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TRANSCRIPT OF PROCEEDINGS

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25 YEARS OF NATIVE TITLE ANTHROPOLOGY

**A TRIBUTE TO THE CONTRIBUTION OF ANTHROPOLOGISTS TO THE
DEVELOPMENT OF AUSTRALIAN NATIVE TITLE LAW**

Chaired by:

**RAELENE WEBB QC, President of the National Native Title Tribunal
PAMELA McGRATH, Research Director of the National Native Title Tribunal**

DUXTON HOTEL, PERTH

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MS R. WEBB QC: Thanks very much, everyone. I want to welcome you to this special event. I would like to acknowledge the Whadjuk People of the Noongar nation on whose land we meet today and pay my respects to their eldest, past, present and emerging and also to Aboriginal and Torres Strait Islander people here today and
5 acknowledge your resilience through the years. Just generally want to welcome you on behalf of the National Native Title Tribunal, the Federal Court of Australia and the Centre for Native Title Anthropology to this event. You will hear a little bit more about how it came about shortly from Justice Michael Barker. I will be co-chairing this event with Dr Pam McGrath who is the Director of Research of the Tribunal.

10 Could I acknowledge particularly the – those people who have made their way here, Justice North, Justice McKerracher, Justice Rees, Justice Barker, Justice Mortimer, Justice White and I think Justice Hiley has come from the Northern Territory. Welcome. The Honourable John Mansfield who you will be hearing from at the end
15 of the day and I think Ian Viner QC is here and Eric Ripper AM as well. And to everybody, welcome, indeed. I'm going to handover, in fact, right now to Barry McGuire for a welcome to country. Thank you very much, Barry.

MR McGUIRE: Good afternoon, ladies and gentlemen, distinguished guests. Ms
20 Webb, thank you so much for inviting me here and Ms [Dr] Finlayson. To represent my people of the Whadjuk lands in which we are actually meeting here today and to my brothers and sisters who are here from the other Aboriginal nations. Welcome. And to all nations as we stand as Australians today. That is very important. Anthropology. I guess one of the things that I would like to say – and I don't mean
25 to be cheeky. We, as Aboriginal people, have been meteorologists for a long time. We have been botanists for a long time. We have been doctors, even lawyers, even ministers. We have been a long time singing our songs on how to keep that structure alive and using that energy that has been placed there, the law in our ground, and how do we get that law.

30 You see, my uncle told me one day, he says, "Son, when I was a little fella we used to travel from community to community. And all I knew back then was that my old people communicated, engaged in law and dance and song. And their structure of how they engaged as a nation between the other nations. As we travelled he says, "I
35 used to hear the songs that taught about the land itself and how we needed to be as Aboriginal people." But there was always a strange song that would come. And the old people, they all knew that song. And it happened over many times.

40 And so I said to my father, your grandfather, he said, "Dad, why is it that every time I hear the common songs but then again there is one that is strange and we have never heard as children. How do you get that song and how does everybody need to know their place? How does the men know what to paint or how to dress the other men? And how do the women know how to clear the ground in order to make that
45 ground ready?" And he said, "Your grandfather looked at me and said, 'Son, the spirits in the ground come out and visit all our minds. They visit our dreams.'" In other words, the little men in the land, the little spirit, that we all talk about came forth and

shared that song that was different. That was always there. Now, these sort of stories and these sort of songs, how do you as anthropologists get to see it? Very hard.

5 You see, in our law and custom as Aboriginal people and to tell you the full extent of that circle of life that we live in there's a certain process that you have to go through in order to get to that song and story and see that connection and feel the energy in that land. We're going to take you through ceremony and customary ways of standing. And that's the hardest thing as Aboriginal people to give to you. To see
10 that it can't sit in you. Because maybe your spirit is not ready. Or maybe the energy is not ready for anybody other than that nation of people. Goes so deep into their culture. It's very hard to bring forth to the top. It's very hard.

15 But we will endure. We will keep going until one day I'm standing here and a non-Aboriginal man will stand with me and speak the words and sing the same song. Because sense of place must live in all nations. Sense of place. And you as anthropologists can help that come forth, tell the stories. Congratulations to the 25 years of anthropology and I thank you for bringing me here. I hope I wasn't too cheeky. I didn't see many smiles but we're friends now, we're smiling. You see my
20 father said, "Son, when you're walking through a crowd of people," he said, "don't worry about the frown on that man, look for the smile. Because you've got something to give and he's got something for you."

25 Look for the smile and we will get there as nations. [Indigenous language spoken] It's beautiful to see you and stand with you. And thank you for having me here today. [Indigenous language spoken] And may my grandmothers and my grandfathers who have walked before me come and hold your light. [Indigenous language spoken]. And later on as you travel to your home or your family or even your country may the old people carry you. [Indigenous language spoken]. And it is
30 an honour to stand here as one with us as Australians. And so many of you heard the song yesterday. I'm going to sing it again. And why do we sing these songs again? Because in our law everything was sung about. That's why we remember them. We sung for a long, long, long time. And we're still going to sing. So from us as the Whadjuk people to the many nations that we share our beautiful country with, may
35 this song bring us stronger because it must. And may you as anthropologists help tell our stories. Either way, whichever way it falls. And thank you for your job and the things that you do for us.

40 [Singing in Indigenous language.]

You see around Australia that confusion about song. Traditionally here to sing is to sing with boomerangs. The *yidaki*, the didgeridoo, it come as you would know from the Northern Territory. It unbalances our country. But in the contemporary movement of art and movies back then with *Jedda* as you would have soon, the old
45 movie, that's when the didge was heard. And so the thing is to bring forth the old energy and to be with us. Because we are underground here. That's a scary thing. Should I tell you that story? No, that's a long story. No, but listen, thank you so much. I'm so happy to come and give you smiles and to all families no matter where you've come from. May you travel home safely and may that knowledge become
50 stronger as one in what you share. Thank you. God bless, stay safe.

MS WEBB: Thank you very much, Mr McGuire for that very warm welcome to country. Before we begin there is some housekeeping. The emergency exits are located directly across the foyer and out the glass doors to the left. The bathrooms are located out the door and to the right. Look for the signs. There are water stations
5 at the reception desk and the back of the room. Can I please ask you now to switch of your mobile phones, put them on silent. The event is being filmed and will be published online but I'm told it is only the speakers who are being filmed. So just to make you aware of that. As co-chair Pam and I have worked out a few things that we need to tell you. We do have a very full program. We will be unforgiving with
10 our timekeeping.

So we will begin by respectfully asking all speakers to observe their allocated time. Right. Five minute warning. And down until we get to the gavel. Right. And at the end of the gavel should you not cease I think we are coming up with a few other
15 ideas which might involve a bit of a hook off the stage or something like that. So if you could please do that, keep to your times. If there is time at the end of each session – if anybody leaves any time there will be – there might be some time for questions. Don't take that as a reason to keep going because the afternoon tea and reception I'm going to invite the audience to bring the questions to you then so you
20 may not actually get to enjoy your afternoon tea and your reception. So with that I – let's launch into our day.

Let's get started so we can try and get through. There's some very interesting speakers and topics today but firstly I would like to introduce the Honourable Justice
25 Michael Barker. Thank you very much. One extra thing. I'm not going to be going through the list of what everybody has done. We have a wonderful program. You can read about all our speakers. Let's just get to the content.

BARKER J: Thank you very much, Raelene. Thank you, Barry, for your wonderful
30 and heartfelt welcome to Whadjuk country and I to acknowledge the Whadjuk people, the traditional custodians of this country and their elders past and present. Like Raelene, on behalf of the Federal Court, the National Native Title Tribunal and the Centre for Native Title Anthropology at the Australian National University, I have great pleasure in welcoming each of you to this seminar, a seminar which will
35 reflect on the 25 years of native title anthropology which we're in the year of celebrating. Amongst you I might also just single out for particular acknowledgment, a former deputy premier of the state, Eric Ripper, who has attended today and Gary Hambly who I think is here. Where are you, Gary? He hasn't made it.
40

But amongst other things I think Eric was responsible for ensuring that state money came forward to provide scholarships for the training of anthropologists some of who may well be amongst you here today. I was flying from Brisbane to Perth late last year after hearing a native title appeal in that state. As I often do on long flights I
45 was ruminating about the state of the world and how to achieve world peace. The course of my ruminations, for no particular reason that I can now recall but no doubt because I was touched by a little melancholy and, no, I hadn't been drinking, I

thought how sadly lacking has been any formal recognition of the contribution anthropologists have made to the development of native title law under the *Native Title Act 1993* since its commencement at the beginning of 1994.

5 This seminar is intended in some small way to help remedy that omission. We're here to pay tribute to the contributions that so many anthropologists have made to the development of Australian native title law. May I at this point say how grateful I am to Raelene Webb, president of the Tribunal, and Professor Nic Peterson of the Centre for Native Title Anthropology for embracing so enthusiastically the idea of this
10 seminar when I raised it. And to Dr Pamela McGrath, the Tribunal's research director for giving the seminar shape and making it happen. Her seminar-making skills, I think, are very well known and they are exceptional. I also know she could not achieve what she has achieved without the willing support of Raelene's personal assistant, Mary McIntosh and the Tribunal's communication manager, Amber Blake.
15 So a very big thank you to all of you who I have just mentioned.

To those of you who entered the new universe of social scientific and legal inquiry we now call native title at the time of or just before or just after the big bang called 'Mabo', the story of how native title came to be and how it was initially surveyed
20 both as a legal and anthropological challenge will be well known. The seeds of the new universe had been planted, albeit it in a very dark part of deep space, in *Milirrpum v Nabalco*, the Gove lands right case in 1971. And in the sequel to that lost opportunity for common law recognition of Indigenous territory rights, the 1976 Commonwealth Aboriginal Land Rights Act in the Northern Territory. The
25 relationship between law and anthropology seems always to have been a testy one, as the experiences of anthropologists and lawyers both in the Gove land rights case and under the land claims procedure of the Land Rights Act that suggested and native title practice has since confirmed.

30 In native title claims not only was the conceptual question raised whether native title was but a minor extension of the land claims process under the Land Rights Act that revolved around the identification of traditional Aboriginal owners who constituted, as defined in the Land Rights Act, a local descent group of Aboriginals who have a common spiritual affiliation to a site on the land and are entitled by Aboriginal
35 tradition to forage as a right over the land. But also the forensic question was raised whether the equivalent of a claim book prepared by an anthropologist or a team of anthropologists engaged by an Indigenous land council was a prerequisite to the making of a native title claim.

40 Looking back, the *Native Title Act* had the same sort of disruptive effect on the established land claim process that Uber has had more recently on the taxi industry. A native title claim was a new process. Any Indigenous person could initiate a claim, at least in the first days of the Act. Claimants suddenly had choice. They did not have to instruct an established land council to bring, fund and maintain their
45 application for recognition of their native title. Indeed, almost immediately a number of applications were lodged by claimants as self-represented parties. Some instructed private lawyers to bring their claims. They did not wait for the

compilation of something that looked like a claim book before commencing and proceeding with their claims.

5 But why they should engage in anthropologists to verify what they already knew to be true about their traditional laws and customs and the continued existence of their native title before lodging their claim was not immediately apparent to many of them. I saw many of these phenomena at close hand in the Ward litigation, the Miriuwung-Gajerrong claim, in the East Kimberleys of Western Australia from the mid-late 1990s onwards. Before I was briefed in the proceeding to act as senior
10 counsel on behalf of the claimants who are represented by the Aboriginal Legal Service of Western Australia, the claimants had lodged their own handwritten claim. The persons included as the registered claimants were broadly representative of local groupings within the relatively numerous Miriuwung people and associated by relatively few Gajerrong people.

15 As it transpired a group of Miriuwung people on the Northern Territory side of the border in the Keep River area engaged the Northern Land Council—the Land Council in the Northern Territory are very familiar, of course, with the land claim process under the Land Rights Act—to act for them. This produced a range of intra-
20 Indigenous native title tensions with which we have all become familiar over the years since and in claims under the Act. Whereas the ALS’s claims considered that a determination of native title should be made in favour of a broader Miriuwung and Gajerrong society, the NLC’s claims supported determinations in favour of estate groups.

25 Therein could be seen the clan of estate local descent group; anthropological theory as to who the “owners” of land are under traditional law versus a broader theory that recognised the potential for a larger society of people to be recognised as the persons possessed of the full range of native title rights and interest in a territory. When it
30 came to the articulation of which of those theories should be adopted for the purposes of making a determination, the ALS’s clients eventually accepted that expressions of anthropological opinion would, indeed, be relevant and helpful to the articulation of their case. However, in the early stages of the pre-trial process they had received advice that suggested they needed only to adduce primary evidence of
35 their social organisation, rights and interests in order effectively to transfer an evidentiary burden to the state of Western Australia to disprove that they as a people were possessed of native title and entitled to the sort of declaration that had been made in favour of the Merriam people by the High Court in Mabo.

40 Namely, that they were entitled to the possession, occupation use and enjoyment of their traditional territory as against all other persons, subject, of course, to the regulation of those rights by valid laws. On that forensic approach to proof of the existence of native title these claimants did not see any critical need to call any anthropologist to express any opinion about their traditional laws and customs. Their
45 evidence would prove that they had their laws and customs, that they were traditional, that they possessed rights and interests in relation to land and waters under them and that by those laws and customs they maintained a connection with their traditional territory today

and, indeed, have done so by since the date of imputed sovereignty in the East Kimberleys in the 1880s when the Duracks had begun building their grass castles on so much Miriuwung territory.

5 So native title is defined in section 223 of the *Native Title Act* would be established. At the outset of the claim there was only one anthropologist, Kim Barber, who had an established association with the Miriuwung and Gajerrong people. Although there were others, such as the linguist Dr Frances Koford and the oral historian Dr Bruce Shaw, who maintained close relations with the Miriuwung-Gajerrong people.
10 Barber was the closest thing to the pre-*Native Title Act* anthropologist who was a participant observer of the claim group. He had a facility in their language and well cultivated contacts with knowledgeable senior people in the community. As a result he was retained to give expert evidence on behalf of NLC's claims and later Dr Kingsley Palmer, who is sitting just here in front of me, was engaged to give expert
15 lead testimony on behalf of the NLC's claims.

As I suggested earlier, the ALS's claims came to accept that they should also pool anthropological evidence. They found themselves in the position that many claimants and other parties find themselves in today and went in search of an
20 anthropologist with appropriate qualifications and training to express considered opinions in relation to the key issues raised by the claim. Associate Professor Will Christensen, who was at that time principally engaged as an academic at the Curtin University in Perth, accepted a brief and undertook limited field work in order to write an expert report. To some extent he was a participant observer, but not perhaps
25 in the fullest sense of that term as I think anthropologists would usually apply it.

The state also called expert anthropological evidence at trial. As is often the case, it too was unable to obtain the services of an anthropologist who was, in any real sense, personally familiar with the claimants. But did obtain the services of the late
30 Professor Kenneth Maddock who, as everyone here will know, was then a well-established, well-credentialed and highly regarded academic anthropologist, but one who had also had experience in the field. He had at one time been an advisor to the late Justice John Toohey when the judge acted as a land commissioner considering claims under the land claims procedure in the Territory.

35 Coincidentally and from the ALS's claimants' point of view, fortuitously, Ken Maddock was also a critic—some might say a trenchant critic—of the traditional Aboriginal owner definition employed in the Land Rights Act. He believed that it failed to recognise the full array of rights and interests possessed by Aboriginal people under traditional laws and customs. He considered the definition of native
40 title in section 223 of the Act appropriately capable of encompassing all such rights and interests. His views largely coincided with those of the ALS's clients and he expressed them in the course of cross-examination at the trial before Justice Lee.

45 And I would like to pay tribute to Ken Maddock for being, I think, probably my best expert witness at trial. I mentioned the Ward litigation leading up to and at trial, not only because it was the first native title trial in Western Australia and the second

judgment after Yamirr delivered in Australia under the *Native Title Act*, but also because of the range of conceptual and forensic issues it identified and which have remained constant throughout the past 25 years of native title. Over this period the discipline of anthropology has continually been confronted by that of law. The
5 sometimes discomfiting role that an expert witness may experience in a court trial not fully revealed to anthropologists and other native title expert witnesses prior to the big bang, became fully revealed to them in native title litigation.

10 That their well-recognised research methodologies might be seriously questioned by blunt lawyers in a hostile trial environment was, to put it neutrally, something of which they had had little prior experience. It should be said more generally that there has not always been a productive relationship between the law and expert witnesses. Courts and our adversarial common law system inherited from the British
15 have long been suspicious of or sceptical about expert witnesses and what they have to offer. They're often seen as guns for hire, pipers who will play the payer's tune. Sometimes when a judge used to assessing competing evidence and trained to make decisions without fear or favour is faced with competing opinions on topics in relation to which the judge herself or himself rightly or wrongly feels comfortable in
20 expressing their own opinion, the judge may do just that, with the result that the courts respect for the opinions of the expert may appear to be lacking.

Indeed, as I have indicated already, familiar questions entered into the native title expert evidence process from the very beginning. To what extent do claimants
25 actually need to rely on anthropological evidence? What was its purpose? Was the judge bound to regard the expert opinions expressed? What happens when opinions conflict? Is a participant observer's opinion to be preferred? Should the opinion of an apparently more detached expert be preferred? To what extent is the expert susceptible to being seen as an advocate for the position of the party who called them to give evidence, rather than as a conveyer of opinions based on appropriate study
30 and experience designed to assist the court, resolve the disputes at hand?

There is no doubt that over the past 25 years and particularly in the early highly contested native title trials, all the parties, their legal representatives and witnesses
35 called on their behalf including expert witnesses appreciated that they were playing for high stakes. Native title was new and often particularly controversial. Government parties were not always amenable to the prospects of the finding that native title existed in a claim area. Claims were strongly defended. State parties in particular were not as experienced then in relation to the anthropology and the law of
40 native title as they are today. The process by which expert witnesses gave their evidence and were cross-examined was also in many instances not amenable to the efficient and respectful resolution of native title claims.

In a number of ways, especially through the conferencing of expert witnesses and the giving of expert evidence concurrently at trial, a number of the early features of
45 native title litigation that might be described as debilitating have been ameliorated if not wholly removed. Through all of that it has been the anthropologist as participant observer; those engaged to undertake independent field work and provide opinions

based on it, and those in an apparently more detached way like Maddock in the Ward litigation, who have helped judges; judges who have often been interested, indeed, fascinated but not ethnographically familiar with the subject matter of native title to grapple with Indigenous concepts of law and custom and social organisation that relate to native title.

Despite the ups and downs and disappointments and triumphs along the way, the constant feature of native title practice has been the continued illumination by anthropologists of the nature and scope of native title as it is defined in section 223. They are the ones who have striven to retain their professionalism and their composure in native title proceedings under extreme odds. They are the ones who have always managed to write reports in beautiful, measured prose, avoiding the temptation, rarely resisted by the lawyers, to be florid. And I have to say, if there is a next life I would like to return as an anthropologist. They have helped broker intra-Indigenous conflicts, tutored generations of solicitors and barristers in the finer points of Indigenous Australia, and instructed judges about all of those things.

In doing so they have been utterly indispensable to the realisation of the very first stated object in section 5 of the *Native Title Act* to provide for the recognition and protection of native title. Presentations at this seminar will, I am sure, serve to illustrate these observations. I will shortly circulate a draft schedule of anthropologists who have been involved in the evidence-giving process in contested native title claims. That is to say, those that have gone to trial since the commencement of the *Native Title Act* as well as in some matters in which native title issues were dealt in a contested forum other than a trial. Accordingly I haven't included the many matters where anthropologists have been involved in a claim which has ultimately been determined by consent or is the subject of interlocutory proceedings or where the court independently commissioned an anthropologist to provide a report in the hope it might assist the parties to resolve the matters at issue.

I will appreciate feedback on this draft as I'm sure my research will have missed some important matters and contributors. I will attach the final, settled schedule to the published version of this paper. With these introductory remarks, and I think 15 seconds of my last two minutes left, I congratulate and thank all the anthropologists who have toiled in the native title universe over the past 25 years. I now look forward to the presentations of our wonderfully experienced and generous speakers, anthropologists and lawyers alike, as they reflect on the various aspects of the meeting of anthropology and the *Native Title Act* over the past 25 years. Thank you very much.

DR McGRATH: Thank you very much. I made a special request to President Webb that I be able to introduce our next speaker so that I had an opportunity to pay my respects to a person who has been important both professionally and personally to many of us. Professor Peterson has mentored generations of Australian anthropologists including many people here today, myself included. He's a dedicated and generous teacher, a constant researcher and writer and, when it comes to understanding Indigenous rights in land, he really is a part of our intellectual DNA.

Simultaneously theoretical and pragmatic, even if we don't always agree with him we owe him a great debt. So I'm very pleased to be able to introduce Nic today to speak to our disciplines origin story in this really important area of law. Thanks, Nic.

5

PROF PETERSON: 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 very special event this is. I'm talking about a short history of the role of anthropology in evidencing Indigenous rights in land.

10

15 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.

20

25 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 their 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.

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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.

40

45 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.

5

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.

10

15

'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.

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One factor that seemed likely to have contributed to obscuring the existence of exclusive possession in this case, as in the Yamirr 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.

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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."

40

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."

45

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
5 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
10 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
15 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
20 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
25 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
30 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
35 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
40 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
45 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. Thank you.

DR McGRATH: Thank you very much, Professor Peterson. So we're now moving into a session essentially lawyers on anthropologists, on the topic of anthropologists and their engagement. We have got five speakers, 15 minutes each, and at the end of the session we will break for afternoon tea. So up first is Robert Blowes. He will be followed by Mr Vance Hughston SC, President Webb, Mr Peter Quinlan SG SC and Mr Joshua Creamer. So, Robert, thank you. Over to you.

MR BLOWES: I intend this to be a tribute rather than a lecture but I will endeavour to leave both anthropologists and lawyers with a couple of take to work points along the way. The first anthropologist that I met in 1982 was Professor Robert Layton. It was a full decade before Mabo and a dozen years before the *Native Title Act*. Much history of interaction between lawyers and anthropologist predates the *Native Title Act*. The intention of the slideshow really is, apart from distracting you from my talking, is to pay tribute to all of the professional and intelligent and dedicated expert anthropologists that I have had the great pleasure to work with over what's now exactly 35 years since I met Professor Layton.

Today I can say that I have met a few anthropologists and that some of my friends are anthropologists. All of them have made an important contribution to the understanding and thinking about respecting and recognising the relationships the Aboriginal and Torres Strait Islander peoples to their land and waters and each other and their languages. The photos aren't necessarily representative. A lot more were taken during my early years of my career than I had time and opportunity to take in later years. So I arrived in Darwin in February 1982 to take up a position as a senior legal officer at the Northern Land Council.

I was first – I was told a few weeks later by the principal legal officer, that my first task would be to get in a Toyota ute and spend two weeks with Bob Layton driving into the Gulf country and out onto the claim area and spending that time doing field work with him. So we headed down the track and ended up at the outstation at
5 Dumnyun-ngatanyana on the claim area where the hearing was later held. Apart from Professor Layton, Diane Bell, Professor Diane Bell, worked on that claim as did Toni Bauman. But my time with Bob Layton at that time was really my ‘anthropology 101’. I will be forever grateful for that early and intensive opportunity to learn and to appreciate the skills and methodology that an anthropologist can bring
10 to bear on a proper understanding of the traditional laws and customs of Torres Strait Islander people and Aboriginal people in their claim area.

My next close encounters with anthropologists followed in quick succession through 1982. Started work with Professor David Trigger and Dr Myrna Tonkinson on the
15 Nicholson River claim. That claim was inaccessible largely involved Trigger and I spending a week or in a helicopter flying around with claimants videoing evidence at various sites. I can recall Dr Trigger in his younger years at that time being indefatigable in his efforts in support of that claim and his working with the claimants. Greg McIntyre came out to that hearing as well. We have probably
20 already passed the photos of Greg McIntyre sitting there beside Trigger. That was before he started on the Mabo case and I think he was probably looking for ideas which he might have been able to apply in his claim with Mr Mabo and the Torres Strait Islanders.

25 My relationship with Professor Trigger continued into the Robinson River claim and then into the Century Zinc Mine negotiations, which was one of the first major future act tests of the *Native Title Act*. In 1982 I also met my now good friends Professor Francesca Merlan and Professor Alan Rumsey. We started work on the Jawoyn claim, the Jawoyn people of the Katherine Gorge area. In the course of that claim,
30 the hearing of that claim, quite a heated issue arose about anthropologists and about the ethics of using material from claimants acquired in the course of PhD research in a manner not contemplated by the informant at the time, and extensively against their interests and perhaps contrary to cultural restrictions.

35 That question didn’t arise from Professor Merlan and Professor Rumsey’s work, I hasten to say. However, it resulted in all of the anthropologists in the room at that time being hastily called to give evidence about the ethics of anthropology. Professor Sutton was among them, Dr Athol Chase, Dr Ian Keen and perhaps others. Dr John Byrne was assisting the Aboriginal Land Commissioner at that point and Dr
40 Ken Maddock was also a witness. I think that claim was also the only time – well, was the only time I have ever seen —an anthropologist formally in a hearing session cross-examine another anthropologist.

45 That was when Jeff Sher QC, asked Alan Rumsey to cross-examine Ken Maddock. It was quite a performance. I have had the great pleasure of working with Alan and Francesca on later claims including with Alan on the Neowarra claim for the Ngarinyin, Worrora and Wunambal people in the Wanjina and Ungurr country in the Northern Kimberley.

The next people I met in 1982, the next anthropologists, were Betty Meehan and Athol Chase and we've – there's a picture there of Athol amongst the claimants in that context. It was a non-functioning dunny and he's got his pants on. And in another lifetime I have worked with Professor Sutton and Dr Michael Walsh during
5 the epic Kenbi Land claim, second hearing. I am going to run out of time mentioning all the others that I have worked with and appreciated the efforts of.

As previous speakers have noted, the role of anthropologists in presentation of statutory claims under the Land Rights Act is not what it is now under the *Native*
10 *Title Act*. Land claims were on an administrative process where the rules of evidence didn't apply and where the claim book was part pleading, part expert report and part hearsay evidence. Generally they were written by the anthropologist. For anthropologists, moving from claim book writing to administrative – in an administrative inquiry— to being experts in a judicial process has been quite a
15 traumatic and dramatic transition.

Following the High Court decision in Mabo I had the privilege of working in the Wik and Wik Way region being introduced to that area by Professor Sutton and Dr Martin and Dr Von Sturmer whose patches it were where when they were doing their PhD
20 research. I then spent much valuable time with Professor Rumsey again and Dr Tony Redman and Professor Valda Blundell and Diana McCarthy during the hearing of the Neowarra case in the Northern Kimberleys. By this time I fully appreciated not only the incredible and professional skills involved in divining and articulating the unwritten rules about relationships between people and country and between people
25 and language that are common to the – in the Aboriginal communities and Torres Strait Islanders.

Without the professional application of those skills the native title system, indeed, the *Native Title Act*, simply would not work unless there was a proper understanding
30 of that. As clear enough from the early rush by lawyers to lodge native title claims without anthropological research and without the consideration of the anthropological analysis of traditional laws and customs of the intended claim areas, the legacy of that rush still haunts us today. The cameo role I played in the Yulara compensation claim required working closely with the irreplaceable font of wisdom and ideas, Professor Peter Sutton. In relation to questions about the form – some
35 difficult questions arose about the form of his report and ultimately led to extensive cross-examination and ultimately a finding against native title in that case.

I must say that notwithstanding what has been written since, none of that should be
40 laid at Professor Sutton's feet. From that, and other experiences it was made increasingly clear to me that anthropologists and lawyers need the considerable support of each other from the very moment that an idea of a native title claim arises through to its completion. Native title claimants are not well served without that cooperation and appreciation. In suggesting the anthropologists need the support of
45 lawyers in the case I do not suggest any failing or inadequacy on the part of the anthropologist. Rather, I merely point out that the requirements of being a significant and expert witness in a complex judicial process is uniquely mystifying and complex, more so than lawyers tend to appreciate.

Everything about the legal process is foreign to a researcher who has experienced the relative freedoms of academic research. A clinical test of relevance is just the start of the difficulties. Legal logic and reasoning is highly constrained and in some respects more demanding of rigour than social research in other contexts. The rules of evidence, the potential for disclosure of all communications between a researcher and his or her informants, field notes, other anthropological reports and so on all add to the mysteries and complexities of getting involved in a legal process. Lawyers need to patiently attempt to explain such things to anthropologists. On the other hand the lawyers are dependent upon qualified anthropological input before any sustainable native title claim can be properly designed and pleaded and presented.

Sufficient broad ranging conversation at that point early and throughout the case is necessary. Anthropologists from that point on are entitled to clear and realistic terms of reference to guide their further research and report writing. In the Torres Strait claim known by the name of the first named applicant, Mr Akiba, the emeritus Professor Jeremy Beckett, Dr Kevin Murphy and Professor Colin Scott were each given separate roles as witnesses and sometimes it was necessary really to design the case partly around who is available to give – to be the expert witnesses. [Dr Garrick Hitchcock assisted behind the scenes.] Jeremy Beckett is an elder statesman of native title anthropology and requires special mention in any tribute to native title anthropologists.

Professor Beckett provides a link between what is sometimes called the early ethnography and current claim research. He conducted research for and appeared as a witness in the Mabo claim and also in the Akiba claim he provided an overview report which commented on the reports of the other anthropologists on the basis of his work going back to the 1950s. While on the subject of longevity and elder statesmen, anthropologists and lawyers have been working towards land rights and native title recognition since the late 1960s. More than a decade since I first met an anthropologist, before I met an anthropologist, the Gove Land Rights case occurred and it probably the beginning followed closely by the Woodward Commission and the drafting of the Land Rights Act.

Professor Nic Peterson may be the only person here or at all who has participated in those early processes and who still has an ongoing role in these questions. Also his report with Dr Jenny Debit was the subject of that transitional stage between expert report writing in the land claim process, and expert report writing for native title hearing because a number of comments were made about those reports in that context which has led the lawyers and the anthropologists to transition to a native title era. In the Gundjtimara native title claim eventually determined by Justice North, Dr Ray Madden, Mr Geoffrey Bagshaw, Professor Basil Sansom and John Morton were involved in a significant conference of experts which led to sufficient commonality of opinion to force the making of a consent determination ultimately made by Justice North in a the large area at south-western Victoria.

Conferences of experts are another question which I just don't have time to go into here. In the Yilka claim I was involved there with Dr Sackett and a question arose in that case. Because that claim was the second hearing of the claim and Dr Sackett had

been a witness in the first hearing, some considerations had to be given to the role of the experts in that context and in that context Dr Scott Cane was also engaged. My – finally, it is always a pleasure to work with Dr Kingsley Palmer as I did briefly and most recently in the Bularnu, Waluwarra and Wangkayujuru peoples claim in the channel country north-west Queensland, ultimately determined by Justice Mortimer.

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Kingsley is one of those – one of the, “I’ve been everywhere,” native title anthropologists. His experience as an expert report writer, an expert witness, is up there with few others. He has contributed to many significant litigated cases including Noongar, Rubibi, Miriuwung and Gajerrong to name a few. He’s consequently very experienced also in dealing with lawyers. So lawyers beware. And Kingsley could no doubt tell a tale or two if today’s tables were turned in the very unlikely event occurred that anthropologists held a conference to pay tribute to lawyers.

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A word of advice though to other lawyers: do not give Kingsley Palmer any material you don’t want him to refer to. My most recent work has been involved in a case which is ongoing so I can’t mention much – can’t tell the stories about it but it involves more anthropologists, as you would imagine. Geoffrey Bagshaw, Dr James Weiner, Dr Janelle White and Scott Cane and Professor Sutton are also involved in that case. I say my first work with Geoff Bagshaw was in the context of the appeal on the Bardi and Jawi case in which Katie Glaskin also played a significant role with her usual meticulous attention.

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Just finally, I have run out of time to provide the complete catalogue but lawyers and anthropologists, I would say in conclusion, play very different but equally important and complimentary roles in native title claims. And it is fundamentally important that each understand and respect the roles of the other. However, anthropologists need to remember ultimately that they’re engaged in a legal process. They may take some comfort, however, that if the case does not succeed it is highly likely that the responsibility will rest with the lawyers rather than the anthropologists.

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On the other hand, however, the lawyers need to appreciate that it is the anthropologists who will be in the witness box and who will be vulnerable to comments by the judge in the course of a decision. Of course there are some cases that are destined to be unsuccessful through no fault of anyone—except our collective national history of disregard and disrespect of the relationships of the original people of this country and their land and waters. Thank you.

40 DR McGRATH: Thank you so much, Robert. Vance, where are you?

MR HUGHSTON: Yes, I’m coming. Always late.

45 DR McGRATH: Welcome.

MR HUGHSTON: Thank you. I want to pay my respect to the Whadjuk People whose country we’re on. And I would also like to pay my respect to all of the anthropologists who are in this room. I think this session is anthropologists and

lawyers, friend or foe, and I know I have been the foe of many of the anthropologists in here but I have also been the friend of a few and I do value those friendships greatly. And even those who have been my foes in my early years in particular unwittingly from their perspective they taught me a lot about Aboriginal culture and respect for Aboriginal culture and respect for anthropology and the way in which anthropologists work.

Now, there will be some crossover between what Robert and I have to say, unfortunately, because I think we both agree on the critical importance of anthropological evidence in native title proceedings. Whether it is success or failure it will depend upon the strength of the anthropological evidence. Now, we all know that the most important evidence of all is the Aboriginal evidence, and if the Aboriginal evidence is there, not even the best expert anthropologists in the world is going to assist. So the Aboriginal evidence is critical but it is also critical that you have an expert who can put that evidence in context, explain that evidence in layman's terms that a lawyer will understand and who has the intellectual ability to trace and describe the continuity between what the court is hearing about now from the Aboriginal witnesses and what the early ethnography may have said about that particular area and that particular group. And, you know, hence anthropology is of critical importance.

Again, as Robert said, the interaction between lawyers and anthropologists really began with the Aboriginal Land Rights Act in 1976 in the Northern Territory and there was a great deal of reliance placed upon anthropologists back then. They prepared what Robert described as a claim book which was, in part, a pleading which described the case. It was also evidence of historical facts, anthropological facts and it also advocated the claimants' case so it was, in part, argument. But the land rights proceedings were administrative proceedings. They weren't judicial proceedings and the definition of traditional Aboriginal owners was a far cry from the definition of native title in section 223 of the *Native Title Act*.

Those practices of preparing anthropological reports, a bit like claim books, and the lawyers leaving it all up to the anthropologists to do without much assistance or much direction continued into some of the early days of the *Native Title Act* and into some of the later days as well, unfortunately. And, again, as Robert said, it is important that we all understand anthropologists and lawyers that judicial proceedings, which native title claims are, are very different to administrative proceedings. A judicial proceeding isn't some open ended administrative inquiry to establish some objective truth about an area or about Aboriginal people. The role of the court is to resolve disputes.

The parties present the dispute to the court and the parties will identify what the factual issues are that the court has to resolve and the court will resolve that dispute by applying established legal principles to the facts which the court ultimately establishes or facts which have been agreed or admitted by the parties. A very different procedure. Now, when an anthropologist has to give evidence in legal proceedings as opposed to administrative proceedings there is a need for a strong

degree of collaboration between the lawyer and the anthropologist. I have done a short written paper, I don't know whether it has been distributed or not, where I start off by talking about the decision of his Honour Justice Lindgren in a case of – that's known as Harrington-Smith (No. 7) where his Honour said that it is of critical importance that lawyers be involved in writing anthropologist reports.

And not in terms of writing the substantive opinions, but they have to give clear directions to the anthropologist in terms of what are the factual issues in this case that we require to get your opinion on. So you have to clearly identify what the issues are and ensure that the anthropologist—because the anthropologist may think, “Well, this is an interesting issue as well, you know, apart from the ones you have raised, this is interesting, I would like to chase this one down or chase this one down or whatever...”—the lawyer has to be able to explain to the anthropologist that, “No, interesting as that may be anthropologically, we have got to stick to the issues.” And the lawyer has also got to ensure that if that important opinion evidence on those issues is to get into evidence that it is put in an admissible form.

And in particular that the anthropologist makes transparent the factual assumptions and the reasoning process behind the conclusions that have been drawn. There have been a number of cases subsequent to Harrington-Smith (No. 7) where other courts, other judges, have strongly supported those views of Justice Lindgren. In the paper I have written I have referred to Justice Selway in the Gumana case to Justice Sackville in the Jango case and to Justice Finn in the Akiba case. In all native title cases, all expert cases – sorry, all native title cases there will be various types of expert evidence led and contributions, useful contributions have been made over the years from historians and archaeologists and linguists and the like. But anthropologists stand tallest in the contribution that they have made to native title claims.

But, again, it is essential that the lawyer – and it all comes down to the lawyer ultimately because they are legal proceedings that it is the lawyer's responsibility to ensure that anthropologist's report does hit the mark and there have been cases, and I refer to them in my paper, where it hasn't missed the mark – it hasn't hit the mark and the court has made it apparent that it hasn't hit the mark because the instructions don't appear to have been there to correctly direct where the evidence should go. I think that's probably as much as I can say about anthropological evidence and its importance. It's still developing. I did a case very recently where the problem again emerged of anthropological evidence being directed towards matters that they shouldn't have been directed towards and, of course, particular confusion in that case.

As well as causing problems in the cases itself, if the anthropological evidence has not been properly directed the time and the money spent in obtaining that evidence is just wasted. Anthropological reports are costly; they're not cheap. And unless they are properly directed that money will be wasted. And both the lawyer has a role and the anthropologist has a role. They both have to have respect for each other and to understand what that role is. But ultimately it is for the lawyer to explain to the anthropologist exactly what their role is because they are legal proceedings and that's

the area where the lawyer should have the expertise to direct the anthropologist in terms of how they're to use their anthropological expertise. Thank you.

5 DR McGRATH: Thank you very much, Vance. We will circulate that paper to everybody later. I'm not sure we've got copies here. Now, it is my pleasure to introduce President Raelene Webb QC, or 'boss lady' as I like to call her.

10 MS WEBB: I have entitled my talk 'Learning from the Experts'. Over two decades of native title practice I have worked closely with many native title anthropologists: those who advised governments, those who worked with native title groups and various others. I formed close friendships with some, and had a nodding acquaintance with others. I worked with so many native title anthropologists I dare not try to name them all in case I inadvertently admit someone. A few will get a special mention shortly. In the main I would describe my experience of working
15 with native title anthropologists as friendly interdisciplinary collaboration.

I would also describe it in the main as having had a jolly good time. What did I learn from the experts? As part of the jolly good time the late Professor Ken Maddock reintroduced me to dry martinis in Kununurra, an example of 'out-of-hours-state anthropologist-Northern Territory counsel-collaboration' during the Ben Ward hearing. In another case I learned from Professor Maddock that native title anthropologists were not immune from pursuing the scent of scandal even, or perhaps especially, if that whiff came from the past. During the hearing Professor Maddock spotted a claimant who he said had a striking resemblance to a German anthropologist whom he thought had been in the area some years prior.
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He did some quick calculations and determined to follow up. Having completed our 'interdisciplinary collaboration' in preparation for the next day's hearing, Ken then went onto his own research. By the next day he had developed a quite compelling case for the German heritage of the unsuspecting claimant. On a serious note, I learnt much from this respected rigorous scholar of Australian Aboriginal societies and it was a sad day when I heard he had passed away. My experience of friendly interdisciplinary collaboration with Professor Basil Sansom over a number of cases was a real treat for many reasons—not the least for his gripping style of report writing.
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I was first introduced to Basil's inimitable style when I read his ethnography, *The Camp at Wallaby Cross*, a book about the fringe dwellers at Knuckeyes lagoon close to where I lived for many years in the Northern Territory. Professor Sansom and I bonded over many things including a bottle of red or two. Love of the Northern Territory helped, as did his deep anthropological knowledge of the region gained over many years as an anthropologist assisting and giving expert testimony in land rights cases. This knowledge he most willingly shared. Basil was keen to see the story come out. And he would agonise over the evidence when he thought that the real story was not finding its way to the judge.
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On several occasions his concern that the applicant's evidence was not doing them justice in their case led him to press me to obtain instructions (which I did) to bring out the evidence on cross-examination. I'm grateful to my government clients who gave those instructions and allowed a story to be fleshed out as a result. Over many
5 cases I became very familiar with Basil's 'anthropological imagination', to use Professor Francesca Merlan's words. So much so that when I came to the section in one of Basil's reports headed 'About pigs' which gave a Barthian perspective on society by reference to a remarkable book called *Pigs for the Ancestors*, I read on without blinking an eyelid. The punch line: a PNG pig is not a Murray Island pig.

10 Now I'm not breaching any confidential orders here as that bit of writing did not make its way into evidence and I am confident Basil would not mind me sharing this with you. My learning from Basil was so complete by then that I read this discourse on pigs in society and instantly understood what he was explaining. By this stage I
15 had been somewhat indoctrinated into the ways of anthropology and anthropologists. I had also learnt that lawyers and anthropologists think differently in a number of ways. First, both address issues of responsibility, but while lawyers are concerned with individual liability or attributing blame, anthropologists try to explain sociocultural reality in more abstract or transcendent terms.

20 Secondly, lawyers assess acts and their consequences normatively, whereas anthropologists generally maintain a stance of relativism. Thirdly, lawyers deductively apply abstract principles to decide specific cases. Anthropologists study specific cases inductively in order to construct abstract models. Fourthly, lawyers
25 equate the cause of an event with the allocation of individual responsibility for it. That is, they look for direct causation. Anthropologists see causality as multiple and ultimately systemic. Lastly, truth lies for lawyers in the story told by the human witness of the human act. For anthropologists, truth lies in the replicable analysis of data much as it does for scientists—other scientists.

30 For lawyers, the notion of fact is philosophically unproblematic. We are concerned with what general principles (or laws) these facts call into play. Through their experience of field work, anthropologists are more aware of the problems of obtaining and using data and less inclined to speak of 'facts' without qualifications.
35 To sum up, it seems to me there is a methodological gulf to be bridged. Lawyers take matters which have been established to the appropriate standard of proof to be true facts, and judges see their task as deciding how the law should be applied to those facts.

40 Whereas for anthropologists, 'facts' are always the products of a particular theoretical approach, and truth is at best provisional and contested. Given this gulf, it is not surprising that judges, lawyers and experts have at time done battle regarding the weight and status of expert anthropological evidence. No-one knows this better
45 than Professor Peter Sutton, one of the most senior applied anthropologists working in Australia who, it is fair to say, took a battering in the Yulara case some years ago. Others have written on this saga and I'm referring particularly to chapter 8 entitled

‘Apocalypse Yulara’ in Paul Burke’s book, *Law’s Anthropology: From Ethnography to Expert Testimony in Native Title*.

I’m told that at one point Professor Sutton became so sick of the politics of native
5 title, Indigenous affairs, anthropology and anthropologists that he publicly
announced via an article in *The Monthly* that he had resigned his membership of the
Australian Anthropological Society and had instead joined his local MG car club. I
searched out the article on ‘Switching Clubs’ with glee, being the owner myself of a
10 classic 1964 MGB. I found Professor Sutton’s article on restoring classic cars as
compelling as his anthropology. Professor Sutton, welcome back to native title. I
had the pleasure of working with you in my last native title case before I became
President. It was a privilege and a great honour to work with you.

If you had remained as one of the wounded experts who never returned to native title
15 it would have been a great loss to native title anthropology and to native title law. I
am very much looking forward to hearing from you on the rebirthing of native
tradition later today. There are many other experts who I have worked with whom I
would like to acknowledge but time will not allow me to do so. Some of you are
here today and I hope to speak personally with you later. But I cannot conclude
20 without paying tribute to a group of native title anthropologists who are often
overlooked, the hard working and dedicated Rep Body anthropologists who are at the
coal face (if it is still politically correct to use that term). You really do the hard
yards with little recognition.

I have worked with a number of young talented NTRB anthropologists. The
25 Tribunal’s very own Director of Research, Dr Pam McGrath, is one of them. As
counsel, I always set myself the task of coming out with a short and succinct
statement, no more than one sentence, which summarises what a case was about. In
the same vein, summarising my learnings from native title anthropologists over the
30 years, it is this: I have learnt to talk like a lawyer and think like a human being.
Thank you.

DR McGRATH: Thanks very much, Raelene. We may actually have some time for
35 questions. Thanks. Yes, well, no, at the end. Thank you. Mr Quinlan. Please.

MR QUINLAN: Thank you, Pam. And thank you all. Your Honours, distinguished
40 guests, members of our combined professions, colleagues. It’s fitting that I
commence my remarks by also acknowledging the Whadjuk People of the Noongar
nation on whose land we meet and pay my respects to their elders past and present
and acknowledge their continuing stewardship of these lands.

When reflecting on the contribution that anthropologists have made to the field of
45 native title in Australia I had first thought I would acknowledge the singular
contribution that anthropologists have made to the fashions on display during country
native title gatherings. Lawyers on the whole follow their innate conservatism when
it comes to one country hearing dressing in what my wife describes as regional
politician chic.

Which for men, and to be fair, most of the women, consists of chinos, RM William boots, preferably brown, checked shirts and freshly minted Akubra hats. Anthropologists are a far more sartorially refined and varied bunch, which a survey of most of the native title hearings will reveal: from Professor Peter Sutton's ubiquitous pith helmet, Dr Kingsley Palmer's Harry Butler inspired khaki ensembles, 5 Dr Janelle White's colourful, floral summer dresses and to Dr Scott Cane seemingly limitless collection of surf wear.

10 I took this as far as I could until it occurred to me that the contrast in habiliment between lawyers and anthropologists was an apt metaphor to demonstrate the different mode of thought in contribution that anthropology has made and will continue to make to us, as lawyers, in the way that we think about property in general and about native title in particular, and the way in which anthropology has helped us as lawyers, in the words of Gerard Manley Hopkins, "To return to our own 15 best being." To introduce that idea can I take a couple of points of personal history. When I commenced to study property law prior to Mabo and Queensland or the Native Title Act the text was Sackville and Neave's *Property Law* by the Honourable Robert Sackville, formally of the Federal Court, and the Honourable Marcia Neave formally of the Victorian Court of Appeal.

20 And when I pulled that book out to start reading it, the first thing that was in there was a Socratic dialogue written by Professor Felix Cohen of Rutgers University in which he explored in the form of a dialogue the difficulty of being able to conceptualise what property was and the idea of property. The dialogue begins with 25 a question and answer, "What evidence, Mr. Black, can you produce to show that private property really exists?" Answer: "Well, here is a book that is my property. You can see it, feel it, weigh it. What better proof could there be of the existence of private property?" Cohen, "I can see the shape and colour of the book very well, but I don't see its propertyness. What sort of evidence 30 can you put forward to show that the book is your property?" Answer, "Well, I paid for it." Question, "Did you pay for your last haircut?" Yes." "And did you pay for last year's tuition, and last month's board, and your last railroad trip?" "Yes." "But these things are not your property," and on and on it goes. You get the idea.

35 What was fascinating to me—and it was fascinating stuff to a young law student such as myself—is here we were being invited to think and think hard about what property was, what the concept was, and where it came from as a social and cultural institution. And, of course, no sooner had that interest been ignited than it was 40 damped down and snuffed out by the doctrine of estates, easements, mortgages and other hypothecations. The social and cultural aspects of property gave way to rules and fixed details that we lawyers could trust, that we could hold onto, and our thinking became rigidified. Law schools will do that to you.

45 And then years later the decision of the High Court in Yanner and Eaton came along and it contained this quote which drew upon a jurisprudential article by Professors Gray and Gray. The quote was this, "Native title rights and interests must be

understood as what has been called ‘a perception of socially constituted fact’ as well as ‘comprising various assortments of artificially defined jural rights’. Let us be frank. That quote met with howls of ridicule and derision within some in the legal profession who regarded it as over intellectualising the subject altogether too much.

5 One of Western Australia’s leading senior counsel, who went on to a distinguished career on the Supreme Court of Western Australia, observed in submissions to the High Court that, “One suspects the Grays prefer Proust to Hemingway and that phrases of that kind created difficulties.”

10 But on closer inspection the recognition of native title as a ‘socially constituted fact’ highlights the centrality of anthropology as a discipline and anthropologists as a group in reckoning with what we call native title, because it requires us as lawyers to be able to perceive facts by reference to particular social and cultural practices. And such perception is not, as we lawyers would sometimes like to think, a given. It is a

15 skill like any other. A particular social practice may tell us a great deal about how rights and interests are generated, what they are and how they are regulated: where people stand, where they sit, who talks first, who talks last, why they do that, who goes where, who doesn’t, and why and in what circumstances.

20 But simply recognising the social practice and perceiving its socially-constituted meaning are two very different things. And we lawyers are not as good as we think we are at the latter. In fact, we often think that we’ve achieved some sort of breakthrough merely by recognising the former. Let me give an example from one case that I was involved in where the courtroom on the first day of the hearing was

25 arranged as courtrooms sometimes are in relation to native title claims, with a large board down the middle of the gallery of the courtroom to separate the men from the women in the courtroom. And the lawyers made something of a show of announcing at the beginning of the hearing, “Your Honour will note that the men are sitting on one side and the women are sitting on another side and there is a big board down

30 between them.”

And almost comically, wherever we went in the hearing we would travel for hours, four-wheel drive through mudflats, through rivers and streams onto cliffs, wherever the court stopped there would be the boards sitting in the middle of the wilderness for

35 people to sit on either side of as a recognition that here was a social practice and, look, we’ve seen that this social practice is there. But not once during the entirety of those proceedings did I recall anybody either asking or saying what that meant. What could we see or perceive from that practice that might inform for us something about what was going on. And it is understanding the meaning of social practices,

40 perceiving its meaning that anthropology, I want to submit, most essentially brings to native title.

And in that way, in the context of native title, anthropology functions, I want to suggest, quite differently to expert evidence as it exists in other parts of the law.

45 Where the court calls upon an expert engineer or a medical practitioner to assist in explaining a medical process or an engineering process, what the court is doing is

calling upon that expertise to provide a piece of evidence which, while used in the process of adjudication, is properly separate from it. It provides a fact to be plugged in to an equation that the law is going to independently provide. And I want to suggest that anthropology in native title is different, because ultimately it is not
5 entirely external to the process of adjudication itself. The perception of the socially constituted facts that anthropology assists in bringing to life is the process of adjudication in identifying laws and customs.

To give another example of a trial in which I was involved in that his Honour Justice
10 North heard evidence of, where – there was evidence given by a particular witness which appeared entirely inexplicable in the manner in which he gave it, in what he said, in how he responded to questions. There seemed to be quite a disjunction between what was going on, what we were hearing in the courtroom and what would have been expected. It wasn't until sometime after that that the anthropologist who
15 was involved in the case identified the social and cultural context in which that had occurred on that particular day which, in effect, made the penny drop and make the evidence itself more explicable.

And there is from time to time, unfortunately, it seems to me, from the lawyers often
20 a tendency to forget that complexity of social and cultural practice that we are supposed to perceive. And when we do forget it the process of discerning rights and interests from the laws and customs of a particular Aboriginal society becomes sterile and bland. This is most notable, I would suggest, in claims, for example, where the anthropological evidence is presented, as it were, as a gloss or a
25 summation of the other evidence, as if the two don't speak to one another, rather than circumstances where the anthropological evidence helps to identify not only the answers but the questions that are relevant to be asked.

Because lawyers will retreat to what they know, what they can fit within their little
30 boxes. And so we see a lamentable retreat from time to time into verbal formula where instead of exploring the day to day operation of a particular society we default into asking questions like, "Who owns that? Who owns this?", and reducing social complexity to neat, little packages. Anthropology calls us back and for this, on behalf of the lawyers here, I thank you all. And for the future, and this is really a
35 question I pose for the anthropologists, is what effect does this process have in the other direction? How and in what way does and do the processes of native title, the distinctions it requires to be drawn, the distinct vocabulary that it is given rise to, all of which are employed with and by members of the societies themselves in formulating claims and gathering evidence, what effect are those things having and
40 what effect will they continue to have on those societies themselves?

Because one thing is clear, and I think Dr Sackett is going to speak about this later, change and adaptation of traditional laws and customs in relation to changing
circumstances and external influences is an obvious fact in this area. Those external
45 influences in the past that we've already observed the change in adaptation to have included colonisation, movement of populations, dislocation, urbanisation. They are all external influences to which traditional laws and customs have, over time,

adapted. Surely the native title process and the environment it brings itself is no different in terms of an external process. And the interesting question, I think, perhaps for anthropology in the years to come, is what effect will that have on the continued change and adaptation? Thank you.

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DR McGRATH: Thanks very much, Peter. Josh, you're early.

MR CREAMER: I think everyone is scared of the five minute and two minute warning and then the - - -

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DR McGRATH: We haven't had to use the gavel yet.

MR CREAMER: It worked, didn't it?

15

DR McGRATH: Absolutely.

MR CREAMER: So we take a puzzle, a puzzle with 500 pieces, even 1000. If you take the pieces, you scrunch some up, for the fire bugs out there you might singe a few, throw some paint on others. You basically damage them any way you can. You take the pieces from the puzzle, you go out to the biggest refuse station you can find, so fancy word for a tip, and you scatter those pieces across that location. Now, you don't just want one puzzle you take hundreds of puzzles. And you scatter the pieces all in the same location. You then ask the anthropologist to go out and collect all the pieces from the first puzzle and put the puzzles together. Now, what the anthropologist doesn't know is that there are hundreds of puzzles all in the same location.

20

25

Now, letting him know that would just be too easy. Now, you might think that all these things pose some obstacles and they do, to some extent. But the greatest obstacle an anthropologist must face is posed by the lawyer. Yes, the humble lawyer. Now, the lawyer herself has never had to complete the task of putting together the puzzle. No, no, no. That would not be right. But despite her lack of experience in putting together the puzzle that doesn't stop the humble lawyer from being an expert in said task. Importantly to, the lawyer is an expert at drafting rules. In this case let's call them the terms of references.

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And before the anthropologist can go off on the merry way the lawyer prepares a 15 page terms of reference on the dos and don'ts in putting together the puzzle. Now, despite all these challenges we know that this story, like all fairy tales, has a happy ending. And the anthropologist brings back a completed puzzle no less. Now, the puzzle itself we could not say is perfect. Because none of us know what the puzzle was supposed to be in the first instance. The puzzle box was destroyed long ago and sometimes when you look at the completed puzzle closely you will see that some of the puzzles may have snuck in from a different puzzle altogether. And some of the edges do look rather frayed which makes it difficult to tell whether they belong or not.

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But fortunately the rest of the pieces, by majority, allow them to remain. In the end though the anthropologist presents us with a puzzle that we're happy to take to the ultimate decision-maker and the person most experienced in imposing order, the judge. Now, having repeated this process over more than two decades it has become
5 obvious to the lawyer and the anthropologist that they are very different. Initially it was presumed that there existed an intramural dispute between the two, but in order to settle the dispute to finality, well, at least until the PBC is established, the skills of the representative body were enlisted. And they quickly set about applying their best lawyers to the task who, as we know, prepared up the terms of reference and research
10 was conducted.

Now, comparisons of the lawyers and the anthropologists brought some notable differences to light. Perhaps the most enduring was the understanding of how they classified themselves. Neither could agree – neither of the two could agree—
15 whether they were a society. In fact, the two couldn't agree on what the term actually meant. Here's some quotes from you, Kingsley. Now, the lawyers initially were happy with the terms 'clan' or 'group' or 'community', and as we know Justice Brennan repeated those in Mabo. But fortunately, thanks to our friends, the anthropologists, our understanding developed to the well-known decision of Yorta
20 Yorta where we lawyers have come to refine our thinking of the terms of a society as a body of persons united in and by its acknowledgement and observance of a body of laws and customs.

See, what we lawyers like most is order. So much so that the greatest TV show of all
25 time is named *Law and Order*. For u,s society has to be classified, categorised, placed in a neat bundle, so that we know exactly which A4 binder on which shelf it must go in. To us, society is a thing in the same way that native title itself is a thing that fits neatly within its allocated shelf on the space allocated under all things common law. If native title didn't fit neatly within its allocated space on the shelf
30 under all things common law, as Justice Brennan said, this would fracture the skeleton which gives our land law its shape and consistency.

To us as humble lawyers, without order there is chaos. And chaos is exactly what the anthropologist revels in. Think back to the puzzle. To the anthropologist, as Dr
35 Palmer says, in law 'society' is indeed a thing. He points out earlier in the article, with some disgust I might add, that thinking of a society in the same way we think of a frog or a jellyfish as a 'thing' is more embarrassing than useful. I might point out I'm yet to see that quote make it into a judgment. As Dr Palmer says, a society in anthropology is made up of a set of relationships changing through time, defying
40 rectification and certainty. Chaos - the anthropologist revels in it.

So we might say there's some difference there. Moving on to the next comparison: language. Dr Palmer rightly proclaimed legal meanings and those of social science show no automatic correlation. I should end my argument there. But I do want to
45 point out, as has been mentioned before, some of the things that were said in Jango. And I will leave the last word to Professor Sutton, which [inaudible]. Yulara was the anthropologist's subtle introduction to common legal words and their meanings. So common, in fact, that my wife, who is a lawyer, and I were introducing our two year

old yesterday to the importance of undifferentiated statements of facts. We were – let me finish – expressing opinion and advocacy of a claimant’s case when she was selecting what cereal she wanted for breakfast.

5 First, yes, we are told that rice bubbles are made of rice but we don’t have any evidence of that. Secondly we know that you say that they are delicious but that is only your opinion, and thirdly, saying that they are the best food in the world is going a step too far. My daughter is also familiar with the rules of hearsay and how the exceptions apply to any stories told by her great aunts about Mount Isa and in particular Lawn Hill [inaudible] for some of you. And whilst for lawyers the decision in Jango only sought to clarify some well-known matters, the impact on anthropologists might be best summed up from the following comments by Professor Sutton: “Legal culture is nothing like as empiricist in approach as it is often assumed or pretended to be. It is ironically almost as phenomenological in temperament as Western Desert thought. It can find itself in anxious competition with the much younger intellectual tradition of scientific method.”

Understandably, the late Ronald Berndt writing on the Gove Land Rights case said it made him realise that the expert evidence had been a matter of the raw and the cooked. Anthropologists were the raw material there to be cooked by their lawyers. Yulara was a case in which law and anthropology were somehow made to join each other in competition. The predilections of law, not social science method, won. As Dr Morton noted with respect to Yulara, the Yulara decisions illustrated that most anthropologists would agree that Sackville J does not understand anthropology and probably sees no requirement to understand it, an odd and unreasonable situation for someone who sometimes has to listen to expert evidence from anthropologists.

But one reflected and sometimes cautious instructions to anthropologists to not educate the judge. Now, I might leave the final remarks for the anthropologists but I would say certainly there seems to be some differentiation on how lawyers and anthropologists use communication. Now, in order to settle this dispute finally, and we did put our best attempts in to mediate the issue, but in order to set it finally the matter was sent before Justice Jagot. Now, what convinced her Honour in determining the issue was not the quote from Bauman about the practices of lawyers when Bauman said “Lawyers on both sides are out to win, to undermine the credibility of witnesses and to relentlessly pursue their cases with sometimes damaging consequences for both anthropologists and claimants.”

Moreover the legal system is built, as McCaul describes, on a system in which each party interprets facts to construct an account that benefits its position and damages that of the other party. It is interesting to think of what our friends the anthropologists think of us. Or, taking into consideration the comments of Glaskin who said, “Many anthropologists, Australian anthropologists have reservations about native title: about the native title legislation and its judicial interpretation, about various aspects of native title claim processes or about the outcomes that Indigenous Australians really gain once the whole protracted process of resolving a claim is over.”

See, it has become a common myth among anthropologists that the only people who gain from native title processes are the lawyers. But as we know, even though enough people might think believe in something it doesn't mean it can be established beyond a reasonable doubt. Now, having assessed the evidence ultimately what
5 convinced Justice Jagot about the difference between the two groups was that the lawyers always stood for the most grandest of ceremonies, dressed in flowing robes and adorned with head pieces centuries old. The leaders would wear the grandest of red ceremonial dress with head pieces that ran past their shoulders.

10 Whereas the anthropologists have got no public ceremonies at all. And it was often debated among the lawyers whether the anthropologists had suffered a loss of their traditional law and customs that had simply been too great for them to establish that they possessed any rights and interest under traditional law and customs. Now, despite the protests of the anthropologists that they were part of the same society, her
15 Honour could not be satisfied that the three-stage test in Waanyi had been met. Now, as I sit down to ponder this question I begin to reflect on my own expertise in putting together a puzzle. I do find it rather ironic that having never put together a puzzle before my mind like all of us who practice in this jurisdiction is filled with the dos and don'ts of such a task.

20 Now, the primary reason for my knowledge in how best to interrogate such a task has come from my learnings of native title. Through the eyes of the many anthropologists who I produce reports in claims that I have worked on and in cases which I have read. Now, ultimately we must balance the legal rules with the science.
25 But it is through the science that the evidence has to be interpreted. Ultimately, in doing so, we come to such conclusions by looking through the lens of our anthropologist and understanding in much more detail and rigour than we would if we did not have their support. I have come to understand that sometimes subtle distinctions that the untrained would not recognise are often more important than the
30 more glaring ones.

I have also learnt much about the history of the country and of those earlier ethnographers who went about cataloguing some of my own ancestors. And for that knowledge I'm indebted and grateful as we all are, I think, for the important
35 contributions anthropologists have made to the knowledge that we all hold. And importantly, to the critical decisions that the judges must make. I will leave you with that. Thank you.

DR McGRATH: Thank you very much, Josh. Look, it never ceases to amaze me as
40 an anthropologist how, for a profession who deliberately takes itself, we deliberately take ourselves, to the margins of society, the extent to which we continually act surprised when we feel a little bit misunderstood professionally. And so, thank you for those fabulous papers. I certainly feel perhaps that – I feel a little less marginal and certainly a lot more appreciated, so thanks very much. Shall we
45 take – we have got a couple of minutes for questions if there were any comments or questions from the floor? Well, how about we go to afternoon tea. If you would like to reconvene just

before 3.30 and we will have our afternoon session and if we have time this afternoon we will take some discussion from the floor then. Thank you.

5 **ADJOURNED**

RESUMED

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MS WEBB: It's my great, great pleasure to introduce the next session which is anthropologists on the laws of the land and the culture of the law. I'm not going to use up your time by speaking so I will invite Professor David Trigger to come and talk with you.

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PROF TRIGGER: Thanks very much. Thanks for the invite to come. I notice that a few of us speaking now have probably got more slides than the earlier speakers. That's right. I'm, sort of, thinking that way. But I'm going to leave you to read some of the text there rather than, of course, read through it. The first couple of points I thought I would make is that anthropologists have had choices over the last 20 25 years about whether to engage with this kind of work and before that, of course, we might say over the last 40 years with the land claims era. And as has been indicated earlier the second dot point there is, sort of, on the money so some of our colleagues choose to remain within the academy. Others such as those of us here 25 today have very much engaged.

And the bottom dot point is all about that difference between the, sort of, flexibility in academic writing, you might say, compared to the forensic inquiry in the legal process. I wanted to make some comments about, as you would expect, from the 30 perspective of the discipline of anthropology. Apart from the law's approach to assessing such a complex issue as changes and continuities in traditional law and custom, it has been the public and also the internal politics of the discipline of anthropology that have influenced whether practitioners have chosen to get involved.

35 And I want to show an interesting quotation from the late Neville Bonner and I won't read through it there but you can look at it. This was a seminar that Mr Bonner gave at the University of Queensland in 1995, not that long after the passing of the *Native Title Act*. And, of course, Neville Bonner was Australia's first Aboriginal 40 parliamentarian. He was addressing students and staff in anthropology and archaeology. Part of the context of his comments at the time, where he wanted to say, that anthropology and archaeology was of great importance in native title. The context was though that there was a particular anthropologist who he referred to at the time who had found from his research that a rival group's claim to rights in country in south-east Queensland where Mr Bonner also claimed rights, of course, 45 that that – anthropologists had concluded that another group had rights there.

So this illustrates, of course, from the earliest periods the difficult position in which investigators and researchers can find themselves. While not advocates in the ways of lawyers, anthropologists can find it difficult to avoid being drawn in to disputation among Indigenous parties. And anecdotally we do know that some people choose
5 not to work in the area for that reason. Mr Bonner's presentation further illustrates the vigorous politics of representation affecting the standing of anthropology and archaeology as social sciences in academic debate and public settings where commentators will find reasons why our research is highly valued but also at times speak of it being unwelcome.

10

Mr Bonner began in 1995 with only a sort of half joking reportage of a belief that some of us who were around at the time heard various versions of, which was, of course, "that any Aborigine had as many anthropologists as a dog had fleas", though the broader tenor of his seminar was clearly about the great potential for the
15 disciplines to address the interests of Indigenous people. He, at the time, was a member of the Queensland Land Tribunal which heard claims under the Queensland Aboriginal Land Act, which interestingly gets lost, though quite a number of claims were heard parallel to, though somewhat different from the Northern Territory jurisdiction of land claims. And in his speech he, Mr Bonner, referred to a particular
20 claim, the Cape Melville claim, on which he had been one of the Members up on the Cape. And on being most impressed with the work of the anthropologist concerned, that being our colleague Professor Sutton at the time, who drew on his academic work to form the opinions required by the legislation.

25

But together with the recognition of anthropology's corpus of academic and applied research, I did want to point to the obvious and that is that there can be a parallel suspicion or ambivalence about the discipline in some quarters, and of course, together in the native title context, with great scepticism about the legal process. It is instructive, for example, that despite the huge contribution to the work of the two big
30 Northern Territory land councils over 40 years now, it is surprising and disappointing that it is not possible to study anthropology or archaeology at Charles Darwin University in the Top End—a location where we would think that, among others, Aboriginal students, in particular, should have opportunities to become professionals in the native title arena.

35

I haven't investigated directly but I suspect the university which has some courses on what is termed "Indigenous knowledges", though I have never understood why the plural makes any sense any more so than for any other kind of knowledge, but that the university is playing mistakenly to the politics of linking dismissal of
40 anthropology to an embracing of decolonisation. And this is part of the politicised context in which students choose whether to embrace the discipline and university colleagues can struggle to defend its intellectual and political integrity.

45

Indeed, I will mention that an example from my own direct experience was at UWA here in Perth in 2005 when we established the first training course for native title anthropologists. The establishment of the course was opposed by a senior person in Indigenous Studies at the university, a colleague there, partly because of a general

dislike of the discipline and also that the course was to involve some staff and students who did not identify with any Indigenous ancestry or identity. So, I am trying to show here, what many know in the room already, that working as a native title anthropologist or lawyer is inevitably political. And those of us who do so have
5 to make judgments about where we stand. My judgment for 25 years has been that this is a highly productive area of work in moral and political terms as well as in regard to practical outcomes.

10 In this context, most here today have witnessed an extraordinary engagement between a social science discipline with underlying aspirations to address historical injustice, and a legal profession charged with the responsibilities of simultaneously applying legislation professionally according to the intention of Parliament. I should add that, in my view, both anthropology and the law also appropriately have
15 responsibilities to the interests of the broader post-settler Australian society, with all of its diverse groups of long-time settler descendants, migrants, very recent refugees and so on. And I say that because I think that broader responsibility to the wider society in the native title context can be lost in the wash of advocacy politics of Indigenism that both anthropologists and lawyers work with and work through.

20 Briefly, in this challenging setting, what is it then that the law requires, commonly producing, I think, among anthropologists both intellectual stimulation and frustration? So a few obvious points: to work with specific wording of the legislation to best fit complex social processes into terms like 'law' and 'custom' and
25 'tradition'; to document creative responses to colonial history, forms of creativity on the part of Indigenous people that we as social scientists expect to find in all human groups. Yet the law requires us to be cautious as well as scholarly in explaining how and why the concept of creativity can be commensurate with adapted inherited rights in country. If an adapted belief or practice exhibits creativity, is it necessarily no
30 longer derived from what the law and custom once was? Words we find in the context of working in native title almost have a life of their own. So, a warning to anthropologists who use the term 'creativity', be prepared to discuss it [...].

And to note elements of frustration for anthropology, I think. We know that anthropology is deeply aware of risks of reifying tradition whereby elements of
35 culture, such as ceremony participation or skin systems or knowledge of kinship terms, become required as proof of inherited rights. We are aware of how the customary bases for decisions among claimants can be affected greatly by practical and financial interests, as much as, as well as, customary concerns, and yet how such interests can't realistically be expected to operate in some kind of bubble, completely
40 separate from Aboriginal people articulating their material and symbolic interests in the contemporary society.

I do have to carry on quickly. So, with the spirit of celebrating 25 years, a concise list. What have I learned from engagement with the law? Well, with native title law
45 focusses our attention on practical outcomes, symbolic outcomes. And this is a stimulating complement, I think, to academic anthropology's aims in theorising

culture and its transformations. I have learned that social science, to be valued outside academic discourse, needs to support interpretations with sound data that are clearly depicted and explained. That professionalism in communication in the public domain brings standing to a discipline and that instant commentary, so prevalent
5 nowadays on social media, has its disadvantages in this respect. And that despite its slow pace, maddening formalities, repetition, waste of paper, there can be great satisfaction in achieving closure through systematic examination and forensic inspection of the issues dealt with in Australian native title.

10 And here we come to the good part; what have lawyers learned from me? Or, more accurately, of course, from anthropology in broad terms. So, as has been hinted at, discussed already: that what the Act terms law and custom is not always consciously known and capable of articulation; that oral tradition is not always discoverable in
15 the form of listed rules and norms; that there are multiple ways of living with tradition in Aboriginal Australia just as elsewhere across the world; and that life circumstances go on, that they drive choices about how much culture to reproduce over generations. Anthropology tells us that this is not a given. All human groups make decisions.

20 But to return to Mr Bonner's plea, from his perspective in '95, that we need to proceed with caution in arriving at conclusions about the washing away of habitual world views by the tide of history. And that collective and individual understandings of traditional connections to land may well vary across a claim group and the loudest voices will not be the only ones to which we need to listen. That taking instructions
25 is not what anthropologists do in the sense that lawyers take instructions. Yes, instructions to carry out broad investigation of particular issues but not to be at a meeting, see a resolution through a show of hands, and take that as a final instruction to a conclusion about membership of a group, or the nature of law and custom.

30 And, given the time pressure, I will need to go finally to my point, that I acknowledge that all of this learning from anthropology makes for a messy and difficult business of resolving ways forward and firm conclusions in native title. But I think it is indeed about that messiness and difficulty in the reproduction over time of customary rights in land that I think lawyers I have worked with, or been cross-
35 examined by, or both, have learned from me. Thank you very much.

MS WEBB: Thank you very much, Professor Trigger. I think you mentioned you had some other slides which - - -

40 PROF TRIGGER: photos.

MS WEBB: Good, photos. There will be a publication of this event so look forward to seeing those in that publication. Just while Pam is setting this one up could I invite Professor Francesca Merlan to speak with you. Thank you very much.
45

PROF MERLAN: Good afternoon. Thanks – pardon. Okay. Thanks for this invitation to be here. It may be, as some have suggested, that eventually

anthropologists will celebrate the law but I have to tell you that very quietly and to myself I am celebrating the law this afternoon. You may have seen on your iPhones that the Ninth Circuit Court of Appeals in the United States has upheld the lower court decision. And so as our – one of our real Presidents said, Abraham Lincoln –
5 well, as he said, “All may yet be well.”

So, now 15 minutes, one point. That’s really all you can do. And my point is about continuity. And specifically continuity with respect to law and custom. I think anthropologists and lawyers necessarily share an interest in questions of continuity of
10 social processes. As is so often the case, though, and as various people have hinted, the two are predisposed by discipline and practice to see some of the issues that native title presents from different perspectives.

So, in the spirit of trying to advance what law and anthropology can usefully say to each other, what I have done in this little paper, which you will eventually see in full, is set out what I see to be some of the issues of continuity and change arising from the *Native Title Act*. I have cited some of the judicial statements on continuity and I consider a spectrum of relevant cases from my point of view, as an anthropologist, based on my experience of both land claims and native title. Now, in this 15 minutes
15 today, I can only do the latter thing. That is, refer to three sort of comparative cases from the area that I know best.

But I want to very briefly preface that by saying that it seems to me in having looked at what native title has thrown up by way of comment on continuity, and looking at
25 some of the judicial findings and statements on continuity, that there has been a tendency to distinguish or to dichotomise what we can call ‘content’ and ‘context’, and to treat them as two different things. So let me – I will not talk about any of these but rather come immediately to this slide which I will invite you to read. So and courtesy of Rob Blowes, who found this or pointed me to this quote. So, here is an assertion:
30

*So long as the content of the laws and customs has its origins in the pre-sovereignty content of laws and customs, the continuous acknowledgement and the observance of them represents the acknowledgement and observance of
35 traditional laws and customs.*

And then there’s a statement down next that:

*It’s not significant that rights in interests possessed under such laws and customs might be exercised in circumstances or in a manner far removed from
40 the situation at sovereignty. For example, it is not significant that with the advent of post-sovereignty technology people may take and utilise different resources by different means and for different purposes than opportunity permitted at sovereignty.*
45

So, if I could interpret that latter statement a little bit in terms of what I said about a distinction between content and context, it seems to me that the discussion of what is

taken, the resources, is being treated here as what I would call content. And how it is taken, the purposes for what it is taken, is being treated as context. And these two things are being distinguished or dichotomised.

5 Now, I think that anthropological views would tend to differ from that
dichotomisation in some respects. I think anthropologists are generally wedded to a
sense of historicity. Here comes the idea of confusion or chaos that we heard talked
about. But anthropologists are wedded to a sense of historicity that is to a view that
10 changes and given aspects of social systems typically also have ramifications in
diverse others. And that it is difficult to bound off aspects of social practices as
distinctly content on the one hand and context on the other.

We all live in continual change. But an important difference for Indigenous people is
15 living in circumstances of inequality between them and outsiders, which shapes
processes of change in certain ways. Social practices, anthropologists would tend to
argue, are redefined and reconfigured as social circumstances change and in close
interrelation with changing circumstances. The question therefore arises whether it
is possible to so neatly distinguish between content of laws and customs and context.

20 So, let me proceed to my three short comparative parts or cases across land claims
and native title that I have had a role in, by which I intend to illustrate how content
and context intertwine; that a very complex issue of historicity is here at issue; and
that this has to be factored in when considering an interpretation of law and custom.
Okay. So, briefly, throughout the 1980's, as I will just show you a location map, I
25 was involved in the Katherine Jawoyn land claim. Heard over areas of land to the
north of Katherine, around to a bit to the north of where it says Barunga there. The
claim was especially contentious because of the Katherine Gorge, about which non-
Indigenous people in the town held the view, or grave fears that Indigenous owners
would lock others out and destroy its tourist potential. The claim book observed that
30 the claimants had recognised small patrilineal land-linked groupings of the kind we
call clans and that this was common to an entire region. But that this system was no
longer very vital or much used over much of the claim area or by most of the
claimants. The currently more salient notion that could correspond to the local
descent group existed at a much higher level; that of a broad socio-territorial or land
35 link group called Jawoyn. That this name implied an Indigenous understanding of
linkage between a particular large scale territory; the Jawoyn language inherent in
that territory; and the people held to be attached to that broad territory; and to bear
this Jawoyn socio-territorial identity that implicates land, language and people.

40 That approach to the local descent group was not problem-free, but it was more
current among most claimants than was understanding of clans and clan territory.
And it did obviate certain difficulties of positing more specific attachment of clans to
parts of the claim area which would have been prohibitive in many parts of it.

45 Now, I want to point to the fact that these people understood attachment to land at
more than one level. One much broader, this Jawoyn one, and more general than the

other, and that the clan level had been more fully maintained here and elsewhere in Arnhem Land and so on, when and where people live in direct and intimate contact with country. But was becoming evanescent the longer they lived in settlements and towns away from outlying areas. Once they were resettled, the higher level of
5 differentiation between themselves and Indigenous others was what became more generally relevant. Elsewhere in the broader region where I have worked, even where people maintain very fine-grained knowledge of country, as along parts of the Roper River, they also think in terms of a similarly broad socio-territorial identity. So that this broad level exists where fine-grained relations also exist.

10 Granted that the evanescence of clans is the product of gradual separation of people from country and of dramatic change in form of life, but it is age-linked. Older people in general have some better knowledge of clans than others; than younger ones. And obviously those who have walked across the country know that level of
15 relationship better than others who have not. But anyway this difference between the broader level and the finer grained level is also very situational, as a comparative but linked circumstance illustrates.

20 So some years later a claim was lodged over parts of what is now Kakadu Stage 3. And there's Kakadu outlined in grey. It became possible for some of the same people who had been involved in the Katherine claim to make a claim to this more northerly area and they did so on the basis of clan level attachments to country in the name of three different, but closely inter-married, clan groupings. Mind you, the sense of attachment here was also highly differentiated by age and life experience.
25 Only a subset of older people of these groups knew this country in any detail. And even those of middle age had never been to many of the sites attributed to their clans.

This general area however, well away from towns, had been the locale of a small rather hard-scrabble European-run family cattle station which became and remained
30 the home base of a few Jawoyn and other families of the region into the 1960's. It had the character of a sanctuary, I would say, and it was also a place where there had been performed one of the most renowned and dangerous ceremonies of the entire region, for which reason the area was regarded as one of special sanctity. In no other part of Jawoyn country was clan level attachment as salient as it was in this area.

35 So this brings us to a third context, that of Katherine town itself, over which there is now a native title process, so I will not say much about it, except what I have otherwise written in other contexts not working on native title. But I would just say that especially of the town of Katherine, which you see there – especially during and
40 since the War, the town has become the home of numerous Aboriginal people who actually originated from other parts of the region, including some of the Jawoyn population. Given their numbers, some Jawoyn have come to see the town area as part of their territory. Yet within the town there are a few discernible families whose social origins and history, traceable in detail, and I have done so over a number of
45 decades, mark them out as people who have long been of the town area and who, in significant ways, have a different history from the incomers.

Now, what's among the important things here is that they are inter-married with some of the more recent incomers into town, creating a certain complexity. Most of these people do not have names for sub-areas of country. For the most part, Indigenous site names have dropped out of use with locales having taken on other
5 dimensions of identity as farms or peri-urban farms, locations on the river that people frequent and so forth. Also, rather than using a firmly established tribal name for this particular grouping of people, there is a great deal of diversity in how they identify themselves. Yet, as I say, neither their marriage to other people, nor their
10 accommodation in various ways to many aspects of European usage of places, erases their discernible distinctiveness.

So, to my mind, all of these situations evince dimensions of continuity with the past in different ways and could be seen as permutations of law and custom relating to land. But one might also, with justification, argue that all reveal elements of change
15 that have implications for what we might consider law and custom. In the first instance, continuity resides in the continuing sense of association with a broad stretch of country and socio-territorial identity, some associated mythological notions of ancestral creation of the Katherine River and so on. But one may also reasonably see the evanescence of clan level attachment and the salience of broader identity or its
20 prominence now as the uneven, emergent product of dissociation from country.

In the second case, particular social and historical circumstances produced a longer term attachment remaining at the specific clan level to an area that continued into the land claim's era and from now on will likely, if at all, be reproduced in other ways in
25 relation to the national park, in relation to park royalties, and in a number of other ways.

In the third town case there is strong substantive continuity of people remaining in place thinking of it as their place in a way that is demonstrably continuous with
30 family and personal histories, and not characteristic of incoming or recently arrived others. But the character of their relationship to places is considerably transformed. So, in conclusion, what I would like to say across these three comparators is that continuity is the other face of change.

Anthropologists are attuned to this pair. But in most contexts they don't have to
35 translate what they see into native title language. They are usually observing these things and commenting on them to make other sorts of arguments. Their attention is often drawn to what is processual and usually incomplete. That is part of how they know there is something in process; something happening—that there are
40 unevennesses of the kind that I have talked about, where some people know something, other people don't, and so on.

In the case of Indigenous people who live in a world of continual change and unequal relations, in how far can change be seen, in its guise as continuity, a transformation
45 of traditional law and custom? I see one contribution anthropologists are particularly well equipped to make, as people who are both on the ground, where the people are, as Keith Hart would say (another anthropologist), and are also interested in

comparison and critical interpretation. I see one contribution anthropologists are well equipped to make as spelling out aspects of continuity and change and suggesting what are the issues of translation to native title language. One, however, has to ask how doable this is in what is often a highly contested and politicised process. Thank you.

MS WEBB: Dr Lee Sackett. Thank you.

DR SACKETT: Thank you, Raelene. And thank you all for attending today and thank you for the invitation to speak. I'm going to be talking, somewhat as Francesca did, about anthropology, the court and change. Particularly change or adaptation and traditional law and custom. I begin with two quotations, one from Justice Lee, the trial Judge in Miriuwung-Gajerrong, and another from an anthropologist Katie Glaskin. Justice Lee indicated – and this is a view that has been reiterated by a number of judges over the years and was picked up today by Justice Barker in his opening address. Justice Lee said:

The anthropological evidence provided a framework for understanding the primary evidence in respect to the acknowledgement and observance of traditional law, custom and practice.

Dr Glaskin noted that:

We anthropologists working in the native title arena may be working within legal frameworks but we need to retain our anthropological vision to continue to present our view of the complexity of the social field; the anthropological perspective.

In what follows, I want to highlight how anthropologists have at times used their traditional – pardon me – their anthropological vision to assist the court in relation to change and adaptation and traditional law and custom. And I can only sketch a couple here and they're sort of obvious but they flag the sort of thing that I will be exploring further in the paper.

Change has been a factor, at least, recognised as a distant prospect from the outset in native title. In Mabo, Justice Toohey, for instance, held that – and I quote:

There is no question that Indigenous society can and will change on contact with European culture. But modification of traditional society in itself does not mean traditional title no longer exists. An Indigenous society cannot, as it were, surrender its rights by modifying its ways of life.

Nods in the direction of change were both continued and limited in the appeals against the trial Judge's findings in Yorta Yorta. And everybody knows the trial Judge's findings about the tide of history washing away real observance and acknowledgement of law and custom. Although an appeal to the Full Bench of the Federal Court was dismissed, members of that court acknowledged – and I quote:

That traditional laws and customs that form the foundation for native title may adapt and change. A frozen in time approach to determination of native title would be incorrect.

5 An appeal to the High Court was also dismissed but not without the members of that court making further comments on the issue of change. It was allowed that where there is clear evidence of change, as change has occurred – and I quote:

10 *Difficult questions of fact and degree may emerge, not only in assessing what if any significance should be attached to the fact of change or adaptation but also in deciding what has changed or adapted. It is not possible to offer a single bright line test for deciding what inferences may be drawn or when they may be drawn, any more than it is possible to offer such a test for deciding what changes or adaptations are significant. But the key question is to whether law and custom can still be seen to be traditional law and custom.*

Now, shortly after the decisions of Mabo and Yorta Yorta, some judges hearing those earlier claims seemed to readily accept the idea of change, or at least certain kinds of change, will at times – at the same time putting provisos on them. For example, in
20 De Rose, Justice O’Loughlin found that – and I quote:

Hunting in a certain area will not cease to be traditional because the identity of the game has changed or because weapons have changed.

25 Unquote. And he also indicated he had no problems with people going to the shop and buying food there. At the same time, though, he indicated:

30 *In every case it will be necessary to make a detailed study of all relevant facts. There is always the possibility that usage of supermarket might be one of several indica which, when added together, might lead to a conclusion that such developments could be part of a number of instances of modernisation that would collectively indicate a break with traditional laws and customs.*

35 It was the discussions about change in Yorta Yorta and Mabo plus the earlier judgments by some trial judges in relation to change that prodded Professor Simon Young to express despair in respect to the legal treatment of change in law and custom and native title. As he had it, when questions of Indigenous change came before the High Court the law ultimately proved unresponsive. In their early joint judgment in Yorta Yorta, their Honours asked with a tone of caution, and perhaps
40 resignation:

How, if at all, is account to be taken of the inescapable fact that since and as a result of European settlement Indigenous societies have seen very great change?

45 Young picked up on this and he says it appeared to him that the High Court was learning conspicuously towards the short response, “Not at all”. Young concluded

by observing that in the end their Honours contemplated little accommodation of change and certainly provided no clear test for such accommodation. Not surprisingly, the difficulties, as he said, persisted in more recent lower court cases.

5 Now my response to Young's glum reaction to the situation is to suggest that
permissible change or a permissible change yardstick is the – or the absence of a
permissible change yardstick is a positive element; not a negative one. It opens
things up rather than hemming them in. And I think proof of this is to be seen in a
10 number of instances wherein the trial Judges have more recently in other – in more
recent cases decidedly confronted the difficulties that Young worried about.

Evidence from anthropologists as to the extent and the significance of change
sometimes countered by other anthropologists, often robustly tested in cross-
15 examination, has proven helpful in this. As claim lawyer Nick Duff observes,
descent affiliation rules are one of the areas where change in the content of law and
custom have repeatedly come into issue. An early example of this was the Rubibi
(No 1) claim. And that was a claim heard in 2000 by Justice Merkel over a small
area of land which took in Kunin, which is a ceremonial ground. It quickly became
20 evident that there were sharply divergent views regarding the laws and customs by
which claimants and their ancestors might claim rights and interest in the area. And,
as it happens, there was very little ethnographic evidence about the pre-sovereignty
rights and interests in land – laws and customs regarding rights and interests in land.

Patrick Sullivan, who prepared reports for the applicant, had it that – and I quote:
25

*The current Yawuru community is constituted primarily of Yawuru persons who
can establish ambilineal descent, that is descent through either their mother or
their father, from a Yawuru person and who follow Yawuru tradition and
30 culture.*

Dr Sullivan further provided evidence and opinion to the effect that – and I quote:
35

*The traditional social structure of the Yawuru community which now uses
Kunin as a law ground was not substantially different to that of the traditional
Yawuru community that occupied the area at 1829; that is, sovereignty.*

The Aboriginal people of the Broome area, he went on to say, have an unbroken
connection with the land. They constitute an organised landholding society and they
continue to occupy the land according to traditional laws and custom. Dr Erich
40 Kolig was asked to prepare reports for the State of Western Australia and he claimed
that the current community model, based on ambilineal descent was not the same as
the traditional model, which he saw as based on patrilineal descent. And he insisted
that the continuity of the patri-clan model of traditional Aboriginal society was a
precondition to recognition of the Yawuru community across time.
45

More than this, he contended that the community he defined that existed in 1829 had broken down to such an extent there was no longer an identifiable community in anthropological terms. He accepted that the identification of the same traditional community from time to time must allow for what he called reasonable change. But
5 he claimed that the broad criteria proffered by Dr Sullivan went beyond what might be accepted as reasonable change. In his judgment, Justice Merkel said that in his view the question was not the one that Kolig was asking about reasonable change or posing about reasonable change but whether the evidence establishes that the present
10 community is the community that has substantially maintained its traditional connection with the area according to the traditional laws and customs. And in the end he found – this again is Justice Merkel:

*Even if there was originally a patrilineal model, evolution to an ambilineal model was part of a process of the community's evolution to its present
15 traditional form, rather than the creation of a new community.*

In sum, the Judge on the basis of the anthropological evidence and of the other evidence as well, obviously, accepted that change was apparent but so too was continuity. It might be that any given claimant could claim through either parent or
20 any grandparent. However, the descent principle remained prominent. It was descent from an ancestor.

Now in the Banjima claim, this is a claim or was a claim to lands of the Hamersley Range area and it was heard before Justice Barker across the years 2008 to 2011,
25 there was evidence regarding a shift from reckoning descent along patrilineal to parental affiliation. More pertinently here though Justice Barker heard evidence from Dr Kingsley Palmer and Mr Michael Robinson who prepared reports for the – Kingsley prepared a report for the applicant and Michael Robinson prepared a report for the State of Western Australia in relation to changes in the nature of the lands
30 held by claimants and their ancestors. Not the way in which they did it but the nature of the claim, the land that was being claimed. As Justice Barker noted:

*Dr Palmer found that while families today are usually associated with areas of country, one called 'Top End' and the other 'Bottom End', such areas are
35 probably now larger and less clearly defined than was the case when traditional groups exploited estates as members of resident groups.*

Specifically, Dr Palmer had it that prior to sovereignty it was most likely the case that people of the area had rights to countries beyond their own. So they had rights
40 on their countries and then rights beyond those limited countries, into their neighbouring countries. He also pointed out that the claimants themselves indicated that they had rights to areas which, in his view, were larger than what would have been the case of what would have been traditional estate areas. Dr Palmer considered such arrangements as based on a customary system whereby rights to
45 multiple estates were permissible, as he saw it.

Now, Justice Barker reported that Dr Palmer came at the issue from a different perspective as well and observed that residents groups no longer feature in the economic system. Perhaps, Dr Palmer surmised, as a result of the cessation of intensive exploitation of the countryside members of country groups became less
5 focused on specific estates, resulting in what he called coalesce estates. It was Dr Palmer's view, however, that such amalgamations of country and rights were based on a customary system. In other words, Dr Palmer held that today's coalesced areas had their roots in laws and customs regarding neighbours accessing and exploiting, enjoying their one another's country.

10 Although Mr Robinson appears not to have disagreed with the essence of Dr Palmer's position, the State of Western Australia maintained that today's laws and customs constituted a new regime. In the end, however, Justice Barker accepted the analysis and assessment of Dr Palmer, that there was a community or society of
15 Banjima people at sovereignty comprising of sub groups and that there is a community or society of Banjima people today, as clearly disclosed in the evidence. Albeit there are two subgroups, the Top End Banjima and the Bottom End Banjima that comprise that society.

20 So there – that while there was a development, a change, to the likely original system, the system that we see today was based on that former system. The courts recognition of various changes as being perfectly permissible changes and the part played by evidence, analysis and opinion from anthropologists in these two cases are by no means the only cases you can find. There are a number of other claims that
25 have been successfully litigated or gone to consent determination where change is recognised and accepted. For example, in the Neowarra claim the Judge recognised and accepted that people today, according to law and custom, paint Wandjina images differently than they had in the past and hence relate to country somewhat differently than they did in the past.

30 To bring everything to a close, what is significant in these and other cases is that they demonstrate that over the years anthropologists have been involved in preparing reports and giving evidence that have been alert to change and continuity. And have been mindful of how today's laws and customs might be seen as rooted in traditional
35 law and custom. More than this, they have employed anthropological insights to assist the court in relation to what the High Court in Yorta Yorta flagged as the difficult issue of change. Thank you.

40 MS WEBB: Okay. I invite Petronella Vaarzon Morel to speak with you.

MS VAARZON-MOREL: Thank you for inviting me to speak today. And I would like to acknowledge the traditional owners of the land and the elders past and present. Gender is at the heart of every Aboriginal society as a dimension of
45 landholding and understanding of the land. In this presentation I want to reflect on gendered relationships to the land in central Australia and the role of anthropology in explaining and translating their significance in relation to native title law. Although I focus on women, gender does not simply refer to women.

Furthermore, in anthropology the concept of gender does not simply equate to biology but is understood as being culturally constructed. For example, in desert Aboriginal societies being a man means more than belonging to the male sex. It means being initiated and being taught carefully guarded religious knowledge about one's country and other matters. Similarly, as women pass through different phases of the life cycle they gain different levels of female gender specific religious knowledge associated with the land. This knowledge may be gender sensitive or in some regions it may be gender restricted. Gender and age play a fundamental role in structuring social relations and the reproduction of Aboriginal society.

However, the relevance of gender to the native title context is not simply in relation to the existence or not of restricted religious information, although this may well be the area where it becomes a marked issue. Gender is relevant because it is at the heart of how Aboriginal society is constituted and its normative expression. Yet it is often invisible and its role taken for granted by the members of the society. Our role as anthropologists is partly to uncover that which has taken for granted in order to explicate the system of law and custom that gives rise to the rights and interests in the land.

Given that anthropology is concerned with cross-cultural translation, anthropologists are also interested in how peoples taken for granted assumptions about gender roles in their own society may shape and influence their interactions with others, particularly in situations of unequal power such as the courtroom. Surveying the native title terrain, what is notable is how the court has responded to gendered norms of Aboriginal society and is prepared to respect and accommodate within limits culturally sanctioned concerns and practices.

Arguably, anthropological understandings and lessons learnt during the NT land claim era partly informed this process. In what follows, I briefly consider how the representation of Aboriginal women in anthropology and the representation and participation of Aboriginal women in the NT land claim context changed over time. I then consider the relevance of gender to the native title context.

It is well documented that prior to the 1970's the ethnographies of Aboriginal Australia reflected the views of male anthropologists working primarily with Aboriginal men. While anthropologists associated men with a religious domain, they attributed little cultural importance to women's knowledge and practices. During the 1970's and 80's research by female anthropologists working in desert societies, and also people like Professor Merlan here, challenged these notions. Influenced by questions arising from feminism, their research revealed more complex and nuanced models of gender relations in Aboriginal societies than had earlier ethnographies. They showed that significant domains of life were gendered but that while expressed differently the involvement of both men and women in ritual life was necessary for the reproduction of the Dreaming and society. Furthermore, women's religious knowledge was concerned with Dreamings and sites on the land.

During the early land rights era, several female anthropologists became involved in land rights cases in the NT and worked to facilitate Aboriginal women's participation in what had been a male dominated process, as Nic referred to earlier. For example, in the Willowra land claim in 1980 in which I was involved, Walpiri women
5 provided important evidence concerning the identifying of sites, Dreamings and ownership of country. In addition to oral evidence, they performed ceremonies demonstrating their spiritual responsibilities toward land. While land claim hearings are inquiries to which the rules of evidence don't apply, they played an important role in developing anthropological and legal understandings of norms associated with
10 gendered Aboriginal knowledge and how they might be accommodated in the native title context.

Furthermore, they established the practice whereby a team of male and female anthropologists research claims and prepare reports. This isn't always necessary but
15 although there will be crossover in their work, this practice means that anthropologists can take account of gender considerations and local cultural proprietaries if issues of gender specific information arise.

What I want to focus on now is the question of how gender informs anthropological
20 research and the preparation of reports that anthropologists prepare for court. Anthropologists are not required to address the topic of gender in connection reports however, like kinship, gender informs anthropological understandings of the way Aboriginal people structure their social interactions, their normative behaviour, and how they express their connections to land. Gender can be a factor in explaining
25 differences and/or changes in land tenure models. For example, Toussaint, Tonkinson and Trigger have noted the increasing importance of matri-filiation in certain regions as a result of factors such as changed marriage patterns and having a non-Aboriginal father.

Deane Fergie has shown how granny groups in parts of South Australia figure in the constitution of what Sutton refers to as "families of polity". In my research among Pitjantjatjara and Yankunytjatjara people from the Eastern Western Desert I found that gender dichotomies in religious and social practices are radically more
30 pronounced than other parts of the continent. This is also something that other anthropologists have reported. Most anthropologists working in the area have also observed there are multiple pathways through which people can claim rights and interest in land. I found that the number of women who have strong matri-filial associations with a particular area was far higher than that of men. That is, there was
35 a marked tendency for women more than men to follow their mothers. This was particularly the case where a mother or grandmother was closely identified with the Dreaming track that women strongly identified with and for which they held a restricted body of law, for example, Kungka Kutjarra, the Two Women Dreaming.

The land tenure system is more gendered in this region in the sense that there's a
45 dual set of laws at play in relation to affiliation with country. In what follows I will give other examples of how gender is relevant to considerations of claimants' laws and customs and the expression of rights and interests in land. In many regions in

central Australia Aboriginal men and women hold a body of knowledge in common but are also custodians of different spheres of knowledge pertaining to song, myth and ritual with gendered domains.

5 Gender specific knowledge may or may not be gender restricted. However, even when it is not restricted, cultural sensitivities generally surround the way it is imparted and the conditions in which it is imparted. These sensitivities are related to the fact that the gender specific knowledge is regarded as being powerful and potentially dangerous to the opposite sex. And it is the duty of custodians not to
10 disclose it or speak about it in front of the wrong people or those people who aren't qualified to receive it, less they become ill.

One way in which men and women express these sensitivities is through spatial avoidance. For example, correct observance of Walpiri law includes respectful
15 practices of gender segregation, avoidance relationship and ritual exclusions. To take another example, relationships between a mother-in-law and son-in-law necessitate physical avoidance, a practice which Walpiri describe as 'having no room'. Such customary practices have implications for the way evidence can be provided in court situations. The manner in which knowledge of laws and customs is
20 passed from one generation to another is generally inflected by considerations of gender and age. Gendered knowledge and practices are relevant to the expression of men's and women's connection to the land and the stories they can tell. They also relate to how cultural knowledge is possessed and norms and the rules and obligations for caring and protecting the land. For example, while some sites may be
25 open and knowledge shared between men and women, albeit sometimes with inside stories restricted to one sex, others may be the responsibility of men. The regulation of access to sites in order to avoid site damage and harms to unauthorised visitors is regarded as a serious responsibility by claimants and sanctions apply to people who break access laws. It is important to note, however, that each gender holds sites in
30 country on behalf of others in the society, including children.

Gender has been an issue in cross-cultural contexts of native title hearings in which Indigenous witnesses and legal representatives operate from within different cultural
35 frameworks. They may have radically different understandings of what is required to prove laws and customs and rights and interests in land and how this should be done. Mediation of these differences can give rise to considerable tension and dilemmas not only between Aboriginal claimants and the court but also between anthropologists and lawyers. And here I want to touch upon the issue of restricted evidence. As McIntyre and Bagshaw have observed, in most Aboriginal societies,
40 quote, "gender based secrecy is an essential feature of the religious domain" and here they are mostly referring to men. Aboriginal customary law places severe penalties on those who breach secrecy.

45 However, Aboriginal people may want to prove their connections to land through gender restricted performances such as sacred site visits, ceremonies or other modalities. In doing so, they have to weigh up the risk of whether or not to disclose secret information. In cases where there is a male judge, Aboriginal women have to

weigh up if they are prepared to make a special exception for a male judge. Because of the significance of his role, they may be prepared to accommodate the situation and allow him to hear and see certain things they would not allow other men to see. In effect, he becomes a nominal woman. So far as I'm aware to date, the situation
5 has not arisen where Aboriginal men have had to weigh up whether they would be prepared to allow a female judge to hear and be shown male restricted evidence.

In closing, it is perhaps useful to observe that our own anthropological system is gendered. While there are many young female anthropologists, there are not enough
10 senior female anthropologists. Hopefully this situation will change. Thank you.

MS WEBB: While Pam is fixing our display, could I invite Dr Kingsley Palmer to talk with you.

15 DR PALMER: This is reflective, and I hope not too negative, but – that's the only funny line in the whole presentation. This is a matter which has been exercising my thinking and my emotions for a little while. And when I was invited to speak this afternoon, for which I thank you very much, I thought this is something I probably need to just air. So some of these ideas are still in their formative stage. But I'm
20 talking about disputes in native title now and I think almost inevitably into the future. And the subtitle, if you like, of this talk is, "Why I don't like native title disputes."

All of you will be aware that one of the – you know, the problems of disputed native title is that the outcomes become less certain. It's almost impossible to get a consent
25 determination if there is an intra-Indigenous dispute. And that's the disputes I'm talking about; disputes between Indigenous parties. A mediated outcome is also unlikely. It adds to the legion of difficulties in proving the applicant's case while, in my experience, in often furnishing distracting or worse still substantive issues, that can be pursued by the other mainstream that is non-Indigenous respondents. It often
30 – disputes often fuel lateral violence and cause social and economic damage amongst the community members. And, lastly, and I don't want to make too much of this, but it is also true that for the researcher, intra-Indigenous disputes provide for a very uncomfortable field of operations and that can be very difficult for the anthropologists who are working.
35

Now, I suppose the final comment is this—that in just this introductory comment—
is this is unlikely, I think, to go away. My experience is that there are more disputes now than there were when I started working. And I think with authorisation
40 processes and, if you like, some of the post-native title problems, there's likely to be more rather than less of these disputes. My principal argument in – that I'm developing in thinking about these things—is that we are at where we are now because the courts, the National Native Title Tribunal and the expert anthropologists are all, to a greater or a lesser extent, ill-equipped for managing and resolving intra-Indigenous native title disputes. And that doesn't mean to say that it is necessarily
45 their fault. It's the way that the legislation has been developed and the way in which the Act has been amended.

I'm sure everybody here is aware that originally the Native Title Tribunal had a very active role in mediating disputes. And that that role has now more or less ceased, by my understanding. And the mediation issues that are available are delivered through the Federal Court. And as Vance Hughston said earlier on, because the Federal
5 Court, its job is to solve disputes. That's one of its jobs. So I don't want to in any way suggest that the Federal Court is not able to resolve Indigenous disputes. But it does it in a very particular way, obviously because of the way that it is set up. And there have been suggestions that the Federal Court is perhaps becoming more like a land court in this regard. And is that the appropriate way for a Federal Court to be
10 able to be dealing with issues that are actually made as an application for the recognition of native title? To end up having not only to decide that but to decide between disputes between Indigenous competing parties?

Now, that's not the main thing that I want to talk about this afternoon but it – and I'm
15 throwing that out—I was I have to admit being a little reluctant to actually say this before such an esteemed congregation, but I risked it. And you're – some of you are still smiling, so that's just an idea. And they're – I did come across an article by Hiley and Levy in 2005 which actually explores some of these issues. So it is not as though I'm coming up with it all by myself.

20 So that's one of those things which seems to make the process more difficult. But what perhaps I'm more equipped to talk about this afternoon is what I'm calling anthropologists in search of a lost time—since we have had the reference to the same author earlier on this afternoon. And it seems to me that in a dispute what you get,
25 you know, whether it is a family that is seeking to be joined to an application and the applicant says, “No, we don't recognise this family”, or if it is an overlapping claim—that's two obvious examples of a dispute—what you get, in essence, is one Indigenous group says one thing and another Indigenous group says another. And somebody has to decide, based on the evidence, which is correct. So what is the sort
30 of evidence and what does anthropology bring to that as a helpful contribution to the process which is currently in place?

Now, one of the problems – and why I say it is in search of lost time is because those
35 statements, those conflicting statements, are of course based usually on an oral tradition. Typically they're based on statements: “Well, I always knew this to be true.” With the other parties saying exactly the same thing, but in the, on the other side of the coin: “I was always told this, this was something the old people always said.”

40 What does anthropology bring to that problem which is going to be of assistance to the court forensically? Well, the most obvious thing, of course, and perhaps not necessarily the only thing, apart from an understanding of the total unreliability of oral tradition in our understandings, particularly that which extends back several
45 generations and beyond, is what you could call independent collaborating texts, or those which gainsay the proposition. And in that we are invited always to examine the early writings of earlier ethnographers —Tindale's genealogies, which occur in almost every claim where he did that work, and there is a dispute or older

genealogies. What I'm – what I've called in other publications is the sort of foundation ethnography, the information that you can get from the archives, if you like.

5 Now, how good is that? How helpful is that? Well, of course, it depends on the nature of the information, and what I feel in looking back – and I say being a little bit reflective – is that anthropology perhaps has tended to be a little uncritical of some of the information that it has been asked to deal with and not to critically evaluate it. I wonder whether our methodological tool bag, if you like, is equipped with the right
10 sorts of instruments to give solid probing to some of that information.

Now, I have published about this, you know, dealing with early texts and the problems. It seems to me that in situations of dispute where the expert is called upon to interpret early texts, there is, if you like, the final problem, which is that you can
15 never really know in many cases how to interpret or what the ultimate truth of the matter is and there's a danger there that, where you have competing two experts who perhaps are taking different points of view, that you end up in some kind of intellectual cul-de-sac. And I think that it is very important that anthropologists who are operating in this field understand that sometimes there is a limit to what you can
20 get out of the old material and to try and help our legal colleagues to understand those limitations, because often the urgency comes from the lawyers saying, "Well, come on, just do a bit more research, you know. Can't you get a bit more out of that?", and there is clearly limitations to what can be done there.

25 The second point which may seem disconnected, but it is obviously linked to the idea of community membership, is about group acceptance. Now, the law in this area I find very interesting because we have a situation where membership of a group seems, according to the native title law, to be determined by community acceptance, rather than by the facts and because the *Aplin* case [*Aplin on behalf of the Waanyi Peoples v State of Queensland* [2010] FCA 625] actually spells that out. I hadn't
30 realised the strange nature of the nature of the fact, as the Judge found it there, and the issue of community acceptance. Now, I know it may depend a bit on the circumstances and the way the claim group is described, but it seems to me, looking at this issue quite recently, that anthropologists are not very well equipped in the
35 native title field to understand the phenomenon of group acceptance.

There isn't anything really that we can bring to bear immediately on understanding how group acceptance works. I mean, what does it mean? You know, is it like
40 there's 100 people in the room and 60 of them say that they do belong? Is that group acceptance or does it have to be 65 per cent or maybe does it have to be 90 per cent or 100 and, you know, these are clearly not very helpful ways of looking at things. But I – and I think there – I haven't got time this afternoon to go into the details of how perhaps this can be looked at in more detail, but it seems to me that this is one area that the native title process and our legal friends have brought to our attention to
45 think about that we haven't paid very much attention to.

DR PALMER: Good. My final comment is perhaps a little bit more personal, not personal personally, but personal to anthropologists, and it relates to the situation that
50 anthropologists find themselves in that I referred to right at the beginning that this is

an uncomfortable space to be in. It is not the sort of space that anthropologists traditionally inhabited where they were, you know, one of the people advocating for them, helping them, loving them, getting to know them. This is not the native title that I know and, in fact, you can almost be certain that perhaps up to 50 per cent of
5 the people you're working with are not going to like you at all.

So that raises some very important issues in terms of the ethics of our profession and there are, in the AAS— the Australian Anthropological Society—a couple of references in the ethics to places where we might work, where there's conflicts. But
10 I think that for native title anthropologists that needs fleshing out and, if I can just briefly mention, as I finish, that I think some of the principles that, you know, need to be really explored in more detail by us is – in an ethical sense is this. That we – when we're doing the research, when we set out, we need to make sure that everybody involved knows what's going on. I will put this very coarsely, but I think
15 you will understand what I mean; that there has to be a full disclosure about what we are doing, who we represent, what we represent, all those things.

Not easily done, but I think that is a – is the case, that we have to be independent and scholarly. I am aware that some of my colleagues that I work with are just not very
20 independent and some of them are atrociously unscholarly and that's really – well, all professions have it, you know. I mean lawyers – I see I'm running out of time. There must be three points here. They're – I didn't have a colour – a thing, you know, so there's three. There's another one. Okay.

That we have to be realistic to everybody about the limitations of what we can do. You know, we can't just turn out answers to these disputes. We can't. We have to be realistic about what we can do. We have to have a good brief, which brings me back to the relationship with the lawyers. That means we have to be very clear what it is we're being asked to do – absolutely. As anthropologists, you know, I tell
30 younger people: don't ever do anything out there until you know exactly what it is those lawyers really are asking you to do because it is the road to perdition. It really is. Yes. It's very dangerous. And, finally, because keeping within your expertise is important. I mean that's in the practice note and we shouldn't do things which aren't in our expertise and, yet, well, you know, there are plenty of people who do stray
35 very easily into areas that they're not really equipped to talk about.

My view is, as I said, that these disputes aren't going to go away. I think this unfortunately is the brave new world. I would like to see, you know, some changes made so that they could be better accommodated within the court process or the
40 Native – or the Tribunal process, but I think that's perhaps unlikely. So, look, thank you all very much indeed and - - -

MS WEBB QC: Thank you very much, Kingsley, and, as my granddaughter would so eloquently say, thank you very much for putting it out there. Could I ask Professor Peter Sutton to give the final talk in this, what has been a very interesting session. Thank you.

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PROF SUTTON: And thank you, Raelene, and thank you to Barry earlier for his very gracious welcome and, putting on my anthropological hat, I feel I have to explain the title of my paper which is 'From Handmaiden to Midwife'. When anthropologists used to wear hats like this all the time, except only once in a blue moon by a lunatic from Salisbury – from South Australia – they were, indeed, handmaidens to the colonial system or the post-colonial one, and the founding of the Australian Chair of Anthropology, the first one in 1926, was premised on the reasoning that they would be vital – the anthropologists turned out would be vital to the administration of the mandated territories in the Pacific and so on.

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I'm now going to take off my anthropological hat and move on from Handmaiden to Midwife. I think one of the things we have to accept is that we are, in a sense, midwifing the rebirthing of tradition. We are not the sole operators; you know, there are nurses and doctors there as well. But we are rebirthing tradition in conjunction with Aboriginal people as record, as written record, acoustic record, digital record, photographic record, and so, when tradition didn't equal the record, the record was a record of the tradition. That was a clear dichotomy in the old days when most of the people working with anthropologists had limited literacy weren't making their own records much at all. Some did.

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But now, for many people, the record is the tradition, or at least it contains most of it or much of it. So it is no longer what is passed on from word of mouth to younger generations by old people. The tradition has become encapsulated increasingly by documents and they end up informing – and the documents are typically written by anthropologists. They frequently end up as the key text in a native title determination, which is another document. And from there they leap into a new life as a Prescribed Body Corporate's rules for belonging and, if the initial anthropology was crap, then the rules for belonging are crap. So it really gives a post-determination set of problems and issues for the day-to-day humdrum administration of the rights and interests that have been recognised.

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So you do increasingly find, when you say to someone, "Where's your country? Where did the old people tell you were from?," one answer in court actually – this is on the transcript in Bidjara: "Well, do you mean Bidjara 1 or Bidjara 2?" "No," the lawyer said – this is the State, I think was asking—"No, I mean I want to know where your old people said your country was." "Well, in Bidjara 2 it went down the Oxley Highway and across on the railway line," and so on, and he never got to give the answer that was being asked and I thought, well, perhaps that is now what the reality of things is for many people, that a statement of consent is actually a signed document in an air-conditioned office of solicitors, that it is no longer a matter of consensus. The consensus had been replaced by some kind of majority rule written into a constitution and so on.

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Now, the movement of oral titles to written titles has been the whole history of the world's relationship with land. This happens to be the last bastion of unwritten titles, if you like, or one of them and who in Oxfordshire would want to go back to moots at which old people were wheeled out to conduct some kind of constraint on young
5 hotheads who were disputing boundaries for sheep paddocks. I don't think we would. So the security, the certainty, the predictability offered by paper this and paper that, including paper tradition, has all these functional advantages.

Of course, it completely ruins the romance of the culture for some of us because it is
10 no longer the living tradition developing. We've heard about recognising change. Well, once it is written down, how much change is it going to be able to go through and what will be the – how – will there be challenges mounted on the basis of the fact that things have changed to the point where the group no longer resembles the
15 determination group and, therefore, someone will want to take that title off them and so on. You know all this. So one of the problems for anthropologists is – and I – here I'm suggesting that there needs to be some really good close collaborative work between lawyers and anthropologists and also a third party, the people who understand the mechanics of the Prescribed Bodies Corporate and all that stuff, what I call the acronym world, which I don't inhabit. I do actually have an MG.

20 One of the problems is that the anthropologist – it is not just the written reports that get submitted and go through the processes that end up as being – having their own life—that then goes on to influence people's lives. It's also the primary source material of the anthropologists which they keep at home, which they don't
25 necessarily divulge. They often have to in litigation, but they don't often have to in other cases. But there's also what's in the anthropologist's own mind. Who owns that? Is that a legitimate medium for the transmission in continuity of traditions they've learned but which the descendents of those who told them haven't learned? That's a really interesting problem.

30 I will give you a really good example, then I will shut up. In 1974, a man who took me as a son in Cape York told me a story which the underlying theme of which is the rule of trespass. Strangers must not just go into other people's countries and behave as if they're at home. So, in the story, the Whale man comes into the country – this
35 is the Flinders Island Group in Cape York – and he gets speared. Now, what has come down to me is not just the story, but the language. I learned this language and I learned the story. But none of the younger people know the story [correction] – know the language, but they've got the story. They've got the story, because I wrote it out for them and they've had it since 1993. So it is a really weird case of whether the
40 race, as it were, of the medium or the conduit, counts for the legitimacy of the continuity of the tradition. So I will just – have I got a minute?

MS WEBB QC: You've got plenty.

45 PROF SUTTON: We've got plenty. All right.

Itjibiya, Aelmbarrin wula, Itjibiya baw ae:ka, Aelmbarrin baw olo – is the two brothers – *Ba wadhi unggan, Arrgeethal* – a man – a stranger came. He was a whale. *Andjin wula! Tju:!* – and killed him. *Amyerr abworrun wul unggarra, aa, Wakayi [Blackwood Island], aa Thilina [Clack Reef], aa Ngurromo [Clack Island* – and they
5 went running north, right up to Clack Island. *Inan wul iki, aathiyān, aathiyān, aathiyān* – and they’re sitting there now looking and they’re waiting for the strangers. So – now, I’ve been unable to teach this language to any of the young people for various reasons, mainly their lack of interest, which is something you can’t overcome in young people, but you can see here where I’m going next, which
10 is the intersection between the linguistic revitalisation and cultural revitalisation as a separate body, notionally, and its inter-linkage to native title. And I do see a future there for more conjunction between linguists, some of whom are, even have the odd practical tendency, and the question of the maintenance of tradition in a way that will allow people to build in certain defences against having their established rights
15 eroded. That’s it.

MS WEBB QC: For those very insightful and I found very interesting comments and can I say I detect that there is another area where the court, the Tribunal and the anthropologists working in the area are similarly having some concerns or thinking
20 about what’s going to come next. And that’s because we are moving into what we might call a “post-determination era” and much of what has been done to date will certainly echo when we move into that era of what we might call “PBCs and management of native title”, not the determination of it. So thank you very much to everybody. Hopefully, we will have some time to have a chat during the reception,
25 those who want to, and we may have some time at the end of it to have some comments. So I will hand over to Pam now to introduce our next speaker. Thank you.

DR McGRATH: Thanks very much, Raelene. I would like to welcome Dr Julie Finlayson to the stage. Julie – when we were planning today, Julie and Nic and I spent some time discussing, you know, who we might invite to speak and there were a number of people, I think, who weren’t able to be here. So we wanted to take the opportunity to make some acknowledgements.

DR FINLAYSON: Thanks, Pam. Well, coming at the end of a fantastic afternoon of papers, you will probably see some familiar themes here [...] So good afternoon, colleagues and friends, and, on behalf of the Centre for Native Title Anthropology, our thanks to the Federal Court and the Tribunal for the opportunity to contribute to today’s celebrations. Today I want to briefly trace the early years of anthropological
40 involvement with native title, our responses and future challenges.

Just as Aboriginal claimants have forebears, so do anthropologists. Today is an opportunity to acknowledge a generation of our intellectual forebears, some of whom are present here. It’s also an opportunity to acknowledge the rise of in-house
45 anthropologists, those we might consider the second generation of native title researchers and beneficiaries of the first wave practitioners. When the *Native Title Act* was introduced in 1993, anthropologists faced challenges for which there were

very few existing precedents. The Act required new forms of inquiry with the imperative to understand and engage with legal culture and legal processes.

5 In the absence of guiding precedents, native title anthropologists turned initially and understandably to paradigms familiar from the Northern Territory land claims. The land rights era was a watershed in Australian Indigenous land research. From the mid-seventies to the late-eighties, research was prolific, although, in some quarters, ambivalence about research undertaken in the context of legislation developed, attention identified between market forces and the intellectual validity of applied
10 work.

Notwithstanding this angst, the statutory Land Councils were major employers of anthropologists outside the Academy. Anthropologists filled in-house staff positions and some advised the Territory Land Commissioner. Funded research made possible
15 the documentation of regional and local cultural heritage, language preservation and community histories. Anthropologists participated in critical policy inquiries and settings around outstations, community infrastructure, alcohol use and a raft of now-familiar socioeconomic concerns.

20 The early discussions about best approaches for native title research were thus enthusiastic and led to publications on the what and the how for the new requirements, a work which helped illuminate the way forward at this time was Peter Sutton's book, *Families of Polity* and I would like to mention here some, although by no means all, of the active early contributors and I would also refer you to Justice
25 Barker's record because I'm just going to mention a few names: Nic Peterson, Peter Sutton, Bruce Rigsby, Diane Smith, Mary Edmunds, Geoff Stead, Patrick Sullivan, Jan Turner, Rod Hagan, Deborah Bird-Rose, Frank McKeown, David Brooks, Susan Werner-Green, Nancy Williams, David Martin, Paul Memmott, David Trigger, Francesca Merlan, Gaynor Macdonald, John Morton, Julia Munster, Ian Keen, Fiona
30 Powell, Geoff Bagshaw, Paul Burke and Daniel Vachon. And, of course, there are many others who came on board as the sector needs expanded and, in recent years, Aboriginal researchers, too, have taken active roles in native title.

35 From the start, anthropologists at the ANU Centre for Aboriginal Economic Policy Research and later the Australian Institute of Aboriginal and Torres Strait Islander Studies played lead roles in supporting discussions on new strategies. Over time, native title talk became integral to the Australian Anthropological Society's annual conference. Now, it is commonplace to find native title anthropologists working with and for Indigenous Australians through the Academy, in Land Councils and
40 native title organisations, in Indigenous cultural heritage and as independent consultants.

The debates of the 1990s over the intellectual validity of native title anthropology has largely faded. Several factors explain why: the scale of professional employment
45 opportunities, role changes for institutions administering the native title system and a continuing demand for anthropological contributions. Anthropologists now participate in litigation, operating as a friend of the court. They

work for the Crown as well as with claimants. They play important roles in pre and post-claim determination situations, in claimant dispute management and in new areas, such as assisting Prescribed Bodies Corporate, researching compensation claims and in community development.

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Two critical things led to the shift in the legitimacy of native title anthropology. As I outlined above, native title opened new employment opportunities, but over time the complexity of claim situations increased and the need for content-specific training followed. Specific anthropological courses emerged. Peter Sutton and Anthropos Consulting ran non-accredited professional development summer schools in the late nineties and early 2000, while the Tribunal itself supported a trial mentoring project linking six early career in-house anthropologists in a one-on-one partnership with a senior anthropologist.

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Over eight years, from 2005 to 2012, the University of Western Australia offered certificate and diploma-level online courses in native title and cultural heritage, supported by scholarships from the Tribunal and the Native Title Unit in the WA Premier's Department. Many staff anthropologists in WA are graduates of this program, unfortunately now defunct, but, in spite of that, there were 50 graduating students over that period.

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Other learning opportunities appeared. The Centre for Native Title Anthropology originated from an idea proposed by native title anthropologists, Bill Kruse, Pam McGrath, and Jodi Neale, and championed by Nic Peterson through the ANU. Deane Fergie and colleagues at Adelaide University ran native title courses and projects through Australian Native Title Studies, while James Cook, Cairns Campus, offered a residential Master Class. Many of these initiatives were funded by the Attorney-General's Native Title Anthropologists Grants Program. The institutional backing, of course, was pragmatic as the Western Australian mining boom needed timely resolution of exploration and development proposals and training could limit the reach of carpetbaggers.

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Twenty years after the introduction of the *Native Title Act*, the landscape for anthropologists continues to see a strong market demand for knowledge and skills, no less so because of Federal Court involvement. We know that a growing cohort of staff anthropologists with significant years of service, experience and expertise now exists. Some have worked in organisations for up to 15 years, contributing local knowledge and proficiency to claim processes. We know, too, that consultant anthropologists work closely and collaboratively with their in-house peers.

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Going forward, the challenge for the second generation of native title anthropologists is to further extend their roles and expertise to that of acting as experts in court. However, public knowledge of their forebears' experience in some court hearings has created anxiety. Where their seniors went, many now fear to tread. Experiential pathways to overcome disquiet will need varied strategies. The Centre for Native Title Anthropology is tasked with this objective over the next three years, but providers, too, must play a role, such as shaping the nature and extent of

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mentoring and increasing staff exposure to professional development. Existing court processes now offer such opportunities through court-ordered conferences, hot tubs, and other dialogic processes including the use of concurrent evidence.

5 In celebrating 25 years in the relationship between anthropology and native title law, a major cultural challenge identified early by our forebears remains, that of enabling and enhancing anthropologists to effectively work with legal processes. Thank you.

MS WEBB QC: Thank you very much, Dr Finlayson. Well, that brings us to our
10 last part of our day and I have the greatest pleasure in inviting the Honourable John Mansfield AM QC to offer some closing remarks.

THE HON. J. MANSFIELD AM QC: Thank you, Raelene, and thank you for the
15 opportunity to be here and speak to you today. I first want to recognise we're on the land of Whadjuk People and to pay my respects to their elders, past and present. That's significant to me because, as a Judge, I took the view that I should never do that until a consent determination or a finding had been made because someone otherwise might object to me hearing a case if ever it came along and I might be accused of bias. So that's the first time I've ever done it.

20 Before I turn to the topic, I was reminded by Lee Sackett of an experience in the Lake Torrens case which I will mention a little bit in a minute about adaptation. We had been on Andamooka Island, a small island in the middle of Lake Torrens, where there were three competing claim groups. And this particular day one claim group, I
25 think represented by Vance Hughston, had given some evidence and we were leaving so they lit a fire and we passed through the smoke because we were going to travel through that smoke, safely back to the mainland. Perfectly common experience that we've all had and I say nothing about that, but one of the lawyers for the other competing group or one of the other competing groups was rather inexperienced and
30 he thought he had a killer question. So the next morning he said to this man who had lit the fire and ushered us through the smoke for safety, he said, "When you lit that fire, did you rub two sticks together?" And this man said, "What do you think I am, a bloody idiot?"

35 But, to return to my role which is a sort of summing-up role, can I congratulate the three convenors for what has been an extraordinary day. It has been a wonderful day. Raelene and Pam, you've done a great job and every speaker I have found extremely stimulating, provoking memories, provoking thoughts, both lawyers and anthropologists, and I'm sure that the rumblings on in memory and thinking of what
40 we've heard today will be very, very significant. So thank you very much and congratulations to you all.

To do a summing up, I started first with saying, "Well, what is the summing up?" I
45 was reminded— because I remember and I loved this author—Somerset Maugham wrote a book called *The Summing Up*. He was a rascally man, a vagabond, a spy, a [inaudible], to some degree, but I love him because of his straightforward language and his insight into human nature and, of course, because I have a love for the South Seas, the

Pacific, where he spent a lot of time. But he wrote a book called *The Summing Up* which was introspective and rather bleak view of his life. The summing up today is quite the reverse. The future role of anthropology and native title Law is a very, very positive one. But how to convert what we've heard today into something that's a bit of a summary and a bit of a little addition.

So starting by saying, well, do we need Judges or anthropologists to be the judges? And I thought I would test that against my two most recent decisions, Timber Creek and Lake Torrens, both of which Michael Barker has already written into history because they're not on his schedule. Timber Creek you would all know about. Pamela McGrath has written an article about that called 'Native Title Anthropology After the Timber Creek Decision', an anthropologist's insight, and I will take some of what she has said in my comments a bit later on, but it is an article which I found interesting, stimulating and perhaps flattering because it probably paid more tribute to what had been going into my intellectual processes than was really the case.

The other case, Lake Torrens, I looked for some publications about that and one of them is by Peter Sutton, who was a witness in that case, and nothing I say today is to be taken as a criticism of the judgment or the judge's who are about to sit on the appeal or to try and influence anybody. So it is really only anecdotal, but the article is called 'Remembering Roxby Downs'. So to understand that some of you might need a little context. Roxby Downs is the town established in the early 1980s to service the Olympic Dam Mine to the west of Lake Torrens. In the early 1980s, there was very considerable anthropological focus on the area of Olympic Dam and Lake – and to the west of Lake Torrens and Roxby Downs because there was going to be a huge mining development there and it has still huge potential.

Just to give you a quality of Peter's writing, which I find very, very witty and clever, he described one engineer who he was dealing with in – when he was doing some anthropology in the early 1980s, he says this engineer was, "Always cool and apparently running very well on idle." Another of the anthropologists who was doing a great deal of work at that time in this area was Daniel Vachon, who did some work for one of the claim groups. His two reports somehow disappeared from the record – and I want to say something a bit more about that a little later on – until they reappeared shortly before the hearing of this case, but that was to do with what Peter was talking about, the preservation of record and the conversion of history – Aboriginal history and culture into a different form.

Anyway, to get back to Lake Torrens and to make the point about Peter's comments about Lake Torrens, there were four communities who have been found by consent determinations to have land around Lake Torrens, to the north, the Arabunna; to the south, the Barngarla; to the west, the Kokatha; and, to the east into the Flinders Ranges, the Adnyamathanha. They are all consent determinations and each of those, other than the Arabunna People, had claimed native title over Lake Torrens itself. So there were three competing claim groups and the issue which I just wanted to explain to you was what evidence was admissible in relation to the Aboriginal occupation of Lake Torrens at settlement, having regard to the consent

determinations which had been made, declared immediately to the west, Kokatha, and immediately to the east, Arabunna – the Adnyamathanha, principally.

I made a ruling that I would not receive and give weight to evidence which
5 contradicted that fact, that is, there was already recognised an Aboriginal group, the
Kokatha People, as it happened, immediately to the west of Lake Torrens. It's
something which Raelene sort of commented on a little earlier today. Peter writes in
his book and I remember the incident quite well, although he probably hoped I didn't
notice, when that ruling was made, he said:

10 *At that moment, I couldn't see any point in staying in the game. I left the Port
Augusta Courthouse quickly. I didn't slam the door. No. It banged shut all by
itself.*

15 Well, Peter, I thought I saw your hand on the door. It's the anthropologist's way of
saying what the lawyers say when you're a Judge and the lawyer says, "With great
respect, your Honour," that's a way of saying, "Well, look, you're really being a bit
stupid." And, if they say, "With very great respect," you're being very stupid. So
20 anyway there was a refined ruling which said that the evidence could be received for
the purpose of informing occupation on Lake Torrens at the time of settlement and
Peter later gave evidence. I won't comment any more about that.

Back to the topic. Anthropologists as judges, probably not. Do Judges need
25 anthropologists anymore? Well, there are two things which have changed since 1993
and, particularly, probably in the last ten years. Firstly, the Indigenous community
has become much more versed in expressing itself in terms which meet the language
of the law. You heard Barry this morning give us that wonderful welcome to country
in a very expressive and genuine and communicative way. So maybe that's a change
for the better. Certainly it is a change for the better, but maybe it means that the
30 anthropological role as an interpreter or translator or communicator of Aboriginal
relationship with land is rather more easily – or better expressed by the Aboriginal
People themselves now than it was some time ago.

35 And the second thing is, I think as Judges, in our court, we are better at it, too,
because we've come to understand more about that relationship and that means to the
anthropologists a job well done, but we don't know enough. I was trying to think of
an analogy and I suppose it is a bit like teenage sons, you know, when they're 16 or
so they think they know everything and then, when they get to about 22 or 23, they
say, "Gee, I suddenly realised my father had a bit more wisdom than I thought." And
40 I think we do have to accept that, as Judges, we don't know everything and we need
the help and continue to need the help with anthropologists offer to us.

So the answer to the question, is there a role for anthropologists in relation to native
title?, there is a very substantial continuing role. An obvious point to make is this.
45 Lawyers, native title, Indigenous rights, those sort of interests are relatively recent.
The 1963 Bark Petition from Yirrkala, the 1996 Wave Hill Strike, then the Gove
Land Rights case, that is about the time when, in any institutional sense, the legal

profession and, to an extent, the Parliaments of the country, came to focus on native title or came to focus on Indigenous rights. It is relatively recent.

5 Anthropologists, subject to what was said earlier this morning in the first
presentation about a refinement and development of anthropology in the early 1980s
have been observing and understanding or seeking to understand Indigenous
Australians for many, many, many, many generations because we go back to
ethnography, we go back to Spencer and Gillen and we go back to the – as you said,
10 the first chair of anthropology in South Australia in 1926. We go back to Professor
Stanner. You go back much, much longer than we, as a legal profession or a group
of Judges, do. Your fundamental knowledge is much more refined. It is your study,
not our study. So, yes, you have a great role.

15 Will it continue? The answer is yes. You will continue to provide the pathway to
adjudication which you have provided to the courts and through the legal profession
in a range of areas and in an expanding range of areas. Obviously, native title claims
will continue to require to be addressed. There are still 300 of them, nominally.
Probably in a substantive sense, about 120 because of the packaging that happens in
20 the Northern Territory, but still a significant number of claims where recognition has
not been granted.

There are still, I'm ashamed to say, 28 unresolved claims under the Land Rights Act.
They're relatively trivial, but they still exist. So one can say, as I sometimes do
25 when I want these things to progress in my new role, "This has been on the record
since 1982. Don't you think it is time you got on with it?" So that sort of work will
continue and it will be more challenging – less challenging because all of us have
observed with the passage of time and the transfer of knowledge from one generation
to another dilution much – to a significant extent in the real practice of traditional
30 and customary laws and practices. It has been diluted by the people moving away by
the action of governments to try and dilute it and, indeed, by the changes of evolution
of the practices. So the sort of evidence which is now available is not the vigorous
sort of evidence which was available in the 1990s or the – even in the decade before
this one. It is an important challenge to anthropologists to be able to give us and to
35 continue to give us that pathway.

Secondly, something which Dr Palmer just spoke about, inter-Indigenous disputes.
They do exist. They seem to be becoming more prominent. They have to be
40 addressed. Why they have to be addressed from a legal point of view is because the
court, when it makes a determination, has to say who the right people are for that
country and that involves defining those people by reference to patrilineal or
matrilineal/patrilineal descendants, but descendants, families, names, etcetera, and
there are disputes. So that is becoming a significant issue.

45 Rhetorically, one of the causes of why that is becoming more important in relation to
Timber Creek, as Pamela pointed out, there is more a focus, perhaps, on individuals
because of the need to have a look at individuals and how they are affected by the
particular Acts which give rise to compensation. There may be a greater interest in

how the compensation is to be applied than it has been in the past because it may be quite substantial. The same with ILUAs. Now that you have the McGlade decision last week, subject to any resolution through statutory processes, that will refocus and that was prompted by people who said, “We have been left out of this claim group.”
5 It’s going to keep happening.

Anthropologists will have to find the causes and the cures and I don’t really think it is an answer about who does the mediations because the process of mediating is a very sophisticated one, but it is very hard to tell people in a mediated context, “You
10 are not part of this group.” They just don’t accept it. For a very good reason, because they don’t believe it, but somebody has to make those decisions because, without them you can’t take the next step and that’s going to be something that you will be seriously addressing. Compensation claims for the reasons which Pamela mentioned will give a different sort of focus to some of the anthropological reports
15 and, as Peter Sutton mentioned in his article about Roxby Downs, section 13, Applications to Revisit Determinations, might or might not because enlivened.

In other areas of practice, we now know that both the Victorian Government and the South Australian Government have announced policies to enter into treaties. They
20 are amorphous concepts. We still don’t know what the legislation is which will be introduced to support them and we don’t know what is in mind, at least in a way which is clearly expressed. We don’t know whether it is more sophisticated than in ILUAs or we don’t know whether it is more sophisticated than a recognition given by a declaration of native title. All of those things are amorphous, but they are going
25 to be real and anthropologists are going to be part of the process of making sure that they happen in an appropriate way.

Two other things of considerable significance, post-determination issues. Those of you who were at the 40th anniversary of the Federal Court Special Sitting on Tuesday
30 would have heard Mick Dodson say this is a big area for the future and it will be because post-determination issues will involve who continues to be entitled to be a significant member of this community and the communities are spreading, the children are getting educated, they’re moving away, they’re coming back, some do, some don’t, some want to come back later, some want to come back earlier, some are
35 always there.

You will be called upon and we will be called upon perhaps, depending on the way these disputes are issued – resolved, to recognise and deal with those things because the law will require accountability and appropriateness in those dealings and, as time
40 goes on and as money becomes available and we all know that there is, at least in some communities, very significant amounts of money available and potentially available. In Peter’s article you will see a figure mentioned for the prospective Indigenous share of what will or might happen at Roxby Downs, Olympic Dam. All of those things will produce disputes and they have to be addressed. So you will be
45 working in areas and shapes that you don’t yet fully have thought through and whether there’s a role for the court or a different court, we don’t know, but that’s – those disputes will have to be addressed.

The last thing I wanted to mention, with one rider, if I may, is what Peter Sutton was talking about, the ownership of information, the confidentiality of information, the storage of confidential information. Those of you who have been involved in litigation will know that there have been – I’ve heard it myself – some old people –
5 some old men have said, “I passed on this story which is a man’s story to a woman because I didn’t have any boys with the opportunity to pass it onto and I want that woman to give it back to my sons or other children or I passed it on to somebody from outside the community so it would come back to the community.” There seems to be, in some senses, an anxiety about getting these things known and they are
10 recorded by anthropologists, but in a way which is not entirely consistent with the confidentiality which is sometimes sought for it.

When you do reports – when you write a report for a Land Council or for a State or Territory Government, who owns the copyright? Who may use it, may the Land
15 Council or the State Government use it for any purpose? May you use it for any purpose or, when it comes into evidence, may the court use it for any purpose? We have, I should – I think this is – I’m pretty – yes, I’m sure John Reeves will correct me if I’m wrong, but it is something that has been debated amongst the native title community, including anthropologists in Queensland over the last several years. The
20 court now has a very significant library, if you like, of significant Indigenous evidence, oral evidence from people that have gone back to the earlier hearings and in the Land Rights context, we have anthropologists’ reports, we have the transcripts of evidence, we have statements, all of that material, some of which is subject to restriction orders.

Should the court, at least in a public way, record the existence of that material that doesn’t break confidentiality to say it exists, but then, when it goes, as it will, to national archives with that lovely word they use to send it to archives, “sentenced” to
30 archives, with terms, how do you deal with that prospectively? How do you make sure that the confidentiality is preserved, but there is a means by which appropriate scholars can get access to it? Very big problems. Do you preserve the confidentiality, do you preserve your record so that you can use it? You will all remember that Mountford was restrained from publishing in part of his book some things which he had received on a confidential basis or a restricted basis and he was
35 perceived as breaking that restriction.

How do you deal with that? I don’t know what you do, but it is – this is sort of a big convoluted potential topic which will require to be fairly carefully addressed and, when, as I mentioned, in Lake Torrens, the reports from Dr Vachon became
40 available, rediscovery by, I think, Tom Gara in 2015, shortly before that hearing, what had happened to them? Had they gone to the Land Council, South Australian Native Title Services or ALRM, as it then was? Had they been held by the community? Had they been held by the solicitors? Had they been not disclosed when they should have been? Who knows. But they came from an external source
45 and happened to be quite relevant. So all of those things about storages of records, maintenance of records, the integrity of the records which you keep, particularly

when you're converting – as Peter said, converting knowledge from oral tradition to a different structure, it becomes very important.

5 May I finally give you one last task and I shouldn't be saying this, but I can now because I'm retired. Yallara is a blot on the landscape. Someone somewhere has to work that out. I can understand what happened in that case and, as it happened, I think both Bob French and I were on the Court of Appeal that said what had happened was not appealable, so it stands, but the fact is that Yallara, as a native title claim area, is surrounded by Land Rights declarations. It is obviously land which
10 Aboriginal People owned and should get the credit for and somehow or other there has to be a momentum from somewhere to do it. So they're my jobs for the anthropologists.

15 A final thought. It was prompted by David Trigger's reference to Neville Bonner saying, "You must tread carefully." W.B. Yeats, that gruff, Irish poet, who I greatly love, has a lesson for us all:

My dreams are but shadows under your feet. Tread carefully because you tread on my dreams.

20

Thank you.

MS WEBB QC: Before we all disappear outside and celebrate the day, I have a couple of tasks. One of them is in relation to the table that was prepared by Barker J,
25 the list of expert anthropologists, and what we would like to have and what Barker J would like to have is some feedback on that, any changes, any amendments, what – anything additional to go in and I think Tina has offered to be a conduit for that. So, if you have any of those comments, could you feed through Tina Jowett, please, and we will work on updating this and getting it absolutely as correct as one can get it.
30 That should be excellent. Thank you very much.

Now, look, I'm not going to hold you up. I do have to make some thank yous and there have been three – the Tribunal, the Federal Court and the Centre for Native Title Anthropology, look, it has been, I think, a great afternoon. I do want to thank
35 some individuals, in particular Justice Barker who initiated the idea and then we took it and ran with it, and to Professor Peterson and to Dr Finlayson from the Centre for Native Title Anthropology for also embracing it so warmly and their contribution to the program and also very generously sacrificing time from their own conference so that we could hold this event this afternoon. Staff from the Tribunal and the Federal
40 Court staff who assisted with organising the event, Mary McIntosh, Amber Blake, Anna Courtman, and, despite being directed not to say this, I must say Pam McGrath, thank you. That ends our event for the day. Could you please make your way to the foyer for the reception. We have a limited bar and canapés. Once the bar runs out, as I suspect it will, if you're still keen to continue, I suggest we just retire to the
45 Lobby Bar upstairs. So thank you very much, everyone.