8. The end of dispossession?  
Anthropologists and lawyers in the native title process

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The tide of indigenous dispossession

A persistent feature of settler colonies has been the dispossession of the indigenous people from their land, and with it the basis of their pre-invasion culture and social structure. Dispossession has seldom been a swift decisive act, but rather a continuing process, carried out all too often in the name of the welfare of the dispossessed, or in the face of good intentions or even efforts to stop or reverse the process.

In Australia we may think of the failure of the lofty intentions expressed in Cook’s and Phillip’s instructions; of the impotence of early Governors who sympathised with the Aboriginal inhabitants; of the collapse almost without trace of the efforts of the humanitarian elements in charge of the Colonial Office in the 1830s to limit dispossession by the spread of pastoralism in New South Wales and the new settlements at Adelaide and Swan River; of how the missions, reserves and settlements established for the protection of Aboriginal people so often acquired the character of concentration camps to assist the process of dispossession; of how Aboriginal farmers who turned reserve land into viable projects found them given to covetous white neighbours; of how housing and community services have been manipulated to relocate Aboriginals; of how in the 1950s, 1960s and 1970s large areas of Aboriginal reserves were turned over to miners, usually without any consultation or compensation; and of how as late as 1963 Aboriginal residents of Mapoon who refused to leave their traditional land were raided at night by a police party which burned their buildings and removed elders, all in the name of their welfare. Even the taking away of children, disposing them not only of their country, but in many cases of their family and community identity, was usually done not maliciously but self-righteously.

In other settler countries we see parallel histories of dispossession. Some, like the early Spanish colonies in the Americas which rapidly wiped out the original inhabitants, were worse than Australia; some, like the United States, Canada and New Zealand were tempered by varying degrees of recognition and treaty-making, less remorseless or with more subtle legal strategies than in Australia; but all resulted in a high degree of dispossession. The history of these jurisdictions, which in various ways
recognised native title long before Australia, show how dispossession can continue despite recognition, and often in the name of good intentions, or as the result of a confused goodwill.

**Has Australia reversed the tide?**

Can Australia, basking in the warmth of *Mabo* and native title, be confident that it has really brought the historical juggernaut of dispossession to a halt, or will it take new forms to bypass or penetrate the barriers that have been erected? Of one thing we can be sure: there are powerful forces working to defeat or diminish the realisation of native title. The chilling blatancy and hypocrisy of the Western Australian Government's attempt to convert native title by legislation from a legal right to a discretionary Ministerial handout, while claiming to preserve it, should not blind us to the subtler ways to undermine or emasculate native title, some deliberate and calculated, some resulting from honest confusion and oversight, some simply flowing from the impossibility of translating one culture to another with complete accuracy or the difficulty of escaping the ingrained habits of professional practice.

Some of these ways may even be acquiesced in by some Aboriginal people, who after 200 years of denial are now too often grateful for small mercies, modest in their aspirations, unprepared for the modern potential of ownership, and susceptible to authoritative statements from white experts. And alas, in some cases so are their advisers. But to point out these vulnerabilities and to criticise their exploitation is to risk the label of paternalism.

The common law doctrine enunciated in *Mabo* did not of itself put an end to dispossession: under it the Crown continued to have the power to extinguish native title without compensation, simply by acting inconsistently with it. The only bar to continuing dispossession was legislation, which first played an unintended role through the *Racial Discrimination Act 1975*. Due in no small part to Paul Keating's strong leadership, the nation decreed through the *Native Title Act 1993* (NTA) that dispossession should finally cease on 1 January 1994, 200 years after it began and 18 months after the *Mabo* decision. It was by no means a unanimous decision, as events in Western Australia illustrated.

But although the NTA has made it unlawful for the arbitrary extinguishment of the past 200 years to continue, it has done little to undo the enormous difficulties that those 200 years have placed in the way of asserting native title. In establishing a system for the recognition and registration of native title, it has left on claimants the burden of proving that native title existed in a particular piece of land under native custom
before Europeans arrived, that it consisted of certain rights and interests, that the customary system has continued to exist (even if changed in content), and that the claimants are the contemporary holders by a continuous chain of customary title. They also have to run the gauntlet of possible extinguishment by all kinds of (often long forgotten and transient) government action over those 200 years, and even, according to some legal authority, carry the burden of proving that no extinguishment has taken place. How the issues of continuing association and extinguishment are to be dealt with, and how native title is to be recorded in the Register of Native Title, will determine whether Mabo and the NTA truly marked the end of dispossession, or merely became its instruments.

Anthropologists and lawyers

Enter the experts, especially the lawyers and anthropologists. Unlike anthropologists, the task of practising lawyers is to advance not the frontiers of scientific knowledge, but the interests of their clients, so far as that may legally be done. They are ostensibly available, on the 'cab rank' principle, for hire as advisers and advocates to all comers. Governments, miners, pastoralists and developers normally have no trouble in hiring lawyers of their choice who will, within the bounds of professional propriety, do their best to advance their client's case.

However Aboriginal claimants are not quite so fortunate, as they have found some of the biggest firms unwilling to act for them, presumably for fear of offending large corporate clients. In addition, as they are publicly funded, there are constraints on the fees Aboriginal litigants can pay, which are unacceptable for some lawyers. Nevertheless there are usually sufficient sympathetic lawyers, including some of the most senior in the profession, more than willing to do their work, and market forces do sometimes operate even in the legal profession. In New Zealand the growth of work in the Waitangi Tribunal led some firms to establish Maori sections, and at least one major Australian firm has set up a native title section.

With anthropologists, the boot is on the other foot; it is corporate clients who complain of the difficulty of retaining anthropologists to assist in fighting Aboriginal claims. This seems to me not, as some corporate clients and lawyers suggest, to reflect bias amongst anthropologists (although anthropologists frequently become emotionally attached to the people with whom they do fieldwork and are sensitive to their problems), but rather problems intrinsic to investigative anthropology.

In contrast to legal practice, anthropology is not an adversarial pursuit, but part of a worldwide scholarly discipline in which truth is
sought on a cooperative basis. It is one thing to assist those whose culture one has had the privilege of studying to present their case for recognition to a court. It is another to accept what is, or may be seen as, a brief to demolish their case. In order to understand and record a cultural domain, anthropologists must win the trust and cooperation of those they work with. Such trust is not likely to be forthcoming if the anthropologist informs them that he or she is employed by, say, a mining company to defeat their native title claim, or, still worse, is found to have concealed that fact.

On the other hand, those whose rights or expectations may be affected by a successful claim are entitled to check its accuracy and veracity, or question the interpretation that has been put on information. The best way out of this dilemma, if it can be arranged, is to have the study done by an anthropologist acceptable to all parties, who is open with everyone, and makes the report available to all parties. However the timing of work often makes this difficult or impossible, there may be sensitivities about the disclosure of information, and adversarially inclined lawyers and clients often want their anthropologist to counter the other side’s expert.

Just how badly lawyers can misunderstand the non-adversarial role of anthropologists was recently illustrated to me when the legal representative of a clan claiming an area contested by two other clans retained an anthropologist to gather evidence in support of the claim, and refused a request to allow members of the other clans to visit the area with the anthropologist on the ground that they were putting views with which the claimant disagreed and hence could not assist the anthropologist. On another occasion the legal representative maintained that it would be ‘unethical’ for the anthropologist to speak to members of other clans.

In a number of other professions a significant number of expert witnesses have lost credibility by being absorbed into the adversarial process as professional witnesses who can be relied on to give the evidence necessary to support a case. At present, experienced anthropologists are scarce. They should, I suggest, endeavour to use the current bargaining power this gives them to establish high standards of professional independence before the high fees on offer draw in a flood of people willing to act as adversarial ‘hired guns’. It is also important that they maintain independence and a critical distance from lawyers, if they are to play the role for which I later argue in correcting the professional myopia of many lawyers.

Why, some ask, does one need the anthropologist, who gets data from Aboriginal people who could be called as witnesses themselves? Apart from underestimating the difficulties that many Aboriginal witnesses may feel in giving evidence in a white forensic forum, this overlooks the extent to which anthropological evidence can compress and summarise material,
perhaps from numerous sources, which would take a court a long time to hear, and the professional skills the anthropologist can bring to bear. These include the capacity to question the people involved in a culturally acceptable and comprehensible manner; to understand their answers and interpret them in the context of the culture as a whole; to evaluate the plausibility of the data in the light of other information about the same or related communities; and to make the whole exercise intelligible to the Aboriginal community on the one hand, and to possibly anthropologically illiterate (or worse, semi-literate) lawyers, courts or tribunals on the other.

Complex social structures and practices cannot simply be described, but require interpretation and, in the legal context, translation to another specialist culture. The Aboriginal expert, steeped in his or her own culture, may well not appreciate the barriers to its understanding by those steeped in a secular, individualistic, industrially based culture, let alone the highly specialised culture of the lawyer. Indeed, anthropologists involved in native title work will have to become more aware of the specificities of legal culture, not to kowtow to it, but to work with and, as may frequently be necessary, challenge it.

Knowledge and power

In a much quoted passage, Justice Owen said in the Supreme Court of Western Australia:

In claims touching on native title the best evidence lies in the hearts and minds of the people most intimately connected to aboriginal culture, namely the aboriginal people themselves.2

But the hand that signs the paper saying what native title will be recognised by Australian law will be that of a lawyer, and what is written will be in language that Australian lawyers can understand and use. It will thereafter define for future legal purposes who will have native title in a precisely bounded and defined piece of land, what the rights and interests given by that native title have been found to be, and who will hold those rights and interests.

What relationship is there likely to be between what is in the hearts and minds of the relevant Aboriginal people and what appears on the paper signed by the lawyer? And what will be the fate of the words on the paper, however faithfully they seek to reflect what was in the hearts and minds of the native title claimants, when the words come from Australian law, and are thereafter owned and construed by Australian lawyers? Who will mediate between the hearts and minds of the claimants and the hearts and minds of the lawyers? Although we may hope that an increasing role will be played by Aboriginal people themselves, and that Australian legal
culture will in the long run incorporate concepts and ways of thinking from Aboriginal culture, for the foreseeable future a major role is likely to fall to anthropologists, if they are willing and able to undertake it. How well will they perform it?

The power relationship between Aboriginal people, anthropologists and lawyers will be crucial in this process. Whereas the amount of knowledge of native title exists in descending order from Aboriginal people to anthropologists to lawyers, the amount of power to define it for official recognition may exist in inverse order in the three groups. The *Mabo* decision recognised that there are two systems of land law in Australia, and that there have been two ever since the British introduced the second in 1788. But the recognition did not offer equality; it is to the courts of the introduced system that Aboriginal people must turn for the recognition, registration and protection of their native title. In this process Aboriginal people, who have the most authoritative knowledge of native custom, will be dependent on the lawyers, who have the least.

It is inevitable that in this process native title will be distorted in some degree. To avoid this distortion being so extreme as to constitute another chapter of dispossession will require some unusual qualities - humility on the part of lawyers, assertiveness on the part of Aboriginal people, and irreverence to lawyers on the part of anthropologists.

One of the titles I contemplated for this paper was 'Don't ask the lawyers. Tell them!' Lawyers often talk as if the law were given and must simply be accepted. In truth the law is continually contested and remade, as the *Mabo* decision itself vividly demonstrated. And as that decision also demonstrated, truth and justice can be powerful weapons with which to contest it. Most of the law affecting native title is still to be contested and made, and some that has been made needs to be recontested. From one point of view my paper is a call to anthropologists to play a major role in that contestation. From another it is an attempt to identify a few of the points at which the contest is already with us.

**Lawyers**

Lawyers are no less ethnocentric than other groups in society and tend to assume, unless they have had some powerful experience to disabuse them, that the basic characteristics of their own legal system are universal, or at all events the culmination of a chain of development which other less advanced systems are still undergoing.

In recent years a number of factors have worked to widen the horizons of Australian lawyers, but it remains the case that few are conceptually equipped to bridge the gap between the two systems of law
with which the legal pluralism of *Mabo* confronts them. Lawyers coming from a common law background expect to find rights defined with a high degree of precision and certainty. They are used to ascertaining rights by reference to deliberately formulated rules to be found by recourse to authoritative written statements in legislation, case law or legal textbooks. The discipline of writing the rules down in a permanent form, and the constant exposure to interpretation in the courts, mean that they can usually be stated with a considerable degree of certainty as to their terms, even if they contain concepts the application of which leaves room for judgment and discretion.

Where rights in land are concerned, several centuries of capitalism and industrialism have worked to bring title to an individualised, alienable and recorded form so that it can be dealt with in a certain fashion as a security and a commodity. This entails certainty as to the exact scope of the rights of clearly identifiable set of individuals at any given point, and certainty as to how that allocation of rights may be changed, including a clear definition of who may change them and how, and what will happen to those rights on the demise of one or more or all of the individuals. Those are the kinds of things that lawyers recognise as rights, and the sort of things that many lawyers will be expecting anthropologists to find.

In a non-literate, non-capitalist, non-industrial, relatively small, face-to-face subsistence society, the situation is very different. The identity of the holders of rights in land, the nature of those rights, and the circumstances in which they may be acquired, lost, modified, transferred or succeeded to can only be determined by reference to oral tradition. Such a society does not have the same pressures for certainty. The face-to-face rather than impersonal nature of the society, and the relative unimportance of property other than land, which in any event is not a commodity, tends, especially in a hunter-gatherer society, to make personal relations much more important than property rights, sharing more socially valued than personal appropriation, and constant negotiation of relationships a normal feature of life. Precision as to boundaries, for example, may be critically important to agriculturists, industrialists or bankers, but not necessarily so for hunters and gatherers. On the other hand, the powerful forces associated with sacred sites may give the transgression of certain areas a significance rarely matched in a western society.

It is thus reasonable to ask that those who seek to record native title should approach with caution, abandoning the preconceptions and expectations of a western legal system as far as humanly possible, and prepared to accept quite different notions. They should not be disbelieving if they find, instead of a clearly defined right, a range of possibilities that may or may not have been negotiated or taken up for a variety of non-legal
reasons. Things they assume to be important and to require precise
definition may have little significance, and the reverse is also true.

The lawyer's love of stable precedent may also find it hard to cope
with the uncertainty flowing from the social stress suffered by many
Aboriginal societies. If, for example, clans have played a central role in the
holding of rights to land, but as a result of extreme depopulation or
disturbance some clans have disappeared and others become too small or
dispersed to carry on their previous roles, new rules about rights may be in
the process of development, consciously or unconsciously, and this will
take time. It would not be reasonable to say that because they were caught
in this transitional stage, native title had ceased to exist. Rather one would
need to record it in a way which left the customary processes of adjustment
room to work through the problem, for example by simply recognising the
overall community title at that stage, without seeking to pre-empt how the
rights of lower level groups and individuals will be carved out of it. This is
a course I advocate later in the paper for other reasons.

Anthropologists

The lawyer has a desperate need for the mediating and educative role that
the anthropologist can play. But, dare I say, anthropologists also have their
human and professional weaknesses. Despite their training, their minds
cannot be free of some preconceptions and assumptions based on past
experience. The human mind does not absorb raw facts in an unmediated
form. It necessarily brings to their study standards for their selective
observation, descriptive categories to identify them, and analytical
categories to arrange them.

Out of the vast mass of available data each anthropological study
selects some characteristics as more important, or more relevant to some
pre-determined purpose of study, than others. An illustration is the lack of
attention to the non-contentious framework of communal land title out of
which the more closely studied individual and small group rights are
carved. It is dangerous when writings are combed for references to matters
with which the investigator was not concerned or took for granted, and the
inference drawn that a feature not mentioned does not exist.

The influence of categories developed by predecessors in the discipline
(or by the observer personally), and embodied in the theories that have
been propounded, is illustrated by the long reign of Radcliffe-Brown's
ascription of Aboriginal landowning to a patrilineal horde which was
certainly not universal and may never have existed. Another distortion may
flow from blinkers imposed by deeply embodied social conditioning, such
as the privileging of male interests over female interests, and individual interests over communal interests.

The history of Aboriginal land claims in the Northern Territory, where anthropologists were drawn into the search for the 'traditional owners' defined by the legislation, illustrates how the definition of the task can affect the finding. It also illustrates the degree to which the law is contested rather than fixed. When Aboriginal people, with the support of anthropologists, rebelled against the pressure to represent their society in terms of what the definition of traditional owner was believed to require, and described it as it was, the accepted understanding of the definition shifted to accommodate the true facts. Indeed, the characteristic of anthropologists I wish to emphasise here is their frequent tendency to treat lawyers with undue deference and respect. If I could adapt the advice of two of our eminent politicians, don't let the bastards run over you, it is your job to keep them honest.

My critique of the professions is not at all intended to imply that lawyers and anthropologists are inescapably locked in their preconceived worlds so that useful knowledge of other systems can never be obtained. I do not wish to suggest that such knowledge is impossible to obtain, only that it is very difficult to obtain, and is always subject to disputation and interpretation. It is, I believe, inevitable that in the process of bringing native title under the shield of the Australian legal system it will be distorted, but I believe that a strong, confident and independent anthropological profession can play a major role in reducing the distortion.

I would like to turn now to specific areas where I see risks of the native title process continuing the course of dispossession. They are risks which can be exploited by vested interests, and may go by default unless they are carefully addressed by anthropologists and lawyers.

**Conceptualising native title**

One strategy to undermine the substance of native title on mainland Australia is to assert that it is not an 'owning' relationship with land – like the exclusive right to occupy, use and enjoy which the High Court found to exist in the Murray Islands – but a bundle of isolated rights to do on the land the things which Aboriginal people did before white people came along. On this view, originally advanced by some mining company lawyers but brainwashed even into some Aboriginal leaders and their advisers, Aboriginal people were never 'owners' of their lands, but just users of land, and have only the right to continue their traditional uses, for example rights to traverse the land, to hunt on it, to perform ceremonies on it, presumably to defecate and urinate on it, but not to mine it or run cattle on
it. On this view the land belonged to no one – we are back to *terra nullius* with grafted on to it a few superficial usufructuary rights which may become of decreasing importance or be abandoned as Aboriginal people are drawn more into the western economy and western lifestyles.

I have argued at length elsewhere that the concept of native title as a bundle of rights defined by previous use is based on a misreading of the *Mabo* judgments as well as a misunderstanding of Aboriginal relationships to land (Wootten 1994a, 1994b). The *Mabo* judgment says that Aboriginal rights are defined not by use, but by a system of law and custom – just as the rights of freeholders and leaseholders depend not on the use they make or have made of the land, but on what the relevant system of law says are their rights. In the *Mabo* case itself, the Court declared that the Meriam people were entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands. The Court spoke of this as the type of proprietary title expected to be found in a community occupying land where there was no other owner. From this communal title are 'carved out' the less extensive, and sometimes merely usufructuary, rights held by sub-groups and individuals, and the obligations assigned to them.

The argument that native title is no more than a bundle of usufructuary rights simply ignores the special character of the communal title of the highest level group in exclusive occupation of land. Such a group, in the past sometimes called a 'tribe', but referred to in the *Mabo* judgements as a 'people' or, in the case of Justice Toohey, as a 'society', and often by indigenous commentators here and overseas as a 'nation', is the group which has the system of custom which defines the rights and interests of its members and subgroups as between themselves in the group land. There is no occasion for the group's customary system, or any other customary system, to limit its title to the land, because in the words of Justice Brennan, 'there is no other owner'.
Rights and systems

On this analysis, anthropologists should not be called on to give evidence about the content (as contrasted to the geographical limits) of a communal title, although they would, I am sure, be comfortable with the proposition that members of an Aboriginal community regarded land with which they had a deep and holistic relationship as 'theirs', not to be reduced to a list of specific uses. Anthropologists may have a role in explaining structure and systems to those lawyers who cannot see beyond particular uses as the definers of rights. Rights get their meaning from a system of law and custom just as sounds get their meaning from a language system. Rights in land standing alone are quite meaningless; they get their meaning only from being part of the customary system of a community.

Imagine the absurdity of trying to define say, freehold title under modern Australian law, by looking at the day-to-day activities of particular landowners. Imagine also trying to list exhaustively the rights existing in land held under freehold title in Australia without incorporating into the description the constantly changing system of Australian law of which it is part. What does a freeholder's exclusive possession against the whole world mean in Australian law? Not that the holder has the right to forbid everyone to keep off the land – there are numerous persons who have a right to enter the land for official or even private purposes. Does it mean that the 'owner' can do whatever he or she likes on the land? There are innumerable activities that are forbidden unconditionally or conditionally, or can be carried out only with some form of permission. Is the 'owner' free to dispose of, or refuse to part with, the land as he or she chooses? By no means in all circumstances, either during his or her life or after death by will. Sometimes the answer to some of these questions may be uncertain and will have to be settled by agreement, acquiescence or litigation.

In short, it would be very difficult to describe all the rights and interests in a block of freehold land in New South Wales except by saying that the owner had the rights given to such an owner by the law of New South Wales, subject to the rights given by that law to other persons (including governments) in relation to the land. Even then the description would only incorporate a snapshot of the rights at a given instance. If the description was to be used as the basis of assessing the exercise of rights in the future, it would be necessary to incorporate into the description the ways in which the rights could be changed in the future, by the acts of the 'owner', by authorities with legislative powers, or by courts giving unexpected decisions like that in Mabo.

To describe Aboriginal rights to land without reference to the system of native custom to which they belong would be equally misleading, and would be likely to lead in the long run to dealing with those rights not only
as if they were frozen in their current form, but as though they were similar sounding rights under the general Australian law. Every determination of rights and interests under native title should, as part of the description of the rights and interests, refer to the system of customary law under which they exist and which defines them, and under which they may evolve. Otherwise lawyers will, in all probability, construe them as defined by common law notions.

This discussion calls to mind the not uncommon fallacy that a native title claimant cannot claim exclusive possession under native title if there is someone else, for example, a miner with an exploration permit or mining lease, entitled to use the land. This may encumber the native title, but no more alters its basic character than the existence of leases or statutory rights of entry on to my freehold land alters the fact that the nature of any freehold title is exclusive possession. One should not be deterred from stating the customary title of a community as the right to exclusive possession because of the restrictions that the other system of law may have placed on their use.

**Individualisation**

It is the natural tendency of lawyers to assimilate native title rights to the common law rights with which they are familiar. Communal title is foreign to them, and can easily be overlooked or treated as of no importance. As already noted, the common law is individualistic and craves clear and certain definition of rights, and operates in a society where land is a commodity with a value quantifiable in money terms. The Aboriginal relationship to land is communal, complex, often contingent and negotiable, and part of a spiritual as well as an economic order.

When an individual Aboriginal says 'this is my land', all these things are taken for granted. The Aboriginal is not saying 'I have an indefeasible, alienable fee simple for which I am accountable to no one'. Rather he or she is asserting an important position in a complex web of relationships and responsibilities, in which people may have, as well as very definite rights, potential or contingent secondary rights which may or may not be asserted, and rights to ask or to negotiate which may or may not be exercised.

For example, the succession to the rights of a family or clan which dies out may not be able to be predicted with certainty, although the process by which it will happen can be described. Who actually succeeds may depend on the relative competencies and strengths of personality of individuals and the support they can muster, and the needs and desires of people who may or may not be able or willing to assume responsibilities, all operating within the overarching framework of communal title under a
particular system of customary law. The *Mabo* decision recognised that native custom may be of this indeterminate character, commenting that a point 'may have to be settled by community consensus or in some other manner prescribed by custom'. If such a point does get to a court, the court may have to 'act on evidence which lacks specificity'.

In the *Mabo* decision the High Court bypassed such complexities by declining to rule on individual and clan conflicts, and simply declaring the communal title of 'the Meriam people'. How these complexities are to be written into a Register of Native Title by lawyers used to common law certainties remains to be seen. Fortunately, early drafts of the NTA, which required an entry in the register to state every right enjoyed by every person involved, were changed, and it is now only necessary for a determination of native title to state whether the native title rights confer possession, occupation, use and enjoyment to the exclusion of all others, and those native title rights and interests that the maker of the determination considers to be of importance.

To name every member of the constantly changing group of persons entitled to native title rights in an area of land, and to specify the rights inhering in each member, would often be a task of such extraordinary length and complexity as to place an unacceptable burden on the assertion of native title. Neither is required by the legislation, and judicial attempts to impose such requirements should be resisted, by appeal if necessary.

The present Act will make it possible to follow the example of the High Court in *Mabo* and facilitate the speedy recognition of native title at the highest communal level, leaving the complex rights of individual groups and persons within the community to be resolved according to native custom if and when they arise, and hopefully by customary processes or otherwise without resort to litigation. The destructive tendency to fragment community title into individual titles, against which Judge Ashley McHugh (1994) of the Maori Land Court and the Waitangi Tribunal has warned Australia, may thus be at least postponed, if not forever avoided.

However, this solution is threatened by a number of factors. One is the tendency to fragmentation already existing in artificial 'communities', for example some Queensland DOGITs where the communal title of a customary community may be confused with the statutory title of a 'community council' elected largely by 'historical' residents whose rule is resented by traditional owners. More relevant for present purposes are the adversarial instincts of lawyers who encourage their clients to press their individual or group rights to the exclusion of other interests. In one case, lawyers have asserted that the 'secondary' rights long documented by anthropologists across Australia are a fabrication for political purposes. One may contrast the view of a very experienced anthropologist 'that customary possessory relationships, whether couched in terms of small
groups or individual interests, have communal foundation. The customary-
law land entitlements of smaller entities are granted to them by the society
of which they form part' (Sutton 1995a: 8).

An example of how difficult Australian lawyers find the recognition
of communally based customary law is to be found in the debate about the
Mabo requirement that Aboriginal claimants should be able to show a
continuing association with the claimed land. In the case of Coe, Mason
described the necessary connection as 'physical' (a requirement that did not
appear in the Mabo judgments).13 If the nature and content of native title is
determined by Aboriginal custom, why should it not be for Aboriginal
custom, so long as it continues to exist, to say what connection a claimant is
required to have maintained, rather than for the common law to lay down
an arbitrary rule? Logically, what needs to be maintained is observance of
the Aboriginal custom under which the title exists. The Mabo decision
recognises that custom is not 'frozen' and may change, but if it is 'washed
away', the foundation of the title disappears.14

**Extinguishment or regulation**

Another road to dispossession under cover of recognising native title could
lie in the failure to distinguish between extinguishment and regulation. If a
zoning plan prohibits me from building a multi-storey structure on my
land, it does not *pro tanto* extinguish my freehold title; it merely regulates
my use of it, and if the restriction is lifted, I can go ahead and build. Yet it
is sometimes assumed that restrictions that have applied to land in the past
have extinguished the right to do these things under native title. A good
eexample of regulation is national park status. This does not extinguish
native title, either wholly or to the extent of the inconsistency. If the
national park were revoked, the full native title right to occupy, use and
enjoyment would be there.

A doctrine which said that only the rights to do things which were
permissible under the national park regime survived would not only make
a mockery of the non-extinguishment of native title, but would eliminate
the possibility of sensible land management by the native title holder.
Fortunately, the High Court recognised the concept of regulation in the
Mabo decision, although the facts of that case did not require its
elaboration. In other contexts it will be of great importance.15

**Extinguishment or encumbrance**

It is my view that a similar misconception sometimes arises in relation to
non-extinguishing grants. Suppose a grazing licence has been issued over
land. Lacking the characteristics of a lease, it is unlikely to be held to extinguish native title, but sometimes people speak of such grants extinguishing native title to the extent of the inconsistency. This is taken to the absurd conclusion that the native title holder could, after the licence expired, do everything with the land except what the grant authorised, that is run cattle on it, the very thing for which the land was (in economic terms) most suited.

It is important to remember that extinguishment depends on the intention expressed by the action. How could anyone sensibly argue that to grant someone the right to graze cattle on a property for a year indicated an intention that the native title holder should never thereafter be entitled to run cattle on it?

Someone may ask, then why do leases extinguish native title? Why indeed? The reason given by the High Court was that a lease vests possession in the lessee and the Crown acquires the reversion expectant on the expiry of the term. This begs the question. If the extinguishing effect of an act depends on a clear manifestation of intention (to be found not as a subjective intention in the mind of the agent, but in the effect of the act), why should one assume that the granting of a lease for say a year was intended to extinguish native title forever, rather than simply burden or encumber it for a year? I can lease my freehold for a hundred years without extinguishing it; why should a limited grant not have a similar effect on native title? Why must the Crown have intended to take the reversion for itself, rather than leave the native title holders to enjoy the native title when the burden of the lease came to an end? To hold otherwise appears to require a clear and plain intention to preserve native title, rather than a clear and plain intention to extinguish it.

The fact that so much of Australia was once under pastoral lease gives this issue major importance. As in the Waanyi case, claimants may fail because of the historical accident that their land was a century ago briefly within a pastoral lease. In Mabo, Brennan rejected the old view that sovereignty extinguished native title as unjust by any civilized standard because it 'took from indigenous inhabitants any right to occupy their traditional land, exposed them to deprivation of the religious, cultural and economic sustenance which the land provides, vested the land effectively in the control of the Imperial authorities without any right to compensation and made the indigenous inhabitants intruders in their own homes and mendicants for a place to live'. Yet if the vast pastoral leases granted over much of the Australian mainland last century are held to have extinguished native title, every word of this eloquent condemnation will be equally applicable, except that the land was vested not in Imperial authorities but in colonial authorities, and in graziers to run their sheep and cattle.
The issue is not whether modern pastoralists may lose their properties; their title is secure on any view. The issue is only whether the process of granting them that secure title necessitated a legal doctrine that is, in the High Court's words, unjust by any civilised standard. Surely it would be enough that leases (or at all events pastoral leases) burdened native title, in effect suspending it rather than extinguishing it forever.

Mediation

The NTA requires all accepted native title applications to be referred to mediation by the National Native Title Tribunal (NNTT). This is a commendable attempt to avoid unnecessary litigation, but there are risks attached which need careful attention. The universally favoured Harvard style of principled negotiation, in which parties are urged to forget about their rights, think in terms of their interests, and try to reconcile those with their opponent's interests, has been adopted by the NNTT and has undoubted merit.

But for Aboriginal people, their main interest is to establish their rights after 200 years of denial. To ask them to put aside these rights may leave them with little. They may have had no time to develop 'interests' in land, recognised ownership of which is a novel experience. They may not want to do anything in particular with it at the moment, but it is part of their identity and their trust for future generations. To balance these interests against the tangible plans of a miner or other developer may put unfair pressure on them to surrender something from their native title. To threaten native title holders with long, stressful and expensive litigation if they do not compromise clear rights is nothing short of blackmail.

Don't let lawyers or mediators bully them into being accommodating to other parties by surrendering clear rights without good reason. But, of course if rights are not clear, or only limited rights can be established for the foreseeable future, compromise may be a wise course. The lawyer's instinct for compromising a doubtful case is soundly based on experience of the unpredictability of litigation. What is important is that compromise should be founded, not on a desire to get a quick result, or a belief that agreement is always the best solution, or a convenient assumption that Aboriginal people do not want to make modern uses of their land, but on a sober assessment of the possibilities, and a realistic view of what they will mean. I find it salutary to ask 'What will the children or grandchildren of the claimants think of this settlement when they come home from Law School in ten years time?'
Evidence

Lawyers, including those who have risen to be judges, are creatures of habit and precedent, from which they find it hard to escape even when efforts are made to free them. Don't let them tell you that antiquated rules of evidence prevent a significant part of your clients' case being presented. The laws of evidence do not apply to proceedings under the NTA. And don't let them tell you that because cases had to be presented a certain way under the *Aboriginal Land Rights (Northern Territory) Act 1973* definition of 'traditional owner', the same must apply to native title proceedings. Northern Territory proceedings are shaped to meet the statutory definition of 'traditional owners', and there is no such definition in the NTA. Judicial attempts to require claimants to produce the same evidence in native title claims as is required under the Northern Territory legislation should be resisted if this is inappropriate in the particular case, by appeal if necessary.

It is often said that when a lawyer gets a client's case to court, the client does not recognise it. If this happens in native title proceedings, something is wrong. Native title is not what lawyers say it is, but what native custom says it is. Your job is not to get Aboriginal people to say what the lawyers want, but to get the lawyers to listen to what Aboriginal people want to say. That may be harder, but it is vital if native title is to survive in a recognisable form.

Conclusion

As one involved in the native title process, I hope that in the retrospect of history what we do will be seen as a genuine affirmation of Aboriginal rights to land, and not the final step in their dispossession. I speak as a lawyer, but I am glad to be able to speak to anthropologists because one of your very important functions is to stand up to lawyers, to detect their ethnocentrism and conservatism, and to resist their tendencies either to mould the law to the interests of powerful clients, or to fall victim to the narcissism of their powerful profession. It may be inevitable that some distortion of traditional native title occurs as it is brought under the protection of Australian law, but a courageous and independent stand by anthropologists could be important in minimising the distortion, and maintaining some degree of autonomy for Aboriginal people to adjust their customary arrangements to the powerful pressures impinging on them.
Notes

1. The author is a part-time Deputy President of the National Native Title Tribunal. However the views expressed are those of the author, and are not to be attributed to the Tribunal and its other members.


4. ibid.: 51.

5. ibid.: 98.

6. ibid.: 217.

7. ibid.: 51.

8. ibid.: 190.


10. NTA, s.225.

11. This acronym stands for Deed Of Grant In Trust, a form of freehold title over Aboriginal reserves granted in Queensland to elected community councils in trust for the Aboriginal inhabitants.

12. This term has come into popular use since the Queensland *Aboriginal Land Act 1991* provided for Aboriginal claims to land on the grounds of either 'traditional' or 'historical' association.


15. ibid.: 64.

16. ibid.: 29.