

# Land, Rights, Laws: Issues of Native Title

Native Title Research Unit

Australian Institute of Aboriginal and Torres Strait Islander Studies

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*The recognition of native title in the High Court's Mabo decision in 1992 and the Commonwealth Native Title Act has transformed the ways in which Indigenous peoples' rights over land may be formally recognised and incorporated within Australian legal and property regimes. The process of implementation has raised a number of crucial issues of concern to native title claimants and other interested parties. This series of papers is designed to contribute to the information and discussion.*

*The decision of the Federal Court in the Yorta Yorta case surprised and disappointed many commentators, not to mention the impact on the Yorta Yorta people. The Court rejected the claim for native title on the basis that the Yorta Yorta had lost their connection with the traditional law and custom that would have sustained native title. This approach to cultural continuity may have devastating implications for native title in the more settled areas of Australia. In this paper Dr Ian Keen of the Australian National University explores the theories of continuity and change and their application to native title in the context of recent decisions such as Yorta Yorta.*

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## CULTURAL CONTINUITY AND NATIVE TITLE CLAIMS

**Ian Keen**

There has been 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 southeast and southwest of the country (referred to by Rowley and others as 'settled' Australia by contrast with 'remote' Australia) where the degree of change in the lives of Aboriginal people has been greatest. How consistent is continuity of native title with social change in these regions? 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 accounts have different implications for native title. In this paper I briefly review some of the main anthropological and sociological approaches and assess their implications for the continuity of native title; each has its strengths and weaknesses. The paper will begin with remarks about the role of anthropology in the native title process.<sup>1</sup>

### **Anthropological theory, native title and the law**

Mantziaris and Martin, drawing on Pearson, have developed an illuminating way of conceptualising 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.<sup>2</sup> The character of Aboriginal relations to country is unique, 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 without 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 anthropological accounts and theories. 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', used both by anthropologists and lawyers, is an example.

The law relating to native title takes Aboriginal relations to country as having a *sui generis* character. The High Court in *Mabo v Queensland [No. 2]* (1992)<sup>3</sup> 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, 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 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (although the constraints differ). The divergent interpretations of the law in two recent judgements - in the Yorta Yorta case, and in the Miriuwung Gajerrong case - have rather different implications for anthropological accounts, for they differ in the degree to which they accommodate change<sup>4</sup>.

Anthropological analyses of Indigenous culture and society in the southeast and southwest, 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.<sup>5</sup>

## **Assimilation and amalgamation**

### **The culture-loss model in Australia**

Many researchers writing between the 1950s and 1970s asserted that Aboriginal people of mixed descent living in the southeast and southwest of Australia had lost their distinctively Aboriginal culture, and were becoming assimilated or Europeanised. They were said to possess only a common group identity as 'black' and an opposition to white people and to being assimilated, integrated, or Europeanised.<sup>6</sup> The Australian studies 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.

A strong culture-loss view has been propounded in anthropological reports tendered in the Yorta Yorta case. Brunton 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 finds similar evidence for the loss of 'traditional laws and customs', such as the body of ritual and cosmology.<sup>7</sup> However, as in American studies of migrants, some early studies of Aboriginal people of the southeast showed that assimilation had not occurred, or not completely. 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. 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.<sup>8</sup>

Anthropological studies in the southeast and southwest carried out during the early 1980s also modified the culture-loss model. These studies isolated elements of social structure and culture, such as the form and extent of networks of kin relations, grammatical features of Aboriginal English, or certain spiritual beliefs, and traced (or implied) continuities from the pre-colonial past to the present. This was done in some cases by comparing features of Murri, Koori or Nyungar social life and culture with features current among more remote communities.<sup>9</sup> A recent study by Diane Bell takes this general approach. This is aptly called a 'culture-traits' approach, because it isolates traits or elements of social life and culture.<sup>10</sup>

How individuals have taken on the culture and values of the dominant society is a matter of acculturation. Enculturation, on the other hand, refers to the transmission of culture within a community or family. There have been few studies of acculturation and enculturation among Aboriginal people in the southeast and southwest; those that have been done tend to point to distinctive social worlds being reproduced within families.<sup>11</sup>

### **Amalgamation**

A second general category of studies of ethnicity among migrant and Indigenous communities is 'amalgamation'. Although several researchers have described Aboriginal cultures as amalgamations of features from the Indigenous past and from the cultures of colonising peoples, these concepts have not been applied in Australia in relation to Indigenous people; it has been assumed that 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.<sup>12</sup>

### **Theories of social and cultural pluralism**

Studies in the United States found that assimilation did not occur to the degree and in ways that were expected or predicted. A general pattern was that second-generation migrants rejected their parents' identity and culture, but the assertion of identity and difference re-emerged in the third generation, whose members revived their grandparents' identity. Parallel studies of migrants in Australia have made similar findings. Some studies of Aboriginal social history have described similar patterns of rejection, with a reassertion and revival of cultural forms in later generations. Such differences are accommodated in theories of plural society.<sup>13</sup>

### **Plural society**

Assimilationist theories see the migrant or Indigenous group as moving (or being moved) towards the culture and values of the dominant society, and towards participation in its institutions (such as education and church), if on unequal terms. Theories of plural society analyse the relationship between culturally distinct populations within (usually) a nation state, one of which is politically and economically dominant. In J.S. Furnivall's classic analysis, 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. Such theories analyse relations within the society in terms of the degree to which 'institutions' such as family and economy are shared, or are distinctive, and on this basis construct typologies from homogeneous, through heterogeneous to plural societies.<sup>14</sup>

A problem faced by these theories is how to describe and analyse very different but connected social and cultural worlds. Characteristically they assume a universal set of types of 'institutions' (broadly defined units in the organisation of society), including family, law, religion, political

system and economy. Difficulties arise where these categories, which are those of western societies, do not fit the ways in which other societies and cultures are organised, including those of Indigenous communities within nation states dominated by settler populations.

### **Internal colonialism**

Theories of internal colonialism developed out of plural society theory. Early theories described colonial relations of domination and exploitation in which the usual relationship between a dominant society in Europe and a distant colony was reproduced within the borders of a nation state. Marxist versions expressed the relation in terms of the articulation of 'modes of production'. Subsistence production within Indigenous communities met some of the costs of reproducing labour for the capitalist sector, so reducing wage costs. But land (e.g. in South African 'homelands') was made insufficient for the Indigenous communities to subsist independently. This approach has been applied in Australia by Hartwig, Beckett and others to the Torres Strait and Aboriginal people 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 applicability to Kooris in the agricultural industry in, for example, Gippsland, where work was seasonal, and foraging and fishing provided an important part of the diet. It has implications for native title to the extent that the kinds of relations to country implied are or were continuous with the precolonial past.<sup>15</sup>

### **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, and draws on a variety of scholarly positions. According to this perspective, contemporary Aboriginal cultures arose in opposition or out of resistance to the dominant society. In an 'embattled situation' Aboriginal people create and recreate a distinct cultural heritage with its own ways of speaking, form of family, modes of interaction, and informal economy. Following assimilationist policies in New South Wales 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.<sup>16</sup> The concept of oppositional culture was prefigured in the notion of 'contra-culture' applied by Ruth Fink to Aboriginal groups living on the fringes of country towns and in cities.<sup>17</sup>

To some extent the oppositional culture approach resembles the earlier 'culture of poverty' theory developed by Oscar Lewis. 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.<sup>18</sup> Hans Dagmar found the approach wanting in his study of Aboriginal people of Carnarvon, 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'.<sup>19</sup>

The similarity to the oppositional culture approach is that the subculture associated with poverty is seen as arising, in the first instance, in relation to external social and economic conditions, and not as the result of continuity from the past.

### **Transformations of difference**

Studies of migrant communities in the US and Britain have described a fourth kind of relation under the general heading of social and cultural pluralism, foreshadowed in the assimilationist studies. Here, the ethnic minority remains distinct from the encapsulating majority, but the content of the difference has changed. It is more a matter of displaying symbols of ethnicity, and making

assertions about ethnic identity; culturally and socially the minority has assimilated. Thus Italian-Americans are different from African-Americans, but they are also different from native Italians.<sup>20</sup>

‘Cultural revitalisation’ in New South Wales has some features of this model according to Creamer’s account: Kooris are ‘engaged in a vigorous promotion of Aboriginality and articulation of Aboriginal values...’ Cultural revival involves a variety of activities including Aboriginal studies, culture camps, and culture centres. Prehistoric sites gain new value, while recently formed beliefs become ancient truths. 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. Morris also writes of the revival of the past among some members of the Dhan-gadi community, as an aspect of regaining control ‘over the production of knowledge of one’s own cultural and political identity’. 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 judgement in the Yorta Yorta native title case shows that cultural revival is unlikely to satisfy demands for evidence of continuity of native title.<sup>21</sup>

### **Emergent forms**

The emergent cultural forms described by Marilyn Wood and Peter Sutton are not the symbolic ethnicities of the above studies. 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. 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. Sutton generalises 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.<sup>22</sup> Thus certain features continue while their form changes.

### **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.

If assimilation has fully occurred, then necessarily native title does not persist, and there is little more to be said. 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 southeast and southwest.

Thus, studies which pick out continuities in elements of culture are potentially useful. A strength of these studies is that they highlight subtle and taken-for-granted elements not identified as ‘culture’ even 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.<sup>23</sup> 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.

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 such 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.<sup>24</sup>

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.

## **Conclusions**

I have tried briefly to describe a range of anthropological approaches to the nature of Indigenous social life and culture in the southeast and southwest, and their relations to the dominant society, and draw implications for native title applications. It is not the case that each kind 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.

Finally, the 'space of recognition' with which this paper began has implications for the role of anthropology and related disciplines. A judgement about whether relations to country and associated practices amount to native title is strictly speaking a matter for legal argument and judgement 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 judgement 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 analyse relations to country that are relevant to such judgements. 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 taken as a base line for deducing social and cultural change. But this must be the topic of another paper.

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<sup>2</sup> Christos Mantziaris and David Martin, *Native title corporations: the design of institutions in a recognition space*, National Native Title Tribunal, Perth (in press); N. Pearson, 'The concept of native title at common law' in G. Yunupingu (ed.), *Our land is our life: land rights past, present and future*, University of Queensland Press, St Lucia, 1996.

<sup>3</sup> (1992) 175 CLR 1.

<sup>4</sup> *The Members of the Yorta Yorta Aboriginal Community v. The State of Victoria and Others*, (unreported, 1606 FCA, Olney J., 18 Dec. 1998); and *Ben Ward & Ors on behalf of the Miriuwung Gajerrong People & Ors v Western Australia & Ors* (unreported, 1478 FCA, Lee J., 24 Nov. 1998).

<sup>5</sup> See William M. Newman, *American pluralism: A study of minority groups and social theory*, Harper & Row, New York, 1973, p. 70.

<sup>6</sup> See for example Ruth Fink, 'The caste barrier - an obstacle to the assimilation of part-Aborigines in north-west New South Wales' *Oceania* vol. 28, no. 2, 1957, pp. 100-110; J.H. Bell, 'Assimilation in New South Wales', in Marie Reay (ed.), *Aborigines now: new perspectives in the study of Aboriginal communities*, Angus & Robertson, Sydney, 1964; R.M. and C.H. Berndt, *From black to white in South Australia*, F.W. Cheshire, Melbourne, 1951; C.H. Berndt, 'Mateship or success: an assimilation dilemma', *Oceania*, vol. 32, 1962, pp. 16-33; Anne-Katrin Eckermann, 'Group organisation and identity within an urban Aboriginal community' in R.M. Berndt (ed.), *Aborigines and change: Australia in the 70's*, Australian Institute of Aboriginal Studies, Canberra, 1977, pp. 288-319; R.G. Hausfeld, 'Basic value orientations: change and stress in two Aboriginal communities' in Berndt, *Aborigines and change*, op.cit., pp. 266-87.

<sup>7</sup> Ron Brunton, *Members of the Yorta Yorta Aboriginal community and others v State of Victoria and others: Report on anthropological and socio-historical issues*, Encompass Research Pty, not published, 1997; Kenneth Maddock, In the Federal Court of Australia Victoria District Registry No. VG 6001 of 1995 *The Members of the Yorta Yorta Aboriginal Community, Applicants, and The State of Victoria and Others, Respondents: Report of Professor Kenneth Maddock* filed by the State of New South Wales, 1997, pp. 68-9.

<sup>8</sup> On the Bandjalang see: Malcolm Calley, 'Economic life of mixed-blood communities in northern New South Wales', *Oceania*, vol. 26, no. 3, 1956, pp. 200-30; on Victoria see: Diane Barwick, 'Aborigines of Victoria', in Ian Keen (ed.), *Being black: Aboriginal cultures in 'settled' Australia*, Aboriginal Studies Press, Canberra, 1988, pp. 27-32; see also J. Beckett, *Past and present: the construction of Aboriginality*, Aboriginal Studies Press, Canberra, 1988; R. G. Hausfeld, 'Life on a typical Aboriginal station in New South Wales', *Proceedings of conference of New South Wales Aborigines*, Adult Education Department, University of New England, Armidale, 1959; Yuriko Kitaoji, 'Family and social structure among Aborigines in Northern New South Wales' PhD thesis, Australian National University, 1976.

<sup>9</sup> See studies by Baines, Carter, Birdsell, Eades, Langton, Macdonald, Schwab and Sutton, in Ian Keen, op. cit.; Eades op. cit.; Gaynor Macdonald, 'The Koori way: the dynamics of cultural distinctiveness in settled Australia', PhD thesis, University of Sydney, 1986.

<sup>10</sup> Diane Bell, *Ngarrindjerri Wurruwarrin: a world that is, was, and will be*, Spinifex Press, North Melbourne, 1998.

<sup>11</sup> Eckermann op. cit.; Carter op. cit.; Robert McKeich, 'The structure of a part-Aboriginal world' in Berndt, *Aborigines and change*, op. cit., pp.252-65.

<sup>12</sup> Robert E. Park and Ernest W. Burgess, *Introduction to the science of sociology*, University of Chicago Press, Chicago, 1921; Gordon Milton, *Assimilation in American life*, Oxford University Press, New York, 1964; Newman, op. cit.

<sup>13</sup> See for example William I. Thomas, and Florian Zanecki, *The Polish peasant in Europe and America*, University of Chicago Press, Chicago, 1918; Louis Wirth, *The Ghetto*, Chicago University Press, Chicago, 1928; Harvey Zorbaugh, *The Gold Coast and the slum*, University of Chicago Press, Chicago, 1929; Marcus L. Hansen, *The problem of the third generation immigrant*, The Augustana Historical Society, Rock Island, Ill., 1937; V. Nahirny and J.A. Fishman, 'American immigrant groups: ethnic identification and the problem of generations', *Sociological Review*, vol. 13, 1965, pp. 311-26; see also W. Warner and L. Srole, *The social systems of American ethnic groups*, Yale University Press, New Haven, 1945; Newman op. cit., pp. 75. On Australia see e.g. Jerzy Zubrzycki, *Settlers of the Latrobe Valley: a sociological study of immigrants in the brown coal industry in Australia*, Australian National University, Canberra, 1964; M.L. Kovacs and A.J. Copley, *Immigrants and society: alienation and assimilation*, McGraw-Hill, Sydney, 1975; cf. Ronald Taft, *From stranger to citizen: a survey of studies of immigrant assimilation in Western Australia*, University of Western Australia Press, Nedlands, 1965; on Aboriginal social history see Barry Morris, *Domesticating resistance: the Dhan-gadi Aborigines and the Australian state*, Berg, Oxford, 1989.

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<sup>14</sup> See J.S. Furnivall, *Colonial policy and practice*, Cambridge University Press, Cambridge, 1948; on institutional analysis see M.G. Smith, 'Institutional and political conditions of pluralism', in Leo Kuper and M.G. Smith (eds), *Pluralism in Africa*, Berkeley, University of California Press, 1969, pp. 27-66; on typologies see Leo Despres, *Cultural pluralism and nationalist politics in British Guiana*, Rand McNally, Chicago, 1967; Nicholls op. cit., 1974.

<sup>15</sup> See H. Wolpe, 'The theory of internal colonialism: the South African case', in I. Oxaal, Tony Barnett and David Booth (eds), *Beyond the sociology of development: economy and society in Latin America and Africa*, Routledge, London, 1975 and Paul Kegan and M. Hartwig, 'Aborigines and racism: an historical perspective', in F. Stevens (ed.), *Racism: the Australian experience*, vol. 2, ANZ Book Co., Sydney, 1972, pp. 9-24; Jeremy Beckett, 'The Torres Strait Islanders and the pearling industry: a case of internal colonialism', *Aboriginal History 1*, 1977, see also Morris, op. cit., on northern NSW.

<sup>16</sup> Morris and Cowlshaw draw on Willis, Corrigan, Gilroy, Genovese and Foucault among others; see Gillian Cowlshaw, *Black, white or brindle: race in rural Australia*, Cambridge University Press, Cambridge; Morris op. cit., 1988, pp. 143.

<sup>17</sup> R. Fink, 'The contemporary situation of change among part-Aborigines in Western Australia', in R.M. and C.H. Berndt (eds), *Aboriginal man in Australia: essays in honour of Emeritus Professor A.P. Elkin*, Angus & Robertson, Sydney, 1965, pp. 419-34; J.M. Yinger, 'Contraculture and subculture', *American Sociological Review*, vol. 25, no. 5, 1960, pp. 625-35.

<sup>18</sup> O. Lewis, *La vida*, Random House, New York, 1966; E.B. Leacock, *The culture of poverty: a critique*, Simon & Schuster, New York, p.10.

<sup>19</sup> H. Dagmar, *Aborigines and poverty: a study of interethnic relations and culture conflict in a western town*, PhD thesis, Catholic University of Nijmegen, p. 262.

<sup>20</sup> See for example Michel Laroche, Kim Chankon, Michael K. Hui and Annamma Joy, 'An empirical study of multidimensional ethnic change: the case of the French Canadians in Quebec', *Journal of Cross-Cultural Psychology*, vol. 27, no. 1, 1996, pp 113-31; Ceri Peach, 'The force of West Indian identity in Britain' in Colin Clarke, David Ley, and Ceri Peach (eds), *Geography and ethnic pluralism*, George Allen & Unwin, London, 1984, pp. 214-230; Charles E. Waddell, 'The well-being of Perth's Indian residents' in Ruth Johnston (ed.), *Immigrants in Western Australia*, University of Western Australia Press, Nedlands, 1979, pp. 53-63.

<sup>21</sup> See Howard Creamer, 'Aboriginality in New South Wales: beyond the image of cultureless outcasts', in Beckett, *Past and present*, op. cit., pp. 45-62; Barry Morris, 'The politics of identity: from Aborigines to the first Australian', in Beckett, *Past and present* op. cit. pp.63-86.

<sup>22</sup> See Marilyn Wood, 'The journey from Burra Bee Dee', in Ian Keen and Francesca Merlan (eds), *Aboriginal identity and title to land in the southeast: historical, archaeological and anthropological perspectives*, (submitted as an Oceania Monograph.) (forthcoming) p. 11; Peter Sutton, *Native title and the descent of rights*, National Native Title Tribunal, Perth, 1998.

<sup>23</sup> Toohey J. cited in *The Members of the Yorta Yorta Aboriginal Community v. The State of Victoria and Others*, (unreported, 1606 FCA, Olney J., 18 Dec. 1998) p. 3.

<sup>24</sup> Gaynor Macdonald, 'Contextualising cultural continuities in New South Wales', in George Morgan (ed), *Urban life, urban culture: Aboriginal/Indigenous experiences*, Proceedings of Urban life, urban culture: Aboriginal/Indigenous experiences conference, Nov 1997, Goolangullia Aboriginal Education Centre, University of Western Sydney, Macarthur, Milperra, NSW, 1998.

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