NATIVE TITLE FROM MABO TO AKIBA

A Vehicle for Change and Empowerment?

Editors
Sean Brennan
Megan Davis
Brendan Edgeworth
Leon Terrill

THE FEDERATION PRESS
2015

PART TWO

Ancestry and Rights to Country:
The Politics of Social Inclusion in Native Title Negotiations

David Trigger

Native title groups face the issue of who to include as members and hence potential beneficiaries of claims and agreements. Ancestry, the historical land associations of deceased forebears, and contemporary personal connections to country all commonly become the subject of intense politicking among Aboriginal individuals and families, who at times have wider reasons to both cooperate and compete. Territorial boundaries between contemporary identity groups, the location of significant sites, and what constitutes heritage are similarly issues of often related, vigorous negotiations. Individuals and families, at times represented by Indigenous corporations, can struggle to articulate local traditional and genealogical knowledge that is partial and heavily influenced by historical and ethnographic documents available from archives and the work of anthropologists, historians, linguists and archaeologists.

Issues of social inclusion and exclusion can be driven by questions of individuals' historical proximity or remoteness from claim areas, accusations of tribal identity fraud or mistaken genealogical affiliations, allegedly relevant mixed racial backgrounds, and blunt personality politics focused on control over real or imagined resources. In this context, respondent parties such as State governments, proponents of development projects and the courts seeking to arrive at appropriate determinations often enough find themselves embroiled in highly emotional disputes between and among Indigenous groups. The resulting mix of intensely personal and cultural politics is a major determinant of native title outcomes and economic empowerment possibilities. This chapter will present case material to illustrate the significance of Indigenous politics of social inclusion in the resolution of native title claims and related beneficial outcomes.

Indigenous Disputes over Claim Group Membership

While the fundamental influence of legal jurisprudence and negotiations with government and industry parties is broadly recognised,[1] the complexities of social and political relations *among* Aboriginal claimants and their impacts on the native title process have been addressed to a more limited extent. The significance of disputes between Aboriginal groups was recognised early in the applied anthropological literature on native title,[2] and there has been analysis of the tendency towards 'atomism' or splitting and fission across populations who might otherwise make collective claims.[3]

---

[1] Marcia Langton and Lisa Palmer, 'Modern Agreement Making and Indigenous People in Australia: Issues and Trends' (2003) 8(1) *Australian Indigenous law reporter* 1; David Ritter, *Contesting Native Title: from Controversy to Consensus in the Struggle over Indigenous Land Rights* (Allen & Unwin, 2009); Lisa Strelein, *Compromised Jurisprudence: Native title Cases since Mabo* (Aboriginal Studies Press, 2nd ed, 2009).

[2] Diane Smith and Julie Finlayson, *Fighting over Country: Anthropological Perspectives* (Research Monograph 12, CAEPR, 1997); Ian Keen, 'Conflict in Aboriginal land tenure' in *Proof And Management of Native Title, Summary of Proceedings of a Workshop* (Native Title Research Unit, AIATSIS, 1994).

[3] Peter Sutton, *Native Title in Australia: An Ethnographic Perspective* (Cambridge University Press, 2003), 85–110; David Trigger, 'Anthropology and the Resolution of Native Title Claims: Presentation to the Federal Court Judicial Education Forum, Sydney 2011' in Toni Bauman and Gaynor Macdonald (eds), *Unsettling Anthropology: The Demands of Native Title on Worn Concepts and Changing Lives* (AIATSIS, 2011), 142, 151–5; Toni Bauman, 'Shifting Sands: Towards an Anthropological Praxis' (March 2001) 71(3) *Oceania* 202; Toni Bauman, 'Waiting for Mary: Processes and Practice Issues in Negotiating Native Title Indigenous Decision-Making and Dispute Management Frameworks' (Land, Rights, Laws: Issues in Native Title, Volume 3, Issues Paper No 6, Native Title Unit, AIATSIS, 2006).

However, partly due to many case materials being confidential, the logic and drivers of internal Indigenous conflicts about group membership have been only obliquely addressed. It is likely that there has also been apprehensiveness about the political consequences of focussing on intra-Indigenous disputes. Some authors have argued for the integrity of internal Indigenous 'management' of conflict and hence the importance of Aboriginal persons as mediators.[4] This approach is largely consistent with a view that 'Indigenous knowledge and experience' is critical in resolving conflicts,[5] and that distinctive Aboriginal values, customs and traditions should inform mediation and resolution of native title claims.[6] To some extent, this faith in internal Indigenous dispute management is part of a broader 'aspirational and utopian' theory, focused on the idea of 'alternative dispute resolution' or 'mediation'.[7]

However, if the aim is to reflect 'local practice and reinforce local community authority' in dealing with intra-Indigenous disputes, thereby enabling community 'ownership' of the process and empowerment of protagonists,[8] in the native title context it is important to understand the key material and symbolic stakes in disputes about rights to country. Bauman and Pope, in their major project on Aboriginal conflict, were unable to include any consideration of land and native title cases. This was due to what they describe as 'ethical issues', cases being still before the court, and 'difficulties in obtaining consent' to do such research with Indigenous groups.[9] Nevertheless, their discussion of the role of 'culture' in *other* domains of Indigenous conflict is instructive. They find that kinship-driven social relationships are critical and suggest this is in contrast to an emphasis in the wider Australian society 'on the dispute itself and resolution outcomes'.[10] They flag the importance of knowing about 'the sub-strata of kinship affiliations and power relations' and of exploring 'the history of family relationships'.[11] Behrendt and Kelly make this point directly in relation to how native title claims can 'add fuel' to a pre-existing 'fire', where feuds between families 'are already a major source of conflict'.[12] Such feuds or 'family fighting' can be fierce, being 'like a volcano that once violently erupted – and may do so again without notice'.[13]

We also know that serious and bitter disputes within claimant groups can result in part from earlier claims having been lodged without adequate research or instituted by 'dissident individuals or groups' who use the services of independent lawyers separate from Native Title Representative Bodies.[14] This is not to say that such representative bodies always get it right, and no doubt there are cases where it is fortuitous that claim groups have resources to engage separate professional services. Arguments over group composition, as well as contested territorial boundaries, can be exacerbated by the negotiation of future acts such as large mines

---

[4] Bauman, *Waiting for Mary*, above n 3; Larissa Beherndt and Loretta Kelly, *Resolving Indigenous Disputes: Land Conflict and Beyond* (Federation Press, 2008); Toni Bauman and Jaunita Pope, 'Solid Work You Mob Are Doing' (Report to the National Alternative Dispute Resolution Advisory Council by the Federal Court of Australia's Indigenous Dispute Resolution and Conflict Management Case Study Project), 100 <http://www.aiatsis.gov.au/ntru/decisionmaking.html>.

[5] Bauman and Pope, above n 4, xiii.

[6] Behrendt and Kelly, above n 4.

[7] Carrie Menkel-Meadow (ed), *Mediation: Theory, Policy and Practice* (Ashgate/Dartmouth, 2001), cited in Mary Edmunds, 'Whose dispute? Mediating Native Title' (Paper prepared for the Australian Institute of Aboriginal and Torres Strait Islander Studies and Central Land Council, The Native Title Conference: Native Title on the Ground, Alice Springs, 3–5 June 2003), 3 <http://www.aiatsis.gov.au/ntru/nativetitleconference/conf2003/papers.htm>.

[8] Bauman and Pope, above n 4, 101.

[9] Ibid, 8.

[10] Ibid, 100.

[11] Ibid, 101.

[12] Behrendt and Kelly, above n 4, 31.

[13] Ibid, 53.

[14] Edmunds, above n 7, 7.

with potentially substantial benefits for those recognised as holding traditional rights.[15] Hence, there are cases involving attempts to replace named applicants because of assertions they do not satisfy membership criteria or do not properly represent the broader claimant group,[16] and also reports of how post-agreement 'disputes are often refreshed by the subsequent distribution of benefits' over time.[17]

Behrendt and Kelly note the significance of 'disputes about the identity of the traditional owners', as well as tensions between 'traditional' and 'historical' land connections. In the New South Wales setting, these authors discuss conflict between people 'with a *traditional* (pre-invasion) connection to country and those with an *historical* (post-invasion) connection to the same country'.[18] They give an example of a family whose parents and grandparents had moved to an area in the 1930s, where the members of the family argued this had led to their adoption and acceptance as holders of traditional rights, though their ancestry connected them to an adjacent language group. The purported process of 'adoption or acceptance' was 'not accepted as customary by the claimants'.[19]

In the native title context such matters are subjects of both public and private discussions in what can be highly pressured circumstances for all parties.[20] The case material in this chapter is drawn from the public record of a claim with which I was involved as a research anthropologist and expert witness, engaged by the applicant. In my view this case is informative with respect to issues arising in a wide range of native title claims across Australia.

Ancestry, Knowledge of Country and Social Inclusion

In what became known as 'the Minnie case', some of the descendants of an Aboriginal woman named Minnie sought inclusion in the membership group for the Waanyi native title claim. The claim covered an area located in the Gulf Country of northwest Queensland (though Waanyi country extends also into the Northern Territory). A representative of the 'Minnie group' became a respondent to the Waanyi native title claim in order to argue that Minnie (his mother's mother's mother) was a Waanyi person, a position that the native title applicant contested. As documented in the legal judgement on this matter,[21] like his mother, the respondent was born in Mt Isa some 200 km south of Waanyi country. He recalled as a child being told when eight years of age by his maternal grandmother that she was born at Louie Creek, a market garden worked by a Chinese man, located within the Waanyi claim area and that he (the respondent) was Waanyi.

The respondent's mother, born in 1942, explained that in the late 1970s she was prompted by publication of a book about Kalkadoon people in the region she lived, to ask her mother about their tribal identity.[22] Told the family had Waanyi connections, she subsequently attempted to gather further information. In her evidence, this woman acknowledged that around 2002 she

[15] Ibid, 8.
[16] Lisa Strelein, 'Authorisation and Replacement of Applicants: *Bolton v WA* [2004] FCA 760 (15 June 2004)' (Land, Rights, Laws: Issues of Native Title, Volume 3, Issues Paper No 1, Native Title Research Unit, AIATSIS, 2005). See also, for example, *Weribone v Queensland (No 3)* [2013] FCA 662; *Anderson v Western Australia* [2007] FCA 1733 *(Ballardong).*
[17] Edmunds, above n 7, 8.
[18] Behrendt and Kelly, above n 4, 27–9.
[19] Ibid, 28.
[20] David Martin, 'The Incorporation of "Traditional" and "Historical" Interests in Native Title Representative Bodies' in D E Smith and J Finlayson (eds), *Fighting over Country: Anthropological Perspectives* (Research Monograph 12, CAEPR, 1997), 153.
[21] *Aplin on behalf of the Waanyi Peoples v State of Queensland* [2010] FCA 625*,* [168] (*Aplin*).
[22] Ibid, [171].

read a letter indicating a decision that the Minnie family was not recognised as members of the Waanyi native title claim group. Her cousin's daughter (also a descendant of Minnie), born in 1958 in Burketown which is much closer to Waanyi country, gave evidence that she had in 2007 attended a meeting concerning acceptance of the Minnie family because 'she was upset at people claiming, in connection with negotiations about the Century Zinc Mine, that "[y]ou ... mob are Chinamen"',[23] a reference to the Chinese men among the family's forebears. Previously she had not had any involvement with the wider extended family's assertions of a Waanyi identity. The meeting of the broad Waanyi claim group in 2007 did not authorize the inclusion of the Minnie family.

The resulting hearing in the Federal Court considered the wider claim group's view, as presented in my expert anthropologist's report, that according to traditional law and custom:

> to be a Waanyi person, entitled to participate in Waanyi public life and traditional rights in Waanyi country, a person must:
> - be a descendant (biological or adopted) of a Waanyi person;
> - identify himself or herself as a Waanyi person; and
> - be recognized by the broad group of Waanyi people as being a Waanyi person.[24]

This definition was disputed by the Minnie group 'in so far as it concerns self-identification and group acceptance'. They asserted that 'Waanyi descent, recognized by one senior Waanyi person (or more) is sufficient qualification for being a Waanyi person pursuant to Waanyi traditional laws and customs'.[25] My own view was that 'this would overlook the need for a reasonable degree of acceptance of this proposition among the holders of Waanyi traditional law and custom'.[26] The results of my lengthy research with Waanyi people[27] were summarised in the legal reasons for judgement:

> A person may relevantly assert their identity as a Waanyi person by: being known among Waanyi and other Aboriginal people of the region as descended from one or more Waanyi forebears; engaging in social relationships with other Waanyi people, including being situated within the kinship system, so that other Waanyi people classify the person as a category of relative; discussing their Waanyi family and cultural background with others, especially senior Aboriginal people of the Gulf region; and
>
> A person is recognised or accepted as being a Waanyi person if: they and their genealogical background are accepted as 'known' by a significant proportion of what we might term the Waanyi 'public'; such acceptance being evident when there is no longer a significant number of Waanyi people prepared to argue overtly against an assertion from a person that they have a Waanyi identity derived from traditional Waanyi law and custom.[28]

In his judgement, Dowsett J went on to refer to my findings that it is fundamental to Waanyi law and custom that rights to country are organized according to how people fit into the kinship system, including the 'skins' (or subsection) system, the range of Dreamings and various other

[23] Ibid, [183].
[24] Ibid, [25]–[26].
[25] Ibid, [26].
[26] Ibid, [26].
[27] See David Trigger, 'Nicholson River (Waanyi/Garawa) Land Claim' (Report prepared for Northern Land Council, 1982); David Trigger, *Whitefella Comin': Aboriginal Responses to Colonialism in Northern Australia* (Cambridge University Press, 1992); Robert Blowes and David Trigger, 'Negotiating the Century Mine Agreement: Issues of Law, Culture and Politics' in Mary Edmunds (ed), *Regional Agreements in Aboriginal Australia* (Australian Institute of Aboriginal & Torres Strait Islander Studies, 1999) 84, 85; David Trigger and Pauline Fietz, 'Anthropological report: Waanyi native title claim (QC99/23)' (Report prepared for Carpentaria Land Council, 2003).
[28] *Aplin*, [26] (Dowsett J).

spiritual features of the traditional landscape.[29] It was uncontested that descent may be through the father or mother and that adoption entitled the person to share in rights to traditional cultural property. However, marriage to a Waanyi person, birth on Waanyi country, lengthy residence on such country, or the fact that a forebear has died or been buried there, *in themselves* are not factors that confer membership.[30]

Contemporary Waanyi people commonly also have non-Waanyi forebears who may be Aboriginal persons or others. They also may have inherited links to more than one language group and while a primary affiliation is typically asserted there is no single rule for this choice. As Dowsett J noted, 'the choice often involves negotiation, largely carried out orally'.[31] While Waanyi law and custom has transformed from identification with relatively small estate groups towards membership of a larger 'tribal' collectivity, arising particularly from negotiations with government and other parties, it remains that 'an individual person's claim to country is ultimately accepted or rejected through a process of collective debate and consideration, which process remains anchored in separate discussions among different Waanyi extended families'.[32]

Indeed, the judgement later quoted one of the Waanyi witnesses for the applicant stating that she does not 'talk for' places other than her family's main area of Waanyi country, adding (perhaps expressive of customary ideals rather than actual practices): 'She has never known the Waanyi people to disagree about which family comes from which part of Waanyi country'.[33] The implication was that the Minnie group would be accepted if they were known to be connected to a particular area of country through Dreamings, 'skin' and kinship relations. Similarly, another claimant witness gave evidence that he 'knows' nearly all Waanyi persons,[34] the point being this was not the case for the Minnie group. He stated he met the man who was representing the Minnie family and his mother in recent years.[35]

In my report I discussed literature concerning persons who have been historically distant from their traditional lands, noting Rigsby's point that while they may be 'entitled to group membership' if recognised as kin, such 'diaspora people' are expected to 'acknowledge the authority of resident elders' and generally be incorporated and socialised into the body of regional law and custom.[36] It is further evident from research that disagreement between local and diaspora persons can be vigorous.[37] The judgement reports my conclusion that physical absence does not erase the right of persons to assert membership but that this can be a complex and politically fraught matter. Of relevance is whether a potential right can be activated through re-establishing residence in or near Waanyi country as well as active interaction with Waanyi people. However, the question of agreement about people's forebear(s) is central, as is their consequent knowledge of the *particular* country within the claim area they are connected with and its spiritual characteristics. 'If they do not have this information, they should be able to derive it from discussions with knowledgeable senior Waanyi people'.[38]

---

[29] Ibid, [27].
[30] Ibid, [28].
[31] Ibid, [29].
[32] Ibid, [30].
[33] Ibid, [203].
[34] Ibid, [211].
[35] Ibid, [224].
[36] Bruce Rigsby, 'Tribes, Diaspora People and the Vitality of Law and Custom: Some Comments' in James Fingleton and Julie Finlayson (eds), *Anthropology in the Native Title Era: Proceedings of a Workshop* (Australian Institute of Aboriginal and Torres Strait Islander Studies, 1995), 26.
[37] Benjamin Smith, '"Local" and "Diaspora" Connections to Country and Kin in Central Cape York Peninsula' (Native Title Research Unit Issues Paper, vol 2, no 6, AIATSIS, 2000), 4, 6; Martin, above n 20, 157–8.
[38] *Aplin*, [34].

Membership of the Native Title Group – How Are Decisions Made?

Critical to the issue in dispute in this case was how decisions are made about acceptance or rejection of assertions of membership. My findings were that senior persons exercise considerable influence but that inter-personal politics also affect the outcome. Dowsett J noted that '[a]s the matter is one of oral tradition, claims should be of a substantially public nature',[39] a finding I did reach in my research, though it is significant that strategic positioning in debates is also sought through use of archival documents dealing with birth, death and marriage details. As the judgement added, '[p]ublic assent may be inferred when no senior Waanyi person is prepared publicly to oppose a particular claim'.[40]

Anthropologist Peter Blackwood was engaged by the respondent family seeking membership of the Waanyi group and reached conclusions also reported in the legal judgement.[41] The current senior members of the extended family are the grandchildren of an Aboriginal woman, Minnie, and her husband, who was a Chinese gardener and cook. These forebears were married in the late 19th century and lived on or in the vicinity of some of the lands claimed by Waanyi people, particularly Lawn Hill Station. The research by Blackwood did not contest my findings that there has been Waanyi succession eastwards to historically take over parts of what had previously been the country of adjacent language groups (Nguburindi and Injilarija).

Blackwood reported the views of a senior Waanyi man, deceased by the time of the litigation, that he knew Minnie (and her second husband) when he was a child (during the late 1920s and early 1930s) and that Minnie's mother was a Garawa or Garawa/Waanyi woman whose country was to the west of the claim area. The site named as Minnie's mother's country had been located in my own research as in Garawa territory, but Blackwood reported his informant's view that Minnie was a 'full blood Waanyi' person whose country was at Lawn Hill Station. This was because Minnie's father was said to be from this area. While Blackwood's informant was recorded in minutes of a 2002 meeting as present where a decision was seemingly taken that the 'Minnie group' was not Waanyi, the judge found the senior man's silence on that occasion did not detract from his views as reported in Blackwood's research.[42]

A third expert anthropologist commissioned by the applicant group to research the matter, David Martin, questioned why this particular senior man's view was apparently an 'outlier' in that specific information as to the identity of Minnie's father was 'not part of wider discussion and knowledge amongst other Waanyi people, as is the case for "core" Waanyi families'.[43] Dr Martin's further opinion was that the senior man's comments about Minnie's forebears could well have been 'post-hoc rationalisation' in that he fitted statements about Minnie's forebears' 'skins' and Dreaming associations with his view that she was a Waanyi person. However, this latter opinion from Dr Martin was given little weight by the Court.[44] David Martin also said, given the reconstruction of events at particular dates, that it is 'inconsistent with the historical evidence to assign a Waanyi identity to a person [i.e. Minnie's father] said to have country in this area who was born half a century before Waanyi migrated [and succeeded] to this area'.[45] The Court was not persuaded on this point given difficulties of estimating Minnie's father's birth date and also precise language group boundaries prior to and following the Waanyi succession

[39] Ibid, [35].
[40] Ibid.
[41] Peter Blackwood, 'Anthropological Expertise and Native Title: An Extract from an Expert Report to the Federal Court in the Waanyi Native Title Application' in Toni Bauman and Gaynor Macdonald (eds), *Unsettling Anthropology: The Demands of Native Title on Worn Concepts and Changing Lives* (AIATSIS, 2011), 161, 161–5.
[42] *Aplin*, [81].
[43] Ibid, [111].
[44] Ibid, [115].
[45] Ibid, [121].

eastwards. Amidst some agreement that Minnie must have been Waanyi, Dr Martin reported convictions denying this proposition; for example, some of his interviewees pointed out that various descendants of Minnie 'had never classed themselves as Waanyi'[46] and that they spoke Ganggalida not Waanyi.[47]

Dowsett J took the view that 'in the absence of modern scientific evidence' knowledge of a person's parentage involves 'stating an opinion or belief based on experience and the views of others, not stating proven biological facts'. Thus, to quote the legal reasons for decision, '[i]n my view it is more helpful to look to such evidence as there is concerning Minnie's opinion of herself and the opinions of her contemporaries than to seek to create theoretical histories for her parents'.[48] The Court also discounted Dr Martin's view that a letter from members of the Minnie family sent to the land council in 1999, stating 'we are just commencing our journey of finding our heritage', indicated no belief on their part of Waanyi identity. The judgement allowed that the family was seeking information to supplement their general knowledge of an inheritance of a Waanyi identity but that was not inconsistent with their convictions about this aspect of their ancestry.

A second elderly man, who had lived distantly from Waanyi lands for many years, provided evidence by affidavit and in court that his own maternal and paternal grandmothers (the first married to a 'Javanese' man and the second to a 'Chinese' man) were Waanyi and that as a boy he knew Minnie to have been a Waanyi woman. He lived in the town of Cloncurry southeast of Waanyi country for approximately 50 years, working at times on stations to the east of the claim area, and had not lived closely in interaction with other Waanyi people. The court found that while this man's evidence was 'honest and reliable' and 'should be given considerable weight',[49] he also 'seems to have picked up some of his Waanyi knowledge in the course of these proceedings. He does not know much about Waanyi law'.[50]

The views of these two elderly men were contested by other senior persons and the broader Waanyi claim group. The anthropological evidence in this case was extensive and only a summary is presented in the legal decision. My own conclusions were that Minnie (together with her Chinese husband who worked at Lawn Hill Station) had an historical association with Waanyi country from the year of her marriage in 1888 until 1916. A number of her children were born and lived for some years at Lawn Hill Station. While I had encountered several Waanyi families geographically distant from Waanyi country ('diaspora' people) who *had* asserted connections to the claim area over the years of my research,[51] this had not been the case for the Minnie family descendants.

Indeed, a granddaughter of Minnie when interviewed said that her mother and mother's sister were Ganggalida people, not Waanyi, and she was uncertain of her mother's mother's (Minnie's) tribal or language affiliation. This lady aged in her 70s complained that in the native title context some of her extended family members pressed her for more specific information than she had ever been told, as during her youth she was not allowed to ask questions of older persons. She tended to associate her mother's, aunt's and grandmother's (Minnie's) tribal affiliation (and, though she remained disinterested in the matter, also their rights in country) with where they lived much of their lives, i.e. in the Burketown area which is in what had become, through

[46] Ibid, [91].
[47] Ibid, [94].
[48] Ibid, [125].
[49] Ibid, [234].
[50] Ibid, [190].
[51] Trigger, *Nicholson River*, above n 27; David Trigger and Jeannie Devitt, 'A Brief History of Aboriginal Associations with the Lawn Hill Area' (Report prepared for Doomadgee Aboriginal Community Council, published by the Queensland Department of Family Services, Brisbane, 1992); Trigger and Fietz, above n 27.

succession, Ganggalida country.[52] The judgement suggested that because the family was 'of mixed race' it was 'at least possible that discussion of their Aboriginal roots was not as important to them as Dr Martin would expect it to have been in an Aboriginal community'.[53]

Of significance in the materials was the transcript of an audio recording of a discussion in Mt Isa in 1991 between the representative of the respondent family and two senior men, one of whom was Waanyi. It was argued that the transcript showed these men to be saying that the respondent and his mother were Waanyi persons. My view given in evidence was that the transcript was unreliable as an account of the conversation, there appeared to be considerable miscommunication and the transcript was not confirmation of the senior men's view that the Minnie family's ancestry was Waanyi. I was concerned about gratuitous concurrence on the part of the senior men for reasons of accommodating the questions put to them. Dr Martin also 'doubted whether it constituted unambiguous endorsement ... of the proposition that … [the respondent and his mother] were Waanyi'.[54] The court was not convinced by our expert opinions on this point, suggesting that the senior men would not want to have misled the young man who was trying at the time to find out about his family.[55]

Legal and Anthropological Discourses on Claim Group Membership

Taking into account the broad data I had assembled together with my reading of other research, my findings did not deny the possibility that Minnie was Waanyi while pointing out the considerable evidence suggesting other possibilities, particularly that she may have been a Garawa or Ganggalida person. In light of conflicting information, the judgement from the court comments on 'the crux of the present problem', namely that the question of descent from one or more Waanyi ancestors is 'a matter of belief or opinion, necessitating a determination as to whose belief or opinion is relevant'.[56] The judge concluded that 'the real differences of opinion amongst the anthropologists reflect the different views expressed by the various persons to whom they spoke'.[57]

Blackwood, who was engaged by the Minnie group, disagreed with the formulation of the test of Waanyi identity advanced by my research and supported by Dr Martin. He pointed out that several deceased forebears of claimants who were accepted by the wider Waanyi group, that is persons other than Minnie, were described in my research as only 'ambiguously Waanyi', raising the question of inconsistency in claimant decision-making about membership. He concluded that the criterion of acceptance and recognition by the broader Waanyi public is more an observation of 'Waanyi behaviour than normative requirements rooted in traditional laws and customs'.[58] The court summarised Blackwood's information, noting some of the informants said different things to me and to other researchers. Blackwood proposed that the issue of collective acceptance 'remains an open question'.[59]

According to the judge, ultimately the broad Waanyi claimant group asserted that Waanyi identity depends substantially, if not entirely, upon acceptance by other Waanyi people. The respondent submitted that Waanyi identity depends upon biological descent or adoption and the acceptance of that fact *by one or more* senior Waanyi persons is sufficient.[60] In his findings

[52] See *Lardil Peoples v Queensland* [2004] FCA 298 (the 'Wellesley Sea Claim').
[53] *Aplin*, [130].
[54] Ibid, [147].
[55] Ibid, [86].
[56] Ibid, [83].
[57] Ibid, [166].
[58] Ibid, [162].
[59] Ibid, [163].
[60] Ibid, [226].

on the facts, the judge concluded there was sufficient evidence that several Waanyi persons, including a senior elder, believed that Minnie was a Waanyi woman. While agreeing that the audio recording of the respondent representative with two elders in the early 1990s was 'not entirely easy to understand', the judge was not persuaded to dismiss it entirely.[61]

The reasons for judgment addressed several possible sources of the disagreement in this case. There is the issue that for the most part Minnie's descendants lived either in Ganggalida country (particularly Burketown in the case of her daughters) or more distant from Waanyi country and that this lengthy association may have influenced the view that the family had non-Waanyi ancestry. The judge also noted the significance of Minnie's marriage to a Chinese man, and at least some of her daughters then marrying Chinese men and living at Woods Lake outside Burketown, 'that area apparently being an enclave for people of mixed descent'.[62] The evidence demonstrated that:

> where a person is descended from two different cultural groups, he or she may have to choose the group with which he or she will primarily identify. There may have been good reason for a person of mixed Chinese–indigenous descent to choose to identify with his or her Chinese side rather than the indigenous side, given conditions prevailing in the late 19th and early 20th centuries. It might not be surprising that a person should have chosen to suppress his or her indigenous affiliation. It may be that part of the difficulty with which we are presently faced arises, as … [Minnie's granddaughter] suggests, from the fact that members of a particular generation of Minnie's descendants were discouraged from enquiring as to the family background. That discouragement may have led to varying degrees of speculation in the search to identify family roots, a search which we all undertake, at one time or other.[63]

It was 'reasons of history, mixed descent and geographical dispersal' which have led to many Waanyi people not recognising and accepting the respondent family members,[64] in the broader context that a person who has been 'absent from the centres of Waanyi society, perhaps since birth ... may re-establish his or her affiliation'.[65]

Considering all the material available, the judge noted that '[i]n a society which does not rely on written records, questions of descent will be largely matters of opinion'.[66] He gave factual findings that from 1888 until at least 1939, Minnie was recognized by the Waanyi people at Lawn Hill as a Waanyi woman, and that from about 1916 until her death in 1943, Minnie was recognized by the Waanyi people at Burketown as a Waanyi woman. This aspect of the decision supported the respondent's proposition that Minnie was a Waanyi woman.

However, in relation to traditional law and custom as it encompasses decisions about those who can claim rights in country, the judge found that 'for the purposes of the *Native Title Act*, it is the claim group which must determine its own composition', and that while it is not necessary that all of the members be identified in the application it is necessary that such identification be possible at any future point in time. While a 'claim group cannot arrogate to itself the right arbitrarily to determine who is, and who is not a member',[67] decisions must nevertheless be based on 'group acceptance'.[68] The decision-making 'cannot be the product of acceptance by one other member' but rather 'must be by the community at a more general level'.[69] Thus, while

[61] Ibid, [231].
[62] Ibid, [242].
[63] Ibid, [242].
[64] Ibid, [268].
[65] Ibid, [265].
[66] Ibid, [249].
[67] Ibid, [256].
[68] Ibid, [260].
[69] Ibid, [261].

finding as a matter of fact that Minnie was believed to be a Waanyi person at certain locations during the relevant historical period, the judge noted that he could not make the decision for the wider Waanyi group as to whether they now accepted that Minnie was Waanyi and hence that those descendants of hers so identifying have rights in country.[70] Finally, the judgment did not completely close off further legal options, as any decision of the claim group 'may not necessarily be beyond legal review'.[71] Ultimately the Court determined the Waanyi native title claim itself on the basis of the undisputed evidence, admissions and the judge's own findings, recognising that the Waanyi people held exclusive and non-exclusive native title rights over the claim area.[72]

Politics and Money in Membership Negotiations

The issues addressed in this chapter are of considerable importance for Aboriginal people seeking native title rights as well as for the wider Australian society, which has various stakes in the resolution and outcomes of claims. The kind of dispute evident in the case I have presented can be emotionally and physically debilitating for protagonists. It can involve dealing with painful histories of dislocation from traditionally significant country, suggestions about dilution of claims due to mixed ancestry and 'the difficult issue of culture loss and an attempt to revive or reassert culture through the native title process'.[73] While some researchers analyse Aboriginal disputes as part of a 'refusal' to accept 'white norms' of civil public behaviour,[74] and fighting as having a meaningful cultural logic,[75] in my view conflict among Indigenous groups is overwhelmingly contrary to achieving both practical and symbolic outcomes from the native title process.

Though not directly evident in the legal proceedings I have reviewed, the question of claim group membership is often connected with conflict over territorial boundaries among named groups to which individuals may have multiple potential ancestral links. Furthermore, the perceived availability of financial and related benefits from claim outcomes overlays the intensely personal negotiations documented in this chapter. For both those seeking group acceptance and people refusing to embrace them, mutual accusations about motives are inevitably mixed with heartfelt sentiments concerning the identities and reputations of forebears. Accusations as to who is being 'greedy for money' or other benefits hence intertwine with convictions about the knowledge and memories of parents, grandparents and great-grandparents.[76]

As canvassed in my cross-examination during the litigation I have discussed, there is a difficulty in unravelling personal biases or inter-family disputes from the issue of whether a particular deceased forebear had a certain linguistic or tribal identity. Indeed, as it was put to Dr Martin in

[70] Ibid, [267].
[71] Ibid, [270].
[72] *Aplin v Queensland (No 3)* [2010] FCA 1515.
[73] Edmunds, above n 7, 5.
[74] Gillian Cowlishaw, *Black, White or Brindle: Race in Rural Australia* (Cambridge University Press, 1988); Morton, 'Why Can't They Be Nice to One Another? Anthropology and the Generation and Resolution of Land Claim Disputes' in D E Smith and J Finlayson, *Fighting over Country: Anthropological Perspectives* (Research Monograph 12, CAEPR, 1997), 83–92; John von Sturmer, 'Aborigines, Representation, Necrophilia' (1989) 32 *Art and Text* 1227.
[75] Gaynor Macdonald, 'A Wiradjuri Fight Story' in Ian Keen (ed), *Being Black: Aboriginal Cultures in Settled Australia* (Aboriginal Studies Press, 1988), 179; Marcia Langton, 'Medicine Square' in Ian Keen (ed), *Being Black: Aboriginal Cultures in Settled Australia* (Aboriginal Studies Press, 1988), 201.
[76] David Trigger, 'Reflections on Century Mine: Preliminary Thoughts on the Politics of Indigenous Responses' in Diane Smith and Julie Finlayson, *Fighting over Country: Anthropological Perspectives* (Research Monograph 12, CAEPR, 1997), 115; Martin, above n 20, 158; see also Beherndt and Kelly, above n 4, 31.

cross-examination, 'the whole notion of whether Minnie was Waanyi or not is so mired in politics that the facts have been thrown out the window'.[77] I acknowledged in my evidence that 'Aboriginal political life is highly personalized' and 'it is extremely difficult to leverage that factor away from decision-making processes'.[78] However, neither Dr Martin nor I agreed with the suggestion that this means the requirement of collective acceptance of asserted Waanyi identity is inconsistent with traditional law and custom; the logic here is that acknowledging the potential issue of individuals' personal and political interests is important but that the existence of politics does not displace the collectively held nature of native title rights.

Broader research has found that social flux and politicking over personal and collective rights in country are hardly foreign to Australian Aboriginal cultural traditions.[79] My own work has documented intense reputational politics among senior men and women in a Gulf Country community and the ways such politics are affected by negotiations with the wider society over rights in land and waters.[80] To some extent disagreement that remains unresolved on issues such as individual and family connections to particular country could be regarded as a normal aspect of tradition-derived law and custom. As Williams notes in her study of decision-making in northeast Arnhem Land, an imperative towards seeking consensus does not mean achieving unanimity, but rather a 'general agreement in the absence of any overt disagreement'.[81]

Nevertheless, native title processes bring particular urgency and finality to the Aboriginal politics of country,[82] and we might expect an increasing number of intra-Indigenous disputes to be taken to court. As in the case I have examined, legal practitioners are appropriately vigorous in their pursuit of their clients' interests as received via 'instructions', and the parties' disagreements over who ought to be recognised as holding rights and receive benefits may well not be amenable to mediation. Propositions in the literature arguing for the integrity of internal Indigenous management of conflict, the importance of Aboriginal persons as mediators, and the significance of Indigenous values may well hold as general principles to be embraced where feasible. However, the kind of case I have discussed will likely not be resolved through such aims, and considerable input will be sought from legal advocates. It would be naive to suggest that disputes over 'tribal' identity and country can or will always be dealt with by seeking to put 'Aboriginal conflict back in the domain of Aboriginal regulation where it belongs'.[83] My own work finding a distinctive Aboriginal domain of life in the Gulf Country made it clear that Indigenous experience is nevertheless enormously implicated in and influenced by its being situated within the political economy and legal system of the wider Australian society.[84]

---

[77] Transcript of Proceedings, *Aplin on behalf of the Waanyi Peoples v State of Queensland* (Federal Court of Australia, 31 July 2009), 419.
[78] Transcript of Proceedings, *Aplin on behalf of the Waanyi Peoples v State of Queensland* (Federal Court of Australia, 29 July 2009), 300.
[79] Les Hiatt, 'Traditional Land Tenure and Contemporary Land Claims' in Les Hiatt (ed), *Aboriginal Landowners: Contemporary Issues in the Determination of Traditional Aboriginal Land Ownership* (Sydney University Press, Oceania Monograph No 27, 1984), 11; Nic Peterson, '"Peoples", "islands" and succession' in James Fingleton and Julie Finlayson (eds), *Anthropology in the Native Title Era: Proceedings of a Workshop* (Australian Institute of Aboriginal and Torres Strait Islander Studies, 1995), 11; Morton, above n 74.
[80] Trigger, *Whitefella Comin'*, above n 27, 111–18.
[81] Nancy M Williams, 'On Aboriginal Decision-Making' in Diane Barwick, Jeremy Beckett and Marie Reay (eds), *Metaphors of interpretation: essays in honour of W E H Stanner* (ANU Press, 1985) 240, 243.
[82] Benjamin R Smith and Frances Morphy (eds), *The Social Effects of Native Title: Recognition, Translation, Coexistence* (ANU e-press, CAEPR Monograph No 27, 2007) <http://epress.anu.edu.au?p=64921>.
[83] Sullivan, 'Dealing with Native Title Conflicts by Recognising Aboriginal Political Authority' in Diane Smith and Julie Finlayson, *Fighting over Country: Anthropological Perspectives* (Research Monograph 12, CAEPR, 1997), 129; cf Morton, above n 74, 87.
[84] Trigger, *Whitefella Comin'*, above n 27.

In my view, anthropological and related research will continue to be central in the resolution of these matters,[85] though it is important for researchers to avoid becoming advocates for particular individuals or groups. Given that anthropologists researching claims are likely to be 'closest to communications pertaining to disputes' in the claims process,[86] there is little alternative to approaching each case with attention to historical and ethnographic detail on the critically important matter of customary rules for membership of those Aboriginal groups who are to benefit from native title outcomes. However, as the court's decision in the Waanyi case demonstrates, ultimately it may not be the expert anthropologist's report nor necessarily even the judge's decision which resolves the matter in any final way. It will be the extent to which particular claim groups decide over time to emphasise inclusivity rather than exclusivity of membership that will drive the outcomes and the procedures adopted to achieve them.

Acknowledgements

Thanks to David Martin and Peter Blackwood for collegial discussion of these issues. Debbie Fletcher, National Native Title Tribunal, kindly gave feedback on the manuscript. Thanks to Leon Terrill for valuable editorial input.

[85] Behrendt and Kelly, above n 4, ix, 29; Toni Bauman and Gaynor Macdonald (eds), *Unsettling Anthropology: The Demands of Native Title on Worn Concepts and Changing Lives* (AIATSIS, 2011).
[86] Morton, above n 74, 87.