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Recognition of Native Title - Revision and problem solving

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1. Introductory remarks.
2. I would like to start this discussion about possibilities and probabilities in the post determination space with a story which flows from some collaborative multi-disciplinary work carried out under the direction of Gkuthaarn and Kukatj people in Gulf country, by Dr Mike Westaway, Shaun Adams, Dr Richard Martin and me.¹
3. As many of you know, in the 1890s that complex character Dr Walter Roth was the Protector of Aborigines and particularly active in far north Queensland.
4. In a letter to Walter Baldwin Spencer in May 1890 Roth wrote:

'for the last four years I have been collecting from N.W. Central Queensland, and the Gulf Country, and now from the far north. My private collection has about 600 different separate objects, 50 of them skeletons & skulls'.²
5. By the time Roth stopped working in north Queensland he had a large collection of Aboriginal artefacts and remains. In 1905 he sold much of his collection, including the human remains and over 2000 artefacts and 308 photographic negatives, to the Australian Museum for 450 pounds causing a controversy particularly about the sale outside Queensland of the remains of Queensland Aboriginal people.

¹ *Truth-Telling in the Wake of European Contact: Historical Investigation of Aboriginal Skeletal Remains from Normanton*, Adams, S., Martin, R., Phillips, S. et al. Arch (2018) 14: 412. <https://doi.org/10.1007/s11759-018-9354-x>.

² Pitt Rivers Manuscript Collection 2014: Spencer Paper Box 1a C.

6. 100 years later bones and skulls from 8 individuals were returned to Normanton as a result of the Australian Museum's adoption of a repatriation policy. The provenance of these remains was known because these people had each been Roth's patients at the Normanton hospital when they died. In 1991 they were reburied not far from the old burial ground on Cornwall Flat by Gkuthaarn and Kukatj people and the area enclosed by a fence. The big floods of 2011 caused erosion which, by 2015, had caused those remains to become exposed.
7. Gkuthaarn and Kukatj people invited Westaway and Adams to help them rebury these old people. To deal with the sadness of the bones needing reinterment, Gkuthaarn and Kukatj people wanted to see what the remains could tell them about their lives and their links to the present traditional owners. It is now possible through bioarchaeological techniques and biogeochemistry, for these old people to tell us quite a lot about themselves. Tiny samples were taken from bones and teeth after their exhumation, before they were re-interred in higher ground, in a safe place amongst Gkuthaarn and Kukatj people buried in a segregated cemetery during most of the twentieth century.
8. Last year the results from the samples were known and Westaway and Adams returned to Normanton to discuss the outcomes with Gkuthaarn and Kukatj people. Tragically all the remains were from young, adolescent people and it appeared that they had died in their youth from advanced venereal disease. This news was met with silence and a kind of withdrawal into themselves by the people. After many moments Murrandoo Yanner understood the mood that had fallen and called out *"Hey you mob, this isn't a shame job. This is about telling the truth about what it has been like – how hard it has been on our people."*
9. This was striking moment that resonated for me with an aspect of our work that had been troubling me for years but which I couldn't quite put my finger on. There is a silence at the heart of many of the stories we draw forth in our work – a silence which increasing understanding now identifies as trauma. It is a silence

that sits between generations when mothers know they cannot protect their daughters from what befell them, illustrated in so many families we work with where the average age of first birth for each generation is 14 years of age. In my view this trauma induced silence can interrupt transmission of knowledge. I am sure you too have had claim group members with whom you are working say “*Mum never told me anything about the past – I learnt anything I know from Nan*”, or “*You couldn’t get them old girls to talk about when they were young*”. Whilst learning from grandmothers might be consistent with tradition, these kinds of statements also indicate communication barriers that have an impact on succeeding generations.

10. There is, as some of us discussed recently in Melbourne, a sanitising effect of the accounts of the past produced for the purposes of native title claims. The narratives we recount do not reveal what hanging onto culture has required personally and do not account for all the causes for suppression of culture and diminution in its observation. One of the reasons for this is that the people we work with – and ourselves – do not have a language for some of these causes. People cannot speak of many of the things that have occurred to them within their families and do not do so to strangers. This has bearing on what is handed down and can play out through avoidance of places and practices that are connected with personal adversity.

11. There is a developing area of trauma-informed legal practice which highlights the effect on people’s capacity to provide evidence when they have experienced trauma including the re-traumatising effect of providing such evidence.³ Some work has been done with Indigenous people in this area as a result of the inquiry

³ See for example the work of the Blue Knot Foundation and papers such as *Trauma and the Law: Applying trauma-informed practice to legal and judicial contexts* <https://www.blueknot.org.au/Portals/2/Reports%20and%20Docs/Legal%20and%20Justice%20Background%20Paper%20with%20Abstract%20FINAL.pdf>.

into the Stolen Generations⁴ but I do not believe this perspective has been used in the context of eliciting connection evidence in native title proceedings – perhaps now it may be necessary.

12. The outcome in *Timber Creek*⁵ requires us to be more aware of harm that has been done to people in the course of appropriation of their land and the consequences of impairment of their laws and customs, what the High Court calls *cultural loss*. It was referred to as "non-economic loss" or "solatium" in the courts below and by the parties in their appeal grounds but, for reasons explained by the High Court, it is better expressed as "cultural loss". The High Court defines cultural loss as *compensation for loss or diminution of traditional attachment to the land or connection to country and for loss of rights to gain spiritual sustenance from the land [and] is the amount which society would rightly regard as an appropriate award for the loss.*⁶ Cultural loss is the *fair and just assessment, in monetary terms, of the sense of loss of connection to country suffered by the Claim Group by reason of the infringement.*⁷

13. The High Court notes that s 51(1), which sets out the criteria for compensation:

*in its terms, recognises the existence of the two aspects of native title rights and interests identified in s 223(1) ... – the physical or material aspect (the right to do something in relation to land) and the cultural or spiritual aspect (the connection with the land) – as well as the fact that the manner in which each aspect may be affected by a compensable act may be different.*⁸

*Both aspects are addressed in terms by s 51(1) providing for an entitlement on just terms to compensation to the native title holders for "any loss, diminution, impairment or **other effect** of the act on their native title rights and interests" (emphasis added in original).*

⁴ See for example Kennedy, R. "Stolen Generations testimony: trauma, historiography, and the question of 'truth'", *Aboriginal history* 25:116-31 · February 2001 DOI: 10.22459/AH.25.2011.07

⁵ *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* [2019] HCA 7, ('*Timber Creek*').

⁶ *Timber Creek* at [3].

⁷ *Timber Creek* at [84].

⁸ *Ibid* at [44].

...Section 51(1) thus recognises that the consequences of a compensable act are not and cannot be uniform. The act and the effect of the act must be considered. The sub-section also recognises not only that each compensable act will be fact specific but that the manner in which the native title rights and interests are affected by the act will vary according to what rights and interests are affected and according also to the native title holders' identity and connection to the affected land.⁹

14. Justice Mansfield's 'intuitive' approach to compensation for cultural loss in

*Griffiths v Northern Territory of Australia (No 3)*¹⁰ has been fully upheld. His

Honour at first instance held:

It is clear that the Aboriginal spiritual relationship to land encompasses all of the country of a particular group, and not just particular "sacred sites". It is also clear that the destruction of a particular sacred site may have implications beyond its physical footprint because of the spiritual potency of the site or because of the level of responsibility or accountability for the site which has not been honoured. It is also clear that the relationship of the claim group to their country, ... is a spiritual and metaphysical one which is not confined, and not capable of assessment, on an individual small allotment basis.

15. In 1986 Professors Berndt and Sansom spoke of the significance of sites and land as follows:

The anthropological evidence, compiled from Aborigines all over the country substantiates the belief that ... sites [and] areas of land are believed to have been formed in the creative era of the Dreaming and that they gave significance for living Aborigines and are identified mytho-religiously. Such places contain, in tangible and intangible terms, the deathless representations of the spirit and mythological characters."¹¹

16. I am not suggesting that all kinds of harm experienced by claim group members is compensable. I understand the focus in native title is on the recognition of rights and interests. I am suggesting that trauma plays a role in communication difficulties about evidence of observation of traditional laws and customs. I also want to suggest that the sanitised accounts we produce as lawyers and anthropologists become problematic as we face some of the consequences of

⁹ Ibid [45] – [46].

¹⁰ *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900.

¹¹ *Bropho Annexure H*, pp. 44 – 45.

determinations, and perhaps a deeper understanding is required in developing revisions to correct, refine and adapt native title, which I will outline in this session.

17. Before I leave this topic, I want to suggest there is another cause of intergenerational trauma which affects native title work.
18. It is part of the record we recount that conduct by governments has massively disrupted people's capacity to maintain their connection to country. It is challenging and galling for native title claimants that the arbiter of whether a group can demonstrate ongoing observation of traditional law and custom, is the very agent that caused disaggregation of the group's norms and diaspora of its people. This inherent unfairness is compounded when matters are litigated and, without exception, the position of the government parties is to challenge and dispute the evidence proffered by Applicants and, if the matter is taken on appeal, to consistently argue for the most meagre, confined and restricted expression of native title they can achieve. This has been the position of government respondents in every litigated native title claim and it is the position of the State in every negotiation. Negotiation is the means by which most determinations are made and the compromises called for are the subject of further comment later in the presentation. The arguments run by the Northern Territory and Commonwealth in Timber Creek are just the latest example.
19. This struggle over recognition with resistance at every point by government hurts and perpetuates harm and adds, as if it was needed, complexity to the call for truth telling and the invitation to walk together provided in the Uluru Statement. I doubt anyone needs to be reminded of the (then) Prime Minister's response to that Statement as an indication of how government behaves.
20. So how do we further develop recognition of rights and interests and where appropriate make revisions to correct, refine and adapt native title?