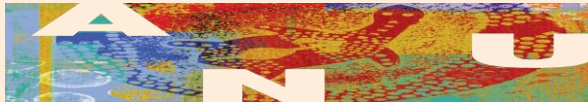


Anthropology's Law:

What's Culture got to do with Native Title Compensation?

Dr Diane Smith
Centre for Aboriginal Economic
Policy Research, Feb 2020



A Provocation Paper

what are other
words for
provocation?

incitement, irritation,
instigation, annoyance,
aggravation, challenge,
stimulus, motivation



'Culture': Anthropology's Law



“... is that complex whole [*not a fragmented bundle*] which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man [*but apparently not by woman*] as a member of society” (E.B. Tylor 1881)



“Aint it just a way of being thinking and doing together?”
(Aboriginal participant, regional governance workshop)



“... small remote Aboriginal communities [are] cultural museums... they might make people feel good but they leave Indigenous Australians without a viable future ... its time to start treating Indigenous Australians like everyone else”
(Senator Amanda Vanstone, ABC Interview 2005)

Cultural Loss; Cultural Change



Cultural loss refers to adverse impacts —as a result of damage inflicted on people — on the knowledge, beliefs, activities, capabilities, livelihoods and relationships which are engaged in, and transmitted by, individuals and groups and which reproduce their sense of place, personhood and grouphood.



Cultural change may be self or collectively-generated and be naturalised as progress, development or creativity



Value — Loss reveals value and preferences. Many types of value = culturally assigned; individually assigned; value assigned by supply and demand; value a collective group assigns; value by institutional fiat.

Tangible and Intangible value. Value over time.

Indigenous Cultural Laws of Compensation

- Part of systems of law (principles, rules, precedents, power)
- Operate within cultural jurisdictions & geographies
- Is about social relations & distribution of property
- Comprised of rights, interests, entitlements, accountabilities & responsibilities
- Evident in practice, processes & outcomes
- Involves agency and burden of interpretation
- An arena of value and valuation (fields of causation, scale, time, effect, outcome)
- Negotiated, multiple forms – physical, personal, collective, social, material, monetary, spiritual, symbolic, performative

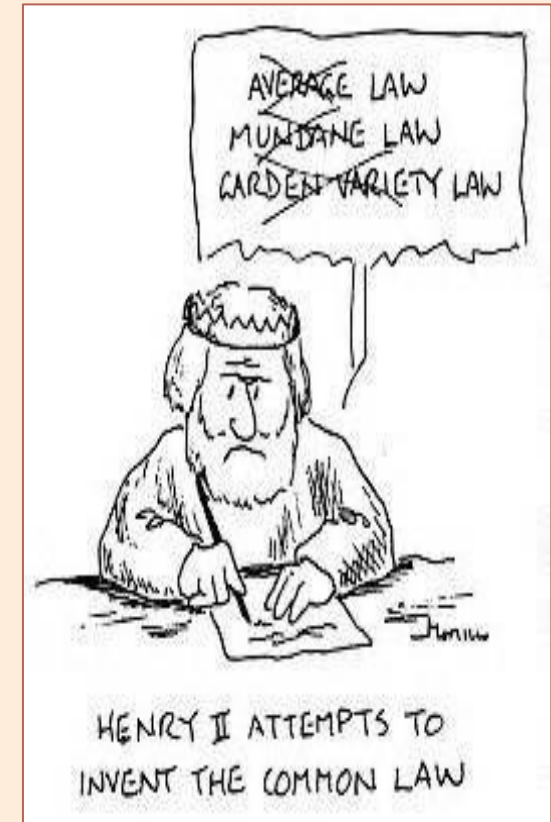
The Culture of Anglo-Australian Law

Law's Culture: Passed its use-by date?

- Posed as British “civilised” law versus “palm tree justice” of Indigenous “customary law” (R. Creyke et al *Laying Down the Law* (10th ed Butterworth 2018))
- Precedents out of date with current anthropology (C. Bell and M. Asch *Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation* (unpub))

■ How *common* is the common law?

“The self-congratulatory and complacent reign of the legal process” ... “[whose] interpretative community reveals a group of mostly white, male, professional and relatively wealthy exponents” (P. Brest, *Stanford Law Review* 1982)



Native Title Compensation

A Recognition Space for what?

Extinguishment ... Negotiation ... More Dispossession?



A Very Dangerous Idea?

Arguably, the culture of the common law itself needs to develop or 'adjust' to recognise that *the 'rule of law' in the field of native title now includes Indigenous laws and principles* for addressing the resolution of issues of rights.

This means that Indigenous laws' principles, precedents and rules for determining appropriate compensation for native title extinguishment *should have procedural standing as such* in courts, tribunals and negotiations.

Whose Culture ... Whose Value?

Here come the JUDGES!

OMG its Culture!

Compensation & the Courts

Arguably cultural loss and culture loss are compensable injuries.

Damage to a way of life constitutes a compensable head of damage.



Just Terms? ... The High Court's Report Card



Timber Creek: The Monty Pythonesque logic of the High Court:

- Freehold equivalence = *Fail*
- Market Valuation equivalence = *Fail*
- Valuation of non-exclusive native title at 50% = *Fail*
- Disregard of inalienability = *Fail*
- Bifurcation as bundle of rights = *Fail*
- Beyond money = *Fail*
- Loss includes collective and intergenerational = *Pass*



= “particularly sparse reasoning”; Relying on its own Intuition



The “community” as ‘reasonable man’ =
“a vehicle for importing discriminatory views into the heart
of the legal standard”. (M. Moran 2010)

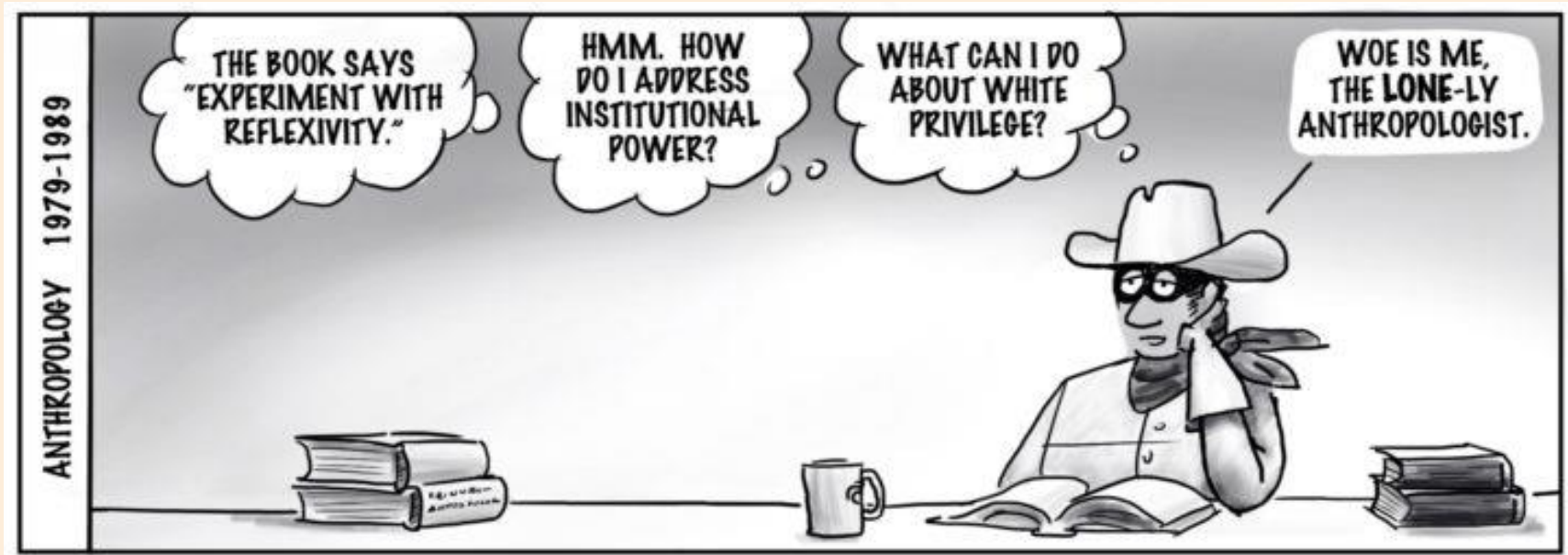


Problems with Native Title Compensation

- Lack of participatory parity for Indigenous comp laws & principles
- Legal ethnocentrism
- Invalid conceptualisation of property
- Invalid reductionism of categories
- The legacy of bundle of rights
- Narrow conceptualisation of value
- Impoverished understanding of loss
- The presumption of benefit and incrementalism
- Monetisation – “Just terms or Just Money” (C. Winnett)
- Challenges of, and limits to, time
- The phantom State
- Impacts of the compensation process - distributive spread & equity

Anthropology *Plus*

Doing Research that Counts How?



“I chose cultural anthropology, since it offered the greatest opportunity to write high-minded balderdash.”
(Kurt Vonnegut, *Palm Sunday: An Autobiographical Collage*)

Some Dangerous Ideas = Research & Practice



Foundation Principle = Participatory parity and standing



Monetisation – Include a “Relativity Clause”



Beyond monetisation Flexible conglomerate packages:

- Rehabilitation of the state – Future Proofing - a “Dispossession Clause”
- Restitution and Restorative Justice (land for land; recognition)
- Reparation (resources, infrastructure, services)
- Reconciliation & Relationships (apology, truth-telling)



Beyond the courts? Part of settlements & frameworks



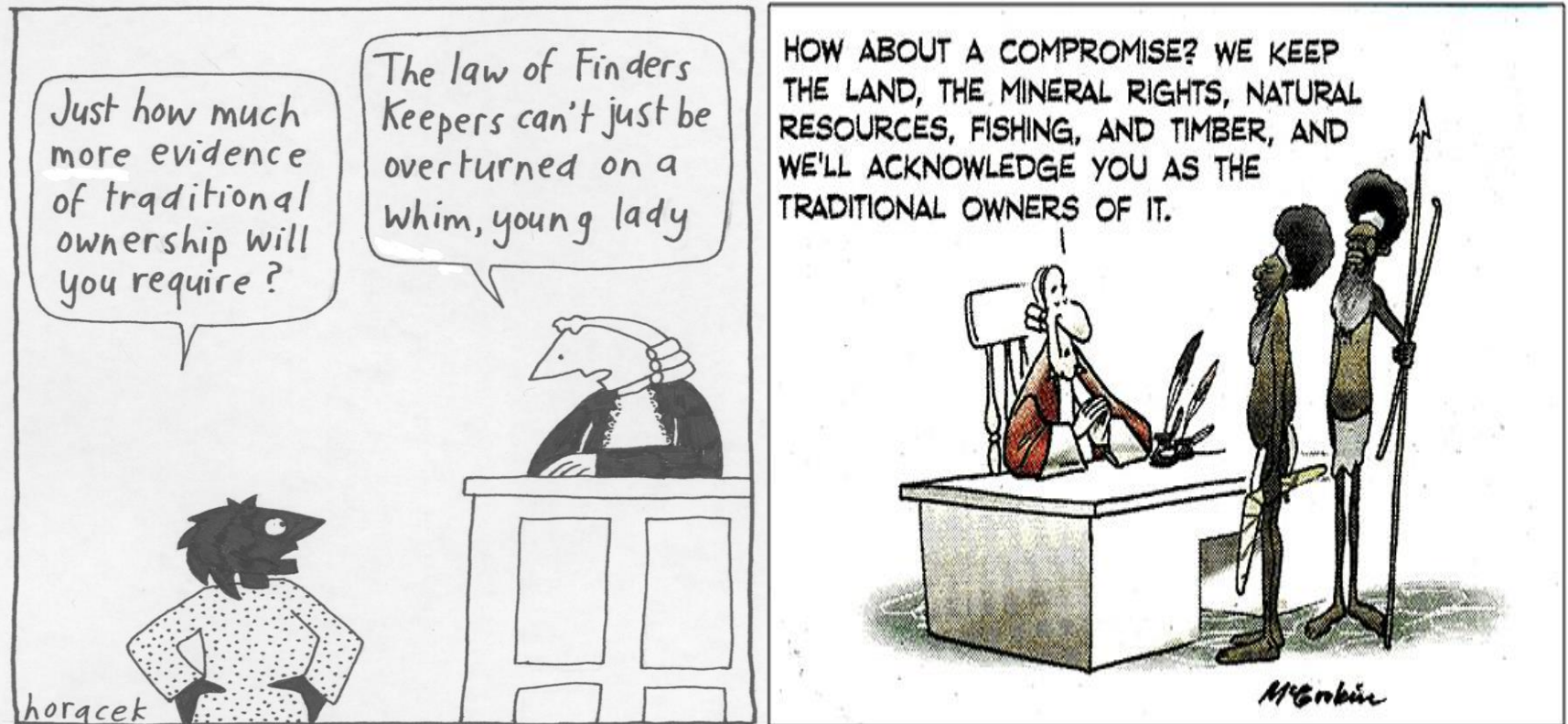
What might a more Holistic approach to value and loss look like?

Anthropology *Plus* Research that Counts

- NTRB Anthros = more than field staff. A research remit
- NTRBs = regional & multi-NTRB compo research agenda
- NTRB + university collaborations on compensation
- Old fashioned ethnographic work on-ground of Indigenous compensation laws, process and outcomes
- Ethnographies of loss, change, resurgence & innovation
- Mapping country = historical comp events & outcomes
- What constitutes 'value', 'satisfaction' for people
- Oral histories about compensation
- Variables of gender, age, generation, time, scale
- CNTA = a valuable resource

COMPENSATION NULLIUS

The Next Gen of Dispossession....?



Compensation for impairment or extinguishment of native title rights and interests remains one of the biggest pieces of unfinished business for Indigenous peoples that must be addressed as a matter of justice and reconciliation.

(Indigenous Social Justice Commissioner, Social Justice and Native Title Report 2016, p. 135)