

## **Law and Anthropology: The Unhappy Marriage?**

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### **Introduction**

‘Anthropology’ is popularly defined as the examination of humankind - ‘the comparative study of cultural and social life’.<sup>2</sup> It draws broadly upon other social and natural sciences, as well as humanities, and for this reason a ‘law and anthropology’ research methodology intersects somewhat with other approaches explored in this journal edition. Yet this specific combination of perspectives has long occupied a key space in studies of ‘property’, for this is a concept that is central to both disciplines. Law is, of course, deeply concerned with the distribution, regulation and protection of property in various forms. And notions of property provide a crucial point of anthropological access to the broader values, systems and interrelationships of human societies. The importance of the theoretical intersection has been greatly enhanced in recent years. These two disciplines have, in a number of jurisdictions, been forced into a very public professional union in the context of Indigenous land claims.

It should be emphasised, at the outset, that the ‘law and anthropology’ methodology is one that involves not simply the application of a less-used or deeper perspective to legal study, but rather a voyage across distinct disciplinary boundaries. That raises some particular challenges, just as the union has done in professional practice. Not least of these is the need for caution in the handling of anthropological terms and concepts; this is a sophisticated and dynamic field of study that is an equal partner in the collaboration. This writer is not an anthropologist, and one of the ultimate purposes of this article will be to remind fellow legal researchers that the old adage is applicable here: as anthropologists we make good lawyers.

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2 Eriksen TH, *Small Places, Large Issues: An Introduction to Social and Cultural Anthropology* (2nd ed, Pluto Press, London, 2001) p 4.

Yet the collaboration is a fascinating and maturing one in many countries. This article begins with a brief review of the origins of this interdisciplinary conversation, and its broad ongoing relevance in various fields of property law. The focus then turns to the way the collaboration works, academically and professionally, in the context of aboriginal (or ‘native’) title. We will examine some of the history of the union in this context, and illustrate its operation with respect to some key practical controversies. Examples are chiefly drawn from the Australian context, however North-American and New Zealand comparisons will be added in particular places.

In the context of Indigenous issues, the value of productive collaboration between law and anthropology is self-evident. Few would deny the inherent limitations of traditional western legal method, left to its own devices, in its contemplation of sophisticated pre-existing Indigenous cultures. Popular staging posts for critique here include the early decisions in the Canadian *Delgamuukw* dispute, *Delgamuukw v British Columbia* (1991) 79 DLR (4th) 185, and the Australian *Yorta Yorta* case, *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606. However, a suitably simple starting point is a comment from the famous Maori lawyer, Sir ET Durie. He once famously decried the stubborn ‘monoculturalism’ of the courts when describing how a Maori elder’s song in a river bed claim was interpreted: ‘The court noted that he sang a song but had nothing to say’.<sup>3</sup>

### **The academic heritage**

Many would trace the formal academic collaboration of law and anthropology back to the early 1900s - in particular the work of Malinowski.<sup>4</sup> The law’s wandering self-examination, and advances in social science, had led to a deepening inquiry into the very nature of ‘law’ and whether it could be found in communities lacking the paraphernalia of western justice systems.<sup>5</sup> Malinowski pressed for a broad understanding of ‘law’ – arguing that it was (albeit in differing forms) a universal characteristic of human society. This was not the first

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3 Quoted in Harris M, “Mythologising “Recollections of Squatting in Victoria”: Law’s Intersection with Colonial Memory” (2003) 1 *Law, Social Justice & Global Development Journal* (electronic) at 8.

4 See particularly Malinowski B, *Argonauts of the Western Pacific* (Routledge, London, 1922) and Malinowski B, *Crime and Custom in Savage Society* (Routledge and Kegan Paul, London, 1926).

5 See generally Donovan JM, *Legal Anthropology: An Introduction* (AltaMira Press, Plymouth, UK, 2008) ch 5.

interrogation of legal principles and definitions by cross-cultural thinkers.<sup>6</sup> In the late 1800s the early legal scholar Maine<sup>7</sup> had been developing influential theories about the evolution of societies, with particular attention to issues such as whether ‘status’ or ‘contract’ was the source of obligations and privileges. Around the same period Morgan<sup>8</sup> was also producing theories of societal evolution – his work born of a fascination with the Iroquois in New York State and his broad-ranging studies of kinship systems. Morgan had emphasised the centrality of ‘property’ in the evolution of societies.

Malinowski’s contribution in the early 1900s was, however, of a different kind. He brought to the academic debates what many regard as the first disciplined ethnographic study, via his fieldwork in the Trobriand Islands. And the cross-disciplinary bridge was very clear from his firm focus on ‘law’ as the central concern of much of his study. He left some important theoretical legacies - notably the ideas that reciprocity could be a dominant force giving ‘rise to the rights, obligations, and prohibitions that are the essence of civil law’,<sup>9</sup> and that property law is not merely about the rights of individuals but also serves a social function in promoting such things as social cohesion and economic stability.<sup>10</sup> While the subsequent years inevitably produced some telling critique of his particular theories, the centrality of ethnographic study (reinforced via the work of researchers such as Schapera<sup>11</sup>) has held firm. For some time such study was driven partly by the pursuit of colonial efficiency, and it has attracted controversy for this reason and because of the inherent problems with any attempted ‘codification’ of living systems.<sup>12</sup> However, ethnographic study has detached itself at least from its questionable early patronage, and is now central to the professional union of law and anthropology in important contexts such as Indigenous land claims.

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- 6 See generally Moore SF, *Law and Anthropology: A Reader* (Blackwell, Malden, Mass., 2006) ch 3, 4.
- 7 See particularly Maine H, *Ancient Law* (John Murray, London, first published 1861, 1894 ed); see criticism by Rouland N, *Legal Anthropology* (Stanford University Press, Stanford, 1994) pp 228 – 9.
- 8 See particularly Morgan LH, *Ancient Society* (Belknap, Cambridge, MA, first published 1877, 1964 ed.)
- 9 Conley JM and O’Barr WM, “Back to the Trobriands: The Enduring Influence of Malinowski’s ‘Crime and Custom in Savage Society’” (2002) 27(4) *Law and Social Inquiry* 847, at 857. On reciprocity, see also Mauss M, *The Gift: The Form and Reason for Exchange in Archaic Societies* (Routledge, first published 1925, 1990 ed).
- 10 Malinowski’s broader functionalist theories were best articulated in Malinowski B, “The Group and the Individual in Functional Analysis” (1939) 44(6) *The American Journal of Sociology* 938. And for general discussion, see Donovan, n 5.
- 11 Eg Schapera I, *Handbook of the Tswana Law and Custom* (Oxford University Press, 1938). See also, as a significant contemporary example, von Benda-Beckmann F, *Property in Social Continuity: Continuity and Change in the Maintenance of Property Relationships through Time in Minangkabau, West Sumatra* (Martinus Nijhoff, The Hague, 1979).
- 12 See Donovan, n 5, ch 6.

The concept of ‘property’ has long been a particular focus of the law / anthropology collaboration. As noted early by Morgan and Maine in the late 1800s, and indeed by many others including Marx, concepts of property and ownership have played an enormous role in the organisation and operation of human societies. Apart from its resulting attraction for philosophers, legal theorists, political scientists, social reformers and revolutionaries,<sup>13</sup> it is necessarily a central interest of anthropology – as a window into the human condition. There was for a time some focus on the commonalities of ‘property’ across cultures, but in recent decades the focus has shifted to the differences and the drivers of that difference (eg in the work of Appadurai).<sup>14</sup> Anthropology has made some significant contributions to the cross-disciplinary inquiry – eg by prompting expansion in our understanding of the very notion of ‘property’, providing an accumulating body of ethnographic data, and explaining the role of property in the broader systems under examination.

The academic collaboration between law and anthropology continues. In addition to the research already mentioned, key contemporary contributions include works by Strang and Busse,<sup>15</sup> the Benda-Beckmanns,<sup>16</sup> Maurer and Schwab,<sup>17</sup> Nader,<sup>18</sup> Goodale and Sky,<sup>19</sup> and Pottage and Mundy.<sup>20</sup> The collaboration has an important informative (and reformative) role as regards many specific aspects of property law – eg as to what can be ‘property’ (eg cultural knowledge?),<sup>21</sup> who is capable of owning or inheriting property,<sup>22</sup> the value and

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13 See Moore, n 6, Part III A. ‘Struggles over Property’.

14 See Appadurai A, *The Social Life of Things* (Cambridge University Press, Cambridge, 1986). See generally Moore, n 6, Part III A. ‘Struggles over Property’.

15 See Strang V and Busse M, *Ownership and Appropriation* (Berg Publishers, London UK, 2011).

16 von Benda-Beckmann F, von Benda-Beckmann K von, and Wiber M, *Changing Properties of Property* (Berghahn Books, NY, 2006); von Benda-Beckmann F and van der Velde M, *Law as a Resource in Agrarian Struggles* (Agricultural University Wageningen, Wageningen, the Netherlands, 1992); van Meijl T and von Benda-Beckmann F, *Property Rights and Economic Development: Land and Natural Resources in Southeast Asia and Oceania* (Kegan Paul International, London & NY, 1999); von Benda-Beckmann, n 11.

17 Eg Maurer B and Schwab G (eds), *Accelerating Possession: Global Futures of Property and Personhood* (Columbia University Press, NY, 2006).

18 See eg Nader L, *The Life of the Law: Anthropological Projects* (University of California Press, Berkeley CA, 2002).

19 Eg Goodale MRG and Sky PK, *Owners’ Relationships to Property and Land Consolidation: A Social Approach* (University of Wisconsin, Madison, Wis, 1999), and Goodale MRG and Sky PK, *A Comparative Study of Land Tenure, Property Boundaries and Dispute Resolution* (2000) University of Wisconsin Land Tenure Centre, working paper no 34.

20 Pottage A and Mundy M, *Law, Anthropology, and the Constitution of the Social: Making Persons and Things* (Cambridge University Press, Cambridge, 2004).

21 See eg Coombe R “Objects of Property and Subjects of Politics” in Coombe R (ed) *The Cultural Life of Intellectual Properties* (Duke University Press, Durham and London, 1998); and commentary in Moore, n 6, p 111ff; Donovan, n 5, ch 17.

transferability of property, the management of common property,<sup>23</sup> and family entitlements to property.<sup>24</sup> Perhaps its most critical contribution, however, is the space it opened for the recognition of Indigenous property rights in post-colonial societies. Yet as will be seen, in that context the ongoing collaboration has been a troubled one.

### **Why law and anthropology in the context of Indigenous land claims?**

Western property law was (and many would say still is) laden with anthropological assumptions; assumptions in respect of economics, family structures, social structures, religion, governmental systems, values, lifestyle, and life purposes. It was a law designed (jurisprudentially and legislatively) for western existence. This perhaps worked while the existence of ‘other’ land relationships (ie Indigenous ones) were ignored, denied or dealt with peremptorily by way of physical dispossession or treaty. However, once the law determined that it would engage with such interests, its entrenched suppositions were inevitably tested. And engage it did. Disconcertingly for the Australian observer, reported judicial recognition of inherent Aboriginal land entitlements dates back (at least) to 1823 in the US,<sup>25</sup> 1847 in New Zealand<sup>26</sup> and 1888 in Canada.<sup>27</sup> Australia surfaced in this respect only in the early 1990s, but that is a story to which we will return.

Initially the judicial recognition of these interests did not require the law to venture too deeply into the anthropological musings of the time (beyond recognising that there was an alternative to western land use norms). The treaty or agreement-making process continued in North America – commonly involving the surrender of the Indigenous interests, the creation of a lesser reservation, and possibly the preservation of subsistence rights over surrendered

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22 See eg Sick D, “Property, Power Property, Power, and the Political Economy of Farming Households in Costa Rica” (1998) 26(2) *Human Ecology* 189.

23 See eg Buck SJ, “Cultural Theory and Management of Common Property Resources” (1989) 17(1) *Human Ecology* 101.

24 See broadly Bowen JR, “Consensus and Suspicion: Judicial Reasoning and Social Change in an Indonesian Society 1960 – 1994” (2000) 34(1) *Law and Society Review* 97; discussed in Moore, n 6, ch 16.

25 *Johnson v M’Intosh* 21 US 543, 8 Wheat 543 (1823).

26 *R v Symonds* (1847) NZPCC 387.

27 *St Catharines Milling and Lumber Company v R* (1887) 13 SCR 577; *St Catherine’s Milling and Lumber Company v R* (1888) 14 App Cas 46.

land that remained unoccupied.<sup>28</sup> The early New Zealand response as regards specific territories was to embark upon an extensive process of statutory ‘conversion’ (identifying the correct owners of particular land and converting the interest into tradeable freehold).<sup>29</sup> These approaches meant that there was, for many years, little call upon the law to engage with deeper anthropological questions. Moreover, any early jurisprudential comment in these jurisdictions on the nature of the Aboriginal interest tended to represent it as a comprehensive one (that required little detailed cultural examination), and generally tended to rest its existence on basic notions of possession and occupation that were well-known to western law.<sup>30</sup> There were exceptions to the law’s early disinterest in finer cultural details – for example in the application in New Zealand of the ‘1840 rule’. The conversion process in New Zealand rested essentially upon an inquiry into titles under Maori ‘custom and usage’ as at 1840 (the time of entry into the Treaty of Waitangi and the assumption of nominal control by the British Crown). The rule produced some controversial results owing (for example) to significant tribal movement around the 1840 period, and for this reason (and because of the accompanying attempt at some codification of Maori ‘custom’) it has been the subject of detailed contemporary criticism.<sup>31</sup>

Post-colonial law has gradually developed a greater interest in anthropological inquiries. In its precise modern form it is more ready for such detailed inquiries, and of course it now approaches Indigenous claims armed with a more visible anthropological archive. Moreover, the law is now working in the shadow of an established intellectual commitment to cultural preservation, and indeed with cognisance of resource pressures that might conceivably be eased by a more historicalised or ‘stylised’ approach to Indigenous interests. Not surprisingly, the draw upon anthropology has been strongest in the last country to deal with Indigenous interests (Australia), and weakest in the country in which such matters were largely resolved by the 1970s (the US).

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28 See the overview (and references cited) in Bartlett RH, *Native Title in Australia* (2nd ed, Butterworths, Sydney, 2004), p 702ff; and Young S, *The Trouble with Tradition: Native Title and Cultural Change* (The Federation Press, Sydney, 2008) pp 48-52.

29 See generally Gilling BD, “Engine of Destruction? An Introduction to the History of the Maori Land Court” (1994) 24 *Victoria University of Wellington Law Review* 115; *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (Elias CJ); Young, n 28, pp 64-68.

30 Young, n 28, pt II.

31 See eg Gilling BD, ““The Queen’s Sovereignty Must be Vindicated”: The 1840 Rule in the Maori Land Court” (1994) 16 *New Zealand Universities Law Review* 136 at 149; Lenihan STM, “Maori Land in Maori Hands” (1997) 8 *Auckland University Law Review* 570.

After the initial recognition of native title in Australia (in the 1992 *Mabo* decision: *Mabo v Queensland (No 2)* (1992) 175 CLR 1), and building in part upon habits formed under earlier statutory land rights methodologies,<sup>32</sup> the Australian law quickly set to constructing a very microscoped approach to the determination and negotiation of claims. It was determined that native title was to be defined according to the traditional (pre-sovereignty) laws and customs of the relevant group, and that its continued existence depended upon the survival of traditional laws and customs and traditional ‘connection’ with land.<sup>33</sup> The courts struggled with subsequent arguments that an overly specific examination of the nature and survival of particular laws and customs would be too onerous for many claimant communities and fail to respect the true nature of Indigenous ties with land.<sup>34</sup> Indeed the High Court reinforced the somewhat constricted methodology (with close attention to the terms of federal legislation) in two critical 2002 decisions<sup>35</sup> - including via a stronger requirement that the Aboriginal ‘normative system’ and ‘society’ must have survived the various historical intrusions. Inevitably the critique continued. Most importantly however, given this judicial reasoning a considerable body of anthropological study (existing or created for particular claims) was squarely in play. And the maturing law/anthropology collaboration was reinforced by the High Court’s broad shift in the early 2000s from an understanding that native title was a ‘burden on Crown title’ to an insistence that it was an ‘intersection of systems’.<sup>36</sup>

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32 See in particular the *Aboriginal Land Rights (Northern Territory) Act 1975* (Cth) – discussed further below.

33 See the language in *Mabo v Queensland (No 2)* (1992) 175 CLR 1, especially per Brennan J at 57-60; and then particularly *Native Title Act 1993* (Cth), s 223. For discussion of the further development of this methodology see Young, n 28, pp 291ff.

34 See eg (initially) Bartlett RH, “The Source, Content and Proof of Native Title at Common Law” in Bartlett RH (ed), *Resource Development and Aboriginal Land Rights in Australia* (UWA and Murdoch University, Perth, 1993) p 35; Pearson N, “204 Years of Invisible Title” in Stephenson MA and Ratnapala S (eds), *Mabo: A Judicial Revolution* (UQP, Brisbane, 1993) p 75; Wootten H, “Mabo – Issues and Challenges” (1994) 1 *Judicial Review* 303; Pearson N, “The Concept of Native Title at Common Law” in Yunupingu G (ed), *Our Land is Our Life: Lands Rights – Past, Present and Future* (UQP, Brisbane, 1997) p 150; Myers GD, Piper CM and Rumley HE, “Asking the Minerals Question: Rights in Minerals as an Incident of Native Title” (1997) 2 *Australian Indigenous Law Reporter* 203; McNamara L and Grattan S, “The Recognition of Indigenous Land Rights as “Native Title”: Continuity and Transformation” (1999) 3 *Flinders Journal of Law Reform* 137; Webber J, “Beyond Regret: Mabo’s Implications For Australian Constitutionalism” in Ivison D, Patton P and Sanders W (eds), *Political Theory and the Rights of Indigenous Peoples* (CUP, Cambridge, 2000) p 60; McNeil K, “The Relevance of Traditional Law and Customs to the Existence and Content of Native Title at Common Law” in McNeil K (ed), *Emerging Justice?* (University of Saskatchewan, Saskatoon, 2001) p 416; Strelein L, “Conceptualising Native Title” (2001) 23 *Sydney Law Review* 95.

35 *Western Australia v Ward* [2002] HCA 28; (2002) 213 CLR 1; *Members of Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58; (2002) 214 CLR 422.

36 See *Yarmirr v Northern Territory* [2001] HCA 56; (2001) 208 CLR 1; *Members of Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58; (2002) 214 CLR 422.

There are ironies in the constrictions of the Australian doctrine. By denying native title to communities most affected by historical intrusion,<sup>37</sup> the western system in a sense benefits from its earlier disrespect for the interest.<sup>38</sup> Moreover, native title processes themselves impact upon Aboriginal practices and beliefs - which are in turn a part of the laws and customs assessed for continuity.<sup>39</sup> And it is noted by some that placing 'tradition restrictions' upon the content of native title simply perpetuates the disconnection of Aboriginal communities from mainstream pursuits that might alleviate their social and economic disadvantage.<sup>40</sup>

Such express historicalisation of the aboriginal title interest has been implicitly or expressly rejected in the other jurisdictions, at various points and by various means.<sup>41</sup> However, some similar inquiries did find their way into the comparative jurisprudence in specific ways – eg in the dual attention to both physical occupation and Aboriginal 'laws' in the assessment of original occupation in Canadian title claims,<sup>42</sup> also in Canadian 'specific rights' claims (which emerged first in the context of defences to fisheries prosecutions),<sup>43</sup> and in the contemporary statutory foreshore claims regime in New Zealand.<sup>44</sup> Not surprisingly, the controversies are stacked deeply in many of these contexts – some are discussed below. However, importantly for present purposes, it is clear that western property law's engagement with native/aboriginal title issues is increasingly a deep foray into anthropology.

To argue that the law has overzealously embraced anthropological histories is not to say that the basic collaboration should be undone. After all, Australia's own history is proof that it

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37 For anthropological discussion of the supposed 'settled' versus 'remote' dichotomy see Macdonald G and Bauman T, "Concepts, Hegemony, and Analysis: Unsettling Native Title anthropology", in Bauman T and MacDonald G (eds), *Unsettling Anthropology: The Demands of Native Title on Worn Concepts and Changing Lives* (AIATSIS, Canberra, 2011) p 1 ff.

38 See Strelein L, "The Vagaries of Native Title: Partial Recognition of Aboriginal Law in the Alice Springs Native Title Case" (1999) 4(26) *Indigenous Law Bulletin* 13. Cf the discussion in *R v Willison* [2005] 3 CNLR 278.

39 See eg Bauman T, "Dilemmas in Applied Native Title Anthropology in Australia: An Introduction" in Bauman T (ed), *Dilemmas in Applied Native Title Anthropology in Australia* (AIATSIS, Canberra, 2010) p 1, 2.

40 See eg *Rubibi Community v Western Australia (No 7)* [2006] FCA 459. See also *R v Sappier*; *R v Gray* (2006) 274 DLR (4th) 75; Chanwai K and Richardson B, "Re-working Indigenous Customary Rights? The Case of Introduced Species" (1998) 2 *New Zealand Journal of Environmental Law* 157.

41 See generally Young, n 28, pt II.

42 *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193 (Supreme Court). There was perhaps some Australian influence here.

43 Eg *R v Van der Peet* (1996) 137 DLR (4th) 289 (Supreme Court). A 'rights' versus 'title' distinction has never crystallised in Australia.

44 *Marine and Coastal Area (Takutai Moana) Act 2011*.



must be pursued. The Australian legal enlightenment in the 1992 *Mabo* decision was in many respects prompted by advancing anthropological understanding of Indigenous peoples and their relationships with land.<sup>45</sup> The implications of this for legal research (theoretical or applied) are here to stay. However, as we will see, perhaps a more functional interdisciplinary relationship can be forged.

### **How do we engage with anthropological perspectives?**

We are chiefly engaged here with only one of the many interesting intersections between property law and anthropology. The fact that this particular intersection operates at both academic and professional levels, and with a high public profile, means that the path for the cross-disciplinary researcher (or at least the beginning of the path) is well-marked. Indeed there is little scope for contemporary engagement with Indigenous legal issues of any kind without attention to the historical, social, political and anthropological context. Some might also add mention here of the inescapable importance of comparative study when working in the specific field of native title. The focus here will remain with anthropology - the importance of attention to historical, socio-legal and comparative context in property law research are well covered in the accompanying articles in this journal edition. However, it might be noted in the context of the case study examined in this article, for completeness, that comparative analysis has been particularly neglected in the field of Australian native title.<sup>46</sup> Some point to jurisdictional differences in the field to justify this, but it would seem that differences in the treatment of Indigenous peoples demand rather than preclude comparative study.<sup>47</sup>

In the context of aboriginal or native title, the legal academic's cross-disciplinary journey begins with the dynamic and complex land claim processes. The contemporary claims tend to be replete with evidence from a large array of disciplines: eg history, linguistics,

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45 See eg *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 104-7 (Deane and Gaudron JJ); *Wik Peoples v Queensland* (1996) 187 CLR 1 at 183 (Gummow J, quoting from Governor Hutt, 1841, WA); cf *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 (Northern Territory Supreme Court) at 255-6, 257, 258, 266, 280 (Blackburn J).

46 For a detailed examination of the worth of comparative study in the field of native title, see Young, n 28, ch 3.

47 As Cooke P explained in the New Zealand context: '[In] interpreting New Zealand parliamentary and common law it must be right for New Zealand Courts to lean against any inference that in this democracy the rights of the Maori people are less respected than the rights of Aboriginal peoples in North America': *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 at 655.

archaeology – and chiefly of course anthropology.<sup>48</sup> The initial challenge for any reader is one of basic navigation. Yet soon it becomes clear that the academic's role in respect of this frantic professional assembly, most particularly the critical exchanges between law and anthropology, can be an important and multifaceted one. The legal academic can venture into the anthropological issues and look back at the law with a new and more critical perspective. We can examine the inter-disciplinary interplay, question the accuracy and practicability of the law's translations, and search for hidden drivers or conceptual inertias in the law's responses and assumptions. And indeed we can assess the law's treatment of and impact upon this sophisticated contemporary science that has been pulled into our rigid legal frameworks and agendas.

Aboriginal title or native title cases are frequently won or lost in court (or in negotiation) on the basis of the anthropological evidence. And particularly in Australia, the relevant legal principles are in many ways shaped by anthropological understandings (albeit that the law's translation in places is contested and/or evolving). As noted earlier, at the heart of the interface in Australia is the law's close attention to 'traditional laws and customs' – both in assessing whether native title has survived the 'tide of history',<sup>49</sup> and in defining its content. Many of the component inquiries in this methodology heavily implicate anthropology,<sup>50</sup> and many have attracted controversy.

In the first place, the identification of the land holding unit (and appropriate claimant groupings) might be contested and can in itself un hinge a claim.<sup>51</sup> There may also be a need for detailed inquiry into group membership (involving issues of relationship and descent). Secondly, there may be a need for examination of traditional decision-making processes and lines of authority – which are important to the legitimacy and efficacy of native title dispute resolution processes. Thirdly, anthropology is heavily implicated in choosing the appropriate description of the rights and interests to be claimed.<sup>52</sup> This has been a particularly contentious area, with some commentators suggesting that the restrictive Australian

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48 See eg *Bennell v Western Australia* [2006] FCA 1243; *Tsilhqot'in Nation v British Columbia* (2007) BCSC 1700; [2008] 1 CNLR 112.

49 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 59-60 (Brennan J); *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 at [129] (first instance).

50 For a general coverage of the key anthropological issues arising, see Sutton P, *Native Title in Australia: An Ethnographical Perspective* (Cambridge University Press, Melbourne, 2003).

51 See eg *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] FCA 31; (2007) 238 ALR 1; Macdonald and Bauman, n 37; Dauth T, "Group Names and Native Title in South-East Australia" in Bauman T and MacDonald G (eds), *Unsettling Anthropology: The Demands of Native Title on Worn Concepts and Changing Lives* (AIATSIS, Canberra, 2011) p 21.

52 See in particular *Western Australia v Ward* [2002] HCA 28; (2002) 213 CLR 1.

methodology has too often unduly reduced the Indigenous land relationship to a fragile list of traditional activities.<sup>53</sup> Fourthly, identification of relevant ‘law and custom’ itself carries some difficulty – there is a theoretical risk (albeit perhaps uncrystallised) that important traditional activities might lack the necessary normative or rule-like foundation.<sup>54</sup> Fifthly, central to the whole process is an inquiry into continuity of ‘traditional law and custom’ and ‘traditional connection’ in the face of change and interruption<sup>55</sup> (which will include analysis of how present practices and knowledge draw from the past). This has been the most contentious aspect of Australian native title jurisprudence, with some commentators suggesting the law suffers from a ‘museum’ mentality that disregards contemporary aboriginality and disadvantages the communities most affected by settlement.<sup>56</sup> Finally, anthropology is heavily implicated in defining the relevant ‘society’ and ‘normative system’ and determining if they have survived. Once again this is contentious, in part because of the meaning apparently attributed by the law to the notion of ‘society’.<sup>57</sup>

Such matters have dominated the Australian native title scene. However, as noted above, the law-anthropology dialogue is not peculiar to Australia. For example, Canada has a controversial test for the establishment of specific Aboriginal rights (eg in a defence to an environmental prosecution): in order to be an Aboriginal right (protected in recent years by s 35(1) of the Canadian *Constitution Act 1982*), an activity must be an element of a practice, custom or tradition integral to the distinctive [pre-contact] culture of the Aboriginal group claiming the right.<sup>58</sup> More recently in Canada there has been a much debated re-examination of the geographical scope of Aboriginal title (and the level of occupation required for its

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53 See the legal articles cited in fn 34.

54 See eg *Mason v Tritton* (1994) 34 NSWLR 572.

55 See particularly *Members of Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58; (2002) 214 CLR 422.

56 See the legal commentary cited in fn 34, and from the anthropology side see eg Macdonald and Bauman, n 37; Babidge S, “The Proof of Native Title Connection *in absentia*” in Bauman T and MacDonald G (eds), *Unsettling Anthropology: The Demands of Native Title on Worn Concepts and Changing Lives* (AIATSIS, Canberra, 2011) p 82; Blackshield S, Sackett L, Hughston V and Parry I, “Good, Bad and Ugly Connection Reports: A Panel Discussion at the *Turning the Tide: Anthropology for native Title in South-East Australia* Workshop, Sydney 2010” in Bauman T and MacDonald G (eds), *Unsettling Anthropology: The Demands of Native Title on Worn Concepts and Changing Lives* (AIATSIS, Canberra, 2011) p 102.

57 See eg Palmer K, “Societies, Communities and Native Title” (2009) 4(1) *Land, Rights, Laws: Issues of Native Title* (Issues Papers Series, AIATSIS); Burke P, “Overlapping Jural Publics: A Model for Dealing with the ‘Society’ Question in Native Title” in Bauman T (ed), *Dilemmas in Applied Native Title Anthropology in Australia* (AIATSIS, Canberra, 2010) p 55 (and his examination there of a paper by G Hiley); Macdonald G, “Territorial Boundaries and Society in the New South Wales Riverine: A Wiradjuri Analysis” in Bauman T and MacDonald G (eds), *Unsettling Anthropology: The Demands of Native Title on Worn Concepts and Changing Lives* (AIATSIS, Canberra, 2011) p 62; Babidge, n 56; Macdonald and Bauman, n 37.

58 *R v Van der Peet* (1996) 137 DLR (4th) 289 (Supreme Court) at 310. See further Young, n 28, ch 5.

establishment); the British Columbia Court of Appeal controversially declared in 2012 that there must be evidence establishing intensive occupation or use of well-defined tracts of land.<sup>59</sup>

As noted above, part of the role of legal academia is to examine the accuracy of the legal assumptions and translations involved here, and check for miscommunication, hidden drivers, inertias, impracticability etc. Such examinations have produced a large body of influential critique on many of the issues listed above.

### **Challenges in the collaboration**

There are challenges arising from the forced union of law and anthropology – two very different disciplines – in this field. Some of these challenges are research-specific. However, a suitable place to start is the nature of the professional interaction, which can be bruising for the anthropologist and sobering for the lawyer. Academic researchers can benefit from some knowledge of the history here, and the Australian example is once again a stout illustration.

Following the participation of Ronald Berndt and WEH Stanner as expert witnesses in the first assertion of aboriginal title in the Australian courts (the 1970s *Milirrpum* claim<sup>60</sup> - a heavy failure), anthropology took on a long lead role in the ensuing statutory ‘land rights’ regimes. A land rights scheme was established initially (and most importantly) in the Northern Territory, as a political response to the common law defeat, but variations spread to other apposite parts of the country (bar Western Australia). The central Northern Territory scheme<sup>61</sup> was defined around anthropological concepts (most particularly the notion of a ‘traditional’ owner), and anthropologists played a central role in the formulation of claims and in the organisation and synthesis of other expert cultural and historical evidence.<sup>62</sup>

Native title is often considered a difficult ‘second phase’ of the Australian anthropologists’ encounter with law; they are engaged here by a range of stakeholders (claimants, claimant

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59 *William v British Columbia* [2012] BCCA 285. For an overview, see Young S, “The Troubled Sequel: Canadian Aboriginal Title revisited in the BC Court of Appeal” (2012) 26(10) *Australian Property Law Bulletin* 147.

60 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 (Northern Territory Supreme Court).

61 *Aboriginal Land Rights (Northern Territory) Act 1975* (Cth).

62 See further Burke P, *Law’s Anthropology: From Ethnography to Expert Testimony in Native Title* (ANU E Press, Canberra, 2011) pp 1, 25.

representative bodies, governments, industry groups etc.<sup>63</sup>), but have a more marginal role in claim design, work to less clearly-defined legal principles in this context, and have more direct exposure to formal adversarial proceedings.<sup>64</sup>

Paul Burke from the Australian National University (highly qualified in both disciplines) wrote in his 2011 book *Law's Anthropology* that:<sup>65</sup>

The bodies of anthropologists, bruised from their encounter with native title, are to be found recuperating all around Australia. Some, still wounded from humiliating cross-examination, swear, yet again, never to be involved in another native title claim. While they lament their lack of influence, others warn of native title completely engulfing anthropology and ruining it.

However, as Burke also acknowledged, some observers and participants in fact blame anthropology for the constrictions in legal doctrine.

Clearly the relationship in practice, and hence the interplay to be examined by the academic researcher, is a complicated one. There appear to be several factors at play here. In the first place, anthropologists have been required to navigate some awkwardly conflicting expectations of their work. On the one hand they have been subjected to post-colonial critique (particularly through the 1990s) that at its peak branded the discipline as antithetical to contemporary Indigenous interests. Yet at the same time they have been carefully watched in legal contexts for signs of partiality towards (or advocacy for) Indigenous communities.<sup>66</sup> Such difficulties were exacerbated by the very public controversy and confusion surrounding the Hindmarsh Island Bridge case,<sup>67</sup> which concerned in part an anthropologist's handling

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63 See generally Bauman, n 39.

64 Burke, n 62, p 1; Hagen R, "Ethnographic Information and Anthropological Interpretations in a Native Title Claim: the Yorta Yorta Experience" (2001) 25 *Aboriginal History* 216.

65 Burke, n 62, p 1.

66 For further discussion of the ethical and methodological dilemmas faced by anthropologists in the native title context, see Glaskin K, "Litigating Native Title: Anthropology in the Court" in Bauman T (ed), *Dilemmas in Applied Native Title Anthropology in Australia* (AIATSIS, Canberra, 2010) p 35; Trigger D, "Anthropology and Native Title: Issues of Method, Claim Group Membership and Research Capacity" in Bauman T (ed), *Dilemmas in Applied Native Title Anthropology in Australia* (AIATSIS, Canberra, 2010) p 147.

67 See particularly *Tickner v Chapman* (1995) 57 FCR 451.

and acceptance of secret traditional knowledge in the context of an opposed bridge construction project.<sup>68</sup>

A second broad factor at play in this troubled relationship is the point (as noted above) that these are very different disciplines, which results in some inevitable incongruity in their purposes, priorities, languages, protocols and processes. There are some obvious issues here: law and litigation is a demanding and sometimes ruthless context in which to work,<sup>69</sup> and indeed its awkward dynamism can require regular re-working of anthropological study.<sup>70</sup>

Burke has extracted from commentary a variety of explanations of this law-anthropology relationship.<sup>71</sup> One theory is that it is a process of ‘digestion’: the law ‘converts anthropology into what it needs for its own functioning’- thus in a sense enslaving it.<sup>72</sup> A second theory is that the relationship is one of ‘collusion’: judges look to a specific applied discipline such as anthropology to ‘share the burden of responsibility’ for difficult decisions. A third is that the two professions compete over the ‘ownership’ of the social problem in issue. This is perhaps evidenced by the fact that it has been common, particularly in the context of statutory land rights, to hear lawyers speak of their role in ‘briefing anthropologists’, while at the same time hearing anthropologists talk of ‘briefing lawyers’. Elsewhere in his work Burke draws an interesting additional point from the broader work on interdisciplinary relationships by Bourdieu – noting that law’s position in academia turns upon its contribution to maintaining the temporal order, whereas sociology relies on its own ‘limitless ambition’ to explain all aspects of society (including law!). Hence for an expert of the latter kind the act of appearing as an expert in an intimidating adversarial context might be a frustratingly subservient experience.<sup>73</sup>

There is much here for the academic legal researcher to digest. And they soon learn that one result of all this appears to be some quite significant miscommunication in the handling of the substantive issues. As noted earlier, some commentators have directed blame to

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68 As to the lengthy ensuing debate, see eg Brunton R, “Hindmarsh Island and the Hoaxing of Australian Anthropology” (1999) 43(5) *Quadrant* 11; Simons M, “The Hindmarsh Island Affair and Australian Anthropology” (2003) 15(2) (Autumn) *The Sydney Papers* 150.

69 See eg Hagen R, “Ethnographic Information and Anthropological Interpretations in a Native Title Claim: the Yorta Yorta Experience” (2001) 25 *Aboriginal History* 216 (particularly the reference to the legal ‘blowtorch’ at 217); McCaul K, “‘Competing Narratives’ versus ‘Interest-Based Negotiations’ and the Bar of Evidence” in Bauman T (ed), *Dilemmas in Applied Native Title Anthropology in Australia* (AIATSIS, Canberra, 2010) p 109; Glaskin, n 66.

70 Bauman, n 39, p 2.

71 Burke, n 62, p 24.

72 Cf also Macdonald and Bauman, n 37, p 3.

73 Burke, n 62, p 26.

anthropologists for the excessively microscoped and historicalised Australian legal doctrine. Certainly anthropology has provided the data. However, anthropologists have often railed against the inquiries and conclusions asked of them, as well as the constrained legal interpretations of concepts such as ‘traditional’, ‘continuity’, and ‘connection’.<sup>74</sup> It has been argued that the rigid legal framework can in important respects ‘foreclose on authentic anthropological understanding’.<sup>75</sup> Clearly deeper communication is needed.<sup>76</sup> And more broadly, some have pressed against the tightly defined roles assigned by the law – calling for anthropologists to push out into practical contemporary matters such as agreement making, governance and dispute management.<sup>77</sup>

One explanation of the central story examined in this article is that the law in Australia has in some respects been asking the wrong questions of anthropologists, that the progeny of this collaboration is therefore in important respects a little gollumesque and destructive, and that now no one is quite sure where it came from. At least the case for increasing cross-disciplinary research is an easy one to make.

There are a range of other challenges that arise in this field of study (orbiting the ones emphasised above). An obvious one is that anthropology is highly complex. There are complicated concepts (models of matrilineal and patrilineal descent are no place for the faint hearted) and even simple terms can have sophisticated meanings. It is important to remember perhaps that our role as legal researchers is to draw upon rather than dabble in anthropological inquiry. Another difficulty is that anthropological work in this field can at times be somewhat compartmentalised and isolated owing to it being not publically available (either for traditional secrecy reasons or contemporary legal reasons).<sup>78</sup> And it must also be remembered that the anthropological archive (particularly earlier work) can be of variable quality and has been shaped to some extent by the predispositions, adopted paradigms and

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74 See eg Macdonald and Bauman, n 37, p 3.

75 Bauman, n 39, p 3; and see further Morton J, “Working With, For and Against the Act: Anti Anti-Positivism and Native Title Anthropology” in Bauman T (ed), *Dilemmas in Applied Native Title Anthropology in Australia* (AIATSIS, Canberra, 2010) p 14. See also Palmer K, ‘Anthropology and Applications for the Recognition of Native Title’ in (2007) 3(7) *Land, Rights, Laws: Issues of Native Title* (Issues Papers Series, AIATSIS); Burke, n 57; and generally Toussaint S (ed), *Crossing Boundaries: Cultural, Legal, Historical and Practice Issues in Native Title* (Melbourne University Press, Melbourne, 2004).

76 See eg Trigger, n 66; Blackwood P, “Anthropological Expertise and Native Title: An Extract from an Expert Report to the Federal Court in the Waanyi Native Title Application” in Bauman T and MacDonald G (eds), *Unsettling Anthropology: The Demands of Native Title on Worn Concepts and Changing Lives* (AIATSIS, Canberra, 2011) p 161.

77 Eg Morton, n 75.

78 Macdonald and Bauman, n 37, p 3.

purposes of its authors at the time.<sup>79</sup> Care must be taken here as the legal use of data might perpetuate error or imprecision, and for this reason again legal researchers should be cognisant of the limited depth of their experience in this additional field. Finally, it is important to not begin and end with anthropological collaboration. Law and legal inquiry in Australia grievously neglected anthropology for a disreputably long time, but the rigorous conversation there now does not excuse us from creating space also for the many other disciplines implicated in native title claims: linguistics, archaeology, history etc.<sup>80</sup> The law must be constantly reminded in this field to listen and think in context.

## Conclusion

Ongoing anthropological study, and improved legal understanding of that study, are key ingredients in contemporary western legal development.<sup>81</sup> The law must engage with systems and priorities not of its own making if it is to maintain its legitimacy in a post-imperialist world. Native title law, particularly in Australia, is one context where this is acutely important. The professional dialogue here between law and anthropology has not been easy. They are disciplines on different trajectories and the collaboration has been a tangled one. Yet it is this collaboration that will drive reform and lasting settlements.<sup>82</sup> Academic researchers (from both disciplines) can very usefully examine the interplay; circle it, prod it and attempt to explain and improve it. They can test the substantive results of the partnership. And they can check the health of each of the partners.

Research in this area is a fascinating challenge – not least because instinct perhaps tells us that these disciplines may never properly understand each other. Anthropology contains decent measures of instinct, extrapolation, reflexivity, and celebrated uncertainty. Yet the law contains healthy measures of pedigreed rigidity and protective scepticism.<sup>83</sup> Justice

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79 See Bauman, n 39, p 8; Palmer K, “Understanding Another Ethnography: The Use of Early Texts in Native Title Inquiries” in Bauman T (ed), *Dilemmas in Applied Native Title Anthropology in Australia* (AIATSIS, Canberra, 2010) p 72; Pilbrow T, “Embracing Our Hallmark Latencies: On Centring Anthropological Practice” in Bauman T (ed), *Dilemmas in Applied Native Title Anthropology in Australia* (AIATSIS, Canberra, 2010) p 87. See also the detailed discussion of the evolution of relevant Australian anthropology in Macdonald and Bauman, n 37, p 6.

80 Bauman, n 39, p 10.

81 See generally Davis M, “Law, Anthropology, and Recognition of Indigenous Cultural Systems” (2001) 11 *Law and Anthropology* 298.

82 Bauman, n 39, p 9.

83 Cf Palmer, n 57; Morton J, “Samson, Sutton and Sackville: Three Expert Anthropologists?” (2007)17(2) *Anthropological Forum* 70.



Vickers of the British Columbia Supreme Court perhaps had such a conundrum in mind when he commented (in the recent Tsilhqot'in claim in Canada):<sup>84</sup>

I confess that early in this trial, perhaps in a moment of self-pity, I looked out at the legions of counsel and asked if someone would soon be standing up to admit that Tsilhqot'in people had been in the Claim Area for over 200 years, leaving the real question to be answered... [concerning] the consequences that would follow... I was assured that it was necessary to continue the course we were set upon.

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84 *Tsilhqot'in Nation v British Columbia* (2007) BCSC 1700; [2008] 1 CNLR 112 at [1373].