# Introduction

This is a book about the practice of anthropology in the context of Australian native title claims. The *Native Title Act 1993* (Cth) established a means whereby Indigenous Australians can make application to the Federal Court for the recognition of their rights to the continental landmass of Australia and its islands and seas. Such rights were identified in the legislation as 'native title rights'. The application is subject to legal process. Those who make the claim (the applicant) have to prove to the court that the native title rights have continued to exist substantially uninterrupted since the acquisition of sovereignty over Australia by the British Crown. They also have to show that the native title rights have not been extinguished by subsequent acts of the colonisers. In this, the onus of proof lies with the applicant. Even applications that seek determination by the consent of the participating parties have to satisfy the Federal Court of the justice of their claim according to the *Native Title Act* and subsequent case law. Consequently, applications for the recognition of native title require that the case be prepared and the pleadings developed. Lawyers must draft the application under instruction from those who make the claim, typically a group of Indigenous Australians who lay claim to a common area of land. Legal counsel must prosecute the application and, should the matter not be settled by the parties prior to trial, the application goes to a hearing. In these regards, an application made to the Federal Court for a determination of native title shares much common ground with other applications brought to that court. Like much else that depends upon a judicial process for its resolution, a significant factor in the prosecution of a native title claim is the evidence that supports the applicant's case.

Indigenous testimony was and remains the most significant component of the evidentiary process of a native title claim. However, others have also been recruited to the process. Principal amongst these are anthropologists. The involvement of anthropology and anthropologists in the native

title process marked a continuance of their professional involvement in Indigenous relationships with the state – and in particular with legislation and related legal action that sought to recognise the rights of the original inhabitants of Australia. By the end of 1993, when the *Native Title Act* received royal assent, anthropologists had clocked up a substantial record of involvement in processes that sought to codify the recognition of Indigenous rights in Australia. Anthropologists had seen action in relation to legislation enacted by state governments, including the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* and the *Maralinga Tjarutja Land Rights Act 1984*. But it was in relation to the *Aboriginal Land Rights (Northern Territory) Act 1976* that anthropologists had found substantial scope for the application of their discipline. The late 1970s and much of the 1980s saw their frequent involvement in the preparation and adjudication of claims in the Northern Territory. The transition from this sustained involvement of some members of the profession in the Territory's *Land Rights Act* to the *Native Title Act* was not altogether smooth, particularly following amendments to the *Native Title Act* in 1998. Anthropologists who had undertaken research on an application and whose views, data and opinions were provided to the court were subsequently subject to a level of scrutiny, examination and cross-examination not previously encountered. The uses of anthropology in a native title claim consequently required a very exact application of the discipline and its methods.

A need for the expertise of an anthropologist in advancing applications for the recognition of native title is a response to legal process. The court recognised that the questions it had to consider in relation to an application were not likely to be illuminated solely by common or popular knowledge or even wholly by the lay evidence of the claimants. Comprehension of the claimants' society and its normative systems, beliefs, customs, land law and customary rights were all complex matters that required expert explanation and exegesis. A good anthropologist had the necessary training and expertise to explain to the court and the respondent parties how these Indigenous systems worked. This was usually done by presenting data collected during fieldwork along with anthropological commentary and archival research in a report, which also served to provide a helpful ethnographic guide to the parties to the application regarding the claimants, their beliefs and practices and therefore to key elements of the application itself. As a consequence, then, anthropologists were called to give evidence as expert witnesses both as a result of their

contributing research, but also because they were recognised by the court as having specialist knowledge that might be of assistance in coming to an understanding of the perdurance of laws and customs – a key aspect of the proof of native title. Respondent parties also appreciated the importance of having an expert to comment on the application, on the reports provided by the claimants' anthropologist and any other matters judged relevant. Native title was then and remains a dynamic and active business ground for Australian anthropologists with a knowledge of and expertise in Indigenous cultures.

Native title activity has engendered numerous organisations. Claims are lodged and managed on behalf of the claimants by bodies created by the *Native Title Act* and known as Native Title Representative Bodies (or colloquially, 'Rep Bodies'). These organisations soon found that employing one or more anthropologists was helpful and indeed necessary. The National Native Title Tribunal (NNTT), also created by the *Native Title Act*, formerly employed a number of anthropologists, although this has decreased over recent years and is now reduced to one.[1] In the post-determination era, Prescribed Bodies Corporate, set up to administer land over which native title had been recognised, also had need of anthropologists, while existing land councils also employed anthropologists who were likely to become involved in native title claims one way or another. Respondent parties to claims – particularly the state departments with oversight of the assessment of claims made within their state – also employ anthropologists, as do mining companies and others with an interest in native title applications. Added to this list must be consultant anthropologists who work by commission for the various groups noted above and who have typically worked on researching claims and writing expert or connection reports used to further the application before the court.

Figures on the numbers of anthropologists directly involved in the native title business are found in a study undertaken by David Martin in 2004. Martin provided an analysis of anthropologists engaged in the native title business, based on a sample of those who responded to a questionnaire that returned 55 respondents (Martin 2004, 9). Martin considered this to represent 'between half and two-thirds of the field of current anthropological native title practitioners' (ibid.). Martin is uncertain as to what might be the total number of those employed directly in the

1 Pam McGrath, research director, NNTT, pers. comm. January 2017.

field of native title, but noted that government as well as non-government agencies also employed some anthropologists. A more recent study by McGrath and Acciaioli (2016a) surveyed 433 Australian anthropologists and found that there are at least 135 anthropologists currently working in Australia who have some level of expertise in native title and land rights.[2] The authors accept, however, that they do not know how representative the results of the survey are. The survey also provided an analysis of the age, sex and qualification levels of the respondents, and other data. These findings were presented by the authors at the 2016 Australian Anthropological Society conference, but are not at the time of writing available in published form.[3]

While the actual number of anthropologists directly engaged in native title may be quite small, the issues raised in this book will be of interest to others who do not engage directly with the native title process. As a part of the practice of anthropology, native title has attracted the attention of many academics as the subject of debate, particularly over the issue of the nature of applied anthropology and possible prejudices such direct application might have to the integrity of the discipline – a matter to which I return in the first chapter of this book. Despite this debate or perhaps in part because of it, native title anthropology has become the subject of specialised courses within universities. Native title features as a part of curricula, either with a view to educating those who might wish to take up a career in the native title arena or as a part of an understanding and appreciation of the practice of the discipline of anthropology in Australia.

That anthropology has become a significant factor in the preparation and adjudication of both applications for the recognition of native title, as well as post-recognition management, is evident. But native title is, as this book will demonstrate, principally about law. Members of the legal profession are more numerous than their anthropological colleagues and their involvement in native title business is significant. The role anthropology has to play is one of the many issues a good native title lawyer has to consider in his or her prosecution of a native title case. Present indications are that native title claims are set to continue for a while yet – a matter I discuss in greater detail in the following chapter. Along with outstanding claims and those yet to be lodged is the relatively

2 I thank Pam McGrath for drawing my attention to this survey and the survey results and accompanying references.

3 McGrath and Acciaioli 2016b.

new question of compensation claimable under the *Native Title Act* (see Chapter 10) and the post-determination management of native title, particularly disputes (see Chapter 8).

These considerations all speak to an anthropology that requires an understanding of the particular application of the discipline to the native title questions. This is something that lies outside of mainstream anthropological teaching and accompanying texts. It is a specialist craft of anthropology and one that has to be learnt, studied and explored by would-be practitioners. What I have attempted to do in the following pages is to provide some guidance as to 'how to do native title anthropology', and I have done so in the context of the broader issues of the *Native Title Act* and its associated social and public policy considerations. Above all else, I have contextualised native title anthropology within the framework of the legislation and the law that determines how it is prosecuted and how it might be practised.

There is a growing corpus of writings available about native title and I refer to these books and articles in what follows. The principal and still significant contribution to the practice of Australian anthropology in relation to native title claims is that by Peter Sutton who published in 2003 *Native title in Australia: an ethnographic perspective*. Sutton's scholarly work continues to provide an essential reference for all involved in any aspect of anthropological research in native title and I have relied on his findings and commentaries in what follows. However, much has developed in the native title field since Sutton published his work, and he did not cover some issues which I regard as now essential to any consideration of the anthropology required for a native title claim. Alternatively, Sutton has covered some topics that I have not addressed directly. It is my intention that this book will extend the account of the application of the discipline of anthropology to native title questions and provide materials relevant to the developing jurisprudence that so strongly informs and sometimes defines native title research.

This book has evolved through my own practice of native title anthropology and my observations over some decades of the often recurrent issues that appear to inform anthropological contributions – or, as the case may be, fail to inform them. Because of this, it is a book that is written with the practice of anthropology by anthropologists in mind. This should in no way be understood to be restricted to those who have been commissioned by the applicant in a particular native title claim.

Anthropologists who have been commissioned by respondents should also find what I present in the following pages of interest. Thus, while one reading of the following chapters could be that they provide an outline of what needs to be considered in a native title report, the text could also be used by a respondent to provide an indication of omissions in a native title report filed by the applicant. Given the necessarily close working relationship demanded by native title between lawyers and anthropologists, I also hope that members of the legal profession will find what I have to write in the following pages of assistance. It may also help to dispel some of the misapprehensions that some members of the legal profession, including judges, have of the work of anthropologists and help to explain in relatively straightforward terms some of the issues that agitate our interest. While I hope that what I have written here will be of interest and assistance to lawyers, I have endeavoured to steer well clear of points of legal interpretation. It will be evident to all who have had any involvement in the native title process that the case law and the underlying statutes are never far away. Thus, a book about native title anthropology cannot be written without some appreciation of the law that defines it. I have done my best to ensure that what I have written in this regard is correct but I write as an anthropologist, not as one who has any training or pretentions in matters pertaining to the law.

For those who study native title in universities or through dedicated courses, this work should provide a useful handbook of the practical application of anthropology to native title. It may also provide an appreciation of this branch of applied anthropology in the context of the continuing debate about the uses of anthropology in the twenty-first century. This debate is not unique to Australia and the involvement of anthropologists and anthropology in Australian native title claims will also be of interest to those involved in the application of the discipline to the recognition of the rights of indigenous peoples in many other countries as well. A more general readership may find the first and last chapters of particular interest since they seek to contextualise and then review native title in terms of the broader canvas of postcolonial Australia. Chapter 8 may be of interest to anyone who has an interest in mediating disputes and the relationship between objective 'truth' and resolution of the different versions of it found in many areas of social interaction, including native title.

Writing about native title does require a certain structure since some topics cannot be properly discussed until others have been set straight. The order of Chapters 2–5 reflects this requirement. Other ways might be devised in order to satisfy the demands of orderly discourse, but the arrangement suggested here has worked for me in the past. In Chapter 2 I examine the society question – identified in the Yorta Yorta case as a key concept in the proof of native title. My own observation is that courts are less concerned with the society question than they used to be. However, it remains a fundamental question for native title anthropology: how can the claimants be understood to comprise a society, whose members entertain laws, customs and share normative values that have endured since sovereignty?

In Chapters 3 and 4, I look at how anthropology can best understand rights and duties exercised in relation to country in Aboriginal Australia. In particular, I am interested to chart, in outline at least, the manner in which the customary system of rights to country has been understood by earlier ethnographies and anthropologists. Later studies subsequently developed a more ecumenical view of the system that is likely to have been in evidence over most of the Australian continent and islands, including the Torres Strait. Chapter 4 looks at how rights might be understood to be exercised in practice, according to the normative systems in evidence, along with some of the topics that frequently emerge from the ethnography and field data that may have relevance to a native title claim. Chapter 5 extends and builds upon the previous chapter and I examine some of the principal elements of Aboriginal religious belief and practice that might be relevant to a native title report. This can only be regarded as a very partial account of an enormously complex and sometimes arcane subject. I spend time discussing the difficulties of conducting research work in this context, particularly with respect to hidden or secret categories of knowledge that are gender and age restricted.

Chapters 6, 7 and 8 tackle what I have come to regard as some of the thornier problems encountered while undertaking native title research. While courts generally privilege the evidence of the claimants above all else, there is an all too evident problem about the reliability of such testimony in relation to issues of continuity, which I explore in Chapter 6. Assertions along the lines that 'we have always done it this way' may resound with conviction, but in an increasingly critical legal environment may not withstand close scrutiny of the sort offered up by respondent parties. This becomes particularly acute should authoritative assertions be made

in contradictory form by opposing Indigenous groups. Oral testimony, particularly as it relates to continuity since sovereignty, is a matter that demands attention. In this context, the use of early texts (Chapter 7) has direct relevance as these may provide a means to demonstrate whether a particular law or custom was in evidence in earlier times. Use of the early texts and their interpretation is not, however, a straightforward matter. It is my aim in Chapter 7 to explore some of the difficulties attendant upon the use of early texts and how these might be obviated.

Chapter 8 is about inter-Indigenous disputes, a phenomenon I have witnessed increasing over the last few years of my practice. Such contests of truth and will place the anthropologist in a difficult position and such situations must be navigated with skill and caution. Native title has undoubtedly exacerbated disputes between Australia's Indigenous people. It is worth noting in this context, however, that when a group of people are recognised as having no rights to landed property, the scope for disputes over country is necessarily minimal. Native title affords recognition of rights to property and the (perhaps) inevitable disputes that follow are a consequence of that restoration. In this context, anthropologists have a particular role to play and I have set out what I have termed a practice guide to applied research undertaken in these often difficult and vexing circumstances.

Chapter 9 might be regarded as providing a guide for a must-have chapter in a native title report. Genealogies are becoming increasingly important in native title research as a result of the more or less universal acceptance that rights to country are gained from forebears. Thus, issues of the descent of rights through a bloodline may overshadow other means of gaining rights, while the necessary conditions for the realisation of rights through descent may get lost as time and intention denude filiation to render it a matter of genealogical reckoning through the provision of a pedigree.

Chapter 10 takes a brief look at a developing field of native title research: compensation. Based on a recent decision of the Federal Court in relation to an application for compensation for the loss of native title rights, I have set out some preliminary views on the sort of anthropology that might be conducted in relation to future claims. This is a topic that might be developed as the jurisprudence matures.

This book represents a compilation of materials I have slowly assembled over some years. All chapters have been expressly written for this book. They contain elements of my research and findings gathered over many years working in Aboriginal Australia, both in the native title era as well as prior to it. Chapter 1 contains the seeds of ideas developed for a seminar paper I delivered with Wendy Asche to the North Australian Research Unit in Darwin in 2011. Chapter 6 builds upon a paper I published in 2011 (Palmer 2011a). A draft portion of Chapter 8 was presented to a native title seminar held in Perth in 2017, convened by the Federal Court of Australia, the NNTT and the Centre for Native Title Anthropology (CNTA) at The Australian National University, Canberra. Likewise, a draft portion of Chapter 10 was first presented to the CNTA annual conference in Perth in 2017. Some of the material contained in the following pages has seen the light of day, in somewhat different forms, as prior publications. An earlier version of Chapter 2 was first published by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) in 2009 and later reproduced as a chapter in Lisa Strelein's *Dialogue about land justice: papers from the National Native Title Conference* (2010*)*. I have substantially revised and updated it for this publication. Some of the ideas set out in Chapter 7 were first entertained in a paper I gave to the Australian Anthropological Society conference, Macquarie University, December 2009, and subsequently published in Toni Bauman's *Dilemmas in applied native title anthropology in Australia* (2010).

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