaction and the way people characterise their relationships to others and to land that anthropologists must turn when compiling ethnographic evidence about a claim to exclusive possession. As the High Court noted in *Ward*, it "is the rights under traditional law and custom to be asked permission and to 'speak for country' that are expressed in the common law as a right to possess, occupy, use and enjoy land to the exclusion of all others." [67]

In the Croker Island native title claim, claimant evidence to the courts about requirements for seeking permission seemed to explicitly support rights of ownership and control to claimed areas of the sea and seabed. For example, when asked about practices in relation to visiting a particular place, one claimant indicated that not only must he seek permission to do so, but that the relevant group has the right to

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[62] *Yorta Yorta* at [84].

[63] Tonkinson 1991, above n 34, p. 117.

[64] See also Bagshaw 2003, above n 40, pp. 68-69, for a similar account of how what he terms 'metaphysical' linkages have successfully maintained Karajarri connections with country.

[65] *James on behalf of the Martu People v State of Western Australia* [2002] FCA 1208 at [8].

[66] A.I, Hallowell, 'The nature and function of property as a social institution', in *Culture and experience*, University of Pennsylvania Press, Philadelphia, 1955, pp. 240-241.

[67] *Ward* at [88].

prevent him going on the grounds that "its their grass…the sea bed is theirs".[68] However, in the absence of such explicit statements, what other ethnographic evidence might anthropologists have regard to that might support claims of exclusive possession?[69] In researching the Croker Island native title claim anthropologists Peterson and Devitt found that 'asking or letting the appropriate people know where one is going is the fleeting and virtually invisible day-to-day social expression of the system of sea tenure'.[70] Given that property is necessarily related to relationships, practices of seeking permission can evidence the ability to refuse access, and thus ownership rights, even though permission may never be refused. Of course there are other indicators of the existence of rights to exclusive possession. However, here I have demonstrated the importance of having regard to the subtleties of social relationships when gathering ethnographic data for native title claims, and such an approach is applicable to almost all of the kinds of rights and interests recognised in determinations to date.

CONCLUSION

Finally, it is worth noting that while the definition of native title in the NTA and as enunciated by the courts should be a guide to the types of ethnographic evidence anthropologists have regard to, it should not be a limit on it. For example, where ethnographic evidence supports the existence of rights of exclusive possession under traditional laws and customs this should be reflected in an anthropologist's connection or expert report, despite the fact that the traditional right is in relation to an area over which only non-exclusive *native title* rights can be recognised. Firstly, such an approach will ensure a holistic picture of the nature of the claimants' connection to the claimed land and waters. Second, it is for the claimants themselves to decide what rights and interests will be claimed as 'native title', and for the courts to determine whether they can be recognised as 'native title'. 'The grant or refusal of recognition at common law or under the [Native Title] Act is not something which affects or modifies traditional laws and customs or the rights and interests to which in their own terms they may give rise'.[71] The anthropologist's role is to research as comprehensively as possible the claim group's traditional laws and customs and the rights they give rise to, regardless of whether they might be recognised as 'native title'.

As anthropologist David Trigger has stated, albeit in a slightly different context, '[c]arrying out research in relation to a native title court case is different from other forms of social science research…[as] the issues requiring attention are circumscribed quite specifically by the context of legal decisions'.[72] Anthropologists working in the native title system should be aware of the legal framework within which they work. However, this task is not up to anthropologists alone who should, of course, be guided by good legal counsel – as native title lawyer Robert Blowes SC has noted, the role of lawyers 'includes a responsibility to adequately inform the anthropologist of the legal context and particular requirements of his or her role in the proceeding'.[73] Clearly the definition of native title is influential on ethnographic practice in the provision of anthropological evidence for native title claims.

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[68] N, Peterson, 'On the visibility of Indigenous systems of marine tenure', *Senri Ethnological Studies*, vol. 67, 2005, pp. 437-438.

[69] Or indeed, even where statements of this kind are made, what might we look for in seeking to ascertain whether group members do what they say they do.

[70] Peterson 2005, above n 70, p. 440.

[71] *Sampi v State of Western Australia* [2005] FCA 777 at [949].

[72] D, Trigger, 'Anthropology in Native Title Court Cases: 'Mere Pleading, Expert Opinion or Hearsay'?', in *Crossing Boundaries: Cultural, legal, historical and practice issues in native title*, ed. S. Toussaint, Melbourne University Press, 2004, p. 31.

[73] R, Blowes 2006, 'Anthropologists in applications for recognition of native title', *Native Title Conference 2006: Tradition and Change, Culture and Commerce*, p. 4. Available from: www.aiatsis.gov.au.

ISSN 1326-0316
ISBN 978-0-85575-327-6

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