*A talk presented at the gathering to celebrate, '25 YEARS OF NATIVE TITLE ANTHROPOLOGY: A TRIBUTE TO THE CONTRIBUTION OF ANTHROPOLOGISTS TO THE DEVELOPMENT OF AUSTRALIAN NATIVE TITLE LAW, held in Perth at the Duxton Hotel on Friday 10th February 2017*

# Understanding traditional land tenure

**Nicolas Peterson**
ANU

Well, thank you, Pam, for that very generous introduction. I would very much like to thank the Tribunal and the Federal Court for organising this event. It's not often that social scientists or anthropologists get this kind of recognition in this sort of forum. Indeed, I was talking with David Trigger and he was saying what a unique experience this was; when they tried in Canada to do the same thing, it failed. There wasn't any willingness amongst the legal profession. So we're all very mindful what a special event this is.

My presentation is a short history of the role of anthropology in evidencing Indigenous rights in land.

Context is crucial to how things are understood and no more relevantly than in European attempts to conceptualise Aboriginal relations to land. Initially framed by the idea of Aboriginal people living in a state of nature and Lockean views about the origins of property, our understanding got off to a poor start. Rights in land did not exist amongst Aboriginal people. However, as early as 1804 David Collins, the judge advocate in New South Wales who was on the spot talking to Aboriginal people, reported on the basis of what he had learnt from Bennelong and others that Aboriginal people not only owned movable things but they had their individual real estates.

By 1880 with the publication of the first formal ethnography of an Aboriginal group by A.W. Howitt—again, based on talking with people but framed by social evolutionary thinking—ownership of land amongst the Kurnai was

recognised. But at this time it was corporate patrilineal clans. In 1910 Radcliffe-Brown arrived in the Pilbara region to work with Kariyarra people, finding there too land ownership was patrilineal. When he returned in 1926 to become the first professor of anthropology in Australia, he had refined his natural scientific approach to the understanding of society looking for structure and regularity. Just before leaving Australia in 1930 he published a masterly synthesis of the existing knowledge about Aboriginal social organisation which included his classic model of Aboriginal land tenure.

This model not only defined the land owners as everywhere members of a patrilineal clan but also described the structure of the everyday land using group. This was made up of clan males, their unmarried sisters and in-marrying wives from other clans. Although there was some limited questioning of Radcliffe-Brown's model, it was not until 1962 that a key muddle in Radcliffe-Brown's thinking was made explicit by Les Hiatt. It was clearly wrong on the nature of the land using group, as no such group as predicted by Radcliffe-Brown had ever been seen—although how wrong is probably still a matter for debate.

It is not simply coincidental that this critique of Radcliffe-Brown, a cofounder of functionalist anthropology, structural functionalism, happened at this time when functionalism was under attack across the Anglophone world. This was because it dealt poorly with history, change and conflict. In the early 1960s, almost by definition, any functionalist-based theories were bound to be flawed. However, Hiatt's critique did not challenge the view that patrilineal descent was the main link between people and rights in land, but it did leave a puzzle.

Why, if there was a patrilineal ideology of land ownership did it not have a connection to land use? At this point W.E.H. Stanner made his important terminological intervention calling for the use of four terms: clan (the land-owning group), band (the land-using group), estate (the land owned) and range (the land used) in discussing Aboriginal relations to land broadly, defending Radcliffe- Brown's model and re-emphasising ecological factors that complexified land use. It was shortly after this with the Gove Land Rights case hearings in 1968 and Mr Justice Blackburn's decision in 1971, that things

started to get complicated, by taking the issue of Aboriginal relations to land out of a purely academic social science discourse and introducing it into a legal field of discourse.

'Ownership', which up to then had been used by anthropologists without rigour, now required new and clearer specification in terms of rights and interests, and to be described in unfamiliar, legal forums with unfamiliar requirements for expert witnesses. Indeed, Blackburn had to protect Professors Stanner and Berndt from the charges that their evidence was merely hearsay and from the criticism of their tendency to speak in ways that pre-empted the answers to the questions before the court. Even with these concessions, the anthropologists were unable to aid in translating the Yolngu system into one that could be recognised by a narrow conceptualisation of property rights in which the absence of the possibility of alienation and the apparent lack of exclusive possession proved fatal.

One factor that seemed likely to have contributed to obscuring the existence of exclusive possession in this case, as in the Yarmirr case, was that the public nature of the hearings meant that senior Aboriginal witnesses were not just managing their relations with those in front of them, but their relatives immediately behind them. This comes through in the following exchange. The solicitor for the defendants in the Gove case wished to establish whether or not a man of one moiety sought permission from men of the other moiety if he wanted to cross their land.

In reply to the solicitor's questions,
Milirrpum of the Dhuwa moiety and of the Rirratjingu clan replied: "If I go hunting by myself on Yirritja [moiety] land I ask first, except when I'm hunting with a Yirritja man, then it is all right."
Solicitor: "Well, when you go to Port Bradshaw [on Yirritja land] to hunt, do you ask anybody?"
Milirrpum: "We Rirratjingu people talk together and then we go."
Solicitor: "Yes, but you don't ask any Yirritja people?"

Milirrpum: “The Yirritja people hear us.”
Solicitor: “... if Munggurruwuy, [a Yirritja man] goes to Dundas Point [which means he crosses your land], ... does he ask your permission?”
Milirrpum: “He tells me, not asks, [and then] ... he’ll go because that’s his country, Gumatj country.”
Solicitor: “Does he ask for permission?”
Milirrpum: “He lets me know but he doesn’t ask.”
Later the solicitor said, “You would never say ‘No’ to Munggurruwuy, [is] that right?”
Milirrpum: “If there’s no trouble, we would say ‘Yes’.”

The elaborate codes of middle class discourse, in which many assumptions are spelt out that are further intensified and demanded in a legal context, not only make no sense in a small-scale community where everybody has known everybody else for a lifetime but are actually quite impolite, disrespectful, disregard relatedness and often unacceptably egotistical. As a result of the Gove case, anthropological understandings of Aboriginal relations to land not only emerged into and had to respond to a field of legal discourse but also to a wider politicised discourse well beyond anthropology. The principal forums for this were the land claim inquiries under the Aboriginal Land Rights (Northern Territory) Act 1976 that were conducted in a lenient adversarial mode and under scrutiny by the press.

Although the model of land ownership in the Act was basically that of Radcliffe- Brown, the Act did not include the word ‘patrilineal’, which was treated as a technical term, substituting the non-technical word ‘local’ which was said to have the same meaning. This was the beginning of a steep learning curve for anthropologists about the law, about interpretative latitude, and about the nature of legal thinking. The notion that ‘local’ meant ‘patrilineal’ did not last long, especially with the growth of feminist anthropology which was generally critical of the male domination of the discipline. And specifically in central Australia where the marginalisation of female anthropologists in the Central Land Council was leading to the consequent neglect of reporting adequately on women’s perspectives on ties to land. This in turn quickly led to the argument that the definition of traditional owner in the Act meant that

filiation through women could receive and deserved the same status as that through men, an argument that took its strength from the managerial or kurtungurlu relationship which is so strong in central Australia. The definition of traditional owner in the Act also raised problems in relation to the demographic impact of European settlement on Aboriginal land tenure, because some land-owning groups were clearly going to die out and others had in the recent past, raising the question of how there could be ongoing traditional connection.

This issue was highly significant in the Fox inquiry into Aboriginal interests in the Kakadu region and led to the first coherent formulation of succession in the sense of non-patrilineal succession and the ways in which Aboriginal people had dealt with this issue customarily. As the claims process proceeded, other ways in which Aboriginal people had accommodated population loss and the movement to live in centralised locations emerged, in particular, the basing of claims on language groups rather than descent groups. In the mid-1980s, the publication of Fred Myers' anthropological work on the Pintupi system of land tenure from a region where a descent ideology was weak or absent, placed emphasis on a number of individual non-descent-based links to the land as a source of rights and interest that fell outside the Act's model of traditional owner.

Some of these interests, such as the place of conception and burial of mother or father, were also significant in many other areas of the continent where there were descent interests as well. It's against this background that anthropologists— as yet incompletely domesticated by legal requirements, still attached to a more discursive mode of reasoning and always assuming ambiguity, uncertainty and contradiction in social life—joined the much more legalistic native title process. The engagement with the legal system has by and large been beneficial to anthropologists. It has imposed a positive discipline, demanded higher levels of evidence, opened their work to unflinching scrutiny including having their own informants present for questioning by others.
But at the same time a consequence of this engagement is that Aboriginal beliefs and practices frequently end up being conceptualised with a formality that they lack in everyday life. This is clearly an inevitable cost of the

recognition of Aboriginal rights by our legal system. But it can also be a source of tension between anthropologists and lawyers. This means that from an anthropological point of view the new ways in which the courts are approaching anthropological participation, originally with conferences of experts and more recently with concurrent evidence, that are more discursive and dialogic are very positive and I believe a much better way for anthropologists to assist the court than in purely adversarial modes.