SOCIETIES, COMMUNITIES AND NATIVE TITLE[*]

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Abstract

In this paper I examine the use and meaning of the terms 'community' and 'society' in native title cases. I consider this use from an anthropological point of view but situate it within legal contexts relevant to native title law. I explore whether there is a difficulty for anthropologists in the way these terms may be used in the context of native title processes and if this be the case, how such difficulty may be alleviated or circumvented.

There is a body of anthropological writing and thinking that has been critical of the interface between anthropology and native title law. In an earlier paper I reviewed some of this material and made mention of a number of articles that addressed ethical issues, the nature of anthropological evidence and practical issues related to participation in the legal process.[1] One aspect of this critique views the anthropology of native title as compromised by the demands of native title law, or perhaps subverted by it. I discussed the Yulara case as a recent example where anthropology had suffered as a result of the demands of the legal system through forcing anthropology into a 'highly constrained reductionist form'.[2] Paul Burke in a recent PhD thesis has examined this interaction between anthropologists, lawyers and judges.[3] He argues that his analysis of social

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[*] This paper was originally presented at the National Native Title Conference 2007. It has since been revised. The paper will also form part of a forthcoming publication by the Native Title Research Unit: Lisa Strelein (ed) *A Dialogue on Native Title: Papers from the National Native Title Conference*.

[1] K Palmer, 'Anthropology and applications for the recognition of native title' *Land, Rights, Laws: Issues of Native Title*, vol.3, no.7, 2007, pp 2-3, 5. See also D Trigger, 'Anthropology in native title court cases: 'mere pleading, expert opinion, or hearsay?' in S Toussaint (ed) *Crossing boundaries. Cultural, legal, historical and practice issues in native title*, Melbourne University Press, Melbourne, pp 24-33 and see generally S Toussaint, (ed) *Crossing boundaries. Cultural, legal, historical and practice issues in native title* (2004).

[2] Palmer, above n 1, p 14.

[3] P Burke, '*Law's anthropology: from ethnography to expert testimony in three native title claims*, D Phil Thesis, Department

process allows for a comprehensive explanation of relationships, removing tensions otherwise present between the dichotomising of law and anthropology. By considering materials taken from native title cases Burke demonstrates some of the issues that arise when anthropologists bring their understandings to bear upon native title (and legal) constructs.

Morton, in a short note concerning the Yulara judgement and Professor Sansom's commentary upon it[4] sees law as in the business of imposing order, anthropology as generating conceptual contradictions and complexity.[5] Morton saw one consequence, 'intolerance of "unreason" evident in the regimentation of anthropologists' reports'.[6] He described the native title process in such circumstances as one marked by, 'a question of how much chaos a judge is willing to tolerate before deciding that a system is not in evidence'.[7]

These accounts together demonstrate the difficulties of anthropology's encounter with the law and the useful application of the anthropologist's expertise in native title matters. They invite further consideration of why these problems are so much in evidence.

In this paper I seek to explore the causes for these difficulties, rather than their manifestations or ramifications. My proposition is that the dissonance between anthropologists and the application of their science in native title inquiries develops from differences between the characteristics of the former and the demands of the latter. At the heart of this difference is the nature of the process whereby anthropologists seek to describe and understand social process (relationships, meanings) on the one hand and another that seeks evidence (statements, expert views) to support or deny that a particular criterion or requirement has been met. The former sees social process as lacking absoluteness, the latter requires it. The former stresses change and mutability, the latter stasis and immutability.

This distinction finds parallels in anthropological practice. The application of anthropology in native title inquiries and the gathering of data and comprehending them are two different undertakings. In native title cases an anthropologist is often asked to provide an expert view based on his or her knowledge, training and the discipline of anthropology. In this the anthropologist is asked to bring data to bear on a legal point of proof. This is not the same as undertaking an anthropological study ('doing anthropology') which is variously a study of process or structure, change and meaning or a combination of one or more of these, and perhaps more besides. While the application of anthropology to the legal matter develops from the doing of anthropology, the two represent distinct fields of operation, with different parameters and theoretical underpinnings. In understanding this we can come to an appreciation of the reasons why there may appear to be disjunction between doing anthropology and the use of skills developed in that discipline to provide opinions to a court that will have status as expert testimony.

At a practical level too there is dissonance. In providing an expert view the anthropologist must, to be of assistance to the court, accommodate the procedural and methodological differences that characterise the practices of the two disciplines. Providing an expert view is constrained by a range of rules and conventions that stem from the legal context, including the rules of evidence. In Sutton's view, this has led in one instance, to the application of the 'lawyer's Occam's razor'.[8]

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of Archaeology and Anthropology, Australian National University, 2006.

[4] J Morton, 'Sansom, Sutton and Sackville: three expert anthropologists?' *Anthropological Forum* vol.17, no.2, 2007, pp 70-173. See also B Sansom, '*Yulara* and future expert reports in native title cases' *Anthropological Forum* vol.17, no.1, 2007, pp 71-92.

[5] Morton, above n 4, p 171.

[6] Ibid.

[7] Ibid.

[8] Noted by J Sackville in *Jango v Northern Territory (No 2)* FCA 1004, 314; See Palmer, above n 1, pp13-15.

The juxtaposition of law and anthropology is nowhere as immediate as when respective practitioners are required to develop an understanding of words that have attracted a special privilege, status and consequential meanings in both discourses. One example is the use of the terms 'society' and 'community'. These are both legal terms (derived, in this case, from native title law but not statute) that are entrenched in jurisprudential thinking. They are also terms of anthropology. The words and the ways whereby they come to have different meanings provide a springboard for this paper. In this context I consider below how anthropologists must treat, in a native title process, terms that are words of law rather than of anthropology, while being an expert by virtue of being an anthropologist.

In this paper I look first at examples of how some legal thinking has defined or commented upon the terms 'society' or 'community'. In turn I then examine some of the anthropological thinking that develops from a consideration of these terms. Finally, I will look at how the two can be brought together, and examine the implications for doing so, potentially, for anthropologists.

LEGAL CRITERIA

The decision of the High Court with respect to the application made by members of the Yorta Yorta Aboriginal community provides a point of departure for a consideration of legal ideas about the centrality of a society to the concept of the perdurance of native title rights.[9] It also raised critical issues about the nature of the society, as required for native title law, at sovereignty, and a consideration of the relationship of the society at sovereignty to that of the claimants.

In the judgment of the High Court, the relationship between the continuity of laws and customs, and rights to land or water and the society is set down.

> To speak of rights and interests possessed under an identified body of laws and customs, is, therefore, to speak of rights and interests that are the creatures of the laws and customs of a particular society that exists as a group which acknowledges and observes those laws and customs. And if the society out of which the body of laws and customs arises ceases to exist as a group which acknowledges and observes those laws and customs, those laws and customs cease to have continued existence and vitality. Their content may be known but if there is no society which acknowledges and observes them, it ceases to be useful, even meaningful, to speak of them as a body of laws and customs acknowledged and observed, or productive of existing rights or interests, whether in relation to land or waters or otherwise.[10]

The identity of the pre-sovereignty claimant society is thus of fundamental importance to any consideration of the continuity of laws and customs, rights and interests. Strelein commented,

> The need to establish a coherent and continuous society defined by a pre-sovereignty normative system creates enormous ambiguity in the requirements of proof. The nature of the group has emerged as a fundamental threshold question for native title claimants. The High Court's deference to the views of the trial judge in *Yorta Yorta* demonstrated the vagaries of an assessment based to a significant degree on a judge's perceptions of the group. … Native title claimants must rely on the ability of a non-Indigenous judiciary to conceptualise the contemporary expressions of Indigenous identity, culture and law as

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[9] *Members of the Yorta Yorta Aboriginal Community v State of Victoria* [2002] HCA 58.
[10] Ibid p 50.

consistent with the idea of a pre-sovereignty normative system.[11]

In considering these matters, the judiciary is also likely to have regard to the evidence of experts. Since no first-hand evidence can be adduced as to the nature of the society at sovereignty, the court is likely to rely on experts to provide a view in this regard. In determining the nature of the contemporary society the court is also likely to need the assistance of an expert, since the concept is a product of law not of Indigenous culture.

In another native title decision (largely in favour of the applicants) Weinberg J quoted one of his colleagues as helpful in defining a society: He also went back to *Yorta Yorta*.

> The concept of a "society" in existence since sovereignty as the repository of traditional laws and customs in existence since that time derives from the reasoning in Yorta Yorta. The relevant ordinary meaning of society is "a body of people forming a community or living under the same government" - Shorter Oxford English Dictionary. It does not require arcane construction. It is not a word which appears in the NT Act. It is a conceptual tool for use in its application. It does not introduce, into the judgments required by the NT Act, technical, jurisprudential or social scientific criteria for the classification of groups or aggregations of people as "societies".[12]

His Honour asserted that for the application of native title law the common English sense of the term 'community' is what is relevant. 'Arcane construction' (the likely province of an expert perhaps?) is not only unnecessary but would involve application of criteria 'foreign' to native title law.

His Honour Merkel J was less critical of potential experts but made it clear as to what was required. Merkel J wrote, in relation to the Rubibi claim, that the applicants made claim for the recognition of native title as a community.

> As stated above, the Yawuru claim is a claim for communal native title rights and interests as it is claimed to be made on behalf of a community of people, namely the Yawuru community as defined in the application. The Yawuru claimants, relying on *Members of the Yorta Yorta Aboriginal Community v State of Victoria* [2002] 214 CLR 422 ('*Yorta Yorta*') at 439 [29], 444-445 [47] and 445 [49], claim that the Yawuru community is a body of persons united in and by its acknowledgment and observance of a body of traditional laws and customs. Those traditional laws and customs are said to constitute the normative system under which the rights and interests claimed are created.[13]

In other judgments I have read the term 'society' is used freely, but to convey the sense that it comprises those who share cultural commonalities and adhere to the same system of laws and customs. For example,

> In 1838 there was an established Aboriginal society close to the western boundary of the claim area (Glenelg River). It was an organised society, the members of which built structures and adorned their environment with paintings including Wanjina paintings, made artefacts of wood, and used stone to crush and grind seeds and to shape into spearheads.[14]

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[11] Lisa Strelein, *Compromised Jurisprudence: Native Title Cases since Mabo*, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2006, p 90.

[12] *Northern Territory v Alyawarr* (2005) 145 FCR 135, 78, quoted in *Griffiths v Northern Territory of Australia* [2006] FCA 903, para 513.

[13] *Rubibi Community v State of Western Australia* (No 5) [2005] FCA 1025, para 8.

[14] *Neowarra v State of Western Australia* [2003] FCA 1402, para 61.

In native title law, according to one authority, 'society' is chosen over 'community' because the former serves to emphasise, 'this close relationship between the identification of the group and the identification of the laws and customs of that group'.[15] Presumably this differentiation is drawn from the ordinary English use of the terms, rather than from anthropology. Conversely, anthropologists might use the term 'society' for larger, complex groupings – I provide some general examples of this in the next section. The term 'community' is sometimes used for smaller groups characterised by closer social ties and interaction and the typical subject of anthropological inquiry.[16] The point is simple. Legal meanings and those of the social sciences show no automatic correlation.

In summary there is a consistent legal view that a community has to be recognisable, because the laws and customs (the normative system) of its constituents unite members through joint or common observance. While it is not stated, it would be a reasonable assumption that those people who did not share these laws and customs but observed others, would constitute a different society or community.

The legal concept of community, to date at least, is clear enough. Native title is a product of recognition of customary laws of a community or society of people. Land law is not going to be their only law, but will form a component of a set of laws which makes up a normative system that characterises the community or society.

ANTHROPOLOGICAL CRITERIA

Anthropological terminology

Social scientists in Australia have used the terms 'society' and 'community' without specialist sense to mean a set of people who can be grouped together because of shared cultural attributes. For example, the term has been used in the title of a few books and articles that treat Aboriginal topics. Ken Maddock had *A portrait of their society* as a subtitle to his 1974 book on *The Australian Aborigines*.[17] C.D. Rowley wrote a classic account of *The Destruction of Aboriginal Society* in 1980.[18] More recently, Ian Keen has used the term 'society' in the title of his book *Aboriginal economy and society* as well as from time to time in the text without defining it.[19] It is not included in his glossary of terms. However, the meaning is to my mind evident from the context.[20]

The term 'society' as used in the examples cited above provides then a useful concept rather than a specific one. It has the facility to convey a meaning that implies a group of people who together have things in common. This might include cultural practices, language and beliefs. However, it does not provide for a very

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[15] Strelein, above n 11, p 104 citing *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, pp 445-6, 50.

[16] An example is a paper by S Holcombe, 'The sentimental journey: a site of belonging. A case study from Central Australia' *TAJA*, vol.15, no.2, 2004, pp 163-184. The author shows that the term 'community' has a 'deep genealogy' in the social sciences.

[17] K Maddock, *The Australian Aborigines: A Portrait of their Society*, Allen Lane Penguin Press, London, 1974.

[18] C D Rowley, *The Destruction of Aboriginal Society*, Australian National University Press, Canberra, 1970.

[19] I Keen, *Aboriginal Economy and Society: Australia at the Threshold of Colonisation*, Oxford University Press, Melbourne, 2004.

[20] Ibid pp 2-5. Examples of the use of the word in titles of academic papers are not common. M.C Howard wrote on 'Aboriginal society in south west Australia': Howard, M.C 'Aboriginal Society in south-western Australia' (1979) in R.M. and C.H. Berndt (eds.), *Aborigines of the West: their past and their present*, University of Western Australia, Perth, 1980, pp 90-99 and Kolig used the word in the titles of at least four papers that I have come across: Erich Kolig, '*Post-contact religious movements in Australian Aboriginal society*' *Anthropos* vol.82, 1987, pp 251-259; Erich Kolig, *Dreamtime Politics: Religion, world view and utopian thought in Australian Aboriginal society*, Dietrich Reimer Verlag, Berlin, 1989, although in the first two citations the word qualified either 'European' of 'Australian'.

tight or exact definition of what might be meant and therein lies its usefulness perhaps for those who have chosen to use it. Should this use be not understood for the shorthand it probably is, the use obfuscates important distinctions in the way anthropology understands the nature of social groups.

Generally, a 'society' for an anthropologist is not a 'thing' but comprises sets of relationships.[21] Beattie counselled that thinking of 'society' as a thing, like a frog or a jellyfish was, 'more embarrassing than useful.[22] It was essential to jettison any analogy with an organism in order to focus on the relationships that exist between people who thereby recognise commonalities.[23]

Michael Herzfeld in what he describes as, 'an overview of social and cultural anthropology', tells us that at the beginning of the twenty first century, 'one thing is for sure: the attempt to abolish uncertainty has failed'.[24] He cited the 'most obvious victim' as being 'the idea of the bounded human group – the "society" or "culture" of the classic anthropological imagination'.[25] Earlier he cites Arturo Escobar who wrote, 'societies are not the organic wholes with structures and laws that we thought them to be until recently but fluid entities stretched on all sides by migrations, border crossings and economic forces'.[26]

These views reflect a trend that typifies anthropology in its interest in understanding diachronic relationships and meaning, developed over time, through social process, rather than a science based on synchronic and structural classification. More recent anthropology has, according to Weiner, been 'dominated by social constructionism in its own "strong" voluntarist version – that, as agents, human beings make their own world consciously and deliberately'.[27] This manner of understanding social process as construction and agency through time is in marked contrast to the idea of a society as a relatively stable and discretely modelled entity.

Based on some of the legal views cited above ('repository of traditional laws and customs') it would appear that in law a society is indeed a thing. In anthropology, it is made up of sets of relationships, changing through time, defying reification and certainty. Herein, then, lies a fundamental point of difference.

WHAT DO ABORIGINAL STUDIES TELL US?

In Australian Aboriginal studies terms like 'nation', 'community' and 'tribe' abounded, particularly in the early literature as early ethnographers sought to identify the building blocks (sets of relationships) that constituted Aboriginal society (or societies).[28] These early accounts are of importance in native title research since establishing a view as to the continuity of a social formation (a society) must rely, to some extent, upon the accounts provided by early ethnographers. Those assisting or assessing an application for native title are likely to go to this early literature to see what was said about the society in question at or about the time of sovereignty.

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[21] J Beattie, *Other Cultures. Aims, methods and achievements in social anthropology*, Cohen & West, London, 1964, pp 34-35.
[22] Ibid p 56.
[23] Ibid p 58-59.
[24] M Herzfeld, *Anthropology: Theoretical practice in Culture and Society*, Blackwell, Oxford, 2001, p 133.
[25] Ibid.
[26] Ibid. Herzfeld provides no citation for this quotation, although he provides references to five of Escobar's works in the bibliography.
[27] J Weiner, 'Anthropology vs. ethnography in native title: a review article in the context of Peter Sutton's *Native Title in Australia*' *TAPJA*, vol.8, no.2, 2007, p 154.
[28] P Sutton, *Native Title in Australia: An Ethnographic Perspective*, Cambridge University Press, Port Melbourne, 2003, p 42.

With two exceptions (Meggitt and Hiatt) which are discussed by Sutton,[29] anthropologists writing post 1950 generally did not use the term 'community'. The term 'nation' was dismissed on the ground that its use implied a degree of political unity that was never apparent.[30]

Applications for recognition of native title have used a variety of different models of society as a means of establishing the parameters within which laws and customs were held in common.[31] Peter Sutton took the view that there were several kinds of Aboriginal groups that could be defined in relation to land.[32] He observed that a choice in how a claimant community was to be defined reflected the reality of 'different landed entities' which would yield, 'a number of overlapping "territories" for the same population'.[33]

Sutton also noted that there were different sorts of Aboriginal 'community' – he identified two, one defined in relation to geography, another defined in terms of the relationships of its members.[34] Each was different and neither necessarily comprised members who were the same as members of a native title community – that is a group who together shared rights in the same country. By this account, then, not all 'communities' will be relevant to a native title application. For the anthropologist there is choice in how the word will be applied. There is no absolute 'community'. The anthropologist needs to ensure that the sort of community chosen is relevant to the group understood to have customary rights to the application area.

The two-fold question in relation to any native title claim then is which sort of 'landed entity' is to be chosen and how broad a compass does its collective interest in land circumscribe.

It is not my intention here to review and categorise the types of society that have been presented in native title applications, even if this were practical. However, there are some sorts of societies that can be regarded as models that are relevant to this paper. For the most part they relate to models that might be applicable to larger rather than smaller-scale social formations. All would appear to me to be anthropologically defensible in terms of meeting the requirements of a society for the purpose of a native title application.

Cultural bloc

The concept of a 'cultural bloc' as an aggregation of constituent tribes or other groups has been the subject of a number of early studies, including Radcliffe-Brown, who was interested in expansions of 'social solidarity' beyond the range of the local group.[35] Similarly, Roth characterised larger aggregates in Western Queensland as 'messmates', united by the use of mutually intelligible languages, 'bonds of comradeship' endogamy and cooperation in times of war.[36]

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[29] Ibid, p 99-107.

[30] RM and CH Berndt, *A World that Was: The Yaraldi of the Murray River and the Lakes, South Australia*, UBC Press, Vancouver, 1993, p 19.

[31] See Strelein, above n 11, pp 104-5, 135-7 for a discussion and some examples in the legal context.

[32] Sutton, above n 28, p 88.

[33] Ibid.

[34] Ibid p 89-92.

[35] A.R Radcliffe-Brown, 'The social organisation of Australian Tribes' *Oceania* vol.1.1-4, 1930-1, pp 445-455; Sutton, above n 29, p 46.

[36] W.E. Roth, *Ethnological Studies among the North-West-Central Queensland Aborigines,* Government Printer, Brisbane, 1897. Facsimile edition 1984, *The Queensland Aborigines,* Volume 1. Hesperian Press, Perth, 41.

Sutton reviewed other accounts that provided evidence of aggregations or 'nations'.[37]   In the context of a discussion of both Mathews and Howitt, Sutton states that the early accounts support the view that there were regional aggregations with substantial cultural commonalities.

> Certain extensive areas of south-eastern Australia, for example, were characterised by a widely reported classical complex in which were to be found matrilineal moieties, sections, matrilineal unlocalised social totems, single linguistic groups numbering several thousand (not just a few hundred people), a *bora* (sacred ceremony) type of initiation system, emphasis on site-bound increase rites, a prominent religious and social role for the medicine-men of high degree who were able to fly, a belief in an 'All-Father' figure located in the heavens, fragmentary evidence of primary recruitment to country though birth or, possibly, conception and, probably, a system of individualised life-time site or tract tenure resting on an underlying communal estate title system.[38]

Sutton also noted that some later writers attempted to identify regional aggregations in relation to drainage divisions.[39]

The 'cultural bloc' is sometimes associated with the Western Desert region. In 1959 R.M. Berndt published an account of local organisation for some Australian desert regions, suggesting that the term 'tribe' was 'not entirely applicable'.[40] Instead, he suggested that the use of a common language, with dialect variations, resulted in 'a common awareness of belonging to a cultural and linguistic unit, over and above the smaller units signified by these [dialect] names'.[41] Berndt identified such a group as a 'culture bloc'.[42] Berndt suggests that within the culture bloc was a 'wider unit' 'formed seasonally by members of a number of hordes coming together for the purpose of performing certain sacred rituals'.[43] These wider units would have changed composition over time and the degree of interaction would have been variable. There would not necessarily have been a consistency of horde membership of a 'wider group'.[44] He concludes that,

> One might expect to find a number of these [wider groups] throughout the Western Desert, with some of their members interchangeable from time to time. … Each one of these might be termed a society, with the main criteria being, (a) sustained interaction between its members; (b) the possession of broadly common aims; (c) effective and consistent communication between them. It is suggested, therefore, on the basis of material presented here, that it is more rewarding to speak of Western Desert societies, rather than ambiguously of tribes.[45]

For Berndt the Western Desert cultural bloc was made up of a number of societies – it was not a single 'society' in the sense that he used the term. The characteristics he ascribed to a society do not clearly equate to the characteristics of a society of native title law. The societies were both labile and ephemeral, so lacked corporate attributes and were social rather than land-holding groups. 'Broadly common aims' is the closest we

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[37] Sutton, above n 28, p 92-98.
[38] Ibid p 95.
[39] Ibid p 96; N Peterson, 'The natural and cultural areas of Aboriginal Australia' in N Peterson (ed) *Tribes and Boundaries in Australia*, Australian Institute of Aboriginal Studies, Canberra, 1976, pp 50-71.
[40] R.M Berndt, 'The Concept of the "Tribe" in the Western Desert of Australia' *Oceania* vol. 30, 1959, p 104.
[41] Ibid p 92.
[42] Ibid p 84.
[43] Ibid p 104.
[44] Ibid p 105.
[45] Ibid. I thank an anonymous reviewer for pointing out this contribution to the idea of a 'society' provided by R M Berndt.

get to any idea that the members of such a society might share laws and customs – although their social interaction might imply that they do.

In a later paper the same writer was to apply this concept to a non-arid region which he called the 'northeastern Arnhem Land bloc'.[46] This identity was marked by a 'local recognition of a broadly common culture', an acceptance of dialect variation constituting a common language and acknowledgement of 'mythic' relationships – that is relationships that existed between constituent groups or individuals that developed from spiritual ties between themselves, the land and each other.[47]

Berndt's comments on tribes and societies provide a useful introduction to what is, to my mind, a more problematic concept and one that Berndt found unhelpful, at least for Western Desert societies.

Tribes

The term 'tribe' retains some popular currency, in part as a result of Tindale's 1974 map and, to a lesser extent, because of subsequent reincarnations by Horton (1994) and others. There has been an assumption, common in lay thinking, that a set of language speakers may form a discrete community with an internal political structure that merited the appellation of 'tribe'[48]. Thus the name of a spoken language becomes a 'tribal' name. A corollary of this is a view that the 'tribe' was the maximal territorial unit, whose members together held a defined area of land in common. There was also an assumption in much early Australian anthropological literature that this model was generally applicable.[49]

Anthropologists in Australia have not always been in agreement as to how best to characterise Indigenous societies in terms that can be shown to have empirical validity. This is a consequence of the fact that the social units that comprise Aboriginal groupings are not easily or simply identified. It is likely that within what was a hunting and gathering society there were several ways by which people identified, according to activity (economic, ritual or regional) as well as by reference to kin relationships. This multiplicity of referents presents a problem if a single unambiguous identity is sought. Moreover, some aggregations are likely to have been labile and so would have changed composition over time, providing an obstacle to the identification of enduring social formations.

The assumptions and preconceptions about Aboriginal political organisation are particularly common in the early Australian literature. They developed from conjecture that a 'native' society would take the form of a named 'tribe' with little or no understanding of the variety of social formations and the multitude of names applied by Aboriginal people themselves to social and regional groupings. For many early writers a 'tribe' was explicitly or implicitly understood to comprise a community of people, with a classifying name, whose members spoke the same language and adhered to a system of government that included a chief or leader. In early (and, indeed in some later) ethnographies, the use of a name to identify the 'tribe' was then a convenience born of a preconception which obfuscated a more complex reality. In any event, unless the term 'tribe' was being used in a narrowly defined sense, the field data did not support the existence of 'tribes' in the popularly understood sense of the term, as later writers were to show.

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[46] R M Berndt, 'Territoriality and the problem of demarcating sociocultural space' in N Peterson (ed.), *Tribes and Boundaries in Australia* Australian Institute of Aboriginal Studies, Canberra, 1976, pp 145-146.
[47] Ibid.
[48] For a comprehensive summary of this issue see A Rumsey 'Language and territoriality' in M Walsh and C Yallop (eds.) *Language and culture in Aboriginal Australia*, Aboriginal Studies Press, Canberra, 1993.
[49] See for example, A P Elkin, *The Australian Aborigines: How to Understand them*, Angus and Roberston, Sydney, 1945, 22 ff.; N.B Tindale, *Aboriginal Tribes of Australia*, University of California Press, Berkley 1974, pp 30–33.

As far back as 1938 Davidson, who also provided an early example of a 'tribal map', stated that the largest political unit in Aboriginal local organisation was what he termed the 'horde'[50]. He understood that,

> Larger groupings are recognised and named by the natives on the bases of dialect and cultural similarities and geographical contiguity. These larger units, which furnish a more practical basis for ethnological considerations, can be spoken of as tribes in spite of the fact that there is no semblance of centralized political authority nor any sense of political confederation.[51]

For Davidson, then, the use of the term 'tribe' was a convenience, the term used to identify groups whose members recognised 'dialect and cultural similarities', furnishing a practical basis for 'ethnological considerations'.

Later writers pointed out the difficulties and errors of 'tribal' models. For example, Ian Keen wrote,

> Many early ethnographers assumed that Aborigines were divided into relatively large and discrete "tribes", each of which shared a common language, culture, and territory. This model survived through the first two-thirds of the twentieth century, adhered to, with variations, by Radcliffe-Brown, Elkin, Tindale and Birdsell. ...the tribal model had begun to unravel more than a decade before Tindale published his book and maps of Aboriginal tribes in 1974.[52]

As mentioned above, R.M. Berndt had questioned the applicability of the term to Western Desert societies in 1959.[53] Rumsey provides a helpful critique of the use of the term 'tribe' and exposes some of the assumptions related to its unquestioned use, particularly with respect to the relationship to both a single language and territory.[54]

Tindale's characterisation of 'tribes' and boundaries' was examined in detail by Monaghan in a thesis presented in 2003. Monaghan sought to understand the extent to which Tindale's representations were in fact the result of his theoretical preoccupations and his ideas of linguistic and racial purity. While the focus of his study was on areas identified as 'Pitjantjatjara', his arguments are relevant to this review.

> This thesis argues that, in producing his tribal representations, Tindale effectively reduced a diversity of indigenous practices to ordered categories more reflective of Western and colonial concepts than indigenous views. Tindale did not consider linguistic criteria in any depth, his informants were few, and the tribal boundaries appear to a large extent to be arbitrary. In addition, Tindale's linguistic work was heavily biased towards the category 'Pitjantjatjara' and was informed by notions of racial and (to a certain extent) linguistic purity. Moreover, because these (among other) preoccupations played a direct role in shaping the historical linguistic record, they must be considered when interpreting the

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[50] D S Davidson, *An Ethnic Map of Australia*, reprinted from the proceedings of the American Philosophical Society, vol.79, no.4, 1938, p 649. Generally later called the local descent group (Berndt, above n 40, pp 102-3) also called the 'country group' (Keen, above n 19, p 277, Sutton, above n 28, pp 54-66).
[51] Ibid.
[52] Keen above n 19, p 234; See also M.C Howard, *Nyoongah politics: Aboriginal politics in the south-west of Western Australia*, Dr Phil, University of Western Australia, 1976, pp 17-19 for a similar view.
[53] Berndt above n 40, pp 91-95.
[54] Rumsey, above n 48, pp 191-195.

historical records rather than simply accepting them at face value, as lawyers, anthropologists and linguists have done in the past.[55]

Keen noted that the early ethnographer Howitt wrote of 'mixed' language group areas and that some marriages took place between people of different language-varieties, making their children, presumably, in his view, of mixed language identity.[56] More recently, researchers (in Queensland) have demonstrated that the relationship between language, social identity and community is complex.[57] People tend to be multi-lingual (or to speak several dialects of the same language), people sometimes marry those from other language or dialect groups and this language, while important, could not be seen alone as a diacritic of group membership. The formation of an identity also involved references to a locality or a relative appellation, like 'northerner' or coastal dweller.[58]

While accepting that much of the early literature casts Aboriginal social life and culture in terms of discrete 'tribes', Keen concluded, 'several critiques have cast doubt on the validity of a cellular model of Aboriginal society'.[59] With respect to the named 'tribal' groups that were the subject of his analyses he warned, 'it should not be assumed that these names refer to societies or localised "social systems", especially given the degree of heterogeneity of both ecologies and cultural forms documented for some regions'.[60]

I agree with Alan Rumsey that the misconception regarding tribes is still current.[61] 'Tribes' are well represented in NNTT research reports that reproduce maps produced by linguists (and others) – of which there would appear to be many, showing 'tribal' territories drawn onto maps by means of boundary lines. This would appear to confirm my view that 'tribes' are regarded by at least some of those involved in native title research as a valid unit in defining customary native title groups. This stems from the lingering popular misconceptions about 'tribes' in Aboriginal Australia.

Since the 'tribe' was not a political entity, it could not have a bounded territory. The territorial regime was, as Davidson pointed out, a matter for what he called the 'horde' or local group. Boundaries were a product of the assertion of rights by members of these groups. Where several groups recognised linguistic commonalities, it seems reasonable that boundaries might also be conceptualised in language-group terms, especially in a regional context. In some cases it is evident that language was imputed into country by reference to both place names and myth, further enhancing the association of language and country. However, it is not the case that this is only by reference to one language.[62] From my own experience this process was not universal and was (and is) more strongly marked in some areas than others.

Defining what might constitute a 'society' or a 'community' in terms of the account of 'tribes' will need to accommodate these difficulties and avoid these obstacles. This is not to say that a 'tribal' model is not sometimes helpful. However, designation of a 'tribal group' cannot, of itself, assume commonalities of law, language and culture. Conversely, a society could comprise more than one 'tribe', since laws and customs

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[55] P Monaghan, *Laying down the country: Norman B. Tindale and the linguistic construction of the north-west of South Australia*, Dr Phil, University of Adelaide, 2003, xi.

[56] Ibid p 149.

[57] Keen, above n 19, p 134-135.

[58] Ibid p 135.

[59] Ibid p 6.

[60] Ibid.

[61] Rumsey above n 49, p 191.

[62] Rumsey above n 49, pp 201-204.

transcend the territorial boundaries of country groups and commonly traverse a number of different language groups.[63]

Language groups

If 'tribes' are problematic for anthropologists a characteristic of groups of people that have been labelled a 'tribe' might provide for a more profitable line of inquiry. Language is a useful tool in defining a society for the purposes of native title. In so far as a language-speaking group corresponds to the old fashioned notion of a 'tribe' there are likely to be ethnographic references resting on assumptions of 'tribal' unity to support the representation of the society as a relatively unified body of people.

Language variation, however, is an issue that has to be addressed in such cases. Pertinent questions include whether dialect variations are a means of asserting difference and what is the Aboriginal understanding of similarity and difference in this regard. Analyses effected by linguists can be misleading in cases where languages are shown to be technically similar, and so classed together, while social and political difference between speakers marks substantial difference. Conversely, there are instances where languages that are technically classed as being quite different are regarded by multi-lingual speakers as being much the same. Linguist Bill McGregor made relevant comment on the nature of linguistic classifications in this regard. Writing of the Kimberley he distinguished between technical classification and how speakers understand languages spoken by others to relate to that which they themselves speak.

> It should be noted that speakers may classify languages quite differently from linguists, and may perceive similarities on the basis of cultural affiliations over and above formal resemblances of either typological or the genetic type, which are the basis of linguists' classifications.[64]

Linguists and others have also made a distinction between language-speaking groups and language-owning groups.[65] The distinction between an ability to speak a language and being regarded as an owner of the language was first made over 25 years ago by Peter Sutton.[66] In short the former are characterised by members who speak the language in question; the latter by those who consider they are associated with a language name, but who do not themselves necessarily speak the language. It is, however, something that they consider they own and thus is a cornerstone of their common identity. This distinction is obviously of importance for many areas of Australia where a traditional language is no longer spoken.

Cultural cohesion

A fourth model for a society is one characterised by close kinship, ritual and economic links, perhaps in relation to a unifying geographic feature, like a river or drainage system. Such an arrangement would not preclude the use of different languages, as multilingualism would be a necessary feature of the population's skills set where the society was comprised of speakers of more than one language. One such example was *Griffiths v Northern Territory of Australia* in the Timber Creek area. In his judgement Weinberg J accepted

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[63] There are examples of successful native title applications that have included members or more than one language-speaking group. Miriuwung and Gajerrong (*Ward v Western Australia* (1998) 159 ALR 483), *Neowarra v Western Australia* [2003] FCA 1402 and *Griffiths v Northern Territory of Australia* [2006] FCA 903 are examples.

[64] W McGregor, 'A Survey of the Languages of the Kimberley Region - Report from the Kimberley Language Resource Centre' *Australian Aboriginal Studies*, vol.2, 1988, p 97.

[65] M Walsh, 'Language ownership: a key issue for native title' in J. Henderson and D. Nash (eds.) *Language and Native Title*, Aboriginal Studies Press, Canberra, 2002, p 233.

[66] P Sutton and A Palmer, *Daly River (Malak Malak) Claim*, Northern Land Council, Darwin, 1980.

that five discrete country groups, representing two different language-speaking groups constituted the society whose members together held native title in the application area.[67]

Likewise, Sundberg J found that a number of groups together made up a community bound together through observance of a number of laws and customs. These were clearly enunciated in evidence.

> The body of evidence in pars [162] - [322] shows that the claimants regard themselves as part of a community inhabiting the Ngarinyin, Worrorra and Wunambal region. Throughout the evidence there is an emphasis on shared customs and traditions that transcend any particular dambun or language area. Central to this sharing is the belief in Wanjina; that Wanjina impressed themselves on the landscape, principally in painting sites. Wanalirri, though in Ngarinyin country, is regarded throughout the claim area as the source of the laws and customs laid down by Wanjina. This belief extends beyond the borders of the claim area into the claim region. The Wunggurr tradition also extends across the claim area and beyond, as do other practices and customs: moieties, the marriage rules, wurnan, wudu, rambarr, traditional burial, dambun and kinship rules. The evidence collected earlier is inconsistent with any description of the group or groups that hold the native title rights other than those who are members of the Wanjina-Wunggurr community.[68]

The Wanjina – Wunggurr community is substantially larger than the Timber Creek society, although the principle of recruitment would appear to have much in common. The commonalties which the groups were held to exhibit by the judges in question, relate to the same sort of cultural beliefs, practices and norms as were outlined for regional aggregations by Sutton (see above) and is perhaps a contraction of the regional aggregation model, which I also noted at the same reference above.

Definitional progress

These models may provide a basis for developing an idea of a community or society. It is possible that no single one will match the ethnography, and the final construct be an amalgam of parts of more than one.

Overall and however the models are used, 'society' comes to have a specific meaning for an anthropologist considering the preparation of an expert view that will be helpful to those involved in adjudicating a legal recognition of native title. In this context a 'society' is a group (or body) of people who recognise themselves and are recognised by others to share commonalities developed and expressed through actual or potential social relationships. In this they identify themselves as having more in common with their fellows than they do with others who may be differentiated as 'strangers'. Cultural commonality is underpinned by the observance of common laws and customs. Other factors may also play a part, but not invariably. For example, members of a society may use the same language (or dialects of the same language), or be multilingual, utilising a suite of languages with varying degrees of proficiency. Members may also feel themselves to be united by social bonds and recognise kinship links by reference to classificatory as well as consanguineal reckonings.

A commonplace and perhaps obvious comment follows from this, but one which is in my experience sometimes not fully appreciated. It is not necessary for a member of a society to know all other members of that society or to expect to interact with all others. Neither is it necessary for all members of a society to live in perpetual peace and harmony, since the sharing of laws and customs does not mandate concord.

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[67] *Griffiths v Northern Territory of Australia* [2006] FCA 903, 6, 377.
[68] *Neowarra v Western Australia* [2003] FCA 1402, 386.

THE APPLICATION OF MODELS

Native title law requires recognition of a defensible society or community – one that is anthropologically viable in terms of both contemporary practice and past ethnographies. Thus the proper society for an application must be founded upon a reasonably argued expert view that such a body of persons were united through observance of common laws and customs in the past.

I have set out above some of the choices for a 'society' that have anthropological credibility. These have the potential, given the right supporting data and evidence, to have relevance to a consideration of native title. However, finding a fit between what might be a native title society or community, however understood, for the purposes of the *Native Title Act* and a society or community defined by reference to the available ethnography presents a challenge for anthropology. There are three reasons for this.

First, for anthropologists unqualified terms like 'community' or 'society' invoke a number of different and sometimes conflicting referents. This is true generally in relation to the discourse of the profession, which counsels strict definitional use of the words. It is also true in relation to Aboriginal studies in particular where many different terms have been used, without consistency, for different types of social formation – real or imagined. As Sutton has pointed out (see above) this may afford some flexibility and choice over the type of social formation identified as apposite in the context of a native title application. On the other hand, the form of the society used to characterise the claimant community needs to be robust and defensible, clearly defined and substantiated by the field data. In short, anthropologists need to do a proper job in their application and definition.

Second, demonstration of continuity of a society necessarily relies upon ethnographic reconstruction. While the early ethnographic accounts for some areas of Australia are many, quality and reliability are both questionable.[69] This is a consequence of assumptions made by observers about 'tribal' organisation and other groupings, their often inconsistent use of terminology and the manner in which their data were collected – mostly at arm's length and second or third hand.

Given substantial difficulties in developing reasonable reconstructions of social formations, expert views about correlations between a contemporary community of native title holders and that likely to have been in evidence at the time of first sustained European settlement will be qualified. Moreover, they will, at least potentially, be subject to criticism on the ground that the cotemporary society has little or no correspondence with that developed from the early ethnography. Again, the anthropologist needs to be aware of this potential difficulty and ensure that it is addressed in his or her account.

The third issue relates to scale. As a general rule, the smaller a society, the more likely will be the uniformity of observance of law and custom. Conversely, the larger the society the greater the likelihood of internal variation. In the case of a clearly bounded society, discontinuity is identified as a boundary. Such is the case, for example, with the so-called 'circumcision line', that Tindale drew on his maps.[70] The line purports to show a discontinuity of a cultural practice (a law) within geographic space. On one side of the line people practiced circumcision, on the other they did not.

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[69] Sansom has disagreed, arguing in relation to the Yulara ethnography that, 'earliest sources are best' (Sansom above n 4, p 79). It was a view challenged by some other anthropologists (Burke, above n 3, p 164; K Glaskin, 'Manifesting the latent in native title litigation' *Anthropological Forum* vol.17, no.2, 2007, p167 and Morton, above n 4, p 172).
[70] See for example, N.B Tindale, 'Distribution of Australian tribes: a field survey' *Royal Society of South Australia*, vol.64, no.1, 1940; Tindale, above n49.

Such a boundary is necessarily a cadastral and cartographic construct. It has the intention of demonstrating the incidence of cultural practice in geographic space, at least in general terms. At the boundary of two distinct societies there would be a defined representation of difference. However, social space is not always so clearly bounded.[71] In an arrangement where aggregations of groups recognise commonalities between themselves and their near neighbours, bounded cultural space as a recognition of cultural correlation is going to be a function of relative proximity. In such a case distinctive commonalities would diminish gradually across space. At opposite ends of a spectrum would be those who understood one another to be observers of different laws and customs while those at various intervals in between might appreciate more or less difference, a greater or lesser degree of correlation.

The question then is this: at what point, for the purposes of a native title application, is cultural dissonance tantamount to disunity and the admission of two or more different societies? Again these issues must be addressed in any expert anthropological view, although as I explore below, issues of cultural process sit with some difficulty with many aspects of the native title legal process.

ANTHROPOLOGY AND LAW: DISJUNCTION OR SNUG FIT?

An essential task for the court – or for the State if it is considering the acceptability of an application for a potential consent determination – relates to a necessity that certain criteria have been met. These are, like any matter of proof, a question of examining whether requirements set down in statute and encased by judgement can be understood to have been attained. In this activity, evidence is judged (by the Court or by another set of persons) either to have satisfied those conditions or not. While native title law can accommodate the notion that things have not stood still in relation to the form and structure of a society over time, the essentially synchronic process of adjudication remains fundamental to the enterprise.

I noted above, in my discussion about the extent of a society, that forming a view of commonalities can provide a challenge for anthropologists. This is because an anthropological account often understands societies to be moving, vibrant entities, which do not remain the same from one moment to the next. Moreover, seeing societies as discrete entities is not a part of our contemporary discourse or a reflection of the manner whereby our science understands such things to be.

There is then a difficulty between a mode of thinking that sees a society as a thing and a snap-shot in time, and a society seen as sets of relationships which are likely to be in a constant state of flux and to change in some ways most of the time.

The ideas I have explored in this paper about community and society have one thing in common. They are all descriptive of structures. That is to say, they represent a view of a social formation during a single slice in time. While what I have called 'cultural cohesion' exhibits some propensity toward a diachronic analysis, it is still essentially a description of a society at a point in time. This fact is what makes them helpful in the context of the consideration of applications for the recognition of native title.

The sorts of social formations that I have set out above that could correspond to a 'society' for the purpose of an application for the recognition of native title are what could be termed models. A model is (amongst other things) a small scale replica founded after reality. It is also, by virtue of its replicated but small scale construction, both an ideal and a representation of that reality presented at a particular moment in time. For an anthropologist models are useful heuristic devices. But in the sense that I use the term here, models cannot

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[71] Indeed Bates tells us that along the line that marked the circumcising people of the south west of Western Australia from the neighbours to the north and east, 'On the borders of this line, right through to its north-western point, the local groups appear to become mixed.' D Bates, *The Native Tribes of Western Australia* (1985, Edited by I White) 45.

easily accommodate social process: the ebb and flow of relationships; the fluctuations in identity in response to political motion; the rise of one man and the demise of another, and the essential uncertainties these vacillations generate. These are the sorts of things that provide the basis for an understanding of social process over time. The use of models, a legitimate instrument for the preparation of an expert view for an anthropologist, provides then for a means of mediation between a requirement of the legal process and the tools available to the anthropologist. It permits the anthropologist to provide expert views in a manner that will be comprehensible to the requirements of a legal process. Because models are founded after the ethnographic reality (and will be tested in court to see if indeed they are so) they are the product of the anthropological endeavour. In this way there is a clear differentiation, but no necessary disjunction, between doing anthropology (understanding social process and meaning) and being an expert witness (furnishing a synchronic model based on that research).

What the court requires is an understanding and a view that relates to the particular constructs and technical requirements of the law – in this case the *Native Title Act*. The focus of an expert view needs to be a clear understanding of that requirement. The anthropologists' view then relates to the field of endeavour which is set and defined by the legislation and the legal process. The apparent difficulties that develop in this regard relate to anthropological and legal fundamentals. Social process is never discrete, final or absolute. In contrast, forensic determination is the absolute product of relating completed evidence to defined claim. In this paper I have argued that it is beneficial for anthropologists to pay heed to these facts and differences and so to recognise the process with which they are engaged. In the adoption of models it is possible to follow the anthropological discipline while developing methodological discriminations that mediate between the fundamentals of social inquiry and the legal requirements for expert opinion and evidence.