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Customary rights to country

Owning rights

At the heart of any native title inquiry is a thorough examination and understanding of the ways the claimants gain rights to the country they call their own. For reasons that should by now be evident, the system of gaining and perpetuating rights to country must be based on customary practices, if they are to be capable of recognition by the court. So fundamental is the notion of elucidating the system of Indigenous rights to land in native title matters that one lawyer has argued for a primacy of its consideration, implying perhaps that other ethnography is of secondary or only minor importance (Hiley 2008). This may have some justification from a legal point of view, but anthropologists who have studied Australian Aboriginal systems of law and land would find it difficult to separate out the strands of spiritual belief and practice, kinship relationships and hunter gatherer economics as isolated and discrete subjects of study. Rather, land and a person's relationship to land is enunciated and codified by reference to spiritual relationships, totemic referents and interpersonal relationships, making separation impractical. Moreover, as I have discussed in earlier chapters of this book, native title law demands that the laws and customs of a society be shown to have continuity as practised by members of the relevant society. Arguably, demonstration of the practice and observance of laws and customs adds to the evidence that the society remains extant, vigorous and viable.

Anthropologists, perhaps like many of their non-legal colleagues, are not always clear as to what exactly is meant by the use of terms of ownership and possession. Thus it is commonplace enough to state that you ‘own’ something or to refer to another as the ‘owner’ of a piece of property. We also use the word ‘own’ to identify a relationship of possession with a thing by saying, ‘That’s my own ...’ article or whatever, as opposed to acknowledging that it belongs to someone else. These generalised statements allow us to communicate on a daily basis, usually without much misunderstanding. However, the terms ‘own’ and ‘owner’ are inadequate for the purposes of developing a comprehensive understanding of an Indigenous system of tenure or possession. This is because the words do not reflect the complexities of the process whereby human beings have appropriated to themselves certain objects or lands according to a normative system of rules and regulations that are accepted by others to hold good for themselves and others with respect to property. In short, ‘owning’ something is not as straightforward as the use of the word might imply. The desire to gain clarity in this regard has been seen as important by Sutton (2003, 15–17) who examines some of the same materials as I consider here.

Anthropologists have visited this issue and can contribute to the present discourse. Max Gluckman, an anthropologist who was particularly interested in customary law, noted the evident but implicit imprecision of the term ‘ownership’. In this regard, he cited a classic work of jurisprudence:

Ownership, in its most complete signification, denotes the relation between a person and any right that is vested in him. That which a man owns is in all cases a right. When as is often the case, he speaks of ownership of a material object, this is merely a convenient figure of speech. To own a piece of land means to own a particular kind of right in the land, namely the fee simple of it. (Salmond 1920, 220, quoted by Gluckman 1943, 8)

Discussing land tenure of the Lozi of southeast Africa, Gluckman commented, ‘The so called owner of a thing has one particular set of rights in it; some of these may be abrogated, limited, or opposed, by other rights held by other people, and the State always has certain ultimate rights’ (Gluckman 1943, 8). Later, but in similar vein, Gluckman expanded this account:

We say that a person or a group ‘owns’ a piece of land or some item of property. We are speaking loosely when we use this sort of phrasing: what is owned in fact is a claim to have power to do certain things with the land

or property, to possess immunities against the encroachments of others on one's rights in them, and to exercise certain privileges in respect of them. But in addition other persons may have certain rights, claims, powers, privileges and immunities in respect of the same land or property ... land ... may be subject to a cluster of rights held by different persons in terms of their relationship within the network of kinship ties. (Gluckman 1977, 36)

Gluckman noted that that 'ownership' is seldom absolute (*ibid.*, 45). What is generally termed 'ownership' is a right to claims, powers, privileges and immunities. The exercise of these rights also involves a duty (*ibid.*, 36). Where rights are not absolute they are exercised in accordance with the rights of others and are burdened by them (*ibid.*, 49–50). It follows from this that the exercise of rights may also be subject to obligations to others while more generally there are rules that govern how rights may be exercised and so also burden those rights.

Radcliffe-Brown understood ownership in terms of what he termed the 'social usage' of the exercise of control (1952, 32). He wrote, 'A right may be that of an individual or a collection of individuals. It may be defined as a measure of control that a person, or a collection of persons, has over the acts of some person or persons, said to be thereby made liable to the performance of a duty' (*ibid.*).

The implications of these definitions are substantial and pertinent to any inquiry into a customary system of rights to country. So-called 'ownership' is, in fact, an expression of a right that is not likely to be exclusive, meaning that it exists alongside rights that are exercised by others, in which case it is 'burdened' by the rights of others. 'Rights' are manifest as complex social arrangements that characterise a system whereby the use and access to property is organised. Anthropologists attempt to understand the system relevant to the native title claim that is the focus of their inquiry. An ability to distinguish clearly the nature, origin and potential of rights within the cultural context is essential.

Distinguishing rights in cultural context

Rights determinative and contingent

It is helpful to distinguish two sorts of rights discussed in this chapter. The distinction has implications for the perdurance of rights through the generations and so is important to native title inquiries. Understanding how rights are endorsed by and sustained by social exchanges and adherence to a normative system are essential to any native title inquiry that seeks to show that there is a system of rights to country rather than a haphazard, ever-changing disarray in the social organisation of relations to country. In any social system the continuity of rights depends upon acceptance of the process that characterises the transmission of rights over time and generations by participants. Thus, the mode of derivation of a right may have important implications for the nature of that right, its transmissibility and perhaps its relationship to rights gained by other means.

A very common way whereby rights to country are gained is through descent. Claimants will often say that they own an area of country because it belonged to their father (or sometimes their mother) and grandparents before them. An expression I hear quite often in my fieldwork is that rights to country are 'in the blood'. Just as a person is understood to have the same 'blood' as their mother or father, so too they share a common bond with the country of their parents. Rights gained by descent are determinative rights. By this I mean that they are determined by the fact of one's birth and cannot be altered or changed. If the rule of descent is applicable a child gains rights to the country of his or her father and is a member of the father's country group. He can leave the group only on his death. There is no other way out. Generally it seems that rights gained through descent are always transmissible – that is, they are automatically passed on to the next generation, the rule of descent (unilineal or cognatic) determining the extent of their exercise in descendent generations.

In contrast, rights that depend upon the attainment of some qualification, such as a command of ritual knowledge or objects, are contingent rights in that they depend upon the satisfaction of a contingency. The child of a man who enjoys a contingent right does not gain that right automatically but would in turn have to gain that qualification on his or her own account. Contingent rights are, then, generally not transmissible in

customary arrangements. Place of birth or conception probably also falls into this category since the rights develop from the belief that the individual gained a spiritual (totemic) attachment to country through their place of birth. It might be argued that this spiritual connection was passed on 'through the blood' by descent, but I think this is a matter that would require further testing against the ethnographic materials available both from contemporary field data and from the earlier literature. When undertaking research in relation to such asserted rights, care must be exercised to ensure that the command of ritual knowledge or place of birth or spiritual conception translates to a real exercise of right and not merely a personal connection or responsibility. Rights that do inure by reference to such contingent acts or incidents may relate to specific areas or places, rather than to a whole estate of the country group.

Other ways to classify rights and the importance of duty

In Western legal systems some rights are generally not available to minors (drinking alcohol, owning real property) but are potential rights that become exercisable upon an individual reaching adulthood, at whatever age that is recognised. Others again depend on gaining a particular qualification prior to their exercise (driving a car is the most obvious) and in this sense have to be realised by gaining the required qualification. Generally, it seems that some rights are given greater centrality in social arrangements and these might be termed 'core' or 'presumptive' rights – that is, those that are probably not dependent on gaining qualification or contingent circumstances but are generally regarded as automatic – although according to this analysis it can be appreciated that no right within a social system is automatic. A right that is understood to afford less direction or control over something than another sort of right might be understood as a 'secondary right', in contradistinction to a 'primary right' to which it is inferior. This is a distinction to which I will return later as its use raises some difficulties in native title inquiries. A person who owns a right may also be able to license that right to another person, perhaps on certain terms and conditions, including the ability to revoke the licence should they choose to do so.

In a social system that provides the structure whereby a proprietary interest in something is articulated, the exercise of the right generally implies a duty so that the duty is a concomitant of the right. In Aboriginal

discourse a duty of this sort relating to land is often expressed in terms of ‘looking after’ the country, that is, keeping it regularly burnt or free of rubbish and preventing it from being damaged or entered by those who have no permission to do so. The exercise of a duty may then be an indication of the presence of a right and can provide evidence of the latter’s vitality.¹ Another example of a duty commonly found in Aboriginal discourse is the requirement that a right holder takes care of visitors, who are understood to be his or her responsibility. This may include advising them of places within the country that are believed to be spiritually potent and consequentially potentially dangerous and performing a ritual that introduces the visitor to the country so that the spirits will be more accepting of his or her presence there.

These types of rights and associated duties take us a long way from the simple and potentially misleading idea that a person ‘owns’ something, implying in much common thinking the ability to do with it more or less as the ‘owner’ pleases. Rights of possession are complex expressions of relationships developed and codified within a culture. In native title dealings these codifications are often referred to as the ‘laws’ of the society in question and represent an accepted and agreed way of ordering social relationships that relate to property, including land. For those who gain their livelihood directly and solely from the land (as is the case with hunting and gathering societies), having a right to country which is acknowledged and accepted by others legitimated by reference to an accepted set of rules is immensely important since it helps to give certainty in an aleatory environment. The system that encapsulates this regulation, comprising the laws, customs, mores, and emotional and spiritual values of the society, can be referred to as a ‘normative system’.²

When is a ‘right’ a ‘rule’?

In an oral tradition, the rules that determine and define rights are expressed through practice and the enunciation of dogma. In this, we must examine the ethnography carefully to gain an understanding of the particulars of the normative system in question. The complexities inherent in the sorts

1 Presumably, it is possible in a normative system for there to be a duty without a right. Those holding rights recognise the rule that they respect the duty and accommodate its exercise. I thank Robert Blowes for this observation.

2 This term is not found in the *Native Title Act* but is a product of the ensuing jurisprudence (*Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58, [37] and following).

of systems that may be revealed in native title research relating to rights to land and sea country present some challenges when they are translated into an alien legal framework that is native title law. For example, a contingent right has to be understood as having legitimate potency in and of itself and not dependent upon or a benefit of the exercise of a superior right. The contingent right has to be capable of exercise without the need for permission or licence from a person who holds a determinative right to the same area – although it may be exercised with due regard to their needs, desires and obligations as it is burdened by that other right.

While this distinction may be helpful, in practice the field data may provide for some ambiguity. For example, a person with rights to country by descent may say of another, ‘Well, he’s got something to say for my country because his spirit comes from there, but he’s got to stand behind the real owners’. The question for the anthropologist is, then, whether the ‘real owner’ is the one with the right, while the person who has ‘something to say’ is awarded a certain privilege but that this does not amount to a right. The matter becomes more complex in situations that I have encountered where a claimant says of another that they lack a ‘right’ to the country in question. The assertion is then qualified (usually on further questioning) by the admission that the leverage exercised by the person in question upon the country (say, through place of spiritual conception) is such that their accommodation must be afforded because to deny it would be contrary to customary practice (usually expressed as ‘the Law’).

The anthropologist will need to consider questions about the relationship between rights and duties prescribed as rules. If access to country is gained by virtue of the existence of a rule that they be permitted to do so, that does not mean that the person who so accesses the country has a right to do so. This is an important distinction and one that has to be explored in the field data collected during the research for a claim. In separating out ‘rights’ from ‘rules’ it may be helpful to bear in mind a fundamental characterisation of the derivation of rights in Aboriginal systems of land and sea tenure. The right has to be derived from a relationship between person and country: descent, which is believed to carry such a link through the blood, totemic spiritual connectedness, ritual qualification or some other social or metaphysical construct that legitimates an essential and noumenal connectedness that lies at the heart of the relationship between Aboriginal people and the country wherein they exercise customary rights. The classic pathways identified in the anthropological literature whereby rights to country are gained (whether descent-based or founded on other

spiritual relationships) all articulate the metaphysical correlation between a person and country. It is upon that principle that a right is understood to exist. In a later section of this chapter I review how anthropologists have identified these different ways of gaining rights to country and the implications that this developing literature has had on our understanding of the complexities of the system whereby rights to country were both gained and exercised.

A rule, on the other hand, is not expressive of this fundamental correlation between a person and country. The application of a rule which, for example, requires that access to country be afforded to certain persons, while mandated and likely to be reflective of social relationships, is a concomitant of the right. It is a feature of the exercise of the right but does not, of itself, represent or reflect the spiritual relationship between a person and their country. It is also a matter of social dealing and even though it may be normatively a part of the exercise of rights is ultimately negotiable.

In my experience, these complexities and their associated complications and obstacles to the successful resolution of the claim arise when there is competition or dispute about the integrity of an asserted right. These are matters that will ultimately be a matter for the court. While the legal process must pay due regard to the Indigenous system of law, this is not necessarily easily or accurately translated into the provisions of the *Native Title Act*.

Succession to deceased estates

Country groups were subject to the vicissitudes of life and, just as families do today, waxed and waned, grew in numbers or declined. Factors that affected the viability of a country group would have included disease, warfare, infertility and probably natural disasters. Inevitably, then, some country groups would have been wiped out or diminished until eventually the last member died, leaving the group with no living representative. The country of that group became then a deceased estate. While the advance of the frontier, with introduced diseases and sometimes significant violence, undoubtedly increased the numbers of deceased estates, early commentators did not generally describe country without an owner as the sole product of European settlement. In a short but classic paper that addressed the issue of 'succession to land' (Peterson, Keen and

Sansom 1977) the authors wrote of the ‘extinction of clans’ as a ‘recurrent problem’. They suggested that the relatively small size of a clan rendered it vulnerable to extinction. It was their view that ‘the Aborigines have evolved mechanisms to deal with’ this eventuality (ibid., 2). Peterson, Keen and Sansom cite Spencer and Gillen, writing in 1899, who reported of a clan country:

if it happens that all the individuals associated with it die, then a neighbouring group will go in and possess the land. It is not, however, any neighbouring group which may do this, but it must be one the members of which are what is called *Nakrakia* to the extinct group – that is, they belong to the same moiety of the tribe as the latter. (Spencer and Gillen 1899, 153, cited in Peterson, Keen and Sansom 1977, 1004)

The early ethnographic observer Daisy Bates was also aware that country could become ‘vacant’. That is, a last surviving owner had died, leaving the area without a hereditary successor. She noted the term for this in the Bibbulmun language of the southwest of Western Australia as *bindardee*. She wrote, ‘it is the “Bindardee” country when the nyungar³ dies who owned it. Nilgee’s house is called Bindardee because it has “no father”’.⁴ In South Australia, probably amongst the Wirangu with whom she camped at Ooldea, Bates recorded the term *narruri* to mean ‘orphaned country’.⁵ Bates’s account lacks the insightful detail provided by Spencer and Gillen and the rich ethnography relating to sacred objects that could eventually be given over to a person believed to have their spiritual quickening from the country in question, so restoring what was believed to be an autochthonous clan (Spencer and Gillen 1899, 154, 302). However, Bates confirms that the idea of country without owners due to the demise of the local group found expression in their language. Taken together these accounts strongly support the view that extinction and subsequent succession were a part of customary dealings prior to the arrival of Europeans.

Peterson, Keen and Sansom (1977) defined succession as a process contingent on the possession of some sort of right in the country in question. They differentiate in this regard ‘primary rights’ gained for the country by patrilineal descent from ‘secondary rights’ gained by other means including place of conception, birth, death/burial, kinship

3 Footnote added: Aboriginal person.

4 Bates n.d., typescript from notebook 15, 54.

5 Bates n.d., typescript from notebook 5c, 63 (Bates folio 68, 23).

and ritual ties and matrification (*ibid.*, 4–5). They go on to document a process of succession that was brought to light during the Yirrkala land rights case where a clan comprising two old women was ‘looked after’ by members of a clan of the same moiety (*ibid.*, 6). Senior members of that clan went on to assert ownership of the country in question – and of its substantial resources – an arrangement that resulted in a longstanding dispute (Altman 1983, 22, 116–117).⁶

Sutton provided additional commentary on the distinction between ‘primary’ and ‘secondary’ rights in relation to succession. In Sutton’s view:

‘secondary’ forms of connection to an estate may become activated as acceptable bases for claims of succession to estates whose owners have died out. Those who succeed in this way, a process which often takes many years or even decades, convert their interest in the relevant estate from a secondary one to a primary one, or at least ensure that the interests of certain of their descendants in that estate are recognised as primary ones in due course. (Sutton 2003, 4–5)

Sutton understood the process of succession to reach its endpoint when ‘a “normal” situation has been restored whereby at least some people again enjoy unmediated rights in the country, and their precise origin is forgotten’ (*ibid.*, 5, 121–122).⁷

Sutton has also provided a helpful distinction between an individual or ‘a close-knit set of siblings’ who forge their succession to an estate and that effected by a group (*ibid.*, 5). The latter case applies when a whole subset of a language group becomes extinct as a result of catastrophic population collapse due to colonisation, killings, poisonings or disease, leading to sudden or eventual extinction. Given this territorial vacuum, the country is ‘subsumed by one or more extant groups’ (*ibid.*, 5). Sutton provided examples that included the Ganggalida, who subsumed country of the defunct Min.ginda (Burketown area); the Waanyi, who subsumed country of the Injilarija (Lawn Hill region); and the Pangkala, who subsumed part of the territory of the much depleted Nauo (Eyre Peninsula) (*ibid.*, 5). Sutton distinguished this ‘group succession’ from ‘small genealogical subgroup succession’ by reference to the scale of the event. However, both

6 See, for example, www.theguardian.com/australia-news/2017/mar/23/indigenous-land-rights-arnhem-land-bauxite-royalties, accessed 22 August 2017.

7 Sansom has called this process of forgetting ‘strategic amnesia’ (Sansom 2001).

rely on some form of existing relationship including common language, geographic unity, moiety affiliations and ritual commonalities (ibid., 6–7). He further remarked:

These cases do not involve the extinguishment of pre-colonial rights of surviving groups so much as their transformation – usually involving considerable simplification – and their generalisation to wider ‘tribal’ areas. One cannot exclude the possibility that similar catastrophic population losses may have occurred before the colonial era, where epidemics could have wiped people out in big numbers from time to time. (ibid., 6)

Other writers have also added to our understanding of the processes of succession and, to some extent, how they have interacted with the legal processes that have contextualised their ventilation (Glaskin 2017, 175, 178, 193). In 2015, David Trigger wrote a paper that features instances of succession in native title cases, while providing a summary of some of the anthropological accounts relevant to their consideration (2015b, 53–55). I return to Trigger’s case studies below.

In the context of a native title inquiry, the fact of a succession to country raises important issues regarding continuity. The processes of succession I have reviewed above all involve a change of owners – rights to country that were vested in one group become vested in another. That such a change happened post-sovereignty means that there is no continuity of ownership according to the principle of descent – given that that is the relevant means whereby rights to country are perpetuated. However, it is the operation and perdurance of the ‘laws and customs’ of the society in question that is a key to the question of continuity in a native title case. Consequently, a change of owners, *per se*, is not inimical to the recognition of native title by the court. However, a succession event is seen by some legal experts as potentially problematic. During a panel discussion, Senior Counsel Vance Hughston commented that, under native title law, ‘The requirement to demonstrate that members of the claimant group are part of a society and that that society has continued to exist since sovereignty united by its acknowledgement and observance of the laws and customs under which the rights and interests claimed is possessed is central’ (Blackshield, Sackett and Hughston 2011, 109). Laws and customs are, in native title thinking, a creature of a particular society. Consequently, an act of succession whereby members of one society take over the country of the members of another society would upon the succession render the laws and customs applicable to the country so taken over different to those evident at the time of sovereignty. Based on this reasoning, Hughston stated:

On the current state of the law, the likelihood is that succession will only be recognised by the courts if it is intra-societal, that is, if it is within the one society. The courts have shown a distinct reluctance to accept that the members of one society can succeed to the country of another society (*Dale v Moses* 2007 at [120]). So, in *Sebastian*, the claimants had to demonstrate that the Djungan were part of the same society as the Yawuru, despite different languages, distinct territories, separate self referents and somewhat different legal traditions. (Blackshield, Sackett and Hughston 2011, 110)

Following Sutton's lead, Trigger provides an analysis of the Ganggalida group succession to the country of the Mingginda⁸ people in the vicinity of Burketown – based on his own long-term field research in the area (2015b, 55–59). Trigger was able to document the demise and eventual extinction of the Mingginda people through disease and frontier violence (*ibid.*, 56). While older informants recalled the group, younger members did not (*ibid.*, 57). Members of the Ganggalida group had moved into the area (around Burketown), claiming rights to it through birth conception and subsequently through Dreaming associations represented as mythology integrated into Ganggalida traditions (*ibid.*, 57–58). Trigger called this 'a case of completed succession' (*ibid.*, 57). It was based on customary principles and won favour with the court. His Honour, Justice Cooper, stated:

130 The second respondent submitted that the interest claimed by the Ganggalidda⁹ peoples in the former land and waters of the Mingginda peoples was not a right or interest held at sovereignty under the traditional laws and customs of the Ganggalidda people. That is, it was an interest acquired post-sovereignty which was not recognised by s 223(1) of the Act.

131 In my view, the submission of the second respondent is incorrect. The new legal order at the time of sovereignty recognised both existing rights and interests in relation to lands and also '*the efficiency of rules of transmission of rights and interests under traditional laws and traditional customs which existed at sovereignty*': *Yorta Yorta* at [44]. If the rights and interests in respect of the Mingginda peoples' countries was acquired under traditional laws and customs which provided for such a succession

8 Sutton's 'Min.ginda'.

9 His Honour chose the spelling 'Ganggalidda', which reflects the name of the application in contrast to Trigger's published spelling, 'Ganggalida'.

and those laws and customs existed at sovereignty, then the interests of the Ganggalidda peoples in respect of those lands and waters will be recognised and protected under the Act.¹⁰

In reaching this opinion, his Honour relied on the evidence of the anthropologist (Dr Trigger) that the succession had occurred ‘under traditional rules and customs which were acknowledged and observed at the time of sovereignty by both peoples’ and so were ‘capable of recognition and protection under s 223(1) of the Act’ (Lardil Peoples [132]).

Trigger added what I think to be an interesting and relevant observation. He wrote, ‘few if any living Aboriginal people disputed the fact that for many years the Burketown, Albert River, lower Nicholson River area had been Ganggalidda country. This conviction was evident even among the few who nevertheless knew they had a likely Mingginda forebear in their own ancestry’ (Trigger 2015b, 59). A footnote qualifies the observation: ‘However, this is not to conclude there was complete agreement of this kind in relation to other inland parts of Mingginda country’ (ibid., fn. 4). This raises an important question: would the matter have been so positively settled (for the applicant) had the matter been in dispute?

Trigger’s second case study also echoes Sutton’s earlier observation regarding the Waanyi. Trigger reports that the Waanyi people moved historically ‘eastwards into Nguburindi territory and southwards into parts of Injilarija country’ (ibid., 59). He observes that both areas were ‘believed by claimants to be culturally familiar, and since European arrival taken over according to Waanyi traditional law and custom with the demise of these two groups’ (ibid.). Trigger documents the cultural commonalities of the groups, even though their languages were distinct (ibid., 59–63) and considered that there was some evidence that these demographic changes occurred in part prior to the date of effective sovereignty (ibid., 60). Land-based mythological traditions were incorporated within the landscape as part of the Waanyi’s succession eastward and their ‘associated cultural assimilation of the landscape’ (ibid., 63). Trigger concludes that, ‘the Waanyi research, in the context of the native title claim, indicated a completed case of adaptation and succession according to tradition-based law and custom in relation to land and waters’ (ibid., 65).

10 *The Lardil Peoples v State of Queensland* [2004] FCA 298 [130–131].

The application was settled by consent.¹¹ Trigger does not tell us what the judge found in relation to this succession for the matter is not addressed in any of the judgments I have viewed, except in passing in relation to a contentious issue of claim group membership.¹²

Trigger is sanguine about the potential for accommodation of changing rights to country within the Australian native title legal system. He wrote, 'substantial change has occurred, yet forms of contemporary connection with country are also continuous with adaptations in the previously operating system' (ibid., 66–67). In order to achieve recognition of these new-order rights in native title law, he takes the commonsense view that what is required is good research and thoroughly documented accounts of the process or processes involved. This would seem to be sage counsel applicable to all our anthropological research.

Part of the reason why anthropologists should pay particular attention to instances of succession is that they present an evident vulnerability in the proof of native title. In the Waanyi case discussed above, the Queensland Government and mining giant CRA argued that there was no evidence of transfer of native title from the Injilarija to the Waanyi (ibid., 67). In the Gangalidda case, as I noted above, the second respondents argued that the rights now asserted were not rights held at sovereignty but rather an interest held post-sovereignty. Research into instances of succession in relation to a native title claim must, then, tackle the fundamental question of how the transference of rights from one group to another has taken place consistent with the claimants' laws and customs, as well as those which may reasonably have been supposed to have been those of the extinct group. It would appear that the laws and customs must be a product of the same native title society, otherwise they would necessarily be different and the issue of their continuity brought into doubt.

The task of researching and providing a positive opinion in relation to these matters is made much easier if the matter is not subject to rigorous challenge by respondent parties. Conversely, it is made much more difficult if it is subject to disputes between Indigenous parties. Trigger remarked in this regard:

11 *Aplin on behalf of the Waanyi Peoples v State of Queensland* (No. 3) [2010] FCA 1515.

12 *Aplin on behalf of the Waanyi Peoples v State of Queensland* [2010] FCA 625 [87], [100], [119].

Where disagreement emerges between contesting Aboriginal parties about whether or not succession has been licit in terms of law and custom, or whether it is a completed process, it can be difficult to determine a resolution. This can involve quite bitter disputes that continue over decades, as in the Finnis River area of the Northern Territory. (ibid., 67)

The process of succession to a deceased estate marks a hiatus in the seamless succession of rights through descent. When the process of succession is in train and knowledge remains of the original owners, those pressing claims through lesser rights or merely consociation are vulnerable to challenge. In the native title era, where claimants have increasing access to archival records, genealogical data and earlier ethnographies, the period of selective amnesia is simply illuminated. While the studies I have discussed above show that, under the right circumstances and with good research, succession to country can find recognition within the native title process, it represents a vulnerability and is ripe for the articulation of disagreements. It is not, then, an area of research for the inexperienced or the unwary.

Linking local organisation and title

In terms of property, 'title' refers to the legal basis of the ownership of that property. 'Native' title in the Australian context requires that there is a customary identifiable system of law and normative regulation that provides a basis for the allocation of rights to country that has legal-like qualities. These rules and regulations must be shown to relate to rights or obligations and be accepted by members of the society as ordering the allocation of rights to country. The recognition of native title today requires that the rights of the original Indigenous owners of the land and the system that sustained them have endured, substantially unaltered, since the time of sovereignty. As with other issues of continuity the anthropologist as expert must apply the 'then and now' test. By this, I mean that there must be a reliable account of the system of local organisation as it is likely to have been at or close to sovereignty, compared with the system that is avowed now by the claimants, as documented in the fieldwork data upon which the anthropologist founds his or her views. This is typically no easy task. Descriptions of local organisation found in the early settler literature are not only elusive but also were sometimes based on naive and inaccurate accounts of a system of land tenure that was poorly understood and incompletely recorded. Early accounts were

also sometimes prejudiced by preconceptions relating to 'tribes' (a matter discussed in the previous chapter) and hostility to the notion that the Indigenous inhabitants of Australia actually recognised property rights at all. As the frontier advanced, the subject was the focus of attention by anthropologists but there were misunderstandings and preconceptions here too. Radcliffe-Brown was a pioneer in this regard and some of his data go back as far as the beginning of the second decade of the last century and I consider some of his writing in this regard below. Anthropologists have not been in agreement as to the details of Aboriginal local organisation, although research in recent decades has probably developed what might be termed an 'anthropological orthodoxy' that has gained general (although not universal) acceptance amongst practitioners.

I do not trace all aspects of the anthropological debate here as this has been done by a number of other writers whose work can be consulted (Peterson 2006; Peterson and Long 1986; Sutton 2003, 38–53). A number of anthropologists who undertook fieldwork in Australia prior to the 1930s developed understandings of how the customary system of rights to country worked, according to their observations and field data. Of these, A.R. Radcliffe-Brown was one of the first anthropologists to set out an understanding of local organisation in Australia (1913; 1930–31, 34–37; 1952, 32–36). Based on a single and probably quite short period of fieldwork in 1911 amongst the Kariyarra of northwest Western Australia (not far from the present site of Port Hedland), Radcliffe-Brown attempted to reconstruct systems of land tenure for the Kariyarra. The paper he published in 1913, following his return from the field, has become a citation classic amongst anthropologists because of its succinct statements relating to local and social organisation as well as its comparatively early date in the history of Australian Aboriginal studies. Consideration of his findings are helpful because they were central to a debate that ensued about the defensibility of his conclusions and so too to the development of a better understanding of customary systems of rights to country that are broadly applicable to other areas as well.

Radcliffe-Brown

The people who Radcliffe-Brown identified as Kariyarra¹³ had been living on station properties for about 50 years by the time he undertook his research. Consequently, it is likely that most of his informants had not known a complete hunting and gathering lifestyle, although some older individuals may have recalled a time before European settlement. Radcliffe-Brown understood that the tenurial system was based on ‘Local groups, each with its own defined territory’ (1913, 145). Membership of a local group was determined by descent in the male line. The country of a local group was identified by reference to an important place or places within the country of that group (*ibid.*). He drew a map showing the location of some of these local groups (he admitted that his data were not complete) within Kariyarra territory that he represented on the map by means of an idealised boundary (*ibid.*, 145).

According to Radcliffe-Brown, the ‘normal’¹⁴ Australian type of local organisation comprised a local group with rights to a defined area of country. Members of other hordes were required to seek permission to use another horde’s country, or be invited into it, so rights of ownership within the local group area were exclusive to members of the local group. He wrote:

The country of a local group, with all its products, animal, vegetable, and mineral, belongs to the members of the group in common. Any member has the right to hunt over the country of his group at all times. He may not, however, hunt over the country of any other local group without the permission of the owners. (*ibid.*, 146)

Pursuit of game seems to have constituted a permissible exception to this rule, but otherwise trespass was punishable by death. Despite these strictures, Radcliffe-Brown noted that visiting and sharing of food was common (*ibid.*, 146–147) such that there was ‘a perpetual shifting to and fro both within the country of the group and from one group to another’ (*ibid.*, 147). Connubial relations also expanded the potential for

13 Radcliffe-Brown spelt this language name ‘Kariara’. I here adopt the spelling employed by members of this group today (Kariyarra) but retain Radcliffe-Brown’s spelling where I have quoted from his writings.

14 Radcliffe-Brown 1930–31, 29.

the enjoyment of country. Radcliffe-Brown found that local groups were exogamous, so a man had to gain a wife from a local group different to his own.

A woman seems to have retained a sort of right over the country of her birth, so that a man and his wife were generally welcome to visit the wife's local group whenever they wished. A man seems also to have a sort of secondary right over the country of his mother, that is the country to which she belonged by birth. In a large number of cases this was the same as the country of his wife. In both cases, however, it seems to have meant no more than that a man was sure of a welcome in the country of his wife or his mother. (*ibid.*, 147)

For Radcliffe-Brown, then, rights to country were a matter of descent, exclusive to the local group and vigorously enforceable. While his opening position was that local group membership had to be descent traced through patrilineage (to the father and father's father), he also recognised that a man had rights in his mother's country and perhaps in his wife's country too. Whether a man could be denied access to his mother's country is not clear. Presumably in company with his wife he could freely visit her country. In any event, he reports constant free movement between estates, indicating that, while there were evident rules relating to how rights to country were obtained, there was flexibility in their exercise since the country was not as compartmentalised as he had first stated. Such flexibility would have been an important factor in sustaining the economy of a hunting and gathering society, as Radcliffe-Brown shows each estate to have been quite small. I return to the question of size below.

One difficulty with Radcliffe-Brown's early analysis is that he conflated two social formations: the descent group and the residence group. This distinction was later shown to be critical to a proper understanding of Aboriginal local organisation (Berndt 1959, 95–96) and remains so today when writing native title reports. The descent group, as the name implies, was recruited according to principles of descent; the latter by choice, kinship ties, commensality and perhaps circumstances. The residence group, whose members moved round the countryside hunting and gathering (and were therefore visible within the countryside), would likely have been made up of a man and his wife (members of two descent groups), the man's affinal relations and perhaps those who were not directly related through blood ties at all. There are records of the composition of these groups available in the ethnographic literature (e.g. Peterson and Long 1986; Palmer 2010a, 74–80). The descent group, on

the other hand, was not in evidence as a reality on the ground except in so far as a residence group might in part comprise a father, his sons and daughters and perhaps grandchildren.

In response to this difficulty Radcliffe-Brown was to revise but not substantially change his views based on his 1911 fieldwork with the Kariyarra and others of the Pilbara region. In 1931, he published a monograph that sought to define the social organisation of Australian tribes and examined many groups in addition to the Kariyarra (Radcliffe-Brown 1930–31¹⁵). In this he generalised from the particular, attempting to set down a definitive account of Australian systems of social and local organisation. He introduced a new term, ‘horde’, to his account, which he hoped would clarify what he meant by use of the word ‘clan’:

The horde is a small group of persons owning a certain area of territory, the boundaries of which are known, and possessing in common proprietary rights over the land and its products – mineral, vegetable and animal. It is the primary land-owning or land-holding group. Membership of a horde is determined in the first place by descent, children belonging to the horde of their father. (ibid., 35)

He sought to clarify membership in reality (‘an existing group at any moment’) by accommodating wives of local group members:

The horde, therefore, as an existing group at any moment, consists of (1) male members of all ages whose fathers and fathers’ fathers belonged to the horde, (2) unmarried girls who are the sisters or daughters or son’s daughters of the male members, (3) married women, all of whom, in some regions, and most of whom, in others, belonged originally to other hordes, and have become attached to the horde by marriage. (ibid., 35–36)

Later, and in the same article (ibid., 59), he attempted to distinguish the horde from the clan. His initial proposition was that, for the Kariyarra, ‘all the men of any given horde belong to a single line of descent’ (ibid., 59). Since the horde is based on descent, ego’s¹⁶ father’s horde is different to ego’s mother’s horde. Recognising perhaps that the two hordes would

15 Published as a monograph in 1931; parts were published in the journal *Oceania* the year before.

16 ‘Ego’ is the ‘I’ of a genealogical account. This is often the person from whom the genealogy has been collected or the person who defines the relationships set out in the genealogy or discussed in the accompanying account. See Sutton 2003, 186.

then constitute a single social unit (the family or group that lived together on a daily basis), he suggests using the term 'clan' for the residential group. His conclusion in this regard is, however, not evident:

We can therefore say that in the Kariera tribe, connected with each horde there is a clan. I have defined a horde as consisting of all men born into the horde together with their wives and unmarried daughters. The clan connected with the horde consists of all persons born in the horde. The male members of the clan all remain in the horde from birth to death. The female members of the clan remain with the horde till they are married and then are transferred to other hordes. (ibid., 59)

Radcliffe-Brown adds a footnote to the end of this paragraph in which he seeks to clarify further his choice of the terms 'horde' and 'clan':

This distinction between the horde and the associated local clan is, I think, a very important one to make and to keep in mind. A horde changes its composition by the passing of women out of it and into it by marriage. At any given moment it consists of a body of people living together as a group of families. The clan has all its male members in one horde, but all its older female members are in other hordes. It changes its composition only by the birth and death of its members. (ibid., 59, footnote 8)

Radcliffe-Brown's shifting terms do not make for clarity. He understood that there was a difference between the filiative relationships of the descent group whereby rights to country were transmitted and the 'body of people living together as a group of families'. His lack of precision was to give rise to a substantial debate that has been discussed by others (Hiatt 1962, 1966; Stanner 1965). However, so it seems to me, despite the shortcomings of the account, Radcliffe-Brown was probably heading in the right direction. It was left to others to clarify the system, introduce better defined terminology and recognise that as hunters and gatherers residential groups were reliant on a sustainable economic base that was unlikely, except in the better watered areas of Australia, to have been afforded by a single hermetic estate. Of direct relevance to native title and an understanding of the allocation of rights to country were his tantalising observations about what appear to be the ability of a man to exercise rights in his wife's country and in the country of his own mother. While Radcliffe-Brown appears to suggest that these were either lesser rights, indulgencies or some sort of standing permission on the part of the relevant local descent group, this is not pursued. In his 1952 account Radcliffe-Brown elevated rights gained through matrilineation, previously described in 1913 as 'a sort of secondary right over the country of his

mother', by stating, 'in the Kariera tribe a man had certain quite important rights over his mother's horde, over its individual members, and over its territory' (1952, 36). From a practical point of view, right of access to several estates made sense. Radcliffe-Brown had produced a map of the 19 estates of Kariyarra country (1913, 144), some of which lay in quite dry country and well away from the coast, which has a more temperate climate than the interior. In all, Radcliffe-Brown had estimated Kariyarra country to comprise between 3,500 and 4,000 square miles (*ibid.*, 145). This computes to an average area for each estate of between 184 and 210 square miles (477 to 544 square kilometres¹⁷). At its largest, then, an estate would be only some 23 km × 23 km. It seems unlikely that, in practice, exploitation limited to the country of a single descent group would be economically viable.

Phyllis Kaberry

Phyllis Kaberry undertook fieldwork in the Kimberley region of Western Australia in the mid 1930s, so she came to her ethnography over two decades after Radcliffe-Brown. As a student based at the University of Sydney she was undoubtedly influenced by Radcliffe-Brown's work, although her supervisor appears to have been A.P. Elkin.¹⁸ Kaberry's principal interest was in the role of women in Aboriginal societies, so systems of land tenure were not her primary concern. However, she would have been aware that Radcliffe-Brown had adopted a somewhat male approach to his analyses of Aboriginal society, such that Sutton stated that his sexism was 'a problem for his analysis' (2003, 52). Kaberry was, then, ideally suited by virtue of her sex and research focus to provide a corrective. As a graduate anthropology student Kaberry was aware that Radcliffe-Brown had set down that the 'normal' method of recruitment to the horde (land-owning group) was patrilineation (e.g. 1930–31, 44, 55, 73; Kaberry 1939, 136–140). Kaberry questioned Radcliffe-Brown's justification for accepting patrilineation as a given, based on economic determinants (1939, 136–137). She cited other researchers (Stanner and Warner) to support her view that a man might live in his mother's country, presumably as of right, as well as his father's (*ibid.*, 137). The real tie to patri-country, she argued, was a result of ritual and spiritual ties that develop as a result of a man's relationship with his father (*ibid.*, 138).

17 Where 1 square mile = 2.58999 square kilometres.

18 Elkin 1939, xli.

However, Kaberry also distinguished rights in at least two other countries: country (or area) of birth and mother's country (*ibid.*, 31, 137, 194–195). Accordingly, Kaberry wrote that the children of a marriage 'inherit their father's country and the right to participate in certain horde ceremonies, but the relationships with the mother's group are retained and emphasised, as opposed to the view that the society is purely patrilineal' (1939, 133). Kaberry, who undertook fieldwork across the Kimberley region, made a similar distinction between father's and mother's country for areas of the east Kimberley, recording different terms used for father's and mother's country, 'a usage that points to different horde countries for the parents' (1939, 125).

Like other writers at this time, Kaberry did not distinguish between the country group and the residence group, using the single term 'horde' to obfuscate any distinction. Kaberry defined the horde at one point as 'the patrilineal group of men and women who own a stretch of territory' (*ibid.*, 136). She added that 'some of them [members of the patrilineal group] may be living elsewhere' (*ibid.*) and thereby implied the distinction that she did not make: the horde or land-owning group was not always the same as the residence group.

Despite these points of variance with Radcliffe-Brown, Kaberry recorded that 'over a strip of territory a patrilineal group exercises well-defined rights which are guarded and enforced by the headman. The body of totemic myth not only strengthens these, but provides a legal and religious charter for land tenure in these tribes' (*ibid.*, 140). For Kaberry, then, rights to country were about far more than a descent of rights, but relied upon totemic links, ritual and religious beliefs that together formed a system (she called it a charter) for land tenure.

While undertaking her fieldwork, Kaberry had written to Elkin from the small town of Fitzroy Crossing in an early attempt to relate social categories to country, but this led her to consider how rights to country were gained.

All the subsections may belong to one horde country, and this is borne out by the fact that a person's country is determined by his birth. Normally that would be his father's country, but not necessarily so. The term for country is *noa:ra*. If a man is born in another country than that of his father, then he still has a right to live in his father's, but the latter is called

'half-country' or *kamera*. A man also calls his mother's or his mother's mother's, or his father's mother's, or his father's father's country his *Kamera* [sic]. (Letter to Elkin, 22 March 1935, 1–2)

Writing from Moola Bulla, some 160 km east of Fitzroy Crossing, she noted later in the same year that, 'sometimes a man gave as his country as the place where he was born, and laid claim to this, even if different from that of mother and father' (letter to Elkin, 8 December 1935, 3).

Kaberry published a paper (1938) documenting the importance of a person's relationship to country through a belief in spiritual conception and place of birth. Writing of data she had collected from the east and south Kimberley she reported the belief that spirits enter the prospective mother as a result of propinquity, while an animal association is established through some incident whereby the animal in question (usually as meat) causes illness to the mother (*ibid.*, 278). The belief serves to link a person with a place and a natural species, founded upon a conviction in the pervasive spirituality of the great creative period of the Dreaming, when the spirits were ordained within the pools (*ibid.*, 279; 1939, 30, 195). Daisy Bates had recorded a similar belief for areas of the west Kimberley two decades before.¹⁹ Consistent with these accounts, Kaberry understood a person's territory to comprise different sorts of 'country' – a term she glossed as *da:m* that was used in the eastern Kimberly and was the equivalent of the term *ngura* that was used in the central parts of the region. These terms (*da:m* and *ngura*) could also be used to mean 'camp'.

The comparison of the word for camp – *da:m*, with those for horde-country – *noera:m da:m*, big camp, and spirit centre – *wanyagoara da:m* (little camp), can be taken up at this point. The repetition of *da:m* would seem to indicate a similar attitude adopted toward all three localities. They are places where a native makes his fire, sleeps and searches for food. This is borne out by the difficulty, frequently encountered, of discovering a man's or a woman's *noera:m da:m*. (Kaberry 1939, 30–31)

My reading of Kaberry is that when she asked people where their country was, the answer was not always a simple one that made reference to their ancestral (and presumably patrilineal) country. Rather, those with whom she worked might refer to one or more of the following: the country they occupied – presumably, as of right; ancestral country; or totemic

19 Bates (1913, 389–391) wrote of spirit children for areas to the west of Nyikina country.

country. In short, country (*ngura, da:m*) could comprise a suite of country gained through different customary means. She wrote that although the horde country had ‘well defined boundaries and is named’ (ibid., 31), her informants sometimes gave her the names of:

half a dozen pools, i.e. places where he had camped and which offer a plentiful supply of game and food. They are vital points in his territory; in part they constitute its significance and value for him. Of these, one generally is more important than the others – his *wanyegoara daam*, the pool where his father found him as a spirit child. This he regards as peculiarly his own though others may camp by it. He visits it frequently, mentions it with pride and will be buried with his head pointing towards it. The tie is a spiritual rather than a purely economic one. Occasionally the spirit centre may lie outside his horde territory, in which case he is allowed to hunt there. (ibid., 31)

In summary, Kaberry presents a system of local organisation whereby rights are to areas of country, principally defined in relation to camping sites (or other significant places) within it, rather than to lineal boundaries. Some rights to country derive from the father. Father’s country is identified both by a generic term (*ngura* for the central Kimberley region) and an area name. A person also has rights in areas of land associated with that person’s spiritual conception, these being areas generally of smaller extent than the totality of what is conceived of as being a country area. Thirdly, a person has rights in their mother’s country, which she termed *kamara*. It is evident from her account of rights to country in the Kimberley that rights did not develop from a unilineal system to just one area, but were multiple and composite.

Kaberry provided detail as to the range of rights that people legitimately exercised in country. This included the right of access, hunting and camping (ibid., 30) and the right of exclusion or invitation (ibid., 31, 139). She wrote that those with rights in country knew their country intimately (ibid., 136–137) and this included knowledge of the spiritual dangers of country and how to avoid them (ibid., 138–139, 203–204). Without such knowledge the exploitation of country was fraught with spiritual danger. Kaberry also reported that senior members of country groups (and their wives, should they have sufficient seniority) had the right and duty to conduct increase rituals²⁰ at renewal sites in their

20 Rituals performed to sustain and increase the fecundity of a particular plant, animal or natural phenomenon.

country (ibid., 138, 203–206). Kaberry stated that ritual duties and responsibilities with respect to the country of a local group could only be exercised by members of the patrilineal group (ibid., 138–139). Later, when discussing ‘increase rituals’ she stated that totemic sites are ‘worked up’ by a ‘headman’ or his wife, if she was old enough – although she would presumably belong to another descent group (ibid., 205). Kaberry concludes that local group members had a duty to undertake the rite on behalf of all others and that this indicates the strength of the cultural interdependence of the hordes (ibid.). In this Kaberry was recognising that the system she recorded involved not only rights and duties but also rules about the exercise of rights and duties as well.

A developing orthodoxy

There were other researchers from the Sydney University anthropology department who also reported a more complex situation. For example, M. and R. Piddington, who worked amongst the Karajari south of Broome in the 1930s, wrote of the coastal Nadja Karajari that Radcliffe-Brown’s rule of exclusive ownership of the horde did not apply to their field data. They wrote:

this rule does not exist. Certain small exogamous groups exist, but they lack the solidarity which characterises the normal Australian horde; small parties composed of less than a dozen individuals from any horde may go on hunting expeditions lasting several months, over the territory of any other horde, without asking permission of the owners, who would not object. (Piddington and Piddington 1932, 351)²¹

Elkin disagreed with M. and R. Piddington, suggesting that since the Karajari had been ‘under white influence for some sixty years’ this made reconstruction ‘difficult’ (Elkin 1933, 279) and that failure to ask permission was due to the ‘decadent condition of this part of the tribe’ (ibid., 280). But Elkin’s own field data demonstrated, in fact, that while patrilineal descent was an operative principle in the descent of rights to country, it was not the only pathway to gaining rights to country in Aboriginal Australia. Elkin recognised the importance of a totemic connection in this regard and the fact that there was no necessary or neat fit between an individual’s totemic affiliations and his or her father or father’s estate. This is a matter I have discussed in detail elsewhere (Palmer 2010a, 88).

²¹ See also R. Piddington 1950, 80.

W.E.H. Stanner's 1965 paper contributed to the debate about the correctness of Radcliffe-Brown's anthropology. His paper is better remembered (and now widely quoted) because Stanner presented his views as to how groups of Aboriginal people used the land over which they claimed rights and how this determined the economic resources they exploited, which in turn was a product of the natural environment. Stanner, like Berndt before him, identified the local group or clan as the group with rights to the estates. Bands were the land-occupying group whose range included the estates of several local groups (1965, 2). He thus succinctly overcame the difficulty of the exclusive patrilineal band and its relationship to country by recognising the practical aspects of the use of country by a band and its constituent members. Stanner wrote:

Each territorial group was associated with both an estate and a range. The distinction is crucial. The estate was the traditionally recognised locus ('country', 'home', 'ground', 'dreaming place') of some kind of patrilineal descent group forming the core or nucleus of the territorial group. It seems usually to have been a more or less continuous stretch. The range was the tract or orbit over which the group, including its nucleus adherents, ordinarily hunted and foraged to maintain life. The range normally included the estate: people did not usually belong here and live there, but, in some circumstances, the two could be practically dissociated. Estate and range together may be said to constitute a domain, which is an ecological life-space. (ibid., 2)

Stanner was of the view that a number of local groups, represented in the countryside as bands, together made up language speaking groups. In a way of speaking, 'tribes' were congeries of bands (ibid., 21). Stanner's focus on bands comprising several local groups and the estate and range distinction meant that "tribal" or language-divisions' (ibid., 13) were not central to developing an understanding of how rights to country were articulated.

There have been some modifications suggested to these ideas, as subsequent studies continue to confirm that patrilineal descent may not have been the only means of gaining rights to country. Evidence produced as a result of land claim research has shown that unilineal descent may not have been the case everywhere, particularly for the less well-watered areas.²² Field research supported the conclusion that rights to country could be

22 For views developed from land claim literature, see Hamilton 1982; Layton 1983; Maddock 1981; Myers 1986. See also Peterson and Long 1986, 59–61 and Sutton 2003, 196–199.

gained through a number of ways, patrification being just one (Peterson 1983, 137–138; Stanner 2001, 112–114). Myers, writing of the Pintupi of Central Australia, showed that rights in estates were multiple and perhaps differentiated as to degree rather than singular in relation to one patri-estate only (1986, 138–140). Cane (2002, 115–140) documented five ways by which rights to country could be gained, again for desert regions of southern Australia (*ibid.*, 137). Sutton has shown there to be multiple ‘pathways’ whereby rights to country can be pressed, again for desert regions of Central Australia (2007, 178–187; 2015, 38ff.). In this regard, Hiatt wrote well before the advent of the native title era:

[S]tatements by anthropologists and Aborigines during land claim hearings, together with academic field research carried out during the last decade [i.e. prior to 1984] consolidate the case against Radcliffe-Brown’s conception of the patrilineal patrilocal horde as the basic unit of Aboriginal local organization. But it is not only that patrilineality can no longer be regarded as a principle uniformly governing residential associations and access to resources; we must now ask, in the light of new evidence, whether patrification was everywhere the basic principle of ownership. My own view is that throughout Australia it was an important credential, and probably in many areas the most important. But, in competing for scarce goods and social status, individuals (in traditional times as well as in contemporary land claims) appealed to various other recognized credentials, such as matrification, birth-place, conception-place, father’s burial-place, mythological links, long-term residence, and so on. (Hiatt 1984, 9)

The evidence supports the view that these researchers had found field data to support the conclusion that proprietary interests in country were multiple and complex, depending on a number of relationships. Permission and the exercise of rights were best understood in the context of the relationships that legitimated their expression. The operation of such a system may account for the fact that at least some of the earlier ethnography demonstrated that people exercised rights to access country well outside their patrilineal estate, perhaps legitimated by other attachments to country that were pressed into service to justify the use of a range of country for economic and social reasons. The ideal of the patrilineal descent group whose members exercised exclusive rights within a single estate was not a satisfactory or adequate representation of the ethnographic reality.

Based on these accounts, it is evident that in arid regions, where maximum flexibility was required to ensure continuity of inheritance in an uncertain environment, more open systems were to be found, favouring multiple pathways of descent and the acquisition of rights to country through means other than descent (Keen 1997, 66). However, there appears to be much variation in the ethnography (cf. *ibid.*, 73) and perhaps the best conclusion is that no model fits all. For the native title anthropologist, then, it is not a simple question of stating that the system was universally uniform. Rather, what is required is the provision of a view as to what was likely to have obtained at sovereignty and whether present laws and customs reflect a continuity of the same system. Above all, however, is the fact that in customary systems it is unlikely that rights were to be gained through descent alone. Other ways of gaining rights to country were also likely to have been important and a part of that customary system.

Consideration of the ethnography provided by Radcliffe-Brown and Kaberry shows that there has been some progress made over the decades with respect to our understanding of customary systems of rights to land in Aboriginal Australia. Radcliffe-Brown's initial view was elementary and disarmingly simple: a man gained rights to the bounded estate of his father and so on from one generation to another. The estate was (like an English country estate) bounded and members of other groups had to seek permission before entering it. Kaberry and the Piddingtons were less sure of this 'normal' type of local organisation. Later writers and researchers have shown that generally in Aboriginal Australia rights may be gained by reference to several principles, while in many desert systems there are multiple pathways whereby rights can be asserted according to customary principles and beliefs. In addition to descent, then, place of spiritual conception or some other totemic link commonly yields rights to country. So, too, may ritual links to a Dreaming that traversed the country, particularly with respect to specific places or sites or command of ritual objects believed to embody the country in question. In my experience these are all quite common principles that provide legitimation for the assertion of customary rights to a range of country. Examples of the free use of a much wider range of country than a man's single estate reflected the reality that, from a practical point of view, hunters and gatherers need a wider range of country than would have been afforded by a single estate, except perhaps in the richest tropical environments. Even if an estate provided an economically viable living space, social imperatives and bonds of kinship would have mandated a system that facilitated social

intercourse, free visiting and access rather than impeding it. This instructs that systems of rights to country are neither singular nor simple. They undoubtedly exhibit regional variation but common principles are found throughout. They are the product of social relationships just as much as of jurally endorsed title and are consequently flexible to changes in those relationships as families and groups wax and wane over time.

Native title rights (and interests)

The native title anthropologist has as his or her primary task the job of seeking to explain the system whereby claimants assert rights to country and the extent to which this might demonstrate continuity with past systems. While a 'right' is fundamentally a legal concept, it has been variously understood by anthropologists, and unpacking the term, as I have done above, will assist in gaining a better understanding of what is meant by the use of the word. This, in turn, may assist in deciding whether something is a right or interest at all, as well as whether it is 'possessed' under traditional laws and customs. Attempts to classify types of rights (determinative, contingent) are helpful to the extent that they will assist in coming to an understanding of the social interplay that defines and distinguishes rights. This is particularly important where there is competition or disagreement between claimants (or would-be claimants) as to the status of one sort of right over another. In bringing some social analysis to bear on these disagreements, anthropologists can perhaps proffer a view as to the customary bases of such assertions – should they have the need or be impelled to do so.

While Australian anthropology has produced what I have termed above 'a developing orthodoxy', the matter is not without contention, particularly with respect to the mode of descent that might most usually have been in evidence in Aboriginal Australia. However, I have discussed above how some more recent Australian anthropologists have taken a much broader view of the allocation of rights to country than some of the earlier writers and shown the richness and complexities of the system. These are all issues that must be treated in any native title inquiry. Assessment should be made of the system today (based on the empirical field data) and the likely system in operation at sovereignty where this can be deduced from the early literature or developed through inference from work undertaken elsewhere. Perhaps above all else, this chapter serves to demonstrate how

complex is the system of possessing, exercising and managing rights to country in customary arrangements. In my view, a proper explication of the complexity is a necessary part of advancing an expert view in relation to a customary system of rights to country.

This text is taken from *Australian Native Title Anthropology: Strategic practice, the law and the state*, by Kingsley Palmer, published 2018 by ANU Press, The Australian National University, Canberra, Australia.