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Introduction

Anthropologists' accounts of Aboriginal culture, identity and ethnicity in Australia have been of more than academic significance. Models of Aboriginal land tenure directly influenced the framing of the *Aboriginal Land Rights (1976) Act* in the Northern Territory. While the Native Title Act, which applies to the whole of Australia, has not drawn on anthropology directly, assumptions and theories about continuities and discontinuities of Aboriginal culture and custom have played their part in Federal Court hearings of native title applications, and are likely to become more prominent in that process. There has been rather little discussion in a public forum of the place of anthropological models and analyses in native title applications and hearings. This lack is particularly apparent in the south-east and south-west of the country where the degree of change in the lives of Aboriginal people has been greatest.

Anthropologists and sociologists have provided contrasting accounts of Aboriginal society and culture during the last forty years or so, grounding their assessments in rather distinct theories and analytical frameworks. These approaches have different implications for native title. In this chapter I review some of the main anthropological and sociological approaches and assess their implications. We shall see that there is a particular kind of articulation between, on the one hand, anthropological and sociological approaches to ethnicity and identity in plural societies, and on the other, legal processes to do with Aboriginal land claims in Australia. Each has its strengths and weaknesses. The chapter will begin with remarks about the role of anthropology in the native title process.[1]

Anthropological theory, native title and the law

On 3 June 1992, the High Court of Australia brought down its decision in *Mabo and Others v the State of Queensland*. The Court rejected the legal doctrine that Australia was *terra nullius*, 'land belonging to no one', at the time of British colonization in 1788. The Court found that it was occupied by Aboriginal and Torres Strait Islander peoples, who had their own laws and customs; the Crown gained 'radical title' to the land but this did not wipe out existing 'native title'. After settlement, governments could extinguish native title by legislation or granting interests in land, subject after 1975 to the *Racial Discrimination Act 1975*. In 1993 the Commonwealth Parliament legislated to provide mechanisms for the preparation and consideration of native title claims, and to validate

past grants. The Native Title Act was amended in 1997 in order, among other things to protect certain pastoral leases and tighten up the process for registering applications.

Mantziaris and Martin (in press), drawing on Pearson (1997), have developed an illuminating way of conceptualizing native title. It exists as a 'space of recognition' formed by the intersection of two circles, one representing Aboriginal traditional law and custom, and the other, the Australian legal system. The character of relations to country within the Aboriginal mode of life is *sui generis*, whereas native title is a concept of Australian law. This device helps us to understand the role of anthropology in that relationship. A court must assess and interpret the evidence of Aboriginal and other witnesses in the light of Australian legal concepts and doctrines. Even in the absence of historical, anthropological or other academic accounts, the court will necessarily bring to bear its own informal understandings of the nature of Aboriginal society, community, traditions, laws, etc. in making those assessments and interpretations. Those informal understandings constitute a third circle which comes between the Aboriginal mode of life and the formal legal system. This circle may also be filled (or partly filled) by descriptions, analyses and theories about Aboriginal history, social life and culture, made by anthropologists or practitioners of other disciplines. (We could complicate the picture further with a circle that represents the interpretation of anthropological and other academic evidence in the light of such informal understandings.) Some concepts in anthropology, and some of the legal concepts themselves, amount to a 'translation device' used to interpret Aboriginal concepts, beliefs, practices and relations in such a way that they can be rendered into legal discourse. The language of 'rights and interests' is an example.

The law relating to native title takes Aboriginal relations to country as having a *sui generis* character. The High Court in the *Mabo v Queensland* [No. 2] case in 1992 took the view that the content of native title cannot be specified *a priori*: it depends on the facts of each case. There is a paradox, however; to pick out aspects of Aboriginal ways of life as 'native title' in the first instance is to begin with interpretive concepts, in this case 'title' and a concept of indigeneity. Moreover, in spite of the doctrine that Aboriginal relations to country are *sui generis*, the courts and parliament have gone further to specify the character of native title *a priori*. Native title is based in 'traditional laws and customs'; it is held by some kind of community or group; the group must have genealogical connections with the community or group which occupied the country in question at the time of the establishment of British sovereignty in Australia, and have substantially maintained its connection with the country; the laws and customs through which title is framed must constitute a tradition, if a changing one. Such a framework imposes constraints in a similar way to the definition of traditional Aboriginal owners in the Northern Territory Land Rights Act (although the constraints differ). The divergent interpretations of the law in two recent judgments - the Yorta Yorta case, and the Miriuwung Gajerrong case - have rather different implications for anthropological accounts, for they differ in the degree to which they accommodate change (Lee 1998; Olney 1998). The shape of anthropological and other accounts of Aboriginal social life and culture is relevant to ways in which a court may construe such matters as the nature

of a community, tradition, the degree and kind of continuity necessary for native title to persist, and the continued existence of a society 'sufficiently organized to create and sustain rights and duties' (Toohey, cited in Olney 1998: 3).

Anthropological analyses of indigenous culture and society in the south-east and south-west, and their relation to the dominant majority, reflect frameworks applied in Britain and North America to issues of ethnicity and cultural continuity among both indigenous and migrant communities. They are also reflected in changes in policy direction through the century. These frameworks can be broadly classified under the headings of assimilation, amalgamation, and pluralism; a fourth approach traces cultural differences which are maintained, but with different content (Newman 1973: 70).

Theories of cultural and structural assimilation

Park (1950) proposed four stages in the process of assimilation of migrants: contact, competition, accommodation and assimilation (see Gordon 1964). Assimilation was the product of social interaction, especially 'primary' social contacts (Social Science Research Subcommittee, cited in Gordon 1964: 62). Gordon distinguishes 'structural' assimilation from 'cultural' assimilation. Structural assimilation evidently means engagement in groups and institutions such as education and government that are ubiquitous and dominant, and so characterize the society as a whole (where a society is equated with the nation state). Cultural assimilation refers in effect to practices that are more restricted in scope, more voluntary, and more variable, such as religion and the arts. Assimilationist models were applied to Aboriginal social life in Australia in the same period.

The culture-loss model in Australia

Many researchers writing between the 1950s and 1970s asserted that Aboriginal people of mixed descent living in the south-east and south-west of Australia had lost their distinctively Aboriginal culture, and were becoming assimilated or Europeanized. They were said to possess only a common group identity as 'black' and an opposition to white people (Fink 1957), and to be assimilated, integrated, or Europeanized (e.g. Bell 1964; Berndt and Berndt 1951; Berndt 1962; Eckermann 1977; Hausfield 1977). A strong culture-loss view has been propounded in anthropological reports tendered in the Yorta Yorta case. Brunton (1997) supports his case with evidence of such matters as the failure of older people to pass on knowledge, and ridicule by the young of older people's songs. Maddock (1997: 68-9) finds similar evidence for the loss of 'traditional laws and customs', such as the body of ritual and cosmology.

What has to be born in mind here is the distinction between, on the one hand, what people are conscious of losing through interrupted transmission, and on the other, beliefs, attitudes, modes of behavior, etc., which people do not think of as 'tradition' or as 'culture'. It is these kinds of things, among others, that the cultural continuity literature has documented (see below).

The Australian studies of Aboriginal identity were consistent with studies of the assimilation of immigrants in Australia, and with earlier approaches to immigration in the

US, which took assimilation to be both inevitable and desirable. However, as in American studies of migrants, some early studies of Aborigines of the south-east were not consistent with the assimilation model. Bandjalang society leaned heavily 'on the logic and outlook on life of the indigenous traditions', yet was quite well adapted to the white community that surrounded it (Calley 1956). The Koori 'subculture' in Victoria was compounded of indigenous traits such as the prohibition on close cousin marriage, as well as various beliefs showing continuity from the past. Introduced traits, such as modes of dress, speech patterns, and drinking habits, came from European rural workers (Barwick 1988; see also Hausfeld 1959; Kitaoji 1976).

Anthropological studies in the south-east and south-west carried out during the early 1980s also modified the culture-loss model (Baines 1988; Birdsall 1988; Carter 1988; Eades 1982, 1988; Keen 1988; Langton 1988; Macdonald 1986, 1988; Schwab 1988; Sutton 1988). These studies are most appropriately represented as being concerned with particular cultural traits rather than relations among institutions. A continuous trait is identified in this kind of analysis by comparing it with a comparable non-Aboriginal Australian trait, and with traits recorded in the ethnography of the community's indigenous ancestors (where such records exist) and/or with traits of other Aboriginal cultures, presumed to be similar in salient ways with the local indigenous culture.

The traits considered in the studies of the 1980s and earlier included features of syntax and semantics in Aboriginal English that resembled features of indigenous languages, household structure, extended kin networks, obligations to be hospitable, a strong preference for kindred exogamy, forms of disputing and dispute resolution, and beliefs in supernatural beings. The recent study by Diane Bell (1998) in effect comprises a culture-traits approach writ large.

Assimilation, acculturation and enculturation

Psychological studies of immigration, such as that of Kovacs and Cropley (1975), understand assimilation not in terms of institutions and practices, but personality traits such as alienation. However, studies of acculturation and enculturation can accommodate both assimilationist and pluralist paradigms. An important aspect of some studies is the role of socialization in enculturation, referring to internal cultural reproduction, by contrast with acculturation, in which traits are taken on from the dominant society (Mithun 1983; Zimmerman et al. 1996).

There appear to be rather few anthropological studies of enculturation in Aboriginal communities in the south-east and south-west of Australia. Eckermann (1977) and Carter (1988) both made studies of socialization into stigmatized identity. McKeich (1977) argues that Aboriginal people of mixed descent in the south-west of Australia have constructed an integrated 'part-Aboriginal' social world. Primary and some secondary socialization takes place among significant others, so that their social reality is 'located and perpetuated within their own ranks and can be understood only in terms of their special vocabularies' (1977: 261-62).

In Mithun's study the family has the primary role of reproducing a distinctive culture, whereas in McKeich's account the Aboriginal community as a whole is the site of

socialization and hence the reproduction of a distinct culture. Practice theory (e.g. Bourdieu 1977) may be of use here in suggesting how the dispositions of individuals and groups (their 'habitus') may be transformed both by exposure to 'objective structures' in contrasting cultural settings, such as through enforced socialization, and as the result of changes in those structures.

An alternative theory of cultural amalgamation implies a more equal interchange than assimilationist ones.

Amalgamation

Park and Burgess (1921) defined amalgamation as the 'fusion of cultures' (Gordon 1964: 63). A theory of amalgamation holds that over time a new group will emerge that is different from the original groups, and is a hybrid or combination of them all. An example widely-reported in the literature is the emergence of a mainstream mestizo identity in Mexico (Newman 1973: 71-72). Although several researchers have described Aboriginal cultures as amalgamations of features from the indigenous past and from the cultures of colonizing peoples, the *mestizo* concept has not been applied in Australia in relation to indigenous people. Rather, it has been assumed that the process of acculturation in Australia has all been one way - to varying degrees Aboriginal people have been assimilated into the dominant culture and not vice versa. More common by far are approaches related to theories of pluralism.

Theories of social and cultural pluralism

The assimilationist perspective posits unidirectional change toward the values, mores, and practices of mainstream society, implying the eventual disappearance of ethnicity. Contrary to expectations, quite early studies of migration into the US found that it had not resulted in assimilation, but in 'cultural pluralism' (Thomas and Zanecki 1918; Wirth 1928; Zorbaugh 1929). For example, Hansen (1937) found that following the second generation's rejection of their parents' identity and culture, pluralism emerged again in the third generation, whose members fell back on their grandparents' identity (see also Warner and Srole 1945; Newman 1973: 75). Parallel studies of migrants in Australia made similar findings (e.g. Zubrzycki 1964; Kovacs and Cropley 1975; Nahirny and Fishman 1965; cf. Taft 1965: 71). Some studies of Aboriginal social history have described similar patterns of rejection, with a reassertion and revival of cultural forms in later generations (e.g. Morris 1989). However, 'pluralism' has been used in a variety of ways.

Structural and cultural pluralism

Just as theories of assimilation distinguished between cultural and structural assimilation, so with theories of pluralism. Structural pluralism 'is the major key to the understanding of the ethnic makeup of American society', in Gordon's opinion, while 'cultural pluralism is the minor one' (1964: 159). Here 'culture' refers to the most pervasive features of social life, while 'structure' refers to differentiation among organized religions and 'racial' identities. While there had been 'a massive trend toward

acculturation of all groups - particularly their native-born - to American culture patterns'
(ibid.), structural pluralism continued.

A structural-pluralist model of society is framed in terms of 'institutions' such as
family, religion, law, government and education, classified in universalist terms. Thus in
Despres' scheme (1967), which echoes that of Newman, a homogeneous society is one in
which all members of a society share a single set of institutions. In a heterogeneous
society people belong to distinct sets of institutions at a local level, but not at the national
level. A plural society is one in which national or 'broker' institutions, which include
trade unions, political parties, religious organizations and the education system, link
regional to national bodies.

In J.S. Furnivall's (1948) classic analyses, plural societies characteristic of colonial
Fiji and Burma consisted of indigenous groups, a dominant European minority, and other
immigrant groups. They were integrated by colonial power and a common capitalist
economic system. Each ethnic group retained its own religion, culture and language, but
as community life had been disrupted they did not form integrated communities. For
M.G. Smith (1969) a plural society contains internally autonomous political units ruled
by a numerical minority which controls the institutions of government, and whose
institutional forms differ from those of the subjugated people or peoples. The transition to
a heterogeneous society, a type that may include regions with many of the characteristics
of plural societies, requires transformation into a cohesive national unit. Stages in the
historical trajectories of the Australian colonies and federation fit this scheme quite well.

A problem faced by these theories is how to describe and analyze very different but
connected social and cultural worlds. Characteristically they assume a universal set of
types of 'institution' (broadly defined units in the organization of society), including
family, law, religion, political system and economy. Difficulties arise where these
categories of institution, which are those of western societies, do not fit the ways in which
other societies and cultures are organized, including those of indigenous communities
within nation states dominated by settler populations. An institutional analysis might
ground Aboriginal relations to country in the institution of religion, or indigenous 'law',
or perhaps a distinct institution of 'local organization'.

Internal colonialism

According to theories of internal colonialism, which developed out of plural society
theory, the colonial relation involves domination and exploitation among culturally
heterogeneous and distinct groups within a country, rather than between countries
(Blauner 1969). Marxist scholars have offered a distinct account of internal colonialism,
framed in terms of the articulation of modes of production. The cost of the reproduction
of labor-power is partly met outside the capitalist mode of production and within the
indigenous mode of production, but land (e.g. in South African 'homelands') was made
insufficient for the indigenous communities to subsist independently (Wolpe 1975: 247).
This analysis has been applied in Australia by Hartwig (1972), Beckett (1977) and others,
to the Torres Strait Islands and Aborigines in the cattle industry. Where workers were laid
off in the 'off season' they met the costs of subsistence and reproduction in part through

foraging. The theory may have some limited applicability to Kooris in the agricultural industry in, for example, Gippsland where work was also seasonal, and foraging and fishing provided an important part of the diet (see also Morris 1989). It has implications for native title to the extent that relations to country are or were continuous.

Studies of cultural continuities go towards documenting one side of the plural divide, but do not consider the overall character of the relationship between the dominant society and the indigenous minority. This was taken up by studies of 'oppositional culture' or 'culture-as-resistance'.

Oppositional culture

While it is not explicitly a theory of plural society, the theory of oppositional culture or culture-as-resistance contributes to the analysis of pluralism in Australia. Cowlishaw (1988) argues that Aboriginal cultures western New South Wales have arisen in part out of continuities from the past, and in part out of resistance, for people defiantly adhere to behavior identified as indigenous and as undesirable by the dominant population. Drawing on the work of Willis and Corrigan (1983), Gilroy (1981) and Genovese (1975), she describes Aboriginal social life in the composite town of Brindleton as 'oppositional culture', which means 'the active creation and protection of this arena of social meaning in an embattled situation'. She writes of 'a wider ongoing recreation of a distinct cultural heritage which also has its own vocabulary, its family form, pattern of interpersonal interaction and even its own economy', and 'a dynamic tradition which is still being created in embattled situations'. There has not been simply an attempt to cling to a past tradition but, wittingly or not, the creation of a set of new ones (Cowlishaw 1988: 283).

Morris' work on Dhan-gadi history and culture modifies a model of plural society in two ways: by tracing the development of relations between indigenous people and the settler society, and by drawing on Foucault for an account of their inter-relations (Morris 1988a, 1989). He provides an account of changing relations between Dhan-gadi people, the developing colony of New South Wales, and the Australian nation state from a position of relative autonomy on the margins of the colonial economy, through encapsulation and control in the interests of squatters to a position of partial incorporation to the extension of state control in what Morris characterizes as 'domestication'. This relation denotes

> a particular form of internal colonialism that seeks to dissolve the cultural
> distinctiveness of the indigenous population and to force its integration into the
> dominant society, while at the same time making a distinction between its political
> status and that of all other groups within the nation-state. (Morris 1989: 111)

A shift towards assimilationist policies after 1940 reflected a concern about Aborigines' secular rights within the nation state (ibid.: 135).

Consistent with cultural and structural pluralism, Morris deploys an institutional framework to analyze changes in Dhan-gadi culture and practice. In the assimilationist era,

> Dhan-gadi culture no longer produced the doctrines, cultural practices and artifacts
> that used to be handed down to each succeeding generation through formal
> institutions, for the overarching institutional forms that subsumed the Dhan-gadi were
> now those of the dominant culture. They could no longer continue to develop their
> own independently determined form of culture and consciousness. (ibid.: 143)

Rather, most of the cultural forms, practices, values, and attitudes took the form of 'concrete forms of resistance against the coercive structure of the wider society', a form of 'profane' culture (ibid.).

Morris sees Foucault's approach as important in its concern with disciplinary power which functions at the level of everyday 'gestures and activities', and which underpinned administrative polices of institutional dependency and domestication. Successive deployments of state power conditioned the social existence of the Dhan-gadi and engendered specific forms of resistance (ibid.: 4). The pervasive controls exercised on the stations brought about 'oppositional struggles' - collective activity and expressions of collective identity that sustained them as a 'social group vis-a-vis the dominant society' (ibid.), and which took various forms (ibid.: 143ff).

The concept of oppositional culture was prefigured in the notion of 'contra-culture' applied by Ruth Fink (1965) to Aboriginal groups living on the fringes of country towns and in cities (see also Yinger 1960). To the extent that it posits a self-reproducing adaptation to the wider society, it resembles the earlier 'culture of poverty' theory developed by Oscar Lewis (1966; see also Leacock 1971). According to this theory, the culture of poverty is an adaptation to conditions in the wider society which, once it comes into existence, tends to perpetuate itself from generation to generation. The resultant subculture involves a sense of resignation or fatalism, and is linked with low educational motivation and inadequate preparation for an occupation. These factors perpetuate unemployment, poverty and despair. Hans Dagmar found the approach wanting in his study of Aborigines of Carnavon, for they were 'not just poor whites but members of an ethnic group with a history of its own'. He also found no convincing evidence of a 'contra-culture' (Dagmar 1978: 262).

The institutional analysis of the oppositional culture model neglects the subtle continuities of often unselfconscious forms picked up by the trait-analysis of the cultural continuity approach, and it tends to undervalue the possibility of continuities of cultural forms. The cultural-continuity model, however, picks out lines of descent linking precolonial practices to emergent ones, but neglects both the internal structure of the indigenous community and the wider social structure.

In contrast, Gaynor Macdonald (1998) has recently outlined an argument for the continuity of a distinct Wiradjuri culture, sociality, society and polity which is broadly compatible with a plural society model, but which draws on structuration theory rather than institutional analysis or Marxist theory. The 'deep structure' of values and social morality which underpin the meanings of everyday Aboriginal practices, Macdonald argues, continue to inform the changing 'surface forms' of those practices, and operate as frameworks which allow multiple levels of meanings to be negotiated and enacted. Such

transformations reflect the motives and creative strategies of individuals as agents in their interaction with the colonizing society. She describes the Aboriginal domain as a reproduced 'society' and 'polity'.

Transformations of difference

The fourth approach reviewed by Newman (1973) is of transforming difference. Ethnic, racial and religious difference among the descendants of distinct migrant groups remain, but they 'assume new meanings'. An Italian-American is distinct from an Afro-American, but is also different from a native Italian. Each is also a political interest group, organized to acquire its share of society's rewards (Glazer and Moynihan 1963; Newman 1973: 79). Many studies of indigenous and ethnic groups in North America, Britain and Australia consider the degree to which people have become acculturated and assimilated, yet deploy symbols of ethnicity and maintain ethnic boundaries (e.g. Laroche et al. 1996; Peach 1984; Waddell 1979). Some people have moved towards what Gans (1962) calls 'symbolic ethnicity', where members of ethnic groups adapt their ethnic identity to their current social position by selecting a few symbolic elements of their cultural heritage that do not affect their social interaction with those of other ethnic backgrounds.

Howard Creamer's study of 'cultural revitalization' in New South Wales has some features of this model: Kooris are 'engaged in a vigorous promotion of Aboriginality and articulation of Aboriginal values...' (1988: 55). Cultural revival involves a variety of activities, including Aboriginal studies, culture camps, and culture centers. Prehistoric sites gain new value; recently formed beliefs become ancient truths (ibid.: 56-7). Nevertheless, reconstructions of the past are based partly on traditional information handed down by the elders as well as new ideas from outside, and so are part of cultural inheritance (ibid.: 58).

Morris (1988b: 75) writes of the revival of the past among some members of the Dhan-gadi community as an aspect of a process of ethnogenesis, an essential feature of which was 'the regaining of control over the production of knowledge of one's own cultural and political identity'. This process requires some form of social closure and perception of commonality. The ethnogenesis of the Dhan-gadi indicated a shift in what Morris refers to as 'the politics of opposition' (ibid.: 76). Unlike the migrant studies, Creamer and Morris do not suggest that ethnicity is solely a matter of symbols, but that it is just one aspect of social practice. And indeed, the judgment in the Yorta Yorta native title case (Olney 1998) shows that cultural revival is unlikely to satisfy demands for evidence of the continuity of native title.

Other studies are also concerned with transforming difference, but not as symbols of ethnicity or cultures of resistance, but rather as emergent institutions or forms of practice.

Emergent forms

Recent work by Marilyn Wood (1997, n.d.) moves towards bridging the gap between the institutional analysis of the plural society paradigm, and the trait analysis of the cultural continuity approach. Wood describes the erosion of detailed religious

knowledge and customary law, and 'the emergence of a more generic and shared Aboriginal culture' accompanied by the introduction of European forms of knowledge and expertise (n.d.: 7). She describes transformations in which fragmented groups of camp dwellers comprised of families of diverse origins became an 'imagined community' connected to the wider community through political and economic activity (ibid.: 9). Overt political activism accompanied the explicit rejection of aspects of religion and law regarded as superstitions and the selective retention of aspects of practices which were relevant and useful in everyday life. A 'folk lore' emerged, combining Dreamtime legends, Christian teachings, and customary as well as Christian beliefs (ibid.: 11). The Burra Bee Dee community was strong enough to provide both a haven from racism and an institutional framework within which Aboriginal people could effect change and determine their future direction (ibid.: 12).

Emergent forms of kinship organization are the topic of a recent discussion paper by Sutton (1998). 'Classical' cultural practices and social institutions are those which are, in large measure, continuous with those prevailing at the time of colonization, found in the more remote parts of the continent. 'Post-classical' practices and institutions have arisen from the time of colonization in less remote regions. However, important elements of classical practices persist in rural and urban Australia. Sutton finds it useful to distinguish between classical and post-classical systems as wholes, from specific practices. Thus a specific rule of reckoning descent may be post-classical in form, but the fact that descent is the basis of the relation between a group and its land in a particular case may be a 'classical' principle that has been maintained from pre-colonial times. Sutton generalizes that the cognatic descent group, and the surname-group system that is a central part of it, is a distinctive post-colonial 'social system', involved in the transmission and maintenance of traditional interests in country.

Discussion

These various approaches to social and cultural continuity and change have rather different implications for assessments of the degree to which Aboriginal traditions have persisted, and hence for native title applications and hearings.

If assimilation has fully occurred, then necessarily native title does not persist. (It should be noted, however, that a social system can be disrupted without 'assimilation'occurring - by population loss and displacement, incarceration, and so on.) However, the assertion that assimilation has occurred needs careful scrutiny, for the early studies missed the more taken-for-granted and subtle aspects of social life and culture that have been found to be distinctive among many indigenous communities in the south-east and south-west.

Thus, studies which pick out continuities in elements of culture are potentially useful, and do describe the more subtle aspects of social life and culture. A strength of these studies is that they highlight subtle and taken-for-granted elements not identified as 'culture' even, perhaps, by indigenous people themselves. The extensive use of kin terms for people who are not genealogically related is an example. But there are problems. First, the demonstration of continuities with the past requires a kind of winnowing process,

blowing away the chaff of culture-change to leave the kernels of persisting indigenous forms. But where radical social change has occurred, and where new beliefs, values and social structures have emerged from the interaction of earlier ones, or from creative adaptation to new circumstances, then a culture-traits approach runs into difficulties. Second, for the purpose of presenting evidence of continuity of native title it is not enough to demonstrate a general cultural distinctiveness. Where they exist, continuities in relations to country must be shown, of a kind that a court might construe as demonstrating native title. This may depend on showing that these relations constitute some kind of system, even if it is not part of a formal system of customary law (Olney 1998: 3). Third is the absence of a broad social analysis - either of the structure of social relations within the Aboriginal domain (where a discrete domain persists), or its relationship with the wider society.

A limitation of structural-pluralist models is their reliance on institutional analysis. Relations to country need not be encompassed within formal institutions. However, if native title is thought to be grounded in institutions and to be a matter of indigenous 'law'then the nature of that 'law' needs to be examined. Even if native title is not grounded in a formal institution of law, legal judgments seem to require a body of rights and obligations, implying some degree of communal agreement about these, modes of asserting rights, and of holding people to obligations.

The law demands that it be demonstrated how current relations to country are grounded in past relations. Among the strengths of the culture-as-resistance approach is its historical perspective, and hence the fact that it considers the changing structural relationship between the indigenous minority and the dominant society. The assumptions of the framework raise difficulties for arguments about the continuity of traditions, however, including connections to land, because it depicts Aboriginal culture as arising (at least in part) not from tradition but in reaction to changing social environments.

Others, such as Macdonald, counter these views with suggestions that deeper structures of continuing values underlie and continue to inform changing forms on the 'surface'. The Aboriginal domain retains its distinctive form of sociality, and remains a distinct polity. Such deep structures need to be given content, however, and this content needs to be relevant to relations to land.

Like the assimilationist perspective, the strong oppositional culture approach implies radical discontinuity of a kind that may be modified in a particular case by an examination of other, unselfconscious aspects of culture and practice demonstrated in the cultural-continuity studies. Emergent forms appear to be more consistent with the requirement for continuity of tradition, provided that judicial findings accommodate change with continuity, and provided that there is continuity in relationships to land of a kind that can be interpreted as native title, even if the form of the group holding title and the content of that title have changed.

I have tried briefly to describe a range of anthropological approaches to the nature of indigenous social life and culture in the south-east and south-west of Australia, and their relations to the dominant society, and draw implications for native title applications. It is not the case that each simply presents the results of an empirical inquiry, and

accurately describes the facts of the case. Rather, each is partly shaped by biases and expectations embedded in the theory or analytical scheme. The same evidence (whether historical or ethnographic) is open to a variety of interpretations. Each gives an incomplete picture that may be complemented or modified by other kinds of study. Moreover, a study conducted in terms of one theory, such as an assimilationist one, can be assessed by looking for evidence suggested by another, such as cultural-continuity model.

A combination of approaches is required for the preparation and assessment of native title claims, combining the historical depth and social-structural breadth of some studies, the sensitivity to cultural continuities of others, and the accommodation of social and cultural change of yet others. It would be helpful to show what range of practices, institutions, or social fields are encompassed in the Aboriginal domain, how people engage (and have engaged) with the dominant society, and how these aspects have been reproduced and transformed. This is important because the nature of relations to country, and the ways in which they have changed, depends on the relationship between indigenous communities and the dominant society.

Finally, the 'space of recognition' with which this chapter began has implications for the role of anthropology and related disciplines. A judgment about whether relations to country and associated practices amount to native title is strictly speaking a matter for legal argument and judgment and not anthropological analysis. Of course, a description and analysis must begin with a view about what is relevant - what kinds of things might amount to continuity of native title. However, in my view it is not the role of anthropologists to say when continuities are sufficient or insufficient for native title to persist, or whether or not certain modes of relations to country amount to 'title'. Nor should anthropologists pass judgment on how systematic relations to country need to be in order to constitute the basis for title (although we might note the degree of coherence in other regions). The proper role of anthropology and related disciplines is to document and analyze relations to country that are relevant to such judgments. Such work does not begin with a blank sheet, however; it is shaped by theoretical stances.

This does not mean that anthropologists can only disagree, and so their accounts ought to be ignored. Without them (or accounts by historians or sociologists) a court must fall back on everyday conceptions, assumptions and prejudices. There are acute dangers in making naive interpretations both of oral and written evidence. There are also hazards in interpreting early ethnographies which may be taken as a base line for deducing social and cultural change. But this must be the topic of another paper.[2]

Acknowledgements

Notes

1) A shortened version of this chapter has appeared as a discussion paper published by the Native Title Unit of the Australian Institute of Aboriginal Studies.
2) Due to limitations of space, this chapter has not considered the constitution of indigeneity (Thiele 1991), or the problematic concept of culture. The assessment of early ethnographies also needs urgent attention.

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