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## Native title research and oral testimony<sup>1</sup>

### Do we tell it like it is?

In applying ourselves to native title inquiries, we face two methodological obstacles. The first relates to resources, including time. The second relates to the type of data that is required for the proof of native title. Both have implications for how we do our fieldwork, assemble our data and the reliance that may need to be placed on oral testimony rather than first-hand observation.

### Time, money and the oral account

What might best be called ‘classical anthropology’ involved long periods of time in the field – perhaps a year or more – during which knowledge of the language was acquired, familiarity with the people gained, trust and respect earned and often deeply forged personal relationships developed with informants who became, in time, life-long friends, confidants and perhaps colleagues. This participant observation, bred from many months in the field, living with those studied, had the advantage of yielding insights and knowledge impossible to gain over shorter, more intense periods of

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1 This chapter builds on my paper, ‘Piety, fact and the oral account in native title claims’ (Palmer 2011a). In order to contextualise my account, I have included some short pieces from this paper in this chapter to facilitate presentation of additional materials relevant to the uses of oral tradition in native title anthropology.

fieldwork. It also had the advantage of providing a ready testing ground to evaluate statements made by informants. So developed the important distinction for anthropology between what people actually do and what they say they do. Recording the former requires observation, often over a prolonged period of time. Recording of the latter requires only the right questions and the opportunity to ask them.

The reality of the situation for native title research is that time and resources are unlikely to stretch to permit prolonged periods of time in the field. The Native Title Representative Bodies have limited funding available for claims. Research has to be focused, intensive and strategically organised so as to maximise opportunities for participant observation, particularly during visits to the claim area. Other techniques are also employed including in-depth interviews and group discussions that may produce good field data and, on occasions, copious ethnography. Properly documented fieldwork undertaken over a period of several weeks that includes return visits and trips to the country of the claim can provide a reliable and detailed account of relevant aspects of the claimants' customary laws, customs, beliefs and practices. This fieldwork method relies to at least some considerable extent on oral testimony. It is not possible to observe at first hand every reported activity. For anthropologists researching a native title claim, then, substantial reliance must then be placed on the oral account.

## The type of data – establishing continuity

Proof of native title relies upon a relationship being established between past customary practice and present practice. The evaluation can then be made as to whether there is continuity of laws and custom over time and, ideally, since the time of sovereignty. As a consequence, native title anthropologists need to ascertain from those with whom they work whether a practice or a belief is of some antiquity. Questions that relate to identity or the language of a forebear, their place of birth or country and the family genealogy are all significant in this process. For an anthropologist researching a native title claim it is not possible to observe past events, interrogate the asserted identities or genealogical relationships of those now long dead. Primary data, in the absence of any archival record, must be derived solely from the oral testimony of those who advance the propositions today.

The anthropologist who seeks to provide an expert view as to the continuity of customary beliefs, practices, identities and relationships for a native title claim has little choice but to place substantial reliance on the oral account of claimants. Given the limits imposed on undertaking extensive empirical fieldwork, this reliance is somewhat increased. On both counts, then, the use of oral tradition in native title proceedings is a significant factor in the research process when undertaking a native title inquiry. The native title anthropologist needs both to appreciate this fact and ensure that his or her use and analyses of oral materials is based on a proper appreciation of the nature of the data considered.

## Oral tradition, reliability, anthropology and the courts

### Oral testimony and the court

The bulk of the evidence in any native title claim that goes to trial is the oral evidence of the claimants. In addition, affidavits and witness statements may be provided to the court as part of the evidentiary process and they too usually rely on the oral testimony of the claimants. The use of oral testimony is commonplace in many legal proceedings. However, witnesses in, say, a criminal or a road traffic accident trial, usually only give evidence about the events they actually witnessed (otherwise, it may be disallowed). Further, the events witnessed are likely to have occurred not long before the trial. This may not be so in a native title trial where people are asked about relationships to forebears, language identity and places of birth and residence that they have only been told about. Evidence may also be given about the antiquity of practices and beliefs based on what the witness recalls being told about the matter by parents or grandparents, sometimes decades ago. My observation in trials is that counsel for the respondent parties may object to some evidence of this sort.<sup>2</sup> I also think it reasonable to assume that judges make up their own minds as to the

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2 For example, ‘The State discounted the Aboriginal testimony about societal unity at the second trial with the broad proposition that “... in the absence of traditional methods of recording social history, Aboriginal historical memory is notoriously shallow, infrequently extending beyond two generations”. The basis for this contention was not stated and I do not accept it as a global proposition which has any part to play in my decision. My assessment of the Aboriginal evidence is based upon ordinary processes of inference and assessment of probabilities and credibility that apply to the testimony of any witness.’ *Sampi v State of Western Australia* [2005] FCA 777 [981].

reliability or weight of the evidence they hear.<sup>3</sup> However, the fact remains that the proof of native title requires consideration of some issues that cannot have been observed by the witness and may rely on an oral recall extending back many decades.

The legal problem develops from the jurisprudential principle that some forms of testimony may be what is called 'hearsay' and cannot be afforded the same weight as other evidence and, indeed, may be ruled out of consideration altogether by a judge. The 'hearsay rule'<sup>4</sup> prohibits most statements made outside a courtroom from being used as evidence in court. Thus, oral accounts that rely on statements that report what others have said may be judged as constituting hearsay. Oral traditions are, by their very nature, dependent upon a verbal transmission over time where authority for a belief or practice is usually cited as an ancestor or deceased forebear, neither of whom would be available to give evidence. Customary Aboriginal systems place heavy reliance on the oral account, imputing a gravitas and authority that stems from the very aspect that European Australian law finds at fault. According to customary Aboriginal principles, the past enunciates authority. Traditional values and beliefs transmitted through the oral account are afforded the quality of unchallengeable inviolable Law and are often regarded as having a sacred quality. Yet, in an Australian courtroom such pronouncements may potentially be categorised as 'hearsay' and may be challenged.<sup>5</sup>

This is a thorny legal issue that has exercised the courts and jurists for many years now. Peter Gray<sup>6</sup> is a distinguished former judge of the Federal Court with a long interest in cross-cultural communication, particularly in the legal system as it has impacted on Indigenous Australians. Gray has provided some helpful insights into the legal background to this

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3 See, for example, 'However, Mr Nathan's oral evidence in this proceeding has cast some doubt on the reliability of what he recounted to Dr Palmer and, indeed, the reliability of his recollections generally. By saying this I mean no disrespect to Mr Nathan: he is clearly held in affectionate and important regard by many people inside and outside the claim area and is a Pitta Pitta elder. However, his evidence was somewhat confused and contradictory'. In fact, I (Dr Palmer) did not work with Mr Nathan but relied on the research conducted by another expert who did. *Dempsey on behalf of the Bularnu, Waluwarra and Wangkayujuru People v State of Queensland* (No. 2) [2014] FCA 528 [261]. See also *Aplin on behalf of the Waanyi Peoples v State of Queensland* [2010] FCA 625 [234].

4 *Evidence Act 1995*, section 59.

5 There are provisions in the *Evidence Act* that provide exceptions to the rule against hearsay evidence with respect to traditional laws and customs (section 72). Robert Blowes SC, pers. comm.

6 Hon. Professor Peter R.A. Gray AM. Now Adjunct Professor, Monash Law School. See [www.monash.edu/law/current-students/resources/course-unit-information/postgraduate/sess-peter-gray](http://www.monash.edu/law/current-students/resources/course-unit-information/postgraduate/sess-peter-gray) accessed 26 January 2016.

issue (2000). Gray noted that the reliability (perhaps ‘truthfulness’) of oral accounts was a matter of debate amongst social scientists (*ibid.*, 6). In relation to claims made by Indigenous Australians to have rights to country, this matter was first examined by Blackburn J in the Gove case.<sup>7</sup> Gray (*ibid.*, 8) cites his Honour as ruling that ‘No question of hearsay is at this stage involved; what is in question is only the personal experience and recollection of individuals. The substance of this evidence had to be proved, in some manner, as an indispensable preliminary to the exposition and understanding of the system of “native title” asserted by the plaintiffs’.<sup>8</sup> Evidence of a witness was then admissible provided he (or she) ‘spoke from his own recollection and experience’. Gray notes that the difficulty of some oral accounts being regarded as ‘hearsay’ and potentially not admissible was a feature of the Mabo trial.<sup>9</sup> The evidence included testimony based on what Torres Strait Islanders had been told by their forebears and this evidence gave rise to hundreds of objections (*ibid.*, 8). Gray observed:

Moynihan J admitted much of this evidence, such as statements made by Eddie Mabo’s grandfather relating to boundaries of land, but stated that further evidence would be needed for it to be accepted as truth. His Honour said:

‘I have little difficulty in accepting that the fact of assertions being made by persons other than a witness may be relevant and hence admissible. The evidence is not, without more, however necessarily admissible as to the truth of the matters asserted.’ (*ibid.*, 8)<sup>10</sup>

Gray reports that other jurisdictions, notably the Supreme Court of Canada, have shown more acceptance of the importance of oral tradition as evidence in cases relating to indigenous rights to land (*ibid.*, 6). Gray cites Lee J of the Australian Federal Court in *Ward v Western Australia*,<sup>11</sup> who himself cited a Canadian case. Lee J identified the disadvantage faced by Aboriginal people should they not be able to ‘depend upon oral histories and accounts, often localised in nature’ and found there to be ‘no suggestion of unfairness in a trial process in which Aboriginal applicants are permitted to present their case through use of oral histories

7 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

8 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 [153].

9 *Mabo v Queensland* [No. 2] (1992) 175 CLR 1.

10 *Mabo v Queensland* [1992] 1 Qd R 78, per Moynihan J [87].

11 *Ward on behalf of the Miriuwung and Gajerrong People v Western Australia* (1998) 159 ALR 483.

and by reference to received knowledge'.<sup>12</sup> Gray considered that Lee J's comments might 'lay the foundation for a more liberal attitude by Australian courts to the admissibility of oral records of Aboriginal people' (ibid., 7).

Some trial judges have shown themselves willing to accommodate oral testimony based on what witnesses were told by their grandparents. Weinberg J stated in this regard:

Of course what they were told will be hearsay, but it is hearsay of a kind that has been readily admitted in native title cases. In *Gumana*,<sup>13</sup> the relevant date for sovereignty was 1788, and not 1825. Selway J concluded that the evidence tendered by the applicants of genealogies and linguistics was sufficient to establish that some of the ancestors of persons who were currently claimants were members of Yolngu society in 1788 and, indeed, well before then.

His Honour wrote (at [194]):

'Ultimately the evidence of the existence of the relevant Aboriginal tradition and custom as at 1788, and of the rights held by the particular clans in 1788 and thereafter pursuant to that tradition and custom, is based upon evidence derived from what the Yolngu claimants currently do and from what they have observed their parents and elders do and from what they were told by their parents and elders ...'

His Honour continued (at [195]):

'As already discussed, there is nothing peculiar or unique about this sort of evidence. It is oral evidence of a custom. It is evidence of fact, not opinion. To the extent that it consists of what Mr Gumana was told by his father and by other old people it constitutes a recognised exception to the rule against hearsay.'<sup>14</sup>

Gray was also cognisant of substantial changes to the *Native Title Act* that did not auger well for the adoption of a more liberal attitude:

The resolution of the relationship between the rules of evidence and Aboriginal traditions in Australia will be particularly important now that amendments to the *Native Title Act 1993* (Cth) have come into operation.

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12 *Ward on behalf of the Miriuwung and Gajerrong People v Western Australia* (1998) 159 ALR 483 [504].

13 *Gawirrin Gumana v Northern Territory of Australia* [No. 2] [2005] FCA 1425.

14 *Griffiths v Northern Territory of Australia* [2006] FCA 903 [574] to [576].

These amendments make the rules of evidence applicable to the hearing of applications for determination of native title, unless the Court otherwise orders. The rules of evidence, so far as applications for determination of native title are concerned, are now to be found in the *Evidence Act 1995* (Cth). An introductory note to Chapter 1 of that Act states ‘This Act sets out the federal rules of evidence’. The provisions of that Act with respect to hearsay are more liberal than the common law rules, but are potentially restrictive of any attempt to create new exceptions. Perhaps the solution lies in a recognition of oral traditions as a category of real evidence, not hearsay at all. (Gray 2000, 9)<sup>15</sup>

The admissibility or otherwise of evidence is firstly a matter for the lawyers who must consider the proper form of the evidence, both of the Aboriginal and expert witnesses. Ultimately, the matter if challenged is a question for the courts. It is also a matter for the court to decide what weight (creditable proof) to place on the oral evidence. However, the questions raised by an evaluation of the reliability of oral tradition, recall and evidence based on non-witnessed events are not confined to legal proceedings. Anthropologists are also aware of the limitations of the oral account and some of the difficulties it raises for understanding and making sense of past action.

## Professor Sansom and Timber Creek

In the Timber Creek native title determination, Weinberg J<sup>16</sup> had cause to consider the evidence provided by claimants as oral testimony, as this had been the subject of debate between the experts – the author (Dr Palmer, called by the applicant) and Professor Sansom (called by a respondent, the Northern Territory Government). As I have noted above, his Honour was sympathetic to the oral accounts provided by the applicant and concluded that reliance on an oral account was not unique to native title law. He also found that there was evidence from claims under the *Aboriginal Land Rights Act* (NT) that supported genealogical connection with the application area to a period at or about the time of sovereignty. His Honour stated that there was ‘Evidence given in the Timber Creek Land Claim in 1985, and also in the other land claims involving adjacent areas’ (Griffiths FCA 903 [572]) that established ‘a direct connection between the claimants, and their direct ancestors’ in relation to the claim

15 Footnotes excluded.

16 *Griffiths v Northern Territory of Australia* [2006] FCA 903 (Griffiths).

area (Griffiths FCA 903 [572]). By this logic, then, the oral account was not without support from independent legal findings, notwithstanding the fact that these very findings had themselves been founded on oral testimony. In addition, based upon the same reasoning, his Honour was prepared to accept that there was evidence of a continuity of laws and customs (Griffiths FCA 903 [572] to [583]). He therefore concluded that 'It would be wrong, in my view, to approach the issue of connection by turning a blind eye to these historical realities' (Griffiths FCA 903 [583]). He was able to determine that 'the rights and interests' that were enjoyed by the forebears of the claimants had 'passed on through this system of descent'. They were rights and interests that were 'in my view, recognised by the common law of Australia, and are therefore properly to be characterised as native title' (Griffiths FCA 903 [584]).

The judge's comments were in part a response to Professor Sansom's assertion that 'In the absence of total and reliable outside documentation of the history of a local group since sovereignty, it is not possible to say of any contemporary local group that it was represented by the antecedents of present members in 1825' (cited in Griffiths FCA 903 [431]). His Honour's comment was, 'Of course, if this statement were taken literally, no native title claim could ever succeed in the Northern Territory, or perhaps in any other part of Australia' (Griffiths FCA 903 [432]). His Honour did accept, however, that Sansom's opinions regarding some 'particular dangers associated with historical recall' were perhaps relevant to the understanding of oral testimony. He cited, by way of example, the customary ban on calling the names of the dead, the shallowness of oral recall and the practice that 'proscribes the telling of stories about a person or persons that one has never met' (Griffiths FCA 903 [433]).

These apparent impediments to the free flow of an oral account were, I think, not quite what Professor Sansom had in mind when, as the judge wrote, Sansom consigned 'oral history to the periphery' (Griffiths FCA 903 [431]). Subsequently, Professor Sansom developed his views regarding oral testimony at Timber Creek and elsewhere (2006). In this paper, Professor Sansom noted the propensity for judges to place substantial reliance on the evidence of the Aboriginal claimants.<sup>17</sup> He was of the view that such reliance showed a misunderstanding of the nature of the oral account. He argued:

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17 Citing Sackville in Yulara (FCA [288]) and other related references.

Of itself, widespread Aboriginal tradition limits recall of traditional practice. Emplaced traditions work, furthermore, to eliminate all memory of any historical departures from once-established norms. The consequence is that credible information about anything but the personally witnessed past cannot be rendered up by the Aboriginal testator who has not had recourse to records. If proof of the continuity or discontinuity of tradition from the time of sovereignty is to be supplied, the court has no choice but to rely on those devices for the remembering, preserving or retrieving the past that have been imported into Australia since settlement. Proof (if any proof there be) is to be gained by recourse to records and/or expert opinion. (ibid., 150–151)

Sansom is not alone in his views regarding the shallowness of historical recall. Morphy (1993, 236) is of the view that, in Yolngu ontology, ‘landscape and myth are ... machines for the suppression of history’ (see also Samson 2006, 153–154). A lack of written history means that changes in the groups that occupied country were ‘masked’ (Morphy 1993, 236). On Groote Eylandt, I collected narratives about migration and settlement. These purport to identify members of a third ascending generation (for example, a great grandfather), but in fact evoke individuals who belong to higher generations, a truth that can be recovered by the use of names in the genealogies collected some decades ago, supporting the view that the oral account can work to truncate or telescope historical events. Chronology is not, however, entirely absent. My experience in other areas of Aboriginal Australia supports the view that Aboriginal history does reveal some sense of limited depth. I have collected stories of Captain Cook in the Victoria River District of the Northern Territory, as has Rose (1992, 187–191). These narratives place him in the distant past, but not in the primordial Dreaming. Stories of Noah’s Ark, which I have collected from the Kimberley, are narratives synthesising customary content with Biblical content (Kolig 1980a) while the events related are assigned to the Dreaming and an indefinite period in the past. Rose (1992, 206–207) writes that events within the Dreaming had a chronology, again something that I have encountered many times in my own fieldwork.

While the case for concluding that Aboriginal history is lacking chronology is not altogether made out, from an anthropological point of view oral accounts are shown sometimes to lack depth and may be unreliable. Given that native title requires a demonstration of a continuity of social formation, laws, customs and ancestral connection to land that spans more than the compass of witnesses’ lived experience, the uses and reliability of oral traditions is a significant consideration for native title

anthropology. Consequently, for both the court considering a native title application as well as for the native title anthropologist, the reliability of oral tradition is an important issue.

In a paper I published in 2011 I have set out a detailed critique of Sansom's position (Palmer 2011a, 272–285). I was of the view that Sansom, while identifying some important issues relating to oral tradition, had rather thrown 'the baby out with the bath water' (*ibid.*, 269). It is one thing to understand the context of an oral tradition and exercise care and qualification as to how it should be used or interpreted. It is quite another to discard Aboriginal oral tradition altogether on the ground that it is somehow 'untrue', not to be trusted and that sole reliance must be placed on 'records and/or expert opinion' (Sansom 2006, 151). Some sorts of oral tradition that relate to the domain of religious beliefs and practices are innately conservative because they are creatures of a fundamentally conservative culture. I have argued elsewhere that this conservatism works to limit change in oral transmission (Palmer 2011a, 281–284). In assessing the validity and veracity of an oral account, these factors that work to limit change may be relevant and I discuss some aspects of this matter in what follows.

## Factors that affect continuity

### Conservative societies?

Ronald and Catherine Berndt characterised Aboriginal society prior to European settlement as 'conservative', although they did note exceptions (1988, 492). They considered that this was a consequence of geographic isolation, small populations and limited resource exploitation (*ibid.*). The social and religious systems were sustained by rules and sanctions that discouraged nonconformity, 'their members emphasising the unchanging quality of life, the importance of tradition, rather than the desirability of change as such' (*ibid.*, 493). The Berndts were writing of pre-contact Aboriginal society in the context of an examination of the impacts of European settlement and invasion. However, these researchers were not alone in understanding Aboriginal society to be innately conservative, a feature that endures to the present in at least some areas where native title research is currently undertaken. Meggitt, writing of the Walbiri of Central Australia, commented that 'regularity, frequency,

efficiency, and propriety are all expressions of normality – behaviour is predictable because it should be’ (Meggitt 1962, 253). Walbiri belief was then ‘inevitably moral, conservative and circular’ (ibid.). Nor did this change fundamentally with the innovations that came with European settlement. Rather, while ways of behaving may have changed, the rules that govern these changed circumstances ‘have altered little’ (ibid., 254). Kolig explains this conservative tendency by reference to what he terms ‘mental continuity’ (1977, 51), represented in an ‘elaborate ideological superstructure’ that could ‘exist undisturbed in their basically traditional and highly intellectually oriented milieu’ despite harsh environmental conditions and, more latterly, the changes wrought by European settlement (ibid.). Morphy sees the beliefs and oral traditions as providing fixed and structured forms, where ‘the untrammelled creativity of the ancestral beings is lost precisely because they created the world in a form that could be passed on from generation to generation as the order of the world’ (1995, 189). Theirs were ‘frozen experiences’, left behind to be significant to the lives of others (ibid.). For the Yolngu, Morphy was of the view that ‘the most conservative part of the system is the totemic division of the landscape and certainly in the case of place names there is remarkable continuity at least since the 1880s when we first have evidence’ (1993, 236).

Myers, writing of the Pintupi of Central Australia, remarked that part of the idea of the Dreaming for the Pintupi is that it ‘implies continuity and permanence’ (1986, 52). According to this understanding and belief, ‘the cosmos has always been as it is and that, indeed, it cannot be different’ (ibid., 52–53). Change and alteration is not absent from Pintupi thinking, for ‘the evidence of new customs and new cults is unassailable; life is not static’ (ibid., 53). However, the Pintupi apply the concept of the Dreaming in such a way so as to present the changes as though the experiences of them ‘*appears* to be continuous and permanent’ (ibid., 53). This resonates with Morphy’s observation of the Yolngu that while change is all apparent, ‘the mythic screen that covers landscape makes the relationship appear unchanging’ (1995, 204).

These writers were not arguing for an unchanging society, far less one that was incapable of adaptation. The common theme is an appreciation of the conservative nature of Aboriginal societies and their inherent stability and adherence to the forces of tradition. So, where changes did occur, as indeed they must, it was on the understanding that the fundamentals of the system had remained intact and only the circumstances or

relationships had become modified. The ideology of stasis and a fixedness of rules and their determining progenitors could not have been sustained in the face of blatant alteration – the ‘mythic screen’ and the *appearance* of an unchanging world had to be based on the conservative and change-resistant structures that the Berndts first identified. These provided for a stability and continuity of belief and practice such as Sutton noted for the Western Desert:

In fact as a basis of tenure interests such knowledge perhaps reaches its greatest prominence in that region. The Dreamings (*Tjukurrpa*) and their sites and tracks seem to be the most stable elements of the system, one that was demographically porous as individuals came and went over long periods. (Sutton 2003, 159)

## The Law and the Dreaming

In an earlier chapter of this book, I discussed the Aboriginal metaphysical construct of the Dreaming (see Chapter 5). The Dreaming unites past and present. It is believed to be the source of all spirituality and supplies an explanation and justification for present action, ritual belief and practice. The customary way to do things is believed to have been ordained in the Dreaming, which is considered to be the spiritual originator and perpetuator of consuetudinary practice that comprises the normative system. The Dreaming and its constructs are important to native title as they provide the legitimation and justification for the view that these ways of doing things are unchanging and unchangeable.<sup>18</sup> The codification of these principles is often enunciated by the use of the English term ‘Law’, reflecting the jural and mandatory nature of the rules, which are understood to be evoked by the use of the term. The choice of the Aboriginal English term ‘Law’ reflects the authority of its precepts and the imperative that its tenets be obeyed – just as European Australians respect and observe Australian law, showing deference for the gravitas that its institutions represent and understanding that penalties may apply to acts that contravene its regulations and edicts. The Dreaming, and the Law it is believed to have engendered and continues to sustain, is a matter of high seriousness in customary dealings. These concepts are implicit in any understanding of how Aboriginal belief systems operate and both, in their separate ways, are a means to emphasise the stability, unchanging character and thus the authority of customary belief and practice.

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18 Meggitt 1962, 251–252; Myers 1986, 53; Sutton 2003, 83.

In the Aboriginal cultures with which I am familiar, a key aspect of belief and dogma articulated through beliefs in the Dreaming and its mandated rules for action is that a person does not meddle with a Dreaming or willingly contravene a Law without fear of dire consequences. This is not only a matter of fear of human physical reprisal or opprobrium. Contravention of Law is a matter for the spirit world. Grave consequences will follow, so it is believed, whether there is a human prosecutor or not. These strictures apply to accounts of the beings of the Dreaming and the names, languages and marks they left behind them and the laws and customs they ordained. One example of this is the canonical lists of place names that a senior ritual leader may rehearse when discussing a narrative string in which a Dreaming protagonist visits numerous places in a traverse of country. Such strings and associated adventures may follow lines of hills, lakes, coast or a river.<sup>19</sup> During the many years I have worked in Aboriginal Australia where oral traditions remain vibrant, I have collected many such accounts that demonstrate the detailed knowledge a person has of country and the activities of the Dreaming beings. I have set out one example of this form of oral tradition in a paper I published (Palmer 2011a, 282) and there are plenty of additional examples to be found in the literature. Narratives, song and ritual performances are all subject to the imperatives of the Dreaming and the demands of the Law. Thus, correctness of word and action in the rehearsal of these traditions is essential. One way whereby people ensure that there can be no suggestion of wrong action relating to oral traditions is to make their performance and commemoration group activities. This works as a kind of insurance, safeguarding practitioners from making mistakes, as well as ensuring that all relevant people knew how a particular business had been conducted. These oral traditions are practised, then, in the company of others who usually have senior status, either in the same country that was being celebrated, or in a neighbouring area.

Individuals are generally unwilling to talk about country without others being present to witness the account. These discussions are often accompanied by an interplay between individuals, which provide a means of ensuring that accounts are correct; that is, consistent with corporate memory. In ritual performance, such commensality is a significant feature of interactions. Without the presence of others, ritual performance could

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19 See, for example, von Brandenstein (1973, 97) who related such a list collected from the Pilbara region of Western Australia.

not take place. In such an exchange, oral knowledge is not individuated. Its presentation is subject to group correction and validation. Performance and transmission is regulated by a jural public, ensuring continuity of content. Ritual instruction is characterised as vigorous and attention is paid to ensuring that an initiate learns fully and correctly. 'Getting it wrong' is subject to sanction and is not tolerated.

Such a process of oral tradition works toward the maintenance of continuity of accounts and limits the possibility for revisionism or innovation. While oral accounts will, inevitably, suffer transmutation over time, transformation is not facilitated by the process I have outlined here. These examples are, of course, taken from a particular genre of customary belief and are more likely than not to be found in ethnographies where customary beliefs and practices remain quite vibrant.

While the texture of Aboriginal belief and practice in such contexts favours conservatism over radical transmutation in the oral account, a common difficulty arises when oral accounts must provide the basis for claimant family history and the related topic of country and language of origin. In making inquiry into these matters, the anthropologist may need to seek independent verification from other sources, should these be available.

## Using oral accounts in native title claims

The task for the native title anthropologist is to comprehend oral tradition as a social exchange replete with meaning and bring these understandings to both the method employed and the subsequent analysis from which expert opinion is derived. For my present purpose I focus on two subjects that recur in native title research. The first is oral family histories which include genealogical knowledge. The second is what can be broadly called 'oral tradition', being the compendium of oral accounts relating to a forebear's place of origin, country of affiliation or language group identity. These two aspects of the oral account have in common a reliance on recall and often involve comments or statements regarding relationships, events or customary belief and practice that are remembered as a part of a continuing oral tradition. What I seek to explore here is how these data can be comprehended in anthropological analysis, making allowance for transmutation or other changes to the original. In this way we can admit oral accounts to our analysis based on a proper understanding of the materials we present and upon which we ultimately rely.

## Genealogies and family history

The fact that genealogies are typically limited in generational depth is well documented in Aboriginal Australia (see Barnes 1967, 119; Sansom 2006, 157–59). Given sole reliance on the oral account, a person generally commands knowledge of two or occasionally three ascending generations from his or her own. Rarely, unless documentary and archival materials are relied upon, will oral recall extend to the great great grandparental generation (that is, ego's FFFF or mmmm<sup>20</sup>). In some cultures learned canonical listings of genealogies are themselves a part of oral tradition<sup>21</sup> but this is nowhere a feature of Indigenous Australian cultures where genealogical knowledge generally extends only as far as ego's own lived experience or that of his or her parents, passed down through the oral account.

Most of those with whom I have worked in native title inquiries have genealogical recall of two ascending generations. If ego is a man or woman of middle to late middle age, then it is also likely that they will have knowledge of two descending generations. Thus, typically, genealogical recall covers five generations, including ego's own. This means that if ego was, say, 70 years old in 2015, and allowing for a gap of between 20 and 25 years per generation,<sup>22</sup> then ego's grandfather is likely to have been born between 1895 and 1900.<sup>23</sup> While it may be possible to find claimants older than this, it is an unfortunate fact that this is unusual and many are younger.

In terms of continuity of ancestral connection, a date of 1895 (allowing for the older of the calculated dates) does not match sovereignty anywhere on mainland Australia.<sup>24</sup> However, in many remote places the frontier did not advance much more than two or three decades before this date. Prior to this, it might be reasonably inferred, customary systems would have remained intact.<sup>25</sup> Thus, the date of what I call 'effective sovereignty'

20 Kinship abbreviations are explained in Chapter 9 under the subheading, 'Some methodological and procedural issues'.

21 For example, the Maori *whakapapa*, recited as part of an oral tradition describing a line of descent from ancestors down to the present day.

22 Peterson and Long have calculated an average generation gap for Aboriginal women as 15 years minimum and for men 30 years, as men traditionally married later (1986, 149–150).

23 Ego was born in 1945, his father in 1920–25 and his grandfather in 1895–1900.

24 Parts of the Torres Strait have a date of sovereignty as late as 1879 (Queensland Government 2003, 23).

25 This is accepted by the Queensland Government 'for the purposes of mediation' (2003, 5) and has been used in a number of native title cases.

will often be some decades after actual sovereignty. In this reasoning, genealogical recall to two ascending generations is useful, if not conclusive, to supporting arguments about ancestral connection.

One way to remedy this shortfall in attaining the date of effective sovereignty is to rely on archival genealogical materials in order to trace the family tree back several additional generations to the required date. I examine some of the practical matters that develop from the use of archival materials generally in native title work and the problems and difficulties attendant upon this task in Chapter 7 of this book. In Chapter 9 I examine the uses of genealogies including aspects of what I there term 'genealogical truth'. Here I am concerned to explore how genealogical accounts recorded by earlier researchers may be brought to bear on the oral account of the claimants, which may serve to bring credibility to the latter. Alternatively, bringing the oral account to bear on the archival account may render the latter more meaningful to the native title inquiry.

There is a range of archival genealogical materials available to researchers in native title claims. Two of the most commonly referred to are genealogies collected by Daisy Bates and Norman Tindale, although there are many others available depending on the location of the research, including Radcliffe-Brown, Elkin and Kaberry. Bates's genealogies were collected comparatively early, generally dating to the first decade of the last century, although some are later. Radcliffe-Brown collected some of his genealogies in company with Daisy Bates and others from the Pilbara region in 1911. I have also used Elkin's genealogies collected from the Dampier Peninsula, western Kimberley region, which date from the period 1927–28, and Kaberry's Kimberley genealogies collected in the period 1934–36. Norman Tindale's work is a common source for genealogical material. He collected his data somewhat later than Bates, although he did take some genealogies as early as 1928 in South Australia (at Koonibba Mission) and carried on this work in many places round Australia until the 1960s. Some of Tindale's genealogies are complex, tracing back three generations from ego with multiple co-lateral branches that can make them difficult to follow. Tindale sometimes complemented his genealogical data with social information entered onto cards, as well as anthropomorphic measurements.

The archival account may itself present challenges for interpretation and should not be uncritically regarded. In this respect, both Bates and Tindale present some difficulties. Bates's genealogies are sometimes hard to follow and the meanings of her many annotations are often unexplained

while actual relationships are not always apparent (see Palmer 2011a, 273–274). Bates used Aboriginal personal names for the most part so it is difficult, if not impossible, to trace English names to her account without the knowledge of claimants who recall those Aboriginal names. Tindale’s ‘tribal’ ascriptions make assumptions about how these identities were formed and the implications of their use (see Palmer 2009). These reservations must be borne in mind when attempting to interpret the archival record. While the written account may command a certain authority by virtue of its being rendered as text, documentation does not mean that it is either unambiguously intelligible or factually correct. Such a qualification should be applied to all archival sources. Thus, reliance on the archival record is no magic cure for the inaccuracies of reported history.<sup>26</sup>

These archival sources are of no assistance to a native title inquiry unless they can be convincingly identified as being the record of a claimant family. The archival record will generally cease at the date of its collection and without the oral account of the claimants there is often no way of linking the written record with claimants today. European names, Aboriginal names and sometimes nicknames may all be helpful in identifying the forebears of a claimant family in a genealogy. Names of offspring and other family members may be helpful in providing some evidence that the genealogy in question does indeed have as its subject the claimant family being discussed. However, care has to be exercised when common names occur in the genealogy, such as ‘Polly’ or ‘Topsy’, lest the name is the sole basis for identification and, in fact, the genealogy has no relationship with the subject family. Given consistency between the archival document and the oral account, the latter, limited though it may be to several ascending generations, provides the means to make sense of the archival account. Without the informants’ knowledge of their forebears, contained in the oral histories, the archival documents would be of no relevance since there would be no way to link claimants with those represented in the genealogies.

Archival accounts, then, complement and supplement the Aboriginal evidence and provide a useful source when trying to reconstruct genealogical connection. The data they contain may provide ground for interpretations

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26 See Rose’s (2002) analysis of the use of European texts such as Curr (1883), which she argues must be read with caution. I discuss the problems of the use of archival materials elsewhere (see Palmer 2010a) and examine the issue in greater detail in the following Chapter 7.

as to people's country of origin and language-group affiliations, which may assist a native title inquiry. The archival evidence supports the oral evidence. This does not render the oral account compromised through processes of its transmission, but rather recommends it as the logical starting point for any genealogical account. The two sources complement each other and resolve the problem for native title work which requires genealogical knowledge that extends beyond the range of oral recall.

From the point of view of anthropology, the implications of this understanding are important as they instruct that identifying native title ancestors back as far as the date of sovereignty or even effective sovereignty through oral tradition alone is limited to the shallow depth of oral genealogical recall. Consequently, it is desirable to subject to analysis archival genealogical data where these are available. Consequently, the use of genealogical materials collected by earlier researchers provides confirmatory data that will support the oral account and may also provide a corrective.

## History

An oral history account is of the present, notwithstanding the fact that it details past events. Since it is of the here and now, it is possible (perhaps likely) that it will be influenced by the present, including the context of its performance and the objectives of the teller. In a contested environment, oral accounts may provide legitimation for pressing a particular suit or point of view so their substance is shaped by contemporary aspiration. This inherent flexibility of an oral history may eventually result in the transmutation of the original 'fact'. Historian Patrick O'Farrell, in an attack on the privileging of oral sources over other data in his discipline, was scathing in his criticism of such singular reliance:

The basic problem with oral testimony about the past is that its truth (when it *is* true) is not primarily about what happened or how things were, but about how the past has been recollected. That being said – hardly a startling revelation – at once all the claims made for oral history – accuracy, immediacy, reality – come under most serious suspicion, and we move straight away into the world of image, selective memory, later overlays and utter subjectivity. (O'Farrell 1979, 4)

O'Farrell does not suggest that the oral account of history has no place – only that it requires other sources to bolster its incompleteness or provide a corrective to the oral testimony, which, being a recollection, is vulnerable

to inaccuracy (*ibid.*, 4). This is not to say that such flexibility is conscious manipulation or eventual transmutation is deliberate on the part of the teller. Views of past events may be held with almost religious conviction by claimants in native title claims and expounded to the court with passion.<sup>27</sup> The challenge for a native title anthropologist is how to evaluate the field data collected from claimants, taking into account the nature of oral tradition. In tackling the likely nature and extent of such, the anthropologist is faced with a forensic task, which is commonplace enough. It is reasonable to expect the researcher to apply checks and balances to the field data. Typically, these may be in the form of archival references, prior accounts or other independent contemporary versions of the same set of incidents. However, these may not always be available and a good deal of the data we collect in the course of our research into native title matters relies on the oral account of the claimants, based on their recollections of what they were told. This means that at times oral history must stand as the field data and the sole basis for an expert view. In these cases the degree of concordance in oral accounts may be significant. Unanimity amongst those who relate events through an oral history account is an important pointer to its possible verity because there is a commonality of recall in the oral memory. Methodologically, then, the absence of a dispute relating to an account of oral history, provided the field has been thoroughly canvassed, places less demand on a need for verification, although where this can be supplied the oral account will have greater weight. This does not mean that uncontested oral histories are uncritically accepted, but it does mean that they should be subject to different methodological procedures than those that are clearly in contention between claimants or claimants and respondents. In cases where there is a contest between Aboriginal parties, inconsistent accounts may flag changes or ruptures to the oral history. Disagreement may be a sign of error in one of the accounts. Assessing which is most probably wrong can only be done in conjunction with the other tools outlined here – archival documents and prior statements.

In practice the application of these methodological principles may be accompanied by some pain when there is contestation between Indigenous participants. Potentially, then, the anthropologist will be required to give an opinion as to the validity or otherwise of an oral history, which may be

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27 See Sutton 2017 for examples and analyses of innovation in an oral account.

uncomfortable in a public hearing. Discomfort will not only develop from those whose views are brought into question, but may also be subject to criticism by the courts if the process followed is not properly understood.

Commonly in native title matters the question at issue will relate to avowed facts given as oral history that might provide evidence of connection to the claim area or rights in it of a particular person. Such facts might relate to the asserted place of birth of an individual, typically an ancestor of a set of claimants or those represented by an Indigenous respondent. More generally they might relate to an individual's country or place of origin or affiliation. Common, too, are claims relating to an ancestor's language group identity, which in turn is identified with particular parts of an application area. Evidence relating to such matters is often adduced in court in the form of statements like 'I was always told this was so by the old people' or 'I've always known this was so. It was just something we were always brought up to know'. This is common in field data too – there being no authority greater than the oral tradition carried by remembered forebears. Where these assertions are advocated by the applicant, the anthropologist may be asked whether there is documentary evidence to support the contention, this usually being done in the expert report. Where these assertions are challenged, the means to support such a challenge is also likely to rely on one or more independent evidentiary items that can be argued to call the oral account into question. In short it is not uncommon in my experience for an assertion that relies on oral history to be subject to scrutiny by the anthropologist whether supported or brought into question, so permitting the court to evaluate the weight that might be placed on the oral evidence.

While documentary evidence that might illuminate the validity of oral history is not always available, where it is it is likely to comprise three broad categories of materials: archival documents; prior statements made in previous native title or land rights claims; and the comments, views and perhaps testimony of others. Each brings its own particular problems, and the path to validation or testing oral history is strewn with obstacles and potholes for the unwary.

Archival documents typically include birth, marriage and death certificates, Native Welfare reports or records and the genealogies collected by earlier researchers where these included comments or annotations relevant to the matter in question. With respect to the last-named source, Tindale is of particular note since he was in the habit of annotating his personal names with a language group designation and sometimes a place name.

The specific problems relating to the use of these documents is a matter I address in the following chapter of this book, so I will not dwell on it here. I note only that interpreting these documents is often a challenge and while they have the authority of the written word, this does not mean they are necessarily accurate.

## The surrounding noise

It is sometimes the case that Indigenous claimants or respondents have been involved in court hearings relating to land claims made under state or territory Acts. These include claims heard under the *Aboriginal Land Rights Act* (NT) or state Acts like the *Queensland Aboriginal Land Act* (1991). There are also cases where claimants or Indigenous respondents have featured in earlier native title claims. The transcripts of these and the reports of commissioners and the determinations of judges may contain evidence relevant to an oral account offered up in a later case. The Bularnu, Waluwarra and Wangkayujuru native title claim in which I was involved<sup>28</sup> illustrates the use of evidence and findings of a prior court case, as well as the role that the competing claims of Indigenous testators may have in the evaluation of the oral traditions upon which the evidence is based.

In the Bularnu, Waluwarra and Wangkayujuru claim, the applicant had rejected the inclusion of the descendants of a woman known as Bunny or Bonny. The family in question, descendants of Bunny, sought and were granted leave to be joined as respondent to the claim. The Indigenous respondent, who was self-represented, asserted that her ancestor held rights to and affiliations with country and language identified with the application area. The experts in the case had identified for the court that the same ancestor had featured in an earlier claim made under the *Queensland Aboriginal Land Act*.<sup>29</sup> The commissioners who adjudicated the claim determined both the language group name and the country of affiliation of Bunny and her descendants (Land Tribunal, Queensland 1994, para 380). This was different to that now pressed by the respondent. The findings of this prior inquiry were a significant factor in the experts' evaluation of the conflicting oral accounts gained from the claimants and the Indigenous respondent.

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28 *Dempsey on behalf of the Bularnu, Waluwarra and Wangkayujuru People v State of Queensland* (No. 2) [2014] FCA 528 (Dempsey).

29 Dempsey, [311].

The native title trial judge, Mortimer J, noted the findings of the commissioners at some length.<sup>30</sup> Her Honour went on to rule that she was not ‘satisfied on the balance of probabilities that Bunny Craigie [the ancestor in question] had rights and interests acquired through traditional law and custom in the land around Roxborough within the claim area’.<sup>31</sup> Her Honour was of the view that the ‘most likely hypothesis on the evidence as it is before the Court’ was that the ancestor in question belonged to a language group and had affiliation to country well to the south of the claim area, but that lack of evidence meant that her place of birth could not be determined.<sup>32</sup> The ‘hypothesis’ was drawn from the findings of the hearing held under the *Queensland Aboriginal Land Act* and the reports of the experts who had evaluated these and other archival materials. The ‘hypothesis’ was in accord with the opinions advanced by the experts and was also based on the evidence provided to a former land claim hearing that had been subject to analysis by these experts.<sup>33</sup>

During the trial the Indigenous respondent’s witnesses had given evidence that Bunny was born in or came from the claim area<sup>34</sup> while some additional evidence was either unclear or contradictory.<sup>35</sup> The applicant submitted that Bunny ‘was not a person who was, under traditional law and custom, capable of transmitting rights in Wangkayujuru country’.<sup>36</sup> The applicant argued that her country was likely to have been south of the claim area, although its location was, according to the experts’ views, uncertain.<sup>37</sup> The state submitted that Bunny probably did not have traditional country in the claim area,<sup>38</sup> noting ‘the general absence of any evidence by the claimants about Bunny’s connection to the claim area’.<sup>39</sup>

My assessment of the oral tradition that supported these contradictory propositions had situated them in the context of other materials I had considered as relevant, including the findings under the *Aboriginal*

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30 Dempsey, [311], [319] to [336].

31 *ibid.*, [844].

32 *ibid.*, [848].

33 *ibid.*, [849].

34 For example, QUD6115/98 24.10.13 p. 405 Rhonda Pagura, xxn Mr Blowes SC; p. 457 Ms Bogdanek, xn Ms Bogdanek; 29.10.13, p. 885, Alfred Nathan, fxxn Mr Blowes SC.

35 Dempsey, [266], [778].

36 *ibid.*, [776].

37 *ibid.*, [778] to [780].

38 *ibid.*, [786].

39 *ibid.*, [787].

*Land Act* and the family's former espousing of a language identity at odds with that advanced in this trial. I called this (too cryptically perhaps) 'surrounding noise'. I told the court:

So, assessing the data as best I can in relation to these disciplinary notions which flow from my understanding of how the world works as an anthropologist, I then have to look around me at the surrounding noise, if you like, that's been generated about the Craigie family over the years. And there's no doubt that within the evidence, or the data which has been presented, there are points of variation about the origin of – of the ancestor including from the family itself who has strongly in the past espoused a Wangkamadhla language identity.<sup>40</sup>

My consideration of the oral account was then informed by the land claim case. My conclusions, like that of the judge, admitted prior documentation to my conclusion that Bunny was probably not in command of any part of the claim area according to the customary system in operation. Despite this consensus, I was criticised by the judge for my evaluation of the oral account that was advanced by the Indigenous respondent. I had found that presented by the applicants more convincing. The judge wrote that in weighing the data available to me I was demanding that the respondent and her witnesses should be 'held to a higher standard' than, presumably (although this is not made clear), the other witnesses, particularly those for the applicant. Moreover, with respect to my apparent non-acceptance of the evidence from the respondents that Bunny was born at Roxborough (as opposed to 'information sourced to the applicant's witnesses') that this was 'difficult to explain other than by some kind of unstated preference' for it as being 'inherently more reliable'.<sup>41</sup> My 'inexplicable reluctance on this issue' and my unwillingness to accept the verity of the oral histories presented by the respondent and her witness, so her Honour concluded, 'undermine[d] the weight I am prepared to give to his opinion about where Bunny may have been "from", or, indeed, where she may have been born. I give more weight to other sources.'<sup>42</sup>

40 *Dempsey on behalf of the Bularnu, Waluwarra and Wangkayujuru People v State of Queensland* (No. 2) [2014] FCA 528 [819].

41 *Dempsey*, [820].

42 *ibid.*, [821].

The lesson to be drawn from this less than mild rebuke is to make it clear how we evaluate differing and contradicting oral accounts. The conclusions I had drawn were not those that favoured one sort of field data over another, nor was I egregiously inclined to doubt the sincerity of the statements made by the respondent, as her Honour suggested.<sup>43</sup> Rather, they were conclusions that evaluated the oral account within the context of prior materials and (in this case) evidence given before a judicial body. This was not a matter of any appraisal of individual witnesses and their characters. I was speaking of an assessment of oral history in relation to the additional materials considered which threw doubt on the reliability of the oral history of the respondent. It was a matter of anthropological analysis of these materials taken together, rather than some unstated preference to believe one set of persons rather than another. Evidently, I did not explain this process with sufficient clarity at the time. It highlights a fundamental difference between the legal and anthropological process: the former deals with proofs and standards of proof; the latter with the comprehension of social process and how this is represented by protagonists. As I noted above, Mortimer J found against the claims of the respondent, a judgment that was consistent with my expert evidence and the other materials I and the other experts had considered.

## Native title research and oral tradition

In this chapter I have shown that the conservativeness and continuity in customary Aboriginal belief and practice, encapsulated in the Law and the Dreaming, works to limit change through oral tradition. The innate conservative nature of Aboriginal societies is a quality found across many areas of Aboriginal Australia. This includes those that are sometimes regarded as being situated in 'settled Australia' – parts of southeast Queensland, the southwest of Western Australia, to name but two. Consequently, oral traditions can be argued to exhibit in their telling compliance with a system of belief and action that militates against too much change. In native title this understanding may prove helpful when considering the degree to which contemporary beliefs and practices represent past observance and credo. When claimants have told me that a belief or practice has 'always' been a part of their culture, or that

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43 *ibid.*, [819].

a connection to land can be traced to ancestors beyond reckoning because that is what the 'old people' told them, I think these comments should be given some credibility, unless, of course, there are grounds for concluding otherwise.

Oral testimony is central to any native title case, whether it be the oral evidence of the claimants as given to the court or their written affidavits. When provided to the court, these accounts can be subjected to mechanisms to test their reliability. During a trial this generally takes the form of cross-examination, questions from the judge and an assessment of the consistency of accounts across the witnesses. Given that an anthropologist relies on data provided by claimants as oral accounts when writing his or her report, they, too, should assess the reliability of the spoken account. An appreciation of the limitations of Aboriginal oral tradition is an important quality of good native title research. Oral accounts relating to genealogical relationships or an ancestor's identity and country can be tested against archival materials or the findings of prior claims, where these are available. Claims that 'this is our country, from the old people, that's what we were always told' or that a particular observance was 'always' a part of customary practice because this is what 'the old people' had said, which are common in native title research, can be tested against early ethnographic accounts – again, where these are available. However, in those instances where authenticating materials are unavailable or their usefulness is limited by the circumstances, methodologies or prejudices of their collection, an oral account constitutes the data upon which we must found our anthropological view. This may not be a problem for the court, given consistency in the accounts and general agreement between Indigenous witnesses. The issues that develop from unsubstantiated oral accounts are exacerbated and become extremely vexed in circumstances when there is a dispute between Indigenous parties to a native title claim, resulting in a stark difference of opinion and contradictory testimony. It seems to me very likely that such disputes will not lessen in time and the difficulties of competing oral histories will exercise the anthropologists as well as the court with increasing frequency. This argues for a more rigorous application of testing and verification of the oral account and, perhaps, less ready acceptance by all involved of the unqualified oral testimony of an Indigenous witness.

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