

**ANTHROPOLOGICAL SUBMISSION ON  
THE REEVES REVIEW**

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*The Aboriginal polity, with its contrast between local or inward-looking and expansive or outward-looking concerns, its freedom from any over-riding institution of enforcement, and its consequent stress on self-reliance and mutual aid within a framework of generally accepted norms, was a kind of anarchy in which the active and enterprising might obtain influence with age but in which none was sovereign. Land rights, self-management, and the recognition of customary law could give much in this polity a new lease on life. There will be this difference, however, that over-arching organizations in the form of land councils are now bringing together Aborigines from widely separate parts to help control vast areas and to handle problems of external relations with outsiders. The future will show whether the new system complements the old or destroys it.<sup>1</sup>*

## **1 BACKGROUND**

I have been commissioned by the Australian Anthropological Society (AAS), the professional body of anthropologists in Australia, to write this submission to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs inquiry into the Reeves QC (1998) Review of the *Aboriginal Land Rights (Northern Territory) Act 1976 (Commonwealth)* (hereafter ‘the Review’). The present submission contains my own opinions, which are not necessarily those of the AAS membership. My brief has been to provide the Standing Committee with specifically anthropological commentary, not to address all aspects of the Review.<sup>2</sup>

Of the Standing Committee’s terms of reference I shall therefore address the following:

1. *the proposed system of Regional Land Councils including*
  - *the extent to which they would provide a greater level of self-management for Aboriginal people, and*
  - *the role of traditional owners in decision making in relation to Aboriginal land under that system;*
2. *the proposed structure and functions of the Northern Territory Aboriginal Council;*
5. *proposals concerning access to Aboriginal land including the removal of the permit system and access to such land by the Northern Territory government...*

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<sup>1</sup> Maddock (1982:55).

<sup>2</sup> I wish to thank the following individuals who have provided background information for this submission or comments on an earlier draft of it: Derek Elias, Julie Finlayson, Sarah Holcombe, David Martin, David Nash, Nicolas Peterson, Marian Thompson, Nancy Williams.

## **2 THE PROPOSED REGIONAL LAND COUNCIL SYSTEM**

### **2.1 The Review's Critique of the Present System**

The Review argues that the present system privileges small 'traditional owner' groups and gives insufficient acknowledgment to the wider regional populations within which such groups are reproduced culturally and socially. While the current Act does give a place to people who are not traditional owners but are entitled by tradition to use or occupy Aboriginal land, ultimate control of what happens on that land is said to lie in the consultative relationship between the traditional owners and the land councils. The fundamental criticism that is advanced deals with both parts of this relationship. The criticism essentially is that:

1. the power of traditional owners within the scheme of the Act is excessive, and the powers of members of the resident Aboriginal community are insufficient
2. the large land councils, while politically successful at a territory and national level, are defective in a number of practical and regionally local ways, unlike the two smaller land councils

The fundamental solutions to each main criticism offered by the Review are, respectively, to:

1. collapse the owner/resident categories into one for the purpose of decision-making
2. get rid of the larger land councils and break up the Northern Territory into 18 Regional Land Councils (RLCs) overseen by a single Northern Territory Aboriginal Council (NTAC).

The critique here proceeds on two main fronts.

Firstly, it argues that the current definition of 'traditional owner' rests on inadequate and outdated anthropological advice. While this definition should be retained for the purposes of clearing up outstanding land claims, it should not in future drive the definition of who makes decisions about Aboriginal land. Instead, the Northern Territory should be divided into eighteen areas controlled by RLCs with wide-ranging localised powers, overseen strategically, financially and in other ways by a single Territory-wide Council (the NTAC). The RLCs would both make decisions about land and also hold the land legally in trust.

Secondly, the Review argues that the two large land councils are substantial bureaucracies with responsibilities for regions that are far too large for them to manage properly, as they are perceived to be remote from local issues, slow to act, and inflexible. The Review does not propose a level of organisation between the RLCs and the NTAC. The review does not address the problems of bureaucracy and remoteness that might be the burden of such a single NT-wide body located administratively in a single centre, presumably Darwin.

## 2.2 Self-management, Decision-making and Regional Land Councils

Aboriginal tradition usually makes a clear and quite profound distinction between traditional affiliations to countries and residential associations with settlements or districts. While there are complex actual and potential relationships between the two, they do not, separately, grant equivalent rights and interests in land. Long term residence, particularly that of a family over more than a generation, may lead to the acquisition of local traditional affiliations, but this is neither universal nor generally encouraged other than on a customary-lawful basis such as succession or formal incorporation. Attempts to merge the two or to blur the distinction by Aboriginal people are rare and in my experience they are typically met with fierce opposition. Of all the cases brought before the Queensland Land Tribunal under the *Aboriginal Land Act 1991 (Queensland)*, none have been on the basis of historical affiliation alone, which the Act allows for. Those who have claimed historical affiliation in that jurisdiction have come exclusively from those who claim traditional affiliation to the claim areas.

The experience of the New South Wales land rights regime, which assigns membership of local and regional land councils on the basis of residence, has been fraught with conflict. One major cause of this conflict is the relationship between those who regard themselves as having ancient and traditional ancestral identification with an area, and those who live in that area because they or their ancestors moved there in the period following colonisation. The *Aboriginal Land Rights (NSW) Act 1983* did not seek a balance of such interests. Pursuit of legal recognition of native title in the same state has raised the temperature, highlighting claims based on ‘way back’ deep connections as against those formed in historical time through migration and deportation. Claims of cultural integrity struggle with claims of equity.<sup>3</sup>

In the present case the Review proposes that in order to be a member of a RLC one must either have a traditional affiliation to an area of land within it or one must be a permanent resident of it (p595). This provision would create conditions in which people may fall into the following categories, although not all that neatly at times:

- Having traditional affiliations within the area and also being resident
- Having traditional affiliations within the area but residing elsewhere
- Being a resident of the area but one who has (few or) no traditional affiliations within the area

Under the Review’s proposals, all such people in the same RLC would be of equal standing in making decisions about land use. This would normally be contrary to Aboriginal customary law in a quite profound way, granting by government fiat a strength of voice to those in the third category which customary procedures would not tolerate.

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<sup>3</sup> Macdonald (1997). Peterson said, of residence-based models of land rights, that ‘it needs to be recognised that [they are] an interference in the traditional system since [they are] likely to result in advantaging those with weaker interests by equating them with the strongest if litigation takes place’ (Peterson and Long 1986:72).

In my view this proposal would particularly sow the seeds of serious conflict in cases where, for example, a number of residents had no strong local traditional affiliations but sought to share in or dominate the power, patronage or benefits available through the RLC of which they were members. The alternative would probably be that such 'historical people', as they are often called, would have to play at best a secondary role, in the shadow of those with traditional affiliations. Unless RLCs were legally obliged to take their views into account, their views may well be omitted from deliberations. Under such circumstances they would thus be worse off, or no better off, than under the present regime.

The Review also proposes that 'no person may be a member of more than one RLC at a time' (p595). There are manifold problems with this.

For example, some Aboriginal residential communities in the Northern Territory practice quite high levels of settlement community exogamy (out-marriage).<sup>4</sup> Perhaps most pronouncedly in the smaller settlements and those with strong Western Desert populations, people may be encouraged to find a spouse in a settlement community different from their own. Whether by choice or by rule, this results in a number of people moving to take up residence in the community of their spouse some distance away. Many of those who move are women, but both men and women are involved. Are such people likely to opt for membership of the RLC that includes their spouse's country (if that is in the RLC area of the spouse's residence), or their own? Assuming the latter, they would be residents of a RLC area in which they lacked membership and therefore, under the Review's proposals as I understand them, had no well-defined decision-making role in land affairs even as a member of a community likely to be affected by development. If they were members of the RLC for their area of residence and not their area of origin, they would be rather unlikely to attain much prominence, or any say at all, in the RLC's affairs. On both choices they would be arguably worse off than under the present scheme.

The following pairs of settlement communities are currently located in different but adjoining land council sub-regions of the Northern Territory: Ngukurr and Borroloola, Maningrida and Ramingining, Yuendumu and Ti Tree, Finke and Santa Teresa, and Elliott and each of Daly Waters, Tennant Creek and Daguragu. These examples could no doubt be multiplied many times, especially at the scale of smaller settlements.

Were the RLC system introduced, I would predict that most people would opt to be members of the RLC for the country where they had their strongest traditional affiliations. In a number of cases this is not likely to result in any very neat alignment between the regional community population and the membership of the RLC. The RLC system may, however, help those who have a tradition of acquiring traditional rights through relatively shallow residential histories (ie. Western Desert people) to establish a

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<sup>4</sup> Amunturrngu, for example, is 'primarily exogamous', with the exception of nearby outstations whose members may intermarry (but not in-marry). The radius for Amunturrngu out-marriages is about 900km (Holcombe 1998:109-110).

powerful presence, if not a dominance, in the affairs of country which is normally associated with their neighbours. In such a case the state may be interpreted as interfering with Aboriginal Law by lending comfort and support to immigrant groups whose territorial ambitions are not welcomed by host groups.

A problem with restricting each person to membership in one RLC only is that of enabling them to continue to exercise their actual customary responsibilities for their primary country. Countries which straddle RLC boundaries, giving their principal spokespersons customary responsibilities in two RLC areas, could thus be governed officially by those spokespersons and others on one side of the border and by people who lacked any such standing, or sufficient standing, on the other. One cannot leave such bureaucratically engineered situations to be managed by local goodwill. It is always conceivable that someone with little customary authority but plenty of political clout could use the opportunities offered by such an official system to ride roughshod over those with customary authority, essentially depriving customary landowners of an effective say over the whole of their countries. A great advantage of the pre-colonial systems, and their current descendants, is that they distribute a 'member of landed group' standing to everyone in the society. Even the 'little people', those who stand in the back row politically, all have country and the standing that flows from that.

Furthermore, it is widely documented in the NT that people often have key customary responsibilities for sites and lands in two, sometimes several, different areas separated by some distance. No amount of adjustment of RLC boundaries could overcome all such cases. Where these sets of countries fall into different RLC areas, the present proposal would require that the people responsible for them relinquish all except one set of traditional responsibilities relating to decision-making. This would make the situation quite unworkable, for example, where *kirda* (patrifiliates etc.) refuse to make a decision about country without the presence and concurrence of their *kurdungurlu* (matrifiliates etc.) as co-decision makers, but where such *kurdungurlu* have opted for membership in an adjacent RLC in which they themselves are *kirda* for a certain country.

The possibility, under the proposed scheme, that long-term Aboriginal immigrant residents from Townsville, say, could be members of an RLC while some of those actually responsible for the RLC's lands under Aboriginal Law were excluded in the ways mentioned above, is one that could cause great bitterness and conflict. Such tensions would be exacerbated over time by chain-migration based on economic opportunity. RLC areas which yielded substantial royalties for RLC members could easily become targets for such migrations, not only by small numbers of people from remote and unconnected places such as Townsville and Adelaide but, with much more dire consequences, larger numbers of people from nearby areas. The proposed RLC membership rules would offer official sanction for small population groups to be challenged by immigrant newcomers, especially in some of the proposed regions that have small populations of only a few hundred to 1000 or so.<sup>5</sup>

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<sup>5</sup> And of these smaller populations only a few hundred would be adults, given the low age of the populations generally.

There is an apparent contradiction between this provision for permanent residence *per se* to be a membership criterion (p595) and the proposal that RLCs ‘hold in trust all Aboriginal land in its region for the benefit of all Aboriginal people who are entitled by tradition to use or occupy that land’ (p597). On the face of it, this would suggest that someone who was not a beneficiary of the RLCs land trust could still be a member of the RLC and its Board of Directors.<sup>6</sup>

### **2.3 Placing people in a Dilemma over RLC Membership**

The Review’s RLCs as presently defined would potentially join together in the same political and administrative unit two sets of people who have quite different customary standing in relation to the same area of country. That is, to take the Cox Peninsula as an example, both the Belyuen residents – who are mainly people of Daly River immigrant stock living on traditional Larrakia country - and the mainly Darwin-resident Larrakia would potentially be in the same RLC and competing for control of it. But instead of two groups with similar ties to the region potentially engaging in conflict, here we would have groups with different kinds of ties having to share political space. I think this is a recipe for more conflict than is strictly to be expected.

The Larrakia greatly outnumber the Belyuen community, and this, if not other considerations such as those of customary law and kin-based solidarity, may persuade the Belyuen people to opt instead for membership of the proposed Daly River-Port Keats Region. One alternative for them would of course be some kind of physical ‘return’ to the south by the Belyuen people, many of whom now have been born and raised close to Darwin. If this were to occur as a result of pressure, it is the very kind of forced move they are seeking to resist.

Either way, the proposed amendments would place the Belyuen people in a difficult if not impossible position. They could stay resident in the Darwin RLC and belong electorally to a different RLC region that includes their patrilineal clan estates (Daly River-Port Keats). But in that case their normal physical absence would probably marginalise them politically and they would not benefit from their local RLC’s disbursements in infrastructure and employment terms. Meanwhile, in their RLC region of residence (but not of membership) they would have no official influence on land council matters.

As a third alternative they could, I suppose, split their own polity, having some Belyuen residents as members of the Darwin RLC and others members of the neighbouring one to the south-west. Given the different lengths of time families at Belyuen have been resident there this is conceivable, but it has a cost in terms of their being able to sustain support and influence politically in either RLC zone, and in any case a split may be unlikely to happen as the settlement community in this case is tight-knit.

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<sup>6</sup> If this seems fanciful, consider the fact that in recent years the remote Aboriginal community of Aurukun in Cape York Peninsula, which has a residential qualification for Shire Council elections, has had a German immigrant as a member of the Council.



There are at least ten areas of the Northern Territory where three (in one case four) of the present land council sub-regions have adjacent boundaries. Under the Review's proposals, decision-making about land use in such areas could be a nightmare. Aside from the problem of traditional owners having to opt for membership of just one of the RLCs involved, even if they have customary rights in the three or four adjacent and abutting RLC areas, there is the administrative problem for industry and government of having to conduct dealings with three or four different bureaucracies at once. Many of these areas of multiple adjacent land council sub-regions are on or close to the major transport corridors of the Northern Territory.

There should be no assumption that RLCs will be particularly motivated to cooperate with each other rather than to compete, especially where organisational boundaries, resource allocation and political standing are placed in the same mixture. If anything, one would expect them to compete with each other and, at times, to engage in vigorous conflict. Settlement communities already compete with each other, even in terms of ritual performances.<sup>7</sup>

In sum, the Review's membership proposals for land councils, while arising from matters of real concern that have to be addressed, seem to me to be capable of causing more problems than we have at present.

#### **2.4 Security of tenure for settlement populations**

The Land Rights Act alone, as it stands, is clearly inadequate to the task of dealing with the security concerns of long-term residents whose ancestral countries lie somewhere other than where they are currently living. Anxieties about being 'kicked off' or 'sent back' by those who have ancient connections to the land are real. The native title system, with its explicit capacity to cover such concerns by formal agreements made at the point of the determination of native titles, offers a much better regime in this regard.

I therefore support the Review's recommendation (p500) that rent-free sub-leases should be negotiated, where possible, so that settlement communities may have security of tenure. But what I have in mind here is some kind of municipal areas, not large tracts of country lacking in permanent dwellings. The Review's recommendations on sub-leases would help to relieve the tensions between parties in situations such as the *Kenbi* case (Cox Peninsula and nearby islands), but only as far as the town areas are concerned. In the *Kenbi* case the legal struggle is not itself over use of the town, which is on a separate tenure not subject to the current claim process, but over the recognition of traditional owners of the rest of the Cox Peninsula and nearby islands.<sup>8</sup>

### **3 THE PROPOSED RELATIONSHIP BETWEEN NTAC AND THE RLCS**

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<sup>7</sup> Holcombe (1998).

<sup>8</sup> However, the question of the control of the town area has arisen as an issue during the hearing, and reveals the potential for anxiety among diaspora groups.

The Review proposes the abolition of the two large land councils and the creation of a single Northern Territory Aboriginal Council plus 18 Regional Land Councils. Given that the two small land councils (Tiwi and Anindilyakwa) have an average of 14 staff, 18 similar RLCs would have a notional total staff of 252. It is hard to imagine that the NTAC itself would not require a substantial staff of at least 100, given that its proposed responsibilities would be extended into areas of economic and social development currently performed by other agencies (p605). On the above assumptions the Review's proposals would result in an increase in the total size of the bureaucracy to more than 350. The current staffing levels of all combined land councils as described in the Review is only 229. The outcome would thus be far more bureaucrats rather than fewer. If such a staffing increase is therefore contemplated, consideration should be given to addressing the 'bureaucratic remoteness' issue by boosting the existing support services at the regional level instead.

#### **4 PERMITS AND ACCESS**

On the grounds of anthropological advice the Reviewer concluded that access to land under Aboriginal tradition was not controlled by maintaining geographical boundaries for travel but by reference to social relationships with the groups occupying the land (p305). I do not regard the two as in contrast. They are aspects of the same process. The anthropological literature is clear on the point that, under classical conditions, the limits on people's social networks had geographic correlates, and their normal geographical range was limited by the point at which they would become a 'stranger' to local people they might encounter. Historical accounts quite often contain stories of Aboriginal guides declining to accompany the first explorers past a certain point into areas where they would be venturing beyond their social range and safe knowledge of the country. One has to conclude that such geographic limits were in place before colonisation. The freedom with which people travelled over each others' highly localised estates within small regions was more a matter of a standing licence, which under certain conditions of conflict or mourning, for example, could be withdrawn, than either a full freedom or a mobility dependent on the granting of specific permissions.<sup>9</sup>

The assertion that 'strangers or visitors were not required to obtain permission before entering land' (p305) is not quite accurate. Often quite elaborate protocols were required of visitors by those receiving them, but in order for distant visitors to pass on beyond the physical presence of their hosts, and to travel unaccompanied further into the country of those hosts, would normally have required some kind of concurrence from the latter. This would have applied especially to far-travelling groups such as revenge parties or, for example, those engaged in the red ochre expeditions between Cooper's Creek and the southern Flinders Ranges.<sup>10</sup>

In stating that 'Aboriginal custom did not appear to include a commonly acknowledged right to exclude others from lands, except sacred sites' (p305), the Review omits mention

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<sup>9</sup> The web of kinship normally meant that individuals could access several countries as of right, rather than by licence or permission.

<sup>10</sup> See Jones (1984 Part I:8).

of the formal closure of camp sites and areas of country by those in authority, owing to recent deaths or ceremonial activities. In the Wik area my data indicate that these closures may be carried out at the level of the clan estate by clan heads. Here the Review also omits mention of traditional resistance to the overstaying of visits, especially by large numbers of people, and restrictions on visitor access to specific resources at particular places, resources that were reserved for the control of a smallish set of people with localised rights in them at the 'local descent group' level (see further below).

However, many of those who currently seek permission to enter Aboriginal land are not members of neighbouring Aboriginal groups but may be geologists from Perth or tourists from Sweden. If one were looking for classical foundations for current arrangements such people would, in the early colonial era, have met with a range of responses, some of which would now be unacceptable. While the present arrangement for permits is clearly problematic and in need of reform, some kind of regulated intervention is arguably necessary, beyond merely applying the laws of trespass.

One reason I say this is because being in favour of getting rid of permits and merely applying the laws of trespass might rest on an assumption that those seeking permission to enter land, and those granting permission, are more or less equally well-informed as to their legal rights, and more or less equal in terms of the power to say no to each other. But there are considerable inequalities on both fronts, inequalities which potentially lend themselves to the kinds of pressure and blandishments that may on occasion result in corruption or exploitation. Assuming that some very unjust outcomes are likely to arise under a laissez-faire approach to land access, is it the state's business to intervene? Given that the state is responsible for producing the conditions under which older and more distributive forms of power have been eroded in this case, and powerful strangers legitimised, some would argue that the state now also has a fiduciary duty to protect citizens from the exploitative potential of those who have more resources and power than others, the latter including some who achieve local political success in remote places. At this point the intervention/non-intervention argument probably becomes one between contrasting political philosophies so I will not pursue it further.

Even if the permit system were abolished, many intending visitors to Aboriginal land will still need, somehow or other, to engage in the courtesy of requesting permissions to enter. One of the practical difficulties of obtaining entirely localised permission to enter Aboriginal land lies in the unpredictability of the capacity of small, remote-area offices to process correspondence within certain time-frames or, on occasion, at all. This is compounded when the people in the office receiving the request are not the people whose permission is required. The two existing smaller land councils, on a per capita constituency basis, have vast numbers of office staff by comparison with the two large land councils, and this may be one of several reasons why they are able to process permit applications relatively efficiently. Short of turning up in person from what is sometimes a great distance, it can be impossible to get a reply to an application to visit an area from a local community-level mini-bureaucracy. I suggest this be kept in mind in relation to assessing the RLC proposal. It may be that industry, for example, would prefer greater predictability to a theoretically more direct relationship with people at the local level, during the process of gaining permission to enter.

Should the recommendations of the Review on land access be adopted in principle, provisions relating to dwelling houses and yards in towns (p307) should be expanded to include open camps and day-shades. From time to time one sees strangers offensively wandering among these domestic spaces on the edge of an Aboriginal town, apparently on the false assumption that, because they are out of doors, they are not in someone's home.

## **5 MISCELLANEOUS ANTHROPOLOGICAL MATTERS**

### **5.1 Settling Outstanding Claims**

The Review stresses the divisive aspects of past procedures for dealing with land claims. From the point of view of an anthropologist, however, the research and documentation of these claims, which has involved much detailed recording of sites, countries, genealogies and local histories, is conducted under rather less divisive conditions than similar work aimed at sorting out who might be the beneficiaries of some proposed development or other, after the land has been granted. To have this documentation done prior to developmental negotiations can mean that the evidence is less skewed by the pursuit of monetary interests by some who assert affiliation to the land concerned, for example.

It has often been my experience that the anthropological research process itself, with its accompanying consultations and meetings, assists claimants and relevant others to work their way through issues such as the relative strength of their various claims, and processes of succession to title. Done well, this can be of considerable long-term benefit, because it is usually these same people who have to continue indefinitely to work together in decision-making under the new bureaucratic conditions. Although not trained as mediators, anthropologists frequently find themselves go-betweening in such circumstances. De facto mediators in this context need above all to be knowledgeable of the people and the country concerned, otherwise they may have no particularly useful standing in meetings where discussions and debates over who has rights in country are taking place. In the absence of focused research by such people, a minimally researched and 'settled' claim may leave in its wake a very unsettled set of claims from the point of view of the bureaucracy.

One of the other benefits of the claims procedure has been that it has funded the creation of highly useful records which are constantly referred to by those who administer the Act in relation to the lands which have been granted. For the Schedule I lands there is sometimes very poor documentation and little need to create it, theoretically speaking, until the traditional owners have to be consulted about some issue or proposal, and then the work may be done under severe time pressures. The large land councils, for reasons of financial priority, simply never got around to creating comprehensive registers of traditional owners for the Schedule I lands during the period that this was required of them by the Act. Much of this work now has to be done reactively and sometimes in a rather more competitive atmosphere than is normally the case when there is a land claim going on free of any immediate resource implications.

Another benefit of the claims research process has been the value to Aboriginal groups of the recording of large amounts of knowledge held by older people who knew their areas very well, but who have now passed away or will do so soon. This level of detailed knowledge of the country and its traditions and early history is only sometimes reproduced by younger people, who have not had to live off the land and have been more subject to foreign influences. In short, the ‘heritage value’ of the claims research has been very significant, and not only for Aboriginal Territorians. For certain parts of the Territory the land claim books are also just about the only reference works available on local history and culture.

The outstanding claims, however, are in many cases to narrow strips of country, a number of which lie next to or between existing Aboriginal land. In such cases the above arguments do not so much apply, and there is every reason to consider the expense of processing these claims through hearings would be excessive in terms of the information gained.

Considering the difficulty in obtaining adequately trained anthropologists at the present time, the settling of the outstanding claims has a certain attraction, in the sense that it may be better to have no anthropology on the record for those areas than to have poorly and hastily done anthropology on the record. This assumes a need for some haste, however. My own view is that it is better to avoid haste, and to combine research – preferably of claim hearing standard – with the settlement process, something which has of course already happened in a few cases.

## **5.2 Sacred Sites and Objects**

I would support the Review’s concern about the current legislative basis for political competition between two distinct agencies, the land councils and the Aboriginal Areas Protection Authority (AAPA), in relation to places of special significance. I have seen this competition in operation and it can result in disservice to Aboriginal people and wasted resources. It can also at times put an anthropologist in a difficult position when trying to access existing information, often information that has been recorded at great effort in arduous conditions, when acting for one of the two kinds of organisations and not the other.

The AAPA’s obligation to deal with ‘custodians’ of sacred sites is obviously far closer an approximation to the way authority and responsibility in regard to sites is managed in Aboriginal society than by an exclusive emphasis on the sites’ ‘traditional owners’. Senior ritual specialists from up to several hundred kilometres away can be among the main people responsible for a site’s religious aspects, even though they may make no claim to hold the soil itself, the latter being more centrally the responsibility of those in whose estate or estates the site falls.<sup>11</sup> Accordingly I would not support the NLC view

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<sup>11</sup> Incidentally, this kind of evidence runs counter to the myth that the relationship of a local descent group to its country is religious and not proprietary. Religious and proprietary interests in sites and estates are closely intertwined at the local level, but may be more distinct at the regional ceremonial level.

that the word ‘custodian’ in the Sacred Sites Act should be replaced by the term ‘traditional Aboriginal owners’.

I do not accept the Review’s argument (p286) that compensation for desecration of a site damaged by a non-Aboriginal person would not constitute an adaptation of customary law that had roots in Aboriginal tradition. It is not simply the end of the matter to say that, in the classical traditions of certain regions, the *kurdungurlu* (ritual ‘managers’ etc.) can demand compensation from *kirda* (ritual ‘owners’ etc.) when a site is damaged, no matter by whom. It is not the case that the offending person him- or herself is considered blameless. T.G.H. Strehlow, for example, cited case material where the death of the offender was several times the outcome in Central Australia.<sup>12</sup> The execution of ‘Racehorse’ for his role in Stirling and Winnecke’s 1894 robbing of a sacred cave in the Haast’s Bluff area is one of the more famous instances both of sacrilege and site desecration.<sup>13</sup> It would be a natural development under modern legal conditions for such severe retribution to be replaced by compensation. The fact that such traditions did not in the past apply to non-Aborigines reflects either the absence of the latter, or, once non-Aborigines became involved, fear of the consequences of applying customary rules to members of the dominant society.<sup>14</sup>

There is an argument that ‘putting a price’ on site desecration is to act contrary to Aboriginal tradition. But in ritual and other very ‘traditional’ contexts it is now quite common for money to be involved in ‘payment’, just as food and other economic resources were involved in ritual transactions before the arrival of the money economy. Under present conditions, money can carry symbolic value that has been made over into something meaningful in Aboriginal cultural terms.

The best argument against monetary compensation, in the eyes of some, is that it may tempt the unscrupulous to fabricate a desecration situation for monetary gain. This perception, whatever its relation to the facts, is itself sufficiently widespread and harmful to race relations to make one hesitate to promote monetary compensation for desecration. It is on the latter basis that I would not support direct monetary compensation to individuals for site desecration, but would support some other form of compensation of a more indirect and communal nature.

### 5.3 Groups of One

Considering that the Review itself declares among its aims the achievement of a better match between customary law and Australian law, it was quite unexpected that it took such a legalistic view of the definition of a *group* of traditional owners. The Review says (p171) that such a group must have more than one member and rejects the call to have the definition of traditional owners amended so that such a group could have just one living member. This is diametrically opposed to Aboriginal tradition. I would regard it as

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<sup>12</sup> Strehlow (1970:114, 137 fn15).

<sup>13</sup> Strehlow (1970:120).

<sup>14</sup> At the time Racehorse was killed, imported troopers and their trackers were still gaoling and shooting down Aborigines in the region in response to cattle spearing. Stirling’s sympathies clearly lay with the pastoralists (Mulvaney 1996:6-9).

anthropologically beyond dispute that Aboriginal country-holding groups retain their corporate and communal character even when reduced, from time to time, to a membership of one living person.<sup>15</sup>

In recognition of this, the *Aboriginal Land Act 1991 (Queensland)* specifically states (Sect. 3) that a ‘group of Aboriginal people’ may include – ‘if there is only one surviving member of a group of Aboriginal people - that person’. There is no evidence that such a group’s surviving member would acquire personalised tenure rights as opposed to the communal rights of tradition. It is the way the holding of rights is construed within Aboriginal culture, not the numbers of members living, that determines whether the nature of the customary title is communal as against individual. It is axiomatic that the last surviving member of an Aboriginal group retains their usual land-holding rights and land-based identity on the basis of that group membership. Indeed such groups, which so often have a corporate character, may survive as corporate entities during periods when they have no living members.<sup>16</sup> With the birth or incorporation of new members the group will re-grow in size, but this does not involve a radical reconstruction of the nature of the title. Here we can see the folly of identifying a group defined under Aboriginal tradition merely with the sum of its currently living members.

The communal character of such group entitlements is a bedrock fundamental of the Aboriginal tenure systems, one that should not be ignored by a legalistic tradition where dictionary definitions of English words determine so many outcomes. A simple amendment along the lines of the Queensland legislation would bring the Northern Territory land rights law into a natural relationship with Aboriginal culture and prevent the perpetuation of what is demonstrably a foreign fiction. For the law to maintain that an Aboriginal country-holding group cannot have one member is like legislating to the effect that henceforth water shall run uphill.

#### **5.4 The Treatment of Anthropology in the Review**

The Review (Chapter 7) discusses ‘Traditional Aboriginal Owners and Anthropology’, beginning with a history of ideas from the late nineteenth century to the 1960s, and moving on to an examination of ‘New Anthropological Thinking’. The focus of the chapter is on the relative importance of small localised groups as against the wider regional population groupings to which members of such small groups also belong. The definition of traditional owners in the current Act was originally based on the smaller groups rather than wider ones (p120), although in practice a number of wider groups, being language groups or combinations of them, have been found to meet the requirements of the Act.

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<sup>15</sup> The Review vastly overstates the degree to which small local descent groups may be ephemeral (p147). In Sutton (in press) I have collated documentary evidence from several regions which shows that, where they survived the impact of colonisation, many can be shown to have been extant and stable over about 150 years or more, which is as far back as the records allow us to go. There is no evidence that they are, in the Review’s words, ‘regularly replaced’ (p147).

<sup>16</sup> Keen (1984:40); Keen’s observation has been repeatedly supported in my own experience in Cape York Peninsula and the Northern Territory. It is where a large proportion of the clans have died out at the same time that their countries tend to be subject to conjoint succession by a single larger group of survivors, such as a language group.

In making this excursion into anthropological ideas the Review draws a distinction between ‘the state of the anthropological understanding’ of Aboriginal traditional ways of controlling land, and ‘the reality’ of those ways (p119). This might be read as suggesting that some of us enjoy some kind of privileged direct access to ‘reality’, while anthropologists have to bear with simply having ‘states of understanding’ at any point in time.

All of us are in the same boat here, however. Developing ‘states of understanding’ are far preferable to dogmas of fixed reality, if the law is to make use of technical advice. Anthropologists and their developing understandings of Aboriginal relations with country have played a significant role in the design and implementation of the Land Right Act, but anthropologists can claim no privileged position in this scheme other than one that is earned by systematic and careful study from a basis of competent training. Unlike most legal counsel and many administrative staff, however, anthropologists have to spend long periods among the people whose lives they study and are faced daily with the discipline of having theory tested by experience.

I have to say that on many occasions while reading the Review’s excursions into matters anthropological I had some difficulty following the thread of reasoning across breaks in the arguments. Nor was it easy to see why some published sources had been called on rather than others, or what implications were meant to be drawn from them by the reader. I came across what I regard as a number of errors of fact or interpretation, particularly in Chapters 7 and 8. I have detailed some of the more relevant of these in Appendix 1.

In particular, the Review’s use of anthropological sources to support, or appear to support, the claim that the RLC ‘community-based’ model is consonant with Aboriginal traditions of land rights and authority structures, was in my view misguided. So also was the use of those sources to justify the removal of what have been called local descent groups from any special recognition in the new decision-making structures that are proposed.

## **6 CONCLUSION**

As several anthropological sources used in the Review report have said, it is a false dichotomy to pit ritually focused groups primarily responsible for particular sites and areas against wider sets of regional land-using populations in order to find some mythical single true locus of land tenure. One cannot even make such a distinction in order to simply divide ‘economic’ from ‘non-economic’ interests in land.

It is also a false pursuit to consider that there is one ‘level’ at which Aboriginal people hold rights and interests in land under their traditions. Such a single level is perhaps suggested in the Review when it says (p131) that

An exclusive focus on relationships between a clan and clan areas does not adequately identify the level at which Aborigines may be said to own land. Rather, in Justice Blackburn’s view [in the Gove decision], the relevant land-



owning group was comprised of all Aboriginal people who legitimately occupied land under Aboriginal tradition.<sup>17</sup>

A little later, the Reviewer put his views as follows (p140):

In the same process [ie. the current Land Rights Act's identification of traditional owners], it has overlooked the group that best represents the complex, dynamic and multi-faceted facts of Aboriginal traditional practices and processes in relation to the control of land: the regional community.

While the Review quotes with apparent approval Professor Merlan's words to the effect that there are no set levels to which one can peg legal definitions of traditional owners which will be appropriate for all purposes (at pp144-145), it effectively proceeds to ignore the principle she propounds.

An assumption underlying the Review's approach seems to be that the legislation needs to continue to single out one 'level' of landed group interests, or a single kind of grouping, which offers the 'best fit' with tradition and real practice. I do not agree. There is no point in replacing undue emphasis on one level of responsibility for land with undue emphasis on another. The Review's proposed amendments would tend to suppress what is a very real and active level of rights, obligations and authority in the lives of most Aboriginal people of the Northern Territory, rather than complement it. In any case, rights and responsibilities in country, under Aboriginal tradition and in current practice, are not vested in or derived from any single 'level' of grouping but are rooted in a complex machinery that coordinates different kinds of persons and groups of different types and sizes, and calls on different sets of people to deal with different kinds and scales of decisions about land as they arise. This is not to say that there are no enduring structures of prominence that are brought into play on these occasions, just that no one of them is universally applied.

There are some parallels in non-Aboriginal tenures in Australia. The individual may have a freehold but owes both informal and legal duties to consult neighbours about certain uses of it. If it is a shop, members of the general public have every right to enter and make economic use of it, even though their occupation rights are qualified and temporary. Municipal and other local government bodies both recognise and restrain the landholder's interests in the freehold block. Widely cast catchment authorities or environmental planning bodies also have certain powers over it, in terms of the owner's freedom to decide its use. The state may have a similar role and may tax it, or in the case of some tenures may extract a benefit from it in the form of a royalty. Ultimately the Crown holds the root of the block's title. It is the articulation of all these levels of rights and powers that constitutes the legal tenure and land use system. Which 'level' comes into play depends on the matter at hand. So it is with customary tenures.

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<sup>17</sup> This must be read as a judgement from within European legal traditions of notions of 'owning', rather than an attempt to reflect Aboriginal traditions. If someone says 'I'm living here with my in-laws, but it's not my country, no way. My country is elsewhere', it is not helpful to ignore what they say and baldly conclude that, because they are living there with the blessing of the traditional system, they must be an 'owner' of the land.

The legislation should therefore create conditions in which the appropriate ‘catchment’ of decision-makers in relation to Aboriginal land can best be determined case by case, rather than sticking to a rigid formula which concentrates power in the hands of those who happen to rise to the control of fixed Aboriginal boroughs. The promotion of structural conditions under which we could expect to see a proliferation of regional fiefdoms and inequalities of the kind alluded to in the Review is obviously to be avoided, and I agree with the Review’s concern about the concentration of wealth in the hands of the few clans on whose immediate estates developments have occurred, when the interests of the regional polity have been downplayed.

But basic aspects of the Review’s alternative model could lead to even greater and more widespread degrees of unequal distribution of resources than occurs at present. This is partly because the numbers of people in each of the 18 proposed regions is very small, and the emphasis is on a permanent concentration of decision-makers rather than on an event-specific approach. A struggle for dominance of these regional structures is thus more or less inevitable, and one of the prizes targeted would have to be the local administrative apparatus in each case. Dominance of the local apparatus may be expected, on the basis of experience elsewhere, to be keenly pursued especially by those who have, ironically, localised ‘traditional owner’ claims on the country that includes the main office.<sup>18</sup> If they have sufficient numbers and talent, they can be expected to win this struggle and thence to have a tendency to look after their own families before others.<sup>19</sup> Is this an outcome likely to be palatable to the wider liberal-democratic public whose members hold culturally different views of duty, accountability, and the imperative to integrate family with politics?

I assume the Land Rights Act should continue to attempt a reflection of Aboriginal cultural practices, not to impose a radical change which ignores them. In my view, the Review’s proposal for long-term residence to be a stand-alone qualification for Regional Land Council membership represents such a change of direction.

If amended legislation were to avoid a fictional ‘single-level of traditional owners’ model and instead created a space in which people can be recruited to decisions in ways that are tailored to the events that are happening on the ground, as I suggest, there would

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<sup>18</sup> Some of the relevant literature here includes David Turner’s local government study *Transformation and Tradition*, which discusses the relationship between community leadership and Dreaming track responsibility at Yuendumu (1986:59ff), Sarah Holcombe’s similar discussion in her study of Amunturrngu (Mount Liebig) (1998:120-125), and Christopher Anderson’s analysis of the relationship between clan estate location, mob size, political dominance and economic inequality at Wujalwujal in Cape York Peninsula (1989:73-83).

<sup>19</sup> It is interesting that anthropologist David Turner, in his work for the NT Government, found that ‘[o]ne of the reasons Community Government is working at Angurugu [on Groote Eylandt] is because the “clan groupings” are the units of representation in the scheme. ... All “interests” in the area are thus represented, irrespective of [clan] population, and no one block is able to exert undue influence or gain control of the Council’ (Turner 1986:39-40). A RLC system that was structured so as to avoid the undemocratic feature of clan dominance problems would thus have to recognise something like local descent groups, as well as be undemocratic in its own way by assigning one member to each ‘ward’ regardless of size or estate location.

be no single committees of 'traditional owners' for all seasons. However, I do not see any practical way of doing this, under modern conditions, without a fairly sophisticated mechanism for negotiations and consultations run out of land council offices and regional branch offices, where the duty to consult, legally advise and report at a professional level is kept distinct from the power to decide and to represent. This requires a certain critical mass of able staff.

Whatever reforms might be made to the current scheme, both it and its successors will depend heavily on the quality and motivation of the staff of the land councils for any hopes of reasonable success. Much land council work, especially the research, briefing sessions and consultations done in the field, is carried out under arduous conditions, both physical and psychological. My own observation of the two large land councils, after an association going back twenty years or so, is that by and large they are heavily reliant on having at least a core of staff, especially professional and field staff, who are believe in what they do, and who commonly perform with a dedication that is beyond the strict call of duty. I frankly do not see how they can perform their complex and difficult functions at a high level without this element of dedication.<sup>20</sup>

The down side of this commitment can be its contribution to the political temperature in a Territory where the party of long term power is not the main party of choice of the substantial Aboriginal minority, and where populations are so small that politics is easily personalised. It is probably no secret to say that gung-ho approaches to negotiations and political issues, on both sides, have been a problem. A more conciliatory spirit is needed, but that is not to say that it will fix things without structural reforms.

However, if 'self-determination' means locating power over land in a single type of 'representative' sub-regional body, reproduced 18 times, this would in my opinion be no advance on the present system, and it would offer official sanction for the erosion of one of the prime sources of stability and predictability in the Aboriginal land rights domain, namely the recognition of an intensely local, typically descent-based (but also otherwise-based) group with a primary and theoretically 'eternal' identification with particular sites in a specific small area.<sup>21</sup> As the first entry-point for individuals into the system, the local group, while it does not stand alone in the realm of authority, remains critical to the composition and stability of many of the wider groupings to which people belong.

Given Northern Territory Aboriginal people's legendary distaste for legal changes and their equally legendary preference for stability in the law, one should only seek to promote legislative reforms of a far-reaching administrative kind when fully convinced that the effects will be unambiguously beneficial. While I agree with the Review's assertion that greater devolution of administrative attention to the local level is needed, and the regional character of traditional rights and interests needs better representation in

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<sup>20</sup> Having had first hand experience of the opposite kind of bureaucracy which ran Queensland Aboriginal affairs and controlled most reserve lands there in the 1970s, I see great danger in failing to take advantage of the energy and performance standards of staff who are committed to the support of Aboriginal interests and aspirations.

<sup>21</sup> I have addressed this issue of the stability of Aboriginal land tenure systems in some detail in a forthcoming paper (Sutton in press).

the decision-making and resource allocation processes, I have serious misgivings about the Review's proposed method of achieving this, and about its use of anthropological writings in seeking to justify that method.

## 7 APPENDIX I: THE USE OF ANTHROPOLOGICAL EVIDENCE IN THE REVIEW

### 7.1 Howitt and Fison (pp120-122)

In Chapter 7 the Review looks briefly at literature by A.W. Howitt and Lorimer Fison who, roughly a century ago, distinguished local organisation from social organisation in the Aboriginal context. Social organisation was to do with kinship and descent-based social structures ('skins' such as moieties, sections and subsections). Local organisation consisted of groupings of people rightfully occupying tracts of land. People did so at different levels of inclusiveness, the 'community' being the most inclusive, 'clans' and 'hordes' and 'families' being the least inclusive. The 'community' 'was the same as a 'tribe', or, where several tribes evinced enough unity, the 'community' was the same as a 'nation'. The essence of their definition of a 'community', according to the Review, was a people's 'occupation in common of a territory and their sense of relatedness', and common language was not an essential criterion of the 'tribe' (p122). Although this is not stated in the Review, this observation would appear to be presented as some kind of evidence in support of a shift of political authority in the Act from traditional owners to the 'community' as a whole.

The views of Howitt and Fison are to an extent misrepresented in the Review. They did not say in 1885, as is stated in the Review (p121), that recruitment to local groups was matrilineal. At various times, discussed below, Howitt (with or without Fison) conceivably implied that such groups may be either patrilineal or matrilineal, or stated that they were patrilineal.

In 1880 Howitt, in a joint work with Fison, wrote that in Gippsland, 'an aggregate of families, all being intimately related by common descent through the father', formed what he called a 'division'. Two or more divisions combined to form what he called a 'clan'. Clans were named, divisions were not. Three of the five clan names were based on roots meaning 'east', 'west' and 'the sea/south', one was untranslated, and another was based on a term meaning 'manly'. Clans included all those individuals acknowledging a common descent, inhabiting a certain area including several divisions, and claiming certain distinctive qualities. The clans had geographical 'positions' or 'countries', and together these clans made up a tribe, and their countries made up a tribal territory.<sup>22</sup>

In 1883 Howitt and Fison said that an Australian 'tribe (or community)', in its 'local and physical aspect', had 'subdivisions' which they called 'clans' or 'local groups'. They said that recruitment to these local groups was by 'perpetual succession through the

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<sup>22</sup> Fison and Howitt (1880:215-6,225, 227-229; map opposite half-title page entitled 'Sketch Map of Gippsland. Shewing approximately the Positions of the Clans of the Kurnai Tribe'; see also Howitt (1904:76-77). Perhaps the earliest terms used by Howitt for local groups were 'sub-tribe', 'subdivision' and 'small family' in his discussion of the Diyari of the Lake Eyre region (1878:300).

males'.<sup>23</sup> In another paper of the same year, Howitt said that the tribe was 'divided geographically, either into what may be termed hordes with uterine [matrilineal] descent, or into clans with agnatic [patrilineal] descent'.<sup>24</sup> The Kurnai of Gippsland only had 'clans' and no 'hordes', because Howitt reserved the latter term for 'local divisions of tribes having uterine descent'.<sup>25</sup> The suggestion that Howitt used the term 'horde' to refer to a local group of a tribe with uterine descent, even though no matrilineal 'hordes' were described, came from Fison.<sup>26</sup>

A reader may be forgiven for understanding this 'horde' therefore to be itself recruited matrilineally, but it seems that it is intended to refer to a local group in a tribe which has (predominantly) matrilineal social organisation (ie. with mainly or wholly non-local classes and totems determined through the mother), but this local group, like that of a tribe with patrilineal institutions, is also perpetuated through the male line. Elsewhere, for example, Howitt said that

the Kurnai tribe is divided into five clans, each of which has succession from father to son in the same portion of the tribal territory. I use the word "clan" advisedly, because, this tribe has agnatic descent. When I use the word "horde" I refer to a local division of a tribe having uterine descent as to its *social* organisation.<sup>27</sup>

As far as I am aware, no ethnographer has ever produced any convincing evidence that any territorial transmission system in Australia was or is matrilineal by rule. Indeed, this is clearly implied by Howitt and Fison's own statement that 'descent through the mother ... has to do with the social organisation only: it does not touch the local'.<sup>28</sup> There is of course abundant evidence of the acquisition of rights in mothers' countries, but this is not what is meant by the term 'matrilineal' in anthropology. 'Matrilineal' refers to theoretically perpetual succession through women as a common rule subscribed to by the members of a group, not to single or even several repeated instances of taking country through mothers by some members of a group.

Howitt considered the Kurnai to be a socially advanced group because they had, in his opinion, moved from a predominance of matrilineal institutions to having none, and to having patrilineal descent of rights in country. This was a 'progressive social change'.<sup>29</sup>

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<sup>23</sup> Howitt and Fison (1883:34). Note that in the Reeves Review, this and the other paper by Howitt and Fison (1885) are cited with the authors' names reversed.

<sup>24</sup> Howitt (1883b:800).

<sup>25</sup> Howitt (1883b:809).

<sup>26</sup> Howitt (1884:439). Note that Fison carried out no field work of his own among Australian Aboriginal people.

<sup>27</sup> Howitt (1885:301, italics added).

<sup>28</sup> Howitt and Fison (1885:144-145, italics original).

<sup>29</sup> Howitt (1883b:804,809). This idea of a struggle between matriliney and patriliney was conceived of by Howitt as correspondingly a struggle between the social organisation (largely uterine in transmission) and the local organisation (largely, perhaps wholly, agnatic in Howitt's experience). Where the local organisation gained strength it could take to itself 'all the powers which the social organization formerly possessed' (1883b:809). The 'aggressiveness of the local organisation' was an unconscious social process.

But the change in local organisation to which he refers does not seem to refer to the way rights in land are transmitted, as he claimed that both less advanced and more advanced tribes had the same form of local organisation in this respect. Instead the change he referred to seems largely to amount to a shift of dominance, in the aggregate, between the various matri- and patri-based kinds of institutions used by a society.

In their 1885 paper, the one referred to in the Review at p121, Howitt and Fison revised their terminology. Instead of the term 'local clan', and presumably also in place of the restricted (and impossible to apply?) definition of 'horde' cited above, all local or geographical divisions of the 'community' or 'tribe' would now all be known as 'hordes'. A horde is a group which 'occupies certain definite hunting-grounds'. A child belongs to '*the horde in which it was born*'.<sup>30</sup> All members of the horde share in common a 'hunting right' over a certain area. But '[t]he succession of the son to the father's horde can scarcely be called inheritance from the father. It is mere continuance in the locality where he was born.' 'The daughter may go away when she marries, but the son remains in the father's horde'.<sup>31</sup>

On the basis of these statements one might conclude that Howitt (and Fison) considered that locality of birth and subsequent presence in one's father's camp was the critical basis of rights in country, not descent from the father as such. Yet Howitt describes a Gippsland man (Gliun-kong) who 'having been born at Lake Tyers, it [ie. the Wurnungatti geographical division] is his country by birth, as Raymond Island [ie. the Binnajerra geographical division] is by inheritance from his father'.<sup>32</sup> This suggests that descent conferred landed identity and rights independently of birthplace.

The Krauatungalung and other clans of Gippsland were subdivided into local 'divisions' which were further divided into 'subdivisions' such as 'the *Bunjil-baul*, or men of the island, who lived on Raymond Island in Lake King', and who were a subdivision 'mostly' of the Tatungalung clan and 'partly' of the Brabralung clan.<sup>33</sup> It would seem that these 'subdivisions' of Howitt's 1904 version are the same as the 'families inhabiting a certain locality' that 'formed that aggregate which [Howitt] ... termed the division' in his 1880 version.<sup>34</sup>

What Howitt called a 'clan' is in all major respects the same kind of grouping which Meggitt and Hiatt called a 'community' (see below).<sup>35</sup> His 'divisions' correspond to what most present-day Australian anthropologists would call a 'clan' or a 'patrilineal group'.

Howitt and Fison wrote, as did Howitt repeatedly elsewhere (see below), as if only sons received such rights from fathers, even though they implied that a female joined the

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Local organisation was 'hostile to social' and its tendency was 'to bring about descent through males, to arrange society on its own basis, and finally to make itself paramount' (Howitt and Fison 1885:144).

<sup>30</sup> Howitt and Fison (1885:143, italics original).

<sup>31</sup> Howitt and Fison (1885:145).

<sup>32</sup> Howitt in Fison and Howitt (1880:226).

<sup>33</sup> Howitt (1904:73-74)

<sup>34</sup> Fison and Howitt (1880:224).

<sup>35</sup> Meggitt (1962), Hiatt (1965).

horde at birth just as males did. It is implied, but not discussed explicitly, that they considered a woman's horde membership to be that of the people with whom she lived at any particular time. But, as is overwhelmingly demonstrable from other sources, under classical Aboriginal rules, women carried with them their descent-based identities, most often as members of their father's land-holding group, no matter where they went to live either before or after marriage.

Only a few years after the 1885 change of terminology just discussed, however, Howitt reverted to his old terminological practices. In 1888 he wrote:

Horde is used to designate one of the local divisions of a tribe which counts descent through the female line. I only use the word clan for the local divisions of a tribe which has descent in the male line.<sup>36</sup>

In 1891 he wrote similarly, but with less clarity: 'I use the term "horde" when there is maternal descent, and "clan" when descent is in the male line', and proceeded to refer to the adjoining 'hordes' of the Wiradjuri (NSW) in contrast with the (similarly adjoining) 'local clan[s]' of the Kurnai (Victoria).<sup>37</sup> In the same year in another paper he stated that the 'class divisions' (moieties, sections etc.) of tribes were not, 'excepting in very exceptional cases, aggregated into localities. They then become "local clans" with descent counted through the male line.'<sup>38</sup> In his major work of 1904, he made his usage clear once more:

(3) Horde, the primary geographical division of a tribe having female descent, for instance, the Ngadi-ngani below.

(4) Clan, the primary geographical division of a tribe with descent in the male line, for instance, the Krauatungalung.<sup>39</sup>

Describing the Ngadi-ngani of Lake Eyre, Howitt refers to the 'definite tract of hunting and food ground' of each local group, and adds:

The sons inherit, or perhaps to speak more correctly occupy, as a matter of birthright, the country which their fathers hunted over. Such is the local organisation of a typical two-class tribe with descent in the female line.<sup>40</sup>

Once again it is clear that such a 'horde' is not asserted to be matrilineal.

Howitt (with or without Fison) defined what he meant by the word 'tribe' more than once. In most cases these definitions include words to the effect that the tribe is a community occupying a common tract of country and sharing a common language or

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<sup>36</sup> Howitt (1888:320).

<sup>37</sup> Howitt (1891a:344-345).

<sup>38</sup> Howitt (1891b:35).

<sup>39</sup> Howitt (1904:44).

<sup>40</sup> Howitt (1904:47).



dialectal variants of a common language.<sup>41</sup> The presence in the tribe's area of people speaking other languages he regarded as an exception brought about by marriage – not knowing, or not taking into account, the fact that such inter-language marriages were quite common in much of Australia. These inter-language marriages alone are fatal to any 'tribe' definition that seeks to combine unity of language with some neat kind of unity of residential range. In any case, common language was usually integral to Howitt's (and Fison's) definitions of 'tribe'. It is therefore surprising to find the Review (p122) stating virtually the opposite:

...it would appear that the essential criterion of the 'tribe' [of Howitt and Fison] was not common language. It was their occupation in common of a territory and their sense of relatedness that defined the 'tribal' group.

Howitt (at times with Fison) made frequent reference to Aboriginal 'communities'. In their first work together they said that 'the word *tribe* [is] used as synonymous with *community*'.<sup>42</sup> They would not, they said, use the term *tribe* to refer to any division within a community.<sup>43</sup> Later, Howitt was to do so (see below). In 1883 they said that 'the Australian tribe (or community) presents itself under two aspects... [a] social aspect ... [and a] local and physical aspect'.<sup>44</sup> Here again was a simple equation of a 'community' with a territorial language group. This kind of tribe was in part defined at essence as the entity which bore, contained or maintained both the system of local organisation and the system of social organisation to which its members subscribed. The fact that such systems were frequently shared in detail with several or many neighbouring 'tribes' does not seem to have discouraged such authors from locating them principally as features of the tribe itself rather than as features of large regional populations or social fields. I would much prefer the latter.

In an 1883 paper Howitt referred to the Wolgal, Ngarego and coast Murring tribes of the area between the Upper Murray, the Monaro and the coast at Shoalhaven River as together constituting a group which is 'indicated by the community of initiation ceremonies'.<sup>45</sup> In a subsequent paper he added to this set the Theddora and the Wiraidjuri, commenting:

These five tribes, or perhaps tribal groups, represent a social aggregate, namely a community bound together, in spite of diversity of class system, by ceremonies of initiation, which, although they vary slightly in different localities, are yet substantially the same, and are common to all. Again, each of these five tribes, if regarded separately, is found to be not only connected in the way I have mentioned with the other four, but also with other neighbouring tribes in a similar manner, so that "the community", as indicated by the initiation ceremonies,

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<sup>41</sup> Fison and Howitt (1880:232), Howitt (1883b:799, 1904:41). See also: 'Some tribes are again spoken of by the name of their language' (1904:xii).

<sup>42</sup> Fison and Howitt (1880:27).

<sup>43</sup> Fison and Howitt (1880:29).

<sup>44</sup> Howitt and Fison (1883a:33).

<sup>45</sup> Howitt (1883a:185) [beliefs].

spreads over even a wider extent of country than that which these five tribes occupy.<sup>46</sup>

As Howitt then pointed out in a footnote, ‘the community of initiation-ceremonies and the practice of [tribal] intermarriage did not prevent the tribes from making raids into each other’s country in the olden time’. Two of these tribes were ‘constantly and desperately at war’ and the Wiraidjuri even made raids on the coast.<sup>47</sup> After the ceremonies were over, the extracted tooth of the novice was passed from headman to headman until it had made ‘the complete circuit of the community, which was present at the initiation’. ‘The circuit in which the tooth is carried marks the extent of the epigamic [intermarrying] community.’<sup>48</sup>

Here we have several contradictions or changes. First, the tribe is no longer coextensive with the community as defined elsewhere by Howitt. Second, members of the same community as defined on the basis of joint initiations and intermarriage may have different forms of social organisation depending on their tribe, whereas elsewhere Howitt says that social organisation is a feature of the tribe itself and the tribe is the community, thus implying that different forms of social organisation must belong to or imply different communities. Thirdly, where the community is a tribe it has a uniquely defined, invariant territory, but where the community is a set of people who jointly initiate youths with varying sets of their neighbours depending on occasion, the geographical correlate of a person’s community varies with the event and is not a constant. A Northern Territory parallel here would be that while the Warlpiri lands can be defined with some constancy, Warlpiri people may be found participating in initiation ceremonies along with people from the lower Roper River, the Victoria River, the East Kimberley, and as far south-west as Kiwirrkura in Western Australia, depending on the event.

In their 1885 paper Howitt and Fison reflected some of their accumulated preceding definitions when they wrote that

The [initiation] ceremonies are held by the assembled community periodically; the community being the aggregate of hordes, or of tribes between which there is epigamy [intermarriage].<sup>49</sup>

Howitt speculated that such ceremonial assemblies, and similar festivals such as the bunya nut harvest in south-east Queensland, represented the probable initial condition of Aboriginal society as an ‘Undivided Commune’. Howitt also uses the term ‘Commune’ to refer to the hypothetical social whole that may be conceived of as distinct from any of its various divisions into tribes, hordes, nations, classes and sub-classes. Social and territorial ‘divisions’ within this hypothetical Commune were thus, for Howitt, not just structural features of contemporary society but also likely to have been historical events in Aboriginal social and cultural evolution.<sup>50</sup>

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<sup>46</sup> Howitt (1884:433).

<sup>47</sup> Howitt (1884:433-434).

<sup>48</sup> Howitt (1884:457-458).

<sup>49</sup> Howitt and Fison (1885:154).

<sup>50</sup> Howitt (1904:142-143, 173-174).

## 7.2 Radcliffe-Brown (pp123-127)

A.R. Radcliffe-Brown's opinions were, as the Review says, highly influential in the development of knowledge about Aboriginal society and land tenure. The Review gives the impression that he presented a single model, but if one carefully examines his various publications it is clear that his models changed over time, and they even more clearly contradicted themselves at the same time. For example, he said that 'male members enter the horde [the territory-occupying group] by birth and remain in it till death'. 'The woman, at marriage, leaves her horde and joins that of her husband'.<sup>51</sup> A married woman's horde, it would follow, is therefore the same as her husband's, so long as they camp together. But this is in contradiction with later statements in the same paper where he distinguishes clearly between the 'father's horde' and the 'mother's horde'. For example:

In Australia the conception of kinship is very definitely bilateral. It is true that everywhere the important social group, the horde, is patrilineal. But the individual is very closely bound to his mother's horde.<sup>52</sup>

Again, in a footnote in which he appears to be grappling with his own contradictions and almost gets out of them, he says:

This distinction between the horde and the associated local clan [patrilineal descent group] is, I think, a very important one... A horde changes its composition by the passing of women out of it and into it by marriage. At any given moment it consists of a body of people living together as a group of families. The clan has all its male members in one horde, but all its older female members are in other hordes. It changes its composition only by the birth and death of its members.<sup>53</sup>

But he immediately contradicts this by saying that it is the horde, not mentioning the clan, that has totems, possesses totemic centres, has a territory and is 'the patrilineal local group'.<sup>54</sup> This would imply that a woman changes her descent-based clan totems on joining her husband's local residential group, but this is not what Radcliffe-Brown intended, there is no evidence for it from anywhere, and there is abundant evidence to the contrary.<sup>55</sup>

The Review suggests (p127) that Radcliffe-Brown differed from Howitt and Fison in not seeing 'a tension between the network of kinship within the wider population and the

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<sup>51</sup> Radcliffe-Brown (1930-31:35).

<sup>52</sup> Radcliffe-Brown (1930-31:442; see also p59).

<sup>53</sup> Radcliffe-Brown (1930-31:59 fn8).

<sup>54</sup> Radcliffe-Brown (1930-31:61 [figure]).

<sup>55</sup> Phyllis Kaberry was among those who early challenged Radcliffe-Brown on this and other points, see Kaberry (1939:31,136,176,195-197). However, like Radcliffe-Brown, she had some difficulty in keeping her terminology consistent, on occasions lapsing into calling a camping group by the same term as a totemic descent group (eg. 1939:138,139).

autonomy of the horde'. On some very narrow definition of 'autonomy' that may be so, and clearly the statement places Radcliffe-Brown in the atomist camp and therefore among those whose emphasis on local group autonomy the Reviewer is seeking to refute. But in fact Radcliffe-Brown went to some lengths to discuss what he called 'factors tending towards an expansion of social solidarity, and other factors tending in the opposite direction towards a contraction of social solidarity'.<sup>56</sup> He advanced the argument that some Aboriginal systems showed wider social integration through kinship (and ceremonial links) than others, and some showed greater emphasis on 'the solidarity of the narrow circle of the horde'<sup>57</sup> than others. His discussion of this topic, framed very much in terms of the role of the horde and the role of the web of kinship connections between members of different hordes, occupied eleven pages of his main treatise on Aboriginal social and local organisation.<sup>58</sup>

There are a couple of other assertions in this part of the Review that may be questioned. Firstly, Radcliffe-Brown's 'meagre' fieldwork in the Pilbara was perhaps not as meagre as alleged in the Review (p123). In addition to two surviving notebooks of very condensed material (E5 and E8), his archival data for the area include some 157 cards mostly detailing specific sites and estates in the area. It seems that he did do some substantial tenure-oriented mapping, perhaps much of it remotely but certainly some was done on the ground as there are unpublished site sketch maps and two published totemic site photographs.<sup>59</sup> Furthermore, although it is true that his Australian work is best known for his capacity to stimulate and synthesise the work of others (cf. the Review p123), the quite substantial field work Radcliffe-Brown carried out in New South Wales, which is not mentioned in the Review, should not be underestimated.<sup>60</sup>

Further, it is stated in the Review that 'Radcliffe-Brown relied on Howitt and others for his information on the Yaralde and Narrinyeri' of the Lower Murray in South Australia. This is not the case. Radcliffe-Brown carried out his own field work with these people at Point McLeay in about 1916 and the resulting field notebook (E6) is quite rich and detailed. His published description of the Narrinyeri in this case is his own. For instance, unlike Howitt who described them as having eighteen 'local clans' (see Review p125), he found them to have sixty to eighty 'hordes'.<sup>61</sup>

### **7.3 Stanner (pp127-131)**

There is in the Review an interpretation of Stanner's concept of 'domain' that seems to go beyond what its author asserted. Stanner (1965:2) said that the estate (owned tract of

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<sup>56</sup> Radcliffe-Brown (1930-31:445).

<sup>57</sup> Radcliffe-Brown (1930-31:449).

<sup>58</sup> Radcliffe-Brown (1930-31:445-455).

<sup>59</sup> The notebooks and site cards are held in the University of Sydney Archives, and have been keyboarded by Brett Baker, Department of Linguistics, University of Sydney. The photographs were published in Radcliffe-Brown (1913:Plate IV).

<sup>60</sup> Five of the Radcliffe-Brown field notebooks held at the University of Sydney Archives, and parts of others, are devoted to his quite wide-ranging survey field work in north-western and north coastal New South Wales. The material is very dense and focuses on his primary interests of kinship and social organisation.

<sup>61</sup> Radcliffe-Brown (1918:231).

land) and the range (the normal geographic area seasonally occupied by a band or camping group) together constituted a domain, which was ‘an ecological life-space’. The Review takes this concept further in concluding that ‘domain’ refers to pluralities of adjacent estates plus the overlapping ranges of the relevant estate-holders:

Domains might be characterised by the interpenetration of band ranges, each focused on its core estate. The formation of communities would thus be relative to each patrilineal core group, and its external relations with adjacent groups. The openness of such a network would make higher-level community groupings hard to define. As Professor Stanner argued, the distribution of resources used by hunting and foraging populations followed biological and geographical structures. This factor limited the openness of social and cultural networks, favouring the formation of domain communities (p129).

This passage appears to be in part laying the ground for an argument in favour of ‘domain communities’, or something like them, as the basis of RLCs. As becomes clear later in the Review, the proposed basis of the RLCs is something like such a ‘domain community’ but it includes long-term local residents who lack ‘domain’ status because they may not all have what Stanner (and Radcliffe-Brown before him) referred to as ‘estates’. The latter addition takes the Review’s model for the future even further from what Stanner considered to be the classical system of land relationships. Given the extent of historically recent displacement and the degree of centralisation of Aboriginal populations in the Northern Territory, the parallel between regional populations and such ‘domain communities’ of the reconstructed past is at best inexact, and in some instances non-existent.

#### **7.4 Pink (pp134-135)**

The historical position of Olive Pink as ‘the first person’ (p134) to focus, in print, on the role men played in the religious affairs of their mothers’ countries is perhaps exaggerated. A.P. Elkin had already focused on the same phenomenon, to about the same degree, in papers relating to the Lake Eyre region.<sup>62</sup>

#### **7.5 Meggitt (pp135-137)**

Meggitt thought of land ‘ownership’ in the Aboriginal context as being defined at essence by the exclusive right to reside on and make economic use of the land.<sup>63</sup> This was something distinct from the question of religious authority over sites or Dreaming tracks or local estates. According to Meggitt, it was not the individual residential food-gathering camp which was the locus of economic land rights among the Warlpiri of Central Australia; instead it was the ‘community’. There were ‘no individual or family possessive rights over tracts of land or waterholes’, he says.<sup>64</sup>

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<sup>62</sup> Elkin (1931:57-59, 1934:176-177).

<sup>63</sup> Meggitt (1962: 214).

<sup>64</sup> Meggitt (1962:94).

Michael Niblett's 1992 thesis includes a valuable critique of Meggitt's assertion that land 'title' was held essentially by 'communities' in the Warlpiri case. The core of this critique asserts that Meggitt did not explicate adequately the land interests of communities *vis à vis* the ritual property interests of patrilineal groups and their *kurdungurlu* or ritual managers. A similar critique had already been advanced by Nicolas Peterson. Peterson pointed out that while Meggitt had said that the 'community' 'had custody of totemic sites within its territory',<sup>65</sup> there was no single community ritual, communities had no formal power structure, and ritual roles were primarily determined by real rather than classificatory kinship. The vital participation in such roles of affinal relatives of the patrilineal kin identified with particular sites in a community area often involved members of 'other communities', thus vitiating the notion that members of a single community had any kind of exclusive custody of its members' sites.<sup>66</sup>

Cultural practices and structures are thrown into particular forms of prominence where they are called upon in the pursuit of concrete objectives, and in some ways this is at the heart of the differences Niblett notes between Meggitt's descriptions and those of more recent ethnographers preparing land claims in the same region. The fact is that in Meggitt's fieldwork period, Warlpiri were not concertedly pursuing concrete land uses across a broad spectrum of country, but were fairly localised or demographically concentrated; much of their vast region was for the time being unpopulated, and Meggitt's assessments of the nature of land-holding relationships were highly retrospective or 'reconstructionist'. A different picture may have emerged if Meggitt had been among the Warlpiri either while they were economically dependent on the land alone, or were pursuing current forms of legal tenure, decentralisation and resource allocations based on royalties and government transfer funds. His fieldwork coincided with a window between two distinct eras of concrete political action focused on land as a material resource base.

What did Meggitt mean by 'the community'? Although he described it as 'an active group and not merely a social category',<sup>67</sup> his own account suggests strongly that this entity is something of an abstraction in its 'social category' sense.<sup>68</sup> If its membership ever resided together in time and space it was seasonally restricted, in Meggitt's description.<sup>69</sup> In my own view, on the internal evidence and in a strict all-members-present sense, it would have been at the best unlikely that a Meggitt 'community' would ever be assembled as one on the ground. For example, on the one hand we are told that during autumn and part of winter the community would congregate in one or two large groups. Yet these were coalescences of smaller food-gathering groups which he describes as 'too labile, too dependent on the changing seasons, the alternation of quarrels and reconciliations, the demands of non-agnatic relatives, and so on' to have

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<sup>65</sup> Meggitt (1962:51).

<sup>66</sup> Peterson (1969:30).

<sup>67</sup> Meggitt (1962:249).

<sup>68</sup> See further below where I discuss Meggitt's distinction between the 'natal community' and the community of long-term residence.

<sup>69</sup> Meggitt (1962:49-50).

been ‘simple patrilineal and patrilocal hordes’.<sup>70</sup> It is hard to imagine the composition of a camp of 300-400 people remaining constant for three or four months of the year.

The Meggitt ‘communities’ were very unlike those of Howitt and Fison, even though both were at heart abstractions. The Meggitt ‘communities’ were subdivisions of a tribe, not tribes.<sup>71</sup> Nevertheless, linguistic differences between such subdivisions were among the most obvious markers of cultural distinctions between them.<sup>72</sup> They were not definable by any statistically significant frequency of in-marriage versus out-marriage, although they were slightly endogamous (in-marrying) on the figures.<sup>73</sup> They were not sets of people bounded by mutual participation in joint initiation ceremonies.<sup>74</sup> Although a community’s members were to be found living in different combinations at different times, in Meggitt’s reconstruction of their bush life, as a whole they were a set whose members knew each other and had dealings face-to-face with each other at various times and places. This abstract set from which action groups were drawn was ‘in many respects the maximal political entity’ – again, one should read this, I think, primarily as a reference to a constituency rather than to an assembly.

Meggitt refers to their members as ‘countrymen’, as displaying ‘in-group ethnocentrism’, and indicates they enjoyed solidarity in that they found scapegoats in other communities and protected fellow community members from attack.<sup>75</sup> Inter-community visits, unless by invitation, could produce feelings of embarrassment, shame or fear if travellers encountered tabooed persons unexpectedly, the environment being structured into regions of greater or lesser personal mobility. ‘The whole concept bears a certain resemblance to the Lewinian notion of the life-space.’<sup>76</sup> This particular passage was the inspiration for Stanner’s use of the term ‘ecological life-space’ as a gloss for his notion of ‘domain’, but Stanner used it in a much narrower sense as the intersection of a clan’s estate with its members’ range – a puzzling construct in that a clan, *per se*, did not have a range.

In spite of such action-based criteria as those just mentioned, these Warlpiri ‘communities’ were also collective identities which survived the ‘displacement’ and migrations of their members, at least for a time, and were thus not land-occupying groups in a simply immediate sense.<sup>77</sup> Meggitt considered that in time, new residential arrangements at modern settlements would facilitate the adoption of a new definition of

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<sup>70</sup> Meggitt (1962:49,51; see also p244).

<sup>71</sup> Meggitt (1962:5,51). The ‘community’ names were also used to refer to countries (Meggitt 1962:47). Compare Meggitt’s Warlpiri countries Waneiga, Walmalla, Yalpari and Ngalia with the map in Jackson (1995:32-33) which shows Warnayaka (Waneiga), Pirlinyana, Manyangarnpa and Ngarliya (Ngalia). It may be oversimplifying to define the four Meggitt ‘communities’ simply as being ‘Warlpiri’. Various sub-groups identify, for example, as Ngarti-Warlpiri and Warlpiri-Kukatja in the northwest, and as Warlpiri-Warlmanpa, Warlpiri-Anmatyerre and Kaytetye-Warlpiri in the east (Aboriginal Land Commissioner 1992:10, Bell 1993:112).

<sup>72</sup> Meggitt (1962:49).

<sup>73</sup> Meggitt (1962:57).

<sup>74</sup> Meggitt (1962:54-55).

<sup>75</sup> Meggitt (1962:51).

<sup>76</sup> Meggitt (1962:54).

<sup>77</sup> Meggitt (1962:47).

the community. Both ‘community’ and conception-based attachments to country were thus subject to a kind of historical impact that ‘lodge-dreaming affiliation’ was not, and Meggitt considered that changes in the latter would probably occur much more slowly.<sup>78</sup>

Still, the limits to ‘community’ countries were not defined merely by habitual physical presence. Meggitt tells us that their boundaries were ‘fixed, validated and remembered through the agency of religious myths’.<sup>79</sup> Such stories specified the places at which songs, rituals and designs should change hands, so that it would be possible to ‘produce from such data a detailed map of the borders of the four countries’.<sup>80</sup> Furthermore, part of the community’s title to its country and its resources lay in its members’ collective memberships of ritual lodges, which were the sets of people identified with and responsible for certain sacred sites of particular Dreamings in segments of the community country, for ‘lodge and community affiliation are commonly related’.<sup>81</sup> Sacred boards owned by patriloces are associated with the Dreamings of the lodges and are ‘maps’ of the Dreaming countries and Dreaming tracks of a community country, ‘so that the boards form part of a community’s title deeds to its territory’.<sup>82</sup> In these features, the Warlpiri ‘community’ countries closely resemble religious units or estates, not ranges. Overall, Meggitt’s descriptions may be broadly divided between the ‘community’ as a stable jural construction that outlives individuals, and which also functions as a political constituency, and the ‘community’ as an active entity composed of living individuals assembled together in time and space.

In line with this ambiguity in his usage, there is evidence in Meggitt’s work that the ‘communities’, or rather their names, were applied in two distinct ways in Warlpiri discourse: a strict or narrow way and a looser everyday way, the latter being an extension of the former and used in a rather weaker or perhaps less formalistic sense. The two senses severally reflected a ‘fundamental difference’ in what they referred to, not a blurred merging of multiple concepts into a single indeterminate one:

Community affiliation depended primarily on birth (or, more strictly, conception) and subsequent residence in the territory occupied by the community and totemically associated with it. There were no ceremonies that facilitated the conversion of non-members into members. The fact of residence itself gave only economic, and not ritual, rights to immigrants. ...

Whereas in everyday life people apparently treated a long-term resident from another community (especially a wife) as a countryman, their actions at the death of the outsider revealed the *fundamental difference* in the latter’s status. Classificatory kin of the appropriate categories might mourn and carry out the duties connected with the disposal of the corpse that close kin and countrymen

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<sup>78</sup> Meggitt (1962:72-74).

<sup>79</sup> Meggitt (1962:48).

<sup>80</sup> Meggitt (1962:48-49).

<sup>81</sup> Meggitt (1962:214).

<sup>82</sup> Meggitt (1962:288).



normally undertook; but the avenging of the death still remained the prerogative of the deceased's *own matriline and natal community*.<sup>83</sup>

It is clear from Meggitt's work that men stayed in closer proximity to other men from the same 'natal community' than women did to women of their own 'natal community' because of marriage patterns.<sup>84</sup> Assuming Meggitt's major informants were men,<sup>85</sup> this may have coloured his account by creating in the evidence a stressing of the – perhaps retrospectively somewhat idealised – alignment of spiritual connections with residence. In any case, we have here a clear distinction between community of residence and community of birth that is maintained until death. The community identity of birth depended on descent and was portable. Co-residence with members of such a community yielded economic 'privileges' (see below), not ritual authority rights or rights of intrinsic spiritual and cultural identification with the country of members of the 'natal community'.

One must consider it axiomatic that, of the two, it is the latter, not foraging rights, that would normally give rise to the assertion that a particular area is a person's own true or proper country. In this feature, the membership of a Meggitt natal community is just like patrilineal group membership. Indeed, as he makes clear, the former is based upon the latter. Patrilineal group membership is the primary entry-point to the natal community, as it normally is also to primary language affiliation.<sup>86</sup> For this reason, in my view, it should not be displaced in legal terms, in the case of groups who maintain such structures, even if it should be complemented by greater recognition of wider regional interests.

Not only is patrilineal group membership one's entry-point to the Meggitt natal community, it is also one's entry-point to the political authority system of that kind of community, in Meggitt's own description:

Although the members of the community conceded some of their fellows the right to co-ordinate certain activities, the ascription of authority to particular men on particular occasions depended largely on considerations of kinship status and, by extension, of descent-line and moiety affiliation.<sup>87</sup>

Given that the Meggitt 'communities' themselves, on the evidence, look rather more like macro-clans than large bands in their core and formal definition, and if we think of the 'community' countries as being like macro-estates, then it is justifiable to say that the Meggitt 'communities' are in principle presented to us very like a Radcliffe-Brown 'horde' and a Howitt (and Tindale) 'tribe' – namely, an amalgam (if not a 'confusion') of a formal cultural category with a supposed face-to-face population.<sup>88</sup> I think it very likely

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<sup>83</sup> Meggitt (1962:243-244,245; emphasis added).

<sup>84</sup> Meggitt (1962:211).

<sup>85</sup> Cf. Meggitt (1962:xiii-xiv).

<sup>86</sup> This is not discount conception and matrifiliation as a factors. See Meggitt (1962:67) on the former.

<sup>87</sup> Meggitt (1962:249).

<sup>88</sup> Morphy and Morphy (1984:52) made a similar observation: '[Meggitt's] community title is really the debate between clan and band as right-holding groups projected onto a higher plane. Just as the band

that this kind of amalgam was itself part of Aboriginal ideological discourse, and that ethnographers have been misled by it accordingly. Given that there is a feedback relationship between continued political presence and the maintenance or attainment of religious interests in country, I am not suggesting that the two can be regarded as analytically isolated from each other.<sup>89</sup> Nor should they be analytically confused. The amalgam probably lies in the way things were represented, rather than in how they observably were.

Groups of the ‘community’ and ‘tribe’ size, namely those in the hundreds, may lend themselves to such analytical blurrings between abstract categories and behavioural ones much more than smaller entities such as ‘clans’ and ‘bands’ do. Up to a certain limit, the larger the abstract set of people who belong formally to contiguous or adjacent countries, the more likely they are also to belong to an interactive set, a set of people who actually know and are ‘used to’ each other. It is thus more likely in such circumstances that the ‘community’-level entities will be both religious and political in their foundations.<sup>90</sup>

Meggitt tells us that a man’s political status depended ultimately on which community he belonged to. His ritual status referred to which particular lodge of which community he belonged to. ‘Lodge, and hence patriline, membership may be an index of community affiliation and, indirectly, of political status.’<sup>91</sup> There is a stronger version of the latter remark elsewhere in Meggitt’s work:

In short, patrilineal descent is the main determinant of lodge membership, which by inference also involves community affiliation. A boy is initiated into the lodge of his patriline, and this is almost always connected with a dreaming located somewhere in his own community country.<sup>92</sup>

In a later work Meggitt further addressed the issue of whether or not natal and non-natal members of his ‘communities’ had equivalent rights and powers, and in this case he did not restrict his comments to the Warlpiri:

Apparently, residence in itself gave *only economic and ritual privileges (rather than rights)* to immigrants, including spouses of existing [ie. natal] members. These people were free to share in the available food and to participate in many ceremonies, but they had *no real authority* in these situations – they could not legitimately command the actions of *true members* of the community.<sup>93</sup>

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consists of members of a number of clans, so the “community” consists of members of numbers of communities since communities are not endogamous units (Meggitt 1962:69).’

<sup>89</sup> For a nice example of this feedback relationship, see Hiatt (1982:20).

<sup>90</sup> But this scenario, which the Review appears to assume is still very widely in place, has in several regions come unstuck and will probably continue to become unstuck elsewhere.

<sup>91</sup> Meggitt (1962:214).

<sup>92</sup> Meggitt (1962:207). Warlpiri patrilines had 30-35 members at a given time (p205). Warlpiri ‘communities’ had up to 300 or 400 people (p69).

<sup>93</sup> Meggitt (1964:174, italics added).

I would regard this as still the general situation for Aboriginal people generally in the Northern Territory, and therefore the Review's proposed RLC membership criteria would effectively mount an attack on this important principle of Aboriginal tradition.

Even if the proposals were amended so that only those with traditional affiliations could be members of RLCs, there would be a major objection to RLCs having decision-making powers over land use rather than the power to consult traditional landholders and transmit their decisions to others. The Review does not appear to place any emphasis on such a consultative and negotiation role for the proposed RLCs, but seems to imply that the RLCs, or perhaps their Boards of Directors, would be empowered to make such decisions themselves. This again would be an erosion of or assault on customary practice. As Meggitt said of classical traditions of authority, 'we should not expect to find the same men representing the local group in all its dealings with other such groups'.<sup>94</sup>

## 7.6 Hiatt (pp137-139)

A close inspection of Hiatt's data on his 'communities' of north-central Arnhem Land indicates that, in at least one sense, which I take to be the primary sense, these 'communities' were environmentally-based categories whose constituent members were land-holding units which themselves were composed of patrilineal subgroups. In this respect Hiatt's communities were not said to own land and in this there is a crucial difference between Hiatt's and Meggitt's 'communities'. Hiatt has recently written:

With regard to land use and residential associations, my findings were similar to Meggitt's. Concerning ownership, however, I had no hesitation in ascribing primary proprietary rights to patrilans. The estates that made up a community's domain each belonged either to a single named patrilineal descent group, or to several such groups that had amalgamated to form a single land-owning unit.<sup>95</sup>

On the other hand, he asserted that 'communities' were the primary land-utilising group.<sup>96</sup> This is not to say that clan estates had no special economic status for their clan owners. Men tended to build fish-traps in their own estates, sharing the proceeds with the general camp. Between ceremonies small groups of kin and affines 'often left the main community for a while and lived by themselves on their own estates' – presumably those of the implied core of patrilineal kin.<sup>97</sup>

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<sup>94</sup> Meggitt (1964:178).

<sup>95</sup> Hiatt (1996:25).

<sup>96</sup> Hiatt (1982:21).

<sup>97</sup> Hiatt (1982:24-25) draws attention to two other cases, of an axe quarry in Victoria and *pituri* (a narcotic) stands in south-west Queensland, where resource exploitation was controlled by small local groups and the precious items were not freely available to the regional 'community'-scale population. The same applies to Howitt's observation of special 'division'-level 'property' rights in the swans' eggs of Raymond Island in Gippsland (in Fison and Howitt 1880:226). To these I can add the coastal Wik distinction between open camping sites and 'secret waters' within any clan estate. Knowledge of the latter's whereabouts is said to have been formerly very strictly controlled and restricted to a small core of male clan elders. This appears to have been related to the estate's role as a fallback refuge during conflict.

Hiatt (1965:19) presents a table showing the four 'community' identities of the 19 land-owning units which made up the Gidjingali language group at the time of his research. There is no suggestion by Hiatt that the relationship between the 'communities' and the land-owning units which belong to them was anything but a relatively stable one. Hiatt does not suggest that a person's 'community' identity changed weekly or seasonally with shifts of camp residence. However, the evidence is somewhat perplexing.

Hiatt's introductory definition of the Gidjingali 'community' as 'a group of people who customarily moved about together' was followed by a very Radcliffe-Brownian statement that it normally consisted of men who belonged to a patrilineally constituted land-owning unit (usually referred to as a clan) which was a constituent element of a community, plus the wives and unmarried children of such men.<sup>98</sup> He presented a table showing that such a community may include wives from outside itself and women of such a community may marry into another community. On his sample of two communities (Anbara and Nagara), more marriages occurred between communities than within them. Upon marriage women generally went to live with their husbands in the husband's father's area.<sup>99</sup> It flows from this that a majority of married women would at any time be living on the country of a community into which they had not been born. Hiatt does not seem to have grappled with the implications here, as it would seem to follow that the women relinquished their birth-community identity (and patrilineal group, language, totems etc.) on marriage to and residence with a man of a different community. The evidence (see below) seems to be to the contrary, and may also be implied in Hiatt's later use of the phrase 'natal community', familiar to us from the work of Meggitt.<sup>100</sup>

Hiatt at one point presents a list of owners of dwellings in a single clearing, showing that the seven senior men living at the five dwellings belonged to five different land-owning units which fell into three different 'communities'.<sup>101</sup> If these 'communities' were simply residential aggregates rather than forms of enduring identity this description would not be possible. The individual men in this case carried their 'community' identity with them wherever they camped, it would seem. The same applies to the six bachelor households at Maningrida, four of which included men of two different 'communities'.<sup>102</sup> The same would appear to apply also to those 'communities' which spent one or more months of the year living in the area of a different 'community' prior to settling at Maningrida.<sup>103</sup> It would follow that the 'communities' as described by Hiatt could not have been residential aggregates, nor even a set from which such aggregates (camps) exclusively or normally drew their personnel.

On his stated criteria Hiatt's 'communities' were either residential aggregates such as one could see on the ground, or a population from which such visible aggregates would

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<sup>98</sup> Hiatt (1965:24).

<sup>99</sup> Hiatt (1965:25).

<sup>100</sup> Hiatt (1982:19).

<sup>101</sup> Hiatt (1965:35).

<sup>102</sup> Hiatt (1965:37).

<sup>103</sup> The Anbarra community for a month or so each year, around August, were guests of the Marawurraba community. In October-November five or six communities camped at a large swamp which belonged to members of only three communities Hiatt (1982:22).

be drawn on occasion. The criteria are discussed, after all, under the heading: ‘Residential Associations’.<sup>104</sup> But he also says they were entirely made up of a limited set of small patrilineal groups whose estates clustered together in the same area.<sup>105</sup> The ‘communities’ were subdivisions of a language group in the case of the Gidjingali language group, but in the case of four other language groups of the same area the language group as a whole ‘formed the basis of a single community’.<sup>106</sup> A problem here is that some of the constituent patrilineal groups making up ‘Gidjingali’ land-owning units named languages other than Gidjingali as their primary tongue. There is thus no neat categorial alignment between ‘community’ and single-language affiliation in this case.

Furthermore, people did not switch primary language affiliation upon residentially joining a ‘community’ other than their own. Hiatt presents statistics showing very substantial proportions of inter-community and inter-language marriages.<sup>107</sup> Thus, even if we consider only married couples, the members of a single Hiatt ‘community’ would be typically have been found living with members of a range of different ‘communities’.

It is therefore impossible that such ‘communities’ were residential associations *per se*. There is no close parallel between Hiatt’s ‘community’ and the regional communities proposed as the basis for the RLCs by the Review, as the latter include long-term residents *per se*.

In his construction of the North-central Arnhem Land ‘community’ Hiatt may be said to have reproduced Radcliffe-Brown’s confusion over ‘hordes’ in an almost identical fashion but at a larger scale of social grouping, rather as Meggitt had done for the Warlpiri. In doing so, Hiatt may have been misled by the local idiom in which such ‘community’ names may be used on occasion to refer obliquely to a particular camp or contiguous set of camps dominated by members of such a ‘community’.<sup>108</sup> Geoffrey Bagshaw, who has worked as an anthropologist in the same area for many years, confirms unequivocally that a Blyth River woman does not lose her own patrilineally-derived ‘community’ identity upon marriage and residence in her husband’s country. Bagshaw calls these Hiatt ‘community’ names ‘regional designations’. They translate as, for example, ‘river mouth’, ‘in mangroves’, ‘mangrove fruit’, ‘tree blossom’ and so on. These environmental terms refer to the typifying environments of the combined estates of their constituent patrilineal groups.<sup>109</sup> They are not sets of combined band ranges.

In Cape York Peninsula, among Wik people, it is also my experience that an environmentally or location based category of the same type can be used in both ways.<sup>110</sup>

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<sup>104</sup> Hiatt (1965:24).

<sup>105</sup> Hiatt (1965:19).

<sup>106</sup> Hiatt (1965:24). The phrase: ‘*the basis of*’, may be a clue here to there having been a somewhat loose relationship between a local person’s description of a residential aggregate as Anbara, Nagara etc. (‘community’ names) and the actual community affiliations of the persons who lived in such a group.

<sup>107</sup> Hiatt (1965:25).

<sup>108</sup> Geoffrey Bagshaw pers. comm. (1998).

<sup>109</sup> Bagshaw (1996:122-123).

<sup>110</sup> See Sutton (1978:126-128) on ‘nickname’ clusters.

This is not ambiguity. It is a case of a primary and ‘hard’ usage that gives rise to an extended and ‘looser’ usage, on occasion. The root sense of the category remains the shared local environs in which particular subsets of owned estates are located. It does not primarily refer to the range of a band or coalescence of bands, or at essence to the estate of a single clan, even if some such ‘nicknames’ extend only to a single clan. Nor do those who belong to such a category normally constitute the set of all persons actually present in a camp or cluster of camps. Recruitment to these Wik categories, as in the case of the Hiatt ‘communities’ and Howitt’s Kurnai ‘clans’, is ultimately by patrification to a constituent or member subgroup which is a corporate group identified with, and which is in a custodial relationship with, certain places and their sacra.

### **7.7 New Anthropological Thinking (pp139-146)**

In this section the Review quotes (pp140-141) from some of my own work where I discussed, in a 1995 paper, my then gradually forming view that regional group members may be said to have an underlying or residual interest in all the small estates of their particular region. ‘On this basis, and according to context, regional group members may be entitled, under indigenous customary law, to play a part in decision-making about land use in large sub-areas of their region’s land or even those lands as a totality, even though their individual primary clan estate or Dreaming track interests are confined to only part of it’.<sup>111</sup>

The Review interprets my comments as being concerned with ‘a regional public’ (p140). But I was not referring to the regional public in the sense of all or any current Aboriginal residents of a region. I was referring to those whose interests in the region were rooted in traditional forms of connection and affiliation. Some resident members of a regional public typically lack such roots and would not normally be entitled to play any kind of central role in decision-making affecting the land. Furthermore, some members of the relevant jural public may reside outside the region concerned. Nor did I intend to imply that such a public would be constant in membership, would constitute a formal adjudicatory body, or have permanent offices filled by the same people for all purposes. I discussed these points and others in a subsequent paper which developed the emergent 1995 ideas in considerable detail and adduced evidence from a range of literature.<sup>112</sup> The Review does not refer to this second paper.

The Review’s discussion of ‘new anthropological thinking’ also omits any examination of the two books which, perhaps more than any other works by scholars, have presented critiques of the way ‘traditional Aboriginal owners’ are constructed by the Land Rights Act, and which do so roughly along the lines advanced by the Review itself. In 1984 Marc Gumbert, a lawyer with anthropological training, suggested that the emphasis of the Northern Territory land rights legislation was misplaced because it was based on small patrilineal corporate groups such as clans and lodges which were ideological rather than economic units. They were sociocentric rather than geocentric. The ‘community’

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<sup>111</sup> Sutton (1995:8).

<sup>112</sup> Sutton (1996).

was the appropriate land owning body, he argued, and he defined this entity, very much as the Review would define membership criteria for RLCs, as:

[t]his collection of people who, from time to time, exercise economic rights over the land or who have a variety of ritual rights and responsibilities over it...<sup>113</sup>

Gumbert's primary emphasis, partly hinted at in the ordering of this phrasing, was on a model 'which commences with the land itself (the economic base)' and which thereby generates a grouping which is not 'sociocentric' but 'geocentric'.<sup>114</sup> What this approach failed to deal with was that ultimate control of land use in Aboriginal tradition is not, at its root, a matter of economic rights but of jural authority, something that is based on personal and group identity as well as achieved standing, and on mutual recognition of that identity and standing between members of different groups. It is from these bases that economic use rights flow. People with the same ordinary economic use rights, such as the right to forage, to get water and timber, or perhaps even to be compensated for the disturbance caused by forced relocation in the case of railway construction, are usually rather clearly divided between those who can also assert the primary right to make decisions about where buildings and roads are constructed, for example, and those who cannot. Gumbert's model conflated the two.

Gumbert also said that 'there is no possible responsibility for the land below the level of the community'.<sup>115</sup> This ignores the contextual nature of responsibility for country and sites in Aboriginal practice, in that some matters may well be defined by the jural public of a region as simply the responsibility of a small set of people, while other kinds of events or proposals require wider sets of people to be involved in decisions.<sup>116</sup> In certain cases the wider sets may involve people from a number of 'communities' or 'tribes' to take part in decisions that regional repercussions.

Among the major problems with Gumbert's proposal, however, were that his 'communities' are not well-bounded, patrilineal may have members distributed across more than one such community in terms of where they exercise their ordinary economic rights of foraging, people change their community area of residence from time to time, and, above all, one could expect strong objections to the proposal to come from members of groups responsible under Aboriginal Law for the lands concerned. Authority over decision-making for land use was not clearly distinguished, in Gumbert's model, from the possession of economic use rights such as foraging rights. Foraging may not change the physical or social environment itself in a dramatic way, at least in the short term, but modern decisions over land use are often concerned with excavating deep holes, mass clearing of vegetation, and the introduction of outsider workforces. To conflate all these with berry-picking and skink-roasting under the heading of 'economic rights' is to ignore the distinction between important business involving economic and social change, on the one hand, and business as usual on the other.

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<sup>113</sup> Gumbert (1984:91).

<sup>114</sup> Gumbert (1984:196).

<sup>115</sup> Gumbert (1984:103).

<sup>116</sup> For more detail on this see Sutton (1995:5-7).

Furthermore, as I have argued elsewhere in greater detail, any legislation which attempts to define a fixed set of ‘traditional owners’ for an area, regardless of the scale and nature of land use decisions, does not match well with Aboriginal tradition and Gumbert’s simple ‘replacement’ model for dealing with the shortcomings of the Act’s definition of traditional owners was in this sense doomed at the outset.<sup>117</sup> To continue to attempt to impose such a fixity is likely to be futile, in my opinion. Traditional ownership is no more, and no less, the exclusive function of a ‘local descent group’ than it is that of a ‘community’ – appropriately defined. The ‘certainty’ offered by such attempts at fixture is an illusion bound to be shattered by disputes, especially disputes about who is on a ‘traditional owner’ (or RLC membership) list and, where administrative boundaries are simultaneously imposed by the new system, disputes about where such boundaries should be drawn.

As the Review points out, it is probably no accident that the only two small land councils which have become independent, Tiwi<sup>118</sup> and Anindilyakwa, both look after offshore island areas dominated by single cultural groups. On the mainland any attempts at administrative subdivision which uniquely aligned traditional connection with power over regional resources and a set of fixed boundaries would be likely to have a severe impact on relations between persons, kin groups, RLCs, and the proposed NTAC central bureaucracy. In the Review’s proposal for 18 RLC areas are the highly probable seeds of endless boundary disputation, in my view. While greater decentralisation and devolution of land council administrative roles is in principle something I support, these are not incompatible with avoiding this type of unnecessary conflict. As Nancy Williams has said of traditional Yolngu (North East Arnhem Land) boundaries:

...for varying purposes, boundaries are always capable of short-term and long-term definition on the basis of differing criteria of inclusion and exclusion. This capacity also not merely accommodates but facilitates change over time. It does not, of course, preclude disagreement about particular inclusions and exclusions, nor disputes that can themselves become instrumental in change.<sup>119</sup>

The other anthropological book which goes to some length to criticise the Land Rights Act and suggest an alternative approach is *Labor’s Lot* by Elizabeth Povinelli.<sup>120</sup> This book was in part ‘an effort to challenge the theoretical divide between Aboriginal culture and economy’.<sup>121</sup> She also challenged the subordination of foraging to social and cultural expressions of land attachment, as it exists in the Act.<sup>122</sup> Her book is about the people of

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<sup>117</sup> My fuller assessment of Gumbert (1984) is contained in Sutton (1985).

<sup>118</sup> The Review’s account of Tiwi land relations was in my view flawed in a number of ways. Contrary to what the Review says on p187, the Tiwi are reported as having territorially important patrilineal descent groups well before the creation of the Tiwi Land Council (Hart and Pilling 1960:111, Goodale 1971:97-98, Venbrux 1995:24). Further, it might be suggested by the Review (p187) that the Tiwi do not have sacred sites which play a role in country affiliations, but, while their sacred sites differ from mainland ones, they certainly play a role in land interests in the case of certain elaborately marked burial sites (Goodale 1971:102, Venbrux 1995:24, and cf. Hart and Pilling 1960:89).

<sup>119</sup> Williams (1986:224).

<sup>120</sup> Povinelli (1993).

<sup>121</sup> Povinelli (1993:3).

<sup>122</sup> Povinelli (1993:30).



Belyuen, a community on the Cox Peninsula near Darwin. The people have detailed knowledge of the surrounding countryside, use it regularly for economic and religious purposes, have many biographical and spiritual links to it, and take much care of it. Most, however, at the same time maintain a primary form of identification with their ancestral homelands to the south around Anson Bay, from which they or their recent ancestors migrated to settle at Belyuen, and many continue to visit and derive economic benefits from that homeland area. With the rarest of exceptions they are not prepared to say, in vernacular English terms, that they are ‘traditional owners’ of the Cox Peninsula area, unless they are among the handful of Larrakia people who are based at Belyuen. The Belyuen people have repeatedly acknowledged that the Cox Peninsula country is Larrakia country.<sup>123</sup>

Povinelli highlights the difficulties of such long-term residents in trying to have their interests afforded appropriate weight under the Land Rights Act regime, especially in a case where the majority of residents are of immigrant stock and the majority of those with ancient ancestral affiliations to the area live outside it. While highly sympathetic to these difficulties, I do not regard her analysis as one which could justifiably lead to a collapsing of the categories of ancestral affiliation and long-term resident in the way the Review suggests.<sup>124</sup>

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<sup>123</sup> They have also done so formally, see the transcripts of the two hearings of the *Kenbi Land Claim*.

<sup>124</sup> I should point out that Professor Povinelli and myself are both involved in the contentious and long-running Kenbi Land Claim, Povinelli for the Belyuen group and myself for the Larrakia group, and that we have put contrasting views in our evidence. Some of the arguments are long and complex and there is no time or space to deal with them here, but I have discussed one of them in Sutton (in press).

## 8 APPENDIX 2: AUTHOR'S RESUME

Dr Peter Sutton is a self-employed consulting anthropologist and occasional part-time Lecturer in the Department of Anthropology, University of Adelaide. His academic background is mainly in linguistics and anthropology. He holds the degrees of BA Hons (Sydney, 1970); MA Hons (Macquarie 1974); PhD (Queensland 1979). Since 1969 he has worked with Aboriginal people, mainly in remote and rural areas in Cape York Peninsula and the Northern Territory, but also in Queensland, South Australia, New South Wales and Tasmania. He speaks languages from western and eastern Cape York Peninsula.

Dr Sutton was Senior Anthropologist (Land Claims) at the Northern Land Council of the Northern Territory 1979-81, and then practised as a consultant anthropologist for several years. In 1981-2 he was a Nuffield Fellow at the University of Cambridge (Department of Anthropology). He was Head of the Division of Anthropology, South Australian Museum, 1984-1989. He has been an elected member of the Council of the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) since 1992.

Dr Sutton has worked in various capacities on over fifty land claim cases in the Northern Territory, Queensland, New South Wales, Western Australia and South Australia since 1979, and under three legislative regimes (*Aboriginal Land Rights (Northern Territory) Act 1976 (Commonwealth)*, *Aboriginal Land Act (Queensland) 1991*, *Native Title Act (Commonwealth) 1993*).

Dr Sutton is an author or editor of ten books<sup>125</sup> and has published around ninety academic and other professional papers. He is currently engaged in writing a series of discussion papers on Aboriginal land tenure for the National Native Title Tribunal. He also conducts intensive courses in Aboriginal land tenure, and teaches an undergraduate course called 'Aboriginal Land Rights and Sacred Sites in Australia'.

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<sup>125</sup> Sutton, P. (ed.) 1976. *Languages of Cape York*. Canberra: Australian Institute of Aboriginal Studies.

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