

# Land, Rights, Laws: Issues of Native Title



## Native Titles Research Unit Australian Institute of Aboriginal and Torres Strait Islander Studies

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## The Proof of Continuity of Native Title

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### Editor's Introduction

The High Court Mabo decision in 1992 and the passing of the Commonwealth Native Title Act in 1993 mark a fundamental shift in the recognition of indigenous rights in Australia. The Act, like the High Court decision on which it is based, transforms the ways in which indigenous ownership of land may be formally recognised and incorporated within Australian legal and property regimes. The process of implementation,

however, raises a number of crucial issues of concern to native title claimants and to other interested parties.

The question of traditional connection to the land was considered in *Mason v Tritton* [1] The case seems to suggest the need for contemporary claimants to prove a direct link with the indigenous people who held native title at the time of the declaration of British sovereignty.

In this paper the question of the proof of continuity of native title is considered from the perspectives of two authors, an anthropologist and an historian. Dr Julie Finlayson is currently a research fellow with the Centre for Aboriginal Economic Policy Research at the Australian National University and a consulting anthropologist on numerous land claims. She takes as her starting point the differences between oral and documentary evidence. Professor Ann Curthoys, of the Department of History of the Australian National University, responds to Dr Finlayson by exploring some of the underlying issues of objectivity, truth and the culturally specific nature of history.

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## **An anthropological perspective - Julie Finlayson**

The burden of proof for native title claimants in the Federal Court is expected to be onerous [2] but a decision on what historical evidence is necessary and the degree to which it will be critical is open to debate. Nevertheless, the importance attached to written documentation seems to be increasing rather than decreasing. To some extent, precedents from the *Aboriginal Land Rights (Northern Territory) Act 1976* may have influenced the growing emphasis on documentation through the model of a claim book as the 'text' for evidence in relation to the requirements of the Act. But it is also possible that in more recent years of the claim process the presentation of 'difficult' cases has elevated the history section of a claim book to greater importance because it is a means for explaining the disjunctions between the group's past and present circumstances with respect to their association with their traditional country. In the context of native title claims, however, the emphasis on documentation might simply be a practical and necessary response to the difficulties of 'making sense' of the unstructured oral narratives offered by claimants in mediation conferences, in addition to substantiating their status as the 'right' claimants.

What do anthropologists have to offer from their experience with oral evidence in land claim processes over the past 20 years? At least one senior anthropologist predicts that the broad requirements of evidence for proof of native title will place a hitherto unparalleled emphasis on historical documentation of Aboriginal social life, customs and practices. [3] Beckett [4] agrees, but he is uncertain how successfully anthropologists will meet the challenge of unpacking the wider issues in questions of cultural change. He predicts that issues of unauthenticity and the shallowness of tradition will be central in native title claims on the Australian mainland: certainly, questions about the historical depth of a secret Aboriginal women's tradition and its continuity were crucial points contested by parties to the Hindmarsh Island controversy. [5]

Beckett's experience of the Murray Island case encouraged his view that 'tradition' and 'continuity' must be addressed alongside 'creativity' and 'innovation' in any discussion of cultural change. He is sceptical of the professional expertise of anthropology and its ability to explain cultural change through evolutionary and functionalist theories which argue that contact between 'primitive cultures' and 'civilisation' are inevitably destructive. The more romantic position is a view that primitive cultures have the capacity to survive contact with outside influences.[6]

None of these views offers a satisfactory explanation of cultural contact. As Beckett points out, functionalism and evolutionary theories underestimate the resilience of indigenous cultural reproduction, just as a refusal to accommodate cultural change makes understanding of the 'processes of cultural revival and the invention of tradition' difficult.[7] Native title claims raise questions of cultural change when evidence of continuous traditional connection is required. Such questions relate to evidence such as genealogies, oral evidence and rules governing succession.

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## **Genealogies and social history**

For the first time in land claim legislation, the Native Title Act seeks evidence of continuity from precontact times to the present. But it is not, of course, the first time evidence has been sought through genealogical information for claimants' association with country. For example, the practice directions of the *Aboriginal Land Rights (Northern Territory) Act 1976* requires evidence of claimants' personal and collective histories on the country under claim. Genealogies are considered important aspects of the association since they help to verify and identify the primary landowning group.

In some areas of settled Australia, the genealogies collected by anthropologist Norman Tindale are considered immensely important to Aboriginal communities. Many communities have only recently had access to the data he collected as part of the Harvard Adelaide University Expeditions and during other field research projects. For Aboriginal people removed from their traditional homelands in Queensland, Western Australia and New South Wales and elsewhere, Tindale's genealogies now represent primary historical sources describing details of their genealogies and providing a touchstone to their classical traditions. Not surprisingly, Aboriginal people in the diaspora are turning enthusiastically to Tindale's research and maps for information about the distribution of indigenous groups and their associations with country.

The importance of personal histories and genealogies is further highlighted in recent directives from the National Native Title Tribunal. In the Tribunal's document, *Procedures for Applications for Native Title Determination and Compensation*[8] it is stated that applicants will be asked [during a plenary conference] to 'present oral statements at the conference outlining the history and nature of their connection with 'the land' the subject of the application, the concerns and objectives they have in relation to it and the ways in which they think negotiations should proceed'.[9]

Yet few anthropologists share the degree of confidence in Tindale's material Aboriginal people display; not least, because the correspondence between territorial groups and language groups is more complex than Tindale imagined. It is also important to seek an informed correspondence between information Tindale collected and places he actually visited. For these and other reasons, his genealogical sources warrant caution.<sup>[10]</sup>

Tindale's genealogies may not be a complete record and, when stretched to cover large areas and extensive claimant groups, they are bound to be inaccurate. Further, where emphasis is given to connection through biological descent, adoption practices in accordance with traditional customs may not be included or reflected in genealogies. On a political level, genealogical information should be treated as private rather than public knowledge, particularly if there are deviations from ideal behaviours or marriages involved. Finally, anthropologists would not consider genealogies the only Aboriginal processes for validating connections to land or recruitment to membership of land holding groups.

Descent is often too heavily restricted to a biological model of relatedness (as appears to be the case in *Mason v Tritton*) and not one reflective of wider kinship reckoning (such as adoption or residence rights, or in some areas, rights conferred by conception). Although the biological model stresses the status of genealogies as history, the history in genealogies is often a social artefact reflecting political, demographic and cultural factors.

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## **Genealogies as oral history**

In land claims in the Northern Territory, documentary evidence of genealogies is presented in collaboration with oral testimony when claimants are asked to list members of the patrilineal land holding group. Yet, as experience in these claim processes illustrates, evidence drawn from oral testimony and based on memory can be problematic especially in terms of reliability. Anthropologists and lawyers familiar with taking evidence from oral histories know that 'shallow' genealogical knowledge is a common phenomenon characterised by a propensity to collapse the great-grandparent generation into the mythical past. As Neate discovered: 'it ...seems rarely possible to trace the patriline back beyond three generations'.<sup>[11]</sup>

Academics have addressed the apparently shallow depth of much Aboriginal genealogical knowledge. Recent anthropological interest focuses on the relationship Aboriginal people see between myth and history; especially as researchers recognise the implications of the relationship for how people present their biographies and the history of their group.<sup>[12]</sup> In the light of the concerns, what status will be accorded Aboriginal social memory and oral testimony in native title claims and will there be greater reliability assumed for and primacy given to, the documentary evidence?

Various cultural explanations have been offered by anthropologists for the limited depth of genealogical knowledge. Some explanations for example, emphasise taboos by arguing that in some Aboriginal communities it is the observed custom not to speak the name or refer to a deceased person. Indeed naming practices whereby people are given the names of their

father's father (FF) or father's father's sister (FFZ) results in the collapse of intergenerational distinctions.<sup>[13]</sup> Bell advances another possibility:

it is more pertinent to recognise that the remembering of a unique name and exact dates adds little to Aboriginal perceptions of the past. The stress is on identifying persons by reference to their relationship to others, their dreaming affiliations and their ritual associations.<sup>[14]</sup>

On the other hand, historians<sup>[15]</sup> argue that oral history typically weaves a disjointed narrative and that the depth of historical memories is generally shallow for all cultures. In this sense, the frustrations with Aboriginal oral evidence are no different from the problems and patterns of oral history among non-Aboriginal people.

However, genealogies will certainly be prominent in evidence of continuous association. Although it will be impossible for most Aboriginal people to track individual and family histories back to 1787, a more realistic option would be to provide genealogical evidence back to the period which corresponds with the establishment of systematic local administrative practices, such as keeping government records. Of course this date will depend on the region in question as the establishment of local government and administration occurred at different times throughout the states and territory.

In native title claims in settled Australia, the genealogical evidence is likely to markedly contrast with genealogical models of patrilineal descent common in the Northern Territory land claim process. Marcia Langton argued this point in a recent public lecture.<sup>[16]</sup> In her view, the impact of the post-colonial settlement on Aboriginal men and male ritual and religious traditions has inevitably led to the prominence of Aboriginal women as custodians of knowledge and as care takers 'holding' land. Consequently, we should not, in her view, simply adopt uncritically anthropological models from remote Australia in native title claims. The historical impact of colonial conquest has given rise to different forms of land holding groups and different mechanisms for maintaining continuity in settled Australia. The challenge for anthropologists is to flesh out such differences in the context of the kinship literature and the imperative to demonstrate within particular cases the threads of continuity in tradition and customary practice.

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## Succession

Legal interpretations of the continuity issue in *Mason v Tritton* seem to emphasise incorporation and reproduction of social groups as fundamentally a function of biological descent. Bartlett<sup>[17]</sup> in contrast, argues that continuity of connection can be established through evidence of the presence of *some* Aboriginal group. Anthropological understandings of the principles of Aboriginal succession may illuminate other approaches to the question. Land claims in the Northern Territory originally focused on patrilineal succession as the dominant mode of descent. Later claims encompassed succession through female membership of the patriline, as well as through trusteeship (groups linked to country through a dreaming track), territorial proximity, adoption, or conception/ birth sites.

In general, Aboriginal land is held as a communal property right of relatively small groups overlaid with individual rights of entitlement (such as conception and birth places in central Australia). Succession proceeds according to specific principles or rules of entitlement. Continuity in native title claims will, in turn, raise questions of how proprietary rights are defined and how the landowning group is conceptualised. Based on their anthropological experience with Aboriginal people in Northern Territory land claims, Peterson and others [18] show that under Aboriginal tradition or law, succession follows a number of legitimate options. Some of these options were made the basis of the eligibility criteria in the *Aboriginal Land Rights (Northern Territory) Act 1976* (originally patrilineal descent, foraging rights, primary spiritual responsibility for example). However, twenty years after the introduction of the Act, anthropologists now package these rights in conformity with both the Act and a more extensive appreciation of the flexibility of Aboriginal tradition [19]

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### **The Waanyi case**

In the recent Waanyi native title claim, succession was argued on an assumption of residual rights. Extensive colonial settlement led to depopulation in various areas of Aboriginal Australia and in turn, amongst some neighbouring regional groups this facilitated indigenous territorial and cultural expansion. However, research into traditional territorial patterns in some areas of remote Australia suggests that depopulation was also a likely consequence of natural demographic change amongst small groups. Continuity through succession might therefore be worth exploring in terms of a regional perspective on land ownership, as the Waanyi people realised.

The Waanyi people asserted ownership to a parcel of land in what was formerly Injilarija territory in western Queensland. The Waanyi people occupied Injilarija country after Injilarija people were decimated at the end of the 19th century. Strictly speaking, Waanyi territory was further west. However, in regional terms Waanyi, Injilarija and Nguburinja, were considered part of the same cultural bloc with common laws and customs. [20] Consequently, Waanyi justified their claim by reference to traditionally-based principles of succession and no issue arose about the continuing Injilarija presence on the claim area.

Cultural commonalities and acknowledgment of their right of occupation by regional neighbours established their legitimate succession under Aboriginal tradition. In addition, historical records verified their established presence in the country. Their case however, emphasised ownership, not simply succession and Justice French accepted the legitimacy of Waanyi succession.

Land ownership is best understood in terms of a regional picture, rather than by concentrating on the smaller, local claimant group. By conceptualising occupation and connection as wider than the localised area, succession operates within this framework as both an internal process and as a social glue for wider territorial relationships; indeed, 'succession' is a mechanism by which groups have continuous rights of association in one another's territory. This process was certainly observed in some Northern Territory land claims. In one case, by the early twentieth

century the traditional land holding group was decimated as a consequence of massacres. The land was currently held by a neighbouring clan under a 'care taker' arrangement. The care takers' role, in accordance with traditional law, concerned the maintenance of responsibilities to the country until such time as the legitimate owners could reassert their primary rights. Over time, knowledge of the former owners is often suppressed and the caretakers emerge as the accepted owners.

Succession in land ownership is therefore as much a political process legitimated through tradition as it is presented and asserted in the context of tradition.<sup>[21]</sup> Since political forces are an acknowledged feature of traditional landowning processes, Bartlett's interpretation of continuity through residual rights by an Aboriginal group is plausible anthropologically. At the same time, intra-Aboriginal conflict over land confirms the existence of systemic laws of occupation and succession, and the different orders of rights between individuals and groups to 'speak' for country. It is not usually the principles of land ownership or succession which give rise to conflict, but the interpretation of who has these rights and what they are.

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## **Rights and land ownership**

The relationship between the local group and the regional context has been widely canvassed in the anthropological literature on questions about how membership in groups is constituted with respect to land. Much of our anthropological knowledge of the internal mechanisms of proprietary rights are the result of land claim work in the Northern Territory and in relation to the particular requirements of the Act applicable there.

Generally speaking, Aboriginal rights in country are contextual and dependent on who one is and what entitlements flow from this status under traditional law and custom. In remote Australia there are different orders of rights (for example, contingent rights and rights deriving from descent and group membership). Contingent rights regulate intra-Aboriginal relationships, notably in relation to resource exploitation and residence on country. Traditionally, territorial exploitation by Aboriginal groups Australia-wide involved regular foraging in neighbouring country. Such contact was systematised through protocols and exchange networks. In this sense, the local group was embedded in a regional political, social and economic matrix.

In conceptualising the relationship between native title claimants and country in native title claims, Peterson uses the analogy of 'islands':

Clearly if the 'people' or 'island' is defined at a highly localised level such as the clan then many areas would be lost to native title claim, because from the point of view of that small area there could be no owners and so there would be a break in continuity. If however this area where succession is taking place is encompassed within a much bigger 'island' then the succession can be seen for what it is: part of the internal process by which the people reproduce their relations to land in the face of demographic fluctuations that have been around since the beginning of time.<sup>[22]</sup>

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## Concluding comments

Unlike the restricted definitions of traditional land ownership adopted in the *Aboriginal Land Rights (Northern Territory) Act 1976*, native title claims have to be developed in terms of their particular customs and laws. Aboriginal notions of continuous occupation may, however, differ from that upheld by non-Aboriginal people. Sutton expects that Aboriginal people will say:

it is our definition of occupation which is relevant, not that of the western legal system. That customary law defines what is the relevant form of occupation, and that is remarkably similar to a technical legal definition of the occupier of a dwelling in a western land tenure system.<sup>[23]</sup>

In the final analysis, any requirement to prove a continuous biological link would, in most cases, present Aboriginal people with insurmountable problems of evidence, irrespective of the need to accommodate different settlement dates across Australia. Documentary evidence will have a corroborative relationship to oral histories. It will also provide governments and non-claimant parties with a degree of certainty about engaging with the 'right' claimant group. Consequently, where documentary sources from government or mission records provide genealogical histories beyond three generations these will be invaluable to claimants. But ultimately, we should critically evaluate the instrumental significance of documentary material in the two tiers of native title claim process; the Tribunal mediation conferences on the one hand, and the Federal Court on the other hand.

The fundamental questions of how continuity will be viewed in the light of Aboriginal law and customs, and what constitutes proof of this continuity within the Aboriginal system of law and custom must ultimately drive the search for evidence of continuous connection. If this is the case, then we might expect to be dealing with ethnographic evidence which is not foreshadowed by the experiences of the Northern Territory claim process.

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## An historian's perspective - Ann Curthoys

There will probably be an increasing emphasis placed in native title claims on written records and historical research. The written documents are seen as able either to corroborate information provided in oral narratives by claimants, or to provide genealogical histories beyond three generations. Finlayson notes, however, that these written records have their own problems. In some areas of settled Australia the genealogies collected by anthropologist Norman Tindale are gaining enormous significance, yet they are not wholly reliable, partly because of Tindale's limited framework of understanding, and also because of their inevitable incompleteness and inaccuracies. Finlayson's points are important ones, and I would like to ponder them further.

The issues are the notion of objectivity and truth in historical research; the culturally specific character of notions of history; the limitations and possibilities of written historical evidence; and the limitations and possibilities of oral evidence.

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## **Objectivity and Truth**

It is important that claimants and their advisers recognise the limited ability of historical records of any kind; written, oral, visual, material; to yield an uncontestable historical truth. The meaning of any record depends on the overall context in which it is placed and interpreted. This is why the history of any people, event, period or place can be rewritten by each generation; the work of earlier generations is always felt to be inadequate, however thorough the historical research. The assumptions, the questions, the conceptual framework always seem in need of revision.

The most startling example of this lies in the revision of Australian history itself. As Bain Attwood and many others have noted, the framework of understanding of Australian history was once one which told a story of discovery and settlement by Britain, through a colonising process which was generally peaceful, and in which Aboriginal society was destroyed mainly by disease, tribal conflict, and an inability to adapt to the presence of the white man. British values and British people were successfully transplanted onto Australian soil, building a new nation and a new people.

In recent years this narrative has been challenged by another, so that the two currently live in uneasy tension, the former still framing much popular white Australian discourse, the latter gaining ground in academic historical scholarship, and in the Mabo decision itself. The second narrative is one which emphasises the longevity of Aboriginal occupation of the continent, recasts the explorers and settlers as invaders, emphasises the violence and destruction wrought by colonial dispossession, as well as the continuing process of economic exploitation, institutionalisation, and surveillance of the indigenous people.<sup>[24]</sup>

Any Australian historical document can be read within the framework of either of these narratives, and many others besides. Which readings of any document will be preferred by historians will depend on the overall interpretative framework the historian uses, as well as on certain shared disciplinary procedures, discussed in detail below. Historical records, in whatever form, cannot reveal an uncontestable historical truth.

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## **The culturally specific nature of history**

The practices of history and the very idea of history itself derive from Western theories of knowledge, ideas about the past which construct a notion of sequence and causation, so that events which occurred earlier lead to later events, and not vice versa. Events are constructed into a linear series by the historian. Writing a history of a people who do not view the past in the same way as the Western-trained historian does, has led many to ponder the culturally specific nature of history itself.

Indigenous notions of the past have been different from those working in a Western tradition, according conceptual primacy to place, or kinship, or relationship to land, rather than time. In modern Australia, history has become an important means for Aboriginal people of constituting identity, arguing for special indigenous rights by right of prior occupation, and arguing for past injustices and the need to rectify them. History is important both for personal identity, especially for people who have been moved around, removed from their parents as children, and separated from their kin and traditional places. It is often in the form of autobiography and biography, written directly for one's family and children and community, a way of passing on to children an Aboriginal account of the past and identity. Aboriginal historical accounts are given within a narrative of colonising injustice. The emphasis is, as Bain Attwood[25] puts it, on 'survival, continuity and difference'. The Captain Cook stories told across Australia are important not for their literal detail but because Cook becomes in them the 'archetypal first white man, an Australian Everyman who invades, colonises the land, and imposes an immoral and unjust law on Aborigines.[26] They cannot be taken as a literal account of events in the history of early colonial contact, but they can be read as insightful accounts of the nature and meaning of that contact, much more insightful than the historical narratives taught to generations of white Australian children.

History, then, becomes an important part of cultural identity, for indigenous and non-indigenous Australians alike. As Elizabeth Tonkin points out, 'minorities are likely to have a sharper sense of their special identity than do the majorities with whom they have to share a country'. Majority identities, in so far as they are uncontested, 'can become naturalised as reality'. If that ground of confidence is removed, as happened in post war Germany, majority identities too become more self-conscious.[27] That is why, she continues, 'sophisticated and sceptical deconstructors of other peoples' legitimating histories can be very upset when someone tries to deconstruct their own social identity'.[28]

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### **The limitations and possibilities of written evidence**

Historians' protocols for reading and using an historical document will include asking questions about the nature of the document: who created it, when, where, why, how, and for whom? Historians insist as well that documents must be read in context, in terms of the language use of the period, the genre or overall character of such documents, the rules by which such documents usually were created. For the kinds of documents that may be relevant in native title cases, relevant concerns may be a knowledge of the nature of colonial bureaucratic practice, the assumptions of anthropologists, government officials, and local landowners creating the documents, the usual nature of police reports, or petitions to the Colonial Secretary or Governor, and so forth.

While historians differ considerably from one another on the degree to which they accept a positivist epistemology, the degree to which they believe it is possible to show the past 'as it really was', they will tend to agree on the necessity to observe the above protocols when reading an historical document. These techniques become, in different historians' hands, a basis either for insisting on the importance of interpretation, of

various possible readings of the one document, or for defending history from an extreme relativism which places no limits on the storyteller.

These assumptions about the use and limitations of written documents are significantly different from some Aboriginal conceptions of knowledge. Particularly important is the difference in the basis on which the authority to tell a story, an account of a long ago event, is derived. Deborah Bird Rose describes the historical submissions in land claim hearings under the *Aboriginal Land Rights (Northern Territory) Act 1976*:

Most of the claimants, most of the time, do not validate their knowledge by testing it against other frames of reference, and certainly not by validating it with reference to the written word. Rather, they validate their knowledge by demonstrating that its authority derives from previous generations: they know, and they have the authority of knowledge, because they were told. Authorised knowledge, in short, has a human genealogy and is orally transmitted.[29]

Using historical records for native title purposes will need recognition of these very different conceptions of the authority to speak, and means of validating knowledge.

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### **The limitations and possibilities of oral history**

Oral history has been popular amongst European and Australian historians since the late 1960s, especially since the widespread availability of portable tape recorders. It has been seen as a way of learning the history of those who left little record, a basis for a 'history from below', a way of giving voice to the relatively powerless, the exploited, the ordinary people. It was countered by historians who cautioned against the unreliability of oral accounts, partly because of the unreliability of memory. By the 1980s oral history practice was increasingly informed by consideration of these difficulties. Many historians found from their own experience with oral history interviews, that all sorts of errors, foreshortenings and silences occur. Information is often presented with the teller in the best light, not in a deliberate intention to deceive, but because that is, now, how the teller remembers it. As Elizabeth Tonkin points out:

it is also known that individuals may become traumatised into forgetting - or into remembering with great vividness what they could not have seen.[30]

Attention turned by the late 1980s to the problem of memory itself, so that oral history accounts were read not so much for the empirical detail they might give about the past, but for the evidence they provided about people's individual and collective memory, their sense of the past. Not only was it recognised that memory was encoded in language, and therefore in some important sense socially constituted, but also the narration itself; its genre, language, and discourse became an object of interest. Oral testimony, it was recognised, must always be interpreted within a social relationship, the context within which it is given. Despite all these cautions and concerns, oral history continued to be seen as providing sources of insight that written records could not yield.

It is important not to assume that all the characteristics of Aboriginal oral histories are due specifically to their Aboriginality. Oral histories in Australia, and similar societies, generally tend to be important only for a short time back into the past, to be grounded by associations of place, smell, sight, and sound, to be characterised by uncertainty about the dating and order of events, to be secured by kinship associations and life cycle events.

Goodall<sup>[31]</sup> discusses the methodological considerations in oral history projects conducted by non-Aboriginal historians with Aboriginal interviewees. She discusses in detail cases where the information provided in oral testimonies seems to contradict that given in the written records, and then shows that if the two kinds of sources are read together, new questions can be asked. If Aboriginal people in New South Wales, for example, believed in the middle decades of the twentieth century that they had no right to buy freehold land while written documents indicate clearly that they did indeed legally have such a right, then we ask why it was they believed otherwise, what this tells us about the nature of information made available to Aboriginal people about their legal and economic situation.

By looking at the two kinds of information together, we develop a more detailed and nuanced picture than could be gained from either source alone.

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## **Conclusion**

Given the extreme destructiveness of the colonising process, there are some Aboriginal groups for whom historical records will not be able to prove continuity of association with specific areas of land. On the other hand, historians should not be too quick to assume their records and techniques cannot show such associations. Until the detailed research is done, in the new legal, cultural and historical environment, we will not know. Twenty five years ago, most Australian historians thought there was insufficient documentary material to warrant a study of Aboriginal history at all. Similarly, the new historians of women of the same period were told that women's history would founder on the absence of records, however good the historian's intentions. How wrong such pessimists have been proved to have been. New questions seem to lead to the finding of new records, or the reading of old records in a new way. In particular, major opportunities emerge from reading different kinds of evidence, oral, written, and material, in conjunction with one another, not for corroboration so much as to prompt new questions and insights not possible from one form of information alone.

There are then significant possibilities, and also room for some disappointment. I hope historians, and the indigenous people who employ them in preparation for making native title claims, find a way to explore the possibilities without promising the impossible.

## **Endnotes**

<sup>[1]</sup> (1994) 34 NSWLR 572.

[2] See Justice Olney's remarks in Edmunds, M., Fingleton, J. and McRandle, P. (eds) *Proof and Management of Native Title. Summary of Proceedings of a workshop conducted by the Native Titles Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies. University House, Canberra, 31 January-1 February 1994, AIATSIS, Canberra, 1994, p. 53.* [3] Sutton, P. 'The relative strengths of oral and written evidence', in Edmunds, M., Fingleton, J. and McRandle, P. (eds) *op. cit.*, 1994, pp. 20-25: 21.

[4] Beckett, J. 'The Murray Island case and the problem of cultural continuity', in Sanders W. (ed.) *Mabo and Native Title: Origins and Institutional Implications, Monograph no. 7, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, 1994, pp. 7-24: 21.*

[5] Tonkinson, R. *Anthropology and Aboriginal Tradition: The Hindmarsh Island Bridge Affair and the Politics of Interpretation. Unpublished manuscript. Paper presented to the annual meeting of the Association for Social Anthropology in Oceania, Kona, Hawaii, February 1996.*

[6] Beckett, J. *op. cit.*, 1994, pp. 21-22; also refer to Sharp, N. 'No ordinary case: reflections upon Mabo No. 2' in *Essays on the Mabo Decision, Law Book Co., Sydney, 1993, p. 30.*

[7] Beckett, J. *ibid.*

[8] Issued by the National Native Title Tribunal on 30 April 1996.

[9] *ibid.*, p. 36. [10] Neate, G. 'Determining native title claims - learning from experience in Queensland and the Northern Territory', *Australian Law Journal*, vol. 69, July 1995, pp. 510-539: 526-528.

[11] *ibid.*, p. 526.

[12] Beckett, J. *op. cit.*, 1994, p. 18.

[13] Hiatt, L. *Kinship and Conflict. A Study of an Aboriginal Community in Northern Arnhem Land, Australian National University Press, Canberra, 1965.*

[14] Quoted in Neate, G. *op. cit.*, 1995, p. 526.

[15] Ann Curthoys *pers. comm.*

[16] 'Gender and identity', *AIATSIS Public Seminars 1996, Series 1: Identity Rights, delivered on 15 April 1996.*

[17] Bartlett, R. *The Mabo Decision, Butterworths, Canberra, 1993.*

[18] Peterson, N., Keen, I. and Sansom, B. 'Succession to land: primary and secondary rights to Aboriginal estates', in *Official Hansard Report of the Joint Select Committee on Aboriginal Land Rights in the Northern Territory, April 19th 1977, AGPS, Canberra, pp. 1002-1014.*

[19] Keen, I. 'A question of interpretation: the definition of 'traditional

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Aboriginal owners' in the Aboriginal Land Rights (N.T.) Act', in Hiatt, L. (ed.) *Aboriginal Landowners*, Oceania Monograph no. 27, University of Sydney, 1984, pp. 24-48; Merlan, F. 'Narratives of survival in the post-colonial north', *Oceania*, vol. 65, no. 2, 1994, pp. 151-175.

[20] See also discussion by Trigger, D. 'Discussion 5', in Fingleton, J. and Finlayson, J. (eds) *Anthropology in the Native Title Era*. Proceedings of a workshop conducted by the Australian Anthropological Society and the Native Titles Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, AIATSIS, Canberra, 1995, p. 109.

[21] See also Ritchie, D. *Constructions of Aboriginal tradition for public purposes*. Unpublished manuscript. Paper presented at Australian Anthropological Society Conference, Adelaide, 1995.

[22] Peterson, N. 'Peoples', 'islands' and succession' in Fingleton, J. and Finlayson, J., *op. cit.*, 1995, pp. 11-17: 14.

[23] Sutton, P. 'Discussion 1', in Fingleton, J. and Finlayson, J., *op. cit.*, 1995, pp. 18-23: 23.

[24] Attwood, B. (ed.) *In the Age of Mabo: History, Aborigines and Australia*, Allen and Unwin, Sydney, 1996, p. 102.

[25] *ibid.* p. xix.

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