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Certainty and uncertainty: Native title anthropology in Australia

The promise

Recognition of native title in Australia opened a new chapter in a legislated history that helped define relationships between the state and Australia's Indigenous minority. It was a complex mix of political will, postcolonial idealism and necessity. Its genesis was the High Court's recognition of a right in the famous *Mabo* case.¹ For some at least the *Mabo* decision was seen as a problem. It was understood to throw uncertainty in the way of development by acknowledging in law that there had been prior owners of the Australian continent. Moreover, the rights of these original owners of the Australian continent continued to be capable of recognition by the very jurisprudence that had alienated much of the land upon assertion of sovereignty by the British Crown. Prime minister Paul Keating, in his second reading speech for the Native Title Bill 1993, highlighted the problem, which he also embraced as an opportunity. In the context of the International Year for the World's Indigenous People, the formation of the Aboriginal and Torres Strait Islander Commission and a Labor policy sympathetic to Indigenous needs and aspirations, this was part of the longer-term legislated approach to remedy past wrongs. But there was a difference to previous attempts to afford protection to Indigenous attachment to land or restore rights to alienated country. The

1 *Mabo v Queensland* [No. 2] (1992) 175 CLR 1 (HCA: Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

Native Title Bill was demanded by many as a means to ensure certainty in the face of doubts as to the legal status of land – assumed since first European settlement to be the secure property of the state and foreign settlers. Keating promised certainty in this regard.

Mr Speaker, some seem to see the High Court as having just handed Australia a problem. The fact is that the High Court has handed this nation an opportunity. When I spoke last December in Redfern at the Australian launch of the International Year for the World's Indigenous People, I said we could make the Mabo decision an historic turning point: the basis of a new relationship between indigenous and other Australians. For the 17 months since the High Court handed down its decision, the government has worked to meet this challenge. As well as clearing up the uncertainties of the past, this bill provides for the future – it delivers justice and certainty for Aboriginal and Torres Strait Islander people, industry, and the whole community. It provides for the determination of native title and for dealings over native title land.²

Sites and rights

In Australia, the late 1960s and early 1970s saw an addition to the legislated direction of Aboriginal affairs. As a result of campaigning by some leading academics at the time and a growing awareness of Australia's Indigenous minority and its members' close associations and deep spiritual relationships with country, attempts were made to protect land as isolated pockets of special significance that might be cordoned off and protected. With such 'sites' identified, development could go ahead without impediment and, so it was hoped, would avoid the difficulties that developed from an increasingly aware and vocal minority. Examples of such legislation that remain on the statute books are found in most states and territories,³ sometimes preceded by attempts to vest land in an

2 Paul Keating, Native Title Bill 1993, second reading speech (1993).

3 Australian Capital Territory: *Heritage Act 2004*, *Heritage Objects Act 1991*. New South Wales: *Heritage Act 1977*, *National Parks and Wildlife Amendment (Aboriginal Ownership) Act 1996*. Northern Territory: *Aboriginal Sacred Sites Act 1989*, *Heritage Conservation Act 1991*. Queensland: *Aboriginal Cultural Heritage Act 2003*, *Torres Strait Islander Cultural Heritage Act 2003*. South Australia: *Aboriginal Heritage Act 1988*. Tasmania: *Aboriginal Relics Act 1975*. Victoria: *Aboriginal Heritage Act 2006*, *Heritage Act 1994*. Western Australia: *Aboriginal Heritage Act 1972*. Copies of these laws can be downloaded from www.austlii.edu.au. Source: www.environment.gov.au/topics/heritage/laws-and-notice/indigenous-heritage-laws/protection-under-state-and-territory-laws, accessed 4 January 2017. Many of these Acts amend or replace prior legislation of which the South Australian *Aboriginal and Historic Relics Preservation Act 1965* was the earliest.

Aboriginal Land Trust to ensure its safekeeping for future generations. While site protection legislation mostly placed the onus on the developer to ensure that no damage was done to sites in the path of the work proposed, the legislation was framed with the idea of providing protection for relatively small areas, effectively isolating significant places from their broader spiritual and social contexts. Thus, the 'sphere of influence' of a site, as it was termed in the famous Noonkanbah dispute,⁴ was difficult to define and was often cynically regarded as employed by Indigenous interests in an attempt to stretch the site-based legislation to accomplish political ends.

Site-based legislation endures across the Australian states and territories but its usefulness is limited by its fundamental concept and, of course, by the political will (or lack of political will) to uphold it. For the most part (but not without exception⁵), prosecutions in relation to site destruction have been insignificant, unsuccessful or not forthcoming. Site protection legislation was, in its fundamentals, a liberal, beneficial act of the state to stem or mitigate damage or destruction of culturally significant sites while ensuring that the business of expansion and exploitation of the land and its resources continued relatively unimpeded. The legislation did not confer rights on Indigenous owners or recognise prior ownership – it protected certain things as being culturally important, like other heritage legislation or natural resource legislation, but generally at the discretion of the relevant state minister. It was a useful way forward but did not address the fundamental problem of the neglect of prior rights to country.

What became known in popular discourse as 'land rights' for Australia's Indigenous people also had a long history and provided a far more radical solution than site protection. The term was not always as commonplace as it

4 The Noonkanbah dispute developed as a result of a petroleum exploration company, supported by the WA state government, drilling on an area of cultural significance to the Noonkanbah people of the Fitzroy River valley in the central western Kimberley region of Western Australia. The community strenuously opposed the drilling and blockaded the access road to prevent the company's convoy from reaching the proposed drill site. Police, sent by the state government to accompany the convoy, broke up the blockade and arrested protestors. These dramatic events and those that followed received both national as well as international news coverage. A full account of the Noonkanbah dispute was given by Hawke and Gallagher (1989). These writers stated that I first used the term 'sphere of influence' in relation to the spiritual imbuement of the countryside extending from a focal point when giving evidence to the Mining Warden's Court in Broome in 1978 (*ibid.*, 119). As far as I know, the transcripts of this hearing have not survived.

5 In 2013, OM Manganese was fined \$150,000 for desecration and damage to an Aboriginal sacred site at their Bootu Creek manganese mine on Banka Banka Station, 120 km north of Tennant Creek in the Northern Territory. Aboriginal Area Protection Authority press release, 2 August 2013.

is today. I recall meeting Aboriginal people in the Pilbara in 1973 in relation to my work under the *Aboriginal Heritage Act* of Western Australia – the 1972 state legislation that sought to protect sites across the state. When I made mention of the phrase ‘land rights’, I found it to be an altogether new phrase for those with whom I worked. By the middle of the decade, however, it was seen as a promise of better things to come. But the realisation of ‘land rights’, that is, the recognition of Indigenous rights to land, was initially limited to the Northern Territory. Here it had its genesis in the failed attempt to gain recognition of customary rights to the Gove Peninsula.⁶ Eventually, the federal government initiated legislation in conjunction with the Northern Territory to recognise large areas of Aboriginal Reserve land (so-called Schedule A land) as the property of its ‘traditional owners’, which was given over as fee simple title. Other land had to be won in ‘land claims’, a commissioner being appointed to hear claims, which were heard rather like a court case and adjudicated by the commissioner who made his recommendation to the federal minister responsible.

Some other states and territories also enacted their own land rights legislation. In 1981, the South Australian Government passed the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act* which afforded recognition of Indigenous rights to land of the Anangu Pitjantjatjara Yankunytjatjara people in South Australia, but did not allow others in the state to make claim for rights to country. The *Maralinga Tjarutja Land Rights Act* followed in 1984 and gave recognition of ownership to land that included land adjacent to the former atomic test sites in the Maralinga area of South Australia. In 1983, the New South Wales Government passed the *Aboriginal Land Rights Act* and there was also land rights legislation passed in Queensland (1985 and 1991), Tasmania (1995) and Victoria (1989, 1991 and 1992).

Like site legislation, however, these acts of state and territory parliaments were driven by liberal notions of justice and a desire to attempt to right past wrongs. There was no implicit or explicit acknowledgement of a prior right existing in Australian law that had survived colonisation. Rather, they were beneficial legislated enactments, acts of favour not of right, by seemingly fair-minded governments.

⁶ *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 (NTSC: Blackburn J).

The paradigm shifts

All this was to change dramatically with the case brought by the people of Mer (Murray Island) in the Torres Strait for the recognition of what was termed 'native title' for those who claimed the island, its reefs and waters as their own since time immemorial. The idea that Australia was devoid of owners when the Europeans arrived and started to settle its eastern shores in 1788 was encapsulated in the convenient fiction of *terra nullius*, which means simply 'void country'. The British Crown assumed ownership of the Australian continent because, so it was argued, it belonged to no one else. The Mabo case showed that the title assumed by the Crown was, in fact, burdened by an existing title. The concept of *terra nullius* was wrong in fact and wrong in law. There were owners and they had been dispossessed, a process effected by force of arms, audacity and, eventually, weight of numbers, legitimated by the false assumption that the Indigenous inhabitants did not own land, but rather wandered aimlessly across it in search of food and water. Mabo changed all that. The rights of these owners, in accordance with their laws and customs, in their traditional lands, had in this case, so the High Court of Australia eventually found, endured through the decades of colonial settlement and were still effectual and recognisable in law. Acknowledgment of the reality of native title meant that Indigenous rights to country did not necessarily need to be legislated back into existence by beneficial acts of parliament because on Murray Island at least they had endured. And what obtained in the Torres Strait might equally apply over many other areas of Australia as well.

The Mabo case was brought under common law and potentially laid the way open for other similar actions. While outcomes in the court might be uncertain and might not yield the same result for applicants as it had in the Mabo case, the events relating to a small island in the Torres Strait and the High Court's ruling in that regard had set a precedent that might lock up land for years to come. The resultant uncertainty might only slowly dissolve with a complex, evolving and uncertain jurisprudence. There was an additional problem that developed from the application of the *Racial Discrimination Act* that had been passed into law in 1975. One provision of the Act was to make it an offence to discriminate against a person on the basis of their race. Mabo brought with it the possibility that any grant of an interest in land by the state might, in fact, be burdened by a prior native title right. Thus, the grant might be compromised or invalid. In order that the state might continue to effect its dealings with the land of

Australia over which it had previously exercised an unfettered and assumed sovereignty, there had to be some remedy to this possibility. A legislated framework would allow claims for the recognition of native title, subject to the criteria for proof of continuity of that title since sovereignty by the British Crown. Such an arrangement would allow for certainty in matters relating to grants of an interest in land and so alleviate potential ambiguities that developed from the Mabo decision.

At first some voiced what was to become briefly a popular hysteria: that the sacred Australian quarter acre block upon which the family home was built was now in danger of being appropriated. Miners, developers and pastoralists saw the Mabo decision as a serious impediment to progress and the federal government also no doubt saw this, as well as what prime minister Keating called 'an opportunity'. The 'problem' created by Mabo could be resolved through legislation that provided the framework for the recognition of native title which would provide 'certainty' as well as the basis for 'a new relationship between Indigenous and other Australians'. Unlike the sites protection and land rights legislation discussed above, the *Native Title Act* was an act of necessity, forced upon the government by the Mabo decision. The aspirations of the liberal postcolonial state were not absent from this equation, as the 'opportunity' was an idealised means to improve the lot of Indigenous Australians and the relationship between the state and the original owners of the continent. However, this opportunity would not have been manifest had it not been for the legal and political necessity to enact the native title legislation.

In this regard one legal commentator has remarked:

Statutory land rights, though, do not represent 'native title' in a technical sense: the former is created by parliament while the latter refers to an inherent common law right, the recognition of something already there, with origins not in the authority of the settler state but in pre-existing systems of law and custom. It is the difference between a right and a favour. (Ritter 2009, 3)

Validation and recognition

Given this background it is hardly surprising that the *Native Title Act* was a complex and extremely bulky piece of legislation. The Preamble to the Act stated that the legislation would provide for certainty and for the 'validation of those acts' previously performed by the Commonwealth.

It would also rectify the ‘consequences of past injustices’ and ‘ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire’.⁷ But bolting down the framework for a post-Mabo certainty while furthering a human rights agenda was never going to be a simple process. Running to well over 500 pages, the Act set out a whole range of procedural matters and organisations for the recognition of native title and its subsequent administration. These included issues of extinguishment, proposals to undertake work or development on land subject to claim (known as ‘future acts’), agreements, compensation, corporate bodies that would administer native title if recognised, representative bodies that would progress applications for recognition of native title, the role of the Federal Court and the creation of the National Native Title Tribunal (NNTT).

There was at the beginning an idea that native title recognition could be accomplished through consensus and mediation. The NNTT, as established by the legislation, originally had a key role in this and its members were charged with mediating disputes without recourse to the Federal Court, which was seen as the last resort. The NNTT also served to provide an administrative function, undertook research and provided information and publications relating to native title. The NNTT was responsible for the registration of a claim which provided advantages for claimants in terms of negotiation over ‘future acts’; that is, proposed developments on land subject to claim.

The role of the NNTT was subsequently eroded and, at the time of writing, applications for recognition of native title, while subject to the registration test by the NNTT, are now matters for the Federal Court. Inevitably, then, their progress to determination in favour of the applicant or dismissal is likely to be one of litigation and trial, unless there is agreement between the state or territory and the applicants paving the way for a consent determination.

Hidden in the labyrinthine edifice that was the *Native Title Act* was the definition of native title, which provided the basis in law for what applicants for the recognition of law might have to prove before the court or the NNTT:

⁷ *Native Title Act 1993*, Preamble.

223 Native title

Common law rights and interests

(1) The expression **native title** or **native title rights and interests** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognised by the common law of Australia.

Hunting, gathering and fishing covered

(2) Without limiting subsection (1), **rights and interests** in that subsection includes hunting, gathering, or fishing, rights and interests.⁸

A finding that native title exists (a ‘determination of native title’) is defined as:

whether or not native title exists in relation to a particular area (the **determination area**) of land or waters and, if it does exist, a determination of:

- (a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and
- (b) the nature and extent of the native title rights and interests in relation to the determination area; and
- (c) the nature and extent of any other interests in relation to the determination area; and
- (d) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of this Act); and
- (e) to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease—whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.

⁸ *Native Title Act 1993*, section 223.

Note: The determination may deal with the matters in paragraphs (c) and (d) by referring to a particular kind or particular kinds of non-native title interests.⁹

It was, then, very much a lawyer's piece of legislation and, from the start, a business directed and controlled by the legal process. Unlike the federal government's Northern Territory *Aboriginal Land Rights Act*, the native title legislation did not benefit from close and informed advice from anthropologists. Nor was it a development made in close consultation with Aboriginal people. The popular phrase 'land rights' used in other legislation was replaced by the arcane 'native title rights and interests',¹⁰ which were 'possessed under traditional laws acknowledged and traditional customs observed' by those with a connection to the land (or waters) that are recognised by the 'common law of Australia'. Moreover, only rights that are 'in relation to land and waters' can be native title rights. While 'native title rights and interests' specifically included those relating to 'hunting, gathering, or fishing', there was no attempt in the legislation to accommodate Indigenous systems and criteria of proprietary rights to country as had been the case in the *Aboriginal Land Rights Act*. The legal concept of native title rights and interests did not invite or readily identify issues or avenues for research that were obvious to the anthropological endeavour. There were no terms here that were common to anthropology or, indeed, that recommended themselves as the subject of our research. The critical anthropological issues were going to be ones that were to develop over the ensuing court cases that identified for potential litigants the matters that the courts held essential to the proof of native title. It would require a close working relationship between lawyers and researchers in order that their inquiry would be relevant to the legal processes and court requirements.

9 *Native Title Act 1993*, section 225.

10 The difference between a 'right' and an 'interest' is seldom, in my experience, brought to notice. A right is a legal concept, denoting an advantage or benefit conferred on a person by the rules of a particular legal system (Walker 1980, 1070). Interests, on the other hand, are 'those claims, wants, desires or demands which persons individually or in groups seek to satisfy and protect, and of which the ordering of human relations in a society must take into account. The legal system of a country does not create interests; these are created or extinguished by the social, moral, religious, political, economic, and other views of individuals, groups or whole communities. The legal system recognises or declines to recognise particular interests as worthy of legal protection ...' (ibid., 629). According to this distinction, then, a right is the realisation in law of an interest: a benefit secured into the future of a present aspiration. 'Interest' is defined in section 253 of the *Native Title Act* self-referentially: 'a legal or equitable estate or interest', 'any other right' and a restriction, all in relation to land or water. The phrase 'rights and interests' is common in the native title literature, presumably because of its privileging in the Act. But the two terms are seldom differentiated in practice.

Interests, rights and the Federal Court

It soon became evident that progress for recognition of native title would be neither rapid nor expeditious. The original ideal that claims would be mediated by the NNTT met with limited success and amendments to the Act slowly diminished its role. While the Federal Court has always had a central role in the determination of native title claims under Parts 3 and 4 of the *Native Title Act*, the Federal Court became the principal focus of any applications and was also then responsible for the progress (or lack of progress) of the claims before it. Codifying and giving legal recognition to Indigenous interests in land by defining them as rights was inevitably a matter for the Australian judicial system. There is some irony in the fact that it is now the Federal Court that is responsible for the determination of rights that had previously been regarded by the colonial and more latterly the Australian legal systems as non-existent, consistent with the doctrine of *terra nullius*.

A judge of the Federal Court, Dowsett J, made comment on the centrality of the courts in the process of recognition of native title. He acknowledged that there was common law recognition that Australia's Indigenous inhabitants, in accordance with their laws or customs, were 'entitled as against the whole world to possession, occupation, use and enjoyment' of their lands, subject to prior extinguishment. That proposition, he wrote:

set the course for the development of Native Title in this country ... This led inevitably to the result that disputes concerning the existence and extent of Native Title would be the business of the courts. By virtue of Commonwealth legislation, those matters are now within the jurisdiction of the Federal Court. It is the primary Native Title court.

The judge continued:

It is for the Court to supervise every aspect of each case so as to bring it to trial at the earliest practicable time and to resolve it according to law. That role, in no sense, excludes the possibility, or probability, of the parties reaching agreement. However the Court cannot properly leave the matter to the parties, or to anybody else, to resolve in their own time. The public, as well as the parties, have a clear interest in the speedy resolution of all litigation, including Native Title litigation. (Dowsett J 2009)

The declared fact that the 'court cannot properly leave the matter to the parties, or to anybody else, to resolve in their own time' asserts the status quo. Aboriginal Australians who seek recognition of native title

are committed to be players in a legal process conducted according to alien rules and subject to uncertain outcomes in terms of gaining legal recognition of a native title right. It is true that native title law remains rooted in the recognition of prior right. However, the codification of that common law right into a legislative form, justified on the ground of providing ‘certainty’, has emasculated the ability of potential rights holders to gain recognition of those rights within the very system that was responsible for their first (and eventual) recognition under the common law of Australia.

The concept of native title in Australia brought with it the notion of continuity and discontinuity. Native title was capable of recognition only where there was a continuing system of laws or customs to support it. Moreover, native title had not survived the colonial settlement unscathed. Indeed, acts by the settlers and their legislators had emaciated the native title of Australia’s Indigenous and original owners. Thus, native title was understood to exist where it had not been extinguished – that is, freehold and some leasehold and reservations for particular purposes rendered native title gone. Consequently, the family home was safe for the majority of Australians whose land was held as freehold, a fact that slowly cooled the initial hysteria over claims being made to people’s backyards. Native title had survived on what was called ‘Crown Land’ that had not been granted by the state for any particular purpose and co-existed on most pastoral properties and some reserve land.

In time it became apparent that the *Native Title Act* did not confer land rights on Australia’s Indigenous minority but rather set a relatively high bar for them to attempt to prove that their rights had not been extinguished or languished into oblivion. This had implications for how the claims, or applications for the recognition of native title, would be run. Apparent surrender of rights that had been assumed by parties who had since the time of sovereignty believed them to be unencumbered was not going to happen without a fight. Principal amongst the opponents of native title were those who considered they had most to lose from loss of rights to non-extinguished land – the states, the mining interests and the pastoralists. Under section 84(4) of the *Native Title Act* the states or territories were automatically a party to a proceeding, unless choosing not to join the matter. The Commonwealth was also entitled to intervene (section 84a). This meant that the role of the states and territories in court hearings was of fundamental importance and they took their role seriously, claiming they had a duty to challenge native title applications made with respect to land within their jurisdiction.

Most set up a review process to gauge ‘connection’ and so took the lead in evaluating claims, a role they have sustained. ‘Connection Guidelines’ were written with a view to providing guidance as to how connection materials should be presented. In this way, states and territories also became a *de facto* judiciary dictating the terms whereby a claim might be considered settled by ‘consent’, and if states or territories accepted ‘connection’ it was likely that other respondent parties would too. The object of this quasi-judicial evaluation was the evidence of the claimants, to the extent that it could be presented via affidavit or other ‘connection’ material as well. The views of the applicant’s anthropologist were set out either as a connection report (to reflect the ‘Connection Guidelines’) or as an expert report, a manifestation of a court process relating to expert witnesses and forensic anthropology. This too was subject to scrutiny and evaluation. At least one Federal Court judge has been critical of this approach, finding that the states have at times assumed a judicial role that was never intended for them in the *Native Title Act*.¹¹ The assumed role might have the potential to prejudice the role of the Federal Court in the determination of native title, as set down in sections 87 and 87a of the Act. Anthropologists were not only operating in a highly contested field, but according to rules and conventions that lay far from their academic comfort zone.

Statistics on the numbers of outstanding claims are out of date almost before they have been garnered from the internet in a publication of this sort. However, the reader can check the statistics for him or herself at the time of reading this chapter at the NNTT website,¹² although web addresses seldom stay valid for long. By way of providing some idea of the situation, I have collected some data published by the Tribunal in November 2011 and compared it with similar figures published in June 2014 and again in January 2017. The table below shows these figures set alongside each other for comparative purposes.

11 ‘The power conferred by the Act on the Court to approve agreements is given in order to avoid lengthy hearings before the Court. The Act does not intend to substitute a trial, in effect, conducted by State parties for a trial before the Court. Thus, something significantly less than the material necessary to justify a judicial determination is sufficient to satisfy a State party of a credible basis for an application.’ North J in *Lovett on behalf of the Gunditjmarra People v State of Victoria* [2007] FCA 474 [37] to [38]. See also North J in *Hunter v State of Western Australia* [2009] FCA 654 [22] to [25].

12 The website current at the time of writing was www.nntt.gov.au/Pages/Home-Page.aspx, with a link to ‘Statistics’ on that page. However, the categories of the statistics provided by the Tribunal have changed over the years.

Table 1.1: Claims lost and won, 2011 to 2017

	November 2011	June 2014	March 2017 ¹
Active native title applications	485	412	316
Finalised applications: native title determined in whole	66	92	315
Finalised applications: native title determined in part	65	142	
Finalised applications: no native title	41	59	63
Finalised applications: discontinued, struck out, dismissed, withdrawn, rejected or pre-combination	1295	1125	

¹ While the NNTT provides statistics available through its website, the categories for which data are provided are not consistent with past data sourced from the same site. Thus in January 2017 finalised applications for recognition of native title in whole are not disaggregated from finalised applications for recognition of native title in part. Data for applications discontinued, struck out, dismissed, withdrawn, rejected or pre-combination are not available.

Source: National Native Title Tribunal: www.nntt.gov.au.

In a period of just over two-and-a-half years between November 2011 and June 2014 the number of 'active' claims was reduced from 485 to 412, which is a reduction rate of approximately 30 claims per year. For the period of just over two-and-a-half years between June 2014 and January 2017 the number of 'active' claims was reduced from 412 to 316, which is a reduction rate of approximately 38 claims per year. Assuming that this increased rate of progress is sustained, it will be another eight or so years before all claims are finalised. Claims determined in whole or in part by January 2017 amount to 314, or a little over 14 a year for the 23-year period since the Act came into effect. The failure rate represented by the row 'Finalised applications: no native title' indicates only those applications that were not accepted by the court, indicating perhaps that should a claim go to court it has a reasonable chance of success. This is probably because lawyers are reluctant to expend the enormous funds required to bring a case to trial unless they consider they have at least a reasonable chance of success. The seemingly high figures of 'finalised applications' are variously described as 'discontinued, struck out, dismissed, withdrawn, rejected or pre-combination', being applications removed as a result of court decisions, technical problems or combining existing claims into a single new claim. Whatever the reason, these claims are not those that resulted in a positive determination of native title. This gives some indication of the complex web of the legal process and counter process that typifies much native title dealing in the court. This statistic is not available in the 2017 listing.

However these figure are read, it seems most likely that native title will exercise the attention of the Federal Court, the NNTT, Indigenous representative bodies and all the lawyers as well as the anthropologists who service them for some time to come yet.

The native title we had to have

In the initial essentialities that accompanied the decision of the High Court in *Mabo*, there was no necessary compassion or the conferral of the benefit of doubt. The finding of a native title right to Murray Island was a truth born of the common law and a matter settled according to the facts as the court had found them, subject to the rules that govern the Australian legal and judicial process. The consequential ‘uncertainty’ that accompanied this landmark decision drove the matter into the political domain. The ambiguities that faced the Keating government of 1992–96 gave them little choice. The fundamentals of British sovereignty and Australian dominion had been challenged by the *Mabo* decision. Prospective common law claims threatened the status quo while application of the *Racial Discrimination Act* meant that grants of land might be invalid or compromised. The final form of the *Native Title Act 1993* that passed through the parliament was a product of the political environment of the time. It was, as one legal commentator has it, a:

product of petitioning, alliance-building, negotiation and compromise that in the end and for diverse reasons was supported by Labor, the minor parties in the Senate, most Aboriginal leadership, the Labor-held state governments and the National Farmer’s Federation, but opposed by the Liberal and National parties, the Minerals Council of Australia, the states held by the centre-right and the government of the Northern Territory. (Ritter 2009, 5)

The legislation reflects the truth of Otto von Bismarck’s reputed comment that ‘laws are like sausages – it is best not to see them being made’. Like many terms of settlement, this was the last act of war rather than the first act of peace. Legislative amendments have continued that war of attrition. The state, territories and representatives of mining interests and primary industry are accepting of the legislation because it is now accommodating of their interests and, some would argue, loaded in their favour. This is why there is now but muted discussion of any further amendment and no political will on either side of the political divide to

discuss native title law. Subsequent acquiescence to the state's demands for connection, substantial amendments, and the ever changing and seemingly compromised jurisprudence, now make this law that prescribes uncertain outcomes. For claimants, the way that involves least risk of failure is achieved through mediated agreements: deals done with the state as a result of their benefaction, indulgence and the granting of favours. This may also mean significant compromise and loss of rights, just as has been the case with many other acts of favour that have sought to protect, bestow advantage or right past wrongs.

Adding the anthropology

I have set out this brief potted history of the development of native title in Australia in the context of its legislative and political origins because it represents a field of inquiry that has significant keynotes. Native title is a perverse and conflicted field noted for its complexity and professional pitfalls. For anthropologists it brings immediate contact with much that is alien and the risk of damage and harm. This field of endeavour represents significant challenges for the practice of anthropology. After the initial and, with the benefit of hindsight, misplaced enthusiasm on the part of anthropologists for involvement in native title, the decisions of the Federal Court started to make their mark. I think it is fair to say that, for some of us involved in those early native title applications, we regarded the venture as being little different to claims made under the Northern Territory *Land Rights Act*. This was certainly true for aspects of the Miriuwung and Gajerrong¹³ native title application as advanced in the Northern Territory portion of the claim. The court was not hostile to the aspirations of the Indigenous witnesses and the anthropology was fairly basic. However, the failure of the Yorta Yorta case, then Wongatha case,¹⁴ and the later dismissal of the Jango compensation case¹⁵ were sobering reminders of the complex nature of native title claims, their dangers, pitfalls and the vulnerability of anthropologists and claimants in the process. For anthropologists, to be involved in a native title proceeding is to be involved first and foremost in a legal context, boxed in by a legislated

13 *Ward v Western Australia* (WCD2006/002–Miriuwung Gajerrong #4), WAD124/2004. Determined 2006, FCA 1848.

14 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (HCA); *Harrington-Smith on behalf of the Wongatha People v State of Western Australia* (No. 9) [2007] FCA 31.

15 *Jango v Northern Territory of Australia* (2006) 152 FCR 150 (FCA: Sackville J).

framework and subject to a judicial process. If an application ends up at trial, the anthropologist becomes a witness and subject to lengthy and at times disconcerting cross-examination. The *Native Title Act* and the developing jurisprudence that has emerged over the two decades since 1993 is one replete with non-anthropological concepts and definitions. It is as though there is now a whole new vocabulary that anthropologists must learn when researching and writing native title, which must then be accommodated within the theoretical and epistemological framework of the discipline. Thus, phrases like ‘laws and customs’, ‘rights and interests’, ‘substantially uninterrupted’, ‘normative system’ and words like ‘society’ and ‘continuity’ gained technical legal meanings that were not always amenable to anthropological analysis or even identification. To do native title anthropology was to attempt to straddle a divide between the law and the discipline – a divide that appeared to become bigger as the case law evolved (Glaskin 2017, 84–85).

Despite these difficulties, I think that it was never a realistic option to exclude anthropologists and anthropology from the native title process. At the heart of the proof of native title was the ability of the law to recognise an Indigenous system of law. The system whereby rights to country had been sustained and perpetuated in times past had been the subject of much anthropological analysis in Australia, particularly since the late 1950s. The academic contributions in this field, which I will discuss in later chapters of this book, were influential in both the Gove case and the drafting of the Northern Territory land rights legislation that followed. That stated, understanding how an Indigenous system of rights to land worked as both a religious process and a political undertaking was complex and likely not to have been uniform across the continent. Native title inquiry demanded a proper understanding of the particulars of this system relevant to the application area in question. Anthropology provided some insights that aided a gaining of this understanding. However, it was an understanding that had to accommodate the requirements of the *Native Title Act* and the constraints of the Australian legal system and the jurisprudential heritage from which they were descended. It was not and could not be simply a scholarly enterprise that sought to comprehend an Indigenous system that was part of another culture through the lens lent to it by the discipline of anthropology.

This disjunction was compounded by the sheer difficulty of the requirements of the burden of proof laid upon the applicants. For native title to have survived, it had to be demonstrated that the laws and customs

of the relevant group or society had remained substantially intact since sovereignty. This back-dating of the evidence meant that anthropologists had to attempt to recover past systems and social formations. The only way to do this was to explore the diaries of early explorers, the journals of early European settlers and comb the later works of the early anthropologists. These, so it might be argued, recorded at least some aspects of the customary systems. Anthropologists generally work with the present and observe what goes on around them, rather than attempt to work out how things might have been in former times. The task, then, for anthropologists was challenging and was one for which the profession was largely unprepared. There was no obvious heuristic framework and little theoretical underpinning that would assist the manner in which these tasks might be accomplished. Yet, it became clear as native title progressed that the court would expect anthropologists to set out their views in this regard with authority and submit to rigorous testing through cross-examination in the witness box.

Native title as the recognition of a prior right is inevitably subject to dispute. Such contestation is not limited to debate between the state and Indigenous Australians, but extends to disputes between parties, including Indigenous groups, who are not in agreement as to who should be recognised as holding the native title right or being included in the group that is recognised ultimately by the court as doing so. This has led to overlapping claims and disputes between Indigenous parties that find their ultimate expression before a judge of the Federal Court. Being an anthropologist in the crossfire that typifies these disputes can never be expected to be a rewarding or welcoming experience. This contested environment is also one deeply informed by Indigenous values, systems and ways of holding rights to country that are subject to scrutiny by the court that seeks to determine whether they have endured, fundamentally unchanged, since the time of sovereignty.

Finally, and perhaps no new thing for the profession of anthropology, the development of native title opened up old wounds in the profession between the academy and those involved in the practical application of the discipline, often referred to as ‘applied anthropology’. Practitioners in the native title field were accused¹⁶ of prostituting their profession in

16 See Trigger 2011, 235–240 for a review of criticisms of applied anthropology advanced by a number of anthropologists including Bastin and Morris (2004), Cowlishaw (2003, 2010), Kapferer (2000), Lattas and Morris (2010a, 2010b) and Morris (2004).

favour of a legal system that determined outcomes, defined research practice and paradigms and narrowed the field of inquiry and, so the argument ran, the subsequent advancement of knowledge. Some said that applied anthropologists were complicit in imperial hegemonic process. While this is not a matter I tackle in any detail in this book, it is nonetheless an additional complexity in the anthropological endeavour and one which has coloured debate and no doubt influenced those considering a career in applied anthropology in native title work in Australia.

An ensuing defence in the literature characterised the involvement of anthropologists in the native title process – as well as in earlier times in the *Aboriginal Land Rights Act* – as legitimate applications of the discipline (Morphy 2006). Trigger (2011) provided a summary of the applied anthropology debate and refuted derogatory views about applied anthropology, particularly in native title contexts. He argued that rather than diminish anthropological clarity and focus, communicating findings to members of different professions and disciplines made for a better discourse and removed anthropologists from their ‘intellectual comfort zone among colleagues’ (ibid., 245). Sackett, an anthropologist with many decades of experience in the applied field, recognised in his native title work a requirement to base conclusions of facts transparently stated so that ‘persuasion flows from opinions based on proof, not artful footwork’ (2006, 7).

This is a book about the uses of anthropology in native title claims in Australia. The complexities and challenges I have outlined above raise issues for our practice and counsel the development of methodological and theoretical approaches to our inquiry. Some of these are novel while others may require a difference in emphasis and a reassessment of focus. The discipline needs a better tool kit to undertake complex research in difficult and overly fraught environments. The series of essays that follow examine some of the more important of the issues I have identified over the years of my practice as a native title anthropologist. Given the inherent complications, the seemingly alien operating environment and the potential to get burnt in the process, it is not a field for the faint-hearted. However, if anthropology is to be useful, then it also has to be relevant. It is my hope that what follows will contribute to some extent to the furthering of this need.

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