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The society question¹

Of proof and process

In native title cases an anthropologist is generally asked to bring data to bear on a legal proposition (though usually more than one) relevant to the points of claim and provide an expert opinion developed from field data, prior ethnography or perhaps the paradigms of the discipline more generally. This is not inimical to the orthodox practice of anthropology but it is both more narrowly defined and focused. Consequently, this is not the same as undertaking an anthropological study ('doing anthropology'), which is more open ended and may have an indeterminate destination, being variously a study of process or structure, change and meaning or a combination of two or more of these. Given that the understandings of a culture that develop from 'doing anthropology' are likely to be relevant to the opinions required by the lawyers, it is helpful to come to an understanding of the structural relationship between anthropology and the law. While the application of anthropology to the legal matter develops from the doing of anthropology, the two represent distinct fields of operation, with different parameters and theoretical underpinnings. In understanding this, we can come to an appreciation of the reasons why there may appear to be disjunction between 'doing anthropology' and the use of skills developed in that discipline to provide opinions to a court that will have status as expert testimony.

1 An earlier version of this paper appeared as Chapter 9 in Lisa Strelein's *Dialogue about land justice* (Aboriginal Studies Press, Canberra, 2010). It has here been revised, updated and expanded.

Getting involved with native title anthropology is, then, not simply about learning the process or developing an appreciation of the jurisprudence that defines the questions that we should address. It is also about understanding the nature of the interface between anthropology and the law and the ramifications that develop as a result of fundamental epistemological differences between the law and anthropology. The dissonance between anthropologists and the application of their science in native title inquiries develops from differences between the characteristics of the former and the demands of the latter. At the heart of this difference is the nature of the process whereby anthropologists seek to describe and understand social process (relationships, meanings) and a legal process that seeks evidence (testimony, statements, expert views) to support or deny that a particular criterion or requirement has been met. The former sees social process as occurring through time and defies absoluteness; the latter tests propositions at a point in time and requires a concluded view. The former stresses change and mutability, the latter stasis and immutability. It follows, then, that the gathering of data and comprehending them as social science, on the one hand, and meeting the requirements of the legal system with respect to the uses of anthropology as expert opinion in native title inquiries, on the other, are quite different activities.

The juxtaposition of law and anthropology is nowhere as immediate as when respective practitioners are required to develop an understanding of words that have attracted a special privilege, status and consequential meanings in both discourses. One example is the use of the terms ‘society’ and ‘community’. These are both legal terms (derived, in this case, from native title law but not statute) that are fundamental to jurisprudential thinking. They are also terms of anthropology. The words and the ways whereby they come to have different meanings provide a point of departure for this chapter. I consider below how anthropologists might best accommodate terms that are words of law rather than of anthropology, while bringing their anthropology to bear on the subject at hand.

Native title society

In native title inquiries, the term ‘society’ has a meaning that is determined by jurisprudence rather than anthropology. The decision of the High Court with respect to the application made by members of the Yorta Yorta Aboriginal community provides the usual reference point for discussion of legal ideas about the centrality of a society to the concept

of the perdurance of native title rights.² It also raises critical issues about the nature of the society, as required for native title law, at sovereignty, and a consideration of the relationship of the society at sovereignty to that of the claimants.

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

If that normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist. And any later attempt to revive adherence to the tenets of that former system cannot and will not reconstitute the traditional laws and customs out of which rights and interests must spring if they are to fall within the definition of native title.³

The judgment then sets out how the relationship between laws and customs and the society is to be understood:

To speak of rights and interests possessed under an identified body of laws and customs, is, therefore, to speak of rights and interests that are the creatures of the laws and customs of a particular society that exists as a group which acknowledges and observes those laws and customs. And if the society out of which the body of laws and customs arises ceases to exist as a group which acknowledges and observes those laws and customs, those laws and customs cease to have continued existence and vitality. Their content may be known but if there is no society which acknowledges and observes them, it ceases to be useful, even meaningful, to speak of them as a body of laws and customs acknowledged and observed, or productive of existing rights or interests, whether in relation to land or waters or otherwise.⁴

The judges of the High Court found as a consequence that in a native title proceeding:

it will be necessary to inquire about the relationship between the laws and customs now acknowledged and observed, and those that were acknowledged and observed before sovereignty, and to do so by considering whether the laws and customs can be said to be the laws and customs of the society whose laws and customs are properly described as traditional laws and customs.⁵

2 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

3 *ibid.*, [47].

4 *ibid.*, [50].

5 *ibid.*, [56].

The ‘society’ provides the medium for the articulation of the relationship between the people and the laws and customs of that group. There is, then, a nexus between the ‘society’ and the laws and customs of its members.⁶ An implication of this is that if the society ceases to exist then its laws and customs, while they might be recalled, are not meaningful.⁷

Law and custom arise out of and, in important respects, go to define a particular society. In this context, ‘society’ is to be understood as a body of persons united in and by its acknowledgment and observance of a body of law and customs.⁸

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

The concept of a ‘society’ in existence since sovereignty as the repository of traditional laws and customs in existence since that time derives from the reasoning in Yorta Yorta. The relevant ordinary meaning of society is ‘a body of people forming a community or living under the same government’—Shorter Oxford English Dictionary. It does not require arcane construction. It is not a word which appears in the NT Act [*Native Title Act*]. It is a conceptual tool for use in its application. It does not introduce, into the judgments required by the NT Act [*Native Title Act*], technical, jurisprudential or social scientific criteria for the classification of groups or aggregations of people as ‘societies’.⁹

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

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

6 *ibid.*, [49].

7 *ibid.*, [50].

8 *ibid.*, [49].

9 *Northern Territory v Alyawarr* [2005] 145 FCAFC135 [78], quoted in *Griffiths v Northern Territory of Australia* [2006] FCA 903 [513].

As stated above, the Yawuru claim is a claim for communal native title rights and interests as it is claimed to be made on behalf of a community of people, namely the Yawuru community as defined in the application. The Yawuru claimants, relying on *Members of the Yorta Yorta Aboriginal Community v State of Victoria* [2002] 214 CLR 422 ('*Yorta Yorta*') at 439 [29], 444-445 [47] and 445 [49], claim that the Yawuru community is a body of persons united in and by its acknowledgment and observance of a body of traditional laws and customs. Those traditional laws and customs are said to constitute the normative system under which the rights and interests claimed are created.¹⁰

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

In 1838 there was an established Aboriginal society close to the western boundary of the claim area (Glenelg River). It was an organised society, the members of which built structures and adorned their environment with paintings including Wanjina paintings, made artefacts of wood, and used stone to crush and grind seeds and to shape into spearheads.¹¹

In native title law, according to one authority, 'society' is chosen over 'community' because the former serves to emphasise 'this close relationship between the identification of the group and the identification of the laws and customs of that group'.¹² Presumably this differentiation is drawn from the ordinary English use of the terms, rather than from anthropology. Conversely, anthropologists might use the term 'society' for larger, complex groupings – I provide some general examples of this in the next section. The term 'community' is sometimes used for smaller groups characterised by closer social ties and interaction and the typical subject of anthropological inquiry.¹³ The point is simple. Legal meanings and those of the social sciences show no automatic correlation.

In summary, there is a consistent legal view that a community has to be recognisable, because the laws and customs (the normative system) of its constituents unite members through joint or common observance. While

¹⁰ *Rubibi Community v State of Western Australia* (No. 5) [2005] FCA 1025 [18].

¹¹ *Neowarra v State of Western Australia* [2003] FCA 1402 [61].

¹² Strelein 2009, 101.

¹³ An example is a paper by S. Holcombe (2004, 163–184). The author shows that the term 'community' has a 'deep genealogy' in the social sciences.

it is not stated, it would be a reasonable assumption that those people who did not share these laws and customs, but observed others, would constitute a different society or community.

The identity of the pre-sovereignty claimant society is thus of fundamental importance to any consideration of the continuity of laws and customs, rights and interests. Getting to grips with the idea of a ‘society’ in a native title claim is then an essential first step in planning the way in which the case is to be presented and adjudicated. Strelein has commented:

The need to establish a coherent and continuous society defined by a pre-sovereignty normative system creates enormous ambiguity in the requirements of proof. The nature of the group has emerged as a fundamental threshold question for native title claimants. The High Court’s deference to the views of the trial judge in *Yorta Yorta* demonstrated the vagaries of an assessment based to a significant degree on a judge’s perceptions of the group. ... Native title claimants must rely on the ability of a non-Indigenous judiciary to conceptualise the contemporary expressions of Indigenous identity, culture and law as consistent with the idea of a pre-sovereignty normative system. (Strelein 2009, 80)

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

While the jurisprudence has moved toward a broader rather than a narrower understanding of how a society might be constituted and manifest, the native title society remains a starting point when defining the customary content of the claimants in any native title application. In this a good starting point is to consider a society for the purposes of a native title claim as being ‘a body of persons united in and by its acknowledgment and observance of a body of law and customs’. While, as I noted above, the terms ‘society’ and ‘community’ are often used interchangeably, it is best to pick one and stick to it, examining the facts to see if the members of an applicant group can be shown, on the ethnographic evidence, to recognise the mutual observance of laws and customs and adhere to a common normative system. Members of a society should be shown to have an internal correlation of laws and customs such that its members can be understood, in the common sense

of the word, to be members of a single ‘society’. It is not necessary for a member of a society to know all other members of that society or to expect to interact with all others. Neither is it necessary for all members of a society to live in peace and harmony, since the sharing of laws and customs does not mandate concord. Constituent groups of a native title society may exhibit different cultural traits – including speaking a different language or dialect – and occupy or are customarily associated with distinct areas. This is a matter that has been subject to some debate by anthropologists (e.g. Palmer 2010b) and is a fundamental question for native title (Strelein 2009, 80, 98). In 2010, judges of the Federal Court¹⁴ considered some of those aspects of ‘law and culture’ that had been held to provide grounds for concluding that the Bardi and Jawi constituted separate societies. These included such things as language (dialects),¹⁵ self-referential terms,¹⁶ country of association¹⁷ and the circumstances of each native title application.¹⁸ The judges concluded:

Thus, in our judgment the linguistic evidence, the evidence of distinct territories or the existence of self-referents was not sufficient to displace the inference from the wealth of other evidence that the Bardi and Jawi people were a single society at sovereignty.¹⁹

The judges make reference to a number of other cases where this broader view of a society has been accommodated.²⁰

In a more recent decision,²¹ Finn J wrote that the evidence supported the conclusion that groups inhabiting the Torres Strait islands comprise a single society. His Honour likened the body of laws and customs (following the anthropologist Professor Beckett) to a quilt of united parts.²² His Honour recognised there to be a relationship between the operation of the component island groups.

14 *Sampi on behalf of the Bardi and Jawi People v State of Western Australia* [2010] FCAFC 26.

15 *ibid.*, [68].

16 *ibid.*, [69].

17 *ibid.*, [69].

18 *ibid.*, [71].

19 *ibid.*, [75].

20 *ibid.*, [72] to [74].

21 *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland* (No. 2) [2010] FCA 643.

22 *ibid.*, [490].

The laws and customs which regulate the internal (or 'domestic') workings, relationships, etc. of each island community largely replicate those of other communities though not entirely or in all respects. The communities themselves are linked each to the others not only by these largely common 'domestic' laws and customs, but also by common laws and customs which govern the relationship of one community's members to the members of another, both within and beyond the former's own land and waters.²³

Societies are often made up of component subsets that may also need to be identified in native title anthropology and it is important not to conflate the parts with the sum of the parts. Thus, the term 'group' may serve to identify any component subset of the society.

Anthropological society

Social scientists in Australia have used the terms 'society' and 'community' without specialist sense to mean a set of people who can be grouped together because of shared cultural attributes. For example, the term has been used in the title of a few books and articles that examine Aboriginal topics. Ken Maddock had *A portrait of their society* as a subtitle to his 1974 book *The Australian Aborigines* (Maddock 1974). C.D. Rowley (1980) wrote a classic account of *The destruction of Aboriginal society*. More recently, Ian Keen (2004) has used the term 'society' in the title of his book *Aboriginal economy and society* as well as from time to time in the text without defining it. It is not included in his glossary of terms. However, the meaning is, to my mind, evident from the context (*ibid.*, 2–5).

The term 'society' as used in the examples cited above provides, then, a useful concept rather than a specific one. It has the facility to convey a meaning that implies a group of people who together have things in common. This might include cultural practices, language and beliefs. However, it does not provide for a very tight or exact definition of what might be meant and therein lies its usefulness perhaps for those who have chosen to use it. Should this use be not understood for the shorthand it probably is, the use obfuscates important distinctions in the way anthropology understands the nature of social groups.

23 *ibid.*, [490].

Generally, a ‘society’ for an anthropologist is not a ‘thing’ but comprises sets of relationships (Beattie 1964, 34–35). Beattie counselled that thinking of ‘society’ as a thing, like a frog or a jellyfish, was ‘more embarrassing than useful’ (ibid., 56). He argued that it was essential to jettison any analogy with an organism in order to focus on the relationships that exist between people who thereby recognise commonalities (ibid., 58–59).

Michael Herzfeld, in what he described as ‘an overview of social and cultural anthropology’, told us that at the beginning of the twenty-first century, ‘one thing is for sure: the attempt to abolish uncertainty has failed’ (2001, 133). He cited the ‘most obvious victim’ of this uncertainty as being ‘the idea of the bounded human group – the “society” or “culture” of the classic anthropological imagination’ (ibid.). Earlier, he cited Arturo Escobar who wrote, ‘societies are not the organic wholes with structures and laws that we thought them to be until recently but fluid entities stretched on all sides by migrations, border crossings and economic forces’ (ibid.).²⁴

These views reflect a trend that typifies anthropology and its interest in understanding diachronic relationships and meaning, developed over time, through social process, rather than a science based on synchronic and structural classification. More recent anthropology has, according to Weiner (2007, 154), been ‘dominated by social constructionism in its own “strong” voluntarist version – that, as agents, human beings make their own world consciously and deliberately’. This manner of understanding social process as construction and agency through time is in marked contrast to the idea of a society as a relatively stable and discretely modelled entity.

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

24 Herzfeld provides no citation for this quotation, although he provides references to five of Escobar’s works in the bibliography.

Aboriginal society

In Australian Aboriginal studies, terms like ‘nation’, ‘community’ and ‘tribe’ abounded, particularly in the early literature as early ethnographers sought to identify the building blocks (sets of relationships) that constituted Aboriginal society (or societies). For example, R.H. Mathews published a map in 1898 showing what he determined to be different cultural blocs, based on difference in types of initiation rituals as he had collected them from his correspondents (1898a). Mathews went on to publish several additional similar accounts (1898b, 1898c, 1898e, 1900). Mathews was not alone in this endeavour. Howitt (1904, 41) defined nations by reference to the terms used for ‘man’ by its constituent members, while Bates also mapped ‘nations’, inventing names for them and relying on kinship, social categorisations and totemism²⁵ to identify groups that she considered to share cultural commonalities (e.g. 1985, 39–61). Many of these ‘nations’ would be much larger in the extent of their country and constituent membership than most native title applications today.²⁶

These early accounts are of importance in native title research since establishing a view as to the continuity of a social formation (a society) must rely, to a considerable extent, upon the accounts provided by early ethnographers. Those assisting or assessing an application for native title are likely to go to this early literature to see what was said about the society in question at or about the time of sovereignty.

Anthropologists writing post-1950 generally did not use the term ‘community’ and the word fell out of favour. Two exceptions are Meggitt (1962) and Hiatt (1996), which were discussed by Sutton (2003, 99–107). R.M. and C.H. Berndt (1993, 19) dismissed the term ‘nation’ on the ground that its use implied a degree of political unity that was never apparent. The word is not much found in the Australian anthropological literature today, although it has found its place in the vocabulary of some contemporary Indigenous political discourse.

Applications for recognition of native title have used a variety of different models of society as a means of establishing the parameters within which laws and customs were held in common (see Strelein 2009, 98–

25 I discuss the meaning of this word in Chapter 5, under the heading ‘Religious beliefs’.

26 Peter Sutton has reviewed these and other attempts to map ‘nations’ and his account may be of interest to those seeking additional information on the subject. See Sutton 2003, 42.

105, 123–125). Peter Sutton (2003, 88) took the view that there were several kinds of Aboriginal groups that could be defined in relation to land. He observed that a choice in how a claimant community was to be defined reflected the reality of ‘different landed entities’ that would yield ‘a number of overlapping “territories” for the same population’ (ibid.).

Sutton also noted that there were different sorts of Aboriginal ‘community’: he identified two, one defined in relation to geography, another defined in terms of the relationships of its members (ibid., 89–92). Each was different and neither necessarily comprised members who were the same as members of a native title community – that is, a group who together shared rights in the same country. By this account, then, not all ‘communities’ will be relevant to a native title application. For the anthropologist there is choice in how the word will be applied. There is no absolute ‘community’. The anthropologist needs to ensure that the sort of community chosen is relevant to the group understood to have customary rights to the application area.

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

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

Modelling society

Cultural bloc

The concept of a ‘cultural bloc’ as an aggregation of constituent tribes or other groups has been the subject of a number of early studies, including Radcliffe-Brown, who was interested in expansions of ‘social solidarity’ beyond the range of the local group (Radcliffe-Brown

1930–31, 445–455; Sutton 2003, 46). Similarly, Roth (1897, 41) characterised larger aggregates in Western Queensland as ‘messmates’, united by the use of mutually intelligible languages, ‘bonds of comradeship’, endogamy and cooperation in times of war.

Sutton reviewed other accounts that provided evidence of aggregations or ‘nations’ (2003, 92–98). In the context of a discussion of both Mathews and Howitt, Sutton (2003, 95) stated that the early accounts support the view that there were regional aggregations with substantial cultural commonalities:

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

Sutton also noted that some later writers attempted to identify regional aggregations in relation to drainage divisions (*ibid.*, 96; Peterson 1976, 50–71).

The ‘cultural bloc’ is sometimes associated with the Western Desert region. In 1959, R.M. Berndt published an account of local organisation for some Australian desert regions, suggesting that the term ‘tribe’ was ‘not entirely applicable’ (Berndt 1959, 104). Instead, he suggested that the use of a common language, with dialect variations, resulted in ‘a common awareness of belonging to a cultural and linguistic unit, over and above the smaller units signified by these [dialect] names’ (*ibid.*, 92). Berndt identified such a group as a ‘culture bloc’ (*ibid.*, 84). Berndt suggested that within the culture bloc was a ‘wider unit’ ‘formed seasonally by members of a number of hordes coming together for the purpose of performing certain sacred rituals’ (*ibid.*, 104). These wider units would have changed composition over time and the degree of interaction would have been variable. There would not necessarily have been a consistency of horde membership of a ‘wider group’ (*ibid.*, 105). He concludes:

One might expect to find a number of these [wider groups] throughout the Western Desert, with some of their members interchangeable from time to time ... Each one of these might be termed a society, with the main criteria being, (a) sustained interaction between its members; (b) the possession of broadly common aims; (c) effective and consistent communication between them. It is suggested, therefore, on the basis of material presented here, that it is more rewarding to speak of Western Desert societies, rather than ambiguously of tribes. (*ibid.*, 105)

For Berndt, the Western Desert cultural bloc was made up of a number of societies – it was not a single ‘society’ in the sense that he used the term. The characteristics he ascribed to a society do not clearly equate to the characteristics of a society of native title law. The societies were both labile and ephemeral, so lacked corporate attributes and were social rather than land-holding groups. ‘Broadly common aims’ is the closest we get to any idea that the members of such a society might share laws and customs – although their social interaction might imply that they do.

In a later paper the same writer was to apply this concept to a non-arid region which he called the ‘northeastern Arnhem Land bloc’ (Berndt, R.M. 1976, 145–146). This identity was marked by a ‘local recognition of a broadly common culture’, an acceptance of dialect variation constituting a common language and acknowledgement of ‘mythic’ relationships – that is, relationships that existed between constituent groups or individuals that developed from spiritual ties between themselves, the land and each other (*ibid.*).

Berndt’s comments on tribes and societies provide a useful introduction to what is, to my mind, a more problematic concept and one that Berndt found unhelpful, at least for Western Desert societies. I refer to the word ‘tribe’, which occurs with depressing frequency in native title discourse.

Tribe

The idea of the tribe lies deep within the popular psyche and has dogged much debate about local organisation and society, often without discrimination. Indigenous societies, it seems, must be made up of tribes, reflecting I think some arcane perception that employment of the term readily identifies Australian Indigenous systems, matching stereotypes of ‘exotic’ peoples in Africa or South America. If there was one word that should be banished from the native title discourse – published, unpublished, spoken or written – it should be the term ‘tribe’.

Unfortunately, use of the term is not confined to lawyers, state bureaucrats and the occasional anthropologist. Claimants commonly press an identity by reference to a 'tribal name' and define their country by reference to a tribal territory. Such arrangements are not, as I will explain below, founded on customary systems of social or local organisation. Rather, they represent a telescoping of prior local interests into what is sometimes an undifferentiated whole, managed by reference to contemporary corporate structures that typify the administration of Aboriginal Australia at a regional or local level. Because of these canards 'tribes' are sometimes misrepresented as land-owning corporations, which (to the extent that the term might be used of customary systems in Aboriginal Australia) they were not. As a model for a native title society then, the concept of the tribe provides for more pitfalls than it does advantages, but it may have some facility if employed with definitional clarity and caution.

The term 'tribe' retains popular currency, in part as a result of Tindale's 1974 map and, to a lesser extent, because of subsequent reincarnations by Horton (1994) and others. There has been an assumption, common in lay thinking, that a set of language speakers may form a discrete community with an internal political structure that merited the appellation of 'tribe'.²⁷ Thus, the name of a spoken language becomes a 'tribal' name. A corollary of this is a view that the 'tribe' was the maximal territorial unit, whose members together held a defined area of land in common. There was also an assumption in much early Australian anthropological literature that this model was generally applicable.²⁸

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

27 For a comprehensive summary of this issue, see Rumsey 1993.

28 See, for example, Elkin 1945, 22ff.; Tindale 1974, 30–33.

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

As far back as 1938, Davidson, who also provided an early example of a 'tribal map', stated that the largest political unit in Aboriginal local organisation was what he termed the 'horde'.²⁹ He understood:

Larger groupings are recognised and named by the natives on the bases of dialect and cultural similarities and geographical contiguity. These larger units, which furnish a more practical basis for ethnological considerations, can be spoken of as tribes in spite of the fact that there is no semblance of centralized political authority nor any sense of political confederation. (Davidson 1938, 649)

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

For the native title anthropologist it is generally a short journey to Norman Tindale's classic map of Australian tribes, published in 1974. The Tindale map and its accompanying text has provided the basis for countless native title application boundaries and is often referred to by claimants and lawyers alike in justification for their claim. I will have more to say about Tindale's work in Chapter 7, when I examine the use of his 'tribal' materials in native title research and some of the difficulties

29 Generally later called the 'local descent group' (Berndt 1959, 102–103) and also called the 'country group' (Keen 2004, 277, Sutton 2003, 54–66).

that have developed as a result of his lack of clarity in relation to social groupings which have become prominent points of reference in the native title debate.

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

Tindale effectively reduced a diversity of indigenous practices to ordered categories more reflective of Western and colonial concepts than indigenous views. Tindale did not consider linguistic criteria in any depth, his informants were few, and the tribal boundaries appear to a large extent to be arbitrary. (Monaghan 2003, xi)

Monaghan counselled against accepting Tindale's research findings, 'at face value, as lawyers, anthropologists and linguists have done in the past' (*ibid.*).

Early ethnographers had found 'tribal' names to be sometimes 'vague' (e.g. Mathew 1910, 128) and boundaries to be drawn without 'exactness even on river frontages where land is most valuable' (Curr 1886, xviii). The indefinite nature of boundaries in Aboriginal local organisation has been remarked upon by a number of anthropologists, including Warner (1937, 18), Stanner (1965, 11), Hiatt (1965, 16), Peterson and Long (1986, 55) and Williams (1986, 83). Other writers have also pointed out the difficulties and errors of 'tribal' models. As mentioned above, R.M. Berndt had questioned the applicability of the term to Western Desert societies in 1959 (Berndt 1959, 91–95). Rumsey provided a helpful critique of the use of the term 'tribe' and exposed some of the assumptions related to its unquestioned use, particularly with respect to the relationship to both a single language and territory (1993, 191–195). Rumsey was of the view that the misconception regarding tribes is still current (*ibid.*, 191), a conclusion which I think cannot be much in contention. 'Tribes' are well represented in NNTT research reports that reproduce maps produced by linguists (and others) – of which there would appear to be many, showing 'tribal' territories drawn onto maps by means of boundary lines. This would appear to confirm my view that 'tribes'

are regarded by at least some of those involved in native title research as a valid unit in defining customary native title groups. This stems from the lingering popular misconceptions about 'tribes' in Aboriginal Australia.

Since the 'tribe' was not a political entity, it could not have a bounded territory. The territorial regime was, as Davidson pointed out, a matter for what he called the 'horde' or local group. Boundaries were a product of the assertion of rights by members of these groups. Where several groups recognised linguistic commonalities, it seems reasonable that boundaries might also be conceptualised in language-group terms, especially in a regional context. In some cases it is evident that language was imputed into country by reference to both place names and myth, further enhancing the association of language and country. However, it is not the case that this is only by reference to one language (*ibid.*, 201–204). From my own experience, this process was not universal and was (and is) more strongly marked in some areas than others.

Some years later Ian Keen wrote:

Many early ethnographers assumed that Aborigines were divided into relatively large and discrete 'tribes', each of which shared a common language, culture, and territory. This model survived through the first two-thirds of the twentieth century, adhered to, with variations, by Radcliffe-Brown, Elkin, Tindale and Birdsell ... the tribal model had begun to unravel more than a decade before Tindale published his book and maps of Aboriginal tribes in 1974. (Keen 2004, 234)³⁰

Keen noted that the early ethnographer Howitt wrote of 'mixed' language group areas and that some marriages took place between people of different language varieties, making their children, presumably, in his view, of mixed language identity (*ibid.*, 149). More recently, researchers (in Queensland) have demonstrated that the relationship between language, social identity and community is complex (*ibid.*, 134–135). People tend to be multilingual (or to speak several dialects of the same language), people sometimes marry those from other language or dialect groups and this language, while important, could not be seen alone as a diacritic of group membership. The formation of an identity also involved references to a locality or a relative appellation, like 'northerner' or 'coastal dweller' (*ibid.*, 135).

30 See also Howard (1976, 17–19) for a similar view.

While accepting that much of the early literature casts Aboriginal social life and culture in terms of discrete ‘tribes’, Keen concluded that ‘several critiques have cast doubt on the validity of a cellular model of Aboriginal society’ (ibid., 6). With respect to the named ‘tribal’ groups that were the subject of his analyses, he warned, ‘it should not be assumed that these names refer to societies or localised “social systems”, especially given the degree of heterogeneity of both ecologies and cultural forms documented for some regions’ (ibid.).

Defining what might constitute a ‘society’ or a ‘community’ in terms of the account of ‘tribes’ will need to accommodate these difficulties and avoid these obstacles. This is not to say that a ‘tribal’ model is not sometimes helpful. However, designation of a ‘tribal group’ cannot, of itself, assume commonalities of law, language and culture. Conversely, a society could comprise more than one ‘tribe’, since laws and customs transcend the territorial boundaries of country groups and commonly traverse a number of different language groups.³¹

Language groups

Given that ‘tribes’ are problematic for anthropologists, the characteristics of a group of people that have been labelled a ‘tribe’ might provide for a more profitable line of inquiry. Language spoken or used as a characteristic of group membership can be a useful tool in defining a society for the purposes of native title. In so far as a language group corresponds to the old fashioned notion of a ‘tribe’ there are likely to be ethnographic references resting on assumptions of ‘tribal’ unity to support the representation of the society as a relatively unified body of people.

Language variation, however, is an issue that has to be addressed in such cases. Pertinent questions include whether dialect variations are a means of asserting difference and what is the Aboriginal understanding of similarity and difference in this regard. Analyses effected by linguists can be misleading in cases where languages are shown to be technically similar, and so classed together, while social and political difference between speakers marks substantial difference. Conversely, there are instances where

31 There are examples of successful native title applications that have included members of more than one language-speaking group. See, for example, *Ward v Western Australia* (1998) 159 ALR 483, *Neowarra v State of Western Australia* [2003] FCA 1402, *Griffiths v Northern Territory of Australia* [2006] FCA 903 and *Watson on behalf of the Nyikina Mangala People v State of Western Australia* [2015] FCA 1132.

languages that are technically classed as being quite different are regarded by multilingual speakers as being much the same. Linguist Bill McGregor made relevant comment on the nature of linguistic classifications in this regard. Writing of the Kimberley, he distinguished between technical classification and how a speaker of a language understands the relationship between his or her own language and that spoken by another.

It should be noted that speakers may classify languages quite differently from linguists, and may perceive similarities on the basis of cultural affiliations over and above formal resemblances of either typological or the genetic type, which are the basis of linguists' classifications. (McGregor 1988, 97)

Linguists and others have also made a distinction between language-speaking groups and language-owning groups (Walsh 2002, 233). The distinction between an ability to speak a language and being regarded as an owner of the language was first made over 35 years ago by Peter Sutton and Arthur Palmer (Sutton and Palmer 1980). In short, the former group are characterised by members who speak the language in question; the latter group by those who consider they are associated with a language name, but who do not themselves necessarily speak the language. It is, however, something that they consider they own and thus is a cornerstone of their common identity. This distinction is obviously of importance for many areas of Australia where a traditional language is no longer spoken. I find the use of the phrase 'language group' to be a convenient way of identifying those who claim commonality by reference to an ancestral language (often no longer spoken except as isolated words). Language groups, so understood, are a significant feature of the native title landscape and it is rare to be involved in a claim that does not have one or more language groups as core components of the concept of the society of its constituent members.

Cultural cohesion

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

Weinberg J accepted that five discrete country groups, representing two different language groups, constituted the society whose members together held native title in the application area.³²

Likewise, Sundberg J, in a determination of native title in the northwest Kimberley region of Western Australia, found that a number of groups together made up a community bound together through observance of a number of laws and customs. These were clearly enunciated in evidence.

The body of evidence in pars [162]–[322] shows that the claimants regard themselves as part of a community inhabiting the Ngarinyin, Worrorra and Wunambal region. Throughout the evidence there is an emphasis on shared customs and traditions that transcend any particular dambun or language area. Central to this sharing is the belief in Wanjina; that Wanjina impressed themselves on the landscape, principally in painting sites. Wanalirri, though in Ngarinyin country, is regarded throughout the claim area as the source of the laws and customs laid down by Wanjina. This belief extends beyond the borders of the claim area into the claim region. The Wunggurr tradition also extends across the claim area and beyond, as do other practices and customs: moieties, the marriage rules, wurnan, wudu, rambarr, traditional burial, dambun and kinship rules. The evidence collected earlier is inconsistent with any description of the group or groups that hold the native title rights other than those who are members of the Wanjina-Wunggurr community.³³

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

The application of models

Native title law requires recognition of a defensible society or community – one that is anthropologically viable in terms of both contemporary practice and past ethnographies. Thus, the proper society for an application

32 *Griffiths v Northern Territory of Australia* [2006] FCA 903 [6], [377].

33 *Neowarra v State of Western Australia* [2003] FCA 1402 [386].

must be founded upon a reasonably argued expert view that such a body of persons were united through observance of common laws and customs in the past.

The models I have discussed above may provide a basis for developing an idea of a community or society. It is possible that no single one will match the ethnography, and the final construct will be an amalgam of parts of more than one. A 'society' is a group (or body) of people who recognise themselves and are recognised by others to share commonalities developed and expressed through actual or potential social relationships. In this, they identify themselves as having more in common with their fellows than they do with others who may be differentiated as 'strangers'. Cultural commonality is underpinned by the observance of common laws and customs. Other factors may also play a part, but not invariably. For example, members of a society may use the same language (or dialects of the same language), or be multilingual, utilising a suite of languages with varying degrees of proficiency. Members may also feel themselves to be united by social bonds and recognise kinship links by reference to classificatory as well as consanguineal reckonings.

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

First, for anthropologists unqualified terms like 'community' or 'society' invoke a number of different and sometimes conflicting referents. This is true generally in relation to the discourse of the profession, which counsels strict definitional use of the words. It is also true in relation to Aboriginal studies in particular where many different terms have been used, without consistency, for different types of social formation – real or imagined. As Sutton has pointed out (2003, 88), this may afford some flexibility and choice over the type of social formation identified as apposite in the context of a native title application. On the other hand, the form of the society used to characterise the claimant community needs to be robust

and defensible, clearly defined and substantiated by the field data. In short, anthropologists need to do a proper job in their application and definition.

Second, demonstration of continuity of a society necessarily relies upon ethnographic reconstruction. While the early ethnographic accounts for some areas of Australia are many, quality and reliability are both questionable.³⁴ This is a consequence of assumptions made by observers about 'tribal' organisation and other groupings, their often inconsistent use of terminology and the manner in which their data were collected – mostly at arm's length and second or third hand.

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

The third issue relates to scale. As a general rule, the smaller a society, the more likely will be the uniformity of observance of law and custom. Conversely, the larger the society, the greater the likelihood of internal variation. In the case of a clearly bounded society, discontinuity is identified as a boundary. Such is the case, for example, with the so-called 'circumcision line' that Tindale drew on his maps.³⁵ The line purports to show a discontinuity of a cultural practice (a law) within geographic space. On one side of the line people practised circumcision, on the other they did not.

Such a boundary is necessarily a cadastral and cartographic construct. It has the intention of demonstrating the incidence of cultural practice in geographic space, at least in general terms. At the boundary of two distinct societies there would be a defined representation of difference. However,

34 Sansom has disagreed, arguing in relation to the Yulara ethnography that 'earliest sources are best' (2007, 79). It was a view challenged by some other anthropologists (Burke 2007, 164; Glaskin 2007, 167; Morton 2007, 172).

35 See, for example, N.B. Tindale 1940a and 1974.

social space is not always so clearly bounded.³⁶ In an arrangement where aggregations of groups recognise commonalities between themselves and their near neighbours, bounded cultural space as a recognition of cultural correlation is going to be a function of relative proximity. In such a case, distinctive commonalities would diminish gradually across space. At opposite ends of a spectrum would be those who understood one another to be observers of different laws and customs while those at various intervals in between might appreciate more or less difference, a greater or lesser degree of correlation.

The question then is this: at what point, for the purposes of a native title application, is cultural dissonance tantamount to disunity and the admission of two or more different societies? Were this the case there would be two (or more) sets of laws and customs relating to rights in country, resulting in different groups of rights holders for the same country. Again, these issues must be addressed in any expert anthropological view, although, as I explore below, issues of cultural process sit with some difficulty with many aspects of the native title legal process.

Anthropology and law: disjunction or snug fit?

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

36 Indeed, Bates tells us that, along the line that marked the circumcising people of the southwest of Western Australia from the neighbours to the north and east, 'On the borders of this line, right through to its north-western point, the local groups appear to become mixed' (1985, 45). See also Palmer 2016, 76.

I noted above, in my discussion about the extent of a society, that forming a view of commonalities can provide a challenge for anthropologists. This is because an anthropological account often understands societies to be moving, vibrant entities, which do not remain the same from one moment to the next. Moreover, seeing societies as discrete entities is neither a part of our contemporary discourse nor a reflection of the manner whereby our science makes sense of and comprehends them.

There is, then, a difficulty between a mode of thinking that sees a society as a thing and a snapshot in time, and a society seen as sets of relationships that are likely to be in a constant state of flux and to change in some ways most of the time. It is not that native title law admits no change: it can accommodate significant change and adaptation provided there is a clear connection with pre-sovereignty formations. Thus, in native title law the structure is the focus of attention and interrogation. Typically in anthropology it is relationships and meanings and their social construction, perpetuation and transformation that are our concern. The study of structure does not, of itself, comprehend the complexity of the social universe we seek to explore and explain.

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

The sorts of social formations that I have set out above that could correspond to a 'society' for the purpose of an application for the recognition of native title are what could be termed models. A model is (amongst other things) a small scale replica founded after reality. It is also, by virtue of its replicated but small scale construction, both an ideal and a representation of that reality presented at a particular moment in time. For an anthropologist, models are useful heuristic devices. But in the sense that I use the term here, models cannot easily accommodate social process: the ebb and flow of relationships, the fluctuations in identity in response to political motion, the rise of one man and the demise of another, and the essential uncertainties these vacillations generate. These are the sorts of things that provide the basis for an understanding of social process

over time. The use of models, a legitimate instrument for the preparation of an expert view for an anthropologist, provides then for a means of mediation between a requirement of the legal process and the tools available to the anthropologist. It permits the anthropologist to provide expert views in a manner that will be comprehensible to the requirements of a legal process. Because models are founded after the ethnographic reality (and will be tested in court to see if indeed they are so), they are the product of the anthropological endeavour. In this way there is a clear differentiation, but no necessary disjunction, between doing anthropology (understanding social process and meaning) and being an expert witness (furnishing a synchronic model based on that research).

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

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