

# **FIGHTING OVER COUNTRY:**

## **Anthropological Perspectives**

Edited by  
D.E. Smith and J. Finlayson

Research Monograph No. 12



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Anthropological Perspectives**

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D.E. Smith and J. Finlayson

**Centre for Aboriginal Economic Policy Research  
The Australian National University, Canberra**

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Diane Smith and Julie Finlayson  
CAEPR  
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## Contents

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Acknowledgments	iii
Abbreviations and acronyms	vi
Introduction	vii
1. Fighting over country: four commonplaces <i>Francesca Merlan</i>	1
2. Anthropologists, Indian title and the Indian Claims Commission: the California and Great Basin cases <i>Bruce Rigsby</i>	15
3. Having it out over Hindmarsh: an essay on the significance of manners <i>Deane Fergie</i>	46
4. 'Recognition and justice': the traditional/historical contradiction in New South Wales <i>Gaynor Macdonald</i>	65
5. Why can't they be nice to one another? Anthropology and the generation and resolution of land claim disputes <i>John Morton</i>	83
6. From humbug to good faith? The politics of negotiating the right to negotiate <i>Diane Smith</i>	93
7. Reflections on Century Mine: preliminary thoughts on the politics of Indigenous responses <i>David Trigger</i>	110
8. Dealing with native title conflicts by recognising Aboriginal political authority <i>Patrick Sullivan</i>	129
9. Aboriginal tradition and Native Title Representative Bodies <i>Julie Finlayson</i>	141
10. The incorporation of 'traditional' and 'historical' interests in Native Title Representative Bodies <i>David Martin</i>	153

11.	Disputes in land: the Northern Land Council experience <i>Jeff Stead</i>	164
12.	Fighting over mining moneys: the Ranger Uranium Mine and the Gagudju Association. <i>Jon Altman</i>	175
13.	Dispute management strategies: suggestions from the Central Land Council <i>Julia Munster</i>	187
14.	Multiplicity and complexity: the Goldfields Land Council's native title experience <i>Jeni Lewington, Steven Roberts and Yvonne Brownley</i>	203
	Contributing authors	215

## Abbreviations and acronyms

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ABTA	Aboriginals Benefit Trust Account
ACA Act	<i>Aboriginal Councils and Associations Act 1976</i>
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
ALRA	<i>Aboriginal Land Rights (Northern Territory) Act 1976</i>
ATSIC	Aboriginal and Torres Strait Islander Commission
CAEPR	Centre for Aboriginal Economic Policy Research
CDEP	Community Development Employment Projects (scheme)
CLC	Central Land Council
CRA	Conzinc Riotinto Australia
CZL	Century Zinc Limited
ICC	Indian Claims Commission
IRA	<i>Indian Reorganization Act 1934</i>
GLC	Goldfields Land Council
KLC	Kimberley Land Council
LALC	Local Aboriginal Land Council
NLC	Northern Land Council
NNTT	National Native Title Tribunal
NSW	New South Wales
NTA	<i>Native Title Act 1993</i>
NTRB	Native Title Representative Body
UGRAC	United Gulf Region Aboriginal Corporation
US	United States
WA	Western Australia



## Introduction

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In the recent context of the *Native Title Act 1993* and the longer-term history of Indigenous land rights in Australia, a recurring issue has been that of disputes about land ownership and usage involving Indigenous people. Complex and often sensitive issues have arisen about the nature and impacts of such disputes, usually in the course of negotiations over resource development or during the preparation and mediation of land claims. The earliest ethnographies indicate that intra-Indigenous disputes over land have probably always occurred. But important questions about disputes within the Indigenous domain remain: Were they endemic? In their past expression, were disputes essentially different in form and conduct to those occurring nowadays? Are contemporary disputes indicative of the continuing vitality of relations to land, or do they represent a breakdown of classical social and corporate group systems? Indigenous conflicts in the past have been characterised by anthropologists as being controlled by the canons of 'equality at arms', 'sufficient retaliation' and 'equivalent injury', and conducted in accordance with an 'immense catalogue' of symbolic and ritualised behaviours (Stanner 1968: 48-9). In the current situation where many disputes involve non-Indigenous parties, an important issue is the extent to which Indigenous disputes over land have been created or exacerbated beyond 'usual' levels and controls by the very statutory processes initiated by native title and land rights legislation.

*Fighting Over Country: Anthropological Perspectives* is an edited volume focusing on these matters and includes papers first presented at a two-day workshop of the same name held in Canberra at The Australian National University, 29-30 September 1996. Sponsored by the Australian Anthropology Society, the workshop had its origins in the recommendations made by participants at an earlier native title conference held in Canberra in February 1995, at which it was suggested that a future meeting be held to consider anthropological perspectives and understandings of land disputes. The resulting workshop in 1996 was given a contemporary theme and application.

The papers in this volume are presented by anthropologists who, collectively, have considerable field research experience, often in the frontline of such disputes. The papers cover a range of perspectives, from those of anthropologists working for representative organisations charged with the preparation and conduct of claims and resource negotiations, to those of anthropologists participating as expert witnesses in royal commissions, court and heritage hearings. The socioeconomic, political and organisational contexts and impacts of disputes over land are canvassed in a number of case studies from urban, rural and remote regions of Australia. Authors focus on disputes between and within Indigenous

groups and organisations; and between Indigenous and non-Indigenous parties (including governments and their departments, private sector agencies, resource developers, and other land owners such as pastoralists and farmers).

To date, a better understanding of the intricacies of these matters has been hampered by the politicised and often very public context within which many land-oriented disputes occur. In some Indigenous quarters, there is a reserve about airing the 'dirty linen' of their disputes and a realisation that such airing inevitably results in areas of restricted knowledge having to be made public. There is also a defensive disquiet in land councils and other representative organisations about the public perception that Indigenous Australians are 'always fighting' with each other over land; a perception that many in the media seem happy to reinforce.

At the same time, the legal and procedural requirements of various land rights and native title legislation mean that what once might have been 'inside' or 'private' tensions between individuals, families and groups are now appropriated into various mainstream forums, be they hearings, royal commissions, negotiations, mediations or court rooms. In the past, there was the possibility that conflicts within the Indigenous domain could be slowly resolved or managed by the flow of time, sometimes over generations, or by recourse to 'traditional' mechanisms and behaviours. Nowadays, time has become a luxury that many Indigenous groups in the midst of volatile negotiations with the State and resource developers can ill afford or obtain. As well, there appears to be an added intensity to disputes generated out of the claims process and resource negotiations. These statutory and institutionalised forums can dramatically alter the nature and duration of conflicts, transforming what were previously low-key rivalries and unspoken grievances into serious dispute 'business'. Unfortunately, Indigenous players tend to be foregrounded in these public disputes; they are inevitably presented as rambunctious and fractious almost by their very nature, as if to be Indigenous is to somehow to be innately unruly (see Morton this volume).

Some of the papers in this volume (see Altman, Fergie, Finlayson, Smith) examine in detail the institutional and statutory contexts in which many disputes over land are now publicly conducted and legally dissected. These provide new settings for playing out old tensions, but also make demands for certainty and systematicity which can override Indigenous preferences for what Merlan calls 'epistemic openness' (Merlan, see also Morton). A number of authors discuss the wider political economy of disputes; in particular, that surrounding the negotiation and distribution of financial and other benefits arising from resource development (see Altman, Lewington et al., Smith, Trigger). In such settings the role of Indigenous political authority and the politics of Indigenous responses can be critical to outcomes (see Finlayson, Sullivan, Trigger). For example, intra-Indigenous politics can be critical to the factors at play in generating and ameliorating disputes, and are evident in the competition between

Indigenous groups for funding to pursue particular disputed objectives; in the strategic use of organisational incorporation to structurally formalise specific land interests against those of others; and in the role and impact of breakaway factions in destabilising organisations (see Finlayson, Martin, Macdonald).

Today there is also a critical internal dynamic to small-scale community life generated by the historical impacts of enforced resettlement and removals; a process now given expression in the so-called 'traditional' and 'historical' peoples (see Martin, Macdonald). These historically created social categories resonate through the daily interactions of Indigenous people in some communities, creating antagonistic alliances and the possibility of real marginalisation. Inevitably, some groups are legally deemed (or deem themselves to be) the right 'traditional owners' or native title claimants for certain areas of country, at the expense of others who may have been locally resident and intermarried for generations, but who are nevertheless classed as 'outsiders' in respect to land ownership. Additional to these interweaving dynamics, the role and impact of external stakeholders (whether they be government departments, legal counsel, the mining industry, media and so on) in these delicate matters of division and discord can be considerable (see Fergie, Trigger).

A number of papers examine the range of practical options initiated by Indigenous groups and organisations for the conciliation and management of disputes, including the increasingly active role played by Indigenous representative organisations in dispute resolution and management (see Lewington et al., Munster, Stead, Sullivan). Certainly the *Native Title Act 1993* has provided a heightened role and set of responsibilities (though these are not mandatory) to Indigenous organisations in the matter of disputes over land and many are exploring new mechanisms and approaches. Mediation has become the buzz-word of the 1990s and many Indigenous organisations are training their own staff to actively conciliate disputes and to negotiate their land-based interests in regard to resource development and land management. A clear theme in the papers is that an overly adversarial legal approach and poorly conceptualised research can entrench antagonistic positions rather than ameliorate them (see Morton, Stead). Accordingly, it is a welcome contribution to see a number of papers give critical consideration to the role of anthropological research, interpretation and theorising in the area of land disputes (see Merlan, Morton, Rigsby). Similarly, the international research and statutory land claim experience in the United States and Canada can usefully assist the understanding of Australian processes and outcomes (Rigsby).

Collectively, the authors point to a number of matters which have important practical and policy implications. Firstly, no two disputes are ever the same; dispute mediation and resolution must be based upon a rigorous investigation of the causal factors and the key relations, perspectives and objectives of the parties involved. Secondly, the

adversarial approach espoused by some legal counsel in the resolution of land disputes is of limited value and, indeed, often exacerbates conflict. Thirdly, there is a limit to the public funding and organisational resources available to underwrite disputing Indigenous parties; priorities will have to be established and publicised. Fourthly, Indigenous representative organisations can play a crucial role in difusing debilitating conflicts over land if they are given more formal statutory powers to resolve disputes and to comprehensively identify the full range of land interests involved in particular claims, disputes or negotiations. Fifthly, Indigenous representative organisations need to establish written policy guidelines and mechanisms for their participation in dispute resolution; and sixthly, formal mechanisms are needed within the context of native title negotiations for the distribution of monetary benefits and the monitoring of agreements, all notable sources of disputation.

In the often fraught context of native title rights and resource development, it is not sufficient to argue that Indigenous people should be able to resolve disputes themselves at the local level. Certainly, in the past, it is at the small-scale, local level that, 'the ties that bound overrode the conflicts that divided' so that disputes could be deflected, avoided, redirected and managed (Stanner 1968: 48). However, while the outcomes of Indigenous disputes lie foremost with the disputing parties themselves, nowadays many of the parties and factors involved operate outside the Indigenous domain and remain intractable to the persuasion of culturally appropriate logic or to the 'ties that bind'.

This volume, as a whole, is a timely consideration of what is a sensitive, highly politicised matter. The immediate outcomes and continuing impacts of disputes over land have potentially fundamental consequences both within the Indigenous domain and for the wider Australian community. Many matters in dispute will increasingly come under public scrutiny and be subject to mounting pressure for immediate resolution. In such circumstances Indigenous people may need access to resources, representation and research; at the least, they should be able to put their respective cases forward on the basis of a level playing field. For all these reasons it is imperative that our anthropological understandings of the generation, exacerbation and resolution of disputes over land - whether they be intra-Indigenous or between Indigenous and other parties - continue to be refined and empirically tested, and be made intelligible to others.

Diane Smith and Julie Finlayson  
Canberra 1997

# 1. Fighting over country: four commonplaces

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*Francesca Merlan*<sup>1</sup>

In February 1996, at a workshop held at The Australian National University, many of us talked about the widespread perception that the conduct of land rights and native title matters has led to increased levels of conflict over relationships to land among Aborigines, and between them and resource developers and agencies of the State. Earlier, Edmunds (1994: 39) had suggested that there has been more conflict over land 'as the material and symbolic stakes have been raised'.

That discussion of last February itself generated some disagreement. Some people took the view that conflict was far too sensitive and heartfelt for the issues concerned to be a matter of public discussion at a forum such as this. Others felt that because it is so pervasive and central to contemporary events, an attempt at systematic discussion should be made. In these two days' gathering we have a strong reflection of the second point of view, but a recognition that the first one is important and demands our constant vigilance.

This chapter reviews four commonly heard propositions concerning conflict over land, expanding most on the last. The first is that conflict over land among Aborigines and claimant groups shows the continuing vitality of relations to country. The second is that conflict is endemic to, and characteristic of, the Aboriginal polity of small scale. The third point of view, commonly heard in some public quarters over development issues, denies Aboriginal claims to land any moral dimension and sees them motivated only by pragmatic calculation. The fourth is that Aboriginal expressions of relationship to land have a constantly shifting, unstable quality which makes needed certainty and finality impossible. Here I am interested in culturally particular forms of what I call 'epistemic openness' which are challenged in changing attempts at legal recognition and codification of Aborigines' relations to land.

Each of these propositions plays a part in the structuring of positions and conflict over Aboriginal claims to land. Each of them can be inflected in a variety of ways and put from a variety of perspectives, both offensively and defensively with respect to perceived Aboriginal interests. My limited purpose here is to show some of the ways in which each proposition, when examined, interpreted and placed into a broader framework, becomes more complex than blunt assertion. This examination makes us acknowledge that the conflict of which we are now so aware is produced not simply within the Aboriginal domain; the new conditions of claim as such, though we cannot simply wish them out of

existence, are a major factor generating the general forms and intensity of conflict we now see.

### **Vitality**

It is often said, particularly by anthropologists, that conflict over land among Aborigines and claimant groups shows the continuing vitality of relations to country, or the 'vigour of Aboriginal society' (Edmunds 1995: 2). While this may be so in particular cases, the generalisation does not provide much clarification. Are there any conflicts which do not reveal some kinds of vital social processes and interests? This alone says nothing about their source or nature - it is an interested statement which does not by itself shed light on the nature of conflict. It seems important to attend to the concerns and intentions from which such statements emanate. Usually, it seems they are meant to reorient those - particularly in government, business or the wider public - who are dismayed by wrangling over land and its possible negative implications towards a more positive interpretation, one that, in particular, constructs a vitality of interests as continuous rather than something determined by current opportunities for claim. The vitality view may have the effect of deferring questions of contemporary conditioning of conflict and actually may help to reinforce the view that in relation to developments such as native title, sources of conflict lie within the Aboriginal domain, as if this could be considered in isolation.

I think we would equally want to reject contrary generalised assertions by some that conflict necessarily reflects uncertainty about title among Aborigines, loss of knowledge, and so on. In some cases this may be so, but we also know that conflict and diversity of viewpoint may exist among those who have the most continuous and traditional-seeming relations to country.

### **The fragmented polity**

A second view about conflict says that it is a consequence of, and expectable in, a polity of small scale, which is constantly prone to fragmentation. The concept of the 'difficulty' of Aboriginal polity has been most thoroughly argued anthropologically by Myers (1986) in his book *Pintupi Country, Pintupi Self*. Identifying as central the parameters of 'autonomy' and 'relatedness', he argues for a kind of 'cultural subject' thoroughly concerned with individuation. But this orientation differs from western individualisms in that it is informed by, and lived out against, a background of dense relatedness. The difficulty of collective action is manifest in the pervasive cultural modes of constituting personal identity.

There has also been more recent writing about the tension between what Sutton (1995) has called 'atomism' and 'collectivism', specifically in

Aboriginal land rights and native title affairs. There is a perception that recent land rights and native title opportunities have stimulated the putting forward of claims on behalf of smaller Aboriginal interest groups, as opposed to more broadly defined ones. Edmunds (1995) has suggested that in the Northern Territory context, increasing Aboriginal use of an adversarial legal system means there is less need for support of any given Aboriginal party or interest by a wider Aboriginal public, and that these things tend towards the sacrifice of 'notions of broader group identity for the pursuit of individual and family interests'. This suggests the fragmentation of Aboriginal society, and individuation or at least narrowing of the scope of Aboriginal interests, political and material.

It is widely observed and relevant that Aboriginal people often do see themselves, in land-related as well as other matters, as acting most interestedly and directly on behalf of what they may call 'family', usually some small- to middle-range grouping of kindred and consociates.<sup>2</sup> This is often so whether they are nominally acting under the auspices of a body corporate actually intended to foster and accommodate broader or collective interests, like the Jawoyn or Gagudju Associations, or whether they are acting outside any such structure. Loose and sometimes shifting federations of such families tend to form, in any event, within such associations.

How Aborigines see such a 'family' grouping with respect to any larger-level and more inclusive identity varies considerably. The pursuit of interests at medium- or small-scale may be carried on within a framework involving notions of shared interests in a broader area of country thought of in terms of some higher-level socio-territorial identity. Many of us have seen cases in which action on behalf of one's 'family' produces conflict and is territorially expansionist and exclusivist, involving a claim that others do not belong to or 'come into' an area. In other cases, claims on behalf of family and kindred are specific and limited, involving the notion that proper behaviour requires recognising the limits of one's own and others' claims. In either case, claims at such levels do not necessarily involve the *sacrifice* of broader notions of group identity but the pursuit of one's interests at other levels, rather than at the broadest ones, in terms of which people may identify themselves.

Often underlying the view of conflict as endemic to the local and small-scale nature of Aboriginal forms of organisation is the assumption of a solidary or 'corporate' nature to groupings at higher levels, which is being fragmented. The idea of the solidary high-level unit is found in some popular assumptions of 'tribe' as corporate. It is quite clear that such a view is ill-informed. Perhaps more common in the anthropological literature has been a different assumption concerning the possibility of locating solidarity and corporateness at lower levels as opposed to higher ones. Thus, it has often been maintained that 'clan' designates empirically 'real' groupings of small scale, and that high-level groupings are progressively

less 'real' and more fictional. As opposed to these kinds of corporatist understandings, certain other crucial ones have recently been introduced.

With respect to higher levels, it is clear that permanent organised confederations did not exist (but neither did permanent lower-level units). 'Tribe' has been reinterpreted as socio-territorial identity, crucially having a territorial aspect but connoting neither solidarity nor corporateness (Merlan 1981; Rumsey 1989). However, it is an aspect of processes of identification which cannot be dismissed as 'fiction' as compared to the 'realities' of clan or other lower-level grouping. Further, it is now also clearer that political solidarity and corporateness are not to be understood as continuous and absolute properties of groupings however small; and that labels such as 'clan' designate particular ways in which people can see themselves as belonging to localised collectivities rather than solidary entities that function in a completely corporate manner (Keen 1994).

All of these post-corporatist redefinitions may seem trivial, but they are not: they are fundamental to dispelling structural notions which lull us into understanding some forms of organisation concretely, without adequately placing them together with others as part of culturally specific ways of making groupings. We need to understand them all as ways of making groupings and producing identities rather than some as types of concrete groups and other as fictions, in order to connect them with our understandings of Aboriginal 'polity' and 'economy'. The general Aboriginal way of life involved greater or lesser impermanence of aggregation, limited in size and shifting in personnel, and social modes of constructing interconnectedness and relatedness (social categories, kinship reckoning and so on) produced in and adapted to life situations of small scale shaped by forms of interaction over wider regions. Notions of 'clan' provided the means for connecting people with country in some ways, while other levels of social identification did so in other ways, to more inclusive stretches of country. The kind of identity which inhered in such connections seems to be most aptly described in terms of belonging to country, rather than the notion of containment within a solidary group. In all these levels of social identification, there is some element of territorial attachment or belonging. The question is, which ones remain recognisable and feasible to Aboriginal people in current circumstances?

While organised interaction calling on the continuous background possibilities of socio-territorial definition at broad geographic scale would appear (before outside settlement or intensive contact) to have been episodic and ephemeral, new circumstances - such as the existence of land rights measures and the definition of areas as claimable - induce new forms of consolidation in terms of identities of this kind. This happens partly in response to what is available for claim, and as a result of the reformulations of social identifications and groupings in terms of which claims might be made; processes which have gone on over decades in which daily life for Aborigines has become more geographically focused



on a few locales and collectively lived out, rather than extended over and intensive in the countryside.

Under the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA) in particular, there have been a number of claims pursued in the name of broad socio-territorial identities (Merlan and Rumsey 1982; Sutton and Palmer 1981; and evidence from some participant groupings in the ongoing Kenbi land claim case). In all of these cases, this has involved people whose concepts of attachment to country at less socially inclusive levels and finer geographic scale is now quite evidently the result of considerable historical contingency and change resulting from outside settlement, and often sits rather uneasily for them with some continuity in the conceptualisation of territorial relations at the level of clan. As Rumsey (1989: 76) observed about the new impulses to consolidation at such broad scale:

Land claim hearings before the Aboriginal Land Commissioner in the 1980s no doubt provide a very different set of conditions from any encountered by Northern Territory Aborigines a hundred years ago ... . There is no reason to expect that what is a relevant grouping under those conditions will remain so in other circumstances.

Thus, it is not so much, or only, that Aboriginal territorial connections are devolving and fragmenting. Rather, on the one hand, that more and less particular connections to portions of country have always been statable in a variety of ways, and on the other, that the new conditions for claim are testing the possibilities for consolidation of modes of identification that were not previously ones of such a degree of solidarity as incorporation implies and requires, but which informed regional systems in a more diffuse way.

Claimable areas are often artificially defined, that is, limits of claim are expressed in terms of pastoral, commercial, governmental or other boundary notions; and many times these contrast, if not outright conflict, with the ways in which Aborigines would construct definitions of areas. From this contrast arise issues concerning how claims to country as Aborigines might state them relate to such bounded areas. There is, of course, also much evidence of historical reorganisation by Aborigines of ways of conceptualising regions and their relations to them, as when pastoral identities as experienced through work and residence come to be foci of definitions of broad areas of country, and around such foci aggregate Dreaming connections, personal and residential attachments, and so on. As these sorts of changes in living conditions have gone on, it has perhaps become increasingly common for what we might call 'diasporic' Aboriginal people, those who originated from elsewhere (and may know this, or others may know it), to make claims to their new location or home-place at least partly in conventional Aboriginal terms (of birthplace, long-term residence, dreaming link and so on), but which may conflict with the claims of those who regard themselves as the original locals. Such conflict,

latent or overt as it may be in changing conditions is, in my experience, common around towns, stations, missions and other locations that have become the new foci of Aboriginal life-worlds, and of forms of claim.

### **Denial of a moral dimension**

Thirdly, there are many assessments of Aborigines' claims to land which deny them any moral dimension and see them motivated only by pragmatic calculation, not to say greed. This view has underlain much conflict between interests seen as Aboriginal ones, versus others - the non-Aboriginal public, developers and so on. Epitomising this attitude is a cartoon that was posted on the front door of the office of the Member for Elsey during the Katherine area land claim. It showed two Aborigines, one saying to the other, 'Wait'll they build something on it before we claim it.' The cartoon implies that all value of the land for the Aborigines lies in the 'improvements', that there is no value in it or attachment to it outside of them, and that their attitude is scheming and calculating.

Though there may be some kinds of pragmatic calculation involved in claimants' actions - how could there not be, dissonant though this may appear to be against the ALRA's religious emphases - there is a problem in unquestioningly assimilating the values involved to one's own (as in the cartoon). The cartoon, for example, assumes a certain history of relationship to money and materiality and all the ideas that surround this. While many Australians readily recognise the notion that there are some things that money 'cannot buy' and that are, or should be, 'above' monetary interest, and intuitively understand certain oppositions between culturally-constructed material and spiritual values, to assume that all Aborigines participate in these concepts in the same way constrains understanding. To attribute to many Aborigines this kind of ideological separation of materiality and spirituality in their contemporary dealings with land appears to be empirically wrong. I have on occasion observed that certain more western-aculturated Aboriginal people presuppose a certain opposition between 'material' and 'spiritual' interests in land as, for example, when individuals of my acquaintance have at least displayed an impulse to not take money or other material benefits where they might be able to receive these, in the name of the higher values of recognition of themselves as some part of a local community, the specialness of relationships to country and sometimes, also, their difference from other Aborigines in that their better material circumstances impose upon them a sense of constraint.

Despite such views as those embodied in the cartoon, there clearly are moral generalisations that many Aboriginal people assume within the claim situations they experience unfolding around them. These have not so much to do with any wrongness they feel in linking connection to land with monetary or other material benefit, as with the wrongness of making

unwarranted claims to country. In a number of cases I have participated in, Aboriginal people have expressed ideas that one should claim what is one's own and it is bad to claim other people's land; but, also, that it is their due to gain benefit from their own land and, therefore, all the more wrong to 'put' oneself into claims and situations where one does not belong. How notions of 'others' and 'one's own' may be defined in such contexts, as well as outside them, can be problematic and fraught with ambiguity, especially in formulations which arise from efforts to find a fit between Indigenous concepts and those of the ALRA (as I have alluded to in the previous section); but an element of public acceptance and public recognition of claims, however put, is clearly of great importance.

To touch on another aspect of conceived moral dimensions of making claims concerning land, I have often heard Aboriginal people in claims contexts experimenting with the notion that one might have to conform to whitefella law to get something back - but that a substrate of Aboriginal ideas and custom persists and, after the land is got back, all the whitefella constructions placed on issues will not matter 'we can go back blackfella way'. This argument has been put, for instance, in response to lawyers attempting to explain what the ALRA requires, a difficult and often frustrating exercise. It certainly involves a degree of systematisation of criteria for claim that may be quite unprecedented as practical usage among Aboriginal people. Partly, such statements reflect Aborigines' growing recognition of a difference between the legalities, and social constructions and practices having to do with belonging and the etiquette of public meetings and disclosures. However, they fail to recognise the extent to which the possibility and then the actuality of claim, formal definition and recognition of interests in terms of western law perhaps also the question of resources or benefits from the land quite dramatically re-contextualise questions about relationship to the land. The notion of quarantining blackfella from whitefella domains and practices as a way of coping with the growing insistence of legalities and formal requirements seems to me to reflect a misplaced confidence on Aborigines' part in the possibility of domain separation in the face of such processes.

### **It keeps changing**

Fourth, the frequently expressed views of Aboriginal relationships to land as having a tentative and constantly shifting, unstable quality - in short, of there being no possibility of an objective and unchanging account of relations to country or, perhaps more accurately, of particular places. Many times this is seen as a problem and, indeed, we know it can produce conflict. No account is necessarily final and, in some cases, an unchanging and neat character of a set of concepts about the landscape may be an indication of rigidification, perhaps even self-conscious formalisation, resulting from the experiential remove of Aboriginal people from it, or the pressured problematisation of human relationships to it.

It is not that there is no stability in accounts of land - far from it. Around the Katherine region, in my general experience people talk about places and Dreaming tracks, and relations to them, in ways that show a great deal of stability over years and changing circumstances. But the point that must be recognised is that in many ways, and perhaps even most strongly where people remain intimate with country as a matter of their everyday living, practical modalities exist for 'new' things, that is things not previously known or accepted in that form, to be identified and interpreted. An example is given by Myers (1986: 64-6) of coloured stones being newly found by some men in the vicinity of Yayayi and quickly linked to a kangaroo dreaming known to be in the vicinity. Such a possibility is a fundamental modality of Aboriginal action, not something incidental. The question is how to understand and evaluate, practically and morally, its operations in the intercultural context in which a great deal of public dispute over land and development issues goes on as between 'Aborigines' and 'others'.

Last year, people I know at a camp about ten kilometres south-west of Katherine noticed a singularly shaped stone lying near the roadside, evidently partly dislodged by some recent grader work. Not at all dismayed by this mundane immediate cause of revelation, their imaginations were captured by the stone's unusual shape. It was shortly suggested that the stone was a dugong, this interpretation 'co-constructed' in relation to the shared knowledge that some people residing locally at the camp came from the Gulf country, making this a socially meaningful and intelligible interpretation. Practices of looking for the stone as one passed by, observing any changes in its colour and condition, getting out and greeting it, relating it to other events and showing it to frequent visitors like myself, rapidly gained currency.

To anyone who has lived for long in an Aboriginal community or camp of this kind, such events as this recognition and subsequent dealings with the stone are familiar, though perhaps not commonplace, for they do tend to create a ripple in the flow of daily life. What was all this about?

Involved here are practices of constant attention to the world around one as part of fashioning that world as one's home in familiar ways, working creatively largely from existing cultural material. In this case, these practices served no immediate instrumental purpose, and did not arise from any pressing issue, and therefore are usefully uncontentious as a first example. I use the term 'co-construction' in relation to something fundamental to Aboriginal modes of invention (Wagner 1975), an epistemic openness to relevance in the social production of meaning. We must reject any understanding of 'context' and, more importantly, any idea of an Indigenously assumed context, as already completely given, and of 'meaning' in such a case as an independent predicate attachable to a context already completely given. 'Meaning' has to be assumed to be something that requires interpretation in the ways that cultural subjects attend to lived experience (Schutz 1977).

A basic cultural construct that separates well-recognised forms of Aboriginal attention to emplaced experience from western ones has come to be known as the Dreaming (and this certainly is a rendition of an Aboriginal concept, or set of concepts, *pace* Wolfe 1991; Merlan in press). We know that in some sense the 'Dreaming' serves as a way of prolonging or extending the duration of potential meaningfulness. It provides both a template for understanding concrete characteristics of place as partly or largely given, as well as a relatively open construct for reading new but related forms of meaning in emplaced human encounters (as Myers' 1986 Yayayi example shows). The Dreaming is often spoken of by Aborigines as an apparently fixed, law-like frame, but the cultural emphasis upon its spatio-temporally durative character provides scope, part of the 'context' if one likes, for the formulation of contemporary meaningfulness - wide scope for interpreting and absorbing elements of lived experience as aspects of the significance of place. Contrast this with cultural constructs such as ones familiar to us, to which a similarly absorbent mode of attention to experience as part of the ongoing construction of place itself is foreign. In these terms, events happen in place, and place and event may become mutually saturated and implicating; but the events get over with, losing their lived duration and are segmented off as part of the past in a place, without potential for extension in experiential time-space outside of human memory. While place and event thus are intertwined and mutually relevant, each remains bounded. This is unlike the concept of Dreaming, through which place and event - what a place may be and what may be said to happen there - remain mutually constitutive.

This phraseology may seem both phenomenological and fuzzy, but it seems to me to address a basic issue of difference as between some Aboriginal modes of orientation to place and the relevance of current events to the meaningfulness of place, as compared with the standards of fixity and stability to which many Aborigines are being held accountable. Some notorious conflicts, or sites disputes, that we have seen in recent years have had as a crucial element of them the encounter between Aboriginal people with this kind of orientation and the fixity demanded by Anglo-Australian law, bureaucracy and business interests.

In sum, the 'frame' (if the Dreaming sort of construct may be so called) which constitutes a relevant subjective dimension for some Aborigines and, to some extent, in their relations to place, is not one of immobility and inherent fixity.<sup>3</sup> What is fundamental is the orientation towards the possibility that significant things can be newly perceived and interpreted, yielding new, or partly new, social objectifications of varying durability and negotiability. The kind of openness in this epistemic attitude has long been epitomised in older Katherine Aborigines' common response to requests when they are as yet unready to specify the meaning of objects, persons and events more definitively: 'Might be something.' The dugong example, above, shows that such openness cannot be seen as existing outside the specific forms of consciousness of conditions, personalities,

and opportunities for reinforcing, creating and transforming social relationships - it is in contact with the basic materials of local politics.

Consider what seems to be another instance of this kind of culturally distinctive tendency within what was a much more highly pressurised situation, the Coronation Hill dispute. The developers wanted to know had the Dreaming figure Bula been clearly and definitively associated with precisely that hill before all the trouble started? Had the minerals now revealed to lie beneath the hill been previously identified with his blood, as some remarks of the custodians seemed to suggest, or not? Developers, pastoralists and miners long in the region, among others, argued that what was being said about Coronation Hill had only been said recently. Coronation Hill had never been a place of any importance and the 'real' Bula site lay far away enough to be irrelevant. Ron Brunton asserted that the 'relevant' details of the Bula story - that is, presumably those to do directly with Coronation Hill - were no more than a decade old (Resource Assessment Commission 1991: 174).

The problem is, of course, what one assumes to be the relevant details, which for Brunton amounted to a restricted definition of Aboriginal interests and concerns. It is important to observe that interpretive variability concerning place, where it seems to have a degree of regularity and thematic predicability, is not a matter of free fantasy, but occurs in typical and established modes of expression, and serves to construct or reformulate locally understandable representations of relationships to country. In the Coronation Hill case, the perception of the numinous and dangerous quality of a larger area of the upper South Alligator Valley including, in my experience, the Hill, was clearly of long standing, reproduced most coherently and in personal knowledge of the countryside by the three principal custodians who emerged to national prominence. It is against this background that there was observable variation in what these men said at particular times.

Consistent with the implicit acceptance by the Resource Assessment Commission (which, as suggested by Levitus (1996), the various anthropologists had a role in shaping) that such questions might not be answerable in that form, was their recognition that an 'unusually high level of explanation has been both stimulated among and demanded of senior Jawoyn people', and that what had been said about Coronation Hill was consistent with (and they quoted Klaus Koepping (1988: 400)) the 'tremendous vitality and adaptability which is present among Aboriginal religious concepts' (Resource Assessment Commission 1991: 174). Such acceptance that one is in the presence of different modes of relating past and present is fundamentally important. I do not think, however, that generally improved understanding of the creativity in Aboriginal orientations to place can or should dispel all questions in the anthropological and wider community about the extent and nature of their relevance and character today. Other issues also demand consideration, such as the undoubted but uneven and little understood transformation of

modes of action and of consciousness, even through such episodes as Coronation Hill.

Questions of this sort can only be addressed through close familiarity and interpretive attention to a social scene and its people, along with an informed historical sense of their situation; none of us would want public assertions of our veracity and attitudes on particular matters to be made on a lesser basis. The paradox must, however, be recognised (in Coronation Hill as perhaps also in the Hindmarsh Island case, though I am not at all familiar with the character of that situation in senses I refer to and consider relevant), that development and other such imperatives constitute the very circumstances in which such modes of 'co-construction' of meaning and context may be stimulated and also run smack up against refusal to accord them any credence or legitimacy.

No simple formulaic anthropological response is possible to the questions of authenticity and situational development that tend to rage around particular current sites disputes: such situations require some amount of involvement and analysis by any anthropologist charged with formulating some notion of 'relevant context'. But though such issues cannot be resolved in any mechanical fashion, anthropologists can shed light in general on what may be involved in such cases that may help to supersede regular accusations of strategic calculation and falsification often levelled at Aborigines (and anthropologists themselves). Very often, genuine rather than spurious matters of intercultural difference and conflict are involved.

Also in relation to the issue of instability in formulations of claim, we need to heighten awareness of the differences between those of us who expect or hope for systematicity in Aborigines' relationships to country (and anthropologists here may keep company with developers, government agencies and others), as opposed to the kinds of formulations to which Aboriginal people give expression from lived experience. Myers (1986: 127) terms a 'cultural logic' the numerous reasons that Pintupi may give for referring to a place as one's 'own country': conception at a place A, conception at a place B identified with the same Dreaming as A, conception at a place B whose dreaming is associated with the Dreaming of A, initiation, birth or conception at A, or any of those possibilities as they apply to close relatives, and so on.

It can be seen that the kind of epistemic openness characterised above is here given ample, even if somewhat structured scope. Any number of reasons are plausible ones for claiming connection to country, and the way in which one presents oneself may co-vary with other aspects of circumstance. Nevertheless, in general and in particular, some of these bases for claim may be locally argued to have greater weight. However this may be, the cultural logic constitutes a set of reasons that can be drawn upon, rather than a highly systematic, coordinated set of criteria with rule-like or logical implications. While each element has cultural salience, they do not exist as a systematic set which Aborigines discuss abstractly. The

'system', if such we wish to call it, consists first in the typical criteria themselves, and second, in the ways in which they are brought to bear and evaluated in action - the latter less highly objectified than the criteria themselves and, therefore, much more difficult for analysts to grasp. The criteria and ways of applying and evaluating them are elements of a practice in which what tends to be indispensable are specific, known people, social identities and areas of country. The application of any criterion tends to be selective rather than systematic and universalising. Just as I have argued that Aborigines, in their uses of some notions of grouping, do not presuppose the notion of this constituting a bounded whole and find having to do so now (for example, in the context of incorporation) fraught with practical difficulties, so no criterion of relationship to country is applied in a completely exhaustive and bounding way.

It may be said, for example, in some areas like the Western Desert that people can claim as their 'own' the place where they were born. But this does not necessarily mean that local practice is to apply this criterion exhaustively so as to include as equal 'owners' all those people who have been born there; indeed, some may not be included, or equally included, in a given reckoning, leading to many forms of variable account.<sup>4</sup> Again, it is possible through systematic inquiry to determine distributively who is considered to be affiliated with a given socio-territorial identity - but this does not mean that all people who are so designated will be exhaustively and equally designated as belonging to any particular area of land, large or small.

It is also common, in my experience, for criteria of relationship to be used in practice in a relatively uncoordinated way. For example, I have heard members of one family, with exclusionary intent, accuse members of another of not belonging to a particular area because 'your father doesn't come from here', when this very same accusation could be levelled at themselves. The charge was levelled without any seeming recognition of possible reciprocity. But why this was so was clear: the framework was long-term inter-family tension of which claims of relationship to land were an integral element. The immediate intention of the damaging remark was to affect the standing of the prominent family against whom it was levelled. Lack of paternal connection was invoked as part of a specific practical, oppositional positioning, not as an element of a larger analytic framework in which the implications were fully thought out.

Attempts to develop notions of Aboriginal land tenure 'systems' - a term which might be better applied to self-regulating natural phenomena than to human social relations - may encourage anthropologists to derive locally typical criteria of belonging and apply them in universalising and exhaustive ways in order, among other things, to be fair-minded according to our lights. Part of the effort, too, is to constitute 'Aboriginal' social relations in ways that are redirected outwards towards external and, for many Aborigines, more abstract or less directly experienced kinds of social



institutions and identities, like those of corporate bodies, and mediated by these and other State-linked institutions. But we cannot lose sight of the fact that Aboriginal practice tends to be practically and personally oriented, rather than synoptic in nature (see Bourdieu 1977 on the general problem of this disparity). We also cannot ignore the fact that the very claims context may make new demands of absoluteness and systematicity which themselves may be a major factor in generating the forms of conflict we are considering today.

### Notes

1. I would like to thank David Trigger for comments on the conference draft of this paper.
2. At the conference, Jeremy Beckett also pointed to the centrality of notions of 'family' for many Aborigines, suggesting that versions of this concept become increasingly important as transformations of other kinds of kin grouping.
3. I say this realising fully that Aborigines often insist on the immutability of Dreaming and Law, both in general and often in specific instances as well. Myers (1986) discusses the negotiated quality of Pintupi social life against a background of assertions of the fixity of Law.
4. During the conference, Lillian Maher gave examples of recent overlapping claims in South Australian native title cases in which each claimant party uses a single dimension to define its relationships to areas of country in a way understood to be exclusive of others, and some claimants seek initiation into the 'Law' in distant Northern Territory communities where ritual is practised in order to legitimise their claims. In light of the fact that Aboriginal claims in many other areas are made on multiple bases, this appears as simplification and rigidification of the bases of claim, and the rise of absolutism which is not typical of local politics in the Katherine region.

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## 2. Anthropologists, Indian title and the Indian Claims Commission: the California and Great Basin cases

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### Introduction

The dispossession of American Indians and the transfer of their lands to the United States (US) and its settler citizens had much the same outcome as the dispossession and transfer of land in Australia, but there are considerable differences of detail. In both countries, the Indigenous peoples lost the bulk of their land. However, the US Government negotiated and signed treaties with Indian groups from its early years until 1871, and it also recognised earlier treaties with respect to territories that it inherited from Britain and acquired from France, Spain and Mexico.

From 1783, when the American Revolution ended, to 1900, the American government acquired over two billion acres of land from the Indigenous tribes and nations. It bought half this total by treaty and agreement at an average price of less than 75 cents per acre. It gained another 325,000,000 acres (mainly in the Great Basin) without any cost, by Acts of Congress and Executive Orders. It got another estimated 350,000,000 acres in the original 48 States and most of Alaska's 375,000,000 acres without cost and without any agreements or even unilateral actions to extinguish the Aboriginal title (Barsh 1982: 7-8).

When the last treaty was signed in 1868, there were 140,000,000 acres left in Indian hands, distributed over about two hundred reservations, mainly west of the Mississippi River. Indian people lost a further 86,000,000 acres of land under the General Allotment Act (also known as the Dawes Severalty Act or, simply, the Dawes Act) of 1887. Under this Act, after individual allotments were made to tribal members, large amounts of tribal land were declared surplus to needs and sold. The process continued until 1934, when the Act was terminated (Jorgensen 1978: 12-17; McDonnell 1991; Rosenthal 1985: 36). Many tribes were left with land that was not useable due to checkerboarding,<sup>2</sup> complicated land titles,<sup>3</sup> overgrazing, erosion and lack of irrigation.

There was a major shift in Indian policy from the appointment of John Collier<sup>4</sup> as Commissioner of Indian Affairs in 1933. It received legislative expression in the *Indian Reorganization Act 1934* (IRA). In general, Collier encouraged the revival and strengthening of Indigenous cultures and groups, including the purchase and rehabilitation of Indian lands (Clemmer and Stewart 1986: 546; Kelly 1988: 72-74; and Stewart 1977a). There was constant opposition to Collier and the IRA, and in the

Republican-dominated Congress of the first Eisenhower administration of 1953, measures were introduced and passed to terminate federal control over Indians.<sup>5</sup>

### **The Indian Claims Commission**

Prior to the establishment of the Indian Claims Commission (ICC) (Pierce 1977; Rosenthal 1990) in 1946, Indian tribes had to get special legislation from the Congress to present their cases to the US Court of Claims.<sup>6</sup> The ICC was meant in part to overcome discrimination in this process as tribes differed in resources and effective spokespersons. It also was seen as a means to resolve the matter of Indian claims and grievances once and for all, an aim consonant with the termination policy 'to get the government out of the Indian business' (Lurie 1957: 57).

The ICC initially had a chief commissioner and two associate commissioners; the Indian petitioners were represented by their own lawyers<sup>7</sup> and the US Government was defended by lawyers from the Department of Justice. The Commission had its own rules of procedure, but followed the rules of evidence of the federal courts. In 1967, the Commission was increased to five members (Lurie 1956: 56; 1978: 100-101).

The ICC Act defined potential petitioners as 'any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska'. Anthropologists often differed over the definitions of these terms and their applicability in particular cases (Lurie 1957: 60).

The ICC Act provided for the establishment of an 'Investigation Division' to search for documentary and written evidence amongst government and Court of Claims records, but it was never set up. Another section allowed the taking of depositions from Indians and others who had direct knowledge of the claims. The ICC Act (Lurie 1957: 62) permitted five kinds of claims (*Section 2, 60 Stat. 1049*):

- i claims in law or equity arising under the Constitution, laws, treaties of the US and Executive Orders of the President;
- ii all other claims in law or equity, including those sounding in tort, with respect to which the claimant would be entitled to sue in a court if the US was subject to a suit;
- iii claims which would result if the treaties, contracts and agreements between the US were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognisable by a court of equity;
- iv claims arising from the taking by the US, whether as a result of treaty of cession or otherwise, of lands owned or occupied by

claimant without payment for such lands of compensation agreed to by the claimant; and

- v claims based on fair and honourable dealings that are not recognized by any existing rule of law or equity.<sup>8</sup>

The meaning of the fourth clause was argued until it was confirmed that the ICC did have jurisdiction to hear claims based only on Indian title, where there was no recognised title; for example, recognised by treaty. The Department of Justice tried to eliminate such claims when the Act was being amended for extension for five years beyond 1957. The question hinged on the outcome of two cases, *Tee-Hit-Ton Indians v. US* (1955)<sup>9</sup> and the *Otoe and Missouri* case (1953). The first case held that Indian title was strictly possessory, not proprietary, and was not compensable as property under the Fifth Amendment to the Constitution of the US. In the second case, the Commission recognised the government to be liable under Indian title, the government appealed to the Court of Claims, which upheld the initial decision, and the Supreme Court declined to review the case (Lurie 1957: 63-65).

Indian groups filed 370 petitions by the 1951 deadline, and these were separated into 615 dockets, as many included more than one cause for action. The number of actual claims was estimated at about 850 (Lurie 1957: 100; Price 1981: 22). By June 1977, the ICC had awarded \$657,000,000 in 285 dockets before lawyers' fees were deducted, but the government's cumulative costs and expenses for the claims must have been greater (Lurie 1978:101-102).<sup>10</sup> Awards ranged from \$2,500.00 (Ponca, Docket 324) to \$29,000,000 for the eight combined dockets of the Indians of California (Dockets 31, 37, 176, 215, 333, 80, 80-D and 347) (Lurie 1978: 102).

Lurie (1957: 59, 1985: 370-71) observed that Indigenous oral evidence played little role in the claims cases. This was for several reasons. The lawyers found it 'frustrating' to examine Indian witnesses, presumably because they (the lawyers) were not skilled in cross-cultural modes of information-seeking and communication (Lurie 1985: 376-77). As well, where there were Indian witnesses with good knowledge of oral tradition, they wanted to digress and talk about other grievances (Lurie 1985: 371), and this made the lawyers uncomfortable. Beyond this, the Commission dealt with questions of occupancy and use in the periods long past when treaties and agreements were negotiated and/or whites dispossessed the Indians, and the lawyers evidently placed little weight on recent Indian oral history testimony. They found it easier to deal with anthropologists as surrogates for Indian witnesses. The anthropologists had got their information from Indian people who had since died, they had special skills for interpreting primary documents and integrating them with ethnographic and archaeological research to produce comprehensive results, and they had previously done and published research independently of the claims cases. They were more tractable, less troublesome witnesses to deal with.

Similarly, there were a number of historians who joined in the work and they too used the anthropological literature in interpreting the documentary record. So it was anthropologists and historians who assumed prominence as experts in preparing claims reports and in giving evidence of fact and opinion.

We restrict ourselves here to the claims cases for California and the Great Basin. These were cases where Indian title had to be proved. They were also cases where a substantial number of well-known anthropologists worked for either side and there is substantial documentation and discussion in the secondary literature that we can draw on.<sup>11</sup>

### **The California claims cases**

Although the US Government signed 18 treaties with 139 California Indian groups in 1851-52, the Senate rejected them and hid them away in secret files until 1905. The Federal Government dealt with the California Indians by establishing 117 reservations by executive order with land taken from the public domain or purchased with federal funds. The California Indians brought suit against the Federal Government in 1928 in the case K-344. In 1944, the Court of Claims awarded the plaintiffs \$17,000,000, but it was offset by \$12,000,000 the government had spent for their benefit. Most of the money was distributed in per capita payments of \$150 by mid-1971 (Stewart 1961: 182, 1978: 705-6; see also Cohen 1947: 36 and Heizer and Almquist 1971: 136). The ICC Act enabled the Indians of California to bring an action to get payment for the 91,000,000 acres not covered by K-344. It took almost 20 years before all the California claims were combined into Dockets 31-37 (Stewart 1978: 707). The main hearings were held in Washington (two months, 1949-50), Berkeley (two weeks, 1954) and San Francisco (two weeks, 1955), making a total of 38 days of evidence-in-chief, cross-examination and re-examination. The transcript ran to 3,838 pages (never published, but held in archives), there were 469 petitioner (some listed and/or reproduced in Heizer 1978a) and 160 defendant exhibits (some published in the Garland volumes) (Stewart 1978: 707; see also Heizer and Kroeber 1976: 38, 64).

Kroeber, Barrett, Gifford, and Heizer (Heizer and Kroeber 1976: 38) testified for the Indians (see also Stewart 1961: 185). Beals, Driver, Goldschmidt, Halperin, Steward, Strong and Wheeler-Voegelin testified for the government (Stewart 1978: 707; see also Beals 1985: 142 and Heizer 1978a: iii). All were former students of Kroeber, some were former classmates, and some were colleagues. Also, Kroeber invited Stewart (also a former student) to Berkeley to advise him on matters of expert witnessing, and Stewart served 'as Kroeber's understudy during cross-examination of the witnesses for the Government in ... September, 1955' (Stewart 1961: 185).

The petitioners' experts prepared submissions that combined earlier recorded ethnographic, archaeological and historical data 'to demonstrate

the fact of Aboriginal ownership, exclusive use, and occupancy of lands lying within tribal boundaries' (Heizer and Kroeber 1976: 38; see also Heizer 1978a: i-ii). Kroeber wrote his 'Basic Report on California Indian Land Holdings' for Dockets 31-37.<sup>12</sup>

Kroeber (1954: 92) described the 'basic, politically independent' land-owning unit in California as the 'tribelet', averaging about 250 people (ibid.: 100). He estimated there were perhaps five to six hundred such groups in Aboriginal times and noted that data on them was uneven. Kroeber (ibid.: 92-100) described the characteristics of tribelets, sketched some examples, and wrote (ibid.: 99) that they were the 'basic political and social units', like 'State or Nation among ourselves'. Their most constant feature was 'their unity and solidarity of spirit; the sense they were one people with common fortunes'. Kroeber (ibid.: 100-101) described collectivities of tribelets as being like nineteenth-century European nationalities, instancing the Germans (as 'Prussians, Bavarians, Saxons') before unification in the last century. He recognised 21 such non-political ethnic nationalities 'or larger ethnic units' in Aboriginal California.

Kroeber (ibid.: 106-108) also discussed the roles of chiefs, and he spoke unequivocally of land ownership when he said (ibid.: 108-109) that each tribelet owned 'a certain tract of land ... All claims to the contrary, namely that there were no boundaries, or that each band or group roamed where it would, are complete misunderstandings of fact'. He presented six kinds of evidence for the ownership of land:

- i Occupancy. The group resided on its own estate, used it for subsistence mainly, and also for 'travel, recreation, exploitation of mineral [and other non-food] resources' (ibid.: 108-109, 118-19).
- ii Conceptual claim to land and authority over it. Owning groups 'resented' infringements of their rights to land and would use force to deal with it, if required. Friendly visitors were generally welcomed and given permission to hunt, etc., if they asked. If others came at night or by stealth they were, minimally, reprimanded, and perhaps attacked and killed when relations were already hostile. Kroeber stressed that owners especially resented trespass (ibid.: 109-10).
- iii Invitation to share. When owners had a good season of whatever, they formally invited their neighbours for an occasion and played host to them with food and entertainment (ibid.: 110).
- iv Permanent boundaries. The estates of owning groups had stable boundaries over time (ibid.: 110).
- v Definite boundaries. Estates had definite boundaries, marked 'by traditional and natural landmarks' (ibid.: 111). They tended 'to consist essentially of a stream or creek drainage, or of a section of the length of a river valley' (ibid.: 111-12).

- vi Private [better phrased as individual] ownership of land. This item is not really evidence for ownership, but Kroeber said (*ibid.*: 104) there was '(p)private ownership in the capitalistic Northwest', where there was 'an extreme particularism and individualism' and '(t)he idea of ownership was so strongly developed as to be extended to sources of food supply', such as fishing spots, oak groves, shellfish beds, which were 'in private ownership' (*ibid.*: 106). They could be traded, bought and sold, or 'ceded in a settlement or marriage contract' (*ibid.*: 113).<sup>13</sup> Otherwise and elsewhere, ownership was by tribelet, family group or individuals on behalf of families. Where private ownership existed, it was superimposed upon basic communal ownership and did not 'obliterate' it (*ibid.*: 111-12).

Kroeber also observed that there was really no uninhabited land: some land was used intensively, some was used less and some was used little at all (*ibid.*: 91), but groups used their entire territories 'in one way or another throughout the year' (*ibid.*: 113).<sup>14</sup> Even country that appeared empty and unused might be an area where game lived and reproduced (*ibid.*: 113-14). He added that every estate included special areas such as where spirit-beings had left their marks. Some special areas were dangerous, while others could confer blessings when prayed to. 'There must have been literally tens of thousands of such natural features or spots throughout California having magical or legendary meaning and significance' (*ibid.*: 119). Kroeber's report (*ibid.*: 120) concluded:

Briefly, the Indians lost the overwhelming area of their lands; with these, their main habitual subsistence; and with the going of this, they lost their way of life, their own culture. All this was taken from them generally without compensation, redress, help, or any but mere pittance of opportunities for readjustment and a new way of life.

In Docket 347, the Pit River Indians presented similar evidence of occupation and use and had it accepted by the Commission (Stewart 1961: 186, 1978: 707). On the government side, Beals (1985: 146) described a 260-page preliminary report<sup>15</sup> and a later fuller 1,155-page report<sup>16</sup> that his team produced for the defendants. I have not been able to consult these volumes, so I rely upon Beals' account. Beals (1985: 141) wrote:

[E]arly in the research it became clear that land ownership in western legal terms was meaningless. Rather, ownership involved rights of usage, reflected most clearly in such things as family ownership of particular oak trees or, in the desert, of particular seed-bearing areas, or the location of fishing locations. This was supplemented by some ideas of exclusive group rights to the use of the resources of a given area.

Although both sides used Kroeber's linguistic area map of California,<sup>17</sup> Beals did not believe that it really represented the effective land-using groups. Beals (1985: 139, 141) accepted Kroeber's view that the tribelet was the main such group, despite difficulties in generalising about



it, and he too noted that groups among the Shoshonean Basin peoples were less structured, while the riverine Yumans had larger-scale organisation.

Beals and his team developed an ecological approach that built on the distinction between 'home range' and 'extended range', which Linton (1936: 210-12)<sup>18</sup> had earlier adumbrated. Beals thought the approach might uncover 'the existence of essentially unoccupied areas, particularly where extensive population declines had occurred under Spanish or Mexican rule' (for the US Government was not responsible for the taking of land by the previous colonial powers). Beals' team's approach was not so much to question occupancy as such. Instead, they hoped to influence 'The amount of recompense received by the Indians'; that is, they wanted to reduce it (ibid.: 141).

Beals said that in one sense the question of occupancy did not arise in the claim because the modern State boundaries defined the Indian estate, minus certain desert areas that went with the Great Basin groups, but his team tried to show that differences in intensity of occupation labelled as permanent, transit, seasonal and 'probably ... never visited' (for example, some higher parts of the Sierra Nevadas) were meaningful in native terms. As well, '(t)ransit rights by other groups were restricted, or sometimes limited to special purposes, casting doubt on the assumption that all Indians held the state equally' (ibid.: 144).

Bean and Vane (1984: 239-41) said that Beals and Hester's ecological researches (plus Beals and Hester 1958, 1960, 1974) were the first good synthetic studies of California ethnography, not superseded by the California volume of the *Handbook of North American Indians* (Heizer 1978b). Their work remained 'one of the finest attempts at describing native California cultures in ecological terms that has been published to date'. They 'broke away from individual tribal description and unrelated facts' to develop a new systematic overview of California ethnography. Beals wrote further:

Clearly the data collected and the manner in which they were presented correspond to an established plan and theoretical viewpoint. It is also presumably obvious that this theoretical viewpoint was not derived solely from scientific considerations but was heavily influenced by the needs of the defense. There was no conscious suppression of data; for example, we emphasized the different nature of concepts of possession or occupancy and cited examples of sharing of resources whenever the data were available, but we also included any data suggesting exclusivity as exemplified by the use of force, although when we could, we emphasized the different Indigenous conceptual reasons for these actions.

The more significant point perhaps is not only I but the entire research staff over time became unconsciously biased toward the defendant's needs. In the adversary relationship the government became 'our' side (Beals 1985:147-48).

Beals said that his team did not develop adversarial attitudes toward the claimants' anthropologists. They were all former Kroeber students, often fellow students or colleagues, and all were aware they were dealing

with the same basic data, but with differing theoretical assumptions. He continued:

Basically 'they' were trying to demonstrate that all the territories available to a given group were essential to their well-being; 'we' were trying to show from the same data that parts of the area were of little or even no use. The key point, I suppose, is the meaning attached to the word *use*. In any case we were all on friendly terms, and while carefully did not discuss the case with each other, the two groups or parts of them often had lunch or dinner together .... a behavior that worried the lawyers on both sides no end (Beals 1985: 148).

Ralph Barney<sup>19</sup> called Beals as the first and chief anthropological witness for the defendants during the San Francisco hearings and, over three days, examined him in order to put their position onto transcript. Beals (1985: 149) does not say who cross-examined him, but he found the experience 'grueling and emotionally and physically exhausting. [He] was outraged and felt degraded'. He said that it led him later to interject comments that angered the Indians' lawyer. It also 'appalled and enraged' the other government anthropologists and upset Strong to the point of illness. Beals learned later that the experience distressed Kroeber too, and the latter told his side's lawyers that he would refuse to give evidence if they continued to browbeat and badger the opposition. Beyond objecting to such treatment of others, Kroeber knew that Barney would work him over if they persisted, and this might have an impact on his heart condition. When the hearings resumed after a weekend's recess, the situation changed markedly. The cross-examination was sometimes waived, sometimes perfunctory, but never again aggressive (Beals 1985: 151).

Beals (1985: 151) noted that the hostile cross-examination led him and his fellows to become more committed to the government position, and he believed that some of the opposition anthropologists 'experienced some alienation and more sympathy for the government position'. The adversarial situation influenced their emotional and intellectual commitments. Beals reflected that '(t)he ideal role of the expert witness should be above the conflict theater', and he proposed that a better solution would be 'a panel of experts who would jointly consider the issues and the available data and bring in a common report' (Beals 1985: 152).<sup>20</sup>

Kroeber was examined and cross-examined for three hours a day over ten days; he was 'an exceptionally impressive witness' (Stewart 1961: 185).<sup>21</sup> It fell to Heizer (Heizer and Kroeber 1976: 39) 'to give the direct testimony in rebuttal and submit to cross-examination in our anthropological evaluation' of the government's ecological approach.<sup>22</sup> He and Kroeber planned the way his evidence-in-chief would proceed, and he felt that Kroeber would have been a better witness. Perhaps Kroeber declined the role out of concern for his heart condition. The transcript of Heizer's examination-in-chief and cross-examination was published in Heizer and Kroeber (1976: 40-64). Heizer observed that he and Barney 'spurred a bit ..., and in this I did not come off well' (Heizer and Kroeber 1976: 39), but he and Kroeber believed that his evidence influenced the

Commissioners to reject the government position and lean towards the Indigenous evidence recorded earlier and independently of the hearings.

At some time, Barney produced a letter of Kroeber's, written when he was considering working for the government and before he decided to work for the Indians. Beals wrote:

In this letter, Kroeber outlined almost exactly the same ecologic approach we had developed. Faced with this letter (and about as discomfited as I ever saw Kroeber), under cross-examination he admitted the validity of the ecological position and conclusions derived from it (Beals 1985: 148).

In 1959, the ICC ruled that the legal entity 'Indians of California', accepted for the claim, was an 'identifiable group' and it removed almost 9,000,000 acres from the claim which had been granted and had its Aboriginal title extinguished by the previous colonial powers, Spain and Mexico. In ascertaining what lands the Indians of California had occupied and used, the ICC said:

We believe the study of the economic resources of the state and their relationship to the quantity of land required to support the Indians in their way of life has value in understanding the economic picture. However, we cannot accept the Government's thesis [i.e. the ecological approach] that resources of the state or any part thereof can be determined mathematically by assigning a large percentage of subsistence derived from a small part of a given territory and reduced percentages of subsistence in other areas of a territory claimed by a particular tribelet. The testimony and the ethnographic literature, of which there are volumes of evidence, show that the Indian groups ranged throughout their respective territories in their gathering, hunting and fishing excursions. While these Indians were never considered nomads, their exploitation of the available resources in a given territory required frequent and extended travel within the territories claimed. We believe it unrealistic and contrary to the Indian mode of life to restrict Indian territorial rights to the lands which would simply provide adequate subsistence and disallow their land claims to the areas which were of secondary importance or supplemental to the main source of supplies. We suspect territorial expanse was as much the desire of these primitive peoples as it is characteristic of the white man for there is much ethnographic evidence that the Indian groups in California moved about their respective domains gathering wild foods as they ripened or captured available game, and during a normal season would visit and use the whole territory to which they asserted ownership as their exclusive places of abode.

We know of no decision by the courts or the administrative officers to the Government which limited Indian land claims to those lands which provided them with the common necessities of life. The requirements of the Indians were so varied that they could only be obtained from a large area for salt, edible seeds and insects, flint and other important supplies were in most cases not available in the confined areas of valleys but obtainable from desert areas.<sup>23</sup>

The ICC also found that the Indians of California had 'Indian title to these lands by virtue of the Act of March 3, 1851'. In the end, the attorneys for the Indians and the government negotiated a compromise settlement of \$29,100,000 for 64,425,000 acres (Stewart 1978: 707; see also Heizer and Almquist 1971: 136). Heizer (Heizer and Kroeber 1976: 65) noted that this

amounted to 47 cents per acre, down from the \$1.25 per acre the Indians received in settlement for K-344.

### **The Great Basin cases**

In the Great Basin, US Government officials negotiated a number of agreements and treaties (of peace and friendship, not of land cession) with Indigenous groups between 1855 and 1868, but the Senate did not approve any of them because they had not been authorised in advance (Clemmer and Stewart 1986: 527-28, 553). Basin groups also lost much land during the operation of the Dawes Act. Table 3 gives details of the alienation of reservation lands left over after allotment and, of course, many Indians lost or sold their allotments (Clemmer and Stewart 1986: 543-46). Some 22 Basin groups brought 32 separate actions before the ICC. One (Southern Ute, Docket 328) was dismissed and four (Northern Paiute 87-A; Western Shoshone 326-A; Northern Shoshone-Bannock 326-C) were transferred to the Court of Claims. See especially Table 5 for details. They received some \$137,000,000 for their lands and other resources taken, but the Western Shoshone declined the \$26,000,000 awarded them. Figure 11 shows the areas where the ICC recognised 'original tribal occupancy'; that is, Indian title (Clemmer and Stewart 1986: 550-53).

I have not been able to read the documents and records of the several Basin cases, but have relied upon secondary sources, mainly Stewart (1955, 1968, 1977b) and Stewart (1966, 1979, 1985).

Stewart (1955: 295) noted that he and Stewart differed in the Northern Paiute case. Stewart had argued that the 'bands' and 'chiefs' mentioned in earlier records and by informants were pre-contact traits that continued after contact. Stewart countered that they were post-contact phenomena and he said the case 'illustrated the hopeless inadequacy of using 'nation', 'tribe', 'band' and 'chief' to convey any precise meaning'. For his part, Stewart wrote:

In the Great Basin and California, where no treaties had been ratified by Congress for 'extinguishing Indian title' of the lands, under the legal theory of 'Aboriginal title', any 'identifiable group of Indians' could present a claim for compensation for their land which had been held under 'Aboriginal title' if they could describe their territory and demonstrate that they had 'used and occupied a definable area' at the 'exclusion of all others'. The phrases just used are the legal phrases which have been tested through other court cases and have been accepted by the courts according to the precedent established by the Supreme Court of the United States as defining the basis for American Indians owning land. Thus in the majority of the Indian Claims cases, the obligation to establish the territorial limits of an area was one of the primary obligations for the Indians if they were to receive any compensation (Stewart 1966: 167-68).

The exceptions involved groups that had signed treaties and who thus had 'recognized title'. Stewart continued:

One of the major defenses in almost all cases was the proposition that the Indians did not own the land because they did not have a sense of land ownership and did not reside within fixed boundaries which would allow them to establish title. In other words, the defense of the Justice Department was that the Indians were migratory and nomadic and moved from place to place to such a large extent that they did not acquire Aboriginal title by exclusive use and occupancy of definable territories. This raised the general question of the concept of territoriality. Was there regular and exclusive use of definable territories by lower primates, or even by mammals in general? I subscribe to the theory that the notion of territoriality is very fundamental among mammals. It has developed strongly among aborigines. The whole notion of tribal and linguistic boundaries being fairly fixed and definite is a good one. The evidence for exclusive use and occupancy of definable territories appears to me more than adequate to justify drawing exact boundaries around the various tribal or linguistic groups (Stewart 1966: 168).

Stewart (1966: 169-70) further noted that there were instances of 'friendly visits back and forth', joint occupancy of areas, and cases where there is no warrant for drawing a fixed boundary between two peoples, but these did not invalidate the notion of territoriality. He also noted that non-human mammals contest trespassers. Stewart then discussed whether it was justified to draw boundaries, saying 'it is my own opinion that boundary lines are justified for large identifiable groups and probably justified for many smaller identifiable groups as well'.

In his summary, Stewart (1966: 203) observed that the ICC judged the Washo to have occupied about three-quarters of the territory he had assigned them. The ICC accepted the Shoshone and Northern Paiute territories 'in about the same size and form as anthropologists had mapped them long before the Indian claims cases started'. It also accepted that the Ute and Southern Paiute were separate groups having their own claims. Stewart concluded:

[I]t is my opinion that the attempt by the Department of Justice to avoid payment by emphasizing the diversity of tribal uses and the fact that different peoples were sometimes present in the territories claimed for their neighbor was not sufficient to justify failure to pay the Indians for their tribal lands as they had been defined by anthropologists during their research long before the beginning of the Indian Claims Commission cases (Stewart 1966: 203).

Stewart's (1968) 'Review of The Current Status of Anthropological Research in the Great Basin: 1964' was his first published response, and he dismissed Stewart's paper as offering no new data or interpretations, calling it a '*non-sequitur* in relation to the main theme of the Conference' (Stewart 1968: 264). Stewart spent most of a page criticising Stewart's paper. He referred to the 'Man the Hunter' and 'Band' conferences, which had shown that bands, 'especially in areas of sparse population and resources that required frequent movement, were usually little more than groups of identification'. He rejected Stewart's claims that there were both bands and tribes in the Basin, and he noted Euler's (1966) positive views of the paper and d'Azevedo's (1966) criticisms of it. He also noted that Stewart's paper

was a summary of his claims case testimony and he suggested three reasons why their views differed so much. First, the existence of bands had not been proven by evidence. Second, the adversarial character of the hearings had prevented 'direct debate between expert witnesses', which reinforced 'the initial position of the litigants'. And third, Stewart's explanation that tribal territoriality was grounded in general mammalian territoriality ignored cultural factors that might explain variations in group size and composition (Steward 1968: 266).

In his (1977b) paper, Steward objected strongly to Stewart's (1966: 203) final statement and he devoted a footnote to the matter. He wrote, 'The very serious charge has sometimes been made that the witnesses altered their views at the request of the attorneys - in blunt terms, that we were bought' (Steward 1977b: 367). He contrasted the situation of the plaintiffs' lawyers on contingency fees with the government lawyers on fixed salaries, and said, '(T)he Department of Justice asked only that I present and interpret the facts according to my own understandings'.<sup>24</sup> Differences were very real between some anthropologists and he preferred to regard these 'as matters of scientific fact and theory. (A)ttempts to discuss scientific propositions which have been forced into terms of American legal principles and to have discourse between scientists mediated through attorneys badly clouded the areas of genuine scientific disagreement. The lack of direct discussion between anthropologists tended to exaggerate and entrench some long-standing anthropological presuppositions...'

Steward argued (Steward 1977b: 366-70) that there were no groups properly called 'bands' in the Basin in Aboriginal times; there were only nuclear family groups and small family clusters. He went on to discuss the lack of property in land, pinenut trees and groves, game, and so on. However, there was ownership of fishing localities, and there was exclusive ownership of 'things on which work had been expended: Irrigation ditches, irrigated areas, cultivated crops, hunting blinds, corrals, traps, and houses. None of these could have involved whole bands'.

Steward (1977b: 380-90) criticised Stewart's theory of mammalian territoriality as extended to humans and notes its similarity 'to Ardrey's ... very dangerous attempt to justify war on the grounds that all animals including man are innately territorial and fight other groups to protect their territories'. He also observed:

The theory of innate territoriality was ... suitable to the legal requirements of the claims cases, and it has a certain scientific appeal in its simplicity and universality, which obviates the need for deeper inquiry.

This theory, however, is negated by O.C. Stewart's own data, which show that neither band nor tribe members did in fact repel trespassers... (I)t is incredible that a broad assumption based on certain observations of mammalian behavior should entirely preclude consideration of cultural factors that are involved in the various forms that rights to natural resources take among human beings (Steward 1977b: 389-90).<sup>25</sup>

In his paper, 'The Anthropologist as expert witness', Rosen (1977) included a section on anthropologists in the ICC cases. He noted that expert witnesses sometimes gave markedly different interpretations and he instanced Steward's (1955: 298) account of his clash with Stewart in the Northern Paiute case on the character of groups and leaders, where Steward said that terms like 'nation', 'tribe', 'band' and 'chief' did not have precise agreed-upon meanings. Rosen thought that Steward's work on distinguishing sub-types of bands was probably encouraged by his involvement in the claims cases and he added property as another topic that Steward had considered. He quoted Steward: 'The plain fact is that anthropology has failed to come to grips with this crucially important problem of 'property' in detail and concreteness' (Steward 1955: 293-94).

Rosen (1977: 567) also observed that it was the claims case experiences that educated many anthropologists about expert witnessing, as well as 'educated courts and lawyers in the use and relevance of anthropological knowledge'.<sup>26</sup> The cases provided support for much research and gave anthropologists 'the opportunity and necessity for reappraisal of long accepted technical and methodological approaches and consequent reaffirmation or abandonment of each of these' (quoted from Ray 1955: 287). They also led to the situation where 'He [the anthropologist] becomes 'evidence' in that his testimony is based to an incalculable extent upon his theory (explicit or implicit), his experiences among the people, his travels over the territory...' quoted from Steward (1955: 300-301).

Stewart (1979) wrote a reply<sup>27</sup> to take exception to some propositions that he thought Rosen had put. He disagreed with Rosen's proposition that being an expert witness posed 'serious scholarly and ethical problems' (Rosen 1977: 555). Stewart said that he had never experienced any problems and that he thought he had not acted any differently from his normal scholar's role when he appeared as an expert witness. He said also that not all anthropologists are able to serve well as expert witnesses and that lawyers call only witnesses whose evidence will be congenial to their objectives. He objected to the implication that expert witnesses would change their views at a lawyer's suggestion and he said that he did not agree with Rosen that being an expert witness might have an impact on a scholar's normal role. He then compared himself and Stewart with respect to their backgrounds and scholarly reputations, and he noted that the ICC had found for the Indian petitioners in all the Basin cases in which they appeared against one another. Stewart described himself as having only presented 'objective data' and opinions based on it and his anthropological training.

Rosen (1979) replied that Stewart was naive to think that the rules and conventions of the adversarial system did not limit, constrain and perhaps bias expert witnesses' oral evidence. He argued that legal proceedings differed significantly from normal scholarly discussion and that scholars such as Stewart were mistaken to assume that his own

(Rosen's) attempts at self-analysis and legal reforms were 'attacks on their personal objectivity and the principles of American constitutional law' (Rosen 1979: 112). He also concluded that the claims proceedings had indeed distorted the evidence presented in them and he repeated his agreement with Steward (1955: 293-94) that 'The plain fact is that anthropology has failed to come to grips with this crucially important problem of 'property' in detail and concreteness'.

Stewart's final paper (1985) is primarily substantive, presenting material on protohistoric Shoshonean movements and locations, and so on, plus a history of the US treaty-making with various Shoshonean groups. He was very pleased that, in its decisions, the ICC closely followed the areas defined by the five treaties negotiated by James Doty, and Stewart describes his own research for constructing maps that ended up looking very much like Doty's.

It is difficult for a regional non-specialist to assess the differences between Stewart and Steward for several reasons. First, I have only their published statements and works to go on, and they are not complete, as Fowler and Fowler (1984: 326-30) several times remarked. For whatever reason, Stewart, unlike Steward, chose not to let his reports be published without further editing nor his testimony be reproduced in microfiche. Second, contemporary Basin ethnographers disagree on the strengths and merits of Stewart's and Steward's work (Bettinger 1983; d'Azevedo 1966; Euler 1966; Fowler 1982; Fowler and Fowler 1984; Shapiro 1986; Thomas 1972, 1983; Walker 1993; plus the Ethnology articles in d'Azevedo 1986). Third, it may be that our contemporary theories of social organisation and land tenure are too rich, such that the earlier data cannot be brought to bear crucially in choosing among alternatives. As Fowler and Fowler (1984: 330) comment, 'Despite much spilled ink since the Claims cases, the exact nature of Aboriginal Great Basin social organization and territoriality remains unclear ... . In all cases - Steward, Stewart and [Elman] Service - the 'data' remain in the ambiguities of the ethnohistorical record and in the 'bits' and 'pieces' trait lists'. And lastly, while it is true that the ICC had the task of determining matters of legal fact with regard to occupation and use, its members did pay attention to the theoretical frameworks in which the experts cast their presentations of data and their interpretations. It would simply be wrongheaded and silly to dismiss the findings of the Commission in its many cases as relevant only to the law and not to anthropology.

## Discussion

In the California and Basin claims cases, the lawyers and anthropologists alike operated with the notions of Indian title<sup>28</sup> (also called Aboriginal title) and recognised title. Kaplan said of Indian title:

In 1974, the Supreme Court explained in *Oneida Indian Nation v. County of Oneida* ... that, in essence, Indian title to land is complete ownership of the land



as against everyone but the sovereign ... It has been viewed as meaning that a right of occupancy based upon Aboriginal possession is not a property right ... It cannot be sold by the Indian ..., and indeed no alienable interest exists in the Indians which would enable them to sell any interest in the land, including any interest in its resources, to third parties (at least in the absence of statute) ...

But this does not mean that the exclusive right of the native occupants to enjoyment of the land is not a right that they may preserve by, for example, an action in tort for trespass ... or for the fair rental value of Aboriginal lands wrongfully taken ... Indeed it has been stated that it is the duty of the sovereign to protect that right of occupancy against intrusion by third parties so long as Aboriginal title of Indians to the land is unextinguished and outstanding.

... (I)t is also important to note that whatever the rights of Indians are as to lands held by Aboriginal title, those rights are generally considered to be possessed by the tribe, not the individual members thereof, even though individual members may hold particular pieces of land by virtue of tribal lot or custom. The land is held by the tribe for the common use and equal benefit of all the members, and any compensation granted for the taking of lands held by Aboriginal title must go to the tribal entity, rather than to the individuals or to their individual descendants ... [numbered references to specific case precedents have been deleted] (Kaplan 1985: 73).

With respect to the acquisition of Indian title, Kaplan (1985: 74) noted, 'It is well established in the law that Aboriginal title is proven by a tribe's showing that it enjoyed exclusive use and occupancy of the land for a long time...'.<sup>29</sup> The courts have not held that the requirement of exclusive use and occupancy would rule out recognition of joint ownership (Erickson 1984: 114-15) and, indeed, in the case of the Bannock and Northern Shoshone, the ICC recognised their joint ownership of land (Stewart 1970, 1985: 200; Sutton 1985: 136). However, the requirement of exclusive use and occupancy prevented establishing Indian title over land where 'many tribes or bands were known to wander or occupy'. And it also required establishing that use and occupancy was sufficiently intensive that the tribe excluded 'white explorers, traders, miners, and settlers' (Kaplan 1985: 74-75).

'Use and occupancy' was taken to differ among tribes such that to establish Indian title required 'examination of the habits, usages, customs, and ways of life of the Indians who had been the users and occupiers' (Kaplan 1985: 74; see also Erickson 1984: 114). Tribal or communal, rather than individual, ownership; nomadic, rather than sedentary, patterns of movement and settlement; and hunting, fishing, foraging and horticultural subsistence activities - all these presented different problems of description and proof. Kaplan (1985: 75) observed that sedentary tribes that lived in 'villages and raised crops, hunted, and traded nearby' had the extent of their claims narrowed accordingly, while nomadic hunters and gatherers could establish larger areas, so long as there was no solid evidence they shared their land with others.

For whatever reason, Kaplan (1985) did not discuss the meaning of 'for a long time' or the alternative 'since time immemorial'<sup>30</sup> but, in the Claims cases, the petitioners had to establish their connection with the

people who were living in the lands claimed at some specified time, such as the time of an unratified treaty or agreement or a piece of legislation or effective white settlement. Some claims made use of oral traditions of origins and of archaeological research as evidence for length of use and occupation.

Some groups did not have to prove their Indian title because they had signed treaties whereby the Congress had recognised that they held specific lands. In such cases, the term 'recognized title' was used.<sup>31</sup>

Although the definitional statement above dates from 1974 and derives from a case brought in a court other than the ICC, its main elements were in place by the Tee-Hit-Ton Indians v. US (1955) case. The important point about Indian title is that it is possessory, not proprietary - it is not property and so is not compensable under the Fifth Amendment. In this regard, Indian title differs from our Australian concept of native title. However, there are alternative views of Indian title that contest the received one (see Berman 1978; Henderson 1977; Newton 1980; Tully 1994). They provide alternative interpretations that recall our *Mabo No. 2* decision, which gave common law recognition to Aboriginal and Torres Strait Islander rights and interests in land arising from Indigenous law and custom where they have not been extinguished by act of the Crown or adverse acts.

I have formed the opinion that the anthropologists who worked in these claims cases were not much interested in the conceptual dimensions of Indian title and that they simply took their tasks to be to prove or to limit proof of Aboriginal use and occupation.<sup>32</sup> In none of the primary and secondary sources that I have searched have I found references to either the wider social science or the anthropological literature on property and land tenure. Kroeber simply set out six kinds of evidence for the ownership of land by California Indians.<sup>33</sup> Beals' team offered no definition of property in land, but regarded exclusive use as indicative of ownership.<sup>34</sup>

Steward (1955: 292-95) wrote of property as a problematic concept worthy of systematic anthropological attention and research, but he did not follow it up. He seemed unwilling to extend the term 'property' to the Indians' exclusive use and occupancy of land. Steward wrote:

A striking illustration of the difficulty [of applying legal concepts to Indian societies] is afforded by disagreements involved in the concept of property. The question is not merely whether an identifiable group or society occupied and maintained exclusive use of a delimitable territory. Property in the modern United States has several characteristics. It implies exclusive rights to the land and what is under it and on it, no matter whether the owner uses these things or even resides on the land. Property rights are validated by a transferable title, which is registered with and protected by a higher authority, or state, which has a system of property laws. Certainly, no one would argue that the Aboriginal Indians attached any of these features to their concept of property, despite such common and bare assertions [sic] in ethnographic monographs as that the 'band owned the land up to certain clearly defined boundaries'. Occasional skirmishes against alien groups can by no means be taken as evidence that a society has mobilized in defense of territory per se or even of resources on it.

The plain fact is that anthropology has failed to come to grips with this crucially important problem of 'property' in detail and concreteness (1955: 293).<sup>35</sup>

Steward's bias against the view that Indians had rights and interests in land commensurate with those of 'Anglo-American' citizens is also seen in his statements calling for comparative analysis:

It seems apriori unlikely, although it cannot be ruled out as impossible, that any Indian society claimed exclusive rights to territory as such. While the legal implications of the varied Indian practices is a problem that only the Claims Commission can settle, it would be helpful to them if the anthropologists could divest themselves of the preconception that 'property' is a universal category of fixed meaning and enquire more deeply into the concreteness of Indian usage. The data brought out in the Claims cases should provide an excellent basis for understanding how kinds of resources and means of exploiting them lead to different patterns of claiming exclusive rights ...

It does not follow that because Indian concepts of property... failed to conform to standard English meanings conveyed by terms conventionally employed they were in all cases unique. Systematic comparisons should disclose recurrent concepts [of property among Indians] and patterns together with the conditions under which they are found. A new terminology, probably one making use of qualifying adjectives [for example, as for kinds of bands] will be required (Steward 1955: 294-95).

In the Basin claims cases, Steward challenged the petitioners' claims by arguing that there were no effective social groups, such as bands, tribes, and nations in which Indian title could have vested. Recall Steward's remarks that:

One of the major defenses in almost all cases was the proposition that the Indians did not own the land because they did not have a sense of land ownership and did not reside within fixed boundaries which would allow them to establish title. In other words, the defense of the Justice Department was that the Indians were migratory and nomadic and moved from place to place to such a large extent that they did not acquire Aboriginal title by exclusive use and occupancy of definable territories ... (Stewart 1966: 168).

For his part, as we have seen, Steward addressed the requirements of proving Indian title primarily by ascertaining the delimited boundaries that pertained to particular band and tribal groups that he identified through ethnohistorical and ethnographic research and by describing their patterns of use and occupation of their lands.<sup>36</sup> His attempt to theorise Indian land tenure was weak - he saw it as grounded in general mammalian patterns of territoriality (see earlier discussion above). Steward (1968: 266, 1977b: 388-90) quite rightly criticised and dismissed it.<sup>37</sup>

Over the past year or so I have been trying to gain some perspective on the anthropological literature that the claims anthropologists might have drawn on to analyse and describe Indian systems of land tenure. I searched for materials published in anthropology journals and monographs as well as in the wider social science literature of encyclopaedias and journals and monographs in closely cognate

disciplines, such as sociology. The wider literature often included contributions from anthropologists. By and large, the materials on property and land tenure for the period up until 1955 are descriptive, historical and/or encyclopaedic, rather than rigorously analytical. Beals and Hoijer (1953); Boas (1938); Brinkmann (1933); Hamilton and Till (1934); Herskovits (1952); Lowie (1920, 1933, 1940, 1948) are a reasonable sample; Beaglehole (1968), Biebuyck (1968), Bohannon (1963), Driver (1961) and Pospisil (1965) are too late.

Lowie (1933) wrote the entry for land tenure in primitive societies in the *Encyclopaedia of the Social Sciences* and he included chapters and sections on property and land tenure in his books (1920, 1940, 1948). Herskovits (1940, 1952) had chapters on property, with sections on land tenure, in his book on economic anthropology. Both Lowie and Herskovits devoted space to the question of whether land ownership had been common or communal before private or individual ownership developed. They were concerned to demonstrate instances of private ownership among hunter-gatherers not influenced by contact with state-based societies. Both referred to the literature on whether family hunting territories among Northeast Algonkian peoples were precontact and both accepted that they were.<sup>38</sup> In this way, both showed their anticommunist, anti-Marxist credentials. Herskovits' general position was:

The formula for land ownership in nonliterate societies - and also for property in general - is that title rests on use. Hence it is a general rule that land under cultivation is free from trespass ... (Herskovits 1948: 283).

The concept of land tenure in nonliterate societies as a kind of 'inherited use ownership' would seem to clarify a good many points (Herskovits 1952: 370).

Two papers, Radcliffe-Brown (1952) and Hallowell (1955), stand out for their utility. Neither was first published in an anthropology journal.

Radcliffe-Brown's paper dealt with the general problem of succession, but it included much relevant to property and land tenure matters. Radcliffe-Brown defined the notion of rights and discussed rights in *personam* and rights in *rem* (noting that these latter can be over a person or over a thing). He provided general definitions of the terms 'corporation' and 'estate'. He clearly identified the members of Australian hordes as joint owners of land. He also said that hordes' ownership of land 'has some of the qualities of corporate ownership, but also partakes of the nature of the relation of a modern state to its territory, which we may speak of as the exercise of *dominion*'.<sup>39</sup> He observed 'that the transmission of property follows the same line as does the transmission of status' and he distinguished among rights in common ('A and B have similar and equal rights over Z and these are such that the rights of A will not conflict with those of B'), joint rights ('A and B (or any number of persons) exercise jointly certain rights over Z') and rights in division ('A has certain rights over Z and B has certain other definite rights') (Radcliffe-Brown 1952: 32-45).

Hallowell's (1955) survey paper was the more substantial contribution. Its theoretical framework was functionalist, but Hallowell did not assume that societies live outside history nor that their members do not contest what counts as property, who owns it and like questions.

Hallowell argued that social scientists must take the contributions of lawyers and economists into account when trying to study property in other societies, but they must also consider property as a social institution that 'structuralizes human relations in order that certain ends may be achieved'. It differs from other institutions in that it relates persons 'to a wide range of objects of various categories (or infrequently, people who function as objects in a particular system of property relations)'. The property relation (that is, ownership) is a triadic, not a dyadic, relation. Thus, A owns B as against C, as opposed to simple A owns B, as in popular discourse.<sup>40</sup> This formulation recognises the insight encapsulated in the usual definition of rights *in rem* as rights held 'as against the world', and Hallowell explicitly noted that property rights are rights *in rem* (Hallowell 1955: 237-48).

Hallowell also discussed four parameters along which property rights differ cross-culturally.<sup>41</sup> The first was 'the nature and the kinds of rights exercised and their correlative duties and obligations'. He noted that our Western view that exclusive use and possession as paradigmatic for defining the property relation 'is only one specific constellation of property rights, a limiting case, as it were', and in fact, absolute property rights are found in no society.<sup>42</sup> Hallowell also adopted the notion of rights developed by the legal theorist Hohfeld, and he endorsed Hohfeld's scheme as having comparative, cross-cultural utility (Hallowell 1955: 239-40).<sup>43</sup>

The second parameter was 'the individuals or groups of individuals in whom rights and privileges, powers, etc. are invested and those who play the correlative roles in the whole complex schema of relations' (Hallowell 1955: 240-42).

The third parameter was 'the things, or objects, over which property rights are extended'. Hallowell here noted that the denial that hunters and pastoralists own land was 'linked with the pseudo-history of the social evolutionary theories of the nineteenth century' and he referred readers to Herskovits (1940) for evidence they own land (Hallowell 1955: 242-44).

The fourth parameter was the character of 'the specific social sanctions which reinforce the behavior that makes the institution a going concern' and 'the way in which they work'. Hallowell also disposed of the proposition that animals own property (Hallowell 1955: 244-49).

Hallowell (1955: 249) concluded that property is universally found in human societies and one of its 'primary contributions ... to a human social order and the security of the individual' is that 'individuals are secured against the necessity of being constantly on the alert to defend [valuable] objects [of property] from others by physical force alone'. This is because in human (unlike animal) societies, we internalise norms and values with respect to property. Over and above the anticipation and fear that other owners will exercise force against us, we are motivated not to

trespass by the wider 'moral, religious, or legal penalties' that may operate if we do not do our duty.

There are a number of lessons in the ICC literature for those of us working in the native title area. These relate to matters of expert witnessing (which engaged our group last September in Adelaide); the characteristics of adversarial as opposed to inquisitorial modes of legal proceedings; the variable definitions of social groups such as bands and tribes; and the question of whether boundaries are definite and how to represent them. There is even a sub-text of conflict among anthropologists, which makes it appropriate to the theme of this gathering. But most important is the lesson we can learn from their lack of attention to the central questions of property and land tenure and how these should be theorised and conceptualised.

Wootten (1995) urged us not to accept lawyers' definitions of situations without question. In this regard, I have been disturbed by the arguments of some that native title rights are better conceived as bundles of use rights or incidents of title as opposed to the view that native title is proprietary, with all the rights that might flow from such a view (Bartlett (1993) takes a similar position). It behoves us to think about property and land tenure in more sophisticated ways.<sup>44</sup>

#### Notes

1. I thank Julie Finlayson and Di Smith for inviting me to do this paper, which I have prepared for an Australian readership not familiar with the American situation. Although an Americanist, I entered some unfamiliar territory and found it frustrating to be so dependent on interlibrary loans and to be so reliant on the secondary literature. I would have preferred to read more transcripts and expert reports, such as published in the Garland series. I thank the staff at The University of Queensland Central and Law Libraries who arranged and expedited interlibrary loans for me. I thank Paula Cardwell and Dr Cesare Marino of the Handbook of North American Indians group at the Smithsonian Institution for sending me Marino (1996), a research bibliography. I thank Alice Khursandi for discussions about property and land tenure. I thank Kay Fowler, Joe Jorgensen, Hank Lewis, Skip Ray, Peter Sutton and Nancy Williams for comments and assistance, but I alone am responsible for any errors of fact or interpretation.
2. Where whites came to own land on reservations, they usually consolidated their holdings into viable farming and grazing units through purchase and leasing. This resulted in checkerboard patterns of white and Indian land.
3. Following the death of an intestate original Indian grantee, land often passed to a legally defined set of surviving relatives. McDonnell (1991: 120) mentioned a 160-acre allotment made in 1887 that passed to 312 heirs by 1985.
4. See Kunitz (1971) and Jorgensen (1978: 17-22) for discussion and assessment of Collier's policies and administration.
5. Joe Jorgensen reminds me that under Public Law 280, Indian tribes had to act on their franchise and vote to terminate or not. If they did not vote to reject termination, and Congress deemed them ready for termination, they could be terminated. Also see Jorgensen (1978: 22-27).

6. Stewart (1961: 181-82) reviewed the overall patterns of decisions, amounts claimed and judgements paid in Indian cases before the Court of Claims 1884-1945. Stewart (1961: 184) also noted that no anthropologists were called by Congress to testify with respect to the proposed ICC Act.
7. They selected their own lawyers and could pay them no more than 10 per cent of the net judgement, plus expenses (Lurie 1957: 59).
8. Rosenthal (1985: 48-49) also reproduced these items and noted that (iii) and (v) created new grounds for action and let the ICC regard treaties as if revised, thus recognising a broad concept of moral claims. See also Barney (1955: 316-17).

Jorgensen reminds me that despite the range of grounds for action, only land was litigated before the Commission.

9. Newton (1980) analysed the Tee-Hit-Ton decision, examining its historical background in depth.
10. Price (1981: 17) wrote that tribes had received about \$707,000,000 (minus lawyers' fees and offsets) for claims under the ICC Act. Some tribes sought to retain Aboriginal title rather than accept payment for the extinguishing of their title (Price 1981: 21).
11. For California, see especially Beals (1985); Heizer (1978a); Heizer and Kroeber (1976); Kroeber (1954), Kroeber (1955); and Stewart (1961); for the Great Basin, see especially items by Stewart (1968, 1977) and by Stewart (1970, 1985). In 1974, Garland Publishing Company published a series of 118 volumes (more than 40,000 pages) which reproduced many reports that anthropologists and historians prepared for claims cases, as well as the findings and opinions of the ICC. The California and Great Basin volumes were reviewed by Bean and Vane (1984) and by Fowler and Fowler (1984), respectively. See those bibliographic entries for details of the Garland volumes. Stewart's reports were not reprinted, but his (1982) bibliography is comprehensive. Sutton (1985: 203) mentioned 'the Clearwater microfiche series of expert testimony before the ICC', and notes that Stewart's testimony did not appear in it.
12. This was published as Volume V in the Garland series California volumes. Bean and Vane (1984: 242) described it as 'without doubt a landmark piece of work'. Kroeber (1954) is a revision that Heizer edited after Kroeber's death, and Kroeber (1955) is a short piece based on his 'Basic Report', but taking a view beyond California. I cite material from the Kroeber (1954) version.
13. Driver (1961: 252) wrote that '... At the southernmost extension of the Northwest Coast culture area, among the Yuroks, fishing stations were owned by individual men, sometimes jointly with a non-relative, and they were rented to outsiders for a share of the catch'. No doubt he got his information from Kroeber.
14. Jorgensen tells me that Driver considered Kroeber's assertion there was total use of territory to be 'ridiculous' with respect to mountain tops, deserts, dry lakes and so on, but the view of Aboriginal title as possessory and based on use would have required this.

As well, we note that Costo (1973: 111) wrote:

The great Dr Kroeber testified at a hearing in the morning that the Indians of the State of California did not use nor did they own the tops of the mountains, but in the afternoon, he changed his testimony, because we *did* use the mountains and it was our land, and we told him that.

15. Published as Volume VI of the Garland California series; Bean and Vane (1984: 243) praised it as 'probably the most significant of these ... volumes'.
16. This item was not submitted as evidence - see Beals (1985: 148) - but was published, I think, as Volume I of the Garland California series.
17. Kroeber revised the map for the claim, changing the boundaries where there was new evidence. Stewart (1961: 185) noted that the 1925 map needed few modifications. The revised map with new boundaries was reprinted at the end of Stewart (1961).
18. Starna (1988: 43) also spoke of Linton's distinction between 'home range' and 'extended range', but I cannot find these terms in his chapter on local groups or elsewhere, although they can be easily inferred from his discussion. 'Property', but not 'land tenure', appears in his index; Linton did not define or discuss property to any extent. Later, Linton (1942) wrote a survey of American Indian land tenure systems. I have not been able to consult it.
19. Jorgensen (1978: 23) noted that '[t]he chief attorney of the Indian Claims Section [Ralph Barney] ... took the position that Indians never really owned any land'.
20. The anthropologists generally seem to have been distressed by the adversarial mode in the claims process, and they favoured a shift to the inquisitorial mode. Lurie (1978: 103-104, 1985: 375-78) regretted that the proposed Investigation Division was never established and operated.
21. Stewart's paper is particularly laudatory of Kroeber's role in the California claim and dismissive of the majority of American anthropologists for their lack of interest and involvement in Indian affairs until the opportunity for employment in claims work arose.
22. Wallace (1957: 311-12) also criticised the Beals' team's ecological approach, which he called 'the so-called nuclear area theory', in an extended footnote in support of his own position that '[t]he basic principle of land tenure among the peoples of the northeastern agricultural area ... was that the tribe had exclusive ownership (that is, use, control, and claim both asserted and recognized) of a tract of land bounded by natural features such as rivers, lakes, and watershed lines'. Wallace also criticised the 'acculturation theory' and the 'common hunting ground theory'.

Wallace's paper (1957: 302) apparently derives from his research for the Indian petitioners in a number of claims before the ICC. Tully (1994: 165) cites it and Starna (1988) as two of the best anthropological studies of Indigenous property systems. However, the two papers differ markedly in their views on land tenure.

Unlike Wallace, Starna (1988: 37-39) considered Aboriginal title to have been possessory, not proprietary. Starna also utilised (see, especially, *ibid.*: 39) territoriality and range, rather than property and estate, as major analytical concepts; and he noted (*ibid.*: 44) that his methodology was none other than the 'ecological model ... [which] was applied extensively in land claims brought before the Indian Claims Commission in the 1950s'. Stewart (1961: 186) also attacked the ecological approach during the Pit River Indians claim. Olmsted and Stewart (1978), as noted by (Sutton 1985: 154), was a later demonstration that the Pit River people, specifically the Achumawi, occupied all their territory and intensively used its resources. The ecological approach was tested primarily in the California cases. In the Basin cases, the matter of groups and boundaries assumed greater importance, often pitting Stewart and Stewart against one another.



23. This item was reproduced in Heizer (1978a: 126-27), and reproduced partially by Heizer and Kroeber (1976: 39-40). Stewart (1961: 187-90) is a fuller reproduction, while Stewart (1978: 707) is a lesser one.
24. Manners (1956) and Lurie (1956) covered much the same ground in their exchange.
25. See also Beaglehole (1968: 590), Hallowell (1955: 248-49) and Hamilton and Till (1934: 530) for rebuttal of the notion of animal property.
26. See also Barney (1955), Gormley (1955) and Stewart (1973).
27. Julian Stewart had died in 1975 and so could not engage his old adversary again. See Murphy (1977) for an overview and appreciation of Stewart's work. Stewart died at the end of 1991. Stoffle (1991-1992) and Walker (1991-1992) provide biographical information and appreciations of Stewart's life and work.
28. The classic paper on Indian title is Cohen (1947). Cohen was the major figure in the development of Indian law, and his 'Original Indian Title' still bears reading. Its discussion of ten major cases on original Indian title is especially useful. Jorgensen tells me that Indian title is sometimes characterised as 'impaired title' because the government can extinguish it and because lands held under it in trust cannot be taxed by State and local governments.
29. See also Bennett (1978) and Erickson (1984) for a similar view of Aboriginal title. Price (1981) is an excellent account of using expert evidence to prove Aboriginal title. Kaplan (1979) annotated significant cases bearing on the proof and extinguishment of Aboriginal title.
30. Erickson (1984: 116) says that '[t]he duration of occupation ... must be sufficient to allow the Indians to transform the area into domestic territory ... Because the lands in question must be domestic territory, the status of Aboriginal territory is not accorded to tribes at the very moment they first dominate a geographic area. Instead, the rights of Aboriginal possession take time to vest. ... Although there is no minimum number of years sufficient to establish Aboriginal title, one court has held that fifty years is, as a matter of law, 'a long time'. Erickson's notion of domestic territory here resembles the nuclear area concept developed by the Beals' team anthropologists in their ecological approach in the California claims case. Kaplan (1979) annotated significant cases bearing on the proof and extinguishment of Aboriginal title. See also Price (1981: 17).
31. For a discussion of recognised title, see Price (1981: 16, 22).
32. In fairness, one might note that more sophisticated theory was not needed to demonstrate the use of a bounded area by an identifiable group over a long period of time. It is also true that the petitioners did win in these cases and probably got as generous settlements as was possible. Stewart never won a land claim, although he appeared in many cases where Stewart opposed him.
33. There are no entries for 'property' or 'land tenure' in Kroeber's (1948) textbook, but his colleague Lowie included chapters and sections on property in his textbooks (Lowie 1920, 1940, 1948).
34. Beals and Hoijer (1953: 373-79), a widely used textbook, included some discussion of property, but did not define it. They noted that land among the Hopi is owned by the clan, and they further said 'it is the right to use property that is possessed; there is no ownership unaccompanied by use ...'.

35. Note that Rosen (1977: 567, 1979: 112) twice reproduced this statement of Stewart's.
36. Stewart also did claims work in a third region, on the Chippewa claims; see Stewart (1967).
37. In another context, Cohen (1947: 57-58) criticised the 'menagerie' theory of Indian title 'that Indians are less than human and that their relation to their lands is not the human relation of ownership but rather something similar to the relation that animals bear to the areas in which they may be temporarily confined'.
38. See Leacock (1954) and Hickerson (1967) for the position that precontact Northeast Algonkians owned land communally and that family and individual ownership developed as a result of involvement in the fur trade.
- Demsetz (1967: 351-53) used Leacock's study as evidence for his theory that new property rights arise to adjust to new cost-benefit possibilities, that is, to internalise new externalities as property rights where the gains have become larger than the costs of not doing so. Schmidt (1994: 51-52) recapitulated Demsetz' account.
- Gordon (1954: 134-35) referred to Speck (1926) and Malinowski (1935) in support of the view that 'stable primitive cultures appear to have discovered the dangers of common-property tenure and to have developed measures [that is, private land tenure] to protect their resources'. Speck was an early participant in the debate whether Northeast Algonkian family hunting territories were precontact or not.
39. This can be interpreted as meaning that Radcliffe-Brown anticipated our contemporary distinction between radical and beneficial title. The exercise of dominion corresponds to radical title, while corporate ownership corresponds to beneficial title. By dominion, I assume he meant there were analogues to the exercise of eminent domain and the right of escheat among Australian hordes. Brinkmann (1933: 74) touched on the same distinction when he wrote:
- What must seem a contradiction in terms to the property notion of Roman or of modern civil law - namely, that there may be two or property rights in the same thing - is evidently the most general rule in the institutions governing the tenure of land. The 'monarchical' or 'democratic' rights of overlordship and eminent domain in the soil of a tribe or territory express in various forms the fact that until the development of the capitalist concept of landed property, immune, except under abnormal conditions, from the state itself[,] *society tends to regard all individual tenures of land as normally dependent upon and limited by its own collective tenure*. The actual institutions which embody this 'superior tenure' are of course manifold. [My emphasis.]
- See also Sutton (1996: 16-31) with respect to traditional Aboriginal title in Australia.
- And see Hiatt (1996) for a review of Radcliffe-Brown's changing views on Aboriginal social organisation and land ownership.
40. See also Paul's (1987: 193) discussion of the same point in which she quotes from Cohen's influential 'Property and Sovereignty' article: '... a property right is a relation not between an owner and a thing, but between the owner and other individuals in reference to things'.
41. Herskovits (1952: 319) also briefly summarised and discussed these.
42. Refer to footnote 39 on radical and beneficial title.

43. It was Hoebel (1942), who first introduced Hohfeldian analysis to anthropology.
44. I can think of few recent Australianist anthropological works that directly address questions of how to theorise property and land tenure, but I may be overlooking some Northern Territory claim books. Stanner (1969) went unpublished, although Williams (1986: 35, 101-104, 141, 163-164, 202), a notable exception, used and cited it extensively. Sharp (1996) also cites Stanner (1969) and considers the questions of property and tenure that arose in the Murray Island land case. Sutton (1996), on the robustness of native title, is an exemplary piece.

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### 3. Having it out over Hindmarsh: an essay on the significance of manners

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Unlike ... South Africa, where the veneer of legality covering a coercive system is almost transparent, in Australia that system is decently clothed (Goldflam 1995: 42).

#### Introduction

In the mid- and late-nineteenth century, titles like *Manners and Customs of the Aborigines of the Encounter Bay Tribe, South Australia* (Meyer 1846) and *The Folklore, Manners, Customs and Languages of the South Australian Aborigines* (Taplin 1879) were standard fare for readers in the developing discipline of anthropology. But the manners of the Aboriginal peoples which the early ethnologists explored were, from readers' cultural frames, 'no manners at all'.<sup>2</sup>

The concept 'manners', like others in its ertswile analytic sibling-set (habits, customs and superstitions), was not rendered problematic by those who used it. Instead such terms essentialised others and their practices, and derived their meanings and significance from implicit and ethnocentric contrasts with the 'cultured' lives of those who authored them. In this framework, the manners of Aboriginal peoples were merely the superficial and radically different 'ways of life' which could be observed by frontiersmen. 'Real' manners were those which were cultivated and disciplined by civilisation.

At the end of the twentieth century, 'manners' feature rarely in the titles of anthropological texts.<sup>3</sup> However, the term remains well entrenched in our taken-for-granted folk and professional vocabularies. Its use and applications in contemporary social practices can have decisive effects on our lives and analyses, particularly, as I show here, in the context of the practice of the law and other institutional processes of the State.

In this chapter I point to the relative neglect by contemporary anthropologists of taken-for-granted assumptions about, and the cultural practices which are glossed in every day speech as, 'manners', 'civility' and 'decency'. I use the term 'manners' as an analytic-concept-in-progress to point to the ensemble of everyday behaviours and demeanours which are subject to, or available for, moral assessment and, with it, social and cultural differentiation. I argue that critically analysing and theorising 'manners', particularly in the context of contestation, and disputes which are subject to the institutional and coercive exercise of State power, is a significant anthropological task. Such analyses are important in the examination of conflicts and contestations about heritage, sites and cultural

significance, and more generally to bureaucratic and judicial processes, in contemporary Australia.

This chapter has limited aims. It seeks to problematise the folk and professional concept of manners and others in its contemporary sibling-set: particularly demeanour, civility, decency. In doing so I seek to highlight the importance of developing a political theory of manners to explore the ways in which the State deals with contestation amongst its citizens and citizenship *per se*. As an example I point in the discussion to the importance of manners in the conduct and findings of judicial proceedings. Secondly, I seek to establish the significance of such an analytic framework in the case of the operations of an ephemeral but powerful institution like a Royal Commission, where the rules and practices of proceedings cannot be taken for granted. I take as a limited case study the Hindmarsh Island Bridge Royal Commission (South Australia, June to December 1995)<sup>4</sup> in which claims of Aboriginal tradition were contested and in which I was entailed (see Fergie 1995, 1996a, 1996b). Thirdly, by reference to this case, I wish to point to the importance of considering different interpretive frames and values, power, gender and the force of emotions in the development of a political theory of manners.

It is chiefly through the work of Bourdieu (1977) that any specific interest in manners has re-emerged in anthropology.<sup>5</sup> Bourdieu is most explicit about manners and demeanour in his discussion of habitus and, more specifically, bodily praxis (see Bourdieu 1977: 94-5). Whilst Bourdieu notes that 'The concessions of *politeness* always contain *political* concessions', he also deals with manners as mnemonic and 'beyond the grasp of consciousness'. By contrast, the manners and demeanour I draw attention to here are not founded, experienced or expressed so latently. As I demonstrate, manners and demeanour in judicial and pseudo-judicial settings are the basis of judgement, consciously scrutinised, open to conscious manipulation and fair game for deliberate attack.

### **The manners and customs of the law**

Manners are a conspicuous feature of courtroom proceedings. Judicial trials are contexts in which manners and decorum amongst practitioners are stylised. The organisation of space clearly differentiates the presiding official, at a bench facing all others, from counsel at the bar, defendant or plaintiff, witnesses under examination, court reporters, sheriffs' officers and the general public. In the higher courts of Australia, judges and legal counsel at the bar wear medieval robes and wigs. Honorific marks of respect are prominent features of proceedings - all in court are bidden to rise and bow as the presiding judge enters the court room; judges are referred to as 'Your Honour'; lawyers refer to each other as 'my learned friend' and interject 'with respect'.

Yet the protocols of legal decorum scarcely disguise what in other contexts could appear as interpersonal combat. Indeed, these manners and

rules of conduct circumscribe the playing out of conflict. Thus, in my observation, legal practitioners referred to each other as 'my learned friend' especially when displaying behaviour that was anything but friendly. Campisi (1991: 17) makes this point well. He observed that in American courts, lawyers 'call each other brother and practice fratricide'.

The adversarial method is the standard in Australian legal practice. Of this form Ehrlich wrote:

People think that a trial is a courtroom investigation of all the available evidence, an investigation so conducted that it will enable the jury to ascertain the truth. This is not the case. The legal profession's current conception of a fair trial is a battle between lawyers according to certain legally established ground rules, enforced by the judge, with the jury deciding the winner (Ehrlich 1970: 49).

The order of the court is in part constituted and reproduced in the very manner of its proceedings. Fundamental to the order of the court are the accepted procedures and practices of the courts and the rules of evidence. These procedures, practices and rules frame the performance of the adversarial system.

Danet and Bogoch (1980) suggest that what is especially interesting in courtroom strategies is not the rules, or their elaborateness *per se*, but what adversaries do with them in trials. Their analysis builds on Salmond's competitive alternatives: maximising the options within the rules; breaking the rules and trying to get away with it; getting the other side to break the rules (Salmond 1974 cited in Danet and Bogoch 1980: 42). To these they add a fourth: monitoring the other side's behaviour to prevent it from breaking the rules, or having it punished for doing so (Danet and Bogoch 1980: 42).

### **Witnesses, evidence and *cross*-examination**

If there appears to be a general under-analysis of manners, decorum and demeanour in the literature about judicial trials, the demeanour and decorum of witnesses are nevertheless widely acknowledged to be central in the decision-making processes of the courts (see Ehrlich 1970: 46; Lewis 1984: 1339), as well as in other areas of the legal process (see Black 1980; Lucas and Fergie 1996; Lundman 1994). As Lewis (1984: 1339) notes, 'In addition to what witnesses might say, the manner in which they say it is vital'. Neither examining lawyers, nor witnesses, have normal interactions between the bar table and the witness box. The giving and cross-examining of evidence is never an 'ordinary' act. Witness boxes are 'bracketed out' in word and deed - witnesses are literally boxed in as they are sworn in. The exchanges witnesses have with lawyers or judges make plain their differential power relations. Normal interactions are unexpected in the clear seriousness of oaths and affirmations and the consequences and entailments of the process. The public, who may be distant witnesses to the

proceedings, are 'barred' from interrupting or interjecting in their conduct. Judges are free to hammer home an insistence for order in the court.

Judicial proceedings are an interpretive context in which the cues for assessing the truth of evidence are not simply verbal, embodied in the text of what is said, but embodied *in the way in which it is said*. Perceptions of demeanour which might indicate honesty or dishonesty are at the heart of assessments by judges, lawyers and juries. They influence judgements of the truth and the force of evidence presented by witnesses in the box. Clothing, bodily demeanour<sup>6</sup> (for example, the manner of sitting, the movement of eyes, even the actual shaping of the mouth to create a manner of utterance), the tempo (hesitancy or eagerness) and tone of speech, and the gender 'propriety' of demeanour and self-presentation are fundamental to interpretations of believability, as much as the literal contents and logical consistency of that which is said. These crucial evaluations are not transparent in the transcript of proceedings. Appeal Courts will not interfere with the primary judge's assessment of the demeanour and credibility of witnesses. This is because demeanour can only be discerned and judged in the actuality of its performance.

Cross-examination is an important context for observing the demeanour of witnesses. It is recognised as 'a powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of his story' (Lord Hayworth quoted in Du Cann 1980: 95). Yet cross-examination can also be discourteous, without restraint 'and without the courtesy and consideration which a witness is entitled to expect in a court of law' (Du Cann 1980: 96). Du Cann (1980: 111-27) describes the means by which 'the advocate achieves the destruction of a witness' with the 'weapons of Cross-examination'. He notes the techniques of successful cross-examination: 'confrontation, insinuation, undermining, ridicule and probing'. As Ehrlich (1970: 51) characterises it, 'Cross-examination is the fierce wildcat of the courtroom'. He typified what he saw as two prevailing styles in the following terms:

the savage, slashing, hammer-and-tongs method of going after a witness to make him tell the truth; and the smiling, soft-spoken, ingratiating method, directed to lulling the witness into a sense of security and gaining his confidence (Ehrlich 1970: 31).

As Du Cann has noted, when an advocate rises to his feet to begin cross-examination:

He, and not the witness, chooses the parts of his evidence on which to ask questions. He may not choose to cross-examine about his evidence at all. He may choose to cross-examine in an entirely different quarter. He, and not the witness, chooses the words with which to do it. He, and not the witness, knows the rules which bind them both. He, and not the witness, knows the foibles of the Judge who is to referee the contest. He, and not the witness, is familiar with and at home in the court in which they both stand, and he is dressed in a medieval armour sufficient to intimidate most well-brought up children and quite a few adults. He, and not the witness, knows where to start and when to stop. Above all, no witness knows how much the advocate knows (Du Cann 1980: 109-10).

Cross-examination may be uncivil and cross indeed. Some barristers adopt a standard tactic of asking a question of the witness and then apparently denying civility by immediately turning around and looking away from them, at the ceiling or public gallery. Counsel pace their questions in ways which would subvert normal conversations outside a hearing. Some uncivilly raise and lower their voices, use tone to unbalance and convey meanings that are not made clear in a literal reading of the words. I have heard one legal counsel express an intention to 'bounce' a witness around for a while at the start of cross-examination. I have witnessed another counsel adopt what was repeatedly referred to as a 'back-door' method of getting at evidence, an expression which signalled the apprehension of its stealth and impolite approach.

In a wide variety of ways, counsel in cross-examination disrupt demeanour and subvert the taken-for-granted assumptions which shape everyday practices of communication. They do this with conduct which, outside that context, would be understood as 'bad manners' and indecent behaviours.

Yet they are acceptable behaviour by legal practitioners conducting a cross-examination in the confines of the court, because legal practitioners in this system of justice accept as a basic principle the idea that the stripping away of accepted buttresses of politeness leaves the truth of the matter, the truth of the evidence, exposed. The evidence will either 'stand up' without the props, camouflages and concealments of everyday civility, or it will not. Stripping away the comfort of good manners in the performance of cross-examination is accepted in legal culture as a technique for revealing the truth. Attacks on demeanour with the courtly manners of *cross* examination is considered in Australian legal practice to be quite proper behaviour by counsel at the bar towards witnesses.

In adversarial judicial proceedings, the manners and demeanour of one set of subjects (witnesses, accused, accuser, complainants, defendants) is deliberately upset. Off-balance, and perhaps reacting to the cross and uncivil manners of lawyers at the bar, the demeanour of witnesses is scrutinised and evaluated against standards which would often find the manners of their interlocutor unsatisfactory.

The witness's protections in adversarial proceedings lie not in everyday conventions of civility, but rather in the ability of their legal counsel to have the rules, practices and procedures of the court applied in a way which favours their case.

### **Demeanour and mis-demeanour - Aborigines and the law**

As Bird (1987) and the Royal Commission into Aboriginal Deaths in Custody, amongst others, have shown, a large proportion of the offences for which Aboriginal people have come before the Australian courts are 'public order' offences and misdemeanours: drunkenness, disorderly

conduct and indecent language. In an analysis of some court material from the Marree-Birdsville Track, Lucas and I have argued that:

a high proportion of cases entail behaviours which can be construed as morally or socially 'dis-ordering' in some way. The vast majority of cases are, of course, misdemeanours. They represent, both literally and figuratively, a failure of demeanour or appropriate conduct on the part of the state's citizens. The coincidence of police concern with both alcohol and demeanour is not arbitrary, but follows a cultural logic of ordered and disordered social conditions (Lucas and Fergie 1996: 38).

Magistrates, and District Court judges around Australia, have disproportionately penalised Aboriginal people for failures to conform to the acceptable demeanour of the dominant social order. Their manners of conduct have repeatedly been interpreted from the dominant cultural frame as beyond the pale and they have been disciplined for their disorderly conduct and indecent behaviour.

### **A Royal Commission to have it out once and for all**

The Hindmarsh Island Bridge Royal Commission was a State inquiry<sup>7</sup> into claims that information (which came to be known as 'secret women's business') which was part of the Federal Minister's decision-making process was fabricated.<sup>8</sup>

The Royal Commission's terms of reference stated that it was necessary to investigate the allegations of fabrication 'in order ... to provide a factual basis for the resolution of the disagreement within the South Australian Aboriginal communities' (Stevens 1995: 2). Despite findings by the State Government that 85 per cent of Ngarrindjeri people opposed the conduct of this Royal Commission,<sup>9</sup> the government re-authorised it to investigate the claims of fabrication.

The Royal Commission's finding of fabrication clearly did not resolve the dispute. Jane Matthews, who presented her Commonwealth Hindmarsh Island Report to the Federal Minister about six months later, noted that:

The proposal to build a bridge linking Goolwa and Hindmarsh Island has probably provoked more controversy and dissension in the Australian community, both Aboriginal and non-Aboriginal, than any other Aboriginal heritage issue in recent years. For those who have been at the centre of the debate it has been a painful and divisive process. It commenced well before this Report was undertaken and I fear that its legacies may remain long after its completion (Matthews 1996: 1).

### **Unstable ground rules for 'having it out' at the Hindmarsh Island Bridge Royal Commission**

Royal Commissions are not judicial processes although, as in this case, they may have the general appearance of judicial proceedings and legal

culture may frame the conduct of the inquiry.<sup>10</sup> These ephemeral institutions are arguably amongst the most extra-ordinary and powerful (investigative) organs of the State.

Royal Commissions are political processes. In Australia they are instituted by the executive arm of government (see Campbell 1984; Hallett 1982), which selects the inquirer, issues the commission and sets out its terms of reference.<sup>11</sup> It is a truism of cross-examination that one shouldn't ask questions one doesn't know the answer to. It is a truism of Australian political life that governments do not set up Royal Commissions unless they already know what their findings will be.

Some Australian States have specific legislation for the establishment, empowerment and conduct of Royal Commissions. As Campbell (1984: 5) has noted, Royal Commissions have coercive powers.<sup>12</sup> Indeed:

The main purpose of the Acts on royal commissions is to give to royal commissions powers they do not possess at common law, notably power to compel the giving of testimony and production of documents and other evidence (Campbell 1984: 5).

Despite their coercive powers, and in spite of the clear recognition that material presented at a Royal Commission, regardless of its findings, may be prejudicial to real persons, the *Royal Commissions (South Australia) Act 1917* offers few procedural or other safeguards to those who are subject to the trials and tribulations of its conduct. A person with a significant interest in the proceedings may be given leave to appear and be legally represented before it. But:

The commission, in the exercise of any of their functions or powers, shall not be bound by the rules or practice of any court or tribunal as to procedure or evidence, but may conduct their proceedings and inform their minds on any matters in such manner as they think proper (s.7, *Royal Commissions (South Australia) Act 1917*).<sup>13</sup>

In short, Royal Commissions 'may receive, insist on receiving and make findings on evidence which would not be admissible in a court of law' (Campbell 1984: 14; see also Hallett 1982: 158-67).

The extra-ordinary position and powers of Royal Commissions in South Australia do not end there. S.9 of the State Act reads:

No decision, determination, certificate, or other act or proceeding of the commission, or anything done or the omission of anything, or anything proposed to be done or omitted to be done, by the commission, shall, in any manner whatsoever, be questioned or reviewed, or be restrained or removed by prohibition, injunction, *certiorari*, or otherwise howsoever.<sup>14</sup>

Writing of Royal Commissions more generally in Australia, Sackville has noted that the reluctance of Australian courts to interfere with their findings:



effectively denies any opportunity for a person aggrieved by a Royal Commission report to seek relief from the courts, no matter how grievous the damage to reputation and how substantial the error of fact or failure to abide by standards of fair play (Sackville 1984: 10).

Because State legislation explicitly denies any rights of review, South Australian Royal Commissions have an especial capacity not simply to be coercive, but also to be a prejudicial, oppressive or abusive context for the exercise of State power and domination. This is a particularly important issue when the State seeks to test Indigenous beliefs and finds, as the Hindmarsh Island Bridge Royal Commission did, that those beliefs are a fabrication.

The Hindmarsh Island Bridge Royal Commission appeared both as an adversarial proceeding and as an inquisitorial commission.<sup>15</sup> The extent of its powers as an inquiry was constantly reiterated to counsel who sought the rights and protections of a court (see, for example, T: 2482).<sup>16</sup> Nevertheless, as its final report confirmed, this Commission 'was conducted along the lines of a trial' (Stevens 1995: 5).

Whilst in a 'classic' inquisitorial trial the judge is the most prominent actor and lawyers are relatively mute (see Danet and Bogoch 1980: 36-38), in this Commission it was counsel at the bar table who were most conspicuous in proceedings, a characteristic of a normal adversarial process. This Royal Commission combined, at times in apparently contradictory ways, both adversarial processes and inquisitorial rulings, while offering few of the protections of the former.<sup>17</sup> The differential shifting of ground rules and goal posts was a fundamental feature of the operation of this Royal Commission.

### **Moral oppositions**

Oppositions, and oppositional frames, were central to the staging of the case in the Royal Commission. A variety of potentially quite different positions were distilled into a fundamental dichotomy, with associated moral labels. Contestants were evaluated as good or bad, courageous or cowardly, rigorous or negligent, honest or dishonest. Evaluations about manners, decency and civility were central to these dichotomies.<sup>18</sup>

Other commentators have already pointed up the contribution of the media to this distinction between 'good' and 'bad' Aboriginal women (see Muir 1996; Nichols 1996). Nichols has suggested that:

Doreen Kartinyeri, the key 'proponent woman' and custodian of restricted orally-transmitted knowledge pertaining to Hindmarsh Island and its surrounding waters, was constructed by the media and within the Commission itself as the apotheosis of the vulgar: a rowdy, disruptive woman, an activist, 'outspoken', given to 'berating' or 'haranguing' others even verging on the 'hysterical'. In short, Dr Kartinyeri was portrayed as a thoroughly badly-behaved Aboriginal woman. Implicit in this construction was an unfavourable comparison with the more restrained, 'refined' demeanour of Kartinyeri's 'dissident' Ngarrindjeri sisters who were for the most part constructed by the

media and within the commission as mild, reasonable and ladylike - in other words, as good Christian ladies (Nichols 1996: 62).

Such a moral distinction between the two groups of Ngarrindjeri women was introduced early in the report of the Hindmarsh Island Bridge Royal Commission. In its first chapter, a fundamental contrast was established between the two under the headings 'witnesses' and 'proponent women', a contrast which carried broader commentaries about relations between the two groups. Of the former, Stevens wrote:

The group of Ngarrindjeri women witnesses (the dissident women) who maintained that there was no secret 'women's business' connected with Hindmarsh Island appeared voluntarily before the Commission. They provided statements at the start of the Commission. They gave sworn evidence before the Commission and were subjected to cross-examination.

They voiced complaints of threats and intimidation from within their own community. This was a recurring and disturbing issue throughout the Commission. Some of these women had been subjected to enormous tension and pressure. The tension was not lessened by the intrusive behaviour of a small group of women inside the Hearing Room who on a number of occasions were assertive and disruptive while the hearings were in progress.

Early in the hearing some of the women witnesses had a very real concern that the Hearing Room and the building housing the Commission had been cursed. While it may have been a difficult concept for the white community to accept, it was not a concern that the Commission could readily ignore. Consequently, arrangements were made for the evidence of some of the women to be taken at another venue.

It is difficult to convey the atmosphere of tension which at times prevailed in the Hearing Room during the early weeks of hearing. Some of the Ngarrindjeri witnesses were intimidated by the presence, while they were giving evidence, of certain women. On one occasion, it was necessary to restrict the persons allowed to remain in the Hearing Room to enable the witnesses to feel confident enough to give their evidence properly. The Commission was prepared to do this as it was convinced that their apprehension was genuine.

Counsel representing these Ngarrindjeri women was permitted to lead them through their evidence in order to assist their composure. In short, whatever measures were available were taken to allay their concerns while the evidence was taken (Stevens 1995: 19-20).

This representation of the 'dissident women' sets them up as compliant and courageous royal subjects and contrasts them with unnamed others who did not submit themselves to the power and domination of the Royal Commission and its 'hearings'. By contrast:

The proponent women, namely a group of Ngarrindjeri women who maintained that the 'women's business' was genuine, did not give evidence. They never had to withstand cross-examination in the witness box. From the very start of the hearings of the Commission, it was obvious that it was unlikely the Commission would obtain any evidence from these women.

On the first day of hearings, the legal representative of the proponent women applied to appear in the Commission for the limited purpose only of making a

statement explaining why these women intended to boycott the Commission. She was permitted to read a statement setting out their objections. This unusual course was adopted so that the Commission had before it some information on which to assess their explanation for refusing to give evidence. Their legal representative asserted that this would be the only opportunity the proponent women would have to have a lawyer speak for them. However, throughout the hearing, they had that opportunity. It was made clear that the women refused to recognise that the Commission had any right to decide whether they had fabricated anything (Stevens 1995: 20-21).

### **All manner of appearances**

In their statement which was read on the first day of hearings, a group of 23 Ngarrindjeri women declared that they would not acquiesce to the Royal Commission. Their statement is recorded in the transcript of proceedings (see T: 19-21). The signatories reasserted the beliefs into which the Royal Commission inquired and made it clear that they were offended that the Government had had the audacity to order an inquiry into them. The letter read by their counsel stated that they did not seek to be represented at the Commission, and that:

We do not recognise the authority of this Royal Commission to debate and ultimately to conclude that women's business relating to Hindmarsh Island exists. We know women's business exists and is true (T: 20).

The letter continued:

We do not recognise you, Madam Commissioner, as a custodian of law in our society ... . We refuse outright to recognise your Commission as having any right to decide whether we have fabricated anything, when we know we have not (T: 20).

But not all of those who were signatories, nor all those Ngarrindjeri women who considered themselves to be 'proponents' of the 'women's business', were entirely absent from proceedings. Some came and heard evidence in the public gallery of the hearing room. Others commented about developments or evidence in the media. The Commission declined to consider such commentary in its deliberations.<sup>19</sup>

At the same time it is clear that in their refusal to be boxed in, these people were indeed 'represented' (in a much fuller sense than the Commission was able to understand). Representations of them as threatening, disorderly, subversive, intimidating and wilful were clearly developed clearly within the proceedings, and those representations in turn framed proceedings, deliberations and findings in their disturbing wake (see Muir 1996; Nichols 1996).

While some proponent women did come to hearings of the Royal Commission, the refusal of recognition by others was marked by absence. Proponents were kept in the forefront of proceedings, often by references to allegations that they were in some way threatening those who opposed

them. This is nowhere clearer than in allegations that a curse had been placed on the hearing room on the first day of hearings (see T: 605ff). On account of this allegation, the venue was changed and the Commission's hearings moved for a time to the Supreme Court Buildings. This move added to the appearance of the Commission as a judicial process. On account of alleged comments in the public gallery, other Ngarrindjeri women were from time to time excluded from the hearing room.

The submission to the rigours of 'hearings' and the manners of some Ngarrindjeri gave witness within the Royal Commission to their conduct as good citizens. At the same time there was a failure by the Commission to recognise that a refusal to cooperate did not necessarily justify an inference of 'guilt'. Other Ngarrindjeri people took the establishment and conduct of the Royal Commission as an affront to their cultural integrity and understood it as a powerful display of cultural disrespect. In this interpretive frame, good manners and cultural respect were demonstrated by a refusal to acknowledge the power and propriety of the Royal Commission.

### **Different 'hearings' and contrary cultural sensitivities**

In the context of this cross-cultural 'hearing', the domination of one set of moral evaluations and the muteness of another was profound. The Royal Commission sought to demonstrate cultural sensitivity in a number of ways; for example, by allowing 'dissident' Ngarrindjeri women to be led by their own female Counsel, rather than by Counsel assisting, as was otherwise the Commission's practice.

Hemming (1996: 27-29) has presented a lengthy section of transcript of the evidence of George Trevorrow (T: 6423-25) which makes the inability of the Commission to 'hear' Aboriginal viewpoints transparent. In an extraordinary piece of testimony, George Trevorrow outlined the significance of the meeting of the salt and fresh waters around Hindmarsh Island, particularly by reference to his clan *nagiji* (totems). Counsel assisting, Smith, repeatedly suggested to Trevorrow that what he expressed was an environmentalist's concern for the area rather than a cultural concern:

*Trevorrow:* Those places like that is where these things breed, where they live, where they feed, all those things. You upset the totem area, you are upsetting everybody.

*Smith:* Let me put a suggestion to you: what you are talking about is a disturbance to the environment. Is that right?

*Trevorrow:* No, more than that. To what those Ngatji are to the people. They are not just animals and fish and snakes and things to us. They are real. They are more like people. Spiritual (T: 6423).

At the end of an extended section of cross-examination and frustrated by what he recognised as incomprehension on the part of Smith, Trevorrow concluded: '... I can't talk to you about that. It is plain to see you would never understand that anyway' (T: 6425).

A lack of comprehension of cultural matters is evident in another section of the evidence, when Ngarrindjeri women in the public gallery asked that an aerial photograph of the Murray River mouth, the area for which they claimed cultural significance, be turned around (see T: 1890-1896). This long interchange began with an interjection by a Ngarrindjeri woman sitting in the public gallery:

Would you please turn those around. They are sacred to Aboriginal women. Please turn them around. Don't snigger. Please turn them around (T: 1890).

Later the Commissioner responded:

What concerns me is that anyone who goes down to that area - any man, woman or child who goes down to that area presumably can see what is there. This is a photographic representation of what is there. I am a little at a loss to understand the basis of the objection (T: 1893).

In the end, the Commissioner moved to adjourn the session so that counsel assisting could sort out the matter overnight. When she announced this, there was a final interjection from the public gallery which suggested something else that could be done during the adjournment: 'You can go and look in the dictionary and see what 'respect' means' (T: 1896).

Calls for respect and respectful behaviour, together with expressions of outrage at the nature of proceedings, were the prominent interjections from Ngarrindjeri women in the public gallery recorded in the transcript (see for example: T: 29, 45, 48, 67, 2477). The representation of those interjections in the final report make it clear that the Commission would not concede that proceedings were 'a monkey show' (T: 45), nor understand what Ngarrindjeri women meant when they demanded that respect be displayed toward their culture or Ngarrindjeri people being discussed in proceedings.

### **The force of emotions**

Dulcie Wilson - a Ngarrindjeri woman who was prominent amongst those who disputed claims of the significance of Hindmarsh Island in the Royal Commission - wrote that it was the force of emotions which led her to raise, in public, her doubts about the claims of other Ngarrindjeri women. After the Royal Commission she wrote:

The proponent women were claiming that the aerial view of Hindmarsh Island resembled a woman's reproductive organs. This appalled me. The idea is ludicrous. How would our ancestors have known what an aerial view of Hindmarsh Island looked like when there were no aeroplanes during that era?

My friend, Dorothy Wilson, was present at a meeting on Hindmarsh Island when the aerial map was being discussed. Men were also in attendance; in fact, it was a man who pointed to the aerial map and said, 'Doesn't that remind you of a woman's private parts?' I was dismayed that such people would cheapen and degrade Ngarrindjeri women and their culture in this way (Wilson 1996: 38).

Other Ngarrindjeri women saw the Royal Commission itself as degrading of Ngarrindjeri women and their culture in a different, but no less forceful, way. The force of their outrage at the 'lack of respect' for Aboriginal people and their culture, which they saw the Royal Commission display, led to a different display of manners from those of Dulcie Wilson. Those manners damned them in the proceedings as well as the findings of the Royal Commission. Conflict about the power to determine manners and express respect remains at the heart of responses to the Hindmarsh Island Bridge Royal Commission.

The warning of Rosaldo to attend to the force of emotions is salient here:

In attempting to grasp the cultural force of rage and other powerful emotional states, both formal ritual and informal practices of everyday life provide crucial insights. Thus, cultural descriptions should seek out force as well as thickness, and they should extend from well-defined rituals to myriad less circumscribed practice (Rosaldo 1989: 16).

## Conclusion

As Andrews has noted:

The appointment of the Hindmarsh Island Bridge Royal Commission to report on the fabrication of Ngarrindjeri beliefs about Hindmarsh Island (*Kumarangk*) is unique. Government inquiries are never held to test the orthodoxy or validity of the spiritual beliefs of citizens. The Royal Commission was so inconsistent with the values of liberal democratic tradition and such an exercise in futility it seemed laughable. It raises issues which are not a joke. ... As the Commission progressed and reported, it revealed that the South Australian Government may have discovered a powerful weapon for Governments wishing to discredit Indigenous peoples seeking to use legal procedures to protect their interests. It appeared to have achieved the political purpose for which it was set up (Andrews 1996: 62).

In early anthropological accounts the manners of savagery were no manners at all. Such a rendering was resurrected in the Hindmarsh Island Bridge Royal Commission to characterise some Ngarrindjeri people and their heritage concerns. Comparable manners of conduct were displayed by some legal counsel, a savagery which was protected and even positively valorised by the legal culture which dominated this pseudo-judicial process.

Much has been written of the conflict between the Australian legal system and Aboriginal 'law' - a conflict which arises most particularly in those legislative domains which are geared to the protection, or even enhancement, of Aboriginal interests in land, sites and cultural heritage. I

have demonstrated that such conflict takes place not simply at the level of case formulation and legal procedure, but also in respect of the more ineffable qualities of demeanour, decorum and moral attribution. The enactment of the Hindmarsh Island Bridge Royal Commission relied as much on physical stances, verbal tone, emotional force and performative power as it did on reasoned or legal argument.

The Royal Commission worked on many levels to control and ignore the expressions of culture which it was set up to investigate. Even its textual traces (its transcript and final report) fail to convey the emotional force of its conduct. Meeting lawyers and journalists who also sat through this Royal Commission, I have repeatedly heard the comment: 'You just had to be there'. In this chapter I have sought to outline just why that might be.

The sentiments of Ridington, who was a witness of the Delgamuukw case in Canada, resonate with my own of Hindmarsh. Of his experience of the violence that can emerge from the dominating force of legal culture on the status of Indigenous people, he wrote:

Following the release of Mr. Justice McEachern's opinion, I experienced a deep sense of shame at the judge's failure to understand the teachings that the chiefs and elders had so generously given him. I knew they would feel deeply wounded by the callous and disrespectful language of his decision, above and beyond their distress at the decision itself (Ridington 1992: 207).

That recent Canadian case demonstrates, as does Hindmarsh in South Australia, that manners and contested understandings of respect are a significant consideration in analyses of the fights of Indigenous people over, and for, their land and heritage.

'Social' studies of the conduct of courts are dominated by a focus on discourse, language and what is said. A similar trend is already evident in respect of analyses of the Hindmarsh Island Bridge Royal Commission. Yet I have sought to demonstrate here that the manner and demeanour of utterance and performance is as important as the content of what is said and that which is capable of being recorded in the Transcript. I have also sought to demonstrate why we need to render these dimensions of social practice problematic and to develop a conceptual and theoretical framework for analysing them which, amongst other things, takes into account contestation between different interpretive and moral frames, power, resistance, gender and the force of emotions, particularly in institutional contexts of coercive State domination. Ephemeral but powerful State institutions, like the Hindmarsh Island Bridge Royal Commission, where procedures, practices and rules of legal culture have unstable and contested status, provide rich fields for ethnographic analysis.

## Notes

1. John Gray, Rod Lucas, Robyn McKenzie and Maurine Pyke made thoughtful critiques of earlier drafts of this chapter. A conversation with Melanie Coombe brought me to an important watershed in thinking about how I, as one personally and professionally entailed in its processes, can write about Hindmarsh. Insightful comments by D.J. Eszenyi were critical in focusing me on the taken-for-granted assumptions of lawyers. A number of other researchers who attended the Royal Commission, including Melanie Coombe, Susan Hemer, Steve Hemming and Marian Thompson provided important sounding boards for ideas deriving from my own 'participant-observation' of its proceedings. Chilla Bulbeck, Charmaine McEachern, Bruce Rigsby and Megan Warin facilitated and directed my reading. I am grateful for all this productive collegiality.
2. Nineteenth century writers were rarely explicit about what they meant by the term manners, but it can be inferred that they were concerned with manners 'as ways of living' which they saw as unfamiliar and exotic. This is evident in an analysis of the most early accounts of Aboriginal life in Australia. It is certainly evident in the earliest accounts of Aboriginal people in the Lower Murray region of South Australia (see Meyer 1846; Taplin 1879).
3. With few exceptions, such as Levi-Strauss's *The Origin of Table Manners* (1968) and Errington's *Manners and Meaning in West Sumatra: The Social Context of Consciousness* (1984).
4. See Fergie (1995, 1996a); Hemming (1996); Lucas (1996); Mead (1995); and Ryan (1996) for brief introductions to the events leading up to the Royal Commission and its conduct.
5. But see also Harouche (1993) who published 'Civility and politeness: neglected objects in political sociology' ('La Civilite et la politesse: des objets 'negliges' de la sociologie politique'), signalling a concern which might well have included 'political anthropology' within its ambit. The publication of Elias' (1978) *The Civilising Process: The History of Manners in English*, has had a significant impact on some sociology into the nineties. I note, for example, the publication of special issues of *Theory, Culture and Society* in 1987 (vol. 4, nos 2-3) and 1995 (vol. 12) focused on the work and contribution of Elias. In Australia, Minson (1993) has explored the efficacy of social change strategies over the issue of sexual harassment and suggested that attention to manners offers much.
6. Bodily hexis, in Bourdieu's (1977) terms.
7. I have suggested elsewhere that with the Hindmarsh Island Bridge Royal Commission a new variation of State-Federal dispute was pioneered in the run-up to a Federal election (see particularly, Fergie 1996b: 139, 141-2).
8. In July 1994, the Commonwealth Minister for Aboriginal Affairs banned for 25 years the building of a bridge between Hindmarsh Island and the mainland of South Australia at Goolwa. He did so because he was persuaded, on the basis of the assessment of his Ministerial reporter (Saunders 1994), that the area was of particular significance to Ngarrindjeri people according to their 'tradition' and because he was satisfied that the building of the bridge would damage or desecrate the area. This process was carried out under the ambit of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. That Act was reviewed in 1995-6 by Justice Elizabeth Evatt (1996).
9. The 'survey' of Aboriginal views was required in a 'consultative process' to properly issue an authorisation under s.35 of the Aboriginal Heritage Act (South



Australia) to enable the disclosure of Aboriginal tradition for the purposes of the Royal Commission. The previous authorisation had been determined to be unlawful after a challenge in the Supreme Court.

10. Legal practitioners were the defining players in the Hindmarsh Island Bridge Royal Commission.
11. By contrast, the establishment of a Royal Commission in the United Kingdom requires the assent of both Houses of Parliament (Campbell 1984: 54).
12. Section 11 of the *Royal Commissions (South Australia) Act 1917* makes provision for penal sanctions of up to three months for a variety of 'contemptuous' responses to the operation of a Royal Commission, including failure to attend on summons, to present material summonsed, wilfully insulting or demeaning a commission or Commissioner, or disrupting or misbehaving before a Commission.
13. The report of the Hindmarsh Island Bridge Royal Commission put the case succinctly:
 

The Commission was not bound by Rules of Evidence (*Royal Commissions (South Australia) Act 1917*, ss.5-9). Accordingly, there was no obligation on the Commission to apply the standards of proof which apply in courts of law' (Stevens 1995: 7).
14. Nevertheless, an application for judicial review of the findings of the Hindmarsh Island Bridge Royal Commission on the basis of a denial of natural justice is presently being pursued by Thomas Edwin Trevorrow (South Australian Supreme Court No. 1185 of 1996) and is expected to proceed to the High Court.
15. Rather than an investigative process; a primary distinction in approach to the inquiry made by Hallett (1982: 150-58; 1995).
16. References to the transcript of the Royal Commission are indicated by a 'T' reference. In this case the reference is to page 2482). The Transcript of proceedings is available on the internet at <[http://library.adelaide.edu.au/gen/H\\_Island/index.html](http://library.adelaide.edu.au/gen/H_Island/index.html)>.
17. Over the past ten or 15 years there has been some vigorous debate about the propriety and powers of Royal Commissions in Australia and the lack of protection they offer citizens mentioned or brought before them (see Hallett 1995; Nyman 1986; Sackville 1984; Whitton 1992; Woodward 1986).
18. Such 'two-sided' views of the matter should not obscure how central protagonists in this case positioned themselves differently in this issue. The existence of a broad range of different opinions and positions will be taken up in another paper.
19. See Stevens (1995: 8).

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#### 4. 'Recognition and justice': the traditional/historical contradiction in New South Wales

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*Gaynor Macdonald*

Differentiations between Aboriginal people residing in New South Wales (NSW) communities are seldom made in policy making or even in anthropological research. There is a tendency to homogenise them as 'one people'. Promoted by a couple of decades of historical and anthropological discourse, there has also been a tendency to represent these communities as products of a colonial history which left their members, whether as passive victims or resistance fighters, dislocated and, implicitly, bereft of their cultural traditions. But such an approach is unable to account for complex intra-community politics which stem not only from the different ways in which people have experienced the impacts of colonial regimes, but also from the continuing dynamic of Indigenous cultural traditions whose values are not necessarily shared by all community residents.

Differences within contemporary communities have been difficult to acknowledge publicly. Resistance to doing so has come from Aboriginal people, policy makers and researchers. From an Aboriginal perspective, access to resources since the early 1970s has been dependent upon conformity to an idealised notion of the cohesive and harmonious community - 'one people' or 'one mob'. This has been translated on the part of policy makers into a model of the liberal democratic society, emphasising the equality of all members, the common good and the need to distribute resources equitably, irrespective of hierarchies or merit. 'Need' was expected to take precedence over merit or seniority in allocations of, for instance, housing. It was necessary to project a united front and non-Indigenous people who did have some understanding of internal conflicts were coopted into a cooperative silence: 'you don't hang out your dirty washing in public' (to which I am obviously still prone, hence not naming the communities I later describe). Much social research has focused on issues of power and inequality, influenced by Foucauldian as well as the egalitarian discourses of feminist theory and theories of development. This has also contributed to a homogenising process in its focus on Indigenous/non-Indigenous relations. Internal conflicts have been relegated to the too-hard basket, for political and probably also theoretical reasons. Few wanted to debate whether conflicts or inequalities could be produced by Aboriginal culture or desires rather than by 'the white system'.

But few Indigenous people could have been aware in the 1970s or even early 1980s of the extent of intra-community conflict that would arise throughout NSW in the following decade and a half. Much of this conflict has stemmed from changes in resource allocations, both from the increase

in available resources and from the way those resources could be accessed. There were few cultural or legislative means of dealing with the subsequent escalation in tension and competition.

There have been significant changes for intra-community political authority and legitimacy which have stemmed from this change. Resource allocations based on kinship and political allegiances, in turn based on relations to place and skills in the workplace or in hunting, have shifted to a focus on equity and need. This has led to much conflict, often to the bemusement of supporters who believed changes in policy were progressive improvements and that the significant increase in the availability of resources would assist communities to develop socially as well as materially.

The reasons for these high levels of intra-community conflict in recent years are complex. There are both economic and structurally imposed dimensions which I discuss elsewhere (Macdonald forthcoming (b)). In this chapter I focus only on one dynamic and, while I consider it a particularly significant one, I am mindful that this discussion does not tell the whole story. The dynamic discussed here is that expressed in the relationships between people who see themselves as having traditional ancestral links to the country in which they live and with which they identify, and those who have come, or whose ancestors came, to live in the area from elsewhere in the post-contact period. It is the long history of refusal to acknowledge this dynamic within NSW communities, as a corollary to the denial of a continuity in cultural traditions, that has led to the underestimation of its impact. In particular, the conflict that it produces through the contending values implied in the recognition of cultural tradition on the one hand, and justice as social equality on the other, have been underestimated. Both have been a focus of political activity in NSW over past decades, but it is only more recently that an inherent contradiction within these two political aspirations has exacerbated tensions in intra-community relations. The presence of the *Native Title Act 1993* (NTA) now brings these into even sharper light. It is becoming increasingly difficult to hide the dirty washing. More to the point here, how did it get dirty in the first place?

### **The composition of Wiradjuri communities**

I discuss these dynamics with reference to the Wiradjuri communities in central NSW. Wiradjuri country - the area characterised by use of the Wiradjuri language - is comprised of approximately 20 communities spread throughout an area of over 80,000 square kilometres of inland NSW. Most of these communities are associated with rural towns and four rural cities and generally take the name of these places, so that the Bathurst community is associated with the city of Bathurst, the Leeton community with the town of Leeton and so on. The size of the communities varies from about 50 to over 1,000 and each has slightly different histories of

colonial encounters which influences their contemporary composition. All of these communities have some people of Wiradjuri descent, sometimes a majority and sometimes a minority. Each community is independent, and land-ownership is at the local level. There are high levels of intra-Wiradjuri marriage and much social interaction, but there was no centralised political organisation until 1982, when most communities voluntarily joined in forming a Wiradjuri region so as to maintain their corporate identity for the purposes of the *Aboriginal Land Rights (NSW) Act 1983*. In most communities, at least some of the Wiradjuri residents claim a continuous link to the 'way back' (traditional) people of that particular part of Wiradjuri country. In most there is also a significant number of people from other parts of Wiradjuri country, as well as non-Wiradjuri people. In some cases the latter are a majority. Below, I describe a sample of these communities so as to illustrate the composition of their Indigenous population. First, however, a short history of colonial encounters relating to land will contextualise the present.

It generally surprises outsiders to learn the extent of the continuing relations between Indigenous people and their country of ancestral origin in NSW. The emphasis given to dispersals and massacres in recent historical studies has often downplayed the desire and the efforts of people throughout south-eastern Australia to remain in, or close to, their own country throughout the devastating years of colonial violence and intensification of European demands for land. These efforts have been well documented by historians (see Goodall 1982, 1988 and particularly 1996; Read 1988). The nomenclature that might signify such relations - through the designation of people as Wiradjuri, Kamilaroi, Paakantji or Awabakal - has not been used in public discourse until recently. This omission is itself a product of the myth of culturelessness, and the consequent homogenising appellation of all Indigenous peoples as 'Aborigines' has served to reinforce the idea that traditional relations to country no longer exist.

My own Wiradjuri research in the early 1980s, as well as that conducted more recently for Wiradjuri native title claims, confirms the claims by Wiradjuri traditional owners that they have continuous histories in place, despite the restrictions on their use of the lands with which they identify. The genealogies I have produced link ancestors of direct descent with the place where their descendants are now living, and go back to the beginning of the nineteenth century and thus before extensive European occupation and its attendant conflicts took place. How Wiradjuri people managed to stay in their own country, usually despite high levels of frontier violence, is a matter for detailed local study. In most cases, pastoral land use enabled camps to be established on stations until closer settlement forced people onto local reserves which were set up from the 1880s. Wiradjuri people moved to these, in many cases, with relatively little dislocation. In other cases, especially where agricultural land use was intense, people fled from violence or were forcibly moved but later returned, sometimes in the following generation. The confirmation of the

Dhanghutti native title claim on the north coast is the first formal recognition of this history of continuing association in NSW.

Goodall illustrates the Aboriginal Protection Board's own acknowledgment of not only the maintenance of Aboriginal relationships to their own lands, but also the significance of that relationship to the maintenance of Aboriginal lifeways. When what Goodall terms the 'dual occupation' on the pastoral stations ended with land subdivisions from the 1870s, forcing people into town camps, the Protection Board deliberately tried to disperse them, a policy that they recognised as having failed when they changed it to 'disciplinary supervision' in the 1930s:

Aboriginal people's identity with their land and kin was a characteristic which the Protection Board saw as fundamental in defining 'Aboriginality', and it believed it was this set of behaviours which had destroyed the 'dispersal policy' (Goodall 1996: 200).

The strong emphasis on assimilation meant that these people's tenacious link to their own land was not in the Board's interests: 'there was now a very pressing reason to disrupt the links Aboriginal people had with their lands, because these were seen to sustain an active identifying Aboriginal community network' (Goodall 1996: 200-201).

However, the colonial history of NSW is a complex one and it is certainly not the case that all Indigenous people were able, or even chose, to remain in their own country. Many became refugees from situations of violence or disease. Some were forcibly moved by agents of the Protection, and later Welfare Board, or fled to other areas to prevent such agents taking their children from them. At times, reserves were closed down or all services stopped in an attempt to enforce dispersal - in Yass, for instance (see Read 1982). The mission at Warangesda, Darlington Point, in southern Wiradjuri country, initially became a refuge for people from many areas, as well as some locals. Once it became subject to Protection Board control as a supervised station, it was also a focus, as was Brungle outside Tumut, for repressive controls as well as the removal of children. Several other reserve communities, initially unsupervised, received many of the refugees from such centres as Erambie at Cowra - although this increase in the population of unsupervised reserves led, in turn, to them being assigned managers.

Reserves were gazetted in over 20 different areas of Wiradjuri country, often with several allocations in one place representing reserves being moved or expanded. They were spread throughout the area, but tended to be concentrated along the major rivers (Murrumbidgee, Lachlan, Macquarie and upper Bogan). There were also camping areas not formally established as reserves but which had long histories, such as the sandhills in Narrandera and the quarry site near Cowra. This gave Wiradjuri people opportunities and options with regard to staying in their own language area, even if not always in the specific local country to which they could claim ownership.



As in Indigenous tradition, people moved to marry and because of local conflicts. Sometimes the intention was that this be temporary, but such moves sometimes proved to be permanent. Once the links between people and their country were weakened or severed, it became easier for some to migrate permanently to other areas, including interstate. There are strong memories of the Aboriginal Welfare Board's 1950s and 1960s policy of arbitrarily moving individuals and small family groups around NSW if they were seen to be either causing trouble or being subjected to abuse of some kind. Older members of the Erambie community in Cowra recall this policy as a deliberate means by which the Board tried to break up politically strong and cohesive communities, believing that such enforced migrations would create a diversifying, and thus a fissioning, of ties within the recipient communities. In the long run, this has proved to be the case, although it was not apparent for one to two decades and it took the influence of Aboriginal organisations (see below) to see this realised.

There were also economic imperatives that caused people to move when access could not easily be had to traditions of hunting and gathering or, in more recent times, the lure of better housing and the prospect of employment has encouraged voluntary migration. The latter has had a significant impact on Wiradjuri communities. The Family Resettlement Scheme of the early 1970s saw hundreds of family groupings move from far western NSW into targeted resettlement areas. Most of the resettlement towns and cities were in Wiradjuri country (excluding Newcastle), including Albury, Bathurst, Dubbo, Orange and Wagga Wagga. The Paakantji populations in some of these Wiradjuri centres are still high, even though up to 50 per cent of resettlement program participants returned to their own country.

Over time, these patterns of movement over the landscape have given different complexions to Wiradjuri communities. Following a convention recently adopted within anthropological and some Aboriginal discourse (see also Martin, this volume), I refer in general terms to those community members who identify themselves as having ancestral roots in their community of identity (whether or not they reside in it) as the 'traditional people'; that is, people who understand their own traditions in terms of that country, people who would, for instance, claim rights as native title owners. On the other hand are those people who reside in the community but who clearly identify with communities in other language areas, as well as people who no longer know their spatial-social origins. These people move into an area for a variety of reasons, most of which (except in the case, of course, of spouses) are a direct product of colonial policy rather than the traditions of Indigenous values or practices, and they are conventionally referred to as 'historical people'. In between the unambiguously 'traditional' and 'historical' people are a whole range of people who variously identify with one or other, or with both of these.

Some of these different groupings are named, but not all, and naming can differ from one community to another. I have encountered the

following labels: the 'way back' people are those who have a long association with an area and are most usually those who could claim to be traditional owners. The term 'visitors' is a reference to the smaller groupings who were moved by the Welfare Board in earlier decades and who have no kin relations locally, but who nevertheless may have lived locally for up to three or more decades. 'Johnny-come-latelys' are those who have resettled from other areas, although the term can be used to disparagingly refer to local Wiradjuri people who have been away for a long time and recently moved back, but who are being too pushy. 'Blow-ins' or 'fly-by-nighters' are sometimes related to community members but live elsewhere and occasionally visit. More often this is a term for temporary residents. They will stay a while, sometimes with high levels of involvement and expectation (or promises), and then disappear.

People who are often distinct in terms of social-political relations, but who are not labelled, include Wiradjuri people who have relocated but who may not have strong kin links with local 'way back' people. They are, nevertheless, often people of long standing in the community and are not seen as outsiders in any way. They can include Wiradjuri and non-Wiradjuri who have married into the 'way back' grouping. There is sometimes some ambiguity about the status of people who were removed from their families at an early age, the 'stolen generations', who return to the community. They may be related to 'way back' or migrant Wiradjuri (or occasionally others) but, although they are accepted, it often takes some time for them to reintegrate in terms of political involvement and legitimisation. The 'poshies' or 'up-town-niggers' are of local descent, but have chosen not to identify as Aboriginal in the past. Some of these have sought to be reintegrated and, like the stolen children, do so with varying degrees of success over time.

The focus for conflict over resource control tends to be between either traditional Wiradjuri and non-local Wiradjuri, or Wiradjuri (traditional and non-local) and non-Wiradjuri. This depends in part on the way in which the community is constituted and the distribution of numbers (see below). A large population of non-Wiradjuri generally tends to unite the Wiradjuri to a greater extent. Where there is competition for control between traditional and non-local Wiradjuri, the non-local Wiradjuri are often able to co-opt with relative ease any non-Wiradjuri 'visitors' whose outsider status can make them politically vulnerable. Nevertheless, there is significant variation with respect to the mix of 'traditional' and 'historical' peoples, and distinctions between them are not always clear-cut - all of which impacts on intra-community political dynamics and makes the on-the-ground relations more complex than my model might suggest. To illustrate how different Wiradjuri communities might be constituted, I have given below a short profile of some communities which, whilst I do not name them, are not disguised and will be recognisable to those familiar with Wiradjuri country.

In 'Town A', the majority of the local Indigenous population can trace their descent back to local Wiradjuri ancestors of the mid-nineteenth century. Almost the only exceptions are incoming spouses, both husbands and wives, the majority of whom until recently have come from elsewhere in Wiradjuri country. There have been occasional times when people have moved in as temporary residents and, in much fewer cases, as permanent residents. This has been a very stable community over time, having had reserves allocated from the 1890s, the major one of which was supervised for a decade in the 1930s. All Aboriginal organisations are controlled by local ('way back') Wiradjuri people. The community is not without its conflicts, but they are explained in terms of personal kin histories rather than the presence of different 'mobs'. It has not attracted resettlement migrants, nor would its economy make this likely. There is no identifiable group of 'visitors' or other outsiders. The Local Aboriginal Land Council (LALC) is under the control of 'way back' Wiradjuri people.

'Town B' has always had a strong local core group. It became a refuge in earlier years for people trying to avoid having their children taken from them under Protection and Welfare Board policies. These people often stayed and predominantly defined themselves as being of Wiradjuri descent. In the 1960s, welfare agents adopted a policy of arbitrarily moving people from other areas of NSW, because they were either experiencing or causing trouble. Small family groups were moved to Town B and were consistently regarded as outsiders, although there have been cases of intermarriage between younger generations which has assisted in redefining relations to some extent. Conflict continues. In the late 1980s there was also some voluntary migration into the town, in most cases by people seeking work or better housing. Relations with these recent migrants differs; some have become involved with the local community, with reactions varying from acceptance to resentment from Wiradjuri locals. Aboriginal organisations are all controlled by Wiradjuri people, but not all are under local Wiradjuri ('way back') people's control. There is a high level of conflict of interests and power struggles, predominantly between way back people and non-local Wiradjuri migrants, with visitors being co-opted by the latter. The LALC is one site of these struggles, although it has largely remained under 'way back' Wiradjuri control.

Its neighbour, 'Town C', had a large reserve from the 1890s which was at one time supervised and noted for its political activism. The reserve community is still the core of the Wiradjuri population which also includes migrants from elsewhere in Wiradjuri country, most of whom have kin links with local Wiradjuri. The city has a significant resettlement population, mostly from western NSW. The non-Wiradjuri resettlement people live, for the most part, on one side of the city and the majority Wiradjuri-based community on the other. Control of Aboriginal organisations is contested, and currently dominated by the politically active non-Wiradjuri. A traditional owner for this area recently attended a meeting of the Wiradjuri Council of Elders to explain his reasons for

retracting an application for native title on a part of the river recognised by local and non-local Wiradjuri alike as being of strong social and spiritual significance. He emotionally reported a decision by the LALC and National Parks and Wildlife Service to remove grooved rocks from the river to a new town park. This desecration of a designated 'Aboriginal place' was clearly devastating to him, as well as to many of the other Wiradjuri people present at the meeting, and the Council sent out strong letters of concern.

'Town D' had a supervised reserve to which people were brought from many different parts of south-eastern Australia. A core of these reserve residents are of Wiradjuri descent but in practice they have intermarried with incoming people in the later nineteenth and early twentieth century, such that distinctions between the original Indigenous people and dispersed refugees might now be difficult to make in many cases. The community is largely made up of this homogenised population, with little immigration from non-Wiradjuri in recent years. Control is seen as being by local Wiradjuri people, although this has been subject to kin factional conflicts. The LALC is controlled by local Wiradjuri.

In 'Town E' there are no people of local Wiradjuri descent and no apparent record of local people having survived into the twentieth century. There is a significant population of Wiradjuri people who have moved from other parts of Wiradjuri country over the past 20 years, the core of which explicitly defines itself as the caretakers of Wiradjuri land in the area. The majority of the population, however, are Indigenous Australians from elsewhere in NSW (mainly the west) and further afield, particularly from Queensland. Control of the major Aboriginal organisations is by non-Wiradjuri people and this is a source of concern to at least some Wiradjuri people. The local media depicts the main two factions as being a 'cultural' one and a 'pragmatic' one, the latter being the non-Wiradjuri controlled LALC which is more individualistic in its approach to policy and funding.

In 'Town F', there is a small Wiradjuri group with a dominant Paakantji population. There has been significant tension between the two. Paakantji are actively involved and members of the much smaller Wiradjuri group have sought alternative means of expression outside of the major organisations. Because the existence of traditions of culture are seldom recognised in NSW, in Wiradjuri areas, traditional owners only have a say in matters concerning their country if they remain an active and numerical majority. Where the immigrant population exceeds the traditional owners, the democratic principles introduced as part of the colonial governing process take over, effectively disenfranchising the traditional people. In this case, the Wiradjuri people no longer try to compete, thus alleviating much of the earlier dissension. I heard one prominent member of the Paakantji interviewed recently on local radio outlining the history of the Wiradjuri in the area, noting that the Wiradjuri of the area did not survive the violence of the 1820s and 1830s and therefore other Aboriginal people such as himself had moved in. A report

of this interview did not surprise some Wiradjuri elders, but they expressed dismay at such a blatant disregard for Wiradjuri people living locally, as well as for Wiradjuri people as whole who, they stated, had not given these others permission to assert control of Wiradjuri lands in this area.

In contrast, in 'Town G' there is a Wiradjuri population all of whom have moved in recent memory from neighbouring Wiradjuri locales, but are now well-established and recognised as the Aboriginal community of that place. There is strong acceptance on the part of Wiradjuri neighbours that, in the absence of 'way back' Wiradjuri in this place, it is appropriate that they should be entitled to claim land there under native title. There are no non-Wiradjuri migrants and it appears that this claim is not disputed by non-Wiradjuri neighbouring communities which are on its borders.

### **Contradictions in cultural and political agendas**

My point is that many communities (defined in spatial-geographic rather than social terms), as a result of waves of refugees and migrants, have a complex composition which reveals itself in differential claims to political status and rights. Even within Wiradjuri country, with its relatively similar pattern of colonial relations, there are wide variations in community composition. Similar stories can be told elsewhere within NSW and, no doubt, throughout Australia in various forms, particularly where enforced migrations or resettlement programs have been implemented: conflict between traditional owners of country and Indigenous Australians who have moved into that country as refugees or migrants has been commonly reported throughout Australia. It appears that the significance of the NTA (and before it the *Aboriginal Land Rights (Northern Territory) Act 1976* and the *Queensland Aboriginal Land Act 1991*) in bringing these distinctions - and thus the conflicts - clearly to light is both widespread and increasing. The prospect of successful claims by traditional owners is being seen by some to have the potential to further disadvantage or dispossess the historical people.

The mixes described above give rise to an intra-community politics which results not only from the interface with the dominant society, and the ways in which political and economic agendas are played out within that society, but also the ways in which they are disputed among community residents themselves. One of the marked differences I have observed over time is the way in which the discourse of 'recognition', as illustrated in calls for self-determination, land rights and native title, can actually conflict with that of 'equity' as this refers to lifestyle improvements, particularly those associated with housing, employment, education and access to legal and medical services. Intra-community Aboriginal politics are often played out as an uneasy tension between the potentially conflicting agendas of recognition and equity, often compounded by different meanings being played out under the same terms in relations with the non-Indigenous society.

One way in which many of the current conflicts within these communities is commonly interpreted by non-Indigenous people is as a breakdown of community order, attributed to 'cultural breakdown'. Indigenous people tend to attribute it to destructive white influences over which they no longer have control. Neither argument convinces, although both have some merit. Many of the conflicts are not signs of cultural breakdown but are, in fact, the opposite: they are evidence that traditions of political order are operative but contested. It is the attempt by people who wish to define themselves as outside that order, by manipulating the mainstream system in contravention of it, that gives rise to many conflicts. Thus, tension is due not merely to the imposition of alien structures, but to the way in which these are played off against traditional structures of relationship and value (which is not to imply that this is a causal relationship either). Both traditional and historical people aspire to the equity principles which underlie their long struggle for justice, but the politics of recognition are primarily and increasingly the politics of traditional people. Both sides criticise the stance of the other, who are variously characterised as 'up themselves', 'selfish', 'powermongers', 'not in touch' or 'living in the past'.

What has been evident for at least the past decade is an increasing polarisation between the traditional and historical people, and a clearer separation of the rhetoric upon which they base their claims for resource allocation. Traditional people base their claims on the demand for recognition of their rights as traditional owners: they seek land to which they are entitled by tradition; recognition of their status as traditional owners by both non-Indigenous Australians as well as by non-local Indigenous people; and the right to maintain cultural practices, including control over what is taught to their children.<sup>1</sup> Resources required to achieve equity in Australian society are seen as their due because of the alienation of so much of their lands. This is an appeal of long standing - a theme found in south-eastern Aboriginal demands since the 1850s.

I would also include within these traditional people's politics the current move to have the history of 'stolen children', and its consequent forms of cultural genocide, recognised and compensated. It is the removal from one's kin and land-based culture that is highlighted in so many of the distressing stories which are being told and more is at stake in their recognition than merely acknowledging the over-zealousness of welfare agents. True recognition also requires an acknowledgment of the right of these children and their communities to their cultural traditions, both social and landed; rights based on their status as Indigenous peoples, not merely as wronged wards of the State.

Historical people cannot engage in the rhetoric of recognition except in general terms as 'Aborigines' and they have tended to emphasise social equity issues, capitalising on government agendas which continually emphasise the need for better education, housing, health and employment. The very fact that they are willing to prioritise these issues, sometimes to

the exclusion of rights based on Indigenous tradition, makes them attractive to mainstream political interests. Aboriginality becomes a matter more of biological descent and experiences of discrimination than of cultural tradition. In seeking equal access to resource providers, which has meant increased efforts to wrest control over resource provision from traditional people through local Aboriginal organisations, in particular the land councils and housing companies, these organisations become sites of contestation. The notion of equity is associated firstly as an issue with other Indigenous people (often the traditional people) who are seen to have dominated access to resources in the past, then secondly in relation to non-Indigenous people.

Initially, the NSW land councils seemed like the proverbial pot of gold and in many cases provided a number of jobs, often with cars as a part of the package. The struggles to control the land councils began early, though they have been lessened by changes in funding policies which restrict the amount of money LALCs can allocate and the levels of staffing which they may have (see Macdonald (forthcoming (b))). They have become less attractive as foci for economic allocations, although still valuable in terms of prestige. Not only does this make them less attractive to historical people, but their failure to address traditional interests (including acquisition of culturally significant land; promotion of culture and heritage; and return of material culture) also makes them of dubious worth at times to traditional people. In some LALCs it is hard to sustain sufficient interest to run them. Housing companies have gained more in prestige as they are still seen to be able to allocate tangible material resources, in the form of housing. In some LALCs these two have merged, with LALC policy, initiated from the central NSW Aboriginal Land Council, beginning to focus on the provision of opportunities for individual house ownership based on low-interest loans: these politics are more assimilationist. Another agenda taken up by traditional people in particular has been the provision of cultural and tourist centres, but these ventures have also succumbed to intra-community factionalism in the Wiradjuri cases.

Traditional Wiradjuri people have been, perhaps one could say by default, the authoritative and influential people in the past, both as far as community dynamics are concerned and in mediations with Europeans, including government. Indeed, this is to be expected throughout a history in which local traditional land owners, with strong kinship networks on which to draw, and often long histories of working with Europeans in the local area, would have maintained authoritative profiles. As I have illustrated elsewhere (Macdonald (forthcoming (a))), however, it is not merely resource acquisition that enables people to maintain power, but also the ability to distribute it in ways which prevent discontent. Thus, stories of stable leadership assume that intra-community resource distribution is being maintained as effectively as it is acquired and on equitable grounds (irrespective of the composition of the community).

The constant changes, or at least attempted changes, in people in formal leadership positions today usually stems from a perception (not always accurate or well-informed) that those in control are not distributing resources equitably. This is sometimes a response from people who do not understand the process of grant allocations from government sources, nor the skills required to make sure the available funds flow in desired directions. The reality is often very different from their expectation of an abundant supply of resources: intense competition exists for 'Aboriginal' funds to be allocated to different projects within the State and nation, more so with the advent of the Aboriginal and Torres Strait Islander Commission. However, it is not the case that funding to Aboriginal communities will produce houses, cars and jobs for all, as the experienced well understand. Local administrators can be criticised for only managing to provide two houses (especially if any of their own mob happened to be next on the waiting list) without local people recognising that neighbouring communities may not have been allocated any at all because their negotiators were not forceful enough. Nevertheless, this criticism is sometimes strategic rather than ill-informed.

There are several discourses upon which historical people can draw in their struggles to wrest control and to legitimise doing so. These directly relate to the non-Indigenous values of a liberal democratic society which stresses individualism over the community good, and the equality of all irrespective of background or history. Coupled with the emphasis which has been placed over the past two decades on the need to ameliorate poor living conditions for Aboriginal people throughout Australia, and the large amounts of money allocated by government to do so, it is not difficult to identify the expectation that material needs, at least, can and should be met. Historical people are much better able to confine their concerns so as to better appeal to the mainstream society which finds its record in addressing Aboriginal living standards an international embarrassment. But this is not the only means of obtaining support. Another is to accuse traditional people of 'nepotism', an increasingly popular form of criticism with strong media appeal, but one which clearly and strategically denies the efficacy and legitimacy of kinship as providing pathways for action within Indigenous tradition. Nevertheless, this criticism also recognises the power differentials which concern historical people. Whether their concerns are warranted, such as whether traditional people do or would exclude or sideline them, is a question that not only requires further assessment (based on evidence rather than assertion) but which the traditional people presumably need to be able to take on board explicitly if they wish legitimisation of their differential status as landowners within a mixed community.

Social theory has also played into the hands of historical people, with critical theory being dominated by concerns with power and equality. The issues have been simplified as being about relations between 'black' and 'white', colonised and coloniser. The justice agenda has focused on



equity - of status as well as material living standards and opportunity. And to the extent that these have been able to be embraced within a liberal democratic ideal, they have been widely supported by Australians. Social injustice as an unacceptable denial of the right of all citizens is a relatively easy banner for supporters to rally together under. To the extent that the 1970s and 1980s land rights movement was perceived in these terms, it was also able to bind together people with disparate values, meanings and agendas. In the process, Indigenous people in NSW were homogenised to the extent that any Aboriginal person, even from interstate, could be seen as an adequate representative for all others. Support was for 'Aborigines' rather than for Wiradjuri or Paakantji. The dismay of many of these non-Indigenous supporters at the conflicts which escalated as they saw their own ill-conceived notions of 'Aborigines' collapse sent many away licking self-inflicted wounds.

Traditional politics are not so popular in that they confront mainstream Australia with its history of colonisation in often uncomfortable ways. They make demands which require a painful letting-go of both material resources and control (such as land) and of complacent ideas of superiority, legitimacy and morality. Under the structural differences which the NTA potentially introduces into contemporary mixed communities, traditional people will need to address the issues arising from their different status. It is only relatively recently that, within feminist debates, there has emerged a demand for a politics of difference from, for instance, third-world and black women who saw themselves being submerged into a general category of 'women', experiencing another wave of denial and suppression - but this time from a category of 'women' defined in terms of relatively powerful white middle-class women from industrialised societies. It may well be that the insights derived from this literature may present models of worth for the consideration of traditional and historical peoples in mediation situations. There is a role for anthropologists to be proactive in this respect rather than waiting to analyse the outcomes. The NTA demands a creative response to the politics of difference that it will necessarily and publicly impose.

What would an acceptable politics of difference mean in the Wiradjuri context? I do not feel confident to address this question. The NTA provides traditional people with a means of securing control of both local resources and status. It is explicitly seen by some Wiradjuri people as a way of putting historical people in their place, whether non-local Wiradjuri or non-Wiradjuri, depending on the community dynamics described above. In fact, it is a recognition of the difficulties that such a confrontation might give rise to that also makes some Wiradjuri hesitant about putting in a native title claim. An application has the potential to completely divide a 'community'. While the divisions may already be well-recognised, there are also traditional means by which conflicts have been managed and contained which militate against polarising them, one of which is not to publicly acknowledge them, at least not outside the

community (Macdonald 1990). The native title process is very public and very confrontational in that it necessarily distinguishes the traditional from the historical people, as well as giving the traditional people the right to represent their own highly localised spatial (traditional country) and social (kin) interests in mediations and negotiations, and in court - to, as the legal process seems to imply, the exclusion of all others.

### **Challenges and opportunities**

Traditional rights stem from the maintenance of a tradition of law and custom that historical people have sought to undermine, sometimes unwittingly but, more recently, very consciously. Certain rights which are held by local land-owning groups throughout Wiradjuri country accrue only through laws of descent and affiliation to land. The descent laws operate through cognatic principles which are structurally flexible but not negotiable, in that they do not admit those people who are not blood-related (even adoption appears to be ambiguous in this respect). Rights of a more limited kind also accrue by virtue of long-standing residence, including involvement in day-to-day community affairs, as well as rights to access and use of lands, for hunting and gathering as well as other activities such as football, socials, camping and so on. Temporary residents do not have such rights and should ask permission to engage in certain kinds of activity; for example, land and resource use, or decision-making forums. These distinctions are comparable with those most societies make to articulate levels of incorporation, and the differential rights that attach to them, and are incorporated in such Australian terms as 'citizen', 'permanent resident', 'temporary resident' and 'visitor'.

I have found the host/guest model of incorporation of both temporary and more permanent non-land owning peoples (see von Sturmer 1984; also Macdonald 1986, chapter 2) useful in explicating the relations which enabled reasonably harmonious acceptance into Wiradjuri communities in the past. Whilst traditional people as hosts have certain powers and rights, so too do guests, and the onus is on the hosts to look after the guests adequately. If not, as particularly evident from the 1970s, complaints will be made which will have an adverse impact on the hosts, and there are 'visitors' in Wiradjuri communities who have become adept at using the white system in just this respect if they think they are not getting a fair deal or can not get their own way.

Within the community of traditional owners, Wiradjuri people do emphasise democratic principles. These are not necessarily extended to outsiders, nor to people who defy their laws. This is also consistent with legal principles held widely throughout the world by societies who label themselves democratic. As is also common in such societies, Wiradjuri people recognise hierarchies of status, prestige and power which, in their case, are based on such factors as kin and personal histories, personality, expertise, land relations and knowledge. Historical people with the status

of accepted permanent residents will often be accorded status along the same lines and held in high regard. However, it is also likely that one of the characteristics of this lies in their willingness to defer to traditional owners when appropriate (which may be seldom necessary in practical terms, but which is no less significant for being so). Complainants are most likely to be those who do not want to play the game according to traditional etiquette and who recognise that the white system doesn't respect them either.

One could argue that, where historical people have been prepared to disregard Wiradjuri etiquette, this is another form of dispossession and denial of traditional rights brought about, in this case, by other Indigenous peoples in a new wave of colonisation; namely, a dispossession brought about ironically by the generosity of earlier generations of Wiradjuri towards Indigenous refugees and migrants - a hospitality they are proud of in their historical accounts - compounded by more recent resettlement in some areas. What happens in such resettlement areas where the 'guests' become the majority? And will there be, in the recognition of native title, respect for traditions of law and etiquette from mainstream Australia after its long history of denial, even disbelief in their efficacy in NSW, and its willingness to allow historical peoples to use them in undermining processes?

The challenge from a traditional Wiradjuri perspective might be to develop a more sophisticated model from a baseline such as the host/guest etiquette which appears to have served well until the mid-1970s - although, as the traditional/historical dilemmas in the recent history of Fijian politics illustrates, this is not an easy task. Traditional rights do not lend themselves to absorption into generalisable democratic values, in situations of numerical imbalance, without the loss of those rights. But neither do they negate the possibility and scope for providing for all members of a community in terms of social justice and lifestyle issues, whilst still maintaining traditionally-based roles. It is possible to understand justice as stemming both from rights as Indigenous owners of country and culture and from citizenship and civil rights in a modern nation state. Ideally, one might argue it is both but, if the contradictions are not acknowledged and the issues involved prioritised, then conflict and miscommunication seems inevitable.

Likewise, recognition could be reduced to a homogenised form of 'Aboriginality' associated with a homogenised history and culture, as taught in many schools. But I doubt that this was ever intended by traditional Wiradjuri people who were involved in the land rights movement of the 1970s. Although they defined themselves as fighting a battle for 'all our people', what they hoped to achieve was expressed in very local terms: land for our own cemetery so our people can rest together; locally-based historical research which could inform Indigenous and non-Indigenous people alike about their own area; free access to areas for camping and opting out; the return of material culture; businesses that

different groups could run; adequate housing; and so on. As I look back now, I can see that many of the people who emphasised material benefits rather than cultural and land-based ones at the time were historical people, even if they were people of long-standing residence in a community. It was not as evident a distinction to me at the time and possibly would not have been to them either.

If successful claims through the NTA are changing the appreciation of the continuing dynamic of cultural tradition in NSW, and the complex community politics this can give rise to with different mixes of traditional and historical people, what impact might this be likely to have? The organisations which are least likely to recognise traditional people as having a privileged status - if only with regard to land-based issues, but also more broadly - are the National Parks and Wildlife Service and the NSW Department of Aboriginal Affairs. One reason for this is the emphasis given to LALCs as appropriate channels through which to deal, irrespective of whether they are controlled or sanctioned by traditional Wiradjuri. Another issue which has long troubled traditional Wiradjuri is the way in which Aboriginal and mainstream organisations refuse to acknowledge traditional cultural boundaries at both a regional and local level when forming administrative areas, denying people's right to operate within chosen spatial-political constellations.

Historical people have rights they accrue as citizens and Indigenous people under Australian law, as well as rights they accrue under local traditional law by virtue of being, for instance, recognised long-term residents ('guests'). One issue which may prove a stumbling block for recognition of authority based on traditional rights will be the question of what happens to the historical people, many of whom no longer have the option to 'return home', any more than generations of non-Indigenous Australians have. How will their rights and interests be both defined and protected, and by whom? Equity principles will come very much to the fore in such discussions: how will they do so without further undermining tradition? What sanctions would apply to traditional owners who do not do the right thing by such people? How are the concerns of historical people to be heard and accommodated? I believe there may be much to be learnt about the potential for conflict in such situations in models which have emerged in the history of decolonisation elsewhere in the world to address similar issues. There is ample evidence that Indigenous peoples often find such dilemmas very difficult to deal with within their traditional legal codes but there is also material, such as Matsuzono's studies of the Kenyan Gusii, which suggests that modified traditional codes are more able to deal with the issues than those imposed from more alien meaning and value systems.

And how will 'Aboriginality' be defined if recognition of native title status confers a differential quality to being Aboriginal. It may not be 'their fault', as Wiradjuri people might point out, that certain individuals have lost contact with their origins through dispersals, been 'stolen' or had

ancestors who needed to relocate away from undesirable situations. But whose responsibility is it? At the moment it is a responsibility that is being met, and has been over many decades, by traditional Wiradjuri people - even if not always willingly or graciously. It could be argued that the presence of such displaced peoples, however well-incorporated socially, should not be used to further dispossess those people who are in possession of their traditional lands and cultural practices.

What is already clear in some native title mediations in NSW is that historical people see themselves as respondents with as much need and right to argue their case for recognition in a new sense. It will be necessary for traditional owners to put their own case in terms that address the 'justice and recognition' contradiction, to negotiate with historical people and to find appropriate and compatible models for dealing with this.

I have done no more than raise the issues in this chapter and I suspect their resolution is a few minefields away. I believe it is incumbent on anthropologists, in particular, to be aware that the challenge to elucidate the content (as distinguished from legalities) of native title is a matter not simply of reworking colonial relations between Indigenous and non-Indigenous Australians, as in pastoral and mining agreements, but also of addressing the social, legal and moral issues (from an Indigenous and not just 'western' perspective) which arise from colonially-constructed intra-Indigenous relations.

#### Note

1. In practice, this might include relevant and approved teaching materials on Wiradjuri traditions, history and language being included in current school curricula; having land returned; compensation paid for lands deemed by both parties to be non-returnable; deference paid to Wiradjuri elders in decisions affecting Indigenous and non-Indigenous land use and other activities; efforts to return cultural materials to local areas, including the provision of adequate keeping places; and so on.

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## 5. Why can't they be nice to one another? Anthropology and the generation and resolution of land claim disputes

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*John Morton*

Since first going to work with Arrernte people in Central Australia in 1981, I have assisted the Central Land Council with determining the 'traditional ownership' of five areas of land - four under the terms of the *Aboriginal Land Rights (Northern Territory) Act 1976* (three being Schedule 1 lands and thus not subject to the full claim process) and one under the terms of the *Native Title Act 1993*. In none of these cases (although some of them overlap) have I failed to encounter at least one dispute between Aboriginal claimants, although the intensity and degree of disputation in each case has varied enormously. In some cases, it would be fair to say that disputes were entrenched or acrimonious; in other cases, they were muted, resolvable or little more than grumbles. Nevertheless, I have come away from my experiences with the lasting impression that disputes are simply part of the territory of Arrernte relationship to land (and I believe this has 'always' been the case). But I can hardly claim such experience to be unique, any more than disputation over land is unique to Arrernte people (see Peterson 1995: 8-9). Yet some explanations of Arrernte disputes might lead me to think otherwise.

I am referring here to casual remarks made to me by people in Alice Springs and elsewhere (some white, some black; some anthropologists; some even Arrernte), since, among those 'in the know' in Central Australia, there is a good deal of essentialist stereotyping of Arrernte communities and their relationships to land. Partly focusing on disputation, this stereotyping falls into one of two categories, or uses some mix of both. The first category encompasses a recognition that Arrernte people are uniquely 'troublesome' and the idea that this is best accounted for through 'culture'. Hence, 'causing trouble' is, for Arrernte people, simply a notable aspect of their way of life. The second category encompasses similar recognition, but includes the idea that it is best accounted for through 'history'. Arrernte people, having borne the long-term brunt of colonisation in Central Australia through the early setting up of the Alice Springs Telegraph Station and Hermannsburg Mission in the 1870s, inevitably have more problems than other Aboriginal people. Hence, trouble represents a 'decline'. This kind of historical consciousness is easily combined with cultural essentialism so that the two appear in tandem: 'trouble' in Arrernte communities may in some sense be of recent origin, but it is now habituated, perhaps even 'coded'. A representative sample of such usage might read as follows: 'Ooooh, those Arrerntes! They're always bloody

fighting'; 'What do you expect from a mob that has been mucked about by missionaries for over a hundred years'; 'That mob! Too much argument. They don't know much'.

Stereotyping people usually has quite complex motivation. In the first place, stereotypes are usually at least partially accurate depictions. In the case at hand, there is no doubt that a specific mix of historico-cultural events has precipitated a situation in which some Arrernte people, particularly those associated with the major older settlements, do on the whole argue or 'fight' more than many other Aboriginal groups in Central Australia. The arguments have many specific causes, but they can virtually all be read as an outcome of population movements which have occurred in the colonial period and impacted heavily on the pre-colonial configurations of land tenure. However, stereotypes may also to some extent be misrepresentations. It is this second aspect of stereotyping which primarily interests me here, especially as it relates to the practical role of the anthropologist investigating land claims. A large part of the problem, I believe, comes from too strong a focus on 'difference', a feature characteristic of the discipline of anthropology as a whole. Notwithstanding the objective basis for images of Arrernte people as 'troublesome', why is it that this 'trouble' looms large in the minds of so many 'outsiders'? The short answer - or so I shall argue - is that the 'trouble' cannot be contained within the bounds of an Aboriginal domain. To put the matter slightly differently, Arrernte people are sometimes 'hard work' for those dealing with them from 'outside', even though their 'trouble' can be partly interpreted as the result of 'outside' influence. This, I further suggest, renders problematic the very criteria by which we might want to judge Arrernte people as 'different'.

Perhaps I can begin with an extract from Spencer's field diary, dated 9 May 1901.<sup>1</sup> At that time, Spencer was half-way through his famous 'across Australia' expedition with Frank Gillen (Spencer and Gillen 1912), camping in Alice Springs and, amongst other things, enthusiastically collecting ethnographic records on film. A group of Southern Arrernte visitors had arrived in Alice Springs and there was considerable tension in the air, with many accusations and old scores being aired between hosts and guests. In the midst of the tension Spencer wrote:

I have now only 50 feet [of film] left and if we can ... bring the two mobs together in a friendly way we hope to be able to get a good dance tomorrow morning, though we hope it will not be followed by a fight. However if I get ... the dance on film they are welcome to a fight in which case I shall probably get some good characteristic photos in addition as the native savage is at his best when fighting.

Notwithstanding changes in context and expression between 1901 and the present, I find this passage revealing when it comes to assessing the nature of Arrernte land disputes.

The first thing to note is that Spencer has an agenda - he has a job to do. His job is not that of documenting a land claim, but the effect of his



interests, I would say, is almost identical to that of prevailing anthropological interests. In other words, as consultant anthropologists, we have a job to do and our primary concern is to get it done. As Peterson (1995: 8-9) has noted, disputes are, and probably always have been, part of Indigenous reality when it comes to claiming land. Others have noted this and have justifiably claimed that disputation (of which outright fighting is but one kind) can be taken as evidence of people's ongoing vital interest in country (see Edmunds 1995: 2; Fingleton, Edmunds and McRandle 1994: 14-15; Peterson 1995: 8). Given that, we know we have to work with disputes and it is important to be able to take them into account as part of the presentation of the claim. 'Nevertheless', as Peterson (1995: 9) puts it, 'it is *obviously* preferable to avoid needless and especially destructive conflict wherever possible' (my emphasis).

But why else is this so 'obvious', if not for the reason that conflict has the potential to make the presentation and management of a claim so much more difficult, not least of all for the researcher. The preference for conflict avoidance is thus not straightforwardly objective: it is subjective as well. It is not simply 'moral'; it is also 'self-interested'. For my own part, I would say that I have found research to be both easier and more pleasant in situations of minimal conflict, though I can sympathise with Spencer to the degree that I would add that such situations are not necessarily more interesting, exciting or engaging. Still, I have certainly found myself on more than one occasion throwing up a pair of imaginary hands and quietly muttering to imagined Arrernte interlocutors that they ought to be 'nicer' to each other. At such times I think, rightly or wrongly, that this would make my life, and theirs, a little smoother. Of course, this fantasy remains a dream in the strict sense: it is an *ideal resolution*.

This brings me to a second aspect of Spencer's diary entry. Note how he portrays the archetypal Arrernte as a 'native savage' in the context of fighting. It seems that there might be more 'savagery' in fighting than in dancing, which one might naturally assume to be somewhat more 'civilised'. Of course, we rightly blush at Spencer's evolutionist framework, which represents an anthropological past which we now routinely disown. However, there remain partial continuities between past and present. If there is a 'supreme good' in Aboriginal evidence, it is a dance - or at least some form of ceremonial activity taken to be an 'ultimate' statement of ties to country. And if there is an antithesis to this 'supreme good', it is surely the public fight or argument, whose apparent crudity opposes it to the performance which demonstrates 'genuine' Aboriginality (or some local version thereof) to be a living and 'fully-functioning' instance of the life of *Homo superorganicus* (Wolfe 1995: 109). To me, this suggests that, tied to the problem of anthropological perceptions being framed by pragmatism and exigencies associated with 'efficiency', is another connected to the particular need of Aboriginal people to demonstrate that they possess (what for want of a better term we might call) a 'culture' - a 'civilised' framework of order, or what the *Native Title Act 1993* calls 'laws and

customs' (Rigsby 1996). Fighting of one form or another, I would venture to say, is perhaps too easily seen as being beyond this 'civilisation'.

There are, of course, any number of different writers who have pointed out that what makes (so-called) 'Aboriginal society' distinctive is its manner of opposition to the dominant values of (so-called) 'Western civilisation' (or just 'the West').<sup>2</sup> Some writers pose the opposition straightforwardly in terms of cultural relativism - Aborigines are simply 'different' rather than less 'civilised' - while others give opposition a more conflictual emphasis, although the two points of view can be assimilated to each other. I have in mind essays like those of Macdonald (1988) and Langton (1988), which argue convincingly that Aboriginal fights can be seen, in Indigenous terms, as legitimate and coded expressions of intention and feeling rather than degraded and disorderly outcomes of 'lack' (especially, in the contemporary context, in relation to poverty, alcohol and dispossession). Moreover, they make clear that such expressions can take on a new meaning in the colonial context, as distinctive markers of difference in contrast with bourgeois standards of peace, law and order. On the one hand, this opens up the question of the degree to which there are two sets of standards operating in relatively autonomous domains - 'two laws', as they say; but, on the other hand, it also brings to the fore the fundamentally synthetic nature of this cultural situation.

So, for example, Cowlishaw (1988: 232-44) and others (see Lattas 1993; Morris 1989: 146-49) write about oppositional culture in a way which might suggest that fighting can become *more* a part of Aboriginal life, to the degree that it represents apparently 'crude' resistance: that is, fighting can become a deliberate, semi-deliberate or even completely unselfconscious strategy of violation of white norms. This aspect of Aboriginality, insofar as it invites a negative reaction from the white 'other', has been (in)famously summed up by John von Sturmer (1989: 139), who states:

It is still the case, as it has been from the very beginning, that [Aborigines] do not live according to 'civilised' notions of society, refinement, propriety, group welfare or personal well-being. They fight too much, they drink too much, fuck too much, they are demanding, they waste their money and destroy property. But a lack of restraint, caution, or calculation is not necessarily an absence or a failing. It can be a superfluity. A refusal: a refusal to accept the repressive principle, a refusal which repels yet at the same time exerts a powerful fascination. It brings down upon the obstinate bearers of that refusal - one which is seen to be infantile and irresponsible - a fierce *resentment*. For the refusal is seen as an impossibility, generating a life both forbidden and unendurable. So it has to be annulled, denied or driven off precisely into the realms of infantilism and irresponsibility, into fantasy states, fit only for traveller's tales and allegories.

Von Sturmer refers to the terms of this 'cross-cultural' situation as indicating the impossibility of a 'truly lived engagement' between Aborigines and their 'other' - 'us'. In relation to this, I would say that one of the things which characterises my experience of Aboriginal disputes is that

they can appear (to 'us') to have a certain 'raw' quality: they seem 'uncivilised' - definitely not bourgeois. As von Sturmer says, it is certainly possible to see this as both a lack and a possession: Aboriginal disputation may seem *uncivilised*, but there is also a kind of directness involved which is often muted under so-called 'civilised' conditions. But it is precisely this kind of directness which, say, in the context of a land claim hearing, signals the danger of negative recognition. While land claim hearings, native title mediations and the like may be less formalised than other Australian court or tribunal procedures, they nevertheless exhibit a characteristic conformity to rules which is thrown out of kilter by seemingly 'raw' confrontation. While such behaviour might be registered simply through a general sense of embarrassment, there may also be a feeling amongst those representing the case that the Aboriginal cause is almost certainly harmed by any such exhibition of 'poor form'. Better, then, to get these matters well covered beforehand.

Enter the anthropologist, complete with legal and logistical backup. It is, of course, the anthropologist gathering information for a potential determination of 'traditional ownership' who normally (though certainly not always) has most to do with Aboriginal claimants. It is thus likely that the anthropologist will be closest to communications pertaining to disputes. So what should the anthropologist's role be here? If the short answer is 'to minimise and contain conflict', then it is clear that the anthropologist is rather more than a chronicler of events or reporter of land-tenure systems. For one thing, systematic documentation and codification - the anthropologist's stock-in-trade - necessarily 'brings unresolved conflict and competition into the open, ultimately forcing people to be explicit about their claims' (Peterson 1995: 8). In that sense, the anthropologist can be active in the generation of disputes and could be defined as part of the cultural situation out of which a claim will be constructed. I would add, however, that my experiences in Central Australia lead me to believe that some disputes can be either resolved or set aside through the anthropologist's mediation and, to that extent, anthropological agency can do more than simply generate or entrench conflict. I could, for example, document cases of how I have assisted in smoothing over a few minor troubled waters *and* in whipping up a storm capable of sinking anything sailing on the high seas. In retrospect, I do not see how the disputes which I have helped to generate could in any real sense be seen as 'unnecessary' (Gladstone 1996): they were, I believe, an inevitable part of getting the job done. Gladstone appears to use the term 'unnecessary' as a synonym for 'caused by outside (non-Aboriginal) interference', but I would argue that the boundaries between 'inside' and 'outside' in such cases are so porous as to make this assessment unrealistic. Aboriginal politics, I would argue, can no longer be contained in Aboriginal 'communities'; nor do many Aboriginal people desire them to be so restricted.

Peterson (1995: 9) has said that 'good research involves a researcher having some independence, being able to talk as freely as possible with all

interests and being aware of the various sides to any disputes about land'. But I think this has to do with much more than the possibility of impartiality or objective commentary - that hallmark of the 'expert witness'. The ability to 'talk as freely as possible with all interests' and 'being aware of the various sides to ... disputes about land' are characteristic of the anthropological 'outsider' who has no direct or long-term stake in the land in question, but they are also precisely what allows one to adopt, however minimally, an 'insider' position in the negotiation of disputes, with a view to resolving them or suppressing open disputation in the claim. One aspect of this inversion of the objective observer's role is the provision of documentary evidence from sources unknown (or not known well) by the claimants. I can think of several examples where documentary records from people like Róheim, Spencer and Gillen, Carl Strehlow, T.G.H. Strehlow and Tindale have been fed into local situations in Central Australia, serving to confirm or complete a picture for claimants and, in some cases, resolving low-level disputes by showing precisely how certain people are related to kin and country. I take the view that such records are free to be reappropriated by Aboriginal people and that it is part of my job to 'interfere' by providing people with their 'own' accounts housed in books, archival records, recorded genealogies and the like.

But then again, this is precisely where I have enhanced disputes in some cases. Documentary records are, of course, open to interpretation. In my experience, people take them on board strategically. If the records are useful in supporting a claim or in clarifying a perplexing situation which is causing arguments, then they may be literally revelatory. However, when they contradict a set of assumptions which are held with conviction, people will say things like 'Strehlow got it wrong' or 'I think that might be just boring or something'. It may, of course, be that the authority to make such judgements is not clear-cut to all concerned, so that one party accepts the records when another does not. This is precisely what happened at an early stage of my research in one notable instance, when I was instructed by spokespersons for one group to give no more historical evidence to the spokespersons for another group. It did not matter that the evidence, which supported the second group against the first, was deemed in any case to be wrong. What mattered was that I was making life harder for those protesting and this was reckoned to be illegitimate. At this stage I decided that I could no longer 'get the job done' and the matter was resolved by giving separate anthropological (and legal) representation to the rival claimants. When such rival claims are ongoing, it is sometimes impossibly difficult to prevent such split representation from becoming adversarial. Thus there can be severe limits on the degree to which the anthropologist can remain 'independent' - but I would add that independence is, in any case, always relative to the pragmatics of doing what is necessary to put forward the best case capable of winning land. And sometimes, it seems, 'working for' simply has to be *de facto* 'working against' (see Rose 1995: 45-46).

Of course, the claimants are not the only people who have a stake in this and, in many cases, disputes are no more desirable for the fact that the land does not have to be won. After all, Wagait is Schedule 1 land, so the concern in this most notorious of disputes (Edmunds 1995: 4-5) is not winning land, in the technical/legal sense, but administering it. While I have never encountered anything in Central Australia of Wagait-like proportions, areas of Schedule 1 land there can sometimes be peculiarly troublesome for the Central Land Council in terms of protracted disputation. I do not have much to say about this, other than that it is obvious that anthropologists play a rather different role here insofar as they do not have the subtle pressure of a land claim hearing to use in suggesting that rival claimants make mute their disputation. But there is one further important point that follows from this, since the overall pressure on claimants to resolve differences is surely no less than in a run up to a full-blown land claim hearing. That, of course, is because the land councils also have to 'get the job done'. Land may not have to be won, but, as I said earlier, it does have to be administered - and land councils have procedural requirements no less than court or tribunal hearings. Perhaps it goes without saying (but I will say it anyway) that land councils are *bureaucracies* - and it has been a long time since those in the Northern Territory lacked the formality characteristic of non-bureaucratic administration. Land councils, too, are places of 'order' in which open disputation may seem 'uncivilised'.

Land rights are premised on novel forms of recognition of Aboriginal realities. Those novel forms are in turn premised on an idea of difference which sets Indigenous people apart from (so-called) 'mainstream' society. Anthropology as a discipline has generally supported this image of an Indigenous 'other'. Indeed, as anthropologists, we are virtually trained in the process of 'othering' and we naturally bring related presuppositions with us when we undertake land claim work. Yet what I have said so far evidently exposes limitations on those presuppositions. Not only are 'etic' anthropologists fully engaged in the construction of 'emic' claims, but they are also contributing to wider processes which, however slowly, are surely bringing Aboriginal people under the increasing scrutiny of State or State-related apparatuses. In invoking this Foucauldian scenario, I am not necessarily making a judgement about the desirability or otherwise of such gradual inclusion, although it is surely related to the paradoxical moral framework which insists that Aboriginal people remain simultaneously 'unique' and 'part of the nation'. Land rights can embody this contradiction by making an exhibition of a local ceremony a supreme statement of evidence before a State-sanctioned court or tribunal which is empowered by more or less standard 'civil' codes to find exotic 'laws and customs'. The contradiction is, in fact, universally evidenced in 'postmodernity', manifesting itself as the twin intensification of localisation and globalisation (Friedman 1994). Land councils, too, are good examples of that contradiction, depending at once on assertions of local autonomy

and identity *and* on a network of legal, economic and political ties that are transnational.

I want to end with a few considerations which resituate what I have been saying in relation to those stereotypes of Arrernte people with which I began. The questions raised by the directions in which I have headed are quite old in anthropology. They surfaced, for example, in early anthropological debates about native welfare, indirect rule, segregation and so on, in Southern Africa, when luminaries like Radcliffe-Brown, Isaac Schapera, Max Gluckman and Meyer Fortes argued that South Africa consisted less of 'different cultures' and more of a single, fully integrated society in which there was a systematic interchange of codes (Cocks n.d.). From an analytical point of view, and notwithstanding differences in time and place between the Australian situation and that of South Africa, it is obviously equally necessary, I think, to point out that the land rights situation in Central Australia and elsewhere is structurally similar: Aboriginal and whitefella domains have only *relative* autonomy and the land claim process brings them into long-term close conjunction, with increasing pressures on Aboriginal people to be ensnared in the wider net through being given a 'fair go' and becoming 'part of the human race'. As Gaynor Macdonald has suggested (this volume), such forms of equity adjustment - what Cowlshaw (1988: 101) wryly calls 'the enlightenment' - can justifiably be interpreted as the second great wave of 'colonial' interference in, and disturbance of, Aboriginal people's lives.

Postmodern theorists are apt to point to the process of hybridisation that accompanies this kind of conjunction, but hybridity is accompanied by losses as well as gains. This is illustrated by the way in which the Aboriginal domain, particularly in relation to the problem of disputation, is being altered. A land claim hearing, for example, can be seen as a temporary 'hybrid' community; a land council meeting may be a similar case. In both arenas, Aboriginal disputes are ideally contained and the perfect scenario is represented by a trouble-free cultural zone in which local communities display their 'autonomy' as tidy packages. This means that everybody else's work proceeds more smoothly. But let us for the moment assume that the 'oppositional' theorists are correct and that Aboriginal 'culture' consists at least partly of forms of argument and conflictual display which appear altogether crude to the bourgeois mind and threaten the bureaucratic order. If this is the case, then we might suggest that land rights, with anthropology acting as its adjunct, is largely in the business of practically 'refining' Aboriginality. Of course, land rights do work in close conjunction with the bourgeois marketing of Aboriginal 'culture' and even provide venues, like land claim hearings, in which this culture can make sense to a wider community. Is this, one might ask, the culmination of the long-held dream (or nightmare) of taming and civilising Spencer's 'native savage'?

One might even take the matter further and ask if land rights are a concrete case of what von Sturmer (1989) calls the impossibility of lived

engagement with the 'other'. Spencer's diary entry in a sense says it all, because one can read there a simultaneous recognition of the twin aspects of the 'impossible dream' - the noble savage, worthy of a picture, and the other, not so noble, who gets in the way of taking that picture. It seems to me that concern about 'fighting over country' exhibits the same ambivalence. As evidence of a willingness to defend, and thus of strength of attachment, disputes might be seen as driving successful claims to land. But they should not get in the way of rational management of country; nor should they be sensed when people visit that country to see the spectacle that is 'Aboriginal culture'. On the whole, we prefer 'civilised' standards and we see fighting as a decline of those standards, sometimes projected back into a more (if not necessarily perfectly) pristine past.

While many of us will fail to recognise ourselves here, there is no doubt in my mind that such preference is manifest in much of what is said about Aboriginal disputes - particularly in relation to the way in which 'blame' for them is often attributed to alien domination, or at least to forms of adversarial resolution which are seemingly less benign than those of the Indigenous domain (Fingleton, Edmunds and McRandle 1994: 14; Rose 1995: 43). This, I think, represents a danger of simply inverting the old order and of turning the western coloniser into the savage other. While I do not want to take anything away from non-Indigenous Australia's potential for domination, conflict and violence, I would also note that we are dealing with a more complex ethnographic situation in which truly lived engagement requires a more measured assessment of people's mutual adaptations.

#### Notes

1. The diary is currently held in the manuscript collection at the Museum of Victoria.
2. In this respect, few notice that the Occidentalism in such comparisons is simply the other side of Orientalism (Carrier 1992).

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## 6. From humbug to good faith? The politics of negotiating the right to negotiate

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This chapter focuses on the 'right to negotiate' procedure established under the *Native Title Act 1993* (NTA) and aimed at ensuring the resolution of disputes between native title claimants, governments and other stakeholders about proposed activities on claimed native title land. In many of the 1,000 or more 'future acts' currently referred to the National Native Title Tribunal (NNTT) which have an active right to negotiate, significant matters of dispute are emerging. These disputes invariably focus on proposed resource development activities and their possible effects on claimed native title rights and interests.

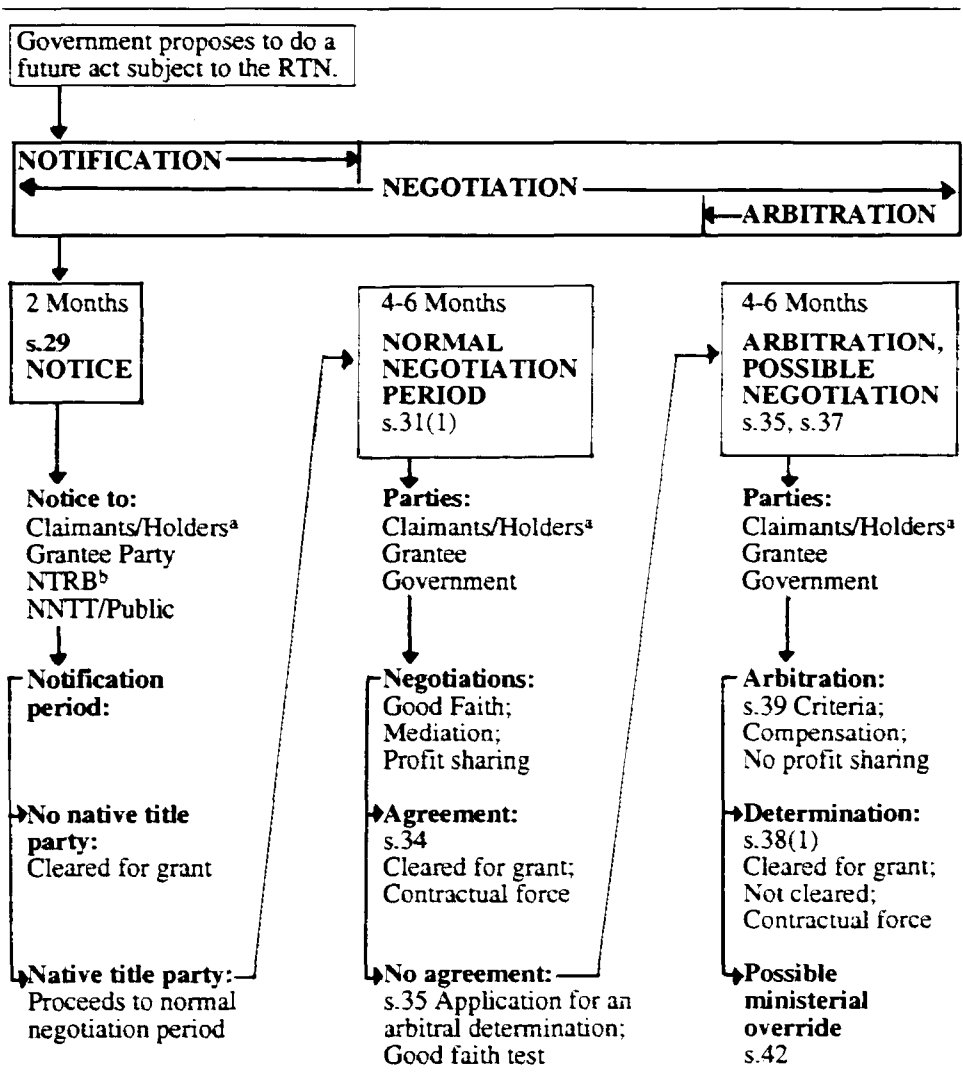
The right to negotiate process is critical to 'mainstream' land management and resource development on native title land and so remains a contentious right, subject to mounting industry and State Government criticism regarding its purported 'unworkability' and adverse transactions costs. The Commonwealth Government has moved to substantially curtail the right to negotiate through legislative amendment.<sup>2</sup> Early ambivalent Aboriginal attitudes to the process have fast transformed with the realisation that it constitutes 'a core element of the recognition of Indigenous rights to land' (Dodson 1996). The right to negotiate exists, then, within a wider political economy of native title which directly influences the strategic behaviour of parties to the negotiating process and, hence, the outcomes. Accordingly, it is a statutory process that is rapidly developing into an important institutional arena for the management of what are coming to be known broadly as 'native title disputes'.

In this chapter I examine the strategic behaviour of the negotiating parties and the representations of native title that they bring to bear on the right to negotiate process. To do so, I firstly describe the key statutory components of the right to negotiate process as it currently stands, prior to proposed amendment by the Commonwealth Government. Then I consider what kind of right it is that appears to be developing in practice. The conduct of negotiations and key issues emerging from the process are analysed by examining the domains, or fields of relationships, within which the negotiating parties operate and interact. In so doing, I seek to elucidate the politics of negotiation, treating the legally enshrined right to negotiate in terms of the processes by which it is being implemented and strategically transformed in practice (Gulliver 1979; Sansom 1985; see also Smith 1996a).

**Future acts and the right to negotiate**

To fully understand the foundations of the right to negotiate, it is necessary to understand the legal class of activities established under the legislation, known as past acts, future acts, permissible and impermissible future acts, low impact future acts and expedited future acts, as well as a host of relevant definitions. In an effort to avoid this legal quagmire, I have substantially simplified the key components and flow of the right to negotiate, concentrating on what is called the normal negotiation phase (see Diagram 1).<sup>3</sup>

**Diagram 1. The current right to negotiate (RTN) procedure.**



a. Native title claimants or native title holders.  
 b. Native Title Representative Bodies.

Suffice it to say here that the legislation defines a range of future government actions called 'future acts' (defined s.226(1)) in which there is a presumption of effect upon native title (s.233(1)(c)). It then allows for specific 'permissible future acts' by government to proceed on claimed native title land, on the basis of a form of 'freehold equivalent test' which means that if the act could be done by governments on freehold title land, then it can also be done on native title land.<sup>4</sup> Permissible future acts do not extinguish native title; while the acts can be done, they only prevail over the existing native title for the duration of the act, after which time native title rights and interests again have full effect.

The NTA provides a statutory right to negotiate to native title holders and claimants over certain permissible future acts proposed by government, before they can legally take place. The legislation sets out the permissible future acts which attract the right to negotiate, including:

- the creation or variation of a right to mine, including exploration, prospecting and quarrying;
- the variation or extension of period of a mining right, except where the variation or extension is legally enforceable; and
- the compulsory acquisition by government of native title land where the purpose is to transfer rights or interests to a party other than government.

Other acts can be added to, or excluded from, this list by the relevant Commonwealth Minister, though no such changes have been made to date. Importantly, the right to negotiate does not apply where there is an unopposed non-claimant application; where there is a legally enforceable right to renew; and to offshore areas.

### **S.29 notices - initiating the right to negotiate**

The right to negotiate has three stages: notification, negotiation and arbitration, with negotiations *potentially* running over the entire period.

Government is required under the legislation to give notification - commonly called a 's.29 notice' - of its intention to do an act over which native title exists, or is presumed to exist, and over which the right to negotiate applies. This notification stage lasts for two months and the right to negotiate is effectively invoked when a s.29 notice is first issued by government. Notice must be given to a number of parties, including:

- to any registered native title body corporate for the land or waters that will be affected by the act (called a 'native title party');
- to any registered native title claimant for the area of land or waters (also called a 'native title party');

- if the act is to be done at the request or application of a person (for example where it is the grant of an exploration licence or mining lease), to that person (called the 'grantee party');
- to any Native Title Representative Body established in relation to the land or waters;
- to the arbitral body in relation to the act (currently this is the NNTT); and
- to the public.

If there is no native title claimant or holder registered with the NNTT, either before or during the s.29 notice period, then the act is cleared for grant.

The legislation stipulates three classes of parties able to become negotiating parties: the 'government party', the 'grantee party' and the 'native title party'. The government and grantee parties automatically become negotiating parties at the point the s.29 notice is issued. Any Indigenous person or group with a native title claim already registered with the NNTT over the same area of land as the proposed future act, or registered as the native title holder, automatically becomes a native title party and secures the right to negotiate. Indigenous people who do not have a claim registered, but who want to secure the right to negotiate must, within the two-month notification period, register with the NNTT a claim over land that includes the same area potentially affected by the proposed future act. They then become classed as a native title party and secure the right to negotiate. Native Title Representative Bodies have no legal standing as a native title party, but they may represent the interests of such parties in the negotiation process at the latter's request.

The two-month period of a s.29 notice is, then, the only window of opportunity through which native title claimants or holders can become parties with the right to negotiate about the doing of the proposed future act. The notification period thereby operates as an effective sunset clause for Indigenous participation: *no retroactive right to negotiate can be secured after the two months has passed.*

### **The normal negotiation procedure**

Subsequent to the issuing of a s.29 notice, there are two main legislative pathways leading parties into the right to negotiate procedure. The main pathway is what the legislation calls the 'normal negotiation procedure' (s.31). The other is via the filtering process known as the 'expedited procedure' that aims to fast-track the approval of certain future acts. Under the 'expedited procedure', if an objection is made to the NNTT by native title claimants to a future act attracting the expedited procedure, and if that objection is upheld, the future act is redirected through to the normal

negotiation procedure and the native title claimants secure the right to negotiate over it. In this chapter, I focus on the heart of the right to negotiate: the normal negotiating procedure.<sup>5</sup>

The time frame for the normal negotiation phase is not open-ended. It must proceed for at least four months if the proposed act is exploration or prospecting, and for at least six months in any other case (including mining). Parties cannot agree to shorten this period of time, but may extend it. Importantly, the period of normal negotiation legally commences *from the point at which the s.29 notice is given, not from the conclusion of the two-month notification period*. In practice, however, negotiations only effectively begin when all possible participating native title parties are identified; that is, at the end of the two-month notification period. This invariably means that the normal negotiation period is actually carried out over only two months for exploration and prospecting, and four months for future acts such as mining.

During the normal negotiating period, the legislation allows negotiations to encompass rent-type payments to the native title party worked out by reference to profits, income or product produced by the grantee party as a result of its future economic activities on the land. This serves as a financial incentive to private bargaining between the grantee and native title parties. Such payments are expressly excluded from consideration as a condition by the arbitral body. At any stage during the normal right to negotiate period, any of the parties may request the NNTT to mediate between the parties to assist in obtaining agreement (s.32(5)(b)). If an agreement is reached during this phase, it has contractual force and a copy must be lodged with the NNTT.

### **Arbitration and the right to negotiate**

If the negotiating parties cannot reach agreement at the end of the normal negotiation period, any of the three parties may apply to the NNTT as the current arbitral body (s.35) for a determination as to whether the act may proceed. If so requested, the NNTT must hold an inquiry and take 'all reasonable steps' to make a determination whether the future act may be done and, if so, on what conditions. This arbitrated determination must take into account a range of potential effects of the proposed future act on the claimed native title rights and interests, as measured against criteria listed under s.39.<sup>6</sup> The resulting arbitral determination has contractual force and is binding upon all parties. In other words, if agreement by negotiation is not voluntarily achieved by the parties within a specified time frame, an arbitral mechanism ensures a determined outcome, also within a specific time.

The role and impact of arbitration on the right to negotiate is substantial. Arbitration has specific legal characteristics and constraints, a number of which have been canvassed in early NNTT arbitral hearings (see

Seaman, Smith and McDaniel 1996; Sumner, O'Neil and Neate 1996). An important, though often forgotten, point is that parties can agree to independently continue their negotiations in parallel with the arbitral process. If those negotiations result in an agreement before the NNTT reaches an arbitrated determination, then such a determination must not be made. In this way, negotiation and recourse to NNTT mediation are given primacy over arbitration, until such time as negotiation becomes deadlocked.

### **The conduct of future act negotiations**

A critical dimension to the conduct of future act negotiations, affecting cost, duration and outcomes, is the behaviour of the parties. Under the normal negotiation procedure as it stands prior to proposed amendment, the government party must give the native title party the opportunity to make submissions to it regarding the act; and must

negotiate in good faith with the native title parties and the grantee party with a view to obtaining the agreement of the native title party to the doing of the act; or the doing of the act subject to conditions to be complied with by any of the parties (s.31(1)).

In the early days of the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA), 'humbug' was felt to characterise the conduct of many consultations by industry and government about resource development on Aboriginal land. Certain traditional owners felt that onerous multiple meetings, private bargaining conducted by companies with select individuals, lack of information and misinformation in the consultation process, and the payment of 'upfront monies' and other inducements to secure agreements, had the effect of tactically dividing them, resulting in outcomes often antithetical to their interests. Such humbug consultations had deeper repercussions within Aboriginal communities where another form of humbug - often referred to as 'lotta bloody trouble' and 'rubbish talk'- ensued. One important factor contributing to that 'inside' humbug was the 'wrong' Aboriginal people attending meetings and nominating themselves as traditional owners of country to which other Aboriginal traditional owners felt they had dubious or non-existent ties. Another factor was when the 'wrong' Aboriginal people obtained benefits from mining agreements.

The combined effect of all these forms of humbug was to create and amplify division and disputation between Aboriginal groups and within communities (see Altman and Smith 1990, 1994; Kesteven 1983; O'Fairchellaigh 1988; Smith 1984). Conflict generated by mismanaged consultations and misdirected financial distributions can derail future negotiations, adding substantially to longer-term transactions costs of all parties involved. The potential for similar conflict under the NTA was

foreshadowed before the legislation became operational (see Altman and Smith 1994). However, there is one constraint upon freewheeling self-interest during the conduct of future act negotiations; namely, the translation of Parliament's insistence on 'every reasonable effort' being made to secure the agreement of native title parties to future acts, into the legal injunction that government *must* negotiate in good faith. In other words, without humbug.

Of course, the strategic nature of the future act arena means that parties may be disinclined to negotiate in good faith. Good faith in conducting negotiations does not preclude disagreement and strategic behaviour between parties, but it does require a willingness to compromise and to take the legitimate interests of parties into account. The onus of good faith on the government negotiating party has recently been confirmed by Carr in a key Federal Court case brought against the Western Australian Government by the Aboriginal Legal Service, which charged a failure to negotiate in good faith (see Bartlett 1996; Bartlett and Sheehan 1996; Carr 1996). Carr (1996: 29) concluded that good faith was indeed mandatory and of 'central importance' to the right to negotiate. It also implies an obligation on all parties to actively participate in the process; as Carr held, to do more than simply 'go through the motions of negotiating'.

The Carr judgement effectively set the requirement for government to negotiate in good faith as a jurisdictional condition precedent to securing access to the arbitration stage of the right to negotiate. Accordingly, the NNTT has developed administrative procedures which now mean none of the parties may move to the arbitration stage without a statement in their s.35 application that the negotiation parties agree that the government party has negotiated in good faith, and detailing the steps that have been taken by the government party to do so.

The extent to which humbug has prevailed over good faith in negotiations prior to the Carr judgement is indicated by the fact that, at the beginning of November 1996, 90 per cent (being 224 of 248) of the applications for a future act arbitral determination lodged with the NNTT were withdrawn by the Western Australian Government, presumably with the intention of recommencing 'good faith' negotiations. In this instance, the State Government party's previous interpretation of its negotiating responsibilities has directly contributed to greater costs to all parties and added delay.

Conspicuous by its absence in the legal matter of the onus of good faith is the native title party. The NTA currently calls only upon the government and the grantee party to negotiate in good faith. Many Aboriginal groups have proven themselves to be immensely effective negotiators. Arguably, there is no reason why, once a native title party has asserted a right to negotiate, they shouldn't also be required to do so from the same benchmark of good faith as other parties.

## The right to negotiate - what kind of right?

The dictionary meaning of negotiate is: [to] 'communicate or confer (with another or others) for the purpose of arranging some matter by mutual agreement; [to] have discussions with a view to some compromise or settlement'. Is this the kind of negotiating right which has been established and is evolving in practice?

Firstly, I should make it clear that the right to negotiate is not the same as the mediation process which currently constitutes a major role of the NNTT in native title claim applications. Parties to future act negotiations may request mediation by the NNTT to assist them in coming to an agreement, but the context of the right to negotiate makes such mediation a substantially different process, with different issues and objectives involved. Not the least of these is that the right to negotiate is not a determination of whether native title exists or not. The NTA and subsequent key Federal Court judgements permit the right to negotiate (including arbitration) to proceed with native title claimants, on the basis that native title may exist in relation to the relevant land.

Secondly, while one might facetiously characterise the right to negotiate as the right of negotiating parties to hire lawyers, it is a substantive legal entitlement for native title claimants and holders. This legal entitlement is not an unfettered one - there are clear limits. Negotiations are conducted within a framework in which participation is legally and procedurally circumscribed; the participating parties have specific legal responsibilities; strict time frames apply and an imposed arbitration mechanism is invoked if agreement is not reached. In other words, it is negotiation 'in the shadow of the law'.

Thirdly, the right to negotiate applies to all parties; it is not simply an Aboriginal right, though it is not similarly distributed across the parties. For example, it can only be initiated by governments through a s.29 notice. But it can effectively be terminated by any one party requesting an arbitral determination; though securing access to arbitration is now dependent upon meeting the good faith condition precedent.

Finally, and most importantly, the right to negotiate is *not* a right of veto for native title parties. While it is a right for them to negotiate, and even to demand a veto over the doing of a particular future act, they have no statutory right to enforce a veto. The entire negotiation process is based on the fact that it is a right to agree - at most, it is a right of the native title party to propose and agree to conditions about the doing of the future act and to seek compensation for the impairment of native title; at the least, it is a right to *agree to disagree*.

The stage at which a veto decision can be made regarding a future act is when exercised by the NNTT in its arbitral role, and only then as a result of conclusions based on logically probative facts relevant to s.39 criteria. Finally, any NNTT determination (whether that be a veto or



clearance of the future act in question) can be overridden by the relevant Commonwealth Minister.<sup>7</sup>

### **Negotiating domains and the rhetoric of representativeness**

The right to negotiate has only recently begun to be transformed from statutory theory into practice, but the politics of negotiation are strongly in evidence. In order to pinpoint the nature and impact of these, it is helpful to think in terms of the domains, or fields of relationships, within which the negotiating parties operate and interact.

The involvement of native title claimants in the right to negotiate procedure involves three broad fields or domains which need to be distinguished, at least in analytical terms. The first domain is the field of relations between individual Aboriginal spokespersons or 'leaders', and the native title claimants they assert to represent in the context of a native title claim or native title negotiations. The second domain is the field of relations between those Aboriginal leaders and the other parties, such as governments and industry, with whom they are seeking to negotiate. The third domain is the field of relations between all claimants (including their leaders) and their regional representative bodies. Arguably, there is a fourth and equally critical domain which impinges upon these Aboriginal domains; namely, the stakeholders within the government and grantee parties have their own overlapping fields of relationships with each other.

There are a number of factors that bear upon the negotiating strategies arising out of these overlapping relational domains. Particularly influential is the rhetoric of Aboriginal 'representativeness', where two questions are frequently raised in the context of negotiations: firstly, is the self-nominating native title party the 'right' party to negotiate with? And secondly, who are the 'right' Aboriginal spokespersons to represent claimants' interests in the negotiating arena? Questions such as these have become a powerful political resource that governments and other stakeholders can use to either assign or deny negotiating legitimacy to Aboriginal leaders and native title claimants (see also Beckett 1985; Weaver 1985).

But, as has been noted elsewhere, the contemporary issue of public Aboriginal representativeness is a complex one (see Martin and Finlayson 1996; Smith 1996b). For a number of reasons, representativeness within the Aboriginal domain may not be immediately or clearly realised when future act negotiations commence. Firstly, the normal negotiating period may be the first time that Aboriginal people have been able to meet together to articulate the range of rights and interests they have in respect to the proposed future act. Secondly, it is often in the very process of publicly articulating the complex parameters constituting Aboriginal land ownership that the constituency of a native title claimant group will arise. If these parameters are not comprehensively canvassed within the

Aboriginal domain during the process of claim preparation, a truncated claim membership can easily constitute itself and, by association, a truncated negotiating group.

Thirdly, representativeness entertains time. The 'right' native title constituency for negotiations may change over time according to the range of native title interests called into play by different kinds of future acts over the same area, or by the different stages of a single future act proceeding over many years (for example, from small-scale exploration to major mining production activities). Fourthly, within Aboriginal groups, questions of authority - of what constitute the credentials and capacities to represent, or 'stand for', others - are subject to ongoing interpretation and construction. Authority in small-scale Aboriginal domains is often an emerging product of the very process of public discourse about its nature and location. From this perspective, authority to represent the interests of others is partly a status conferred upon an individual who has managed, in a range of public arena, to mobilise an authorising constituency of people to validate his or her actions and opinions. However, such authorising constituencies can be highly volatile, especially in the context of changing or contentious resource development scenarios. An individual's authorisation to represent may need to be periodically re-enacted, so running the chance of being challenged as well as confirmed.

This fluidity of Aboriginal authority and the context-related character of group identity does not fit easily into the expectations of other parties to be able to negotiate with the same group and with spokespersons who have continuing representative legitimacy. But this has been a long-standing point of tension between government, industry and Indigenous Australians throughout the history of land rights negotiations in this country.<sup>8</sup> Under the pressure of such expectations, and during the more formalised negotiation and arbitration procedures, a critical process can be observed; namely, Aboriginal people attempting to translate, for the purposes of non-Aboriginal understanding, labile patterns of land ownership into more 'palatable' accounts which emphasise fixed social and corporate identities, and ordered systems of land tenure.

Of course 'representativeness' is a political resource amenable to strategic use not only by government and grantee parties, but also within the Aboriginal domain. Aboriginal people often rely upon senior leaders to advocate their position and opinions in a wider forum. However, a cause for concern also expressed by Aboriginal people is that some such leaders, especially when largely 'self-selected' and having only a minimal constituency, can acquire considerable personal power as a result of their involvement in the direct private bargaining that can occur during the negotiation process. Such power can be translated into personal financial benefit, to the disadvantage of fellow claimants. For example, moneys negotiated by a native title party in the course of coming to a future act agreement do not have to be held in trust for later native title holders (as do

arbitrated compensation payments). Rather, negotiated benefits can be provided by a grantee party as 'upfront moneys' directly to individuals or to one section of a native title claimant group.

In this context, the issue of representativeness does raise an important question about how to achieve equitable outcomes for Aboriginal interests from the right to negotiate process. Of critical concern is what could be termed the negotiating equity between the members of a native title party in regard to their respective ability to participate (to whatever extent they may seek) in the negotiation process. Negotiation equity is a tricky concept for, if there is one thing that is not based on equity in Aboriginal societies, it is knowledge and the knowledge-based right to speak for land. Simply put, some people have the right to speak and others have the right to remain silent. Some do not want to actively participate and are happy to have others 'look after' their interests.

For these reasons, equity of access to the negotiating process may not be seen by individual claimants as being a problem *until* their marginalisation in the process leads to a subsequent distributive equity problem; that is, until they are excluded from equal access to the benefits that flow from negotiated agreements. This issue of distributive equity also applies to future native title holders who may miss out entirely on gaining access to agreement benefits if the claimants who initially secured the right to negotiate, and who perhaps received agreement benefits, are subsequently determined not to be native title holders. Arguably, *all* benefits (whether labelled compensatory or not) derived under agreements or obtained directly during the normal negotiating process should be held in trust until native title is determined.

In the wider debate surrounding the right to negotiate, much has been made of the difficulties and uncertainties arising for governments and grantee parties from the matter of the representativeness of the native title party and its leaders. There is substance to some of their concerns, as well as political smoke.

The current situation is that, as soon as a native title claim application is lodged with the NNTT, claimants gain the right to negotiate. Furthermore, because the right to negotiate is currently being conducted with native title claimants and not native title holders, the government and grantee parties can find themselves negotiating with multiple native title parties for the same area of land. Some of those claimants may subsequently be determined not to be native title holders. For example, in one recent case, a single native title claimant group secured the right to negotiate via the s.29 notice process. By the time arbitration of the future act in question commenced, some four months after notification, there were an additional seven native title claims registered with the NNTT over part or all of the same area. None of those later claimant groups gained the right to negotiate over the specific future act, having missed the two-month notification period. Nevertheless, some, or all, of those claimant groups may eventually be determined to be native title holders.

However, the purported areas of uncertainty that are said to arise from such situations for the government and grantee parties should be critically evaluated. Firstly, as a result of the sunset clause of the s.29 notification period, there is no uncertainty as to who, legally, is the 'right' native title negotiating party. The 'right' native title parties are *only* those who have secured access to the negotiation procedure during the s.29 notice period. Secondly, the grantee and government parties are legally assured that the outcome of a negotiated agreement or arbitrated determination is a valid future act and that, once valid, it remains so regardless of the eventual native title status of the claimant party or other subsequent claims. Thirdly, multiple claims by different groups to the same land do not necessarily mean that certain groups have no native title legitimacy or that only one is 'the right' native title group. While multiple claimant groups may be in dispute, they might nevertheless *all* have valid claims to various native title rights and interests in the same area of land.

At the same time, a multiplicity of negotiating agendas asserted by different native title parties who are in conflict with each other, can make the negotiation process more complex and problematic for all parties. While a multiplicity of negotiating agendas may serve to escalate the complexity and costs of negotiations, such volatility is part and parcel of contemporary negotiations in many other commercial and diplomatic arenas. It may be that formal mechanisms for arriving at consensus or majority decision-making between native title parties (whether they be western democratic, or traditional Aboriginal decision-making methods, or both) need to be developed and agreed upon at the beginning of the normal negotiating procedure. Arguably, the strict time frame and the statutory constraints on the conduct and content of native title negotiations make the right to negotiate a certain and transparent process, especially in comparison to many other kinds of negotiation.

Finally, the issue of uncertainty is not one which adheres only to the government and grantee party. For example, in an early arbitral hearing by the NNTT, a single native title party faced parallel negotiations with multiple grantee parties proposing different future acts on their claimed native title land. The grantee parties ranged from small individual concerns to large multinational companies, asserting different corporate approaches and having varied financial capacities and objectives.

Where there do appear to be significant difficulties is in the monitoring of future act agreements and conditions over time. There are few financial guidelines and no institutional arrangements established under the NTA to direct the distribution and use of future act agreement moneys. There is also no legislative mechanism established for monitoring either the content or the implementation of agreements produced under the right to negotiate. An enhanced statutory role for Native Title Representative Bodies in these matters is urgently needed (see ATSIC 1995: 1; Dodson 1996). In particular, Representative Bodies, serving as the 'transaction floor' (Dodson 1996) for dealings between native title parties,

industry and governments could serve to greatly streamline the negotiating process by ensuring comprehensive consultation with claimants, co-ordinating decision-making between multiple claimant groups and monitoring the implementation of negotiated agreement conditions.<sup>9</sup> To perform such a role, Representative Bodies will need to establish their own representative credentials and accountability within the Aboriginal domain.

## Conclusion

By and large, it is the politics of negotiation, in particular the strategic behaviour of parties in the negotiation process, which are more critical to outcomes than any asserted unworkability of the statutory process itself. In the politics of native title negotiations, the rhetoric of representativeness has become a powerful political resource that governments and other stakeholders can use to either assign or deny negotiating legitimacy to Aboriginal leaders and native title claimants. The matter of representativeness is itself a critical issue within the Aboriginal domain, especially in circumstances where multiple and disputing claimant groups are involved in the same negotiations and when agreement benefits can flow directly to claimants as opposed to being held in trust for native title holders.

At the same time, the right to negotiate is a significant right arising from native title and based upon the Indigenous customs and laws in which *native title is embedded*. It is that *native title right* which has been given a specific statutory form in the NTA's right to negotiate. The exercise of the right has already resulted in a growing number of negotiated agreements, indicating that the process of negotiation, when entered into in good faith, can achieve equitable outcomes and positively assist in the management of disputation over proposed uses of claimed native title land. Evidence to date indicates that outcomes can be achieved within a statutory time frame; outcomes which are capable of providing legal certainty for valid future acts as well as protecting of native title.

When the NTA was originally passed, the right to negotiate was a compromise position secured by an Aboriginal leadership in exchange for not gaining a veto over mining and for agreeing to the validation of past acts by government. In other words, the right to negotiate was itself a product of strategic Aboriginal negotiation. It remains to be seen, however, whether the right will remain a robust one, or will be whittled away by legislative amendment, and whether the potential economic benefits that arise from its operation actually flow to native title holders. A preliminary view, put by the Aboriginal Social Justice Commissioner Mick Dodson (1996: 15), is that the proposed amendments to the right to negotiate regime 'represent a fundamental shift away from protecting Indigenous rights to privileging non-Indigenous interests ...'. Certainly, government and other stakeholders involved in the wider political economy of native title continue to demand that the right to negotiate be substantially curtailed.

## Notes

1. The author is a part-time member of the National Native Title Tribunal. However, the views expressed in this chapter are entirely those of the author as an academic engaged as a Research Fellow at the Centre for Aboriginal Economic Policy Research and are not to be attributable in any way to the Tribunal or any of its other members.
2. This paper was written in late 1996, in the context of proposed amendments to the *Native Title Act 1993* (NTA) which had, at that time, neither been debated nor passed; and prior to the High Court's *Wik* decision. Therefore, the chapter concentrates on the NTA as it stood before amendment. The *Native Title Amendment Bill 1996* and Exposure Draft (Commonwealth of Australia 1996), containing amendments to be moved on behalf of the Commonwealth Government, were introduced into the House of Representatives in 1996 and were expected to be debated early in 1997. The Bill proposes substantial changes to the right to negotiate process. The nature and implication of proposed amendments to the right to negotiate have been canvassed in detail by Smith (1996a). The High Court's decision in *The Wik Peoples v. Queensland and Ors* (23 December 1996, unreported) has major implications for the current round of amendments, with both the Commonwealth, State Governments and industry calling for additional, substantial amendments to the right to negotiate.
3. See Smith (1996a) for a more detailed description of the various component phases of the right to negotiate, including, in particular, the expedited procedure and the arbitral hearing stages.
4. Permissible future acts by government include compulsory acquisition of land for public purposes; the grant of exploration and mining titles; the renewal of validated commercial, agricultural, pastoral or residential leases; acts offshore; acts defined as low impact; and acts covered by an agreement with native title holders.
5. See Smith (1996a) for a fuller description of the expedited procedure.
6. In making its determination, the arbitral body must take into account the following criteria listed under s.39 of the NTA:
  - (a) the effect of the proposed act on:
    - i any native title rights and interests; and
    - ii the way of life, culture and traditions of any of the native title parties; and
    - iii the development of the social, cultural and economic structures of any of those parties to the lands or waters concerned and their freedom to carry out rites, ceremonies or other activities of cultural significance on the lands or waters in accordance with their traditions; and
    - iv the freedom of access by any of those parties to the lands or waters concerned and their freedom to carry out rites, ceremonies or other activities of cultural significance on the lands or waters in accordance with their traditions; and
    - v any area or site, on the land or waters concerned, of particular significance to the native title parties in accordance with their traditions; and
    - vi the natural environment of the land or waters concerned;
  - (b) any assessment of the effect of the proposed act on the natural environment of the land or waters concerned:
    - i made by a court or tribunal; or
    - ii made, or commissioned, by the Crown in any capacity or by a statutory authority;

- (c) the interests, proposals, opinions or wishes of the native title parties in relation to the management, use or control of the lands or waters concerned;
  - (d) the economic or other significance of the proposed act to Australia and to the State or Territory concerned;
  - (e) any public interest in the proposed act proceeding;
  - (f) any other matter that the arbitral body considers relevant.
7. When States establish their own State arbitral bodies, as is possible under the NTA, the relevant State or Territory Minister can override an arbitral determination.
  8. In 1982 I wrote regarding the impact of consultations on mining projects and the process of identifying traditional owners under the ALRA in the Northern Territory, that:
 

The fact is that consultations and negotiations do create interests: they immediately include certain people and exclude others. Ad hoc divisions often develop a life of their own and determine future groups for consultations. Such processes are not irreversible, of course, but the fact of the matter is that developers do not like fluid situations and exert constant pressure on Land Councils to have lists of owners fixed and therefore finite, and to have the same individuals present from one meeting to the next (Smith 1984: 93).
  9. Such an enhanced statutory role was strongly recommended by the national review of the role, function and funding of Native Title Representative Bodies (ATSIC 1995) and has also been endorsed by a number of other stakeholders in the right to negotiate process (see for example, Smith (1996b); Wand (1995: 1493-94, 1515); and recent comments by David Russell, President of the Queensland National Party, *The Australian*, Tuesday 7 January 1997, p.11).

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## **7. Reflections on Century Mine: preliminary thoughts on the politics of Indigenous responses**

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Aboriginal responses to large-scale mining projects have been subject to increasing public attention during recent decades. Concomitantly, a literature has gradually emerged which presents various analyses of, and commentaries upon, what are often broad conflicts between Indigenous groups, companies and governments (see, for example, Connell and Howitt 1991). While the overwhelming focus in such studies is on a conflict of interest between resource developers and Aboriginal people, there is an occasional acknowledgment of the importance of an arena of internal politics within and between Aboriginal communities. An example is writings about Argyle diamond mine in the east Kimberley region of Western Australia where, in 1980, several individuals signed an agreement with the company and subsequently became embroiled in disputes with other Aboriginal people claiming rights to the lands involved in the project (Dixon and Dillon 1990: 3; Vachon and Toyne 1983: 318). While this small group can be seen, with hindsight, as having gained implicit recognition of Indigenous rights in land and negotiated considerable financial benefits (Dixon and Dillon 1990: 3), some analysts have noted how this family has faced 'the anger of their fellow countrymen' (Vachon and Toyne 1983: 318), the 'majority group of traditional owners ... [who] ... felt utterly betrayed' (Langton 1983: 394).

A second example from a decade later illustrates how a proposed mine prompted disputation about religious knowledge within an Aboriginal society. In the early 1990s, the proposal to mine Coronation Hill in the Northern Territory led to differing attitudes among Aboriginal 'factions', with some people apparently changing their minds about whether the area was of spiritual significance and whether mining should take place (Keen 1993: 348). To the extent that senior individuals took 'contradictory positions', this should be understood in terms of 'possible political processes among Jawoyn people', as well as a variety of pressures implicit in the circumstances in which these positions were elicited (Keen 1993: 350-51).

In this chapter, about a similar set of Indigenous responses to a very large mining development in north-west Queensland, my aim is to build upon the analyses that have begun to address the nature of Aboriginal politics. My general point is that social relations among an Aboriginal population drawn into dealing with a new large-scale resource development are a major determinant of outcomes. This may sound like a

truism; however, the processes of Indigenous politics are rarely transparent to government and industry, or to the wider Australian society in general. Thus, there is a constant danger (if not an entrenched tendency) for various negotiators, mediators or commentators to assume a unity of interests across Aboriginal 'communities'. In discussing Century Mine, I seek to dispel any hint of such assumptions.

This case exhibits what has been aptly termed a high degree of factionalism and localism characteristic of social relations among Indigenous groups (Martin and Finlayson 1996: 21), a pattern of ongoing tensions that has been encompassed within diverse responses to the proposed mine. Through this process, certain non-Aboriginal interests have become heavily involved in supporting some groups against others (see Edmunds 1995: 6), and aspects of a national Aboriginal politics of indigenism and ideology of protest have proved influential over the positions taken by some local groups and organisations.

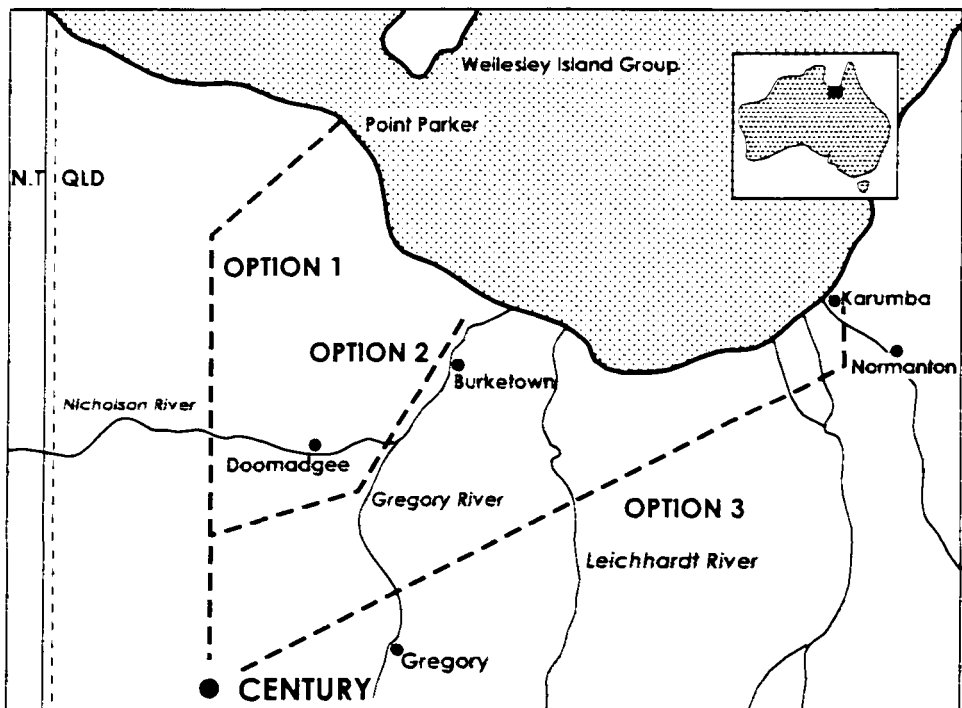
### **Background to the Century Mine dispute**

Aboriginal people of the southern Gulf communities first began hearing of Century Mine in late 1990. Initial approaches from Conzinc Riotinto Australia (CRA) and the Queensland Government were to the local government Councils at Doomadgee and Mornington Island. There were many public meetings and smaller private discussions. The mine was said to be a potential benefit to all Australians, including Aboriginal people; however, as I have discussed elsewhere (Trigger, in press), Indigenous responses to the rhetoric of pro-development ideology were to raise many issues about possible negative effects of the mine. Of great concern in the early discussions was the question of the pipeline route to the Gulf coast. Figure 1 shows the three potential routes as presented by CRA. There was considerable opposition to the pipeline going to Point Parker (option 1 on Figure 1), an area of substantial traditional and historical significance to coastal Ganggalida people; and, with hindsight, it seems clear that anxieties about this initial proposition from the company (a potential pipeline route that was subsequently abandoned) have continued to cast a shadow over the ongoing negotiations. In any case, over the years, there have developed substantial concerns about the other two routes as well. Many 'saltwater people' of the Wellesley Islands have been largely opposed to any pipeline to the sea with its attendant port and shipping operations.

With the passing of the *Native Title Act 1993* (NTA), the Carpentaria Land Council (which had been a fledgling organisation for a decade or so) began to emerge from its relatively poorly resourced status. Under the influence of its governing committee and several Aboriginal people working for it, the Carpentaria Land Council assumed a major role in coordinating negotiations about the mine. In mid-1994, a native title claim was lodged over a small area of camping and water reserve near the mine.

This claim subsequently was rejected by the National Native Title Tribunal (NNTT) on the grounds of extinguishment through a pastoral lease having been issued prior to the reserve coming into existence. However, this first Waanyi claim was appealed ultimately to the High Court and finally won acceptance into the processes of the NNTT. The claim assumed a status of symbolic importance in the Gulf Aboriginal communities. Some Waanyi people went to Canberra to witness the decision. They proclaimed victory to the media and were greeted on their return to Mt Isa airport by Aboriginal people in a spirit of celebration (see *North West Star* newschaper 2 February 1996 for front-page coverage of this event). The tee-shirts taken by those who went to Canberra (and which continue to be worn proudly by some people as the negotiations about Century continue through 1996) proclaim the words: 'We opened the door to the highest court in the land ...'.

**Figure 1. Part of the Capentaria Mineral Province, showing Century Mine and pipeline routes options.**



Also in 1994, the Carpentaria Land Council requested (on behalf of Waanyi people) that the Federal Minister for Aboriginal and Torres Strait Islander Affairs invoke the *Commonwealth Heritage Protection Act 1984* to protect certain areas near the mine site, and a mediator was appointed. What followed was a year or so of fairly intense negotiations between CRA

and Aboriginal groups assembled under the umbrella of an organisation known as United Gulf Region Aboriginal Corporation (UGRAC). UGRAC sought to include a very wide range of Aboriginal corporations under one team in the negotiations; some individuals working for the Land Council took a major role, as did a number of prominent Aboriginal leaders from other parts of the country. The latter were involved as advisers and the negotiations at times received substantial media attention.

However, with the failure of this negotiation process to reach any agreement, and after the Queensland Government came close to passing special enabling legislation to facilitate security of title, new negotiations commenced in mid-1996 under the 'right to negotiate' process of the NTA. Seven native title claims have now been lodged over various parts of the lands required for the Century Mine project including the proposed long pipeline to the Gulf coast. In September 1996, the NNTT was invited by some claimants to become involved as mediator in the negotiation process.

### **The complexity of emergent interest groups among Aboriginal people involved in negotiations**

It is important to consider the diversity of interests that have emerged across the multiple Aboriginal communities involved in the Century Mine project. As the years of meetings have gone by, considerable disagreements have been voiced among various groups, families and individuals. While it is plausible to suggest that conflict is 'an indication of the continuing vigour of Aboriginal society, not of its breakdown' (Edmunds 1995: 2), the Century case illustrates the very great strains that negotiations over large-scale resource development projects prompt in Aboriginal communities. We see this illustrated, for example, in the emotional words of the chairperson of UGRAC, as he faced a media conference in Brisbane in July 1996:

What CZL [Century Zinc Limited], the Government, you name'em - what have they done to Aboriginal people? They came in and threw 60 million bucks on the table here and said: 'Blacks, fight over it!' ... And divided us, divided us something bad. And you know, the Aboriginal people that went along with CZL, I'm very disheartened. ... I cannot sleep at nights, because of what the White man have done to turn my own brothers in my own community against us (ABC Television 7.30 Report, broadcast 8 July 1996).

The reference to \$60 million is to the reported value of a complex deal offered by the company to apply over the 20-year life of the mine; and, as this man implies, this has proved attractive to some Aboriginal people, much to his own dismay. His comment about not being able to sleep at night might well have in part been meant to refer to the break-out of physical conflicts at Doomadgee from time to time over the past few years (see, for example, a story entitled 'Families at war', *Courier Mail* 18 October 1996). These disputes are by no means related solely, or even

mainly, to differences over the Century issue. However, as Edmunds (1995: 2) has put it in her discussion about conflicts affected by native title claims processes in general, the question of responding to the new mining development has 'become one more factor that has been added to the resources of Aboriginal political life'.

Because of the substantial implications of the mine, either positive or negative, depending on which position is taken, the Century issue has proved a highly potent intrusive 'factor' in social relations among Aboriginal people. The mine has come to mean different things, in both a material and symbolic sense, to various individuals and groups, and people's views on the new development project have become part of their status profile in the context of the vibrant arena of Indigenous politics. To the extent that organisations (often constituted and labelled in terms of 'tribal' or language names) have become key foci for people's aspirations, these tend to be integrated into competing positions as to whether the mine is a good or bad thing. Indeed, it is no exaggeration to say that 'such organisations become the vehicle for passionate and ... vitriolic disputation' (Martin 1995a: 30).

How, then, might we understand what leads people to take up different positions on this new mining development? At this moment in my own studies I can only offer some general comments on this complex matter.

#### *Real differences of opinion*

Firstly, there are real differences of opinion as to the potential benefits and dangers of the mine and pipeline. Despite what particular factions may at times say of their opponents, the differences are not simply due to people being 'confused', or to a strategy of narrow self-interest that excludes genuine concerns for the welfare of others in their communities, the cultural and environmental integrity of significant country, and so on.

From the perspective of those who stress the value of what appear to be promises of substantial economic benefits (employment, training for young people, funds for new business operations) it is pointless and wrong-headed to ignore the opportunities that the mine presents. To quote the reported words of a spokesperson for one of the incorporated Indigenous associations: 'The reality is this mine is going to go ahead whether we like it or not, and if we are not careful we will lose what they have offered us now' (*Courier Mail* 4 April 1996, p. 4). In the words of the chairman of the elected Aboriginal Council administering local government services at Doomadgee (the largest community in the region), the mine represents 'our bread and butter'. This was so, he suggested, especially in the light of possible future cuts to government funding for benefits such as unemployment payments. Similarly, at a meeting at an outstation community in August 1996, one visiting woman from Doomadgee linked her support for the mine and pipeline to proceed to

improving the circumstances of young people: 'I'll support the jobless', she commented forcefully.

In taking this position, such people risk being defined as 'greedy for money' among those for whom dangers of environmental pollution and/or the cultural integrity of the landscape are paramount (see Trigger, forthcoming). For example, they are 'jumping on the bandwagon of greed', according to one Waanyi man quoted in a newspaper report in the *Courier Mail* (28 June 1996, p. 3). In a social world where intense webs of interpersonal relatedness are monitored according to a broadly egalitarian ideal (Martin 1995b: 6), stressing the importance of economic advancement for Aboriginal people constantly risks being denigrated as simply a disguised form of personal acquisitiveness. 'He's working for the company', is thus the sort of accusative dismissal directed at an individual perceived to be in close liaison with industry or government personnel seeking to establish the project. At least, this is so among those opposed to cooperation with building the new mine; their condemnation rests on the accusation that such individuals simply hope to gain benefits for themselves and close families and thereby cut themselves off from the broader networks of relatedness and obligation with other Aboriginal people. Perhaps the most extreme accusation of this sort has been that 'corruption' is involved; that is, that certain Aboriginal people ('the jacky-jackys so to speak') have been 'bribed' or 'paid off' by the company and the Queensland Government to manufacture their assent to the project (see statements made on Channel 9 *Sunday Program*, broadcast 21 July 1996).

Yet the responses of persons attacked in this way can be equally disparaging about their critics. Those seeking to oppose the project completely may in turn be labelled as selfishly pursuing their own personal agenda of political protest and thereby undermining attempts to realistically negotiate 'some good things' for the wider population of Aboriginal people. This type of condemnation rests on the broad proposition that activist opposition to the project is manufactured by only a small number of individuals who are accused of not consulting with or listening to others (see, for example, comments to this effect on Channel 9 *Sunday Program*, broadcast 21 July 1996). The implication is that adequate consultation would recognise that the majority of people support the mine because it will bring economic advancement.

Nevertheless, this latter assertion is hardly easy to demonstrate; over recent years, there has been no shortage of occasions on which some individuals have vigorously expressed cynicism about the notion that the mine will bring jobs and associated improvements in health and other social problems. Furthermore, opponents of the mine are seen by their supporters as making a strong point by suggesting that government should address the material needs of Indigenous communities, thus obviating the necessity to accommodate a negotiated agreement with the mining company. Thus, what some regard as sensible embracing of economic opportunities, others decry as a form of blackmail: 'Why should we have to

sell our souls for a house?' was a question raised by an impassioned speaker at a meeting with Queensland Government personnel during September 1996.

Finally, these contesting positions, which I will label 'oppositional' and 'accommodationist', are not opposed on all matters; for example, proponents of both are likely to stress the importance of achieving what is seen as the return of some land as part of any deal that might be agreed to with Century Zinc Limited (CZL). However, major differences tend to emerge over how much compromise is appropriate. For instance, those broadly supportive of the mine have appeared to be prepared to accept an offer of partial control of a number of pastoral properties purchased by the company; whereas others remain committed to achieving full control of such lands through establishing native title rights over them.

*Factors relevant to taking an oppositional or accommodationist position*

Some people have been in receipt of more information about the mine than others, through their involvement on a number of committees or as semi-regular attenders of meetings. In any case, the process of assessing evidence and assertions about environmental safeguards and economic benefits has proven difficult. While some expert (and allegedly expert) advice has been available on these matters from time to time, the available information has usually remained somewhat opaque, either because of highly technical language or because of a lack of a clear weight of evidence one way or the other.

We can note the obvious point that people may, or may not, be prepared to accept the notion of a very large-scale open-cut mine pit in their country. In terms of *in-principle* support or opposition to mining in general, the question arises whether we should expect Indigenous communities to be necessarily any more or less united than other parts of the Australian population. It may be arguable that such issues as potential threats to biodiversity and aesthetic properties of the bush will prove to be of greater concern for some individuals than for others, and that this could vary according to differences of educational background, employment situation, age and so on, just as these factors variously influence the views of people in the wider society.

However, this sort of assumption gives us little insight into the bases of real differences of opinion among Aboriginal people of this region. There are few substantial differences of educational background; only a small proportion have formal educational qualifications beyond primary school. There are some apparent differences in income levels, but most people are on relatively low Community Development Employment Projects (CDEP) scheme wages or social security benefits (Crough and Cronin 1995: 12-15).

Nevertheless, it would be useful to look closely at whether support for the mine is greater among people who have been involved in at least two CDEP-arranged pilot work projects at the mine. While CDEP scheme



wages are quite low, and often involve relatively uninteresting maintenance work on a part-time basis, jobs at the mine are likely to lead to considerably higher wages. For example, quotations from one young man on a national television program indicated that the opportunity to work at the mine could be a strong factor leading people to give the project support:

Well at the mine site for me at the moment, it's pretty important for me like for the money side, keep on working up there. ... [At Doomadgee] ... people just drinking, oh well I drink, but up at the mine site I find it a lot better (Channel 9 *Sunday Program*, broadcast 21 July 1996).

It is also significant that the CDEP office has served as a contact point for several key people supporting the mine over the past few years. This is reflected in the fact that the CZL consultant who prepared the economic aspects of the deal offered to Aboriginal groups spent some time in communication with the office, discussing ways in which the residents of Doomadgee might benefit from the new development.

Beyond these factors, my observations at regular intervals over the past six years indicate that both oppositional and accommodationist positions have been expressed among those who at times avow commitment to Aboriginal Law. Similarly, people actively engaged in Christian practice and belief do not appear to disproportionately take up one or other position. Given these generalisations, how might we get a better understanding of the politics of the emergence of views about the mine?

### *Place of residence*

Where people actually live appears to be an important matter. Those living in daily contact with the seas of the southern Gulf are understandably more focused on the possible dangers of marine pollution than those living at Doomadgee. Similarly, people at Gregory camp near where the pipeline carrying zinc slurry to Karumba crosses the Gregory River (see Figure 1) are particularly concerned about dangers of pollution of water courses. However, the further issue is whether those living at such outstation communities as Gregory are less likely to focus upon potential job opportunities than, say, residents at a large settlement like Doomadgee. Are they less committed to participation in the sorts of training and job routines envisaged as so potentially positive among mine supporters at Doomadgee? Addressing this matter would require further research; however, what the Gregory residents have made clear is that they are distinctive because they are 'trying to make a go of it' out on the land (though there are, of course, other outstations and bush camps frequented routinely from Doomadgee as well).

Their point, I think, is that living so closely next to what is referred to locally as 'the running water' of the Gregory River, and away from residential blocks serviced with power, plumbing and other facilities, they

are both more involved with the bush in an everyday sense and acutely aware of perceived dangers from pollution. Moreover, there is a symbolic dimension to the proposition put by Gregory River people. In attempting to recuperate a life away from the big town of Doomadgee, with its several offices, administrative staff and so on, they can claim that they are seeking to re-establish a lifestyle in touch with Aboriginal traditions. In turn, this positions their outstation enterprise as part of a general politics of indigenism; that is, as bound up with a national self-consciousness among some Aboriginal people that is committed to 'cultural revival'. To the extent that local government officialdom makes it hard to build houses and a small community with facilities at an outstation like Gregory, this is seen as the wider society opposing the recuperation of Aboriginal culture. Why, then, would they choose to support a large-scale new mining development that is so obviously a part of the wider society's vision for the future, but not at all integrated closely into their own sense of appropriate aspirations for a small struggling distinctively Aboriginal community?

#### *A politics of Indigenism*

This is certainly the general question raised among the relatively small number of people who have opposed the mine (and/or the pipeline) very actively, through media appearances, leading a 'sit-in' demonstration and generally politicising the consciousness of their peers. For this group, responding to Century Mine is very much bound up with a politics of indigenism (Beckett 1994); that is, with the task of reproducing and recuperating Indigenous 'culture' in the context of an intensely politicised struggle with the wider Australian society. The struggle is seen to have both material and symbolic dimensions among these activists and encompasses the sort of political consciousness entailing 'symbolic opposition' to the broader society that has been written about for certain Canadian native communities in the 1960s (Schwimmer 1972). Thus, the mine becomes symbolic of the continuing process of white colonisation. To this extent, opposition to it is regarded as resistance against the sort of commercial enterprises that originally drove the process of Aboriginal dispossession: 'We will be dispossessed again!' exclaimed the chairperson of UGRAC when addressing the media about the prospect of the mine (ABC Television *7.30 Report*, broadcast 8 July 1996).

The more the rhetoric of government or industry or media commentators touts the great value of this 'biggest zinc mine in the world' - a project with 'the potential to generate absolutely massive wealth of the State and the nation', in the words of the Queensland Premier in 1996 (*Sunday Mail* newspaper 31 March 1996) - the more opposition to it assumes symbolic importance as a form of Aboriginal resistance. After predicting negative social impacts such as 'racial' conflicts with 'redneck miners' and the prostituting of 'our young women for alcohol', the coordinator of the regional Land Council told one journalist exactly what he thought of pro-development rhetoric: 'Is that something we should

accept, just in the interests of the nation, more degradation to our culture?' (quoted in Wear 1996: 35).

### *A politics of reputation*

For another comparatively small proportion of the Indigenous population; namely, senior men and women known to hold traditional and historical knowledge of the landscape and of those with rights to it, this emergent politics of indigenism remains somewhat remote. These older people are typically focused upon a local arena of Aboriginal politics in which their reputations are made and sustained (see Trigger 1992: 111-8 for discussion of this domain of politicking at Doomadgee in the early 1980s). While the cultural knowledge they control is a key form of 'currency' made central to negotiations over rights to land or future resource developments, they themselves are often more concerned with what we might term a vibrant politics of reputation *within* Aboriginal communities than with the assertion of cultural difference as part of a politics of opposition to White Australian domination.

On occasions, I have witnessed senior Law experts seek not to oppose or protest against various whites involved in negotiations, but rather to impress them, thereby drawing them into an acknowledgment of the authority of the 'old people', a high-status category to which the Law experts can claim to belong. This has occurred especially when influential senior individuals come to feel that general control over dealings involving 'country' is being co-opted by younger people less knowledgeable about 'culture'. In these circumstances, significant tensions can develop.

In the Century Mine case, it is arguable that the actions of both company personnel and a Queensland Government department's officers have exacerbated these tensions through their attempts to forge an alliance with certain older people. They have sought to achieve this outcome, partly by appearing to acknowledge the asserted decision-making seniority of these individuals, and also through energetically making a display out of talking about and looking after their material needs; for example, by transporting them around the region, assisting them with shopping, ensuring they receive adequate food at meetings, and so on. In such contexts, apparently helpful outsiders also tend to become embroiled within the inevitable discourse of complaint from the old people, about whether they have been looked after adequately by the Land Council personnel arranging facilities and transport associated with consultations and meetings.

While the motives of company or government officers may well at times be genuinely oriented to the straightforward task of ensuring that older people are looked after properly, the consequence is that their benevolence breeds considerable personal goodwill towards them as individuals: 'They look after you just like you family, make you real welcome', commented one man aged in his sixties about the experience of visiting the mine site for discussions on several occasions during 1995-96.

This type of sentiment can clearly work in favour of Aboriginal people agreeing to company propositions in negotiations over the mine, at least partly on the basis of personal feelings towards individuals, rather than through considered assessments of hard facts to do with economic benefits or environmental safeguards. To this extent, the pattern of benevolence tinged with a proclaimed respectfulness on the part of some industry or government people, could be said to inflame emergent tensions between particular senior holders of cultural knowledge and younger people opposing the mine.

One illustrative case must suffice here as an ethnographic example of the way such tensions can be played out. At a meeting in 1995, a young Land Council officer argued aggressively with a company man who had transported important old people the long distance from Mt Isa to a remote location for the discussions. At a particularly heated moment, the young activist sought to include other Aboriginal people present in a deliberate insult directed at the company man: 'anybody want to keep talking to this *juga*?' he exclaimed, thereby using the term for 'young uninitiated boy' for the white company officer clearly much older than himself.

The younger man had only recently been initiated under the supervision of the most senior Law man present,<sup>2</sup> and this authoritative traditional leader was clearly not impressed with the young activist's aggression and attempted insulting behaviour. As the meeting broke up, and the Law man was about to return to Mt Isa (along with his family, in the company man's vehicle), he expressed to me considerable condemnation of what had transpired: 'we've never had meeting like that before!' Following that incident, the old man refused support for the Land Council officer. On a television interview filmed some months later, he stated, with reference to this person's opposition to the mine: 'He's doing the wrong thing' (Channel 9 *Sunday Program*, broadcast 21 July 1996).

On the same interview, the senior Law expert restated what he has been saying for some time; namely that the mine location does not impinge upon any sacred site: 'It's all right. I tell everyone [about] that one, mine [is] away from that place [that is, from an important Dreaming site]'. However, my reading of this pronouncement is that it is embedded firmly within a regional politics of reputation, such that this very respected man is particularly concerned to maintain his acknowledged authority on matters of 'country' and its significance. While he knows that younger activists and their supporters would rarely (if ever) criticise him overtly, he is also aware that a major arena of Aboriginal action (through the media and as part of the general discourse with government and company personnel) tends to marginalise senior people such as himself. His detailed knowledge of the totemic geography of the mine area can, from his perspective, appear to be left out of the politics of protest being controlled by younger and less knowledgeable people.

From the viewpoint of those opposed to the mine, suggesting quietly that such older respected individuals may be 'confused' is to imply that, in

their intense focus upon the local arena of a politics of reputation, senior people may ignore the wider issues of importance; for example, matters of gaining economic benefits in return for allowing mining, environmental impacts and the general struggle with government and industry to achieve positive outcomes for Indigenous communities. The suggestion is that older people may be influenced by the fact that company or government personnel (or journalists) appear to listen attentively to their pronouncements (at times, we must assume, without the language fluency to understand much of what is being said). While it is doubtless a tactical error (and locally bad etiquette) for people engaged in protest against what the mine represents to marginalise senior Law experts, the notion that the old people are not always fully aware of what is involved in the mining development cannot be regarded as completely without foundation. In the case I have outlined, several questions are apposite. Does the old man realise how very deep and wide the open-cut pit will be? And does he know how much stone artefact material is located on top of one of the hills marked for destruction (a hill too steep for him to climb, at least on the occasion during which I was present)? If his pronouncements about such culturally significant materials during visits to other sites in the region are any guide, his comment on the television program, that proceeding with the mine poses no threat to the cultural integrity of 'country', might well be qualified in the light of his gaining more information.

*Why meet again to talk about the mine?*

For the vast majority of members of Gulf Aboriginal communities, both the politics of indigenism among activists and the politics of reputation among senior Law people remain peripheral to everyday life concerns like feeding children, maintaining functioning motor vehicles or, in the case of youth, keeping up with the latest locally popular fashions in clothing, rock music and video programs. Everyday life circumstances in communities like Doomadgee or Mornington Island involve major social and health problems, in part associated with a chronic pattern of alcohol abuse, and it is hardly surprising that most people do not maintain an energetic focus upon more and more discussions and meetings about a new mine.

Nevertheless, especially when ongoing intra-community disputes about other matters are exacerbated through the incorporation of key individuals' differing positions on whether the mine is a good or bad thing, a very wide range of people can become aligned with the protagonists on the basis of kin networks. It comes as no surprise that Aboriginal politics is driven largely by such alliances that encompass various lines of family connections in the context of disputes (Trigger 1992: 118-25). In recent negotiations, it has sometimes appeared that what is most important in the position people take is, firstly, how they perceive close kin to be proceeding and, only secondly, the substantive matters under consideration.

However, the alliances are rarely easily predictable. Within their networks of kindred, people usually have a number of links through which they might channel their loyalties and it is normally the practical realities of everyday social and domestic relations that influence whether people support, say, their siblings who are opposing the mine or perhaps their immediate in-laws who might be supportive of it. One example will serve to illustrate: a senior man living on Mornington Island has chosen consistently to align himself with the broadly oppositional position of his in-laws who are 'saltwater people', rather than with the accommodationist sentiments pursued actively among some of his close Waanyi kin at Doomadgee. To simplify the matter, he may be seen as aligned with his Kaiadilt brother-in-law with whom he shares a community of residence, much more than with his younger brother who lives at Doomadgee.

### **Prominent issues in negotiating about the new mine and associated native title claims**

In the context of substantial tensions among Aboriginal people, various assertions and counter-assertions become the substance of politicking over who holds relevant knowledge, who has rights of ownership and/or use of particular lands and whose biographies are consistent with the rights to country that they are now claiming.

Factors that are hotly debated include whether people should, according to customary Law, trace primary rights to country through their father or mother, or through one or more grandparents. Assertions on this point vary with circumstances and all kinds of propositions are put with great conviction. For example, a man tells me: 'you go through father, my mother is a full Waanyi, but I'm a Ganggalida man, I'll always go through father'. However, he may well assert a right to be present at Waanyi meetings to discuss the pipeline, on the basis of his Waanyi mother. 'Did you know that girls can choose their mother's country?' a woman asked me recently, after which we discussed some of the complexities prompted by the Waanyi/Garrwa claim of 1982 under the *Aboriginal Land Rights (Northern Territory) Act 1976*; in this claim, people asserted primary ties to both their father's father's and mother's father's estates, but were content to leave other ties as secondary affiliations. 'My father was born at that place', 'my grannie is buried there', or 'my mother's dreaming is in that country' are all similarly statements made to trace and assert rights to land.

While it would be possible to discuss at length the nature of the changing traditional pattern of land ownership and use, in this area of the southern Gulf Country in the 1990s, just how much force such proclamations have tends to follow more from speakers' acknowledged standing in local politics than from any consistently applied principle of a 'system of land tenure'. Age is important: 'she's only kid along side of me!' is a commonly used means of dismissal. Personality and the manner of

putting one's case are also critical in having assertions about country accepted. Just who is 'causing division' or 'splitting people up' is a constant source of consideration.

Furthermore, the nature of the mining development proposal itself engenders a particular set of assertions about native title rights. Just as the Northern Territory land claim over the Nicholson River lands (Trigger 1982) prompted discussion in terms of the legislative definition of 'traditional owners' having 'primary' or 'secondary' spiritual responsibilities for lands, native title claims in response to the new mine are framed according to a particular context. The very scale of the proposed modifications to the land, at the mine site and across some 300 kilometres of the pipeline route, affects substantially 'how widely the net of interest-holders' is cast (Sutton 1995: 6). In the case of such large-scale developments, seen as potentially affecting whole regions,<sup>3</sup> those with what Peter Sutton has described as 'local, small-scale traditional possessory interests' are unlikely to be able to sustain a position that all decision-making rights belong to them (Sutton 1995: 5-7). In the case of Century Mine, there has certainly been a series of much broader regional responses; though this matter of just how widely distributed is the 'right to negotiate' over relatively confined parcels of land remains a matter of fluid discussion.

These matters arise among Aboriginal people in many and varied situations. Perhaps the most common setting in which decisions are sought is the meeting with a relatively large group present. This is partly because to do otherwise risks condemnation on the grounds that 'secret' discussions are occurring that exclude the broader range of interested individuals. As one researcher has put it in discussing the impact of mining in Western Arnhem Land, smaller meetings do not routinely result in good communication afterwards to wider networks of people: 'People who attend meetings do not report back to their community ... there is no obligation to inform others of what went on' (Kesteven, quoted in Smith 1984: 91).

Yet relying upon large meetings as decision-making processes is also fraught with difficulties. Thus, some of the public meetings about Century Mine have tended to lead to some long-standing controversial issues being aired; for example, disputes over which individuals or families are truly committed to 'culture', who really 'belongs' to country in the vicinity of the lands to be developed, and so on. Expression of these conflicts is evidence of the way negotiating about the mine encompasses existing axes of tension in communities. While large meetings have proved necessary at times, as Aboriginal people have sought to respond to a range of proposals, they present major difficulties in terms of producing generally agreed decisions or resolutions. In particular, a large meeting can quickly become a 'stage' for 'performance' where positions are stated with great emotion and at times in a more uncompromising fashion than might otherwise be agreed to in more relaxed circumstances among smaller groups. To risk a generalisation, it is likely to be difficult to achieve

agreement on the basis of 'principled decisions' in the context of large meetings with multiple factions present.

This point goes directly to the question of how a broad Indigenous population, divided along a range of lines of alliance, can be consulted with and represented adequately in negotiations over native title and resource development issues.

### **Consequent difficulties in the process of 'representation' and consultation**

Against the background I have presented, of conflicts and politicking among Aboriginal people of the Gulf Country, the difficulties of the small regional land council as the 'representative' body under the NTA are enormous.

*'Representing' diverse interest groups or operating as a political pressure organisation?*

The Carpentaria Land Council in the Gulf region, like others, is a representative body under s.202 of the NTA. Its statutory functions under s.202(4) include the facilitation of research and preparation of claims by individuals and groups, assisting in the resolution of disagreements among such individuals or groups about the making of claims, and assisting such individuals or groups by representing them, if requested to do so, in negotiations and proceedings about native title.

In the context of contesting assertions about native title, and diverse views about potential benefits and dangers of a large project like Century Mine, these tasks loom large and difficult for those working in the Land Council. In particular, if Land Council staff (both Aboriginal and non-Aboriginal) have personal political positions with respect to the mine, how should these be given expression? In the case of local Aboriginal people who work for the Land Council, how do they voice their legitimate personal views on the proposed development, while ensuring that the Land Council can 'represent' other Aboriginal groups and individuals whose views differ markedly from their own? This has been a particular problem in the Gulf region, and several Land Council officers who have been prominent in effectively organising Aboriginal opposition to the mine have found themselves confronted with demands from contesting Indigenous positions that the Land Council act as a truly representative body and provide assistance, advice and so on to those wishing to sign up an agreement with the company and government.

*Resolving competing assertions about the bases of native title*

The difficulties for the representative body follow also from the complexities of deciding between competing arguments about rights in land and the associated disbursement of benefits. An example, at the time of writing (September 1996), is that CZL has agreed to transfer title to two



relatively small but valued areas of land to Aboriginal people, plus an amount of money to fund infrastructure on these properties. However, the basis on which the properties and funds should be transferred to particular groups is an issue of considerable dispute.

The land and funds are meant to be 'compensation' for the destruction of a significant hill at the mine site. So should these valued resources go to those who make the best case for being most closely associated, according to customary law, with the land destroyed? Should the funds go to provide infrastructure on other Waanyi lands already under the control of Waanyi people and badly in need of basic facilities? Should the property and funds go to those who are the accepted 'traditional owners' of the actual lands forming the 'compensation payment'? And, if the latter is appropriate, are the 'traditional owners' all those affiliated with the linguistic territory within which the compensation lands are located, or the smaller group who argue that they inherit a particularly close tie to the lands - variously, because their parent(s) or grandparent(s) are known to have been aligned intimately with the 'Dreamings' there, or with Dreamings elsewhere but on the same watercourses passing through the land? Others argue the strength of their 'native title' rights on the basis that one or more of their close relatives are buried on the lands to be transferred.

One possibility in attempting to resolve these types of conflicts is to create more and more incorporated bodies that are purpose-specific. Hence, in the case of transferring ownership of 'compensation lands', there could be one or two new organisations created to hold ownership of the land areas. The positive result could be that this is the only solution likely to find broad acceptance, in that all those asserting an interest in the land could become constituents of the new owning organisation. The negative outcome is that, as more and more such corporations come into existence, they can be simply co-opted into the process of politicisation, become the arena of operation of a particular faction, family or interest group, and leave a whole lot of disaffected people who then continue down the path of creating yet another incorporated body to represent what they see as their conflicting interests (native title and otherwise). In the Century Mine case, it remains to be seen just how the conundrum of these 'compensation payments' can be resolved and whether a solution can be found that might defuse, rather than inflame, the tensions surrounding them.

### **Outcomes of the right to negotiate process: empowerment or alienation?**

The outcomes from the Century Mine negotiations proceeding under the NTA remain to be seen. The attempt to negotiate a deal outside the framework of the future acts regime of the legislation (during 1995-96) failed to achieve any agreed upon position across many separate Indigenous groups, the company and government.

The NTA establishes procedures and a framework for trying to reach agreements that may pay off in some settings. Partly because of the long pipeline route to the coast, the Century project involves a particularly broad range of Aboriginal groups. The political complexities among these groups flow from a history of colonial social relations that has produced a diverse Indigenous population now asserting various forms of connection to the lands involved.

In this chapter, I have also argued that there are genuine substantial differences of opinion among Aboriginal people about whether this huge new mine will produce overall positive or negative consequences for their communities. While, as has been suggested by some writers (Martin 1995b: 11), 'wealth' for Aboriginal people lies substantially in 'social forms of capital' (that is, in maintaining intense patterns of social relationships) in this region at least, perceived potential economic benefits from the mine play a major role in shaping the responses of some families and groups. Yet this view is contested by others who stress the importance of sustaining the emergent recuperation of Indigenous culture against what they see as dangers posed to the environmental and cultural integrity of 'country'. As a result, quite severe social tensions have developed and these tend to be incorporated into wider axes of dispute operating in the life of communities where conflict is given routine public expression.

We do not have a situation where the 'representative body', the Land Council, is yet in a position to fulfil expectations that it can play an arbitrating role. While the notion that such bodies will develop a capacity to do so has been put by some commentators (Altman and Smith 1995: 8), in a region like the Gulf Country this remains at best an ideal for the future. It is more likely that individual groups will seek energetically to pursue their particular positions through the courts, if necessary, when they are in dispute with other Aboriginal parties. Somewhat ironically for those who would believe otherwise, it can often be precisely because key people in the local representative bodies are so fully engaged within the field of regional Aboriginal politics that the organisation they work in is not seen as independent or neutral with respect to intra-Aboriginal disputes.

However, providing each local Indigenous interest group with its own professional body of advice may well be financially untenable and organisationally not viable from the perspective of government agencies such as ATSIC. For better or worse, 'representative bodies' under the NTA are often the only available corridors for funds needed to facilitate Aboriginal people being able to negotiate with mining companies and government on anything resembling an equal basis. This is a difficult conundrum where a representative body may itself be involved substantially in disputes with other Indigenous organisations and groups. The implications of my preliminary discussion of Aboriginal politics in this chapter are that there simply should not be any expectations about a unity of aspirations or approach among the multiple groups involved in projects like Century Mine. To this extent, procedures must be found for allowing

the different interest groups to feel they have the opportunity for their particular voices to be heard, and this remains a major challenge for the immediate future.

### Notes

1. I am indebted to Robert Blowes (Barrister, Canberra), Morag McDonald (Carpentaria Land Council) and Francesca Merlan (The Australian National University) for helpful comments on the first draft of this chapter.
2. This had occurred at a community across the border in the Northern Territory. Initiation ceremonies have not been performed at Doomadgee or surrounding areas since the 1950s, though there has been a revival of the ceremony at Mornington Island over the past couple of decades.
3. The impact is regarded as only partly upon the land itself. The influx of several hundred incoming workers at the new mine (albeit on a proposed fly-in/fly-out basis) strikes many Aboriginal people as a substantial change to the region.

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## **8. Dealing with native title conflicts by recognising Aboriginal authority systems**

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*Patrick Sullivan*

### **Introduction**

Conflict is probably no more a feature of Aboriginal society than it is of any other. One reason that it may currently appear to be so is the lack of any effective internal political authority over large and medium-sized Aboriginal groupings. The effect is two fold. Conflicts that in other societies are either contained and regulated by statute or convention are, in Aboriginal society, allowed to affect the Aboriginal polity to a disproportionate degree. Without a recognised system of Aboriginal internal authority over disputing groups, the authority of non-Aboriginal systems and structures is brought to bear. The key words here are 'recognised system'. Of course there are systems of Aboriginal authority, but they confer a peculiar right - authority without power. It is the wider Australian political system that firmly embraces Aborigines. Yet this is incapable of adjudicating, and frequently of understanding, the dynamics of Aboriginal conflicts which are then allowed to further fester. Australia is caught in the dilemma of the colonial control that dare not speak its name. Pretending not to colonise, it is incapable of devolving power to Indigenous systems of authority and intervenes only with crass and ill-adapted non-Aboriginal solutions.

In the Kimberley region of Western Australia (WA) the approach to conflict in native title claims is to encourage claims by relatively large groups within which smaller groups may remain in conflict but be assured of having their needs addressed. This encourages internal mechanisms for the control and regulation of the processes of dispute. This approach requires, firstly, the description of a large land-holding system containing the smaller groups; secondly, the identification of a 'group' that holds the system in common (in other words a social structure that has, among other things, a dynamic of authority that makes of it a political system); and thirdly, the institutional representation of these two in a corporate entity capable of running a claim for registration of title, negotiating benefit from it, and regulating and managing land. This paper describes these three aspects as part of an approach to putting Aboriginal conflict back in the domain of Aboriginal regulation where it belongs, discussing first the possibility of a large group ethnography, then the political dynamics of such groups. It concludes with a case study, that of Rubibi in Broome, where these problems are being grappled with in a concrete manner. However, the paper is sceptical whether local self-governing structures can

be perfectly tailored to Aboriginal cultural expectations and, in any case, concludes that present models of incorporation misread the problem by viewing social groups as corporate enterprises.

*The ethnography of large-scale land-holding groups*

The native title era has finally set us free from the straitjacket of functionalist ethnography, completing a process begun by Hiatt with his questioning of the concepts 'clan' and 'horde' and reaching a certain milestone more than 20 years later with Peterson's band perspective on Aboriginal territoriality (Hiatt 1962, 1966; Peterson 1986). Following this period, while the refrain of 'clans' and 'bands' and 'estates' continues to play, either as a main theme or as a counterpoint, in ethnographic descriptions, anthropologists have felt greater freedom to describe relations between groups and land in terms appropriate to the circumstances, rather than trying to explain the circumstances as variations on a universal abstraction. The Mabo judgement and the *Native Title Act 1993* (NTA) both encourage us (or, at worst, permit us) to have the flexibility to further new and creative approaches to the ethnographic description of social groups, particularly large-scale territorial groups.

This does not entail a complete break with the past. There is a less emphasised tradition in Aboriginal anthropology that has attempted to identify large social communities. In Berndt's essay on the tribe in the Western Desert he describes a regional 'society' about which he says, 'it is those who meet regularly and consistently, even if intermittently - and are closely involved in reciprocal duties and obligations - who make up the widest functionally significant group' (Berndt 1959: 105). Meggitt later called this wider group 'a community' saying:

It is obviously misleading to regard these Walbiri food-gathering groups as simple patrilineal and patrilocal hordes. Their composition was too labile, too dependent on the changing seasons, the alternation of quarrels and reconciliations, the demand of non-agnative relatives and so on. From the point of view of the individual, the group at its greatest was the community that comprised all his countrymen and included most of his closer relatives. At its least, the group was his family of procreation or orientation. Between these extremes, the unit might perhaps be termed a horde, but it was one whose personnel were recruited on a number of different bases that varied from one occasion to the next. These might reflect consanguineal links, affinal ties, bonds of ritual friendship or obligation, the pull of temperamental compatibility - or combinations of all of them (cited in Gumbert 1984: 75).

Recently, Peterson outlined a similar perspective in relating contemporary regional social domains to the composition of groups that come together for ceremonial purposes. He says:

Prior to settlement the basic residential domain was the range occupied by a group of coresident households that made up a band. The band was integrated into a regional domain through the personal, social, political and ceremonial ties of individuals in any band to people nearby. Aboriginal people speak of this network in a spatial way as a people who constitute one-countrymen which Fred

Myers glosses as: 'delineating the widely extended set of persons with whom one might reside and cooperate'. ... While individuals would certainly have slightly different ideas about the scope of such a domain there would be considerable overlap for people in any desert region making it possible to refer to the population of domains as a community (Peterson 1995: 4).

Merlan (1996: 171-74) has outlined an approach to native title cases that could describe the group at three different levels. Level three, the widest, is something akin to ethnic identity and has as much anthropological integrity as level one, the narrowest clan grouping. In a recently published paper, Sutton posits a wide area grouping that may hold 'underlying title' to land under Aboriginal law, in that it regulates and oversees the proper distribution of tighter title holding by smaller groups and is the repository of laws of succession and land redistribution. He says:

Aboriginal native title systems, in the broad sense of the Indigenous customary laws and cultural practices of mainland Australia that give rise to traditional land tenure, are dual systems that recognise both an *underlying title* and *proximate title* in land. The living holders of specific traditional land interests, often now called the traditional owners in a vernacular sense across much of Australia, hold title to those lands in the proximate sense, while underlying titles are maintained by the wider regional cultural and customary-legal system of the social networks of which they are members (Sutton 1996: 11).

In any discussion of a large group ethnography, the little-published work of Chris Birdsall should also not be neglected. She describes the structure, methods of recruitment, renewal over time and behavioural aspects of Nyungar extended families and their attachment to land in 'runs' and 'lines' in rural south-west Australia (Birdsall 1988).

With this tradition of the discipline in mind, the terms of the NTA permit us now to describe large land-holding groups as made up of alliances of smaller groups of various types with overlapping memberships, which are contextual rather than fixed in time and space and which exist for certain purposes at certain times. The important thing is only to show that the relationships are systematic and relate to control over land, not that there is a fixed canon of laws capable of articulation by each member of the group. One important consequence of this approach is that certain constellations of alliances of individuals within the larger group may remain in conflict with others without contradicting the existence of the larger system. Indeed, the terms in which the conflict is played out support its existence. If this approach to claims can be sustained in situations of conflict it means that, as far as running the claim is concerned, conflicts can continue without the intervention of the court or the Tribunal and without recourse to an anthropological body of knowledge that purports to scientifically determine levels of right. This is an optimistic view, however, which does not escape the problems set by the regulations for the prescribed body corporate established under the NTA (Sullivan 1997). Some pertinent concerns arise from a description of large land-holding

groups which are made up of smaller units with more particular attachments; in particular:

- i While the system may be discernible, what is the group? How is it named and described?
- ii A central element of (i) must be how is authority asserted and what is the political structure?
- iii How can this structure be recognised in ways that will allow the group to run their claim for registration of their title, negotiate over use of the land and control the land in a way that accurately reflects the common law rights of all members of the group?

### **Aboriginal political authority**

These questions lead to a consideration of the political system in Aboriginal culture. The prevailing view during the colonial era is characterised by an almost 'in passing' comment of Elkin's which was later taken up by Berndt. Elkin said: 'The male elders are those who exercise authority in the local groups. There is usually one headman for each group who unofficially presides at meetings, settles quarrels and makes decisions bearing on the group's economic, social and ceremonial activities, though other elders also express opinions' (Elkin cited in Berndt 1965: 167). Radcliffe-Brown shared this view:

... amongst the Australian aborigines the independent, autonomous, or, if you will, the sovereign, group is a local horde or clan which rarely includes more than 100 members and often as few as thirty. Within this group, order is maintained by the authority of the old men. But for the celebration of religious rites a number of such hordes come together in one camp. In the community so assembled there is some sort of recognized machinery for dealing with injuries inflicted by one person or group on another. ... Each assembly constitutes for the time being a political society (Radcliffe-Brown 1940: xix).

But he was also aware of larger political structures; earlier in the same work he had said:

Every human society has some sort of territorial structure. We can find clearly-defined local communities the smallest of which are linked together in a larger society, of which they are segments. This territorial structure provides the framework, not only for the political organization, whatever it may be, but for other forms of social organization also, such as the economic, for example (Radcliffe-Brown 1940: xiv).

He concludes that hordes from time to time belong to 'different larger temporary political groups', but fails to elaborate on the difficult problem, which is brought about by his insistence on the horde as the basic political unit, of how a grouping can at the same time be effectively a political



entity and temporary (Radcliffe-Brown 1940: xix). When small groups are observed making decisions, informal discussion and consensus arrived at by a group of relatives co-resident by mutual consent can appear as an institutionalised gerontocratic authority structure. We need to ask whether this identification of small group gerontocracy is really an institution of government that characterises the society and has a formal existence in some sense independent of human practice. The political grouping may be better characterised at the larger level where a temporary residential grouping, of the kind referred to by Radcliffe-Brown, expresses an enduring underlying law-holding community characterised by a succession of such temporary groupings.

The concepts of 'headman', 'council of elders' and 'gerontocracy' imported from the European experience to formalise an essentially informal Aboriginal process were later subject to criticism, particularly by Sharp, who said they had 'seeped into and seriously rigidified the discussion of Australian Aboriginal social structure' (cited in Hiatt 1986: 4). However, in describing Aborigines as a 'people without politics' he did not mean that they flexibly exercised essentially personal power in relationships. On the contrary, he believed that all relations between individuals were fixed from the beginning by the regulation of kinship obligations. Decision-making structures and political authority are unnecessary because every person has an exact balance between their obligations to others and others' obligations towards them (Hiatt 1986: 5).

Meggitt supported the view that there was '... no formal apparatus of government, no enduring hierarchy of authority, no recognised political leaders' (Meggitt cited in Hiatt 1986: 5), but differed from Sharp in emphasising the inflexible application of mythological precedent rather than kin obligations and added to the debate the concept of an ethic of egalitarianism, which was later taken up by Myers (1986). Attempting to reinstate Elkin's model of a gerontocratic council of elders, Berndt pointed out that kinship is not a rigid prescription for activity, but produces a variety of behaviour according to circumstances (Berndt 1965: 174, see also Tonkinson 1978: 126-27). Hiatt argued that myth, similarly, is 'not so explicit and unequivocal, nor sanctions so unerring, as to constitute a set of instructions which people follow automatically' (Hiatt 1986: 6).

As the concepts of 'clan' and 'estate' being the building blocks of Aboriginal social life have given way to consideration of relations between clans or family groups, dialectical divisions, religious lodges and ordered regional communities making up a wider, more complex group structure, so the conception of how authority is asserted within that group has expanded also. The 'headman' approach to political authority works in a limited way for small groups (see Anderson 1988) but for large-scale community relations Hiatt's phrase 'ordered anarchy' is more appropriate (Hiatt 1986: 4). Myers shows that this is structured by the competing needs to reaffirm relatedness and to insist upon personal autonomy. He says that there are no general figures of authority, only older people with particular

relations of authority to particular individuals towards whom they also have a nurturing responsibility. He isolates the concept of 'looking after' as central to Aboriginal (Pintupi) social life: it permeates both ritual and secular domains. A major part of nurturing is the transmission of esoteric knowledge. The principal dialectic of Aboriginal social life is the tension between the need to express, demonstrate and reaffirm 'relatedness', and the equally strong demand for personal autonomy. The idiom of nurturing recognises both of these. There is, then, a hierarchy in Aboriginal social organisation, but it is not necessarily a hierarchy of power.

Hierarchy is therefore not perceived as a human creation. Instead, it is simply the form taken by the transmission of something of extraordinary value that pre-dates human relations. Authority and responsibility are passed on to younger people, embodied in an object that is not their product. In the Pintupi view, the capacity for authority does not reside within the person. In this transmission, subordinate and passive juniors become superordinate and autonomous seniors. This feature of social life is the foundation of the way in which Pintupi conceptualize their physical environment and larger cosmos (Myers 1986: 241).

This expansion of our understanding of the reciprocal nature of Aboriginal authority is useful to an ethnography that seeks to describe the connections between small groups and the dynamics of the larger group. The challenge is to reflect the finely balanced lines of authority that stretch throughout the whole society in modern institutions whose purpose is holding and dealing with native title land. The proposed structure for the Rubibi Land Heritage and Development Council (Aboriginal Corporation) balances this operation of authority in Aboriginal culture with the requirements of a modern and efficient organisation. In doing so, it makes allowance for the balanced continuation of the inevitable bargaining over situations of internal conflict in the wider group. The organisation is founded in its own particular cultural and historical circumstances. These first need to be described, to understand why certain choices were made in its constitution.

### **The formation of Rubibi**

During 1991 and 1992 the Kimberley Land Council (KLC) was involved in helping the Yawuru people in Broome defend an area of land from development for a crocodile farm on the grounds of its cultural significance. When the Western Australian Minister for Aboriginal Affairs decided to allow development using his discretion under the *Western Australian Heritage Act 1972*, the KLC lodged a case in the Supreme Court, claiming native title rights for the Yawuru on the principles of the Mabo High Court decision, and applied for an injunction against the development pending a hearing. They lost the injunction application, but eventually gained some protection of the area under the *Commonwealth Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. The native title claim remained (and remains) with the Supreme Court of WA,

but was also submitted in essentially the same form to the National Native Title Tribunal (NNTT) under the NTA, when that Act came into force.

Because of its origins as a hard-fought heritage issue of concern to a particular segment of the Broome Aboriginal population, the KLC had concentrated throughout the case on the rights of the Yawuru people and had lodged the native title claim on land to the south of Broome township. Soon afterwards another group, called Goolarabooloo, engaged the WA Aboriginal Legal Service to lodge a claim over land the Yawuru traditionally considered to be theirs to the north of Broome. Another group, the Djugun, also claimed this land. There was a great likelihood of a three-way contest in the NNTT and the Federal Court, with each group undermining the other's case with the use of separate legal representation and anthropological advice. The KLC was concerned as much at the resource implications of these developments as at the potentially negative impact on intra-Aboriginal community relations. It convened a meeting between the Djugun and the Yawuru in September 1994. Goolarabooloo representatives also turned up and asked to be included as observers. Use of mediation techniques and legal advice brought the groups to the point of an agreement surprisingly rapidly. A very simple five-point memorandum of understanding between the groups was drawn up. This is the full text of that memorandum:

A joint meeting of representatives of the Yawuru, Djugun and Goolarabooloo Aboriginal Corporations held on 14 September 1994 agreed to establish a Working Group, consisting of two members of each group, to explore issues of common concern about land and cultural heritage in the Broome region.

This memorandum of understanding establishes the minimum procedures for the Working Group to be effective.

- i The Working Group will be chaired by the KLC.
- ii The first and principal matter for the Working Group's attention is the coordination of native title claims in the region.
- iii The Working Group will oversee the establishment of a structure for the control of land and the distribution of its benefits.
- vi All discussions of the Working Group will be kept confidential.
- v The Working Group will try to gain consensus among its members and work together on cultural heritage issues.

The Working Group had three important purposes. The first was simply to bring antagonistic groups to the same table, to put their differences in abeyance in order to work on areas in which they had common interests, in the hope that trust could be established that would make the underlying differences easier to mediate in the future. Secondly, the Working Group was to deal with immediate issues of lodging and managing native title claim cases, acting as the client group for legal instruction. This role expanded rapidly once the cases came into the NNTT where mediation

between the claimants and other interested parties became necessary. The third role was to establish a more permanent organisation, set up in such a way that it would meet the continuing interests of all native titleholders, particularly for future generations.

These ongoing tasks require constant negotiation among groups who feel important aspects of their interests are incompatible with one another. It required widespread community consultation among people dispersed throughout the town and environs with little experience of concerted community action. At the same time, the demands of the mediation process with non-Aboriginal groups provided little time and few resources for this fundamental but less immediately urgent activity.

The Broome township is among the fastest growing communities in Australia. The rapid expansion of tourism and community services has led to a form of 'bootstraps' development which is common in North Australia, though in Broome it seems to have hit an unusual exponential phase. In this form of development, a sudden increase in the immigrant non-Aboriginal population immediately requires expanded services such as housing, telecommunications, public utilities and commercial outlets. These services in turn require more immigrants to provide them and thus development spirals. With native title claims over all the vacant Crown land in the town and environs, over much of the sea and some leasehold land, and with potentially explosive heritage issues over the rest, the Working Group found itself inundated with requests for their involvement in consultations and negotiations even before many of the claims were accepted and mediated by the NNTT.

Despite these pressures, and a debilitating lack of resources, the Rubibi Working Group and its legal adviser sporadically carried out consultations into the establishment of a trust body to hold money and other benefits flowing from the negotiations. The trust body is to be ultimately responsible to a community-based organisation that was more difficult to arrive at, but which eventually managed to contain within its proposed structure most of the tensions and aspirations of the native title claimants. This body, the Rubibi Land Heritage and Development Council (Aboriginal Corporation) is in the process of incorporation under the *Aboriginal Councils and Associations Act 1976* (ACA Act) and it is intended that it should be the appropriate prescribed body corporate to receive any eventual determination of native title under the NTA.

### **Rubibi structure and interests**

Before proceeding to a description of the structure of the Rubibi Land Heritage and Development Council, it is necessary to briefly outline the interests it is proposed to represent, since they explain some of the difficulties in its formulation.

It is commonly thought, particularly by members of the NNTT and the WA State Government, that there are three competing Aboriginal

interest groups in Broome, as stated above - the Yawuru, Djugun and Goolarabooloo. This is a misapprehension, and any organisation formed explicitly around three such groups and no others would be bound to malfunction sooner or later. There are two complementary reasons for this. Firstly, these divisions do not take into account the common ground between these groups. The fact that some members of each could be members of the other if they wished to so identify, and the potential for future alliances and realignments that would render such present forms of boundaries non-explanatory, is often ignored. Secondly, it does not take into account the multitude of other groups, many quite small, which have chosen to differentiate themselves from any of these three. Some of these have recently incorporated under the ACA Act, others can be expected to arise in the future, and any of them could provide conflicts just as intractable as those of the three groups presently said to make up the Rubibi Working Group.

It has been necessary, then, to constantly bear in mind in the formation of the Rubibi Land Heritage and Development Council the need for a structure which is the institutional expression of all potential native titleholders and within which present and future conflicts can be managed. The difficulty here, of course, is that native title arises out of a pre-colonial system of land ownership and inter-group relations. It is difficult, without distorting the conception of pre-colonial Aboriginal society, to find any simple fit between traditional systems of authority, decision-making and resource distribution, and the requirements of the modern world. For a number of reasons, many of which can be explained by the above cultural outline, the Rubibi Group has decided to construct a modern organisation around the core of traditional Aboriginal authority. To a great extent this is expected, by those proposing the structure, to derive from the practice of male initiation ritual.

The proposed Rubibi constitution is unusual in that it tries to define, list and rank Aboriginal cultural forms that are frequently left to work themselves out less formally in the business of Aboriginal organisations. There are three instrumental levels of the organisation and two key categories of concern that are defined to reflect both Aboriginal cultural forms and the needs of members. The proposed organisation has a membership simply composed of all the common law native title claimants. It has also a Governing Committee and a Council of Elders. The way that these three relate to each other is governed by many aspects of the rules, but also, as will be explained below, by the two key concepts - Aboriginal Law and Traditional Interest.

The Council of Elders is not elected. This was seen to be contrary to Aboriginal culture. Elders are a category of experts who have achieved status, their status is not conferred in the act of recognition by the membership, but is considered to pre-exist it. The relevant provision simply states: 'There shall be a Council of Elders consisting of such members of the Common Law Holders [of native title] as are recognised by

the Rubibi community, in accordance with Aboriginal Law, as having authority to speak about Aboriginal Law as defined in these rules'. Aboriginal Law is defined as 'the laws, traditions, observances, customs, ceremonies, rituals and beliefs of the Rubibi Community'. In this way the Council of Elders is composed not simply of 'wise old people' who may vary from time to time, but of those people who can demonstrate competence in the knowledge listed. There are, therefore, grounds for challenge and for demonstration of competence. Ritual knowledge is explicitly recognised. The two consequences of such provisions should be that Aboriginal culture is valued at the core of the organisation and that a significant modern reason arises for younger people to achieve competence in it. Since it is in the hands of elders, this gives them functional as well as symbolic status.

The Governing Committee, on the other hand, is elected by the membership from among the members and is responsible for the day-to-day running of the organisation. Overall control of the decisions of the Governing Committee by the Council of Elders was felt desirable. On the other hand, it was recognised that involvement in every decision, sometimes on the basis of a lack of information, was a possibility to be guarded against. The balance is achieved in two ways. The Council of Elders appoints the Governing Committee nominated by the members and may only not do so if an appointment is considered contrary to Aboriginal Law. There are provisions applying to deal with such cases. The Council of Elders also has power to make decisions binding on the membership concerning Traditional Interests, Traditional Country and Aboriginal Law and culture, as defined in the rules. Implicitly, it cannot make other decisions, but the ambit of these areas is wide enough for it to have a review function over all the activities of the organisation. The Council of Elders can participate in the meetings of the Governing Committee.

The Governing Committee, in carrying out the objects of the organisation, has most of the normal responsibilities of an Aboriginal corporation and in addition is required to carry out the role of a prescribed body corporate under the NTA regulations. Significantly, the first of the objects of the Corporation is to ensure the continuance of Aboriginal Law, language and culture and to protect Traditional Country.

The concept of Traditional Interest has been introduced to take account of the smaller interest groups that comprise the native title claimants of the land under claim.

Traditional Interest in the rules means 'an interest held by an individual member of the Common Law Holders or a group of such individuals recognised by Aboriginal Law'. The Governing Committee is to 'as nearly as possible comprise a fair balance of members from among those groups who hold traditional interests within the Rubibi community'. It is notable that these are not necessarily land interests, but will probably mainly be so. The Corporation is not to make decisions regarding a Traditional Interest without the consent of the 'traditional interest holders'.

Again, the Council of Elders is given ultimate control in determining, where there is dispute, what is a Traditional Interest and who holds it. This power, like the others given to it, is based on the crucial assumption of their legitimacy through meeting the criteria of knowledge as set out in the rules. The Council of Elders must approve any decisions of the Governing Committee concerning a Traditional Interest, but are required to give this approval unless it is contrary to Aboriginal Law.

## Conclusion

These are the major provisions of the Rubibi structure. It is a finely balanced attempt to meet modern needs, traditional practices and the requirements of a particular local cultural and political situation. It now needs to pass the scrutiny of the Registrar's office in its ability to fit the requirements of the ACA Act under which it is required to incorporate in order, eventually, to operate as a registered native title prescribed body corporate. The final question that must be asked is whether this is appropriate. The Rubibi constitution is nothing less than an attempt at a self-governing structure reflecting customary Aboriginal Law. Whether it succeeds in this, indeed whether such a venture could ever be completely successful, is not the issue. A fundamental weakness of the situation is Rubibi's need to meet the requirements of non-Aboriginal corporations law. Such laws are founded on fundamentally different principles. Among them is the need for control by the membership, democratic decision-making and principles of recruitment, and formal fiscal accountability and scrutiny by outside powers. It has been argued elsewhere that the regulation of entire social communities by means of corporate law that is appropriate to voluntary associations for specific purpose ventures is ineffective and may breach common law rights by denying the operation of customary Aboriginal Law (Sullivan 1997). The Rubibi approach is flawed, then, not in its aspirations but in its lack of an appropriate statutory framework by which its members can live as a land-holding community with their own recognised laws, customs and local system of political authority. Yet, without such a framework, the authority to bind members to agreements with outside interests is lacking, and disputes and dissension can be expected to continue unchecked, confounding the wider community's pursuit of certainty in Aboriginal affairs.

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## 9. Aboriginal tradition and Native Title Representative Bodies

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Section 202(1) of the Australian Commonwealth's *Native Title Act 1993* (NTA) specifies the statutory functions of a Native Title Representative Body (NTRB) to assist Aboriginal groups through the process of claim preparation and legal advocacy for claims presented under the Act.

Three principal areas of representation are alluded to in the Act:

- facilitation of research and preparation for lodgement of claims under the Act;
- mediation of intra-Indigenous disputes; and
- representation of Aboriginal claimant groups during the plenary sessions of the native title process, including matters affecting native title and provision of compensation.

However, before an Aboriginal or Torres Strait Islander organisation can acquire NTRB status, it must be accredited by the Commonwealth Minister on the basis of the Minister's satisfaction that the body is 'broadly representative; that it satisfactorily fulfils its existing functions; and that it will satisfy its functions' as listed in s.202(4).

In 1977, under proposed amendments to the NTA, a new regime for recognition was suggested. The amendments themselves are a proposed legislative response by the new Coalition Government to accusations from mining industries and pastoralists of the 'unworkability' of the existing Act. A transition period will follow the introduction of the proposed amendments if they are passed by the Senate in February of this year (1997). During the implementation period, existing bodies will continue to operate.

However, at the end of the transition period, all NTRBs will be expected to reapply for Representative Body status. In deciding whether to grant recognition under the new scheme, the Minister will consider such matters as:

- Will the new body satisfactorily represent Indigenous people living in its area?
- Will the body satisfactorily take into account the interests of native title holders?

- Does the body satisfactorily perform its current functions?
- Will the body satisfactorily perform its new functions and abide by its new obligations?
- Does the body have fair organisational structures and administrative processes? (Aboriginal and Torres Strait Islander Commission (ATSIC) 1996: 26).

The import of these questions reflects a bureaucratic concern with accountability both internally, to the body's constituents, and externally, to the funding source.

There are currently (1997) 25 endorsed NTRBs throughout Australia. However, in 1995, the Commonwealth commissioned a major review of the existing NTRBs together with other organisations currently representing claimant groups to assess and comment on their capacity to accommodate and respond to the legislative functions (ATSIC 1995). The review team invited submissions and conducted a series of Australia-wide consultations resulting in recommendations for shaping the future development and role of the NTRBs. In general, these recommendations have had a critical influence on policy developments and funding regimes for the NTRBs, not least in regard to the review's proposal for a funding formula linked to case loads, professional staffing needs and infrastructure resources (Smith 1995). Furthermore, many of the proposed amendments as they relate to accountability issues in the performance of NTRBs were foreshadowed by the Review's recommendations.

Conscious of the political demands for financial accountability, performance indicators and economies of scale within the funding parameters for Aboriginal organisations in general, the review team argued persuasively for the development of regional NTRB organisations with the capacity to deliver a professional service to a diverse range of Indigenous clients. Such services would be expected to demonstrate a high degree of professionalism in service delivery and operate according to decision-making principles and representative structures capable of subverting the endemic problems of factionalism commonly found in many Aboriginal organisations.

As a member of the review team, Smith later observed that although 'representation' and 'representativeness' were crucial issues for the future viability and effectiveness of representative bodies, so too were questions of how NTRBs as regional organisations would accommodate the particular bases for rights in land (Smith 1995: 59-60). She identified an inherent tension, if not contradiction, in the nature of the NTRB: NTRBs are not based upon traditional authority structures, even though they are required to establish their public legitimacy partly in terms of being able to speak for, and on behalf of, landowning groups. First and foremost, they are a new class of legislatively created institutions located at the interface

between Indigenous land values and aspirations, and those of the wider Australian political and economic system' (Smith 1995: 68).

In this chapter, I discuss the problems of regional representation where the NTRB's constituency comprises both Aboriginal groups living on ancestral lands and those who are not (see Martin 1996), since this appears to be one of the perennial sources of intra-Indigenous conflict repeatedly arising in the context of native title claims (Edmunds 1995), although such conflict is often presented in terms of 'representativeness' (Smith 1995; Martin and Finlayson 1996). Ideally, a professional service should have no difficulties representing diverse clientele. In practice, however, questions of rights in land are deeply embedded in a politicised localism sufficiently powerful to reduce decision-making processes to issues of the *specific* and the *particular*.

At one level, management of these forces is a matter for policy and process and will not be addressed here. Instead, I want first to focus on the broad character of the Indigenous political domain; and then to suggest how anthropological thinking about representative structures might contribute to an administrative resolution of the endemic conflict NTRBs are expected to manage.

I believe the initial optimism for regionalism as a perspective from which to approach native title matters has been overtaken to some extent by the virulent and intense disputes about representation constantly surfacing and resurfacing in relation to what constitutes Indigenous traditions of land-based authority and what the Indigenous polity recognises as a legitimate claim (Smith 1995: 68).

## Tradition

In the NTA, 'tradition' refers to how claimants acknowledge the traditional laws under which their rights and interests are maintained and reproduced through the observance of traditional customs (s.223(1)). Certainly, there is a notion of an extant system embedded in this view of tradition, whereby specific groups of people are identified with particular areas of land or what might be characterised as a 'high-level socio-territorial identity' (Merlan 1996: 174). Interpretations of tradition in relation to land tend to emphasise two platforms of connection; first, through membership in a specific social group with proprietary relations to land and, second, in the appeal to a 'kind of structure which has an undisputed pre-colonial origin', namely, the clan (Merlan 1996: 167).

Initially, many of the ideas about how groups constitute their membership in relation to land in native title claims will lean towards anthropological knowledge gained during research for claims under the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA). However, for some Aboriginal people a continuing emphasis and importance given to pre-colonial models of entitlement to membership in landowning groups, limits their present capacity to qualify as 'traditional owners'. They argue

that such interpretations of tradition are effectively preferential in offering certain groups advantages over others in the context of competing native title claims. In their view, tradition is a means of marking differences; in particular between the ways of their fathers and mothers on the one hand, and their own ways on the other, and in contexts where social change is read as acculturation. Smith (1984) was one of the first researchers to write about the divisiveness of establishing a category of 'traditional owner' in the Northern Territory land claims process, where land councils had a statutory obligation to compile a register of traditional owners.

Anthropologists are increasingly aware of the need not only to re-appraise and revise earlier ethnographic models of Indigenous traditions - not least by exposing the specific intellectual frameworks in which these ethnographies were developed - but equally, to theorise tradition within a matrix of ideas about social change. Indeed, anthropologists have pointed out the shortcomings in both State and Commonwealth heritage legislation for 'assessing claims of Aboriginal tradition or for identifying authoritative [Indigenous] voices' (Tonkinson 1996: 20; see also Fergie 1996; Henry and Greer 1996; Ritchie 1996).

However, against this background, my view is that to appreciate how and why arguments about 'tradition' emerge and re-emerge as contested issues in intra-Indigenous political discourse, anthropologists need to go a step further. We need a clear analysis of the character of the Australian Aboriginal political domain and its salient features.

The notion of tradition in this paper should not, however, be seen in terms of a rigid ascription of particular meanings, actions, relationships or rituals with respect to land, or that my remarks necessarily authorise some meanings over others. Indeed, under the native title legislation, Aboriginal tradition can potentially encapsulate a variety of conceptual spaces or meanings with which claimants might think about and describe different Indigenous histories, customs and knowledges. Tradition, in this sense, might relate to ways of structuring narratives of self and community in terms which have purchase for particular groups of Aboriginal narrators, yet encompass a regional perspective (see Merlan 1996; Sutton 1995; Peterson 1995). However, it is also crucial to ask how localised understandings of tradition, based in specific and particular knowledges with reference to sites, Dreaming business and so on, encapsulate entitlement or authority to speak about country, since it is apparent that Aboriginal groups do insist on the importance and priority of local authority, especially in political discourse associated with land matters. As Tonkinson argues on the question of authenticity in tradition:

The dynamics of 'emic' testing may not be all that different from those of the anthropologist, since acceptance and establishment of new knowledge are partly dependent on the social standing and identity of the innovator, and partly on perceived congruency, or lack of disjunction, with pre-existing cultural constituents. In a highly charged political field, marked by rivalries within given communities, acceptance of the new knowledge may be restricted to only a

segment and also subjected to attacks on its legitimacy or validity by rival groups-sometimes regardless of its intrinsic 'fit' with other cultural elements (Tonkinson 1996: 20).

In regionally representative political organisations such as NTRBs, tradition is often at the centre of a whirlpool of claims and counterclaims about authority to access resources, including land. Such responses may arise from contradictory and ambiguous views that resources are both a matter of equity, yet also constitute a domain for legitimate Aboriginal political activity based on competition between locally constituted interest groups. No shared view necessarily exists amongst the constituents of Aboriginal organisations that an ordered set of principles (such as strategic planning, needs-based analyses or a regionally representative structure) *ought* to underpin decisions about allocations. Smith sees the contestation as a normative aspect of Indigenous politics and, in relation to the native title processes, she says of claimant groups that 'some will be recognised within the Indigenous domain as owners of particular areas; others will not be' (Smith 1995: 69).

In Martin's (1996) view, the contestation surrounding such issues should be understood as part of an internally focused political process by which Aboriginal groups establish, negotiate and extend the range of internal social relationships and acquire *social capital* (after Bourdieu 1977). Unfortunately, internal goals are usually achieved at the expense of organisational outcomes and consequently draw attention from governments concerned about the possible misuse of public funds.

Yet Aboriginal people are aware that funding to engage in legislative processes regarding land or heritage issues does require adherence to sets of externally generated ordering principles, often constituted in terms of Aboriginal traditional knowledge and practice, coupled with external demands for accountability. Consequently, within many NTRB jurisdictions, Aboriginal people argue that they are penalised by the importance placed on the forms and practices of the pre-colonial period. They argue that it is not their fault that they and their ancestors were removed from their land or that their languages were prohibited on missions. Further, they argue that their access to their own heritage is effectively denied them by two groups of people - traditionally-orientated people living on their country and asserting their particular rights to speak for it, on the one hand, and by anthropologists and legislators who are said to reify particular forms of Aboriginal cultural tradition as being fundamental to Aboriginality, on the other.

### **Constituting the local political domain**

The emphasis on the *particular* in relation to traditions and practices is consistent with what is known of the character of the Aboriginal political domain from studies provided by Martin (1995), Myers (1986), Sansom

(1982), Sullivan (1996) and Sutton (1995). In general, the Aboriginal sociopolitical world is shaped by what Martin (1996) describes as 'localism', where issues specific to the local situation not only form a focus for interest groups, but have precedence over wider, regional or even national concerns. Sutton (1995) argues further that Aboriginal sociality tends toward atomism and fission rather than corporateness, although these predispositions exist along a spectrum of collectivism. Similarly, Myers (1986) identifies autonomy and independence as paramount qualities in Aboriginal sociopolitical relations and argues their deeply embedded nature within Aboriginal political discourse and decision-making.

However, while localism and autonomy are undoubtedly generic features of Aboriginal political styles and processes, both Myers (1986) and Martin (1996) see it as essential that these dynamics are analysed contextually, since there is a high degree of fluidity in how interest groups coalesce and regroup.

Much discussion has developed around the question of how groups constitute themselves. Recently, Merlan (1996) argued that anthropologists currently stand at the crossroads of theoretical decisions about how to effectively ground notions of group membership in terms which supersede the constraints of traditionalism and the appeal of the clan model and reflect an ethnographic reality. Moreover, we know that Aboriginal identity is certainly constituted from factors other than descent, including language, regional or sub-regional ritual affiliations, seniority, gender, residence, family groupings, even collective historical experiences like those shared by members of the 'stolen generation'.<sup>1</sup>

She further argues against a notion of historical authenticity grounded in a particular pre-colonial form, because the qualifying criteria (like language, clanship and identity) are themselves shaped by history. In this sense, the socio-territorial identity of differently constituted groups, especially in relation to land, are not differences in kind. For her, the nub of the distinction rests in the 'social processes of their reproduction, the modes of belonging (to country and to imagined human collectivities) they may give rise to, and in the implications that differences between them may have for the role of these identities in the social scene of the future' (Merlan 1996: 170-71).

Research on self-management issues within Aboriginal incorporated bodies provides alternative interpretations to assumptions about the consensual nature of social and political domains in Aboriginal communities and community organisations. At the same time, the complexity of how a concept like independence is politically elaborated, and the importance of a contextual reading of Aboriginal political and social relations, shares little in common with Brunton's (1993; see also Smith 1995: 66) views of Indigenous political and economic individualism with its accompanying plea for individual, not collective, Aboriginal property rights.

## Striving for a regional perspective

The *raison d'être* for a NTRB is, of course, delivery of a professional service to facilitate Indigenous interests in land in relation to the requirements of the NTA. In practice, nothing as straightforward as this occurs. To begin with, the dominance of legislative concern with Aboriginal tradition and its manifestations as a means of verification and authorisation for identification of interests in country is seen as problematic. As I have already mentioned, many Aboriginal people no longer living on their ancestral country immediately feel excluded by, or at the very least defensive about, such requirements for authenticity. Clearly they do have interests in country through genealogies and oral knowledge. They may, indeed, have spent part of their own childhood in their ancestral country or returned to live within the region. In this sense, their identity too is grounded in a 'social geography' linking individual and collective identity with country (Merlan 1996: 168). But relationships of this kind may not entail a performative capacity, with its inherent potential to accumulate 'cultural capital' (Merlan 1996: 169). In contrast, Aboriginal people who continue to live in their ancestral country, and participate in performative practices, establish and reproduce identities which are capable of conversion 'into the symbolic capital of legitimacy and recognition' (Merlan 1996: 170).

At one level, the problem for a NTRB of dealing with a diverse constituency is not just a matter of distinguishing between those who have the corpus of traditions, knowledge and authority which qualifies membership in landowning groups from those who do not. Decisions about who has rights in a particular area of country are generally known in relation to particular considerations such as descent, ritual and site knowledge - these considerations are usually local and specific with reference to Aboriginal Law and group inclusion. In Indigenous Australian community organisations, the same principles operate since decisions about resource allocation often reflect the dominance of an interest group of particular members promoting a localised view of entitlement and Indigenous authority. This explains why, in highly charged political processes, Aboriginal people generally prefer to conduct negotiations on their own country - in the expectation of the 'home town' advantage and the necessary acknowledgment which must be conceded by outsiders (to insiders) of the priority of local authority.

The regional NTRBs must contend with an Aboriginal political discourse predicated on the negotiability of internal social relations manifest through a process Martin describes as 'social calculus' and resulting in the accumulation of 'social capital' (Martin and Finlayson 1996). Effectively, this means that local groups are unwilling to cede their autonomy and independence to a wider body, least of all in decision-making processes, since this would undercut their potential to accumulate power and social capital amongst kin and like-minded constituents. The

accusations of some Aboriginal people who lose out to those who are living on their own country should be understood, in part at least, within the context of Indigenous political discourse to acquire social capital. Even in the relatively egalitarian Aboriginal societies, difference is grounds for differentiation and is the basis of inclusion or exclusion - from the perspective of the clan through to large corporate groupings at the regional level.

Nevertheless, anthropologists need to rethink assumptions of the constitution of socio-territorial groups and community organisations, especially if tradition is used to imply pre-colonial structures and alliances. In addition, we need to expose popularly-held ideas of tradition for their narrowness and limitations, especially where there is denial of the active role of history in shaping the content and form of social institutions and symbolic domains. More incorporative models of group relations to land, based on ideas of historical continuities rather than dislocations of lived experience, are needed. However, clashes over tradition are also disputes about the collective basis of authority, the domain in which this authority resides and the individual's capacity to acquire authority primarily through cultural capital; although increasingly many people are attempting the conversion on the basis of their social capital derived from positions of office and status and a network of contacts and influences associated with membership in incorporated bodies.

Where different opinions exist between Aboriginal groups resident on their ancestral land and those with connections to this country but resident elsewhere, over the legitimacy of claims, the residential group will argue on the basis of their performative congruence with traditional Law and the authority of their performative knowledge (through male initiation in particular, ritual knowledge and status, site knowledge and familiarity, care of country, participation in and knowledge of men's and women's Law business, and so forth). The non-resident group may also have similar cultural capital, although the depth of language knowledge, site familiarity and genealogies will differ. In some cases, such cultural knowledge may reflect an idiosyncratic personal knowledge which does not have the capacity to dovetail with a comprehensive knowledge of regional socio-cultural geography.

### **Authority in the non-Aboriginal domain**

One source of the increasing tension over claims to country is the appeal by some Aboriginal people to authority derived essentially from the non-Aboriginal domain. Instead of arguing on the basis of their status as initiated men, or people with a practical role in caring for and visiting country, arguments are advanced on the basis of social justice principles, equity criteria, issues of representation and, more recently, appeals to heritage legislation (see Keen 1994; Ritchie 1996). Such activity is not culturally illegitimate; it simply demonstrates Indigenous recognition and



understanding of authority in non-Aboriginal domains and how the authority of the State has sufficient power to transform and reinvigorate tradition through legislation. By appealing to the authority of the State, some Aboriginal groups have managed to enhance the status of their social capital to the degree that it operates as if it were, in fact, cultural capital. Consequently, what is often at stake in local disputes is not simply how particular group differences are expressed and maintained, but the validity of status acquisition and conversion processes and how far these are either consistent with, or confronting of, collective understandings of particular Aboriginal customs, traditions and practices. Disputes over issues of tradition are essentially disputes about authority and about the domain - the Indigenous or non-Indigenous - to which appeals to authority are being made and whether this is sustainable.

### **Concluding remarks**

As I read it, conflicts in NTRBs and other Indigenous incorporated bodies are not confined to debates about cultural authenticity or continuities with the pre-colonial past. After all, regional associations are usually a complex of sub-regional groups with specific and diverse historical experiences. Nor are intra-Indigenous conflicts solely the result of inappropriate government policies or flaws in the claim process itself (Cowlshaw 1990; Gladstone 1996; Sullivan 1995).

Ultimately, many of the reasons for conflict pertain to internal processes which are sufficiently vital and endemic to the internal dynamics of Aboriginal sociopolitical life to surface in arenas like native title, where there is contestation over what Pearson (quoted in Martin 1995) calls a 'recognition space' between two cultural systems. A significant aspect of Indigenous disputation revolves around the partnership between authority and internal accountability, questions of which political domain should nurture this marriage, and with which political domain should the principles of representation, accountability and authority be consistent.

If bureaucrats find these matters complex and confronting, consider the situation for Aboriginal groups who see the Dreaming Law as the source of reference for ideals of authority and performative identity, yet are challenged by other Aboriginal people who have indisputable ancestral connections to country but who draw their particular authority and accountability from another domain.

It is not entirely clear to me how disputes about the validity of different sources of political authority and principles will be resolved. Some measure of incorporation and accommodation of local groups within regional contexts will be necessary - if only to sustain viable native title claims. It remains to be seen what impact intra-Indigenous conflict has on the capacity of 'recognition spaces' like native title to bridge earlier and more restricted views of how Aboriginal people relate to, reproduce and maintain their relations with country at the micro-level, and how far

organisational structures can facilitate a process incorporative of the diversity of Aboriginal traditions, customs and observances.

However, as this paper has described, as long as the principles of the Aboriginal political domain are ultimately shaped by the specific concerns of local situations, tensions between local and regional perspectives will persist. The situation for NTRBs is no different from that of other incorporated community organisations; all are beset by conflicts over legitimacy, authority and representation. Indeed, the parallels are obvious.

The question of how to achieve organisational accountability and regional representation, whether in Aboriginal councils and associations or NTRBs, is strikingly similar in terms of how the Indigenous political system accords priority to rights at the micro-level. Thus, the authority of traditions represented by clan-based affiliations to land parallels the political tensions which arise in other representative organisations where the local focus of members overshadows the concerns of the regional constituency.

Ethnographically, a spectrum of different kinds of socio-territorial identities exist within a particular region and these combine and disintegrate with great plasticity. However, in the context of a NTRB, the grafting of the wider constituency to the local membership is often seen as a challenge to the authority, legitimacy and status of a membership drawn from sub-regional family networks or land-based groups. What fuels disputes in these circumstances is not so much the matter of whose traditions are authentic, as the question of *how* authority is established and reproduced and *to whom* (internal or external) accountability is owed. Understandably, the traditions or narratives that groups tell others about themselves support and sustain the centrality of their own political position; as social analysts, our task is to tell the wider story.

#### Note

1. Many Indigenous Australians were forcibly removed from their families under the assimilation policy and placed in institutions on reserves and missions. The Commonwealth Human Rights and Equal Opportunity Commission is currently (1996) investigating their situation as an abuse of human rights.

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## 10. The incorporation of 'traditional' and 'historical' interests in Native Title Representative Bodies

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*David Martin*

### **Introduction**

In September 1995, the Review of Native Title Representative Bodies (NTRBs) (sometimes known as the 'Parker Report') was submitted to the Board of Commissioners of the Aboriginal and Torres Strait Islander Commission (ATSIC). This report (ATSIC 1995) provides some comprehensive proposals for clarifying the roles and responsibilities of NTRBs and establishes a detailed framework for their development and resourcing until the turn of the century. At the time of the review, no representative body had been determined for the greater Mt Isa region - an extensive area of Queensland stretching from east of Cloncurry across to Mt Isa and west to the Northern Territory border, and south to Birdsville and the South Australian border. In 1996, I was engaged by the ATSIC Native Title Branch as a consultant to facilitate discussions amongst Aboriginal people of the region about appropriate organisational structures and to report about the implications of the nature of Aboriginal land-related groupings in the region for the establishment of an NTRB (Martin 1996).<sup>1</sup>

Section 202 of the *Native Title Act 1993* (NTA) provides that the relevant Minister must not determine an organisation to be a representative body for a region unless he or she is satisfied that, amongst other matters, the body is 'broadly representative' of the Indigenous peoples of the region. My consultancy report to ATSIC was concerned in part as to how this undefined term 'broadly representative' should be construed for this region of Queensland, which is characterised by Aboriginal residential populations of diverse origins, and intense and often virulent politicking about identity, especially legitimate rights to speak for land and resource developments on it. This chapter examines one particular aspect of these dynamics, the conflict between the so-called 'historical' and 'traditional' peoples of the region, and examines some mechanisms for accommodating their differing interests in future NTRBs.

### **Aboriginal land interests in western Queensland<sup>2</sup>**

This part of far western Queensland is very complex in terms of the diversity of its Aboriginal traditional groupings, its post-contact history and its contemporary Aboriginal and wider politics. Contact history throughout the region was characterised by extreme violence - such as in the so-called 'Kalkadoon wars' of the 1880s - dispersal, removals, and the consigning of

remnant populations to appalling conditions on cattle station fringe camps and reserves. However, the impacts of this history have been somewhat differential across the region, with those groups from the plains country around Julia Creek and Cloncurry, and down to the Georgina River basin and the fringes of the Simpson Desert, first exposed to the occupation of their countries from as early as the 1860s. The establishment of fringe camps on cattle stations for some of the remnant groups, though, allowed the maintenance of some cultural practices and of relationships with traditional lands for some considerable period, albeit in attenuated form.

This history has clearly led to profound changes in the social, cultural and demographic characteristics of the Aboriginal populations of this region. The immediate post-frontier period, and subsequent implementation of Queensland Government policies in the earlier part of this century, saw large numbers of Aboriginal people sent to centres such as Palm Island and Yarrabah under the removals policies of the day. There are now also many Aboriginal people with links to the south-western region, in particular, living in centres such as Port Augusta and Alice Springs. Consequently, many of those who assert rights to ancestral lands in this region, and who are accorded legitimacy by kin still living there, are to be found residing outside it.

There have also been considerable long-term movements of Aboriginal people both within this region and into it. The demise of the role of Aboriginal workers in the cattle industry in the 1960s and 1970s led to further migrations from the station camps to regional townships and, as Mt Isa developed into the major regional centre in the second half of this century, there has in turn been a considerable movement to it. Consequently, the defining demographic characteristic of the region is the concentration of its Aboriginal population in Mt Isa. This demographic imbalance - which to a large extent also correlates with a political and economic imbalance - has important implications in particular for the establishment of a NTRB in the region, and for how politics between 'traditional' and 'historical' peoples are manifested. A large number of those with ancestral lands in the region now live in Mt Isa itself, including Kalkadoon people from the mountain country in which it lies. Others still live on or near their lands, in the small townships of Dajarra, Boulia, Bedourie and Birdsville. However, most who assert links with lands in the region either live in Mt Isa or Cloncurry, or outside the region altogether. There are also significant populations of people with links to lands in the Northern Territory in centres such as Boulia, Camooweal, Urandangie and Mt Isa, and substantial numbers, particularly in Mt Isa itself but also Julia Creek and Cloncurry, who have links to other regions of Queensland, including the Gulf and the east coast. In many instances, these immigrants have lived in the region for many years. To add further complexity to the situation, there has been considerable intermarriage between all these groupings.

Despite the traumatic past, in recent years there has been a considerable degree of cultural revitalisation amongst Aboriginal people of this region, as evidenced, for example, in a resurgence by their public identification with ancestral lands and by the intense politicking which centres on land. A significant contributing factor in my view has been the removal over the past two decades or so of the overt surveillance and controls of the original Queensland Aboriginal affairs regime. These processes have been dramatically accentuated by the passage of Queensland's *Aboriginal Land Act 1991* and the Federal NTA, and by various statutory heritage, environmental and social impact schemes which require consultation with relevant Aboriginal people about such matters as site protection (Martin 1995: 29).

The historical processes during and after the first contact period have led to major changes in the systems by which Aboriginal people of the region relate to land. There can be no doubt that this has involved significant attenuation of their original complexity, but the fine-grained detail of the classical systems by which specific groups were related to particular tracts of land has arguably undergone a process of amalgamation, rather than simply disappearing. The major contemporary labelled groupings of the region, such as Kalkadoon from the general Mt Isa region, Wangkangurru from the far south-west and Pitta Pitta from the Boulia area are typically referred to as 'tribes' by Aboriginal people themselves. These appear to follow the pattern described by Sutton (1995, 1996b), in being comprised of a varying number of 'families', each of which is commonly associated by Aboriginal people with particular surnames. These 'families' are essentially restricted cognatic descent groups, defined by shared common descent from specific ancestors. Larger families may themselves be comprised of recognised sub-groups identified by particular surnames and defined as descendants of nodal ancestors from generations below those of the earliest remembered forebears.

Thus, these contemporary 'tribes' are comprised of 'families', each associated with a set of surnames and tracing descent from particular nodal ancestors. Sutton argues that this distinctively Aboriginal system is widespread in Australia and is the dominant post-classical Aboriginal social formation (Sutton 1995, 1996b). In this region of western Queensland, in common with many others, the label for each 'tribe' is the name of the language group which is held to have occupied the area in question; typically, the rendition of this name and, indeed, often the extent of the territories associated with the group, are drawn from the Tindale map (Tindale 1974). The process of amalgamation referred to above commonly leads to the use of the name of just one of the original language groups from a region to refer to the contemporary 'tribe' associated with it. However, larger 'tribes' in particular can be internally differentiated in terms of land affiliations, with particular areas or sub-regions being associated with specific 'families'.

Commonly, these 'tribes' or their constituent 'families' will have corporate manifestations in terms of formally incorporated Aboriginal organisations. These bodies play fundamental roles within the Aboriginal political domain, as well as in the interface between it and the mainstream society (see Martin 1995). Most are embedded within, and are significant players in, local-level politics. Questions of the legitimacy of members' asserted identities, and of their authority to speak in relation to matters of Aboriginal Law, lands and identity, assume a central and constituting importance and are subject to constant surveillance and criticism. Such organisations thus become focal points around which the intense politicking so characteristic of the region occurs, through which the competition for resources, particularly funding, is undertaken, through which support from key non-Aboriginal groups and individuals is sought and through which the constant struggle between families and individuals for legitimacy and authority, both within the Aboriginal domain and in the wider one, is waged.

Schisms within 'tribes' and 'families' are often reflected in the establishment of competing organisations, each claiming to reflect legitimate traditionally-based authority and to represent the interests of the particular group. As Memmott (1996) notes, which identity labels and hence organisations people choose to align themselves with will have as much to do with the politics of recent marriages, ties to significant individuals working in government and resource agencies, sporting team alliances and so forth, as with formal ancestry as such. While many people assert an unambiguous identity in terms of membership of a particular 'tribe', in general identities can be stressed differentially according to context, and the groups in terms of which they are expressed are not bounded and solidary entities.

Another defining characteristic of the Aboriginal political and social domain in this region - as elsewhere in Australia - is its emphasis on the primacy of the local over the regional or national (Martin and Finlayson 1996). This can take many forms but, in the context of seeking to achieve support for a regionally-based body, such a dynamic means for many people in smaller townships or communities, whether 'traditional' or 'historical', that there is considerable suspicion of organisations based in the main regional centre. It also means that it is very difficult for Aboriginal organisations to function effectively across the broader 'community' whose interests they are claiming to serve, since the Aboriginal political and ethical imperative is almost always to serve the interests of the kin, families or other local group with which the particular individual is linked. Such bodies are almost always embedded inextricably in the particularities of intense local politics, and thus a major challenge for NTRBs is to abstract themselves from this dynamic, while still taking account of it, and become effective and professional in their delivery of services and articulation of Aboriginal native title rights and interests. This is in fact a challenge not only for NTRBs, but indeed for all Indigenous service



delivery and advocacy organisations which operate at more than a purely local level (Martin and Finlayson 1996).

### **'Traditional' and 'historical' interests**

One result of the historical factors briefly outlined above is that residential populations throughout this region, as in many other areas of Australia, are characterised by their polyglot nature in terms of regions-of-origin and other traditional affiliations. The mix of what are termed by Queensland Aboriginal people 'historical' and 'traditional' or 'tribal' peoples provides one of the fundamental dynamics within the Aboriginal political domain in this region and indeed in many others. It has important implications for the establishment and operations of NTRBs. The terms 'traditional' and 'tribal' people of a particular region, as used by Aboriginal people, here refer to those who are recognised as members of the 'tribal' groups whose lands lie within the region; that is, they are accepted as belonging to one of the relevant 'families', primarily through socially validated genealogical connections. They are the ones who can legitimately 'talk for country' and thus should be consulted about its use. The 'historical' people include those who are living in a particular area now, but who are from elsewhere in this region, and those who have moved here from outside the region entirely, for example from the east coast or from the Northern Territory.

This 'traditional/historical' dynamic is complicated by at least four factors. Firstly, there is constant and often vitriolic disputation as to who can rightfully claim to be the traditional owners of many areas and this in turn is rendered even more complex because of the high degree of optation by which people can assert genealogical links to forebears, and by the enormous social dislocation in the region during the colonial period.

Secondly, there are strong concerns expressed in regional townships about domination by people and organisations based in Mt Isa. These concerns can be seen, in part, as structurally arising from the common resentment of remoter regions to bureaucrats and organisations in any urban centre. There is an added dimension too, in that those Aboriginal people who live in the small, remote townships feel that they are maintaining their own cultural identity and links to land in a way which the 'urban' people are not. It could even be argued that for the Aboriginal residents of these small communities, the commonalities developed through living together outweigh the differences arising from diverse regions-of-origin and language affiliations.

Thirdly, there are also people who assert traditional ownership of the outlying regions who now live in Mt Isa and who are seen by at least some of the residents of the smaller townships as being politically linked there. Fourthly, there are major resource developments in the region, which have provided a focal point for conflict over who can legitimately speak for country, on what basis assessments of the impacts of these developments

on Aboriginal people should be made and how any benefits from the developments should be directed.

These conflicts are played out in a number of forums. For example, there are currently two Aboriginal organisations in one particular centre which have been involved in negotiations over resource developments in their region, whose members have also been involved in discussions over the establishment of an NTRB and whose names are quite clearly based on different renditions by Roth (1897) and by Tindale (1974) of the original language of the immediate area. Yet, the legitimacy of the spelling of these names is itself a matter raised with great passion by some of the protagonists. In a situation where there has been enormous dislocation and a radical attenuation of the fine-grained knowledge of the classical system, such matters can assume great importance and, within the Aboriginal polity, go to the heart of the perceived legitimacy or otherwise of people's knowledge of country and rights to talk for it.

Questions concerning resource developments on lands in such regions, such as who should legitimately participate in site clearance surveys, to whom any ultimate negotiated benefits should flow and what form these should take, which organisation should have carriage of such negotiations, and what the relative rights are of 'traditional' and 'historical' people, can be matters of great dissension. Those who have lived there for many years, but who do not claim to have their ancestral lands in the region, in my experience always acknowledge the primacy of the rights of the 'traditional people'.

At the same time, they frequently express the strong view that major resource developments will have the greatest social and environmental impacts on local residents, whether 'historical' or 'traditional', and that they should be involved along with traditional owners in any negotiations regarding the assessment of these impacts. Many of these people stress the necessity for an NTRB to assist in the negotiation of comprehensive social and economic benefits from mining in the region, including employment and business enterprise development, rather than just royalty or compensation payments. While this may of course be seen as self-serving, since such people would not be expected to be included in any royalty or compensation regimes based on native title rights in the area, they stress that such opportunities should be created for those actually living in the areas affected, since it is they who would suffer the worst of the deleterious effects of developments.

### **Implications for the representative structures of NTRBs**

I turn now to briefly consider the implications of this analysis for how an NTRB might be structured in regions such as this one, given their statutory requirement under s.202 of the NTA for them to be 'broadly representative'. While in principle it is the Aboriginal groupings with common native title interests which are relevant to NTRBs, rather than residential populations

and their incorporated manifestations as such, arguably there are considerable cross-linkages between these two categories in this region. In some senses, there may be agglomerates of both 'traditional' and 'historical' people.

As discussed by the NTRB Review report (ATSIC 1995), it is not appropriate for NTRBs to be seen as 'representative' in the sense of providing another level of democratic representation in the political process. They are of necessity political because of the nature of the contentious arena in which they operate but, in my view at least, they should be seen as primarily service delivery organisations, even if part of that service is advocacy in native title matters. Thus, the issue is not ensuring that every single grouping in the region has a place in a representative structure even if this were practicable, but that there are processes in place which ensure there is effective, equitable and accountable provision of native title related services to the organisation's constituencies.

Moreover, in many regions, 'broadly representative' would arguably need to reflect more than simply native title interests. Such inclusive representation would need to take in to account:

- i the large-scale migrations which have taken place within many regions, such that residential populations do not correspond in any sense to traditional affiliations to lands;
- ii the dynamics caused by the often significant demographic imbalance between the Aboriginal population in regional service centres and those in the smaller regional townships and communities;
- iii the complexities caused by multiple inheritances and diffuse (and frequently contested) links to traditional groups;
- iv the processes by which original sub-regional language groupings have typically undergone amalgamation into larger, albeit still internally differentiated ones; and
- v the pervasive view amongst many Aboriginal people that the rights and interests of the long-term historical residents of the region have to be incorporated into the structures and operations of NTRBs.

It could be argued (as indeed it is by some Aboriginal people), that an NTRB's role is solely to represent native title interests in its own area of operation and that therefore there is no place in its structure for those whose native title interests lie elsewhere. Those people who are immigrants from another region would have their native title interests represented by the NTRB responsible for that region, and 'collaboration protocols' would be set up to facilitate cooperation between the relevant NTRBs. In such

cases, the Parker Report proposes that 'NTRBs should restrict their representation to providing native title advice, referring constituents to the relevant NTRB and undertaking a watching brief of subsequent assistance (Parker 1995: 38).'

However, I am of the view that there are good arguments for incorporating wider Indigenous interests into the structures of NTRBs in many regions, in particular those of an 'historical' nature, as well as more narrowly defined core native title interests. For one thing, this is a view supported by many Aboriginal people themselves. For another, it would not be unreasonable to argue a case that the often diffuse and sometimes tenuous traditionally-based links which individuals and groups assert in many areas exist on a continuum with those of an 'historical' nature, rather than being of a fundamentally different order. As an example, while the claim over the Simpson Desert National Park under Queensland's Aboriginal Land Act was made on behalf of Wangkangurru and Wangkamadla people on the grounds of both traditional affiliation and historical association, ultimately the Land Tribunal's recommendation was to grant the land on the latter, historical, grounds.

Furthermore, while it is certainly the case that the processes instituted under the NTA are predicated on protecting native title rights where they can be shown to exist, and that a core statutory role of NTRBs under s.202 of the Act is to 'facilitate the researching, preparation or making of claims for determinations of native title or for compensation for acts affecting native title', there are also other important roles for NTRBs which go beyond this and of necessity involve those residents of the region with 'historical' as well as 'traditional' interests. These would include involvement in the negotiation of local or regional agreements under ss.21(4) of the NTA,<sup>3</sup> for example concerning such matters as land use agreements, provision of services and economic benefits and environmental protection, as well as providing assistance to constituents in statutory land rights schemes;<sup>4</sup> involvement in heritage protection and social impact assessment procedures under both State or Territory and Federal legislation;<sup>5</sup> liaison with the Indigenous Land Fund in terms of developing coordinated strategies on regional and national levels to provide land for those whose native title has been extinguished; and other matters such as educating constituents about native title matters, negotiations with resource developers and other parties with interests in land, and mediation over native title claims.

It is my view that these broader roles for NTRBs in many regions provide compelling arguments for their governing structures to include Aboriginal people who may be long-term residents without necessarily asserting native title rights in the region or locality where they are living. Given, however, the scheme of the NTA which provides mechanisms to implement the High Court's findings on native title, and Aboriginal people's own views,<sup>6</sup> the structures and processes of NTRBs need to be based on the primacy of native title interests. There are a number of

mechanisms which could incorporate the interests of both 'traditional' and 'historical' peoples, while preserving this hierarchy of interests.

Firstly, membership of the NTRB could be open to all adult Aboriginal people normally resident in its region and to adult Aboriginal people living outside the region who have traditional associations with lands in the area - that is, both 'traditional' and 'historical' people could be members. Secondly, the organisation could have a 'bicameral' governing body, which could have elders nominated from each 'tribal' group<sup>7</sup> as well as equal numbers of representatives from each township or community.<sup>8</sup> The basis for 'traditional' representation would vary from region to region; where there has been considerable dislocation of the original society and the processes of amalgamation discussed above have followed, representation might be drawn, for example, from the contemporary 'tribes' of the region or from groupings based on broad cultural and political affiliations.<sup>9</sup> Under such a scheme, there could be some division of roles between elders and community-of-residence representatives, with the former having responsibility for ensuring that, as far as possible, Aboriginal Law was followed by the organisation. Thirdly, a series of mechanisms could be adopted by which the organisation could be made accountable and responsive to its constituency, including both 'historical' and 'traditional' groups. These could include regionalising services as far as practicable, to ensure that those living in the remote townships had access to them, forming steering committees comprising representatives of those with native title and other interests for such matters as negotiations over resource developments; and developing protocols for consultation with Aboriginal constituents and for allocating resources between competing interests.

Such mechanisms will never 'resolve' disputation or conflict, including between those Aboriginal people with long-term 'historical' interests and those asserting native title rights. However, they can provide a framework through which such conflict can at least be addressed in a reasonably equitable, transparent and professional manner, which arguably is ultimately to the advantage of all those concerned.

## Notes

1. This chapter draws upon this consultancy fieldwork and the report. However, while the ethnographic details relate to this particular area, the arguments advanced regarding the incorporation of divergent traditionally and historically based interests have an import beyond it. Furthermore, this chapter in no way should be construed as pre-empting any decisions which may ultimately be made regarding the establishment of an NTRB in the greater Mt Isa region.
2. This section draws on material made available to me by Memmott (1996), and secondarily by Sutton (1996a) and Trigger (1996) in the course of the consultancy, supplemented by other published materials (for example, Breen 1981) and my own field enquiries.

3. While such agreements might formally spring from the assertion of native title interests in a particular area or across a region, it would be expected that the outcomes negotiated would also involve other long-term Aboriginal residents.
4. In this area of north-west Queensland, there have not as yet been any claimable lands gazetted under the Queensland Aboriginal Land Act, but this situation could possibly change. There is also a continuing process of transferring Aboriginal Reserves to inalienable freehold title. Under that Act, those 'particularly concerned with the land' being transferred to Aboriginal Trustees who have to be consulted include people with historical connections to the region, as well as those with traditional affiliations.
5. Clearly, both residential populations affected by proposed developments and those with potential native title rights would need to be considered under social impact assessment processes.
6. Which can themselves be seen as being one aspect of a continuing body of Aboriginal Law and custom which constitutes native title.
7. Each township could be able either to nominate or to elect its own representatives, as they decide. Thus, while it might be necessary to hold elections for representatives from Mt Isa, smaller towns might prefer to nominate theirs. Each 'tribal' group could nominate its own representatives.
8. The demographic imbalance between major centres and smaller regional townships and communities could in part be redressed by having equal representation from each community, regardless of size.
9. However, it must also be said that with traditionally-based identities typically being multifaceted, emergent and often contested, it is unlikely that any definitive list of groups could be drawn up. I am of the view that ultimately the question to be met is what would comprise reasonable broad representation.

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## 11. Disputes in land: the Northern Land Council experience

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*Jeff Stead*

The Northern Land Council's (NLC) new computerised record system was used during the research for this chapter. After punching in the key words 'disputes' and 'land disputes', 50 files were found under these categories; many more than expected. Thirty-nine of these files dealt with one dispute alone: what has become known as the Wagait dispute. The Kamu/Malak Malak dispute ran second in terms of the number of files: a mere three. Of the 39 Wagait files, a staggering six were devoted solely to the invoices of lawyers. A major proportion of many of the other Wagait files were devoted to billing matters; anthropological costs were also substantial. My initial reactions were to muse on the fact that the NLC expends more resources on land disputes than initially expected and to rue that I had not undertaken that law course after my anthropology degree.

Obviously, the key-word check is not a complete or scientific test. There are many land disputes which are not subsumed under the key words, a considerable number being located in general files or in the Anthropology Branch's Land Interest Register, to which there is no general access. Even if these files are included, none match the time and energy devoted to the Wagait dispute. Rather, their inclusion makes the circumstances appear even more gloomy. At least one-quarter of the work effort of the four staff anthropologists at the NLC is currently expended in handling disputes over land. The last five years has seen an increased number of disputes accelerating to a serious stage, especially disputes that involve the proponents hiring outside legal assistance.

This acceleration in disputes is a consequence of many factors, two of which stand out. Firstly, though the NLC is charged with a statutory capacity to assist in conciliating disputes between traditional owners under s.25 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA), till recently it has lacked effective, formalised dispute-resolution procedures.<sup>1</sup> Secondly, Justice Olney's Federal Court decision in the *Majar* case has had vast resource allocation implications, especially with regard to the Wagait dispute (Olney 1991). Olney's decision in that case was that if Aborigines claim to be the traditional Aboriginal owners of any land, including land which is already Aboriginal land under the ALRA, land councils in the Northern Territory (NT) must provide legal and anthropological assistance unless the claim is 'patently unmeritorious'.

This chapter describes the statutory role of the NLC in dispute conciliation and prevention, and examines the main points of the *Majar* decision, in particular its implications for the resolution of disputes



between Aboriginal groups. It briefly reviews the interplay of factors which generate and exacerbate disputes over land and describes the dispute conciliation procedures developed by the NLC since the *Major* decision. In conclusion it considers the wider implications for Native Title Representative Bodies (NTRBs) in fulfilling their roles under the *Native Title Act 1993* (NTA).

### **The legislative background**

Various sections of the ALRA deal with the responsibilities of land councils in the NT in dealing with 'disputes with respect to land'. Section 25(2) of the ALRA states:

Where a land council is informed that there is, or there may arise, a dispute with respect to land in the area of the council between persons to whom this section applies, the land council shall use its best endeavours by way of conciliation for the settlement or prevention, as the case may be, of that dispute.

The role of the NLC in dispute settlement and prevention applies to Aborigines, land trusts, Aboriginal councils, incorporated Aboriginal associations and any other incorporated Aboriginal group.

More importantly, a NT land council has an implied power to resolve disputes as to the traditional Aboriginal ownership of Aboriginal land, where conciliation fails (*Tapnguk*) (Angel 1996). This power arises from s.23(3), and similar provisions, which require a land council to identify the traditional owners of Aboriginal land for the purpose of performing certain functions. These functions include obtaining consent regarding development proposals and the distribution of royalties and other benefits to traditional Aboriginal owners. A key effect of these responsibilities has been to progressively ensure that the land councils in the NT identify and act under instructions from traditional owners and that they widely consult with them in order to do so.

In addition, under s.24 of the ALRA a land council has a discretion to compile and maintain a register of the specific names of traditional Aboriginal owners. This provision was originally a mandatory requirement, but was amended in 1985 to be discretionary. For logistic reasons the Northern and Central Land Councils generally utilise the alternative approach whereby their Anthropology Branch maintains general information as to traditional ownership and ascertains the specific identity of traditional Aboriginal owners when, for example, a development is proposed or instructions are sought. In *Tapnguk* the NT Supreme Court upheld the validity of this approach as empowered by s.23(3).

The ALRA also sets out the criteria which must be met in order to qualify as traditional Aboriginal owners; namely, they must be a local descent group of Aboriginal peoples; have common spiritual affiliations to a site on the land; have primary spiritual responsibility for that site and that

land; and have an entitlement by Aboriginal tradition to forage, as of right, over the land.

In the event of competing claims to traditional ownership of Aboriginal land, land councils in the NT may attempt to conciliate the dispute under s.25 and, if unsuccessful, may make a decision regarding traditional ownership under s.23(3). Neither process is mutually exclusive. Even where the land has been the subject of an Aboriginal land claim and the Aboriginal Land Commissioner has made a finding as to the identity of the traditional Aboriginal owners, the land councils are not bound to agree with the Land Commissioner's findings (see Smith 1984; Toohey 1984). They may find that other or additional Aborigines are traditional Aboriginal owners of the relevant land as, for example, where traditional ownership has changed through deaths or succession, or where there was some defect in the material examined by the Aboriginal Land Commissioner (Angel 1996).

### **The implications of the *Major* decision**

The *Major* decision of Justice Olney (1991), in his capacity as a judge of the Federal Court, dealt with the ongoing dispute between Aboriginal groups over traditional ownership of the eastern Wagait area; a case commonly known as 'the Wagait dispute'.<sup>2</sup> The case was brought under the Administrative Decisions (Judicial Review) Act by two groups of Aboriginal people upset by the NLC decision in 1986 that other groups were the traditional Aboriginal owners of the eastern Wagait and that they were persons with lesser rights (under s.7 of the ALRA). Justice Olney handed down his decision in this case on 23 May 1991, ordering that the NLC's decision be put aside and that the matter be referred back to it for further consideration. He also ordered 'that the Northern Land Council assist the two groups in pursuing their claim to a traditional land claim to the subject land', in particular by arranging for legal assistance for them at the expense of the NLC (Olney 1991).

Whilst there were a number of grounds for the appeal, the applicants' case was based on two essential arguments. Firstly, that ss.23(1)(f) of the ALRA imposed an obligation on the NLC to provide them with both legal and anthropological advice and assistance in pursuing their claims to traditional Aboriginal ownership of the land in question. Secondly, that the NLC had failed to fulfil its obligation to provide the resources necessary for the applicants to prepare and present their cases to the NLC and, thereby, the essential element of natural justice was denied them (Olney 1991: 31-2). Sub-section 23(1)(f) of the ALRA states that a function of the land council includes 'to assist Aboriginals claiming to have a traditional land claim to an area of land within the area of the land council in pursuing the claim, in particular, by arranging for legal assistance for them at the expense of the land council'.<sup>3</sup>

The Land Council suggested that ss.23(1)(f) was not relevant to the decision that had been made by the Aboriginal Full Council of the land council in 1986 regarding traditional ownership of the eastern Wagait area. Rather, it argued ss.23(1)(f) was only relevant to land claims conducted under s.50 of the ALRA; that is, to claims to unalienated Crown land heard by the Aboriginal Land Commissioner. As the eastern Wagait lands were designated as scheduled Aboriginal lands under the ALRA, they had been transferred to Aboriginal ownership immediately upon the passage of the legislation and, therefore, were not subject to the land-claim process. Accordingly, counsel for the NLC argued that there was no obligation to provide independent legal and anthropological assistance.

After analysing the relevant provisions of the ALRA, Justice Olney came to the conclusion that claims before both a Land Commissioner, and the Aboriginal Full Council, came within the definition of 'traditional land claim'. Further, ss.23(1)(f) imposed a statutory obligation on a land council to assist the applicants in pursuing their claim to be recognised as the traditional Aboriginal owners of the land. In particular, the land council was thereby obliged to arrange for legal and anthropological assistance at its expense (Olney 1991: 40).

Justice Olney then considered whether the failure of the NLC to perform its statutory function resulted in a breach of the rules of natural justice. He concluded that the applicant groups wanted their claims put to the NLC by a legal practitioner. Olney judged this a reasonable request given the complexity of the issues and the past history of land claim inquiries in that region. At that stage, the applicant groups were not legally represented, because of their inability to meet the cost involved. Justice Olney judged that the refusal of the Land Council to meet its statutory obligation to provide such assistance denied the applicant group the opportunity to have their cases prepared and presented to the best advantage (Olney 1991: 43). He further found that the process of procedural fairness did not start at the 1986 meeting where the NLC had made their decision on traditional ownership. Rather, it also involved all of the necessary preparatory steps required to enable the presentation of relevant evidence and reasoned argument leading up to the NLC's decision. These steps would obviously include the assistance of anthropological, legal and other expert advice.

There are important consequences of the *Majar* decision for the land councils operating under the ALRA, but also, by implication, NTRBs operating under the NTA. In particular, the decision means that:

- in the NT, Aboriginal claims to Aboriginal land as part of a dispute can be interpreted as 'land claims' under ss.23(1)(f) of the ALRA; and
- unless such a claim is 'patently unmeritorious' (or perhaps in other circumstances justifying an exception), land councils in the NT have an obligation to provide the necessary assistance needed for the preparation of that claim.

The *Majar* decision had substantial consequences for how the NLC approached the Wagait dispute in particular, and on its funding and procedural approach to disputes in general. The Wagait dispute ending up consisting of six disputing Aboriginal groups, none of whose cases could be judged, on initial examination, as being patently unmeritorious. Thus, the NLC was obliged to provide the financial resources so that each party could be represented by legal counsel (whose roles were briefed out and coordinated by the land council) and by the services of an anthropologist to write a claim book, draw up genealogies, prepare site maps and registers, and so on. To ensure absolute procedural fairness, the NLC provided the committee of Aboriginal elders delegated by its Full Council to hear the dispute, with male and female anthropological advisers. A senior barrister was also engaged to advise the Land Council's committee of elders on legal matters, in particular on issues of procedural fairness. As was to be expected, the financial cost was enormous,<sup>4</sup> with the result that the Land Council was not able to research or process any land claims for over 12 months.

### **The implications of the *Tapnguk* decision**

It should be noted that private solicitors have sought to extend the *Majar* decision to apply not only to traditional land claims before a Land Commissioner or before the Aboriginal Full Council, but also to private litigation between Aboriginal groups regarding Aboriginal land. In the *Tapnguk* case one Aboriginal group argued unsuccessfully that the NLC had no power to ascertain traditional ownership contrary to the decision of the Land Commissioner in 1982. Justice Angel (1996) held that the NLC was not bound by the decision of the Land Commissioner. The NLC might reach a contrary decision in various circumstances, including where traditional ownership had changed due to births and deaths or succession from one group to another, or where further information is available which was not before the Land Commissioner.

The private solicitors of the unsuccessful party argued that the NLC should pay their costs, even though they lost the case, on the basis that a 'traditional land claim' includes private litigation in the courts and that their litigation was not 'patently unmeritorious'. Justice Angel rejected this view and held that a traditional land claim does not include private litigation in the courts.

The private solicitors, on behalf of their clients, have now appealed against the costs aspect of the decision. The NLC has further argued that *Majar* is wrong in law in that:

- a traditional land claim is limited to claims before a Land Commissioner and does not include the resolution of matters by a land council pursuant to s.23(3);

- s.23(1)(f) does not impose an obligation on a land council to fund traditional land claims - a land council has a wide discretion, taking into account its funding position and competing priorities, to decide whether to fund private legal and anthropological representation in a traditional land claim.

The NT Supreme Court has reserved its decision.

### **Dispute conciliation procedures**

The *Majar* decision has pushed the NLC into developing procedures to assist in dispute resolution and, in particular, dispute conciliation under s.25(2). The first step in any dispute conciliation or resolution is defining the issues. Firstly, expert research and comprehensive consultations should take place to sufficiently define the area of Aboriginal land concerned. This is a fundamental, but often much neglected, step. Many disputes arise in the context of economic and resource development proposals because of mistaken ideas about exactly what areas of land are being subjected to the proposed activity.

For instance, much of the confusion and dispute evident in the late 1980s over the traditional ownership of the Mereenie oil fields in Central Australia was associated with the use of the word 'Mereenie'. The oil developers used that term in a geological sense to define the oil field derived from the 'Mereenie sandstone' formations which dominated the area. However, the Mereenie sandstones were actually located and took their name from an important Aboriginal site called 'Merina' or 'Mereenie', located some 70 kilometres north of the oil field. Also, there is a well-known landmark known as 'Mereenie Bluff' located even further to the north. The confusion of these three areas during the prolonged consultations conducted for the oil field development resulted in the distribution of royalty payments to the wrong Aboriginal groups and the generation of major disputes between certain families in the region which are probably still continuing.

Secondly, once the land in dispute is clearly defined, the Aboriginal groups involved in the dispute and the nature of their respective social relations with each other, need to be clearly and comprehensively identified. In order to do so, additional anthropological research may need to be commissioned or carried out by the land council.<sup>5</sup> Again, this is a fundamental, but often neglected, step. Once this clarification occurs, it can be ascertained if all group members agree there is a dispute and, if so, who are the appropriate people to be discussing it and representing their interests with respect to other group members. Often it is found that there is not a dispute about land occurring, so much as a dispute over control and authority (often between key individuals), with the land council being used

as part of the internal Aboriginal political process. In some cases the disputes are the direct result of poor or inappropriate consultations taking place; for example, where consultations over an issue have been held with a younger brother rather than the older, where consultations have not been inclusive enough or where the land council officer has been unaware of some long-term personal dispute or underlying political dynamic. In some of the cases I have investigated, the dispute is connected with some intimate or personal action that happened many years previous to the current issue at hand.

This leads to the final step in defining the parameters of the issues under dispute; namely, obtaining an understanding from each group involved of their perception of the origins and continuing grounds of the dispute. This is a crucial step and if carried out properly can save time and resources. To try to identify what it is people are arguing about, what it is they want and why they want it, and to identify ways of reaching those goals without dispute, is essential at this point. The aims of the disputing parties may not be mutually exclusive and it may be possible to put actions in place which satisfy most of the parties.

For instance, in the Palm Valley Gas Field negotiations, just before the agreement was signed two of the three land-holding groups identified as the main traditional owners began to dispute previously agreed-upon land boundaries with the third group. Investigation revealed that the former groups believed only the group whose land actually had a gas-well built upon it would receive royalties. The only gas-well so far erected was on the country of the third group (who had started this rumour). They were thus attempting to reinterpret boundaries so as to gain financial benefit. Once they were assured that this was not the case, and the third group was convinced that future wells would be built on the other two countries, thus depriving them of the status as sole well owners, the dispute faded away.

Once these preliminary steps are taken, it is useful to put in writing those matters that have been agreed to, so that there are no subsequent misunderstandings. The next step, if the dispute continues, is to develop general framework procedures for resolution and conciliation. An important first step here is to ensure that all the disputants are aware of the criteria which must be met in order to qualify as 'traditional Aboriginal owners' for the purposes of the ALRA. It is not suggested that, in the context of a dispute, subsequent discussions be restricted solely to such criteria. However, for procedural fairness, the parties must be aware of these criteria. They may claim later that not being aware of the criteria resulted in their failing to present relevant material.

Another important aspect of such a framework is to forge a consensus amongst the disputing groups about the mechanisms or protocols to be used to conciliate the dispute. There may be, for instance, some appropriate traditional dispute-settlement mechanism which can be used, such as a group of elders. It may be helpful to have an anthropologist

acceptable to the disputing groups carry out an investigation and prepare a report and other material about the parameters of the dispute. Such a report can then be used to facilitate discussion between groups and the conciliation of issues in dispute. Alternatively, a senior Aboriginal leader or group of elders could be delegated by the land council, or by the disputants, to consider the dispute and to comment upon or play an active role in its conciliation. Galarrwuy Yunupingu, the Chairperson of the NLC, plays this role in many disputes and demonstrates great skills of mediation and conciliation. Underlying this important process is the need for those acting as conciliators and mediators to be trained in the skills required or to have extensive practical experience.

The final step in the development of dispute-conciliation procedures is to review the steps taken and measure their success, if any, in bringing the parties closer together. Attempts to conciliate a dispute may stretch over a number of months, even years. The time-scale should be one acceptable to all parties. Finally, if these procedures fail in the conciliation of a dispute over land ownership of Aboriginal land, there may be a need to have the land council make a formal decision as to traditional ownership. This can be accomplished by the Full Aboriginal Council of the land council, or by an officer or committee of the land council to whom such power has been formally and properly delegated. Whichever avenue is most appropriate should be considered in light of the circumstances of the particular dispute. An important procedural point at the stage when such a 'final' decision is made, is that the anthropologists and lawyers who have been involved in representing various Aboriginal parties to the dispute should withdraw from any active role in the land council's decision, in order to ensure procedural fairness.

At any of these stages the land council may have to make decisions about applications for assistance under s.23(1)(f) of the ALRA. Justice Olney (1991) ruled that a land council must provide legal and anthropological assistance unless the claim is 'patently unmeritorious', although what might constitute a 'patently unmeritorious' claim was not spelt out. Essentially, each application for such assistance will have to be examined by the land council and considered on its merits and the particular circumstances of the claim. For example, in circumstances where copious anthropological research has already been carried out, an application for further extensive anthropological research may be deemed unmeritorious, especially if the Aboriginal Land Commissioner has also canvassed the issues in a report. Or the land council may have to determine, as a point of equity between parties in dispute, whether particular issues need to be funded for further research on behalf of one particular group, when other groups have more substantial existing research available to them. No decision on applications for assistance can be made unless the applicants make it clear, at least in a preliminary manner, the quantity of legal and anthropological work required. Most applications for NLC funding assistance do not do so.

Importantly, a land council should not enter into any agreement with parties to a dispute, or their professional advisers, to provide assistance without agreed terms of reference which address:

- what costs will be paid and what will not;
- a maximum level for costs;
- agreed consultant fees, and consultancy work program and outcomes; and
- a set of practice directions or protocols, by which the process will be carried out, and the respective roles and responsibilities of the land council and the applicant group.

Such terms of reference will vary, depending on the particular circumstances of each case, which, as NLC experience has proven, can vary greatly. Some disputes involve the determination of traditional ownership of Aboriginal land; others will involve claims over land where the Aboriginal Land Commissioner has already made a determination. There may be abundant anthropological research or very little. Some disputes will only involve two parties, others many.

The practice directions or protocols by which a land council manages and conciliates a dispute do not have to mirror those of the Aboriginal Land Commissioner. The directions should focus on the essential elements of the dispute and on a reasonable time frame for its resolution.

The reports of anthropologists should concentrate on the critical elements of the dispute and the criteria of traditional ownership under the ALRA. The NT land councils play a critical role in commissioning and coordinating the work of professional experts (be they anthropologists or lawyers) to facilitate the dispute-conciliation process. A number of factors essential to the effective management of such consultants have been discussed in Stead (1996). Suffice to say that, in regard to the land council's responsibilities and objectives, what is required is a succinct research statement of the evidentiary bases of the contending claim at the heart of the dispute. As with land claims, the most telling evidence will be that of the claimants. In terms of the land council's coordination of legal advice and briefing out of matters under dispute to legal counsel, it is critical to establish and maintain, as much as is possible, a non-adversarial approach by legal practitioners. This may often be difficult to achieve, but is particularly important for creating an atmosphere conducive to mediation and conciliation of disputes, as opposed to further entrenching antagonistic positions. Importantly, all consultants should perform their commissioned roles under contract to the land council in which time frames, fees and the expected outcomes for their professional services are clearly stipulated.



Finally, a land council's involvement in dispute conciliation should be informed by clear policy guidelines about staff resources and allocative decision-making. Land councils must not simply ensure that Aboriginal owners have equitable access to their services, but procedural fairness must be based on prioritised workloads informed by the clear limits of their budgetary capacity.

## Conclusion

The statutory basis of the NT land councils under the ALRA provides them with a clear role and set of responsibilities in the arena of Aboriginal dispute resolution and conciliation, whether such disputes be intra-Aboriginal or between Aboriginal traditional owners and non-Aboriginal parties. Under the NTA, the role of NTRBs in dispute conciliation is far less legally formalised and is not mandatory; and, accordingly, the framework for ensuring their accountability in the process of dispute mediation and negotiation is less certain. It is nevertheless clear that many NTRBs have been, and will increasingly be, involved in the conciliation of disputes between native title claimants, and with other parties.

A major difference is that NTRBs have no power to determine a dispute as to the traditional Aboriginal ownership of land. Proposed amendments to the NTA, though more specific, do not provide this power.

The *Majar* decision was made in respect to the operation of the land councils under the ALRA. It nevertheless has immediate implications for the functions of NTRBs. In particular, where NTRBs provide representation in cases where the claimants are in dispute, the *Majar* decision emphasises the necessity for them to operate in a manner which enables disputing native title claimants equitable access to their services and to funding for the preparation and conduct of claims over the same land. The historical experience of the NLC in matters of land dispute reinforces the need for NTRBs to undertake their representative role with objectivity and to act under instructions from their Aboriginal clients. It further emphasises the importance of land councils in maintaining a coordinating role over the contracting and funding of legal assistance and anthropological research that disputing groups may need. To do so, NTRBs will need to develop formalised procedures for determining their priorities for funding disputing groups; to make transparent their decision-making processes about funding allocations; and to establish policy and organisational structures which reinforce their representative role.

## Notes

1. In fact, since its inception, the NLC has been involved in the ongoing management of intra-Aboriginal disputes over land, and in funding research and briefing out legal counsel to assist in the conciliation of such disputes. This informal conciliation role has occurred as part of its preparation of land claims,

and its role in the negotiation of resource agreements and the distribution of royalty moneys. In the Land Council's early years, the establishment and maintenance of a register of traditional Aboriginal owners, and the negotiation of mining agreements, became the foci for some groups wanting to 'straighten out' disputes over land ownership. In performing these statutory functions, NLC staff and consultants have often become involved 'as active adjudicators in Aboriginal disputes' (Smith 1984: 98), though this rarely occurred in a formally structured way.

2. See also Edmunds (1996) for a brief discussion of various aspects of the history and ethnography of the Wagait dispute.
3. Section 3(1) of the ALRA defines a 'traditional land claim' as 'a claim by or on behalf of the traditional owners of the land arising out of their traditional ownership'.
4. The Wagait dispute is a long-standing one for which the NLC had already assumed a long-term financial commitment prior to 1986 in respect to staff resources as well as consultancy research and legal costs.
5. See Stead (1996) for a discussion of the role of land councils in commissioning and coordinating anthropological research, and of the research prioritisation and focus that land councils need to establish in order to facilitate effective dispute mediation and claim preparation.

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## 12. Fighting over mining moneys: the Ranger Uranium Mine and the Gagudju Association

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*Jon Altman*

This chapter focuses on issues associated with 'fighting over money' and, more specifically, fighting over mining moneys. This is an extraordinarily complex issue, not least because the principles and statutory intent in Aboriginal land rights legislation for paying mining moneys to Indigenous Australians have never been clearly articulated. From an anthropological perspective, fighting over mining moneys could be regarded as a subset of the more general issue, fighting over country; after all, mining moneys would not be paid to Indigenous Australians, in the Northern Territory (NT) at least, if it were not for special provisions incorporated in the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA). However, such a monolithic view would oversimplify historical, political, legal and economic reasons both for paying mining moneys to Indigenous parties and for the almost inevitable disputation that subsequently occurs over the distribution and use of such money.

This chapter takes what is, arguably, a best-case scenario: the payment of millions of dollars of mining moneys, with respect to the Ranger Uranium Mine (Ranger) within Kakadu National Park, to an incorporated Aboriginal group, the Gagudju Association. It focuses on an examination of why and how disputation has occurred. The analytical approach taken is unashamedly empirical, regionally-focused and practical; it is based on a consultancy undertaken for the Northern Land Council (NLC) early in 1996 that, while couched in terms of 'reviewing' the Association, had the explicit objective of resolving a major dispute. This dispute flared within the Association in late 1994, but subsequently extended in 1995 to disputation with, and legal action against, the NLC (Altman 1996).<sup>1</sup>

My approach though is also historical. In the past, I (among others) have assessed the Association as representing a very successful 'royalty' association.<sup>2</sup> Politics and the law also loom large in the analysis, because there are inescapable wider political issues that have fuelled this dispute, particularly strained relations between the NLC and the Gagudju Association, and long-standing and unresolved structural problems in land rights law that arguably make such disputation inevitable. At one level of analysis, it could be argued that the absence of public disputation within the Association during the period 1979-94 is, while explainable, close to miraculous.

My more pragmatic public policy concern is as follows: the payment of mining moneys to Aboriginal groups has been predicated, implicitly if

not explicitly, on an assumption that these financial resources will be utilised to either ameliorate the negative socioeconomic impacts of resource development projects or to provide access to scarce capital to facilitate economic development. If the payment of mining moneys causes excessive disputation, a negative impact, or does not result in positive economic outcomes, then government may justifiably argue that such payments, a net cost to the Australian public and mining companies, should be reduced or cease.

Paradoxically, in any negotiations for mining on Aboriginal land, land councils (or representative bodies with respect to land where native title parties lodge claims) seek to maximise financial returns to Indigenous interests, without perhaps paying sufficient attention to shortcomings in statutory and institutional frameworks that will inevitably result in suboptimal utilisation of such resources. While this short chapter cannot miraculously offer solutions to very deeply-entrenched problems it ends by identifying, in general terms, a number of issues that need to be urgently addressed.

### **The broad mining moneys context**

The statutory genesis for paying mining moneys to Aboriginal interests in the NT extends back to the pre-land rights era: it was Paul Hasluck, now the doyen of the assimilation era, who, when Minister for Territories in 1952, implemented a very radical policy that earmarked, for Aboriginal use, any statutory royalties raised on then Aboriginal reserves (Altman 1983: 3-9). Mining moneys have been paid to Aboriginal people in the NT for over 30 years, beginning in 1964-65 with respect to the manganese mine on Groote Eylandt.

Twenty-two years after Hasluck, the Woodward Aboriginal Land Rights Commission also recommended that statutory royalties raised on what was to be Aboriginal land should be earmarked for Aboriginal use (Woodward 1974). But whereas Hasluck's reforms only gave Aboriginal interests a royalty right, Woodward's recommendations, subsequently incorporated in the ALRA, provided Aboriginal land owners with a somewhat obscure and indirect, and probably unintended, property right in minerals. This resulted from the current requirement in land rights law that Aboriginal traditional owners be consulted on, and have to consent as a group to, exploration and mining on their land. Even in cases of prior interest, where an exploration licence or mining lease pre-existed over Aboriginal land, financial terms and conditions have to be negotiated and this too constitutes a (somewhat weaker) tradeable form of property.<sup>3</sup>

These developments immediately complicate the nature of the broad term mining moneys used in this chapter, because these moneys now extend beyond statutory royalties foregone by the Crown in favour of Aboriginal interests: they can also include additional negotiated payments

made from mining companies direct to Aboriginal interests either as a form of mineral-rent sharing or land-rent payments, or as the transfer of statutory land rentals to traditional owners of land.

The statutory mechanisms for returning mining moneys to Aboriginal people who either own a mine site or are affected by a mining operation were also altered under the ALRA. Under Hasluck's system, statutory royalties were paid to the Aborigines Benefits Trust Fund, but no mechanism existed to ensure that those affected by the mine received a share of these moneys: division of the royalty cake was left to administrative fiat.

In the ALRA, statutory mining royalty equivalents are paid to the Aboriginals Benefit Trust Account (ABTA) from Commonwealth consolidated revenue. The ALRA then stipulates in s.64(3) that a proportion of these royalties (30 per cent) are paid to incorporated groups whose members either live in, or are traditional owners of, the area affected by a particular mining operation (under s.35(2)). The remaining 70 per cent is earmarked for other purposes, most significantly the financing of land council operations. Different mechanisms exist in the ALRA to distribute under s.35(3) additional negotiated payments and under s.35(4) other statutory payments for the use of Aboriginal land.

This statutory framework introduces a number of ambiguities that are pertinent to both the particular dispute examined here and to other situations. Five of these can be briefly summarised as follows.

First, there are broadly two types of mining moneys: a statutory (or statutory equivalent) variety that can be termed public money, paid by government, and a negotiated variety that can be termed private money, paid by mining companies.

Second, while traditional owners of land have a property right in minerals, they have no guarantee that they will receive any return from mining on their land, a concern raised by several commentators many years ago (Altman 1983; Rowland 1980; Turnbull 1980). This is primarily because land councils, broadly constituted representative bodies, have statutory powers to determine who receives 'areas affected moneys'. Even if traditional owners of a mine site form a very exclusive incorporated group, at most they will receive 30 per cent of statutory royalties, plus any negotiated payments specifically earmarked for them.

Third, the geographic term 'areas affected' which Woodward (1974) recommended be defined to extend for a 60-kilometre radius from a mine site was undefined in the ALRA. Subsequently, while there have been variable legal opinions over the last 20 years about the meaning of the term 'areas affected', the jurisdiction of an area affected has never been tested in the courts.

Fourth, while the ALRA was fairly specific about the use to which 70 per cent of statutory royalties paid to the ABTA should be applied, there was no statutory attempt to stipulate how areas affected moneys should be spent. In particular, it was unclear if these moneys were intended as

compensation (for the negative impacts of mining) or as a form of mineral rent (that is, profit) sharing (Altman 1983: 140-44).

Finally, and not surprisingly given the above ambiguities, the ALRA initially required no accountability for the utilisation of areas affected moneys beyond that required under corporations law (that is, primarily, audited financial statements). Subsequent amendments to the ALRA (s.35A) required lodgement of these financial statements with the land council from which payment had been received. There was no explicit requirement for land councils to monitor the activities of recipients of mining moneys, especially if there was no regional competition for these moneys from more than one incorporated group.

### **The particularities of the Gagudju Association case**

In 1978, after completion of the Ranger Uranium Environmental Inquiry (Fox, Keller and Kerr 1977), the Commonwealth signed an agreement with the NLC for mining to proceed at Ranger. This was the first post-land rights mining agreement. The agreement was unusual on a number of counts:

- the Commonwealth was a joint venturer in the Ranger project at the time of signing, although it sold its interest not long after;
- an additional negotiated royalty of 1.75 ad valorem was not paid to regional interests, but via the ABTA; from a regional perspective this was a poor financial deal; and
- a number of agreement payments totalling \$1.3 million were to be paid and distributed via s.35(3) of the ALRA, while an annual rental payment of \$200,000 per annum (that was not inflation-proofed) was earmarked for traditional owners of the Ranger project area.

After considerable regional consultation sponsored by the NLC and orchestrated in large part in collaboration with undisputed claimants in the Alligator Rivers Stage 1 and Stage 2 land claims, the Gagudju Association was incorporated in 1980 to receive agreement payments paid in accord with s.35(3). Subsequently, in 1982, after the Ranger mine began production, and the first biannual royalty equivalent payment was made to the ABTA, there was regional expectation that the Association, with a membership of about 300, would also automatically receive areas affected moneys.

However, there were legal problems. First and foremost, s.35(2) at that time stipulated that members of an incorporated group needed to reside in the area affected by a mine. However, a large proportion of the Association's members who were acknowledged traditional owners of the formal region of the Association did not reside in that region. This

technical problem was resolved by the creation of a holding company that was paid areas affected moneys on condition that these were transferred to Gagudju (Altman 1983: 125). Amendment to the ALRA in 1987 included the term 'traditional owners' in s.35(2)(b), thus addressing this issue.

A second problem was that the area affected was generally assumed to refer to the region defined in the Gagudju Association's constitution. This area corresponded to the area referred to in the Ranger Uranium Environmental Inquiry (Fox, Keller and Kerr 1977) which extended into Western Arnhem Land. This region was only nominal and effectively the Association's region is, and always was, primarily Stage 1 of Kakadu National Park. Even this area though is far larger than the Ranger project area and downstream sections of the Magela catchment that are directly environmentally affected by the mine.

A third teething problem in 1982 was that the NLC did not have mechanisms in place to distribute areas affected moneys. Indeed, initially it was erroneously thought that the area affected referred to the region of the NLC and applications for funds were sought from incorporated groups in this region. While 31 applications were received, this very wide interpretation of area affected was never operationalised and the Gagudju Association was determined as the appropriate incorporated body to receive all s.64(3) moneys (Altman 1983: 103-4). The legality of the correlation between the Association's regional constituency and the area affected by the Ranger Mine was recognised as problematic but left unresolved.

Similarly, the use to which the Gagudju Association applied its mining moneys was left at the Association's discretion. The *raison-d'être* for the Association was initially to receive such moneys, but from its establishment it had much wider functions. This was primarily because the Association was established in a regional organisational vacuum: there was no other incorporated group in the Kakadu region and the Association, from its establishment, took on the task of operating as a regional resource organisation, especially for Aboriginal outstation communities in Kakadu National Park (Altman 1983: 122).

In the period 1979-80 to 1995-96, the Gagudju Association received nearly \$38 million dollars in mining moneys, with most (89 per cent) being areas affected moneys, or public moneys according to my nomenclature (Altman 1996: 55). While the Gagudju Group's corporate structure has historically been complex, its activities can be simplified to two broad entities: a commercial arm which owns a number of businesses; and a non-commercial service-delivery arm that undertakes a number of functions (including provision of outstation support, health and education services, and housing and infrastructure) both for Association members and non-members residing in its region, acts as a clearing house in making cash payments to all adult members (irrespective of place of residence) and operates a children's trust where the equivalent of all payments to adults are accumulated for juvenile members until they reach majority.

Until quite recently, the Gagudju Association was regarded as the most successful post-land rights 'royalty' association in the NT. Such positive assessments have been made primarily by academic social sciences researchers (Altman 1983, 1988; O'Faircheallaigh 1986; Stanley 1982). These assessments have been based, first and foremost, on the Association's ability to meet its diverse goals: it has invested heavily in the regional economy, especially in tourism enterprises, and now owns two of the three major hotels in the region; it has actively supported outstation development and other regional community development goals; and it has managed to make conservative distributions of cash to its adult members (never exceeding \$2,000 per annum) while simultaneously holding equal cash shares in trust for juvenile members.<sup>4</sup> The Association has been very favourably assessed as an association that has wisely utilised mining moneys for the benefit of its members, while also investing for the future.

### **The reasons for disputation**

In late 1994, a key section of the Association, the Mirarr Gundjeyhmi traditional owners of the Ranger project area, approached the NLC seeking review of the Association. Complaints articulated included absence of Association accountability to members, poor service delivery and lack of transparency in Association decision-making. This action followed a dispute between two key segments of the Association, the Mirarr Gundjeyhmi and the Murumburr who have historically been close allies.

The reasons leading up to this dispute are multidimensional and include a combination of structural, statutory, financial and cultural elements; it has many cross-cutting causal linkages that are not amenable to one correct explanation. The following is my interpretative account that is discussed in full elsewhere (Altman 1996: 14-42) and is simplified somewhat here.

As already noted, when the Association was established in 1980 there were structural shortcomings in its constitution. In particular, the Association's membership was somewhat inclusive and based on historical residence as well as traditional ownership criteria (see Levitus 1991). Throughout the 1980s, these shortcomings were overcome primarily because of strong and unchallenged Association leadership. Critical to this was a political alliance between a Mirarr Gundjeyhmi man, who was widely and undisputably recognised as the senior traditional owner and key spokesman for the Ranger project area, and a senior Murrumburr man. These two men were close allies whose leadership styles were very complementary, one having high standing particularly in the Aboriginal domain, the other having standing in both the Aboriginal and non-Aboriginal domains. This alliance first developed in the pre-land rights era when theirs were the only families residing in the region; it grew considerably in the late 1970s when both men not only drove the regional



land claims process, but also united to strongly resist expansionary land ownership incursions from Western Arnhem Land.

In 1989 the senior Mirarr man died and, soon after, the senior Murrumburr man resigned as Chairperson of the Association, to be replaced by his sister. While the eldest daughter of the Mirarr man inherited her father's ownership status with respect to the Ranger project area, and was publicly acknowledged as the spokesperson for the mine site, she did not inherit her father's leadership mantle in terms of his personal status derived from regional knowledge, experience, political skills and so on. The reasons for this are complex, but suffice to say that her father was an unusually effective regional statesman, while her involvement in public affairs was then limited. While her father was accorded significant status within the Association, this new Mirarr leader was treated little differently from other Association members and her relationship with the chair of the Association deteriorated.

There were important financial reasons for this deterioration. Throughout the 1980s, the now deceased senior traditional owner had transferred Ranger rental moneys (\$200,000 per annum) to Gagudju, although there was tacit recognition that he had first call on these resources. After his death in 1989, the special status of these moneys appears to have been overlooked or misinterpreted. At about the same time, the world price of uranium started to decline and the Association's mining moneys receipts concomitantly declined. This decline, coupled with commercial expansion, a reduction in regional tourism linked to the pilots' strike and economic downturn, and existing commitments, especially to meet debt servicing obligations and to make cash distributions to members, placed the Association under enormous financial pressure. Whereas in the 1980s the Gagudju leadership was able to skilfully balance the tripartite Association objectives of investment, service delivery and cash distribution, this became increasingly difficult in the 1990s. There was a strong, growing and probably justifiable view among Mirarr Gundjeyhmi that they were not being appropriately serviced by the Association and that their economic interests, especially in relation to home ownership, had not been given sufficiently high priority.

The crucial catalyst for the escalation of this dispute in 1994 was externally driven and occurred in the context of the Commonwealth's attempt to resolve a protracted legal action, called the Ranger litigation, by mediation. These proceedings were instituted by the NLC against the Commonwealth and Energy Resources of Australia in 1985; they basically sought to rescind the Ranger Agreement of 1978. After nine years, the Commonwealth sought to resolve this litigation by offering regional Aboriginal interests a mediation package worth at least \$7 million, contingent on extension of the period of mining at Ranger from the year 2000 to 2015. The Gagudju Association leadership was keen to accept the mediation package so as to alleviate the financial difficulties of the Association. But the senior Mirarr leader, who had the final say, rejected

the offer in a public and very acrimonious meeting at Muirella Park in Kakadu National Park on 1 September 1994. This meeting marked the very visible genesis of disputation.

While the Mirarr Gundjeyhmi may have felt increasingly marginalised within the Gagudju Association, their right to withhold acceptance of the mediation package and the general public acknowledgment that they are the primary traditional owners of the mine site emphasised their growing political status. Late in September 1994 the senior Mirarr leader sought review of the Gagudju Association, raising concern about the Association's transparency and accountability to members. These were not the first complaints received by the NLC but they were certainly the most significant. They may have been fuelled by renewed discussion during the Ranger litigation about rental payments for the mine site.

The NLC sought Gagudju agreement to independent review of its activities, but the Association initially resisted. The call for review was perceived by the Association as a heavy-handed attempt by the NLC to seek retribution for Gagudju support for the Ranger mediation package. In a subsequent stand-off, the NLC made further transfer of areas affected moneys contingent on review, while the Association initiated action in the Federal Court to force the NLC to transfer these moneys to the Association. In 1995, the Gagudju action was dismissed on a technicality, as these moneys had to be transferred by the NLC within six months of receipt (Olney 1995). But the Association's action in the Federal Court and its continued opposition to review forced the NLC's hand: in July 1995, the NLC determined to pay all areas affected moneys received to the newly-formed Gundjehmi Aboriginal Corporation, whose chair was the senior Mirarr leader. As a consequence of this determination, the Gagudju Association's financial situation became parlous and it remained solvent, in part, due to financial assistance from the new Corporation. Ultimately, in November 1995, after considerable negotiation and ministerial intervention, the Association acquiesced to review.

### **Resolving the mining moneys quagmire**

The review of the Association early in 1996 was conducted in two parts; an assessment of its financial and corporate structure (Lewis 1996) and an assessment of the effectiveness of its functioning (Altman 1996). The latter review found that the Gagudju Association was underperforming, although this observation was qualified by the belatedness of the review vis-à-vis cessation of payment of mining moneys. It was noted that the Association needed professionalism, transparency and internal systems and processes to ensure that key members were not disadvantaged. It was clear that the internal conflict within the Association had been significantly exacerbated by the absence of appropriate accountability structures and poor internal communications.

By March 1996, the dispute was partially resolved, with the NLC agreeing to reinstate payment of mining moneys to the Gagudju Association, contingent on the Association reviewing its constitution and rules and developing a strategic plan that recognises the special status of Mirarr Gundjehmi. Rental payments, however, were reserved for the use of the Gundjehmi Aboriginal Corporation, whose membership of less than 30 persons consists primarily of Mirarr Gundjehmi. With time, the deep rift between the senior Mirarr leader and the Murrumburr chair of the Association may abate. Nevertheless, it is my view that two far broader issues will need to be addressed and resolved to ensure that this dispute does not reignite.

First, there are shortcomings in the ALRA that do not allow the NLC to exercise statutory requirements that it monitors the performance of incorporated groups receiving mining moneys with discretion. The only very blunt instrument available to the NLC to force such groups to agree to review and restructuring is the threat of defunding. Clearly as a representative body such an approach is not only potentially politically damaging, but is also undesirable. The NLC wants 'royalty' associations to utilise mining moneys effectively, but it wants to do this without creating untenable conflict with relatively autonomous and regionally-powerful bodies, like the Gagudju Association. It is important that the NLC inform and educate its constituency about financial provisions of the ALRA, including different types of mining moneys and the various statutory roles of the NLC in monitoring their use.

Second, there are shortcomings in the ALRA that need to be urgently addressed. The statute does not define areas affected with any precision, does not clearly distinguish traditional owners (of project areas) from residents (of areas affected) and does not stipulate the purpose for which mining moneys are allocated. Furthermore there has been considerable ambivalence, at an ideological level, in recognising that areas affected moneys are public moneys and, consequently, an acute tension between Indigenous and bureaucratic perceptions about how the use of these resources should be monitored and acquitted. Under such circumstances, fighting over mining moneys is an almost inevitable consequence of mining on Aboriginal land.

## Conclusion

This chapter deals with a best-case scenario, the Gagudju Association, where after 15 years of relative success a number of external statutory, structural and political and internal political and cultural factors have led to major disputation. To some extent the Gagudju case represents remarkable harmony and cohesion, given the potential for conflict. Such conflict over mining moneys is by no means limited to Gagudju: there is also long-documented conflict over mining moneys on the Gove Peninsula (Martin 1995; Palmer 1984); in Western Arnhem Land (Altman and Smith 1994;

Australian Institute of Aboriginal Studies 1984; O'Faircheallaigh 1988) and no doubt elsewhere. Without being exhaustive, it is clear that in an ever-increasing number of situations internal organisational and external statutory mechanisms need to be either modified or established to avoid, or ameliorate, conflict over mining moneys and associated economic, social cultural and wider political costs. Such modification could result from legislative change, alterations to the operations of incorporated groups receiving mining moneys and modification of incorporations law (see Martin and Finlayson 1996).

In a very practical sense it is of concern to realise how vulnerable 'royalty' associations can be to internal conflict. In the Gagudju case, such vulnerability extends to commercial enterprises that not only provide an additional stake (beyond land ownership) in the regional political economy, but also provide a very tangible investment for future generations.

Two final considerations are noteworthy. First, the Federal Government has recently announced the establishment of the Kakadu Region Social Impact Study to consider issues associated with the social impacts that may result from the development of the Jabiluka uranium prospect. The traditional owners of the Ranger project area (who are also the senior traditional owners of the proposed Jabiluka mine site) oppose development, in part, on the grounds that the payment of mining moneys is having a negative regional impact on Aboriginal communities. The creation of appropriate mechanisms to ensure a positive link between such moneys and improved socioeconomic status for Aboriginal community members will prove essential if Aboriginal land is to be developed. Second, the potential implications of fighting over mining moneys need to be extended to an increasing number of situations where less transparent deals are being struck between resource developers and native title parties under the auspices of the Native Title Act. It is important that both positive and negative lessons from prolonged experience under the ALRA are now utilised constructively.

#### Notes

1. While this chapter draws heavily on the consultancy undertaken in 1996, it is also based on research undertaken in the region in 1982, 1983, 1986, 1989, 1990, 1993 and 1995. Many people have collaborated with me over the years and while it is a little invidious to separately identify individuals, it would be remiss if I did not specially thank Peter Wellings, Mick Alderson and Steve Roeger for considerable input.
2. The term 'royalty' association which is currently popular is erroneous because, as explained, these incorporated groups do not receive royalties as such; they receive a share of the equivalents of royalties transferred from consolidated revenue, as well as agreement and/or statutory rental payments.
3. The weak property right with respect to prior (pre-land rights) mining interests is not dissimilar to the 'right to negotiate' (but not to veto) provisions of the *Native Title Act 1993*.

4. These positive assessments have been influenced in part by some notable regional failures, in particular the poor utilisation of mining moneys paid with respect to the nearby Nabarlek uranium mine that has now been decommissioned (see Altman and Smith 1994; O'Faircheallaigh 1988).

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### 13. Dispute management strategies: suggestions from the Central Land Council

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*Julia Munster*

Whilst preparing this chapter, I was struck by the problem of talking meaningfully about intra-Indigenous land disputes (and strategies for their management) within the Central Land Council's (CLC) region whilst avoiding breaching the confidentiality of participants and/or indirectly creating political and legal consequences for participants or the CLC. There are some who would argue that this reeks of paranoia or an inflated sense of the importance of the paper and, to a certain extent, they are right. However, let us not lose sight of the confidential and sensitive nature of the subject matter, and the highly politicised and litigious contexts in which disputes develop and land councils and Native Title Representative Bodies (NTRBs) operate. This paper, then, to paraphrase Diane Smith in her opening welcome to this workshop, is neither 'unashamedly anthropological' nor 'frank'.

Indeed, many discussions about intra-Indigenous land disputes from a land council or NTRBs perspective are explicitly or implicitly curtailed by the overarching principle of confidentiality. It is useful, however, to ask: whose confidentiality, and for what reason or purpose? Primarily, confidentiality is 'owed' to those families or groups in dispute - to protect both their privacy and their intellectual property (see Rose's (1994a) discussion on confidentiality and intellectual property in claims under the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA)). Confidentiality is also 'owed' to land councils and NTRBs, as evidenced by the confidentiality clauses contained in employment and consultancy contracts. These clauses are not merely an extension of maintaining confidentiality to constituents, they are also aimed at minimising political and legal challenges to the organisation and some or all of its constituents.

One of the many tasks facing NTRBs and their staff and consultant anthropologists involves a balancing of competing interests and needs. On the one hand is the need to be reflexive about the way they operate (particularly in relation to intra-Indigenous disputes) and to share their expertise with each other. On the other hand is the need to protect the interests of their constituents and, by extension, their organisation's interests, by placing restrictions on the degree to which such reflections and self-examinations are made public. Diversity amongst NTRBs in the way they balance these competing interests is already evident. I suspect, however, that it is easier for many of us to comment more critically on the practices either of other organisations, or of organisations for whom we are or were engaged as short-term consultants, rather than on those

organisations for whom we currently work! (See, for example, Altman and Stead's papers in this publication and Stead (1995).)

Land disputes do not consume, and have not consumed, Central Australian Aboriginal people's daily lives all the time. Over the last 20 years, within CLC's region, there have been:

- tens of land claims and community living area applications;
- hundreds of land-use agreements;
- thousands of meetings; and
- hundreds of thousands of consultations and discussions with people about country.

Many of these projects and meetings have been uncontentious. Some have been contentious, but have either been resolved or managed in such a way so as not to develop into serious disputes. Few projects have resulted in long-standing, bitter and public conflict, although these are the ones that receive media attention. These serious, public and bitter disputes have constituted perhaps less than 10 per cent of CLC's total human and financial resources over a 20-year period,<sup>1</sup> although they have nevertheless exacted significant costs from participants and CLC alike.

CLC has had 20 years to refine, and is still refining, its organisational and research strategies for representing and consulting Aboriginal people on land matters within its region. The experience of the CLC has shaped the ways in which it is researching and preparing native title claims and representing native title holders. The deliberate focus of this paper is on practical and organisational, rather than theoretical, dimensions of intra-Indigenous land disputes in the CLC's region. The paper explores the extent to which disputes are created and/or entrenched by external factors, such as the stance adopted by participants, legal processes and the involvement of external interests and parties. The paper then considers strategies adopted by the CLC and claimants to minimise and/or manage disputes.

### **Factors beyond control of land councils and NTRBs in managing intra-Indigenous disputes**

Intra-Indigenous land disputes are likely to arise independently of any action or strategy adopted by NTRBs. These may be due to a number of factors, including the following: the attitude of participants towards resolution or management; legislative impacts; and the actions and representations of external, typically non-Indigenous, parties. Other factors also operate, of course, some of which have been discussed by Agius (1995: 28-31).



*The stance taken by participants*

Whatever the cultural and political context, resolution of any dispute is only reached when: firstly, parties share a common (albeit reluctant and pragmatically-based) desire for resolution; and secondly, parties agree upon a process for dispute resolution, including a mutually agreed mediator and/or arbitrator. Mediated or arbitrated settlements are usually contextually limited and may be reactivated in the future by the original participants or their successors.

Aboriginal parties employ various strategies in dispute management. Attempts are usually made to recruit the support or the mediation services of other individuals, groups or organisations, including land councils and community councils. Yet, despite the often substantial involvement of others, the outcome of the dispute ultimately lies with the participants themselves. Where participants are unwilling or unable to resolve matters, others may be blamed either for the stalemate or for the dispute itself.

*Legislative and procedural factors in dispute creation and exacerbation*

Discussion about the extent to which land disputes are created and/or exacerbated by the legislation under which CLC operates is a moot point, as disputes do not occur in a legal or sociopolitical vacuum. The ALRA legislation under which CLC operates confers substantial potential benefits upon people within its region, thereby raising the stakes on what might otherwise be small-scale disputes. Participation in the processes leading to such 'rewards' carries with it enormous costs, not the least of which is the requirement to assert publicly one's connection to country and deal with the intrusive interest and involvement of other parties.

In claims where there is uncertainty and/or disagreement as to who should be included in the claimant/beneficiary group, the ALRA imposes a particular outcome that has the effect of simplifying and artificially minimising conflict both during and after the claims process. The statutory definition of a 'traditional owner' in the ALRA denies the claims of significant numbers of people, irrespective of whether those claims are supported by others.<sup>2</sup> This is ameliorated to some extent by other provisions of the ALRA that entitle the Minister to establish Aboriginal Land Trusts for the 'benefit of Aboriginals entitled by Aboriginal tradition to use and occupy the land' (s.4(1)) and which require the Northern Territory land councils to take account of the interests of 'other Aboriginals' (s.23(3)). Nevertheless, identification as a 'traditional owner' amounts to a formal and legal recognition of one's connection to country, and therefore carries powerful symbolic and practical weight.

Where disagreement has arisen over who should and should not be included in the claimant/beneficiary group, the outcomes forced upon claimants and the Land Council by the ALRA are *for the purposes of the claim only*. The dispute is effectively removed from the land claim context (and therefore all the attendant publicity), but is not necessarily resolved.

In fact, disputes may re-emerge later, in the management and administration of Aboriginal land.

The *Native Title Act 1993* (NTA), on the other hand, does not provide a statutory definition of 'native title holders', stipulating instead that the identity of the claimant group/s and the content of the rights claimed are whatever Aboriginal law and custom pertaining to the claim area decrees. Given that many disputes within the CLC's region are essentially disputes of this nature, it is possible that the extent of disputation will be more accurately reflected under the NTA regime than under the ALRA. It is unclear whether the NTA and the courts will require 'law and custom' to be one unitary system or will allow for the possibility of disputed laws and customs said to cover a native title claim area.

Furthermore, it is strongly arguable that the NTA entitles a 'registered claimant' (an individual or an incorporated body) to enter into agreements under the NTA that bind all native title holders. Where the 'registered claimant' is an individual, his/her ability to make binding and solitary agreements distorts the way in which group or communal title is held and is likely to exacerbate conflict and lead to the proliferation of competing claims throughout Australia, rather than encourage resolution or compromise.

Under the right to negotiate provisions of the NTA, agreements may be made before a determination of native title. Although it is imperative that native title claimants/holders have the right to be consulted about land-use proposals affecting their country both before and after a determination, the exercise of that right before a determination may be problematic where claimants are in dispute. In allowing a 'registered claimant' to make agreements, the NTA does not provide any incentive for dispute resolution, but may, rather, encourage disputation. The role of NTRBs in managing these situations will be explored later in the paper.

The native title claim process, and specifically the requirement that claimants engage in formal claim mediation or negotiation/arbitration under the right to negotiate with third parties, also has the potential to exacerbate land disputes. I am referring here to formal mediation between claimants and non-Indigenous parties, rather than between competing claimant groups.<sup>3</sup>

Land disputes are often also disputes about knowledge,<sup>4</sup> and these can be exacerbated during formal mediation. For example, a group that equates detailed knowledge of country (typically, ritual and ceremonial knowledge) with ownership or custodianship of country may then demand that opposing groups demonstrate or produce the requisite knowledge. Opposing groups may then refuse either to accept the assertion that such knowledge is a prerequisite for ownership, or may argue that the type and/or content of knowledge held by the first group is wrong or not related to the land over which they are in conflict.

In a claim under the ALRA, the hearing signals the commencement of the formal and public part of the claims process and becomes fixed in

the minds of claimants as *the* forum in which they get to have their say. Although the hearing is organised and controlled to a large extent by legal requirements, the evidence of claimants is of paramount importance. Claimants are entitled to give that evidence in whatever form they choose - showing the Aboriginal Land Commissioner the country, singing songs, performing rituals, producing sacred objects and answering questions. Claimants speak on matters about which they have detailed knowledge and authority - for example, their connection with country and with each other, and their rights and responsibilities for country. In claims involving disputing claimant groups, the hearing has been seen by claimants as an opportunity for each side to demonstrate its claims and then have them validated or refuted by an independent arbiter, the Aboriginal Land Commissioner.

In a native title claim under the NTA, however, the giving and hearing of so-called 'traditional' evidence comes much later in the formal claim process and is preceded by structured and formal mediation and negotiation processes with which claimants are often unfamiliar and uncomfortable. These processes require a knowledge of contemporary legal-political systems and language.

Claim mediation and the arbitration phase of the right to negotiate provide expansive opportunities for the demonstration of contemporary knowledge and minimal opportunities for the demonstration of 'traditional' knowledge. The domination of mediation meetings by alienating legal argument and the presentation of the position of each party, together with the ongoing nature and lack of finality of such meetings (as opposed to a once-off hearing) restricts the extent to which claimants may, or even want to, demonstrate their connection with country. This can exacerbate all sorts of tensions between claimants. For example, the relative ease with which some claimants are able to articulate their aspirations and address external parties such as members of the National Native Title Tribunal (NNTT) and government representatives may be interpreted by other claimants as a provocative denial of cultural protocols and a wrongful assertion of authority to speak for country.<sup>5</sup>

Furthermore, in claims heavily opposed by non-Indigenous interests, opposing claimants may adopt different political strategies in mediation and negotiation meetings. Some may decide not to reveal publicly the existence, nature and extent of disputes with other claimants, but rather to maintain a united front. Others may decide, for various reasons, to assert publicly the nature of their claim - a strategy that may result in the public airing of grievances between opposing claimants. Whichever strategy is adopted, conflict tends to brew, simmer or erupt during the seemingly endless and, in some cases, futile mediation and negotiation cycles.

#### *Involvement of external parties*

NTRBs are unable to control the actions and representations of external parties, particularly governments, which may create and/or exacerbate

disputes. Contrary to popular opinion, NTRBs are also unable to control the responses of their constituents to the actions and representations of external parties, although their advice of NTRBs may influence the response of those groups to whom the representations, and so on, are made. Such powers are bestowed upon NTRBs neither by the NTA nor by the people with whom and for whom we work, and the CLC does not seek such powers.

The role of external parties has particular relevance in the context of native title holders' right to negotiate. Although the right to negotiate is merely a right and not a veto, native title holders are likely to be subjected to intense pressure from external parties, and from within the native title holding group to give approval to land-use proposals within unrealistic time frames.

Unlike the ALRA, the NTA does not establish a statutory scheme requiring that all land-use proposals be directed through NTRBs. This creates a danger that the group, or communal, nature of native title will be overlooked in favour of individual rights and is of particular concern in those cases where negotiations take place prior to a determination of native title. It is important that native title holders whose land is affected by land-use proposals have been identified and consulted as a group, given an opportunity to express their wishes as a group and have consented to any such proposal as a group. Any regime other than this is likely to exacerbate conflict.

In summary, there are some factors in the generation and exacerbation of land disputes that are beyond the control of land councils and NTRBs. Nevertheless, organisations are also players in land disputes. The next section considers organisational strategies for minimising, and/or managing, intra-Indigenous disputes.

## **The role of NTRBs in the generation and management of land disputes**

### *NTRBs as players in land disputes*

Organisations such as the CLC are players in intra-Indigenous land disputes, primarily because of the statutory rights and responsibilities entrusted upon them by the ALRA and, more recently, the NTA.

Where disputes have arisen under the ALRA, the CLC has had a statutory obligation not to remove itself altogether from the process, but to attempt reconciliation between the parties (s.25 ALRA). The NTA does not impose a similar obligation on NTRBs. However, they are the organisations with local knowledge and on-the-ground experience and are generally better placed than outsiders such as the NNTT or independent 'crack mediation squads' to facilitate the conciliation of intra-Indigenous disputes. Provided they are properly resourced, NTRBs should have the primary responsibility for assisting opposing groups in identifying the bases of dispute and of common ground, establishing the outcomes sought

by each group and investigating whether agreement can be reached on some matters.

Given that organisations such as land councils and NTRBs have statutory roles and responsibilities on land matters within their respective regions, it is inevitable that their policies, consultative processes and modus operandi will have an impact on the lives of their constituents. Their actions and policies may unwittingly generate, and/or exacerbate, disputes, or they may result in the dissolution of potential disputes and minimisation of actual disputes. The challenge is for all of us to develop policies and procedures that are more likely to lead to the latter rather than the former outcome.

### **Strategies for minimising the generation and/or exacerbation of land disputes by NTRBs**

The CLC has had 20 years to refine, and is still refining, its organisational and research strategies for consulting and representing Aboriginal people on land matters within its region. Like other long-established land councils, it has developed corporate practices and procedures, with varying degrees of success, for minimising and managing land disputes within its region.

The strategies discussed below are intended neither to be exhaustive nor fail-safe measures in preventing disputes. They will not necessarily be applicable or available in all situations. Time constraints, limited human and financial resources, and varying priorities and workloads will no doubt have an impact upon the ability or desire of a NTRB to implement them.

#### *NTRB research and administrative strategies for minimising the generation of disputes*

- i Develop and implement transparent and fair processes which outline the way the NTRB will fulfil its statutory obligations. Disputes are more likely to arise in situations when due process has not been followed or, alternatively, when there is a perception that due process has not been followed. It is important, therefore, that NTRBs develop, implement and communicate to their constituents policies and procedures that are transparent and fair. Indeed, this is now a condition of grant under the Aboriginal and Torres Strait Islander Commission's (ATSIC) Native Title Program. The decisions of NTRBs are also subject to review under the *Administrative Decisions (Judicial Review) Act 1976*.
- ii Develop and implement continuing community education programs and disseminate information to native title holders about native title law, process and possible outcomes, and the type and status of other existing claims within their region. The provision of such information often allays the fears and/or unrealistic expectations of

native title holders which, if left unchecked, may lead to conflict and the lodgment of multiple claims. A continuing issue facing the CLC is the need to adequately convey to native title holders/claimants the differences in law, process and outcomes between the NTA and ALRA.

- iii Develop and implement research strategies. Ideally, conduct adequate research and consultations well before potentially divisive and stressful legal or other proceedings. Although much native title work may be reactive rather than proactive, it is important to develop research strategies for all the types of requests that may reach the NTRB (see the contributions of Peterson (1995: 8-15) and Sutton (1995a: 3-4) on this topic). Naturally, different projects and types of claims will require different research strategies.

If consultants are to be engaged, they should be brought in as close to the beginning of a claim as possible. In some cases, it may be possible and preferable to postpone research until appropriate consultants are available (this strategy is, of course, unrealistic for s.29 Notices).<sup>6</sup>

Like many NTRBs, the CLC conducts a preliminary assessment of various components of a prospective claim before agreeing to take on that claim. However, the CLC has not been inundated with s.29 Notices and is conducting full-scale research for all current claims.<sup>7</sup>

The CLC has not lodged new native title claims until the completion of substantial legal, anthropological, historical and other research. Naturally, such research continues after lodgment, but we have aimed to substantially complete it before mediation begins - such research can then be used in mediation or a Federal Court Hearing. At a minimum, anthropological research focuses on the composition of the native title holding group/s; the criteria for membership of those groups; the claimants' collective and individual rights and responsibilities towards land to be claimed; and the varying types of (continuous) connection they have with that land.

Research may reveal certain conditions and obstacles requiring urgent attention before proceeding with the claim. For example, we discovered during preliminary research for one claim a division between senior prospective claimants about the need for a claim and the involvement of the CLC. This led to claimants postponing the claim.

The holding of regular claimant meetings, parallel to the research process, may also provide claimants with an opportunity to develop greater understanding of each other and to address claim issues as a group rather than as families or individuals. This has been particularly important in those claims within the CLC's region where a combination of historical and contemporary factors has led to a

climate of suspicion and mistrust between prospective claimants. Although we are still developing appropriate processes with claimants and there is always a danger in 'meeting fatigue', meetings themselves have provided a forum for minimising potential disputes.

It is important that the research strategy focus not just on the claims process, but on life after the claim. It is useful to consider how native title land will be administered after a determination, and the structure and membership of the native title holding body.

Research, however, will not necessarily reveal the composition of the native title holding group. We are currently working on a potential project in which there are lively discussions and diverse views relating to the criteria for inclusion in the claimant group. Yet all the research in the world is unlikely to deliver up a set of principles to which all prospective claimants subscribe. What becomes important, in cases such as this, is the way in which both claimants and their NTRBs manage possibly conflicting claims - and I will return to this below.

In summary, the aim of our research strategy is twofold:

- to reduce the potential for intra-Indigenous disputes and the lodgment of multiple claims over the same area; and
- to provide prospective claimants with more time to deepen their understanding of native title law and procedures; to consider their collective, group and individual aspirations for the claim; and to manage potential or existing tensions within the claimant group before legal and political pressures associated with the claim begin to weigh down upon them.

- iv Conduct research, consultations and meetings in a culturally appropriate manner. Naturally, what is culturally appropriate will vary from native title holding group to group. The use of large formal meetings to conduct research is generally an inappropriate research methodology. We have found on several occasions that what emerges at large meetings as the consensus view will later be condemned by all and sundry, but for different reasons in each case. People may feel unable to publicly challenge particular views put forward in meetings, and substantial negotiation is then required to modify meeting outcomes.

In other areas, the concern of claimants that there be no 'funny business' (that is, secrecy) during research has resulted in the practice of open and closed notebooks: the researcher records notes when everyone is present and then closes the notebook (that is, does not record any more information) at the conclusion of that particular period of research.

Decision-making processes contain numerous pitfalls. The CLC generally uses the formal, large meeting model, having so far failed to find more appropriate alternatives. We have found that decision making in meetings of small sub-groups is generally inappropriate.

Where there is agreement on who should be consulted, then it is imperative that all those people are present, or at least have an opportunity to be present, at meetings. Decision making without key people and/or in the presence of the wrong people, will often result in subsequent demands that decisions be overturned, thereby creating and/or irritating tensions amongst native title claimants/holders. Ensuring that the 'right' people are present at meetings or research is often easier said than done and involves organisational coordination, finesse and political acumen of a high order.

- v Attention to both the micro and macro levels of the organisation of meetings, consultations and research is particularly important. The day-to-day and personal aspects of dispute prevention or dispute management are just as important as 'big picture' and long-term strategies.
- vi Staff roles and skills. The potential for disputes is minimised when Representative Body staff and consultants are attuned to potential or actual conflict and do not accidentally exacerbate matters by behaving in such a way as to be perceived to be partial to the interests of one group against another, or by misjudging a situation as though a serious conflict is about to erupt when people are merely managing minor disputes by getting things off their chests.

The human capital of a land council or NTRB is vital both to the success of its work and to minimising stresses on or between claimants, particularly during country visits. Research trips and meetings are more likely to run smoothly and convivially when they are well planned, staff and consultants are well briefed on all relevant issues including the purpose of the project and the tentative agenda/itinerary, staff and consultants agree upon and value their respective roles, and the lines of communication between all participants are kept as open as possible. Multi-skilled field officers play a particularly important role - they often possess detailed knowledge of local and community issues, are skilled at communicating with and attending to the needs of claimants and are good problem solvers.

It is very important that once the parameters of research have been agreed upon by NTRB staff (in accordance with legal requirements), that anthropologists rather than lawyers or other staff coordinate the anthropological research process. Anthropologists are



better placed to know what sort of specific research is required, with whom and by whom it should be conducted and when it should be conducted. Inappropriate or inadequate research may unwittingly generate intra-Indigenous disputes (see Wootten's (1995) rhetorical 'call to arms' to anthropologists to reassert their role in native title law and process, and Burke's (1996) response).

- vii Dealing with external bodies. Obviously the extent to which native title holders/claimants and their NTRBs are able to influence the stance taken by external (often non-Indigenous) groups is minimal. Nevertheless, engaging in constructive consultation and dialogue with parties such as government and industry groups increases the possibility of successful resolution of the claim. It is important that this should be done where possible and without inappropriately placing the burden and/or responsibility of 'winning over' external opponents on claimants and their representatives. Such action may also reduce the potency of divisive tactics that opponents of land rights have consistently and sometimes successfully used against claimants under the ALRA. This is not to say that such efforts will ultimately be successful - not at all. Where claimants are faced with a multitude of interested parties, as in the Yorta Yorta claim, they are unlikely to have the resources to take such action.

Whilst the Alice Springs claim is yet to go the full distance, claimant negotiations with the local council and local interest groups to date have minimised the extent of local opposition to the claim, thereby marginalising the opposition of the Northern Territory Government. This has reduced external and internal stresses on both the larger claimant group and individual families within it.

*Suggestions for dispute management: minimising unnecessary exacerbation by NTRBs<sup>8</sup>*

To my knowledge, the CLC has not arranged for staff to undertake formal training in mediation skills and techniques. Rather, significant emphasis is placed upon 'on the job' training, and acquisition of the organisation's corporate knowledge and practice of dispute management.

- i Develop and implement holistic policies and procedures that aim at managing rather than resolving disputes and which are based on a positive rather than negative view of disputation. Debates and disputes about country, and about the particular people or language or stories or systems that 'belong' to country, are fundamental aspects of Aboriginal tradition in Central Australia and, in fact, throughout Australia (Sutton 1995b). This is not to say that people are consumed by conflict but that, where disputes occur, they can and/or should be viewed in a positive light; that is, as demonstrating the ongoing and unique, albeit contested, connection Aboriginal people

have to country. The latter is an important evidentiary requirement for native title claims.

- ii Develop and implement policies for conciliation and/or arbitration. There is a need for NTRBs to consider in advance their role in conciliating and/or arbitrating disputes and establish protocols for taking such action. The issue of partiality should also be considered. Disputes may be exacerbated if participants feel that organisations and/or their representatives have improperly taken sides. On the other hand, CLC's constituents often have an expectation that CLC staff will decide upon the 'real' owners of country, an expectation which staff find problematic, onerous and inappropriate.

The hearing of land claims under the ALRA by the Aboriginal Land Commissioner is the most common form of arbitration operating within our region. For example, opposing claimant groups in the Palm Valley Land Claim recognise the authority of the Aboriginal Land Commissioner to hear their respective claims and perceive his role to be that of deciding upon the 'true' traditional owners. It is possible, however, that one or more groups will be unhappy with the decision and subsequently rethink or withdraw their acceptance of his arbitral role.

- iii Develop and implement policies in relation to the collection and access of claim material. It is not uncommon for parties in intra-Indigenous land disputes to use anthropological and historical records in support of their claims, or to discredit the claims of opponents. Given that NTRBs conduct substantial archival and face-to-face research with native title holders, it is also not uncommon for one or more parties to seek access to the confidential information, particularly genealogies, which they hold.<sup>9</sup>

Many organisations, the CLC included, operate under a policy that such information belongs not to the organisation, but to those persons who provided it, and other constituents are entitled to have access only those records that directly pertain to them. There are occasions, however, when the provision of information to participants has the effect of minimising disputes - for example, where genealogies show that opposing groups share a common ancestor.

- iv Conduct, or arrange for others to conduct, research establishing the cause/s and background of the dispute, investigating areas of possible common ground and identifying what each group wants. For example, the demand by one group for recognition of its work in 'looking after' country may be reconcilable with the aspirations of another group who want recognition of their authority to 'speak for country'.

- v Facilitate discussions between disputing groups and provide them with opportunities for compromise and cooperation. In claims under the ALRA, it has not been uncommon for competing groups to decide to temporarily suspend public facets of their dispute for the purposes of achieving a common mutual goal (that is, of a successful land claim). This strategy has contributed to the overall strength and likelihood of success of these claims. It is likely to be particularly useful in native title claims opposed by non-Indigenous parties.
- vi Provide separate representation, if required. As soon as an NTRB becomes aware of the intractable nature of a dispute, separate legal and anthropological representation should be provided to each group. This is not currently required by the NTA. The statutory requirement in the ALRA that land councils in the Northern Territory provide separate representation has served to contain disputes, to a certain extent, and ensured that their management remains 'in-house'. One advantage of in-house management is that when hiring consultant anthropologists and counsel, the land council can screen out those who are unnecessarily adversarial, 'fleecing the system', or motivated by other agendas such as attacking Aboriginal rights and interests. Parties requiring separate representation will not, of course, always accept the names of those suggested by the land council.

There have been occasions when Northern Territory land councils have organised separate representation for one group (or, sometimes for more than one) whilst also representing others. Provided land councils are scrupulously fair in their dealings with all groups, and are perceived to be fair, this arrangement is preferable to alternatives in which land councils remove themselves from the process, thereby leaving a void in the coordination and management of the dispute. Finally, it should be emphasised that the provision of separate representation will not necessarily substantially alter the way in which the dispute subsequently develops. This is particularly so where conflict arises just before, or at, legal proceedings, as it did in the Lake Amadeus Land Claim.

### **Conclusion: a plea for cross-fertilisation between NTRBs**

Despite the limits on the ability of NTRBs to prevent disputation, we can and do influence the generation and exacerbation of disputes in a myriad of ways. The dispute minimisation and management strategies discussed in this paper have certainly guided and assisted the CLC in its approach to performing its native title functions. Other NTRBs have no doubt trialled these and other strategies. There is a breadth of expertise amongst staff and consultant anthropologists in dealing with intra-Indigenous land disputes in

a range of contexts and legislative regimes, as chapters in this monograph have shown.

NTRBs are less likely to generate intra-Indigenous disputes and more likely to manage disputes effectively and fairly when we are able to learn from our experiences and those of other organisations; are self-reflexive about the strategies employed and whether they worked or not; and open to new ideas. Concerns about confidentiality may constrain the degree to which their reflections on these issues are made available to other organisations or to the general public, but they should not prevent the process of reflection taking place at all.

### Notes

1. Although much of the CLC Land Tenure Section's work is taken up with intra-Indigenous disputation, this is not reflected throughout the organisation.
2. The CLC is awaiting decisions from the Aboriginal Land Commission as to whether affiliation arising from what is termed in English as 'boring' (or conception site) satisfies the statutory definition of a 'traditional owner'.
3. This is not to deny that mediation *may* be more culturally appropriate than court hearings, increase the likelihood of win/win outcomes and provide claimants with time to prepare their case and manage disputes. Sullivan (1995), however, discusses problems with structured mediation in the National Native Title Tribunal and suggests that claimants are being 'short-changed' by the process.
4. Rose (1994a) raises this in her paper, although intra-Indigenous disputation is not a focus of the paper and the extent to which differing types of knowledge are held by disputing groups is not discussed. See Edmunds (1995) discussion on this point.
5. Attempts to create appropriate native title holder decision-making processes and structures, such as the Rubibi model in Broome, Western Australia, have the potential to ameliorate these problems. To date, however, the Rubibi group is the only one to have received funding for its work. The Aboriginal and Torres Strait Islander Commission has refused to provide funding to research and/or establish Prescribed Bodies Corporate or their equivalents, before a native title claim determination.
6. When choosing consultants, consideration should ideally be given to the formal and practical expertise and experience of candidates, and to gender balance. Experienced low-key consultants who are able to do the job with a minimum of fuss are least likely to generate disputes. It is preferable to engage a female and a male consultant, particularly, but not only, where claim information is likely to involve gender restrictions. Disputes in which opposing parties are based on gender are not uncommon (see Rose (1995) and Burke (1995)).
7. To date, the Northern Territory Government has chosen not to follow the 'future act' processes when dealing with land that is, or may be, subject to native title within CLC's region. This has meant that the CLC has not had to deal with future act s.29 Notices and non-claimant applications, which require an urgent response not conducive to the conduct of substantial pre-lodgment research. The CLC has, however, attempted to monitor 'future acts' within its region.

8. Many of the strategies discussed in the previous section will apply also to the management of disputes.
9. I am not referring here to anthropological or historical reports prepared and distributed to all parties in accordance with 'Practice Directions' issued by the Aboriginal Land Commission or the Federal Court.

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## 14. Multiplicity and complexity: the Goldfields Land Council's native title experience

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*Jeni Lewington, Steven Roberts and Yvonne Brownley*

The Goldfields Land Council (GLC) is the Native Title Representative Body under s.202 of the *Native Title Act 1993* (NTA) for the Goldfields region of Western Australia (WA). The GLC's area of representation extends roughly from Wiluna in the north of WA down to Ravensthorpe in the south and across to the South Australian border (see Figure 1). The GLC's eastern border with the Ngaanyatjarra Land Council is currently being reviewed.

There are a large number of native title claims in the Goldfields region. This chapter will provide an overview of the development of the claim situation in the Goldfields; an historical overview of the region, a discussion of some of the contributing factors to the lodgement of multiple overlapping native title claims in the region; and the GLC's response to this situation. To conclude, we provide a discussion of some of the directions of our research based on our experiences working with the GLC in the past few months.

Firstly, we (Steven Roberts and Jeni Lewington) would like to situate ourselves for the purposes of the paper. We were hired by the GLC approximately four months ago.<sup>1</sup> While the GLC was incorporated in 1985 under the *Aboriginal Councils and Associations Act (1976)*, it received limited funding until 1993 and no native title funding until March 1996. Since then, more substantial funding has made it possible to employ full-time anthropologists and, more generally, equip the GLC to undertake its functions as a Representative Body.

### **The development of native title claims in the Goldfields**

Three native title claims had been lodged with the National Native Title Tribunal (NNTT) over areas in the Goldfields region at 1 March 1995 (see Figure 2). These were the Koara, Maduwongga and Waljen claims, none of which overlapped. During this period, the WA Government refused to recognise the validity of the Commonwealth NTA and was referring land-use applications through the State's *Land (Titles and Traditional Usage) Act 1993*. This State Act purported to extinguish all native title in WA and replaced any native title rights that might have existed with 'rights of traditional usage'.

On 16 March 1995, the High Court handed down its decision in the *State of Western Australia v The Commonwealth*, holding that the WA

legislation was invalid and the NTA was valid, and had been valid since 1 January 1994. In the four months following that decision, a further five claims were lodged over land in the Goldfields, with overlap on two of the claims - Mirning and Ngadju (see Figure 3). Of these five claims, three were so-called 'polygon' claims (Koara 2, Waljen 2 and Maduwongga 2) lodged in response to s.29 future act notices.

In the subsequent 12 months (that is, from June 1995 to June 1996), a further 38 claims were lodged in the Goldfields, including a number of polygon claims, giving a total of 46 claims in the region at 1 July 1996 (see Figure 4). Of the 'non-polygon' claims, there are ten in the north-east region, six in the north-west region, six in the Kalgoorlie-Boulder region, and eight in the southern and coastal region.<sup>2</sup> All of the claims are overlapped to some extent by other claims. At the end of August 1996, there are approximately 370 native title claim applications lodged with the NNTT for all Australia, of which at least 50 per cent are for areas of land in WA. A great proportion of those claims are concentrated in the Goldfields region.

### **Historical overview**

From the first discovery of gold in the region in the early 1890s, to the subsequent influx of settlers, the introduction of new diseases and illnesses, and the expansion of the mining and pastoral industries, colonisation has resulted in continuing and substantial impacts upon the Aboriginal people.

Missionary activity was particularly influential in the region. A number of missions operated, for example, at Norseman, Cundeelee and Mt Margaret. Stanton (1980, 1983, 1984-85, 1988) has written substantially about the Mt Margaret mission which 'attracted Aboriginal families from the fringe camps associated with the nearby mining towns' (Stanton 1983: 160). It also attracted people as it became the main ration depot when other depots were closed in 1927 (Christensen 1981: 110). Later, under legislation, the missions provided a dormitory system for Aboriginal children, where they were provided with education and were introduced to Christianity (Stanton 1983).

Children were brought to Mt Margaret from all over the Goldfields region, and further afield, either by the police or by their parents, who feared that otherwise they might be taken further away to the Moore River Native Settlement (north of Perth), from where they might never be seen again. Through this experience, the betrothal system was discouraged and many marriages occurred which were contrary to the section and kinship system, as young people chose their own partners. Modifications of traditional social organisation occurred in many areas as Aboriginal people adapted to the contact pressures of colonisation. Aboriginal section systems were adjusted (for example, at Mt Margaret and Kalgoorlie) (Christensen 1981), and language changes occurred, as Aboriginal people from different regions came in contact with each other.



Predominantly, claimants today reside in Kalgoorlie or the major towns of the region (for example, Leonora, Laverton and Esperance). Others come from one of the three predominantly Aboriginal communities in the more remote non-urban settings (Mulga Queen, Mt Margaret and Coonana). Many claimants spent time at one of the missions in the region, but still hold strong connections to the country they were raised in before they went to the mission. In many cases they, their children and grandchildren continue to visit such country on school holidays or weekends and also visit relatives in other towns and communities.

Aboriginal people in the Goldfields region today are a diverse and complex group of people reflecting their varied experiences in the region. Many people retain knowledge regarding sites and ceremonies, though the degree of knowledge amongst individuals varies. There is still a large body of research to be conducted to document claimants' relationships to and knowledge of the land.

### **Multiple claims - some contributing factors**

#### *S.29 of the NTA*

Since May 1995, there has been a flood of s.29 notices by the State Government relating to the doing of future acts in the Goldfields. There have been well over 500 such notices relating to mining lease applications, and countless exploration, prospecting and miscellaneous licences. The so-called polygon claims have been responses to such future act notices and enable the native title claimants to secure the right to negotiate over particular lease applications.

#### *The registered native title claimant*

Under s.62(1) of the NTA, claims are lodged by one or more applicants. In principle, they can be made solely on a person's own behalf, but generally are made on behalf of a larger group. Upon registration and acceptance of the claim by the NNTT, one of the applicants is designated the 'registered native title claimant' (s.61(1)(3)). In our experience, the NTA gives this person considerable power. He or she is, for all practical purposes, the 'native title party' to be negotiated with in relation to mining leases and other future act notices.

However, there is a lack of provision within the NTA as it currently stands to ensure that:

- the other claimants on whose behalf the claim is being made are appropriately consulted and fully involved in negotiation or arbitration processes; and
- benefits negotiated and received by the registered native title claimant are distributed to other native title claimants.

This situation contrasts with the specific arrangements which pertain once native title has been determined. Once determination has been made, prescribed corporate bodies will be established with trust arrangements. The secrecy surrounding negotiations and agreements fosters an atmosphere of distrust, jealousy and anger amongst many of the claimants. Claimants perceive that, to benefit from the right to negotiate process, they must be the registered native title claimant and this has led to the lodgement of further claims.

### *Mining companies*

In some cases, conflict has been exacerbated by mining companies who offer special financial benefits to the registered native title claimant only. This has led to the lodging of further claims where the registered native title claimant of the new claim is also listed on another pre-existing claim and often related to people on the previous claim.

With rumours of riches to be made almost overnight, Aboriginal people who have benefited little from regional development in the past sometimes view native title as an opportunity for personal and familial advantage.

### *The claim threshold test*

Since decisions by the Federal Court which have led to the application of minimal tests for the registration of claims (following the Mirriuwong Gajerrong (No. 1) and Waanyi (No. 2) cases), *prima facie* evidence has been sufficient when lodging a native title claim with the NNTT. Substantial research at the 'front end' of lodgment has not been required. The lack of threshold testing has made it easier to make claims.

### *Alternative funding sources*

Following the passage of the NTA (and prior to the GLC being proclaimed a Native Title Representative Body), the Aboriginal and Torres Strait Islander Commission (ATSIC) gave funds to a few Aboriginal groups, some of which engaged private lawyers to develop their claims. The expectation by some groups (and their lawyers) of similar and continuing levels of funding meant that there was no apparent financial disincentive to the lodgment of multiple overlapping claims and has also encouraged claims to be developed without the involvement of a Representative Body.

Some legal firms were prepared to pursue native title claims on behalf of their claimants in the expectation that sufficient funds might be generated from the right to negotiate process to meet their legal costs as well as deliver financial benefits to claimant groups. The involvement of private lawyers, in these circumstances, has also meant that the carrying out of necessary research has been delayed. They have been reluctant to invest money into genealogical, historical and anthropological research unless and until it is required.

## **Goldfields Land Council's response**

As the Representative Body for the region, the GLC has the role to assist in the development of native title claims and to mediate between Aboriginal groups in conflict with one another. The GLC has established a Working Group process which provides an opportunity for claimant groups to resolve their differences.

The Working Group process was initiated in April 1996. There are now four such Groups in different regions of the Goldfields (the north-east; the north-west; the central Kalgoorlie region; and the southern region). The Working Groups are provided with resources from the GLC to facilitate their activities. Each Group comprises two representatives from each of the claimant groups in the region and operates under a set of cooperative principles which may differ from area to area.

For example, it seems that the Working Groups in the north-east and north-west of the region are taking different approaches regarding the organisation of their Groups. The north-east Working Group has adopted a united claim approach, whereas the north-west Working Group has preferred to maintain separate claims to retain particular people's authority over particular regions, while undertaking a cooperative approach within the Group.

The Working Groups provide a forum for representatives from the relevant native title claims in the region to communicate with one another. In the past (and still today in some cases) there are long-standing conflicts between people which preclude discussion. The Working Groups also provide the potential means by which negotiations with mining companies can occur on a collective basis. In the past, mining companies have had to negotiate separately with up to ten different native title groups who overlapped in a certain area.

The process is still in its developmental stage. However, Working Groups are being successfully established and holding meetings, and the process is being supported by most claimant groups. The response from some mining companies has also been quite positive and some are, likewise, attempting to form a united mining company Working Group for the purposes of negotiating agreements.

## **Directions of research**

Firstly, there has been little or no anthropological research for many of the native title claims in the Goldfields so there is a large amount of work to be done (although some claimant groups have hired, and continue to hire, consultant anthropologists to undertake their research). Foremost amongst the research needed is clarification as to the basis on which claimants are claiming native title. From initial research, it is evident that there are various ways people are connected to country (for example, through birth, through their father's, mother's, grandmother's and grandfather's country,

and so on). Claiming country is not limited to any one of these ways. Some claimants appear on more than one claim. For example, they may claim country through both their father and mother which often relates to different regions of country and different claims. It is feasible to have a situation where claimants on numerous claims can 'choose' which claim and kinship ties to support. Further research regarding these issues is required.

Secondly, we are guided in our research focus and priorities by any hearings which are pending for which anthropological research may be required. For instance, there may be research required to object to exploration, prospecting and miscellaneous lease applications. Including mining lease future act notices, the GLC receives between 50 and 100 s.29 notices every fortnight. Due to the volume of such notices, the majority tend to go through unopposed. Any existing native title claimants already registered with the NNTT also receive these future act notices for their respective claim areas and find the volume of notices overwhelming. The notices are often uninformative, as they do not provide enough information for us to identify the claimant group or area exactly without further research. The time and costs involved in doing this would be great. At present, unless registered native title claimants specifically come to the GLC and request that they would like to object to a future act notice, it is impossible for the Land Council to choose which ones to give priority to. We are currently investigating computer mapping packages which could aid our work by identifying the location of these mining notifications.

A third area of GLC operations relates to work area clearances and site surveys which claimants or mining companies request. Through the Working Group process, native title claimants can request that we do such work in a particular region. Such requests also need to go to the GLC Executive Director for approval.

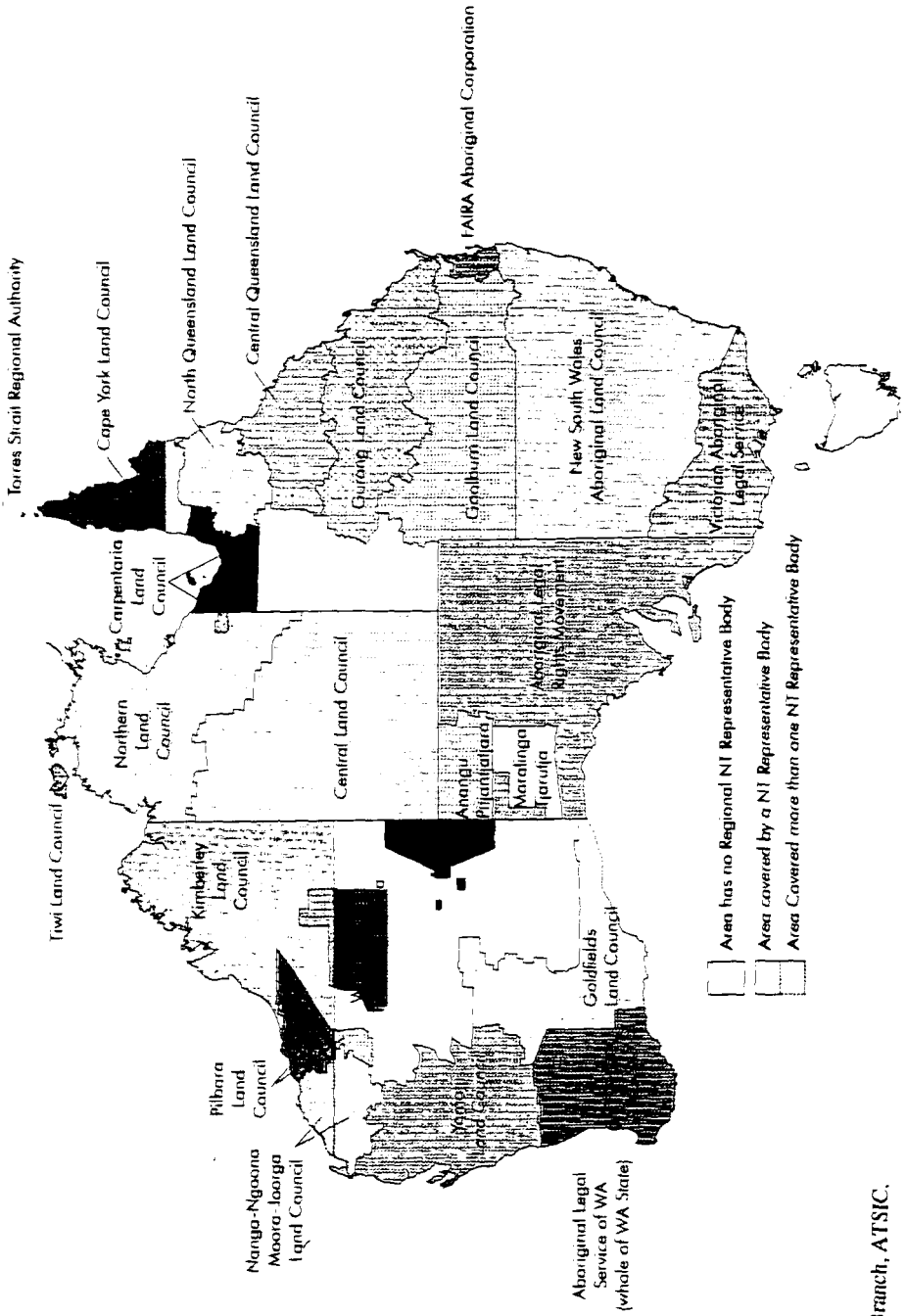
The Working Groups provide the forums where the GLC can raise issues that need to be brought to claimants' attention. For example, one claimant recently wanted to make an objection to a proposed future act on the land she is claiming. We informed the Working Group of her wish to object and sought their approval. This is a slow process, as we often need to wait for the next Working Group meeting (held every two to four weeks) to address the representatives of the claimant groups. However, the process provides a level of transparency which has not been available before, and claimant groups are increasingly more aware of what is occurring with the other claimant groups.

In the event that all the claimant groups in an area decide to lodge one united claim, the GLC will need to consider how to proceed with conducting research for such a large claim. Possibly, we will be assigned to different areas and utilise consultant anthropologists as required.

## **Conclusion**

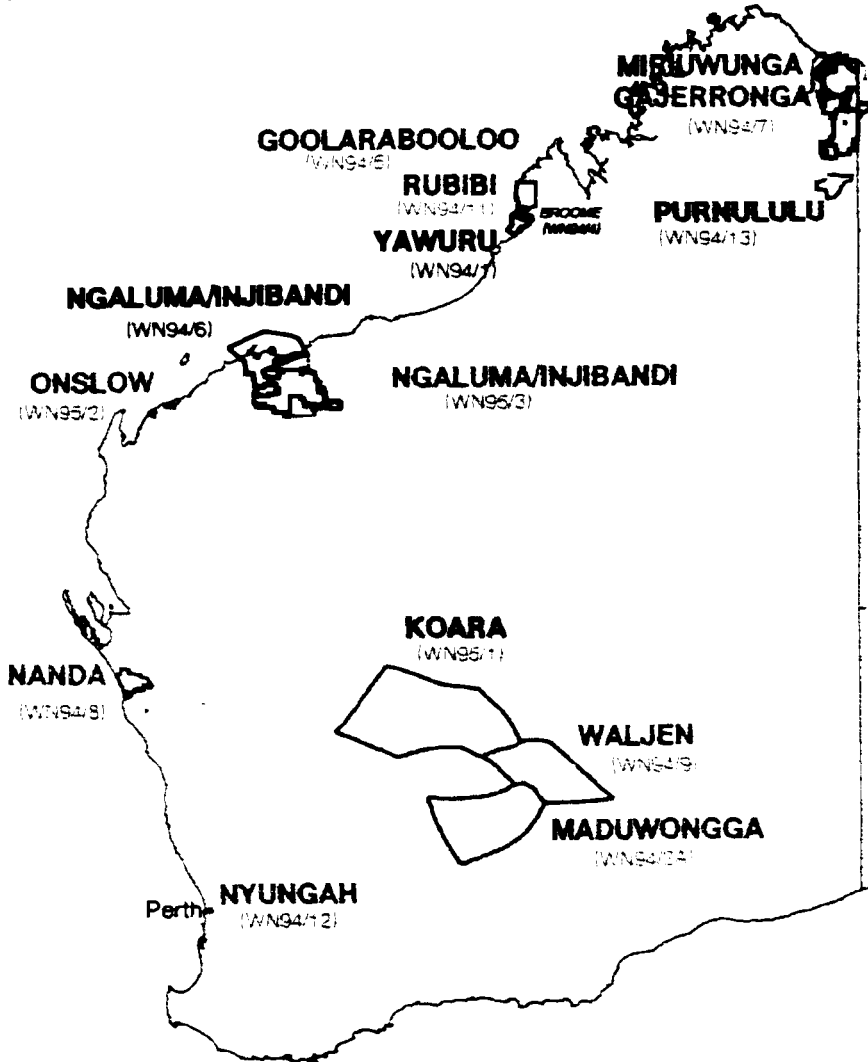
This paper has raised some of the factors which have led to the lodgment of multiple claims in the Goldfields region, the GLC's response to this situation, and some of the issues with which the GLC is involved. The Goldfields region is distinctive because it has such an intense focus on mineral exploitation. For a hundred years, Aboriginal people have been largely excluded from the mining industry in the region. They now wish to be included in all aspects of the management, use and development of their traditional lands in the Goldfields. The Working Group process may provide benefits and enduring agreements which will benefit not only the registered native title claimants, but hopefully all Aboriginal people in the Goldfields.

**Figure 1. Native Title Representative Bodies, at June 1996.**



Source: Native Title Branch, ATSIC.

Figure 2. Native title claim applications in Western Australia, at 1 March 1995.<sup>a</sup>

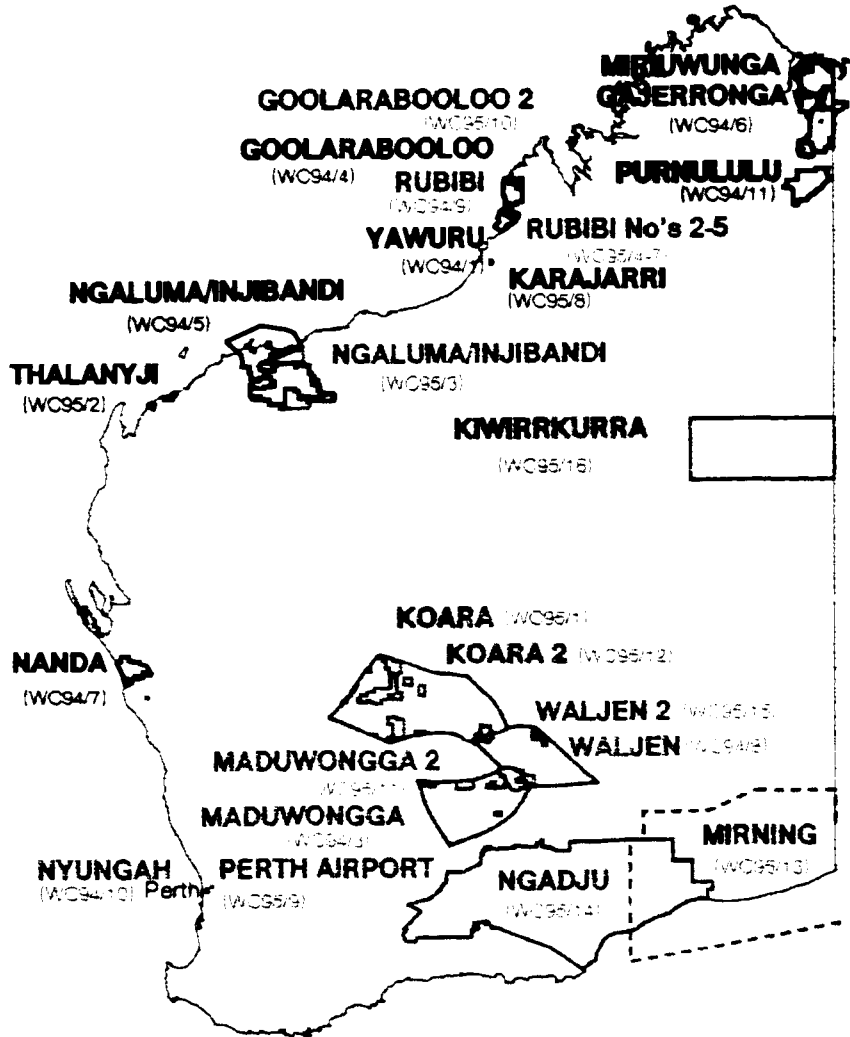


LEGEND			
CLAIMS		NON-CLAIMANT	
LODGED	(WN94/8)	<i>LODGED</i>	(NN94/35)
ACCEPTED	(QN94/8)	<i>ACCEPTED</i>	(SA94/1)
COMPENSATION	(VN94/2)	<i>DETERMINED</i>	(NN94/5)
DETERMINED	(EN94/1)	<i>WITHDRAWN</i>	(QN94/14)
REFERRED TO FEDERAL COURT			

- a. This map depicts only an indicative assessment of the geographic extent of native title claimant applications as at the time indicated. The map does not attempt to identify areas within applications that are excluded from the applications, such as freehold land.

Source: Land Claims Mapping Unit, WALIS, Western Australian Government, PO Box 222, Midland, WA 6056.

**Figure 3. Native title claim applications in Western Australia, at 30 June 1995.<sup>a</sup>**



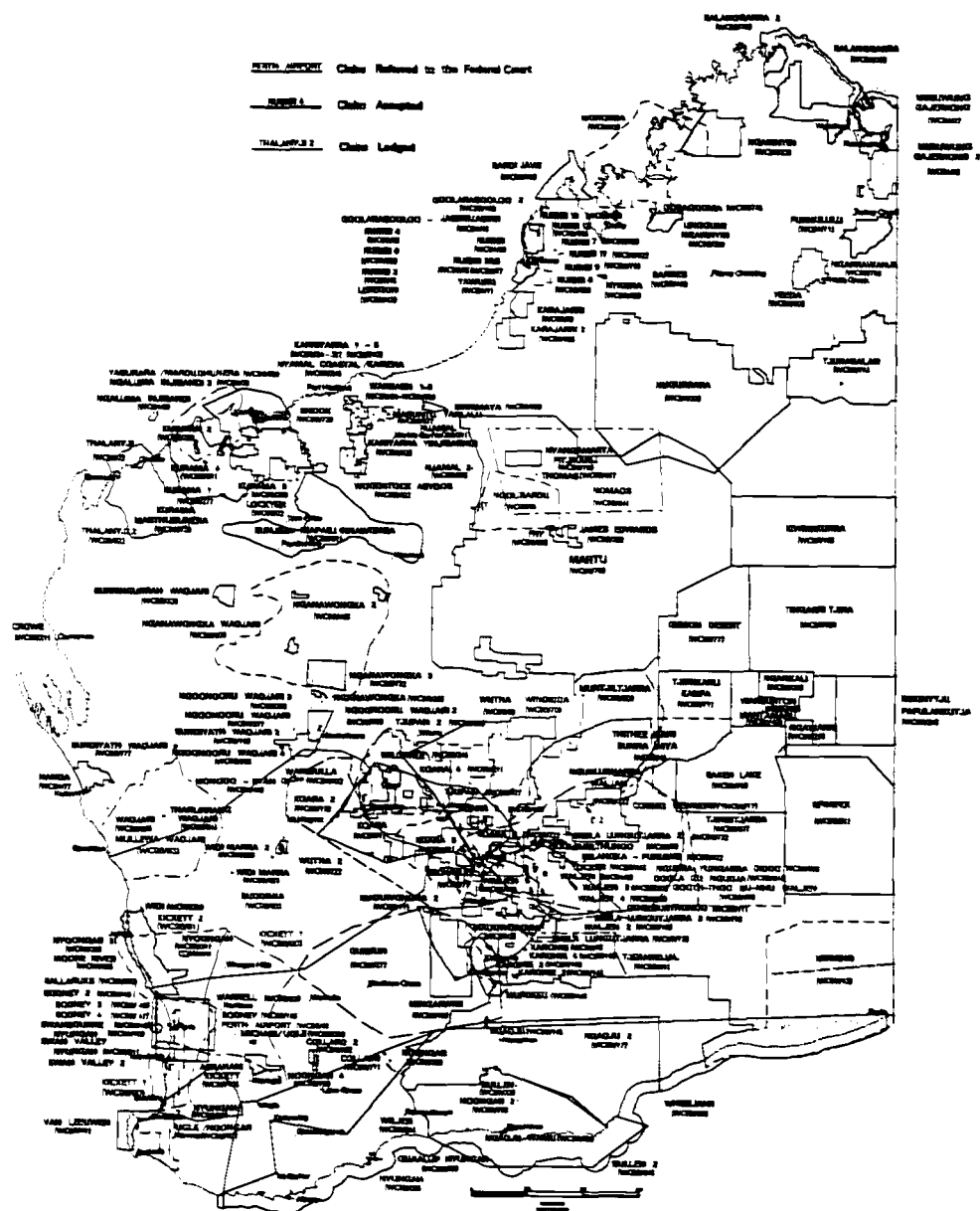
LEGEND	
CLAIMS	
LOGGED	(WC94/8)
ACCEPTED	(OC94/8)
COMPENSATION	(VPA94/2)
REFERRED TO FEDERAL COURT	
DETERMINED	(EN94/1)

a. This map depicts only an indicative assessment of the geographic extent of native title claimant applications as at the time indicated. The map does not attempt to identify areas within applications that are excluded from the applications, such as freehold land.

Source: Land Claims Mapping Unit, WALIS, Western Australian Government, PO Box 222, Midland, WA 6056.



**Figure 4. Native title claim applications in Western Australia, at 1 July 1996.<sup>a</sup>**



a. This map depicts only an indicative assessment of the geographic extent of native title claimant applications as at the time indicated. The map does not attempt to identify areas within applications that are excluded from the applications, such as freehold land.

Source: Land Claims Mapping Unit, WALIS, Western Australian Government, PO Box 222, Midland, WA 6056.

## Notes

1. That is, four months prior to the Australian Anthropology Society workshop held in Canberra, 29-30 September 1996.
2. Since 1 July 1996 a few more claims have been lodged with the NNTT. Hence, the numbers quoted are an approximate guide only to the number of native title claims in the Goldfields area.

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