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## Native title disputes

### Introduction

The promise of the *Native Title Act* was that it would deliver ‘justice and certainty’. The Act provided a framework whereby Indigenous Australians could make application to the Federal Court for recognition of those rights that had survived the settlement of their continent by (mostly) European peoples. The new settlers had imposed a novel set of laws and asserted a new set of rights in relation to the land. Indigenous – or ‘native’ – rights had survived, so it was acknowledged in the Preamble to the Act, in certain circumstances. Part 3 of the Act set out in detail the rules for making application for the recognition of native title and so, too, determined the procedures that would be followed. The Federal Court was given the power to hear and decide native title applications. The National Native Title Tribunal (NNTT), established under Part 6 of the Act, had powers to mediate native title and compensation claims referred to it by the Federal Court so the matter could be settled by consent. The Registrar of the NNTT was required to apply the registration test to claims to determine whether they had merit.<sup>1</sup>

I think it true to say that in designing the architecture of the *Native Title Act*, the overall goal of delivering ‘justice and certainty’ was seen in terms of righting past wrongs and creating certainty for land owners and developers as well as for state and territory governments. The ideal

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<sup>1</sup> The *Native Title Act*, Commentary, 52 and 53.

resolution was to accomplish this through a mediated outcome – between the claimants (the prospective native title holders) and the respondents (the state or territory, pastoralists and developers) through the agency of the NNTT. Disputes between Indigenous Australians who sought justice and certainty were not explicitly factored into the process as proposed. Disputes were to be expected but these were likely to be between the claimants and the miners, pastoralists and state governments (which indeed they were), rather than between competing Indigenous interests, claims and counter claims.

As things have turned out, the reality is rather different. Applications made for the recognition of native title have increasingly been characterised by intra-Indigenous disputes that most commonly have as their focus disagreements as to who are the individuals or groups with customary rights to the country of the claim.<sup>2</sup> This contested field is manifest in many different ways. It may be that one particular family or an individual feels aggrieved that they are not included in the application. On a larger scale the dispute may develop from the complaints of members of a language group who argue that the land claimed belongs to their own language group rather than that identified in the application. In whatever way the battle lines are drawn, the result is a dispute between competing Indigenous parties that is often acrimonious and evokes strong emotions.

My own experience has been that the NNTT originally operated to mediate intra-Indigenous disputes.<sup>3</sup> The NNTT has the function to mediate disputes on its own account (*Native Title Act* section 108) or, originally, at the direction of the Federal Court (*Native Title Act* section 72; repealed 1998). At the time of writing, the Tribunal's website advertised its function as mediator as a service that could be requested through a Tribunal office.<sup>4</sup> However, the Australian Law Reform Commission's *Connection to country: review of the Native Title Act (1993)* noted in 2015 that 'from 2007, the NNTT has sole responsibility for mediation, but in 2010, the mediation function was transferred from the NNTT

2 See Burnside 2012 for a discussion of the problem from a legal perspective. The problem was subject to comment early in the native title era by Edmunds (1995).

3 'The primary purpose of the Tribunal was conciliation and mediation. A proposal in 1995 that the Tribunal be redesignated as "The National Native Title Mediation Service" fell on deaf ears' (French 2003, 8). Article downloaded from [www.austlii.edu.au/au/journals/MelbULawRw/2003/18.html](http://www.austlii.edu.au/au/journals/MelbULawRw/2003/18.html), accessed 12 October 2016, pp. 1–29.

4 [www.nntt.gov.au/assistance/Pages/Assistance-with-indigenous-dispute-resolution.aspx](http://www.nntt.gov.au/assistance/Pages/Assistance-with-indigenous-dispute-resolution.aspx), accessed 11 October 2016. See also *ibid.*, 10, 15–16.

to the Federal Court'.<sup>5</sup> While the Federal Court advocates mediation in intra-Indigenous disputes, it lacks the resources of the original NNTT. Moreover, given the intransigent nature of many disputes mediation has often been an unrewarding experience. The upshot is that disputes between Indigenous groups frequently result in the disputing party seeking to be joined as a respondent to the application. This effectively means that a mediated outcome reflective of some compromises on both sides is discarded in favour of a court ruling. In this it is the judge who must decide on the merits of the disputing Indigenous parties and their various claims and counter-claims.

This has resulted in a function for the Federal Court and its judges that requires that it make decisions relating to disputes between Indigenous Australians with respect to property rights founded upon customary principles but adjudicated in terms of postcolonial legislation. In applications that go to trial where there are Indigenous respondents, an issue before the court is whether the granting of native title will damage or reduce the rights of that respondent.<sup>6</sup> The question then before the court is more complex than was originally envisaged: whether native title has survived more or less intact through demonstrated continuity of laws and customs. Rather, the court has to decide whether the granting of the application might be detrimental to the Indigenous respondent. Presumably, a part of this assessment would be to determine whether the respondent could rightly be regarded as a native title holder – either as a part of the application or on their own. In cases where there are overlapping claims (that is, two applications are made over the same land, either in whole or in part) the claims may be heard together or the matters delayed pending some ultimate resolution through mediation. In such cases the question before the court must be not simply whether native title rights have survived but rather, if this is so, which set of claimants are the 'correct' set for the country of the application or applications.

While this seems to me to raise some difficult questions about processes and outcomes, it is a significant feature of native title claims and one into which anthropologists are likely to be willingly or unwillingly drawn. My own view is that in the post-native title era challenges to the integrity

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5 Australian Law Reform Commission (ALRC) 2015, 3.41.

6 'The Federal Court may at any time join any person as a party to the proceedings, if the Court is satisfied that the person's interests may be affected by a determination in the proceedings and it is in the interests of justice to do so' (*Native Title Act* section 84(5)).

of native title bodies, claim group membership and authorisation will become increasingly matters brought to the attention of the Federal Court for determination. I think that there is a good case to re-evaluate the role of the Federal Court in this regard and consider providing a special division within the court to deal with such native title matters, as has been suggested by two eminent jurists (Hiley and Levy 2006). The Australian Law Reform Commission noted the lack of mediation services (ALRC 2015, 10.117–10.123) and suggested that the Australian Government consider establishing a national Indigenous dispute management service (*ibid.*, 10.124).

Given this background, native title anthropologists must be prepared for a contested field of action and understand the complex and often uncomfortable nature of these disputes and their contribution in bringing them to some sort of a resolution in the court. This raises significant questions about our practice, ethics and methodology. Anthropologists as experts are likely to play a role in these disputes so it is important that we understand both the potential of the discipline of anthropology to assist the court in these matters, as well as the limitations of our social science. In this chapter I consider the processes and difficulties that face anthropologists when asked to provide an opinion based on their research when rights are contested between Indigenous groups. I examine likely scenarios that illustrate the complexities of a process that seeks to engage anthropology in dispute management and settlement. I define the limits of useful anthropological involvement in these circumstances. I set down a practice guide to what is possible and likely to be helpful for use by both anthropologists and those who seek to use their services.

## Native title disputes and anthropological evidence

In native title claims disputes arise when one person or group holds a view about their customary rights to country that is not shared by another. The truth of an assertion made by one party is then contested by another. Subject to the Federal Court process this translates to an adversarial relationship between the applicant (the claimants) and an Indigenous respondent or competing (overlapping) claim group. In seeking to convince the court (that is, in the first instance a single judge) of the veracity of their claim, each seeks to rely on evidence. This is likely to include

the testimony of the individuals involved. However, contradictory oral accounts are the hallmark of overlap or membership disputes and provide a neutralising and often irreconcilable dialogue that invites appeal to other data – a matter I have considered in Chapter 6. Moreover, the use of oral accounts with respect to the reconstruction of a system as it might have been over 200 years ago raises issues as to the reliability of the oral account, which has been questioned elsewhere (Sansom 2007) and defended to some extent by me (Palmer 2011a). Typically in a native title claim, rights to country are understood to derive from filiative relationships and associations that are at some historical distance from the present. Given that such a time depth may be well beyond oral recall, reliance cannot be placed on the recollections or present-day opinions of the individuals involved, but rather on documentary materials like genealogies or early ethnography which shed light on the legitimacy or otherwise of claims and counter-claims of rights to country.

In the previous chapter of this book, I discussed the use of what I term ‘foundation ethnography’ in the native title research process to provide a reconstruction of a pre-sovereignty society for comparative purposes (see Chapter 7). This is one means to tackle the continuity issue in native title: is the society and its laws and customs one that has continuity with the past? By comparing the way the society may have been understood at or about the time of sovereignty or effective sovereignty and the way it is now, it is possible to provide a view as to the nature of the changes that are evidenced in the contemporary ethnography. The degree or quality of change that might be understood to accommodate the continuation of a system of law and custom consistent with the case law of the *Native Title Act* is a principal matter for consideration by the court. However, the use of early texts is not restricted to the formulation of foundation ethnography. It may also be called upon to serve a related purpose. Early texts may assist in illuminating past genealogical relationships or an individual’s country of association or his or her language identity. As such, they can be used to posit language group affiliations of an ancestor from whom a party to the dispute traces descent. Genealogical particulars or language group identities collected some many decades ago and prior to the advent of native title disputes may provide a basis upon which a disputed matter can be adjudicated by the court. Alternatively, they may provide information about the ancestor’s place of birth or country identity. Application of this methodology finds particular utility in cases where there is a dispute between Indigenous parties to a native title claim.

Rights contested by Indigenous parties in native title applications may then be subject to inquiry in the context of early texts. A proficiently trained anthropologist has competence in the interpretation of early texts and their comparison with contemporary ethnography. We can provide an understanding according to the paradigms of our discipline of such things as the nature and structure of society, land-owning groups and how people are recruited to them and how rights of its members are articulated, perpetuated and transmitted through time. In this the requirement to answer questions as to the continuity of these social processes and meanings by comparison with the foundation ethnographies is critical. Thus a question as to whether this group or that occupied the claim area at the time of sovereignty becomes a matter of the interpretation of early texts with all the inherent difficulties, problems and qualifications attendant upon the process – such as are illustrated in my earlier chapter. It is appropriate for the anthropologist to provide an expert view in this regard – and, indeed, providing such an expert view should be the basis of much of the work we do.

As an analytical exercise, however, this cannot be undertaken without due consideration of the difficulties inherent in the interpretation of early texts – as I have discussed them in Chapter 7. Accounts provided by early ethnographers need to be understood in the context of the intellectual environment within which they were produced. This may be a product of the proclivities of the individual writers themselves, or, more broadly, within the context of the prevailing intellectual thinking of the time that was brought to bear by the authors on the materials they considered. In addition, the extent of the account is also of considerable relevance to its usefulness today. Much early ethnography was partial, incomplete and covered only certain and sometimes rather esoteric aspects of the culture described. Thus, reliance on some accounts yields a limited reconstructed ethnography with many gaps and omissions. Early records, such as government registers or birth, marriage or death certificates may contain errors or misapprehensions and need to be critically appraised. Finally, and perhaps most importantly, these ethnographies were not collected with native title questions in mind and it may be tempting to assume data are relevant to the contemporary dispute when, in fact, they are not.

## Contested truths in native title

In native title applications, contemporary disagreements amongst claimants regarding the legitimacy or otherwise of the claims of others primarily focus on one or the other of two contested truths. The first relates to a dispute over which is the ‘right’ group for an area of country. This may be manifest as overlapping claims (that is, a claim lodged over another in whole or in part). Data on the number of overlapping claims rapidly becomes out of date. In December 2007, 45 per cent of claims were overlapped, some with as many as five or more overlaps (Neate 2010, 207). More recent figures are elusive but the Australian Law Reform Commission identified overlaps as one of the factors that leads to delay and increased costs (ALRC 2015, 3.4, 3.79). In South Australia, as in most jurisdictions, overlapping claims ‘have been a significant issue’ while ‘in recent years there have been more overlapping claims and more intra-Indigenous disputes’ (ibid., 3.27).<sup>7</sup> Figures provided to me by the NNTT in March 2017 identified 227 ‘registered claims’ of which 128 were ‘subject to overlap’. Figures from the NNTT website set out in Table 1.1 show there to be 316 applications at that date, so presumably the difference is made up by non-registered claims.<sup>8</sup> Such data as there are, then, indicate that a little over 56 per cent of registered claims are overlapped.

This is consistent with my own experience where overlapping claims are now common and the majority of the applications I have worked on over the last decade have exhibited one or more overlaps. The second contested truth I look at in this chapter relates to an individual’s right to be included in a claim group. My sense of this is that the profile of this area of contestation has increased over the last few years – perhaps as individuals become more aware of their rights, have gained access to pro bono legal advice and have gained a better understanding of the potential benefits

7 Despite this the same report states that, ‘Overlapping claims, while still an issue, have significantly reduced since the 1998 amendments that introduced both the authorisation provisions and the registration test’ (ALRC 2015, 10.19, footnote omitted).

8 The data provided was accompanied by the following qualification: ‘Please note: Genuine overlaps are as listed in native title determination application compliances. There may be claims that have not had compliances completed as at today’s date and overlaps that may be determined as genuine following compliance may not be represented in these results. The National Native Title Tribunal accepts no liability for reliance placed on enclosed information. The enclosed information has been provided in good faith. Use of this information is at your sole risk. The National Native Title Tribunal makes no representation, either express or implied, as to the accuracy or suitability of the information enclosed for any particular purpose and accepts no liability for use of the information or reliance placed on it.’ (Data provided by the NNTT to the author, 9 March 2017.)

of being an unambiguous member of the claimant group. While not invariably so, excluded persons are often manifest in the claims process as respondents.

Overlapping claims and Indigenous respondents remain a significant impediment to the successful resolution of many applications. Both overlapped claims and the joining of an Indigenous respondent renders the application almost impossible to resolve via consent with the state. At trial overlapped claims may result in the representation of Indigenous respondents (or applicants, if the claims are heard together) adding to the legion of difficulties in proving the applicant's case while furnishing distracting or (worse still) substantive issues that can be pursued by other respondents. At the community level intra-Indigenous disputes fuel lateral violence and cause social, emotional and economic damage.<sup>9</sup> Given what is at stake both in terms of community relationships and potential benefits or losses resulting from the court's final decision, being involved in intra-Indigenous disputes is likely to be an uncomfortable and probably unforgettable experience for the anthropologist.

While every dispute is different, I noted above that most fall into one of two classes. The first is typified by a disagreement over the language group identity of the claimed area and the constituent language group membership that comprises the claimants. I identify this as 'right people for country' and it frequently results in an overlapping claim or the contesting of the registered application. The second relates to membership exclusion. Typically this happens when the members of a particular family are not accepted as being claimants because their ancestor is not accepted by the claim group as being of the country of the claim. Simply put, this is a dispute about claim group membership.

## Contested truths: right people for country

### The fundamentals of the dispute

It is not unusual for a claim group to be identified by reference to a language group name. Members of the group make application to the court for recognition of native title by authorising the application (and thereafter

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9 See Mick Gooda, *Koori Mail* 2011, issue 513, 13, [aiatsis.gov.au/collections/collections-online/digitised-collections/koori-mail/koori-mail-issues](http://aiatsis.gov.au/collections/collections-online/digitised-collections/koori-mail/koori-mail-issues), accessed 15 March 2018.

subsequent action) and together can be called ‘the applicant’.<sup>10</sup> The claim and its proponents, then, easily adopt a language group identity and act as a legal entity with an apparent corporate structure. I wrote in a preceding chapter that language groups (or ‘tribes’ as they are sometimes called) are identity groups and, in customary arrangements at least, lacked such corporate characterisation. Native title law has the effect, then, of transforming a customary formation that is amorphous but whose members share cultural commonalities into a corporation with a structure, a decision-making process and the capability of legal recognition. In short, the ‘tribe’ becomes the thing that purports to hold native title rights to the country of the claim. The morphing of one type of formation into another for the purposes of a native title application is not, of itself, a problem. The difficulty is that it leads to misapprehensions that have the potential to be particularly damaging in intra-Indigenous disputes. This is because the dispute over who are the right people for the country in question is understood in ‘tribal’ terms. The argument is put that the country of the claim (or a portion of it) ‘belongs to’ the such and such ‘tribe’, rather than understanding that the members of the language group named in the application were and continue to be commonly associated with it but did not in a customary manner constitute a corporation exercising rights as owners. The discourse typically runs as follows:

- That country always belonged to the X tribe. This is what we were always told by the old people.
- Now members of the Y tribe are saying it is their country and they’ve put a claim over it.
- I am a member of the X tribe. I have always known this.
- Those Y tribe people are trying to steal my country.

Members of the ‘Y tribe’ can be understood for their part to assert much the same thing and ‘Y’ and ‘X’ are transposed according to their argument. The contested truth is, then, whether the country in question belonged to the Y tribe or the X tribe. In pursuit of the ethnographic truth both the proponents and respondents evoke a plethora of maps purporting to show ‘tribal’ boundaries, of which portions of Tindale’s 1974 publication often figure prominently, along with those produced by linguists and others, many of whom based their maps on Tindale’s work and his accompanying texts. Even in so far as the maps and associated

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<sup>10</sup> *Native Title Act* subsection 61(2).

texts can be regarded as providing a rough indication of where speakers of particular language or dialect were to have been found, such mapping, generally done remotely and without regard for multilingualism, shared country and the vagaries and fluidity and flexibility of identity formation, are inherently unreliable and unsatisfactory.

In my view such debates reflect only the legal arrangements occasioned by compliance with the native title application process. They do not and indeed cannot reflect customary process or reflect the land-owning units of customary formations – a matter I have discussed in some detail above (see Chapter 2). The error is aided and abetted by the native title process that comprehends identity groups as corporations. In customary arrangements rights to country are held by the country or estate group. Members of several such groups together in aggregation comprise a language group although membership is not fixed and descent group members may espouse more than one language group affiliation.

For the anthropologist involved in disputes over ‘right people for right country’, the first and essential step is then to appreciate the science – however the matter is represented through the courts, mediation or by the proponents and respondents. Searching for ‘tribal owners’ is not only naive but it is likely to be futile at least in terms of attempting to resolve the dispute. What is required is a thorough examination of the question: who was in command of the disputed area at the time of effective sovereignty? Their language group association is only of importance if its discovery or establishment assists in responding to this question.

Identifying the ancestors who commanded rights within a particular area many decades ago is no simple task and such data may well be absent from the ethnographic records. This is not always the case. Some reliance can be placed on early genealogies including Bates, Radcliffe-Brown, Elkin, Kaberry and more recently Tindale and Birdsell – if they are available for the area in question. However, such accounts are sometimes incomplete, unclear or simply lack the sort of data required to establish ancestral country. In these cases it is important that the anthropologist be clear about the limitations of the materials available. While there may be some pressure on the researcher to ‘come up with’ the facts that will settle the matter, the reality is that this may simply not be possible. In the end, all that can be provided is an informed opinion based on the materials available with the limitations clearly enunciated for the court.

Other archival materials may also be of assistance. Generally, the official records (various registers, government departmental files, birth, marriage and death certificates) are of little assistance in determining country of affiliation as this was not a matter of interest to the official record. Some registers from the Northern Territory are an exception, while the official record may assist in identifying where a person was at a particular date. This does not, of course, mean that this was their traditional country but it may add to other material and so enable the researcher slowly to build a case. Birth, marriage and death certificates often include the name of parents as well as location of the event, so may help in establishing family relationships. None of these materials is likely to provide a swift, unambiguous or definitive answer to the question before the researcher – ‘Who was in command of the disputed area at the time of effective sovereignty?’ In my own experience, trawling through archival materials is as time-consuming as it is often unrewarding, at least in terms of answering the question. However, by careful and conservative examination and by amalgamating indications derived from several data sources, it may be possible to provide an expert view that will be afforded some weight by the court. This relatively optimistic view should be balanced by the reality of working with early texts. The difficulties with their interpretation are often a major impediment to the formulating of an unambiguous expert view on the part of any of the anthropologists involved. It is important that these limitations are clearly acknowledged to the court by all the anthropologists involved as experts.

## Contested truths: claim group membership

A common source of dispute in a native title application relates to the legitimacy of membership of the claim group. A typical example of this is when a family or individual presses to be included in a claim and the members of the claim group reject the request. The rejection is often based on the ground that it is not evident that the apical ancestor for the family originated within the claim area and exercised customary rights within it. Alternatively, or in addition, it may be argued that the petitioning individual or family are unknown to the claim group, as a whole, and were never known to be a part of the claimant community in times past.

## Separating group acceptance from findings of fact

Issues of community recognition were highlighted in a Queensland case<sup>11</sup> where the judge held that the *Native Title Act* stipulated certain requirements for claim group membership:

Inevitably, these requirements lead to the conclusion that for the purposes of the Native Title Act, it is the claim group which must determine its own composition. ... A claim group cannot arrogate to itself the right arbitrarily to determine who is, and who is not a member. As to substantive matters concerning membership, the claim group must act in accordance with traditional laws and customs. As to matters of process the claim group must act in accordance with traditional laws and customs or, in the absence of relevant laws and customs, pursuant to such process as it may adopt.<sup>12</sup>

His Honour continued that the jurisprudence:

clearly demonstrate that membership must be based on group acceptance. That requirement is inherent in the nature of a society. However the society may accept the views of particular persons as sufficient to establish group acceptance.<sup>13</sup>

His Honour accepted that while ‘the test is community acceptance ... such acceptance may be demonstrated by the absence of opposition from senior people’ (ibid., 262). He found that, in relation to the female ancestor Minnie:

the claim group must determine that question. To date they have refused so to recognize her. I cannot take that decision for them. Nor can I find that during her lifetime, the Waanyi people, as a whole, accepted her as being Waanyi.<sup>14</sup>

These findings as to the nature of claim group membership under the *Native Title Act* are in contrast to the judge’s ‘factual findings’. Based on the evidence of the expert anthropologists (there were three) and the lay evidence reviewed at some length in the judgment (ibid., [226] to [249]), the Judge found in part that:

On the balance of probabilities, I make the following factual findings:

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11 *Aplin on behalf of the Waanyi Peoples v Queensland* [2010] FCA 625 (*Aplin*).

12 *ibid.*, [256].

13 *ibid.*, [260].

14 *ibid.*, [267].

during her life, Minnie identified herself as a Waanyi woman and asserted such affiliation;

such self-identification was based on her belief that she had at least one Waanyi parent.<sup>15</sup>

My lay reading of these findings is that the question for the anthropologist in relation to native title and disputed claim group membership is one that needs to focus on how group acceptance and community composition operate consistent with customary practice relevant to the groups in question. ‘Factual findings’ with respect to genealogical descent and self-identity in times past may not be of much assistance to the court since, in this judgment at least, findings of fact did not prevail over findings framed in terms of the *Native Title Act* since this is the determining legislation in the matter.

The *Aplin* case and the politics of social inclusion and exclusion in that native title case have been discussed by David Trigger in an article that examines his role (along with two other anthropologists) in the trial (2015a). Trigger notes that the judge cited him in the judgment in relation to the quantum of community acceptance required (ibid., 203). It was Trigger’s view that there has to be ‘a reasonable degree of acceptance’ or a ‘significant proportion’, or no longer a ‘significant number prepared to argue overtly against’ the inclusion or when ‘no senior Waanyi person is willing to dispute the claim publically’ (ibid., 203, 205). How this would translate to social practice is unclear, although the implication is that there would need to be some sort of assessment of numbers and opinion. In cases where the claimants hold a common and mostly unified view, ‘community acceptance’ is not an issue. However, in my experience, claim groups are often characterised by substantial divergences of opinion. How many members of the group would constitute ‘substantial’? Given an absence of a customary means to determine this matter, would a simple secret ballot be sufficient to settle the matter? These are legal and administrative matters that lie outside of the anthropology.

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15 ibid., [250].

## Anthropology and group acceptance

The court must decide who holds native title and does so on the basis of the operation of traditional laws and customs. Consequently, the task for the anthropologist is to identify the process that is relevant to acceptance of group membership. The focus of experts' deliberations in relation to disputed membership has to date been very much in terms of genealogical reconstruction and descent. This is because in most native title claims descent from an ancestor, typically identified and accepted as being a member of a particular language group, remains the defining factor in being a member of the claim group. In these cases, descent is determinative. Without it a person cannot be a member of the language group, unless they are adopted. Anthropological research may be able to assist in seeking data that will either support or discredit the identity of an ancestor and whether or not his or her country was within the current application area. However, there are substantial limits to what can be accomplished in this regard. Experts for the different sides in a dispute may simply exhaust to the point of inconclusiveness their inquiries and subsequent opinions on these matters. Given the poverty of some archival materials and the ambiguities implicit in their interpretation, debates between experts employed by the different parties to a dispute may furnish opinions that are, taken as a whole, inconclusive. The extensive debate, material considered and opinions provided by the experts result in a sort of evidentiary *cul de sac* that is of little or no assistance to the court. Moreover, and significantly as noted above, it appears that in native title 'findings of fact' in relation to prospective claim group membership may not be material to the decision of the court – although subsequent jurisprudence may of course change this.<sup>16</sup>

This does not mean that anthropological inquiry has no place in these disputes. Establishing genealogical facts – if indeed such can be established, may be effected through archival research and the examination of early texts or other records. The provision of an expert view based on these inquiries may be influential in opinion formation within the group and acceptance or rejection of the petitioning party. Indeed, some claimants with whom

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16 Dowsett J wrote in this judgment that, 'There is, as far as I am aware, no precedent upon which to base a decision as to the availability of judicial relief in the event that persons who, according to traditional laws and customs, are entitled to Native Title rights and interests, are wrongfully excluded from membership of the claim group'. His Honour goes on to list a number of cases that, by analogy, might provide relief. *Aplin* [270] (Dowsett J).

I have worked have suggested that research of this sort may be significant in how they might regard the matter. However, research findings will be only one factor that influences opinion formation within the group and may be disregarded if other considerations prevail. In the absence of an evident ability to establish genealogical facts, anthropologists should turn to two other criteria that claim group members might consider to be important when framing their views about the assertions of a petitioning family or individual. The first relates to knowledge of the country held by the group seeking membership of the claim group; the second to what can be called 'social relatedness'. In this I refer to how dealings with the individuals concerned are accommodated within the kinship relationships that typify the social intercourse of customary interactions.<sup>17</sup>

## Country, kin and group membership

Local organisation in Aboriginal Australian has as its fundamental building block the local descent or country group. Aggregations of local groups that share or shared commonalities of language, cultural practices and beliefs and held proximate country together comprised language groups – often referred to in the earlier literature as 'tribes'. Such aggregations depend for their continued operation on social and ritual relationships, as well as mutual obligations and co-dependency. Local groups whose members trace common ancestry are 'local' in the sense that they relate to, have spiritual affiliations with and consequential rights and duties in relation to the country or estate. People without country cannot be situated within the social fabric and network of relationships that are needful for the language group to have vitality, coherence and integrity. Without certainty as to their country there is no way they can be accommodated within the network of relationships that characterise the claimant society. They are, simply stated, *sui generis*.

In many areas of Aboriginal Australia, the manner whereby Indigenous Australians interact in both daily exchanges and ritual dealings is determined by reference to a categorical system often referred to as the 'section' or 'subsection' system (depending on its form) and, more colloquially, as 'skins' or by a term of the claimants' own language. Even in areas where the categorical system is absent (and was so, on the evidence, in earlier times too), classificatory kinship systems articulate and define

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<sup>17</sup> These are considerations also addressed by Trigger (2015a, 204).

a person's place within his or her social universe. Such relationships, whether determined by reference to categorical classification, kinship reckonings or both in complementarity, determine obligations and duties with respect to quotidian interaction, roles in ritual and to the use of country and the benefits that derive from it.

From an anthropological perspective, then, lack of knowledge of the requirements of social relationships and the system that frames them renders the person outside of the language group as they cannot be accommodated within the network of relationships that comprise its visceral quiddity. In some areas where I have worked a person without a 'skin' is classified as a 'stranger', being referred to by a term from the claimants' language that carries this meaning. A 'stranger' in this sense is not just an outsider but is unknown and therefore unpredictable. Consequently, they are to be regarded with suspicion, as potentially inimical to the language group members and beyond the boundaries of ready accommodation. They are intruders to the exclusive command of rights to country that the claimants assert to be theirs. In earlier times they were regarded as being so dangerous that they were killed.

Participation in the sets of relationships that make up the language group requires attributes that must be evidently declared, recognised and accepted by others. These components are the fabric upon which opinions and emotions about relationships and the degree of acceptance or otherwise are based. A family that lacks known and agreed ancestral connection to an estate within the country of the language group cannot be afforded recognition of that group. Similarly, a family whose members lack the wherewithal to effect social accommodation through section term attribution or known kinship relationships is similarly unable to be accommodated within the language group membership. These principles are evidently customary in that they derive from key aspects of cultural practice that are likely to have been in evidence prior to sovereignty. Their application to cases of disputed membership would then equip a claim group to make decisions about membership 'in accordance with traditional laws and customs' (*Aplin* [256] (Dowsett J)).

## Methodological and ethical issues

### How many anthropologists does it take ... ?

The expert's first duty is to the court and not to any party to the proceedings. We should be and should be seen to be independent and non-advocatory. Having two or sometimes more anthropologists as experts is common practice in contested native title claims, reflecting the use of experts by opposing parties in a trial. Where there is a strongly antagonistic environment this may be the only way forward as claimants sometimes consider that having 'their own' anthropologist will be an advantage for them. Moreover, as things often turn out, the anthropologist who commenced the research, working with the initial claim group, may be seen as biased or unreliable by an opposing group. This may be only a perception on the part of the members of the group who are in dispute but it remains an impediment as we can only work with those willing to work with us. The anthropologist should seek to reduce these fears from the outset, but these are matters that are hard to control as a researcher. A difficulty with having an anthropologist for each disputing party is that each gains data from only one group so there is no ability for one researcher to assess the whole of the data, particularly the views of both sets of claimants.

The nature of the legal process as it is currently designed does not readily accommodate the use of a third expert appointed by the court – although this is not unknown.<sup>18</sup> This would appear to provide one means of limiting the possibilities for bias in an account that treats only one side of the data. However, a court appointed expert may have difficulty in gaining unfettered access to claimants and respondents and by my understanding the procedure is not one that is common for the Federal Court. The Land Commissioners appointed under the *Aboriginal Land Rights Act* (NT) invariably had an anthropologist to advise them, but as far as I know those so commissioned did not undertake any primary fieldwork.

To my mind, the use of two anthropologists rather serves to confirm the potentially partisan nature of the expert – at least in the eyes of the claimants. In the practice of our profession we work closely with people in

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18 See G. Davies 2005. The Federal Court's 'Expert Evidence Practice Note (GPN-EXPT)', October 2016, paragraph 2.1, also recognises this possibility.

order to gain their trust and to establish a relationship that will facilitate discussion of quite personal information and often deeply held beliefs and practices. It is hard to develop such a relationship without also forming friendships or at least sympathetic attitudes. However, native title work requires that we focus on the end game and we have a duty to explain to those with whom we work that our first duty cannot be to them. This raises ethical problems and is contrary to the expectation that was formerly common amongst anthropologists that they would become, over time, advocates for those with whom they worked. Such an approach in the context of native title is not only naive but is untenable. A partisan expert who is an unashamed advocate for one group has no credibility in the legal process and consequently does a substantial disservice to those with whom he or she has worked. What is important is that those with whom we work know from the outset to what purpose the data they provide may be put. This includes the fact that once written as notes in our field note book and relied on in the formulation of our expert view, it may be discoverable by the court and so to other parties hostile to the application.

The ideally independent position required of the expert facilitates his or her working with those who are on opposite sides of the dispute. In these circumstances where emotions often run high and passions are deep, transparency is all. My personal approach is to explain my role as an independent anthropologist and expert to the court to all those with whom I propose working. The legal representatives of the various parties must be included in this process. I also act on the principle that I do not discuss data provided to me by one group with another, resisting sometimes quite strong demands that I do so. My stock answer to such requests is to explain that should a group or individual wish to know what another group told me, then they should ask them, not me.

The experts should have the opportunity to meet to discuss their findings and to seek to reach agreement on at least some of the issues that lie between them. The legal representatives on both sides of the dispute may wish to agree a set of questions for the experts which can be helpful in giving direction to the conference which is relevant to the legal issues before the court. One drawback of this arrangement I have noted is that our legal colleagues often wish to overload the experts with an impossibly long set of questions (some quite repetitive) and all involved need to be realistic about how many questions the experts can usefully consider in a day. I set the maximum at about six per day – although if there are more than two experts this may be too many. In terms of the practical

and realistic allocation of resources, the experts can probably not be asked to meet for more than two days, while in many cases a single day should be sufficient. Such meetings of experts – best termed a ‘conference’ or ‘conclave’ of experts although other names are also used<sup>19</sup> – generally feature as a part of the management of the application by the Federal Court and the judge may direct that such a meeting take place usually by a particular date. In my experience in recent years the conference of experts is chaired by a Registrar of the Federal Court who also records the outcomes (points agreed and disagreed and, if the latter, the reasons why). The issues agreed between the experts may be accepted by the parties and the judge as settled and not meriting any further consideration. However, the anthropologist remains only a witness providing a particular sort of evidence and even when experts are agreed their views are not determinative of legal outcomes.

## Uncomfortable spaces

Anthropologists who are involved in disputes often find the experience harrowing. This is a research environment often charged with strong emotions marked by acrimony, bitterness and sometimes even physical threats. The expert is almost inevitably drawn to provide a view that will gainsay an Indigenous party’s evidence, raising questions or accusations regarding our right to do so and to allegations that as outsiders we should not make comments on cultural matters as in doing so we are appropriating the knowledge that rightly belongs to others. This can, then, be an uncomfortable and challenging environment and is not for the fainthearted. This makes it all the more important that we understand our special role, the limitations of our science and the methodological and ethical standards that we must apply.

Professional anthropologists should be members of the Australian Anthropological Society (AAS) and so bound by its code of ethics.<sup>20</sup> The AAS Code of Ethics states:

3.1 Where a conflict of views or interests arises among the parties to research, anthropologists should endeavour to ascertain the views of the various research participants, as independently and impartially as possible.

19 See Hughston and Jowett 2014.

20 See [www.aas.asn.au/about-aas/code-of-ethics](http://www.aas.asn.au/about-aas/code-of-ethics), accessed 21 October 2016.

This is clearly relevant to research conducted in a native title inquiry and supports the proposition that an anthropologist should work across competing parties, rather than with one only. Relevant in this context also is a subsequent portion of the Code of Ethics:

3.10 Anthropologists should not knowingly or avoidably allow information gained on a basis of the trust and cooperation of the research participants to be used against their legitimate interests by hostile third parties.

The expert's report (and perhaps, inevitably, this book) is likely to be used in a court of law by a respondent or applicant party that may not seek to use it in the interest of those who provided the information but against them.<sup>21</sup> This raises substantial ethical issues since, as writers of an expert report for the court, we may have no control over how the report or the information within it is used. However, the ethics also instructs:

4.2 Anthropologists should maintain integrity in the recording and presentation of anthropological data, and should not discredit the profession of anthropology by knowingly colouring or falsifying observations or interpretations, or making exaggerated or ill-founded assertions, in their professional writings, as expert witnesses, or as authors of any other form of reportage related to their work.

In seeking a balance between objectivity, integrity and the betrayal of trust and cooperation in situations of contestation and conflict, the role to be filled by the researcher and the possible uses to which the material may be put must be explained to the participants at the outset. This is consistent with the requirement to obtain informed consent from those with whom the anthropologist will work (Code of Ethics, 3.4).<sup>22</sup>

The commonsense approach, then, is to ensure that the researcher explains before the research commences the nature of the work, the uses to which it may be put and the possibility of consequences that do not accord with the claimants' wishes. Provision of such advice provides claimants with the

21 See Glaskin 2017, 107–111 for a case study relating to the use of field notes in a trial.

22 The principle of informed consent expresses the belief in the need for truthful and respectful exchanges between social researchers and the research participants.

'(a) Negotiating consent entails communicating information likely to be material to a person's willingness to participate, such as: - the purpose(s) of the study, and the anticipated consequences of the research; the identity of funding bodies and sponsors; the anticipated uses of the data; possible benefits of the study and possible harm or discomfort that might affect participants; issues relating to data storage and security; and the degree of anonymity and confidentiality which may be afforded to informants and subjects.'

opportunity to make an informed decision as to whether they wish to be involved in the research process or not. Some potential participants may decline to be involved and we need to accept this with equanimity. Non-participation in the research process by claimants may on at least some occasions be detrimental if a court requires expert evidence based on field data gathered necessarily from the claimants. Understanding this, then, the choice for the claimants as to whether to participate in the research may be an invidious one. Indeed, participation is a natural consequence of the process of making application for the recognition of native title in the first place.

## Toward a practice guide

The particular nature of anthropological research conducted in an environment of intra-Indigenous dispute invites application of some guidelines. These are in addition to the more general ‘Expert Evidence Practice Note’ issued by the Federal Court and updated from time to time.<sup>23</sup> The guidelines I have set out below should not be seen as prescriptive but may provide guidance for those who seek to navigate these difficult waters. Perhaps the most obvious principle to enunciate is that as practising anthropologists we should seek from the outset to avoid the necessity to participate as an expert in situations of contested truth. Solutions like negotiations and mediation arrived at through discussions between the parties are more likely to result in a successful outcome than the application of the research findings of an expert anthropologist to the dispute. Usually, however, by the time the anthropologist is invited on to the scene, the battle lines have been drawn. In such cases the following methodological principles may be of assistance:

- Those approached to participate in the research should understand the process, the consequences of their participation and the likely uses to which their information may be put.
- The expert must be independent, non-partisan and be fearless in expressing sound views. These must be founded upon a reasoned account, based on all available materials, fully referenced and scrupulously researched. There is no room in this process for bias, advocacy or partisanship.

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<sup>23</sup> [www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-expt](http://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-expt), accessed 3 February 2017.

- The anthropologist should be mindful of the sometimes extreme limitations of the materials with which he/she deals. The anthropologist should ensure that those who commission expert views based on archival materials and early texts understand the likely limitations of such research before it is undertaken.
- Anthropologists should seek clear questions, which it is their task to address. Vagueness and imprecision in the brief provided to the anthropologist has the potential to yield imprecise or ill-focused commentary and will diminish the usefulness of the opinion to the party commissioning the research and so, too, to the court.
- The anthropologist as expert is qualified before the court to provide an opinion on matters that are within his or her expertise. Consequently, the questions that the expert is asked to answer must relate directly to the expertise of the anthropologist. The anthropologist should be consulted first about the questions contemplated and reject any questions that he or she considers to lie outside of their area of specialist knowledge. The list is best developed by agreement between the legal team and the researcher.

Disputes in native title are a notable feature of the legal, administrative and research environments. As more of the difficult (i.e. contested) claims come to the attention of the court and post-native title procedures seek to test membership and jurisdiction, I think that they are likely to increase rather than diminish. Anthropologists are now unlikely to avoid involvement in issues of contested rights. Nor, to my mind, should they seek to do so if the application of their discipline to real-life situations is a part of their understanding of the proper uses of anthropology. In facing these challenges there needs to be a more realistic understanding and declaration of the limits of anthropology in this particular regard – and that in relation to the research I have discussed in this chapter there is no ‘God’s Truth’ out there to which anthropologists have access via the interpretation of archival texts and early ethnographies. Practitioners need to be cognisant of the particular issues that should be the subject of their research that have relevance to disputes over ‘right people for country’ and claim group membership. These methodological as well as ethical issues need robustly to inform our practice and give direction to the sort of research we undertake.

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