

Contested Forms of Belonging: Anthropology, History and Culture in the Era of Native Title

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Abstract: Calls to imagine new ways of thinking about place, difference and belonging in the Australian context often pre-suppose extant crude binaries. Overlooked in such exhortations to think anew is the fact that life, as the saying goes, goes on, and its going on is in the context of entanglements which produce “the ever-changing conditions of possibility” (Bauman 334), and that “social and cultural structures are reproduced” (Weiner 218) within those changing conditions. This issue arises in the context of the new social fact of native title, or more specifically, in the legislation giving effect to recognition of native title. A distinction is increasingly drawn between so-called traditional owners of country, and those whose relationship to country is historically constituted, or in other words, those whose relationship to country is at least in part an artefact of dispossession and other post-contact ructions. Although this is familiar terrain to anthropologists, more broadly the relevant tensions remain largely unknown or unacknowledged where so. This article explores these tensions. It critiques the instrumentalities which with (mostly) good intentions seek to give due recognition to Indigenous interests and specificities, but in doing so harden borders and further reify binaries not only between Indigenous and non-Indigenous, but between Indigenous peoples too. The overarching concern of the article, however, is how new social facts which have their derivation in misunderstandings of cultural esotery sediment into culture and praxis and become the orthodox and authoritative understanding of culture. The challenge for us is to be aware of our role in this.

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The recognition of native title and the legislative reforms giving effect to that recognition is one of the most significant transformations in Aboriginal-settler affairs to date. While sober scrutiny foresaw that in practical terms land rights and other mechanisms under state legislation were and would be more efficacious in returning land to many claimant groups,¹ the symbolic weight attached to cognisance of native title cannot be overemphasised. However, this symbolic weight is also perhaps one reason why outside of specialist interest and professional necessity native

¹ There has been some softening of the exclusionary parameters that saw many claimant groups fail the initial registration test for native title claims. There has also been a greater willingness on the part of state governments, multinational corporations including mining companies, and other landholders to negotiate with registered native title claimants in the interests of finding common ground, principally through Indigenous Land Use Agreements. For example, Western Australia, the only state to have no Land Rights legislation, relies on the arbitral processes of the National Native Title Tribunal to progress claims. In late 2018, the “most comprehensive native title agreement negotiated in Australian history”—the South West Native Title Settlement—was concluded. Comprising “the full and final resolution of all native title claims in the South West of Western Australia, in exchange for the Settlement package,” the agreement represents some 30,000 Noongars and approximately 200,000 square kilometres (“South West Native Settlement”).

title is so poorly understood, including by those heralding it. Also poorly understood, and just as often misunderstood, are schisms rent by native title in hitherto reasonably cohesive groups. Rather, there is a tendency to dichotomise the affiliation that Aborigines are said to enjoy with “country” and that of settler others. Further, underpinning this dichotomy one can sense (although on occasion it is explicit) a primitivist hue. Whereas for settlers land is merely a commodity exploitable for pecuniary gain, for Aborigines land in the guise of “country is a living entity with a yesterday, today and tomorrow, with a consciousness, and a will toward life ... country is home, and peace; nourishment for body, mind, and spirit; heart’s ease” (Rose 7). This notion of a special, unique even, relationship between Aborigines and place is found throughout much demotic and scholarly discourse. In this discourse, symbolically at least, native title recognises this relationship.

The Native Title Act (NTA) specifies (in part) that native title rights might be enjoyed where:

- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters. (1993, S223.1)

This criterion is further qualified by what it is necessary to demonstrate successfully to register a native title claim. In short, the Registrar must be satisfied

- (a) that the native title claim group have, and the predecessors of those persons had, an association with the area; and
- (b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests. (1993, S190B.5)

As widely discussed, both in relation to native title claims and more generally, what constitutes tradition is the subject of vigorous debate. Concerning native title, tradition is retrospective. It is a construct built on perceptions of enduring cultural and social formations that existed prior to colonisation, supposedly evidenced by the laws and customs extant when the British assumed sovereignty over Australia. Although there is some evidence that the rigidity of exclusionary bases behind claimant groups failing the registration test are softening, particularly in respect to consent determinations, the Yorta Yorta judgement still casts a long shadow (Australian Law Reform Commission). In finding against the Yorta Yorta’s native title claim Olney J. adjudicated that “the tide of history” had “washed away” any “traditional rights” that the Yorta Yorta might once have exercised over the land claimed (*Members of the Yorta Yorta Aboriginal Community v the State of Victoria and Others* S.126), and moreover, those rights and interests were “not capable of revival” (*Members of the Yorta Yorta Aboriginal Community v the State of Victoria and Others* S.129).

Amongst much other evidence the Yorta Yorta cited concern for the environment and their conservationist ethic as examples of continuing traditional practices. This is unsurprising for many Aborigines proclaim that their relatively benign impact upon the environment arose from

management practices consciously aimed at achieving just that. While politically oppositional and strategic in its contrast with the impact that industrial societies are having on the natural environment, the sentimental understanding that Aborigines traditionally were motivated by an environmentalist ethic is widespread, no matter the evidence to the contrary (see Rolls; Sackett; Gammage 1-2). In the Yorta Yorta judgement, however, Olney J. found this proclaimed ethic to be a post-contact artefact and one of “relatively recent origin” (*Members of the Yorta Yorta Aboriginal Community v the State of Victoria and Others* S.125; see also S.123, S.128). It was not “the continuation of a traditional custom” (*Members of the Yorta Yorta Aboriginal Community v the State of Victoria and Others* S.123). Hence the Yorta Yorta’s claims of ongoing traditions were dismissed by Olney J. as arising instead from the processes of contact history. The High Court of Australia determined similarly in a subsequent appeal. Explaining the conundrum of change versus continuity in cases like the Yorta Yorta’s, the High Court stated

that demonstrating the content of pre-sovereignty traditional laws and customs may be especially difficult ... where it is recognised that the laws or customs now said to be acknowledged and observed are laws and customs that have been adapted in response to the impact of European settlement. In such cases, 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 it was that was changed or adapted. It is not possible to offer any 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. ... The key question is whether the law and custom can still be seen to be traditional law and traditional custom. Is the change or adaptation of such a kind that it can no longer be said that the rights or interests asserted are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant peoples when that expression is understood in the sense earlier identified? (*Members of the Yorta Yorta Aboriginal Community v Victoria*, paragraphs 82-83)

It is to the problem of change versus continuity in the context of so-called traditional versus historical people and native title’s role in provoking this schism that this paper now turns. Marshall Sahlins described how “the specificity of practical circumstances, people’s differential relations to them, and the set of particular arrangements that ensue ... sediment new functional values on old categories. These new values are likewise resumed within the cultural structure ... But the structure is then transformed” (Sahlins 68). These processes of transformation are integral to all cultures. Without dynamism responsive to prevailing exigencies—no matter their source—cultures wither. Aboriginal cultures, when first encountered, presented as vibrant and strong. Upon this baseline of strength, colonial and then settler history did and is doing its work. Aboriginal societies responded to the new vicissitudes confronting them. These responses were and are not arbitrary, plucked as it were anew from a hitherto unknown repository of cultural tools, but rather are based on the sedimentation of “new functional values on old categories” (Sahlins 68). As Bauman argues, “Aboriginal people will seek, as always, to give meaning to their lives out of the ever-changing conditions of possibility in which they are embedded” (Bauman 334). While native title presents on the one hand a changed condition of possibility, the enabling legislation is resistant to these processes of change and instead asks Indigenous claimants to de-historicise themselves (Macdonald and Bauman 10). Tradition is not sought

where it might be found in today's everyday practices (Macdonald and Bauman 8), both mundane and profound, but is located somewhere in the indefinite past.

This retrospectivity ignores how “social and cultural structures are reproduced through events” (Weiner 218), and these transformative reproductions are not isolable from a peoples’ cultural heritage but contingent with it. As discussed, native title legislation, however, insists on the primacy of traditional laws and customs as ostensibly extant in the past and is ill-equipped to countenance evidence of continuity, traditions and laws in the mundane lifeworlds of the everyday (see Monaghan 55; Macdonald and Bauman 8), or to acknowledge the legitimacy of emerging traditions. In settled Australia claimants press and the legislation accepts traditions demonstrating “connection to country” as revealed in transmitted knowledge “rather than [in] the repertoire of subsistence skills” (Weiner 220), but it is in the latter that the social processes affiliating a people with country—in settled Australia at least—are more fully developed and expressed. It does not necessarily hold that the possessors of transmitted knowledge are the same people as those who by historical processes occupy the same country and whose mundane lifeworlds are equally constitutive of or on occasion more fully reveal the social and cultural processes that are held to link a people to country. Through necessitating such distinctions native title has produced new and divisive social categories which are cleaving previously cohesive groupings. Rather than a mechanism facilitating the reproduction of a shared sociality, native title is instead promoting assertions of distinction that are rapidly reified once a claim is successfully registered.

Fieldwork conducted by Eve Vincent in the west of South Australia highlights how native title has exacerbated, even provoked, distinctions between so-called traditional and historical peoples and their respective interests in country. From the mid-twentieth century onwards Aborigines in the Ceduna region mostly identified under the Kokatha group label (Vincent, “‘Sticking up for the Land’” 158; Monaghan 49). The advent of native title, however, introduced potentially new ways of accessing a range of resources, including political and economic, based on assertions of distinctive social categories. In response to these possibilities, Wirangu re-emerged from the Kokatha group label as a social category. As Vincent explains, “The native title process ... stimulated a resurgence of lapsed ‘tribal’ identities rooted in historical knowledge and archival sources” (Vincent, “‘Sticking up for the Land’” 158). People previously identifying as Kokatha are now “position[ing] themselves as Wirangu ‘traditional owners’” (Vincent, “‘Sticking up for the Land’” 157).

Those continuing to identify as Kokatha feel that their understanding of themselves arising from their historical trajectory is an attack on their very essence (Vincent, “‘Sticking up for the Land’” 158). Those now constituting themselves as Wirangu—the traditional owners whose ‘authenticity’ is attested to by historical records and archives—are distinguishing themselves from the broader Kokatha-identifying people, whose occupation of the region concerned is historically constituted—in other words they moved there from elsewhere—rather than traditionally constituted (always been there). Hence the native title process provokes, according to Weiner, “two analytic separations”: “one is the contrast between society viewed as a static bundle of structural normative laws and principles, and society as a historically-constituted community of persons associated both temporarily and spatially” (Weiner 217).

Vincent explains how the consequences of these emergent divisions “are omnipresent in everyday life” (Vincent, “Sticking up for the Land” 159). The Wirangu, now recognised as traditional owners, “have gained local prestige,” increased recognition both formally and informally, and “a kind of moral authority” (Vincent, “Sticking up for the Land” 159). Such divisions and distinctions are not peculiar to western South Australia and the Wirangu/Kokatha people. By and large they are arising, formally at least, through the workings of native title legislation in settled Australia. Writing of claimant groups across four states with whom they have worked, Correy et al. comment on how they “observed the alacrity with which the various claimant groups ... have re-inscribed distinctions, generated by the native title process, between persons and the groups, locating these distinctions within a highly charged moral order” (Correy et al. 42).

Although these processes of division arise more broadly, it is more a feature of settled Australia which is where the majority of the Aboriginal population live. Writing of the Wiradjuri of central New South Wales, Gaynor Macdonald notes that:

The NTA provides traditional people with a means of securing control of both local resources and status. It is explicitly seen by some Wiradjuri people as a way of putting historical people in their place, whether non-local Wiradjuri or non-Wiradjuri, depending on the community dynamics ... An application has the potential to completely divide a “community.” (Macdonald 77)

The divisions between the Kokatha and Wirangu were further exacerbated by the interests of mining companies. Once native title claimants have succeeded in having their claim registered (a step prior to determination), they are able to negotiate with (but not veto) mining interests. Many residents of Ceduna, both Indigenous and non-Indigenous, including those now identifying under the Wirangu group label, were supportive of mining for the additional resources and opportunities it would bring to a small regional town. A prominent faction of the Kokatha, however, remain implacably opposed to mining. Moreover, this faction believes that negotiating with miners commits cultural travesty, for in their eyes mining destroys the constitutive elements (mystical and otherwise) of the Aboriginal relationship to land. Further, members of this faction have since 2006 been undertaking restoration of and maintenance work on a series of natural rock holes occurring in granite outcrops, as well as more regular impulsive bush trips (Vincent, “Sticking up for the Land” 167-168). The leading protagonist regards these trips as “enacting her relationship to country” (Vincent, “Sticking up for the Land” 168), as “living out their vitally alive and embodied relationship with Kokatha country” (Vincent, *Against Native Title* 161). It is arguable that this enactment is an element embedded in daily lifeworlds in which are inscribed the social, cultural and symbolic processes that link—and traditionally linked—a people to country. For the Wirangu on the other hand, the registration of their native title claim which facilitated the negotiation of an Indigenous Land Use agreement, had their identity confirmed through recourse to archival records, more so than evidence demonstrating practices associated with embodied relationships to their country. In this way native title legislation insists that “greater authority, veracity and truth-effect inhere in the colonial record than in contemporary Aboriginal people’s self-understandings” (Vincent, “Sticking up for the Land” 162). The “authority and explanatory power of local sources” is undermined (Vincent, “Sticking up for the Land” 161).

Native title necessitates the drawing of group distinctiveness based on a set of fixed attributes that are thought to be exemplary of a group's foundational social reality in the distant past. Ironically, such ostensibly foundational groups were in themselves historically constituted and unstable, not in the sense of such a foundation being inauthentic, but in the sense that identities have always been fluid, subject to change, responsive to a range of exigencies, to what worked best at any given time in any given context (Dauth 25). Furthermore, increasingly one's intrinsic and enduring affinity to this supposedly coherent exemplary group identity is located in biology, not social relations. This is contrary to the looser—but by no means arbitrary—composition of pre-contact groupings. As Correy et al. argue,

A unit of kinsmen defined by descent from named ancestors operating as a group constituted for social action was not a self-evident structure of the lived social reality of the pre-native title era. These social worlds were not strangers to continuous gradations of difference and it is also not the case that persons were unaware of their social relations to each other. (Correy et al. 48; see also Dauth 25)

While cognatic descent is the primary means of affiliation connecting people to country—although this is usually made manifest through “a relationship of identity” with Dreamings associated with that country (Sutton, “Kinds of Rights in Country” 4; see also Sutton, *Native Title in Australia* 1-37) among other symbolic associations—it is not the only form of authentic belonging recognised. Morton argues that

the “genealogical relationships” ... are not exhausted by simple “consanguinity” (genetic connection), which is one of a number of ways of registering common substance between self and other within the scope of belonging to (totemically defined) country. (Morton 62)

Where one was conceived, born, the birthplace of one's parents, the country in which a parent died, the birthplace of one's children, the country of one's partner, among other connections are all ways through which affiliation to country is negotiated and established. The Kokatha identifying group of concern here—the “historically incoming” (Sutton, “Kinds of Rights in Country” 5)—locate their group cohesiveness in their knowledge of and care for country, lived experience and their network of social relations. It is arguable that this more fluid and dynamic relational system underpinning the Kokatha group's sense of themselves and their ties to country is more representative of so-called traditional formations than those called forth under native title legislation. Consequentially, as a new social fact native title is re-shaping “the local and broader social contexts with which it articulates” (Smith and Morphy 5). This is evidenced in the distinctions now drawn between being the “historically incoming” Kokatha and being Wirangu, and the differential authority and opportunity attributed to these distinctions.

Conclusion

Correy et al. describe how “the category of ‘traditional owner’ has emerged as a social category of the natural attitude and as a structure of indigenous consciousness; one which is reproduced through an ontological mode of being in-the-world, specifically that of a native title claimant” (Correy et al. 42). This notion of “traditional owner” instantiating a “structure of indigenous

consciousness” is accepted in much scholarly work in the humanities and social sciences (and more broadly in demotic discourse) as a general Indigenous disposition *vis-à-vis* belonging. However, this “structure of indigenous consciousness” is an artefact of the new social reality of native title. It does not arise from the more complex, nuanced, fluid and relational social systems that traditionally and still today tie people to country and to each other. The necessity to demonstrate distinctiveness on the basis of difference under native title legislation, and arguably under land rights legislation too, is producing new social orders that “become ossified and transformed into enduring social groups” (Correy et al. 42). As Bauman argues,

competing “tribal” claims to land and challenges to identities continue to give rise to much conflict. Descent and “bloodline” compete with familiarity with country and lived experience and traditional rights compete with residential ones. Distinctions between classificatory and actual kin assume far greater significance as biological descent increasingly provides the basis of definitive claim. (Bauman 325)

The well-meaning embrace of native title and respectful recognition of the authority and legitimacy of the social category of successful claimants, contributes to the ossification of divisive social categories that have emerged in response to new potentialities. The structures under which the claimants are made manifest seem to be regarded as inevitable, natural even, which obviates any need to recognise the claimants as being politically agentic in shaping their representation. Writing of the multicultural and multiethnic constituency of Southall, west London, Gerd Baumann observed how the “Southallians ... develop their discursive competencies in close connection with the social facts of everyday life, and they cultivate fine judgements of when to use what discourse in which situation” (204). Those claiming native title are making the same judgements in accord with the social facts of their everyday life. However, a great deal of demotic commentary and scholarly analysis from within the humanities and social sciences simply reflects “the reifications [found], instead of analysing them” (Baumann 204). Such reifications are either ignored or not even recognised by many of those for whom alterity is instrumental to their critiques of, say, settler Australian society. Instrumentality supersedes analysis of what is being instrumentalised. Misunderstandings of the varied nature of the Aboriginal connection to country—or just plain ignorance—sediments into culture and praxis and becomes *the* nature of the Aboriginal connection to country. In locating the essence of Indigenous belonging in categories produced under the new social fact of native title, naïve promoters of these categories of difference contribute to the further disenfranchisement of those whose sense of themselves arises from more recent historical trajectories. It also further disenfranchises those whose connections to country are and were forged not directly through cognatic descent and having “lived authentically on the spot” (Ingold 2), but through wider social, political and economic responsibilities and relationships. It is arguable that in their social practices and behaviours, visits to country, and mundane daily lifeworlds, a more rounded and accurate praxis of Indigenous belonging is to be found. As Tim Ingold reminds us, “[l]ife is lived ... along paths, not just in places ... It is along paths, too that people grow into a knowledge of the world around them, and describe this world in the stories they tell” (2). It is in the category of the “historically incoming” (Sutton 5) groups where the potentiality exists for rethinking difference, place and belonging, not in the ossified “structure of indigenous consciousness” (Correy et al. 42) upon which native title is so dependent.

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