

Contextualising Native Title, and this Volume

THIS UNIQUE CROSS-DISCIPLINARY volume on legal, cultural, historical and practice issues in native title explores contemporary themes of relations to land, law and representation. Its precedent stems from June 1992 when the High Court found in favour of the Meriam people, custodians of the Island of Mer in the Torres Straits, in what is generally known as the *Mabo* decision.¹

The *Mabo* decision was significant for many reasons. It recognised that customary laws in land had not been extinguished by the impact of colonisation on the Island of Mer. It established the principles whereby future native title claims might be made. It rejected the legal fiction of *terra nullius* that had underpinned Australia's colonial, moral and legal history for more than two centuries. The High Court's ruling also effectively overturned Blackburn J's 1970 decision in *Milirrpum v Nabalco* (also known as the Gove or Yirrkala case),² which had ruled that while Indigenous customary law continued to exist and have meaning for the Yolgnu in Arnhem Land, such law could not at that time be recognised by the Australian legal system.

On the basis of recognising customary laws in land, the High Court introduced a new title into Australia's property laws. While it was not immediately apparent in 1992, this belated recognition of Indigenous land tenure laws also introduced the potential for increasing professional engagement among anthropologists, linguists, historians and lawyers in a way that had not occurred before. The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth) had witnessed the emergence of cross-disciplinary work for

claimant groups in the Northern Territory but, as many contributors to this volume show, native title has brought with it a new set of circumstances warranting a rethinking of past and present practices. Issues related to the recording and representation of Indigenous cultural beliefs, practices and laws are paramount here.

Recognition of native title was the first form of land title in Australia that had not emerged from European notions of property ownership. Native title exists only for and can only be claimed by Indigenous peoples. In keeping with the principles enshrined in the *Mabo* decision, the onus is on Indigenous claimants to prove that they have a right to claim native title by showing that an individual or group can demonstrate a continuing connection with the land consistent with Indigenous use (for instance, by continuous possession, residence and/or that rights in land have been conferred by customary laws). Proving, in accordance with legislative requirements, that native title has not been extinguished has been and continues to be one of the most difficult matters facing Aboriginal and Islander claimants, especially those groups most directly affected by colonisation and dispossession.

Some of the principles enshrined in the *Mabo* decision were translated into legislation in 1993 through the creation of the *Native Title Act 1993* (Cwlth) (implemented in January 1994). Unalienated Crown land, some national parks, and reserved Aboriginal land were generally regarded as areas that would most readily engender successful native title claims.

Since its implementation, the Native Title Act has established the National Native Title Tribunal, with a head office in Perth and other offices throughout the country.

The High Court's *Mabo* judgment was unclear whether pastoral leases extinguished native title. In the later *Wik* decision, it found that the granting of a pastoral lease did not necessarily extinguish native title.³ The High Court judges decreed, however, that where there was a conflict of interest, the pastoral lease would usually take precedence over native title. The *Racial Discrimination Act 1975* (Cwlth) proved valuable with respect to *Wik*, as it had done in the original *Mabo* decision. The High Court ruled that some governmental acts (such as a pastoral lease) that had occurred after the implementation of the Act (on 31 October 1975) may have been invalid resulting in the nature of extinguishment becoming an area of contestation. On the other hand, most past acts of government (public works, freehold title, commercial lease) were defined as having extinguished native title. In the *Miriuwung Gajerrong* case, the High Court determined that pastoral leases could extinguish native title when use of the lands was determined as 'inconsistent' with Indigenous beliefs and practices.⁴

The Native Title Act has continued to evolve since 1993. It has also been amended by a conservative federal government on several occasions, especially in 1998. A document titled 'The 10 Point Plan' outlined the amendments. These have undoubtedly diverged from the principles enshrined in the *Mabo* decision and resulted in difficult consequences for claimant groups, and for those who work with them on the preparation and submission of a claim. For example, one of the amendments now requires Indigenous claimant groups to lodge claims through particular Native Title Representative Bodies rather than through their own local representative group, and claims are more readily directed to the Federal Court.

Native title has become an increasingly significant issue in many people's lives, including with respect to the wider society, media interest and processes of reconciliation, such as that evident in the national group, Australians for Native Title and Reconciliation. Native title has also generated complex areas of historical, legal, cultural, linguistic and methodological debate and interpretation, such as how and why Indigenous cultural beliefs and practices relate to land and continue from the past into the present. Other issues include the basis for the extinguishment of native title, and the cross-cultural reliability of oral and archival evidence. A stark example of a range of issues can be seen in *Yorta Yorta Aboriginal Community v Victoria* in 1998, where Olney J privileged the nineteenth-century writings of squatter and amateur historian Edward Curr to find that native title had been extinguished. That Olney judged Curr's historical material to be more persuasive than Yorta Yorta testimony and the complementary accounts prepared by anthropologists, historians, linguists and legal counsel represents a significant matter for native title claimants and those who work with them on the preparation and submission of claims.⁵

Practitioners and theorists within disciplinary fields such as anthropology and law increasingly appreciate that not only do claimant groups and the legal requirements of the Native Title Act demand individual and professional assistance, but also the professions themselves need to be open to learning more from each other, especially about how they might work more effectively together in a field clearly reliant on productive cross-disciplinary knowledge, expertise and practice.

For this reason, in September 2000 linguist John Henderson and I convened a two-day national conference titled *Crossing Boundaries: Anthropology, Linguistics, History and Law in Native Title* at the University of Western Australia. Our aim was to create a forum whereby those from disciplinary backgrounds most involved with and experienced in native title could come together to debate, listen, question and learn. *Crossing Boundaries* drew on ideas, experiences and skills from individuals actually

working within a variety of settings, including members of claimant groups, and representatives from the National Native Title Tribunal, land councils, sectors of government and industry, the Australian Institute of Aboriginal and Torres Strait Islander Studies, the Aboriginal and Torres Strait Islander Commission, universities and professional organisations. Independent scholars, practitioners and students were also involved and added their perspectives to the vitality and richness of the forum.

Chapters in this volume reveal the extent to which native title workers need to communicate more cogently and, in some cases, to redefine their practice. How history is interpreted and by whom presents a case in point. While lawyer Fred Chaney cites the need to find a new paradigm by identifying native title as representing a break with the past, anthropologist Veronica Strang shows that representations of a past that continues to have intrinsic meaning in the present is central to Indigenous identity. Included in this is how claimant groups articulate relations to land and water. Under the operation of the Native Title Act it has become apparent that the legal cultures of the state and Indigenous customary laws, and the way that these cultures are represented are not easily reconciled. The constant possibility that Indigenous rights and interests in land will be absorbed by multiple legal relations and requirements has also appeared. David Martin, in a chapter premised on an appreciation that the 1992 *Mabo* decision and the 1993 Native Title Act emerged from a post-colonial legal discourse, is critical of imposed structures that bear little resemblance to Indigenous legal and political frameworks. He foreshadows problems associated with the implications of the 'juridification' of Indigenous relations. Julie Finlayson and James Nugent are also concerned with the imposition of structures (such as Native Title Representative Bodies) that have arisen because of requirements embedded in a Native Title Act dramatically amended in 1998. Legislative requirements rarely mirror Indigenous social and political organisations in Indigenous Australian settings.

Anthropologist David Trigger's view that the state could benefit by incorporating the way in which Indigenous claimants themselves describe cultural and political interests in land also finds some resonance with other contributors. Trigger makes the point that one of anthropology's most urgent tasks is to demonstrate to the courts the reliability and rigour that go into anthropological fieldwork and analysis. Finlayson and Nugent urge anthropologists, linguists and historians to be more prepared for the adversarial circumstances in which native title work generally occurs, a point also addressed by historians Mandy Paul (on the Arrernte claim⁶), and Christine Choo (on the Miriuwung Gajerrong claim).

Lawyer Carolyn Tan takes a slightly different position. Tan describes the need for anthropologists and other expert witnesses to be prepared to

meet the demands of court procedures. As someone who works within the legal requirements of the Native Title Act, Tan discusses confidentiality and privilege as legal doctrines. Her chapter ponders the sorts of dilemmas raised by Trigger and others, including the potential for anthropological reports and associated field notes to be subpoenaed. Unlike those anthropologists who work closely with Indigenous groups and are bound by a certain code of ethics and social and cultural etiquette, Tan argues that an examination of the state's 'rules' of evidence should occur as attention to these might be the best way to protect the aspirations of native title claimants. She takes readers through the legal doctrines involved in the protection of knowledge, such as issues of privilege (including a waiver of privilege) and the possibility of litigation. Citing case law and the doctrine of public interest immunity, Tan claims that the law continues to develop and remains in an uncertain state.

That native title law continues to evolve is also discussed by former National Native Title Tribunal President Robert French, who describes it as still 'young enough to accommodate change'. In a chapter that draws attention to the 2002 appeal decisions in the Miriuwung Gajerrong case and Yorta Yorta, French explains that a legal and conceptual shift from a prior emphasis on common law has occurred. He concludes that while these decisions have undoubtedly been discouraging to native title applicants, there is still room for 'negotiation, agreement and positive outcomes'. Lawyers David Ritter and Frances Flanagan take a slightly divergent path, discussing uncertainty as a potential resource for Aboriginal people in mediating and litigating native title matters. Ritter and Flanagan ruminate on the need for lawyers to adopt a critical approach to the application of legal theory and method. Observing that the field of native title is predominantly 'legal', they note that some lawyers misunderstand or fail to acknowledge the instructive cultural role and analyses of historians, anthropologists and others. This point is also raised by Finlayson and Nugent, who stress that most lawyers have little understanding of what anthropologists and linguists actually do.

Philip Vincent, a lawyer with a long history of involvement in the field of Indigenous land claims, discusses the process that led to the Nharnuwangga, Wajarri and Ngarlawangga people's claim in Western Australia.⁷ In his view, there is a need for native title interests to be 'balanced'; resolutions should involve pragmatic 'goodwill' from all parties, including among the Indigenous groups and professionals who work on the preparation and presentation of a claim. The example of the Nharnuwangga, Wajarri and Ngarlawangga 'consent determination', presided over by Madgwick J, shows how Indigenous groups, pastoralists and representatives from the mining industry worked together to reconcile a range of

co-existent interests. The 'consent determination' approach, however, suggests only tacit acknowledgement of native title and carries with it what some describe as a weakened form of native title rights.

Focusing on the Arrernte claim in Central Australia, historian Mandy Paul draws metaphorically on the expression to 'push back the boundaries of the court' in her discussion on how law and history might work together more productively. Paul explains these disciplines as emerging from different systems of knowledge and maintaining different discursive practices. Critical of lawyers who seek 'positivist' historians to provide concrete chronological time-lines, Paul explores the absences in the written historical record, finding meaning through filtering devices throughout the extant records. Paul also suggests guidelines for a better working relationship among the disciplines, including that all parties should recognise one another's skills, regularly exchange information among themselves and with Indigenous applicants, and prepare joint reports. Historian Neville Green also presents guidelines on how practitioners involved in native title might produce histories that are fully contextualised. Unlike Paul (and sharing some similarities with the concerns of Tan), Green argues for the writing of a history that will meet the stringent demands of the court. Conceptualised this way, the questions of how research is undertaken, and how and by whom evidence is presented in court again arise.

Linguist Patrick McConvell stresses that some native title claims can 'crucially hang' on questions of language. Adopting an approach he calls 'linguistic stratigraphy', McConvell demonstrates how important it is for those involved in cultural research and the preparation of reports with Indigenous claimants to include treatment of language issues, including translation and interpretation, and analysis of linguistic shifts. Concerned to identify the relationships between language, culture and Indigenous affiliations to land and water, McConvell shows that such relationships are not always present in a claim's construction. This absence and a failure to attend to linguistic change over time can result in a lack of sensitivity to Indigenous systems of customary law; they also have the potential to misrepresent a claimant group's land tenure interests.

In the 1998 Miriuwung Gajerrong claim, Lee J found in favour of the applicants with respect to most of their claim in the East Kimberley, a finding that Western Australia appealed.⁸ Michael Barker QC, anthropologist Will Christensen and historian Christine Choo present a unique insight into working together on the first stage of the claim through the Aboriginal Legal Service. They provide substantive detail on methods and some of the more complex political native title processes. Barker also highlights the way ambiguous aspects of native title law continue to hamper the work of many professionals engaged in native title research applications. The importance

of managing the claim and the benefits and limitations of working across disciplinary boundaries are considered. Each author argues that while primacy should always be given to the evidence of the claimants, the expert witnesses' accounts in the Miriuwung Gajerrong claim clearly strengthened the Indigenous applicants' position.

Will Christensen's reflexive contemplation on methods and politics raises a number of significant practice issues. He highlights three matters that might result in a successful claim: rigorous scholarship, consistent corroboration, and a heavy reliance upon the claimants' direct testimony. Christensen's emphases are not dissimilar to Christine Choo's; she explains how crucial it is for expert witnesses to be prepared for detailed legal interrogation with respect not only to reports prepared on behalf of native title claimants, but also to representative disciplinary methods. As Choo discerns, it was not only her evidence that was put on trial in the Miriuwung Gajerrong claim, but also her discipline. This adversarial nature of native title practice clearly affects not only historians, but also Indigenous claimants. In Strang's analysis, this outcome is one of the most vexatious aspects of native title. As Strang describes in an evocatively titled chapter, 'Raising the Dead', claimants are required to demonstrate the continuation of cultural beliefs and behaviours, some of which necessitate revisiting places associated with the death of loved ones. While claimants often relive emotional stress in a process aimed at restoring legal recognition of their lands, outsiders rarely appreciate the circumstances in which the sorrow is evoked, and the on-site experience does not always result in a successful native title outcome.

Some contributors, such as Paul and Green, make suggestions on how historians might reflect on their own methods as well as engage more critically and confidently with legal colleagues. Anthropologists and linguists such as Christensen, Trigger, McConvell, Martin and Finlayson emphasise the importance of ensuring that complex cultural research in native title continues to be undertaken with adherence to the discipline's aims and integrity, especially the epistemological means whereby Indigenous claimants have the opportunity to represent their own system of land tenure laws. Yet others, such as French, Tan, Chaney and Barker, have formed the view that while the legal requirements of the Native Title Act may not be entirely satisfactory, the legal process surrounding native title has been established, albeit in a state of evolution. Ritter and Flanagan, on the other hand, are concerned to instil a critical, questioning legal process, especially with respect to recognition of Indigenous testimony and the supporting evidence of expert witness accounts. However, as Jan Anderson and Wendy Ashe describe from their land council vantage points, questioning the legal process surrounding native title can sometimes be counter-productive.

The contributors to this volume make plain that there is much more room for conversation and action across the disciplines. It is also evident that each discipline needs to undertake some reflection on its own foundations, practices and theories. While some contributors argue for the need to concentrate solely on the rights and aspirations of Indigenous claimants and the expansion of debate on the presentation of cultural evidence in court, others suggest ways in which anthropologists, linguists and historians might work more effectively together and with lawyers on native title claims. Yet others make distinctions between those anthropologists and historians who work for the state, often in opposition to the stated interests of claimant groups and their own professional code of ethics. Matters circumventing objectivity and subjectivity permeate this volume, revealing not only the complex nature of crossing disciplinary boundaries, but also the centrality of native title, and the broader aspects of Indigenous and non-Indigenous relations and reconciliation in Australian cultural life.

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