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978-0-521-01190-7 - Native Title in Australia: An Ethnographic Perspective

Peter Sutton

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Native Title in Australia

An Ethnographic Perspective

Native title continues to be one of the most controversial political, legal and indeed moral issues in contemporary Australia. Ever since the High Court's Mabo decision of 1992, the attempt to understand and adapt native title to different contexts and claims has been an ongoing concern for that broad range of people involved with claims. In this book, Peter Sutton sets out fundamental anthropological issues to do with customary rights, kinship, identity, spirituality and so on that are highly relevant for lawyers and others working on title claims. Sutton offers a critical discussion of anthropological findings in the field of Aboriginal traditional interests in land and waters, focusing on the kinds of customary rights that are 'held' in Aboriginal 'countries', the types of groups whose members have been found to enjoy those rights, and how such groups have fared over the last 200 years of Australian history.

Peter Sutton is a distinguished anthropologist and linguist, and is widely regarded as one of Australia's foremost consultant anthropologists. He has worked with Aboriginal people in remote and rural areas since 1969 and he speaks languages from western and eastern Cape York Peninsula. He has written or edited eleven books, including *Languages of Cape York*; *Art and Land: Aboriginal Sculptures of the Lake Eyre Region*; *This is What Happened: Historical Narratives by Aborigines*; *Dreamings: The Art of Aboriginal Australia*; *Wik-Ngathan Dictionary* and *Country: Aboriginal Boundaries and Land Ownership in Australia*.

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Introduction

THROUGH MUCH OF THEIR history, anthropological studies of Aboriginal land and marine tenure have been focused on contemporary groups with strongly surviving classical traditions, or on reconstructing those traditions for people whose social and cultural lives have been even more greatly changed since Australia's colonisation by Britain in the eighteenth and nineteenth centuries. Following the arrival of legislative schemes for recognising customary Aboriginal land rights, beginning in the 1970s but reaching a high level of activity since the passage of the *Native Title Act 1993 (Commonwealth)*, more anthropological attention has been given to current relationships between 'country' and Aboriginal people of a wide range of cultural backgrounds, including those who live in urban and rural circumstances as well as those in remoter areas where older traditions have better survived.

This book attempts to take into account this wide range of information in order to discuss the major issues confronting Aboriginal native title claimants and title holders and those who seek or hold recognised rights under state and territory land and marine rights legislation. The emphasis, however, is on the native title context. Readers unfamiliar with the bewilderingly complex Australian native title legal and bureaucratic apparatus should familiarise themselves with the basic relevant literature if they want further background on the state of the law and its interpretation and implementation.¹ The issues covered in this book are currently faced by legal, bureaucratic and anthropological practitioners, whether the context is one of native title determinations by consent or by litigation. A number of them are also pertinent to indigenous land use agreements.

My orientation is necessarily both to present practices and to the classical 'baseline' situation reconstructible for the early contact period, which varied from the seventeenth century to the 1980s depending on location. This necessity arises in part from legal requirements, especially the need, under certain circumstances, to prove the continuity of present traditions with those held at the time when British sovereignty was established in Australia. But it also arises because it is important to apply insights gained from earlier land tenure systems when trying to

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understand how contemporary systems function and may be analysed, and how they might or might not have their roots in the classical or in innovations. Furthermore, knowledge of present systems can shed light on the frequently fragmentary records of the deeper past.

The legislative background

In 1969 and 1970 members of land-holding groups in north-east Arnhem Land, in the Northern Territory of Australia, brought action against the mining company Nabalco and the Commonwealth of Australia in an attempt to gain recognition of their own traditional rights over the land of the Gove Peninsula.² This led to the famous Gove case of 1971, which resulted in a reaffirmation of the doctrine of *terra nullius* which had long been the basis for official non-recognition of customary and pre-existing indigenous rights in land and waters in Australia.³ A form of statutory Aboriginal title was introduced by the Commonwealth government for the Northern Territory in the *Aboriginal Land Rights (Northern Territory) Act 1976 (Commonwealth)*, section 3(1) of which reads:

‘traditional Aboriginal owners’, in relation to land, means a local descent group of Aboriginals who –

- (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and
- (b) are entitled by Aboriginal tradition to forage as of right over that land;

This definition, which rested on anthropological ideas and advice of the time, inevitably drew many anthropologists into researching and providing evidence in the many claims heard under this Act, claims which at the time of writing were coming to a close. The State land rights scheme created for Queensland in 1991 has similarly drawn many anthropologists into the application of the legislation to the claims process, which recognises three bases of claim: traditional affiliation, historical association and economic viability.⁴ Other state legislative schemes which deal with Aboriginal land interests (other than native title, see below) have not required the same kind of anthropological involvement.

In 1982 three Murray Islanders, Eddie Mabo, David Passi and James Rice, on their own behalf and on behalf of their families, commenced proceedings in the High Court of Australia seeking, *inter alia*, a declaration that they were the holders of traditional native title and that the Crown’s sovereignty over the Murray Islands (Torres Strait) was subject to their rights according to local custom and traditional native title. In 1992 the High Court delivered its historic *Mabo* judgment in which a majority (6:1) held that native title could be recognised by the common law of Australia.⁵ By the end of 1993 the Australian government had passed the *Native Title Act* which created a statutory scheme for the recognition and protection of native title and, among other things, provided (i) a mechanism for determining claims to native title (ii) ways of dealing with future acts affecting native title and (iii) in certain circumstances, compensation for its extinguishment.⁶ Although the

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Act was subject to far-reaching amendments in 1998, attaining a complexity found daunting even by lawyers, it retained its essential definition of what constitutes 'native title' or 'native title rights and interests'. Section 223(1), reads in part:

The expression *native title* or *native title rights and interests* means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognised by the common law of Australia.

A series of High Court decisions have gradually refined the proper construction and meaning of these words, although there will undoubtedly be more to come. It is now clear that claimants need to establish that the traditional laws they acknowledge and the traditional customs they observe, and on which their rights in land and waters are based, are substantially the same as those of their predecessors in the same area prior to the imposition of British sovereignty. Those laws and customs must have normative content. The chain of transmission of these traditions also must be shown to be substantially unbroken, and traditions reconstituted in recent times will be of no avail.⁷ Many are of the view that this decision effectively removes the possibility of succeeding in having native title recognised except in remote regions where classical traditions have persisted most appreciably. It is also clear now that the High Court has rejected broad traditional claims of an essentially proprietary kind, preferring instead the 'bundle of rights' approach.⁸ These decisions have pushed the emphasis of anthropological research on native title cases into greater historical depth of detail and into a greater focus on particular rights or traditional 'activities'.

It is conceivable that a native title scheme that did not encourage or require work to be done by anthropologists might have been created, and it is notable that the definition of native title rights and interests in the Act, unlike the Northern Territory Land Rights Act and similar legislation, owes little of a direct nature to anthropological models. There is variable opinion on the extent to which anthropologists are necessary, even in the evidentiary testing process, given that claimants are typically called, in contested cases, to give evidence about themselves. But there are good reasons why expert evidence is normally called as well, and may be relied upon by a court.

Anthropologists working on native title cases record claimants' and other informants' statements about how one may rightfully belong to a place, what rights flow from one's traditional connection to a place, how one should behave according to customary rules to do with interests in sites and areas of country, and so on. These statements are highly important guides as to how people consciously formulate relevant principles. Those statements, however, do not alone account for or predict how people relate systematically to places or how they in practice

allocate rights and interests in them. They are ‘folk models’ – and usually only fragments of them – that contribute important subjective knowledge to the record. An anthropological model, on the other hand, has to take into account what we can learn from people’s actual behaviours, including other statements, as well. A senior man may say, for example, that strong interests in a country can only come from having a birthplace there or a father from that place, but it may become fully apparent that there are many cases which do not conform to this ‘rule’, yet which are so patterned as to clearly be manifestations of a regular customary system. Furthermore, a scholar who has good archival or other older historical records of the relevant ethnographic area can reach longitudinal conclusions spanning as much as a couple of centuries, well beyond living memory or even oral history. Do patterns which people do not recognise, or do not wish to recognise, fall outside the normative?

In non-legal and anthropological terms the ‘normative’ covers not only explicit rules but may also include the behavioural reflection of the *assumption* of a norm,⁹ and *average* or *typical behaviour* as well as ideal norms.¹⁰ In classical Aboriginal cultural traditions it would be abnormal, perhaps even inconceivable, that people would produce explicit, full and objective articulations of how their social order works, comparing ideals with action, and extracting underlying patterns of typical behaviour. Anthropologists rely on combined informant verbal and behavioural evidence together with documentary evidence in order to gradually form a systematic picture of topics such as customary ways of recognising rights in country and how they might have changed over time. For these reasons it would be both unsophisticated and counterproductive to reduce the category of evidence for traditional ‘laws and customs,’ for example, entirely to verbal formulations that might be elicited from particular Aboriginal informants or witnesses. One cannot put the weight of responsibility for such central probative matters on brief statements given in what is often a culturally alien context, and sometimes in a person’s third or fourth language. If one takes a narrow view of how traditional rights are ‘acknowledged’ by claimants, restricting it merely to their verbalisations and omitting what may be abundant other evidence for their possession of a complexly patterned cultural logic, an ingrained system, of recognising rights, one may miss important evidence. Patterned behaviour is not merely a statistical norm when it comes to human social behaviour: such behaviour is informed by often deeply submerged cultural presuppositions, of which the people concerned may be only partly aware. There may also be presuppositions and rules of which people are aware but which they may be constrained, by customary law, from articulating, especially in public. Without the analysis of an external observer, they may not be able to do justice to their cases in a context where a negotiation or court hearing simply can never offer claimants and their assessors the kind of direct exposure to significant periods of everyday life and to multiple sources of evidence that an anthropologist necessarily engages with during fieldwork. Further, contemporary statements by claimants may be of little assistance in articulating the normative content of relevant laws and customs which applied before sovereignty was established, or in articulating transformative and other relationships between past and present.

The approach

In this book I have endeavoured to maintain a focus on the ethnographic rather than on the legal and bureaucratic dimensions of native title, about which in any case I know little. Theoretical issues of the discipline of anthropology are also only in the background here. This book is aimed not only at my anthropological colleagues and their students but also at people other than anthropologists, especially those legal and administrative practitioners concerned with the processing of claims, whether mediated, directly negotiated or litigated. For this reason, specialist terminology and many anthropological concepts are introduced without an assumption of anthropological training on the part of the reader. I do not go into questions of territorial boundaries in any detail in this volume, as my views on that subject are contained in another publication.¹¹

Throughout the text I employ a distinction between ‘classical’ and ‘post-classical’ social and cultural formations and practices. The term ‘classical’ has begun to replace ‘traditional’ in Australianist writing since the late 1980s.¹² The main reason for this is that the former customary distinction between ‘traditional’ and ‘contemporary’ (or ‘urban/rural’) tended to suppress the fact that contemporary urban and rural Aboriginal people also have traditions. I prefer to use it as a distinction, not between kinds of society but between particular socio-cultural institutions. By ‘classical’ principles and practices I mean those which may be considered to take substantially the same form as can be reconstructed for the early colonial contact period and the era immediately before it. Many classical elements, such as classificatory kinship *per se*, belief in Dreamings (Ancestral Beings), totemic identities, or the inalienability of land, are widespread and share many underlying similarities across Australia. When taken in conjunction with the archaeological record, which reveals only very gradual and modest transformations in the hunter-gatherer economy and material culture kit over millennia before colonisation, many of these underlying features must be considered of ancient provenance. The classical practices and institutions persist to a significant degree in the remoter parts of the continent, and there are important elements of them that also at times persist in rural and urban Australia as well.

By the ‘post-classical’ I mean those cultural practices and social institutions that have developed distinctively since colonisation. It is useful to distinguish classical and post-classical whole systems (such as kinship) or underlying principles from specific classical and post-classical activities, social rules, artefact types and so on. Thus a specific rule for reckoning membership of a kin group which holds land may be post-classical in form, but the fact that an appeal to common ancestry remains the cornerstone of landed group identity in a particular region may be a classical principle that has come down more or less intact from pre-colonial times. One often finds that Aboriginal people in urban or rural areas have regular post-classical social practices which can be sourced back to older classical forms but they do not necessarily articulate those practices as ‘laws’. However, where they are regular and to some degree regulating of behaviour I would regard them as having a jural component. That is, they attract a negative sanction in the breach. Matters jural are not simply a matter of individual preference or choice.

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Some colleagues, however, may find my approach too much influenced by the 'jural paradigm' of mid-twentieth-century anthropology, and too little influenced by certain recent theoretical developments in the social sciences.¹³ While that may be so, and I acknowledge a jural orientation in this aspect of my work, it is important to recognise that much of the existing anthropological literature dealing with Aboriginal land tenure has been oriented in a similar way, and familiarity with the ideas and language of that literature is important to grasping its ethnographic content in a way that takes account of its theoretical background (for example, Chapters 1 and 4), whether or not one takes a very different approach oneself. I hope that my introductions to technical terminology and concepts of kinship and social organisation (Chapters 7 and 8), for example, are useful to those who wish to understand the literature of the past and a good deal of that of the present. They are not intended as an encouragement to return to a past variety of structuralism, although I do argue for a persisting interest in structure and the need for anthropologists working in the native title arena to have the training to be able to perform a structural analysis of a body of data (Chapter 6). The kind of anthropological evidence that tends to be emphasised in the native title context is that which is relevant to legal questions of proof. This inevitably skews attention towards that which is collectively patterned, normative and rooted in old traditions (for example, Chapters 2 and 3). The application of methodological individualism may result in some rather different views of the same ethnographic base material, without necessarily contradicting observations made while paying greater attention to collective forms. Aboriginal people themselves, in most regions, traditionally pay a great deal of attention to collective formations such as named groups. It would be reductionist, in a comprehensive academic study, to examine such traditions purely through the lens of the collective objectifications of one's informants, just as it would be to examine them purely through the lens of egocentric kindreds, for example. But native title research only occasionally enjoys the luxury of being grounded in a comprehensive academic study, as when researchers return to places where they have carried out long-term fieldwork (for example, 12–20 months or more). In fact most native title anthropological research is carried out by consultants or staff who have much tighter time-frames.

This book is largely concerned with mainland Aboriginal Australia. Although there is some reference to the Torres Strait Islands in the text, a region usually regarded as part of Melanesia, I cannot claim any expertise in the anthropology of land and sea relationships there, and there is a book by Nonie Sharp which deals specifically with native title issues and historical developments for that region.¹⁴

Themes

Given that the focus of native title in Australia is on the translation of customary and traditional rights in country into legal 'rights and interests', Chapter 1 enters in some detail into various conceptual schemes which have been put forward for characterising and categorising the various recorded types of rights. In particular, I advance a model in which 'core' rights are distinguished from those that are

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'contingent'. The initial motivation for this hypothesis was that I had seen a number of native title applications in which the rights claimed were listed in such a way that even people with only rather ambient interests in the claimed area might have been lumped together with those for whom the area was their primary country. It remains to be seen whether or not such a distinction, which I believe commonly reflects the ethnographic facts, is too problematic to survive in this rather skeletal form.

By way of background, especially for those new to the subject, Chapter 2 offers the reader a brief history of ideas about Aboriginal 'local organisation' (basically, land tenure and land use) from the late nineteenth century to the mid-1960s, just before the land rights era proper. While being necessarily selective, I trace the evolution of models of relationships between social organisation and customary interests in and rights over land, waters and their economic, religious and other content. In that period these ideas moved from a framework of historicism to one of ahistorical structural-functionalism and then, especially in the case of W.E.H. Stanner, to a more processual kind of modelling that also encompassed ecological considerations.

Although native title rights may be those of individuals (see above), they are most often put forward in terms of a group of some kind. Some claimant groups have been based on a common linguistic territory identity, as they have been in other jurisdictions, such as cases heard under the Aboriginal Land Rights Act or the Queensland Aboriginal Land Act. As in the case of some other developments in the field, I have been closely involved in several such cases.

The pitfalls of this domain of 'groupness', especially for those new to the topic, are perhaps greater than those of any other discussed in the volume. For this reason I digress a little in Chapter 3 into the thorny subject of relationships between sets and groups, and groups and labels for groups, before setting out what seem to me to be the main issues to do with how groups of people and the relevant areas of country are conceptualized in relation to each other. This discussion is extended in Chapter 4, where I discuss some practicalities and conceptual issues concerned with how widely or narrowly the net may be cast when sets of people are collectively identified as having links to and rights in areas of different relative sizes. Here again I revisit the history of ideas, looking at concepts of Aboriginal 'nations' and 'communities' between the late nineteenth century and the land rights era.

I argue for a model of local Aboriginal country relationships which takes account of regional tenure systems and regional populations as well, but in a particular way (Chapter 5). This model suggests a two-layered conception whereby those who are alive and have rights in local countries have 'proximate' entitlements which are pendant on a less labile, more widespread regional system of underlying title. Although this hypothesis resembles the radical title/ beneficial title scheme of English legal tradition, it is not based on it and it is not the same, although some of the similarities between the two are striking. A consequence of such a model might be that, even where there are for a time no living holders of proximate title over an area, native title might still be found to exist there, albeit held in a kind of

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wider or neighbouring regency arrangement, so long as keepers of the regional system maintain that system.

Note: Aboriginal norms which have customary force, especially those underpinned by religious belief, and bodies of relevant belief and ritual practice, are here distinguished in spelling as 'Law'. This is also the common English term for such norms and bodies of belief and practice among Aboriginal people.

In line with the convention in legal texts, I have adopted the use of italics in referring to land claim or native title cases: for example, *'Mabo'*, *'Lake Amadeus'*, *'Jawoyn'* and *'Kenbi'*.



Places and regions referred to in the text.

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