THE SUBMISSION OF DR PAUL BURKE TO THE AUSTRALIAN LAW REFORM COMMISSION REVIEW OF THE NATIVE TITLE ACT 1993

Introduction: what can Anthropology contribute?

1. In making the submission I draw upon 30 years of experience working in land rights and native title both as a lawyer and anthropologist and my doctoral research on anthropologists in native title claims (Burke 2011). Assuming there are enough lawyers to make submissions, I intend to focus on the particular contribution anthropology might make. In invoking anthropology I want to make it clear that this is a personal submission and I am not claiming to be speaking on behalf of other anthropologists. Four broad areas anthropological concern could be distinguished:
   1. Anthropological accounts of traditional land tenure and the processes of cultural transformation over post-contact history, including interaction with the native title system as a whole;
   2. Reflections on the actual experience of the formulation of expert anthropological evidence in native title hearings (a comprehensive list of references appears in Burke 2013);
   3. The use of anthropological knowledge to help design effective post-determination native title corporations (Mantziaris and Martin 2000, Martin, Bauman, and Neale 2011); and
   4. Discussion of what appear to be anthropological and sociological concepts adopted into legal doctrine of native title.

   The relatively broad scope of anthropological interest in native title is also exemplified in the Benjamin Smith and Frances Morphy's introduction to their edited volume *The Social Effects of Native Title* which distinguishes between themes of recognition, translation and coexistence (Smith and Morphy 2007). Crucially, that introduction identifies the process of recognition within the confines of the legal system as necessarily partial and transformative (2007:3).

2. Although I intend to address some of the specific questions asked in the Issues Paper, I would like to make some general contextualising remarks, not least to explain a certain degree of ambivalence I have about the whole project of native title and the specifics of the review. Like many, I see of the great nation-building project of the recognition of native title as fraught with seemingly intractable problems and injustices that were not so plainly apparent in the initial sense of the bold achievement of the statutory reinforcement of the High Court's decision. Accordingly, this is mostly a submission about why it is difficult to make a straightforward contribution given the relatively narrow terms of reference of the review.

Native title as a poor man's land rights: problems of indeterminacy and a 'laws and customs' approach

3. Emanating from professional legal practice and the norms of argumentation within the court system there is a tendency in legal circles towards acceptance of the law as it is. The promise of bodies like the Australian Law Reform Commission is to step outside the usual orientation towards acceptance, at

least within the terms of the enquiry. Yet, as I will argue below, some of the problems underlying the specific questions of the inquiry stem back to fundamental choices in the judicial formulation of the legal doctrine of native title which are not the subject of a fundamental and original review (as in a Woodward style royal commission preceding land rights legislation in the Northern Territory) but relatively minor amelioration. The most fundamental choice (and choice may not be the most apt term here given the state of pre-Mabo jurisprudence) was to adopt a 'laws and customs' approach in which ideas of 'laws and customs' become universal, cross-cultural means of recognition. This can be compared to the land rights approach which instead used a combination of cross-cultural concepts of genealogy (descent group), religion ('primary spiritual responsibility') and economy (foraging rights).

4. What I have suggested elsewhere, is that the anthropological literature on primitive law and legal pluralism can usefully be mined to clarify some of the implications of the laws and customs approach (Burke 2011: 16-18, Burke 2012). Critical debates in this literature arose over the question of whether concepts of Western law were useful in analysing traditional African kingdoms which appeared to have similar institutions such as centralised political authority and specialised dispute resolution institutions. The debates continue up to the present and are particularly acute in relation to Melanesianist anthropology which found much looser social organisation, more egalitarian and diffuse authority structures and widespread recourse to self-help in dispute resolution - all like Indigenous Australia. In such societies anthropologists tended to locate 'law' at the level of shared norms. To jump to the conclusion of my own review of some of this literature: despite the recognition of fundamental differences in the scale and organisation of non-state societies, there is a tendency in studies of primitive law/legal pluralism to model the description of law, typically in a subterranean way, on specific Western institutions that emphasise its explicitness (positive law), its uniformity (one law within a national jurisdiction), its comprehensiveness (extensive codes on multifarious topics), its political authority (the constitutional state) and its uniform enforcement (specialised enforcement mechanisms). Thus, although we know Indigenous societies are very different, in using a laws and customs approach, we never quite break free of the roots of law in Western institutions.

5. The extent to which we move away from or towards peculiarly Western institutions of law in native title is the central indeterminacy of the legal doctrine of native title and it is often overlooked as if the idea of law is unproblematically universal. This indeterminacy tends to map neatly onto applicant and respondent positions within the adversary system and explains perennial arguments about degrees of specification of law and customs and levels of proof required, even if those arguments are not made in the terms I have used. Difficulties over traditional succession are a particular illustration of this, with some arguments seeming to require that Indigenous groups need to have anticipated such eventualities and authoritatively and explicitly legislated a rule of succession to cover it. Perhaps an even clearer example of the subterranean playing out of inevitable tensions and translation problems between state law and non-state law is the Yulara case where, among other

things, the claimants' inability to provide an explicit and comprehensive overview of their system of land tenure was a critical factor in the judge's negative conclusion, notwithstanding that the variety of traditional bases for legitimate claims closely matched anthropological generalisations about their system (for anthropological reflections the case, see Burke 2007, Glaskin 2007a, Morton 2007, Sackett 2007, Sansom 2007, Sutton 2007).

6. The main point I want to make about what could be called the out-of-Africa 'laws and customs' approach, is that considering all the kinds of non-state societies in the world, Indigenous Australia is the furthest away from possessing the institutions of modern Western law and therefore native title is always going to be a question of translation (rather than straightforward recognition of similarities) and it is always going to be a stretch. It is telling in my view that Australianist ethnography does not feature prominently in the primitive law/legal pluralism anthropological literature. I think this is because law never seemed an appropriate overarching approach to the relatively small-scale, loose social structure that the ethnographers of the time found (notwithstanding the early and continuing theamatising of traditional land tenure as a part of studying local organisation). The fact that Aboriginal people themselves have adopted the terminology of 'Aboriginal Law' and that it has entered public discourse does not vitiate my main point. This is because 'Aboriginal Law' typically has a unique range of reference inclusive of rituals, songs and sacred objects that have no counterpart in the modern law of the secular constitutional state (Burke 2011: 203-4, Mantziaris and Martin 2000: 35-7).

7. In the academic sphere, Brian Tanamaha, in a series of seminal critiques of the terminology of 'legal pluralism', wondered why the phrase 'legal pluralism' could not be replaced by less loaded, less Western-orientated terms such as 'rule pluralism' or 'institutionalised norm pluralism' (Tamanaha 1993, Tamanaha 1995). He argued that such terminology would avoid the connotations of a state-like apparatus inherent in the word 'legal'. His suggestion provides a model for possible clarification of the definition of native title perhaps along the lines of some of the clarifying amendments to section 223 proposed in the Native Title Amendment (Reform) Bill 2014:

   > Without limiting subsection (1), ***traditional laws acknowledged*** in that subsection can include any rule or institutionalised norm and such rules or norms do not have to possess the same degree of explicitness, uniformity and comprehensiveness or the same legislative, judicial and enforcement bodies as found in the law of modern constitutional states.

8. The two other principal indeterminacies in the legal doctrine of native title are the scale of relevant groupings of people (choosing the title holding group or the relevant 'society' from among the available groupings) and the degree of allowable change of traditional laws and customs before traditional connection is lost. For me these three principal indeterminacies are the gaping holes in which the injustices or otherwise of the native title process are worked out. That is why I have found it necessary to follow the factual details of particular cases in order to find out what really goes on in the native title process rather than relying upon judicial conclusions about facts and statements of the legal

doctrine (Burke 2011). Of course, the native title procedure like any legal adjudication does provide a mechanism for resolving these indeterminacies through trials and appeals. I merely wish to point out at the start that the indeterminacies are so broad and so central they impose severe limits on improving predictability in particular cases and this will remain broadly true notwithstanding the kind of amendments to the Act that appear to be contemplated in the Issues Paper.

The social context: The native title juggernaut and Indigenous lifeworlds

9. Native title legal doctrine envisages a grand, continent-wide rationalisation of those who have maintained traditional connection and those who have not (and those in between who might be able to negotiate a non-native title outcome). The belated enunciation of the doctrine in 1993 and the uneven course of colonial history meant that the doctrine caught a thousand different Indigenous groups (or is it ten thousand?) in a thousand differently constituted historical circumstances and degrees of attenuation of pre-contact traditions. Some of the diverse permutations of local circumstances have been mapped, if in an extremely variable way necessitated by a lopsided and fragmented historical record. Much of this ethno-historical mapping remains inaccessible, paradoxically because it has been initiated within the legal context of native title and remains confidential. The obvious significance of this archive is that it provides something of the social context into which the doctrine of native title was received and would provide some guidance to the Commission on the likely effect of changes to the legal doctrine beyond the superficialities of the acknowledgement of change and loss within the legal doctrine. One can imagine that if the project of the recognition of traditional land rights across Australia had been commenced in a more orderly way via a Woodward-like royal commission, this ethno-historical archive would have been of primary importance in devising the best way to recognise the diversity of local circumstances.

10. There are already sufficient lists of references to a publicly accessible archive of this ethno-historical material (see, for example, the references listed in Macdonald and Bauman 2011:6-7). But it may be useful for the Commission if I point out some pertinent references that are not so easily accessible or their relevance not so readily apparent. The other broad aspect of the social context of native title that has exercised the minds of anthropologists is the effect that native title itself has on Indigenous lifeworlds. The conceit of the legal doctrine of native title is that it merely recognises what is already there. By outlining some of the already apparent social effects of native title it may assist in predicting the likely effects of changes to the legal doctrine envisaged in the Issues Paper.

11. My own account of the first Rubibi claim around Broome provides one example of the diverse elements that sometimes come into play in a particular locale (Burke 2011: Chs 4 and 5). As in many parts of Australia, the initial devastating contact period was followed by a period of relative recuperation on pastoral leases and then a move to town. Broome, especially in the heyday of the pearling industry, was unusually ethnically mixed and so were the

Aboriginal groups drawn to Broome. One significant group of migrants was from Western Desert cultural bloc far to the east. The arrival of such a culturally assertive group who had a much shorter contact history typically led to tensions with much reduced local groups who had suffered a much longer contact period. Also in town there was intermarriage between language groups and processes of stratification and differentiation within the Aboriginal population for example between the dwellers in town camps and mixed-race Aboriginal people in town, a differentiation also encouraged by legal regimes of the time. The result was that when the time came for the first native title hearing in the year 2000, there were a multiplicity of Aboriginal groups who had been following their own divergent family traditions about the area and the hearing brought them into direct confrontation for the first time. The most intractable divergence, and one that is common around Australia, was between those who identified primarily with a smaller area (reminiscent of a clan estate) and those who identified with an overarching language group incorporating many different local attachments. Also, the nature of the legal doctrine reinforced the authority of those who had continued with traditional rituals and relegated those Aboriginal people who had been pursuing other forms of land security like towns leases. Thus the claim itself became the means of a dramatic readjustment of intra-Aboriginal relations.

12. This theme of the native title being a powerful intervention that precipitates a reordering of intra-Aboriginal relations was given the most detailed and intimate treatment in Katie Glaskin's doctoral thesis on the Bardi Jawi claim (Glaskin 2002, also see Glaskin 2007b). Blending oral history, documentary evidence and previous anthropological accounts she reconstructed the diverse life experiences of her claimants and their ancestors. From this material she was able to make some sense of the crosscurrents of local politics including the different reception of Catholic and Protestant missionising projects, variation in knowledge of traditional practices, the devastating exile in Derby and their return to traditional country encouraged by the outstation movement.

13. On top of these complex crosscurrents a single, all-encompassing native title claim was lodged, not only necessitating an unprecedented level of co-operation outside a ritual setting, but also an unprecedented need to formalise membership of a representative working group to run the claim and to draft a constitution specifying the internal dimensions of this diverse group for the eventual native title corporation, referred to in the legislation as the Prescribed Body Corporate (PBC). It is in Glaskin's observations of the process of structuring representation on the working group and drafting the constitution of the PBC that the most compelling evidence of the objectification of traditional practices is presented. Representation on the working group was decided according to named regional areas that now institutionalised some successful strategic behaviour on the part of some claimants at an initial decisive meeting. Furthermore, in response to the claimants' insistence that the draft PBC constitution should reflect Bardi/Jawi Law, such key customary terms as '*madja-madja*' (ceremonial leader) entered into the draft constitution as a term defining the key advisory body for the executive in issues of membership, disputes, 'Law' and *buru*. Previously such a status operated largely outside the domain of European structures depending upon the learning

and demonstration of esoteric knowledge and the acceptance by the rest of the community. Now they were explicitly drawn into an administrative structure.

14. From these two examples and from other more accessible case studies it is possible to develop a list of the social effects of native title that have been identified by anthropologists. These include:
-increased opportunities for family disputation over the divergent views of traditional relations to land that in the past could be accommodated by different family traditions developing in isolation from one another (cf. Smith and Finlayson 1997);
-the speeding up of processes of objectification and regimentation of traditional relations to land (Merlan 1995, Merlan 1998: Ch 5); and
-the dramatic juridification of relations to land that were previously outside the scope of the Australian legal system (Mantziaris and Martin 2000: 126-8).
On a more prosaic level, in the post-native title world many Indigenous people find their lives taken up with attending meetings, often very fractious ones, and in the internal governance of corporations set up to manage their affairs.

15. Because it is obvious and well documented, I also do not wish to labour the point about the inevitable transformation of Indigenous relations to land as the traditional economy was radically transformed and the lives of the indigenous people became enmeshed in varying degrees with that of the settlers and various government projects of education, labour and welfare and non-government projects of missionisation and economic development. The variable reach of those projects, especially in remote areas, as well as active Indigenous strategies of domain separation and compartmentalisation accounts for the variation in the attenuation of traditional land tenure systems. But everywhere, Indigenous people were never left completely alone, but added to their identities as traditional owners new roles and identities that were a product of intercultural engagement (in relation to Aboriginal Christianity in native title, see Trigger and Asche 2010). The legal doctrine of native title wants to minimise the effect of intercultural history by assuming there are still some places within Australia where such intercultural history can be discounted and a separate, freestanding social domain of continuing traditional laws and customs can still be identified. Accordingly, the legal doctrine of native title tends to be radically ahistorical and to incorporate a radical denial of intercultural history (except for some indeterminate degree of allowable change of traditional laws and customs). Thus, from the perspective of anthropological theorising, the legal doctrine of native title legislates for primitive law and against intercultural history.

Question 5. Does section 223 of the native title act adequately reflect how Aboriginal and Torres Strait Islander people understand 'connection' to land and waters? If not, how is it deficient?

16. As should be clear from my opening remarks, this seemingly straightforward question is an invitation to innocence which has already been lost by considering the terms of the native title doctrine in anthropological theorising and native title claims in their social context. Some would see it as an invitation to participate in setting the guidelines for a system of 'repressive

authenticity' (Wolfe 1999: 179). While I see that as an extreme view that gives insufficient credence to Indigenous agency and ability to engage strategically with the native title system, I do think that any definition is inevitably part of a system that is inherently productive of juridification (to varying degrees), homogenisation of regional differences and pressure to conform to a certain limited kinds of traditionality. Perhaps a more evenhanded way of describing the invitation to comment on the legal definition of native title is to say that it invites a radical bracketing of contexts outside the strict confines of legal doctrine and the legal system.

17. Deliberately keeping those non-legal contexts in view, however, it is possible to reimagine the task of the definition as one that would do the least damage rather than one that would reflect an ethnographically more accurate image of traditional land tenure. 'Least damage' would include a definition of sufficient generality that it would not prematurely foreclose the chances of all but the exceptional Indigenous groups with a relatively short contact history and relatively minimal social disruption. I take it as already established that because of the largely incommensurable systems of land tenure the definition of native title inevitably involves a process of translation from one system to another (Mantziaris and Martin 2000: 29-43). Marcia Langton has recently illustrated the nature of this incommensurability by pointing out, by reference to a Cape York example, how Aboriginal property relations are typically embedded in more fundamental social relationships with the sacred ancestral past that bestows a whole social world ('a spiritual bequest') which includes property relations (Langton 2010). Thus she argues that there is a unique, non-Western ontology of Aboriginal title which, among other things, assumes that the nature of being is emplaced being and conceives of property relations primarily in terms of stewardship and transmission to the next generation.

18. I do not necessarily take Langton to be arguing that legal recognition would be better pitched at the level of an ontology. In any case, it would be difficult to see how this would work outside those limited remote parts of Australia where such ideas are still present and observed in particular practices such as calling out to the spiritual ancestors at sacred sites or invoking them to maintain the fecundity of the country. The laws and customs approach in current native title legal doctrine is predisposed towards secular rules. While this predisposition limits the scope of recognition in areas such as Cape York, it does have the potential to cover a wider number of local circumstances where Aboriginal people may not see their contemporary relations to land primarily in spiritual/religious terms. This is one of the implications of Gaynor Macdonald's reflections on the Wiradjuri in her article 'The Secularisation of Riverine Law in South-East Australia' (Macdonald 2011). Accordingly, I do not think that the secular bias in the current formulation of the legal doctrine is a problem. As part of the process of translation in native title, it is possible for aspects of the Aboriginal ontology to be translated into social norms relating to land and the project of recognition does not necessarily falter because the full implications of property relations are not explicitly mentioned.

19. In other words, I tend to take a minimalist position on the scope of the codification of traditional laws and customs in the definition of native title on

the Native Title Act. The consequence of such a position is that the resolution of many important issues are left to the vagaries of the trial process, the formulation of the determination and the formulation the internal rules of native title corporations without any guidance from the Act. Although these are inevitable consequences of the minimalist position, there are two related problems that continue to test my resolve to maintain this position. The more general problem is the levelling of traditional hierarchies in the native title process that, in an extreme case, would mean everyone who has got any native title right, no matter how qualified, being lumped together and given equal voting rights in a native title corporation. The second related problem is the requirement to make a global characterisation of the native title rights as exclusive or non-exclusive.

20. While anthropologists have long argued for differentiated traditional rights to land (for example, Sutton's broad distinction between contingent and core rights (Sutton 2001, Sutton 2003: Ch 1)) there is a tendency in the formulation of determinations of native title towards identifying a single entity like a language group having comprehensive rights ('to possess, occupier, use and enjoy') and then detail a list of more detailed rights and activities that are allowed for all members of the group (also see Mantziaris and Martin 2000:61-80). It could be argued that the Native Title Act does not preclude internal differentiation, for example, allowing decision-making according to traditional laws and customs. But in the definition of native title and what needs to be addressed in a determination there is no direction towards the possibility of differentiated rights. This can be compared to the scheme of the Aboriginal Land Rights (Northern Territory) Act in which the definition of traditional owner is focused on those with primary rights ('primary spiritual responsibility') and for those with contingent rights they are recognised outside of the traditional owner decision-making and informed consent provisions in a separate section (s. 71):

> ... any Aboriginal or group of Aboriginals is entitled to enter upon Aboriginal land and use or occupy that land to the extent that that entry, occupation or use is in accordance with Aboriginal tradition governing the Aboriginal or group of Aboriginals with respect to that land, whether or not those rights are qualified as to place, time, circumstance, purpose, permission or other factor.

21. Apart from these general comments, I also wish to narrow my focus somewhat to the issue of the sharp distinction made in section 223 between exclusive and non-exclusive rights. This problem goes all the way back to Brennan's judgement in the Mabo decision in which the seeming common sense example of non-exclusive hunting rights was used to justify and exemplify the bundle of rights approach that was later confirmed in the Ward decision. The problem, as I see it, from the ethnographic perspective is that non-exclusive hunting rights never existed in isolation anywhere in Aboriginal Australia. Everywhere it was a case of non-exclusive hunting rights being granted by traditional owners with full rights to country (or, in Sutton's topology, 'core' rights (Sutton 2003: 12-21)). As far as can be ascertained, in the pre-contact era the whole of Australia was fully occupied by those with 'core' rights. While there is evidence in the early ethno-historical record of Aboriginal

circumspection about traditional boundaries such as permission seeking rituals and practices, such things were part of regional systems of intermarriage, shared norms of generosity towards kin, co-operation in holding regional ceremonies along with more parochial tendencies encouraged by fear of unfamiliar sorcery and strangers outside one's kinship universe and intermittent feuding and warfare. Consequently, especially in desert areas, boundaries were likely to have been porous for long-standing neighbours, who in any case were likely to be kin, and punishment for trespass or examples of the active exclusion of neighbours is likely to have been rare.

22. The rarity of examples of the exclusion of other Aboriginal people from one's own traditional country is exacerbated by the typical post-contact loss of control over free access to traditional country and general subordination to white authority. Thus, after decades of such regimes claimants are sometimes expected to produce examples of their traditional exclusive possession and this tends to focus narrowly on examples of exclusion rather than reasonably extrapolating this from the comprehensiveness of 'core' rights. The elicitation of such evidence, even in cases where traditional continuity and demonstration of their 'core' traditional rights was strong, has proven to be very problematic, as in the De Rose Hill native title claim hearing (Burke 2011: 213). In that instance, the problems were the abstract nature of the question (asking the witness to imagine what would have been the case but for the actual control of access to the property by the long-term pastoralist) and the norms about generosity to Aboriginal visitors confounding the elicitation of permission seeking norms.

Question 10. What, if any, problems are associated with the need to establish that native title rights and interests are possessed under the traditional laws acknowledged and traditional customs observed by the relevant Aboriginal or Torres Strait Islander people? For example, what problems are associated with:
(a) the need to demonstrate the existence of a normative society 'united in and by its acknowledgement and observance' of traditional laws and customs?
(b) the extent to which evolution and adaptation of traditional laws and customs can occur?
How could these problems be addressed?

23. I wish only to comment on the 'society' question, although it does raise more general questions about the nature of legal borrowing from non-legal academic discourses. I also wish to explain why my already published proposal for dealing with the society question is not meant to be taken up in revising the legal doctrine of native title (Burke 2010).

24. Confusion about the nature of borrowing from anthropological and sociological theorising in the formulation of legal doctrine has a long history going back to the definition of traditional owner in the Aboriginal Land Rights (Northern Territory) Act. The essential paradox is that those framing the legal doctrine sometimes turn to anthropology, sociology or sociological jurisprudence to import into the statement of legal doctrine a degree of realism and recognition of difference but once those concepts appear in legislation or judicial pronouncements the links to their original context is severed.

Henceforth, the imported concepts are interpreted according to legal procedures which tend to emphasise their ordinary English meaning and not their technical meaning in the disciplines from which they came. Thus, in the land rights case, the definition of traditional owner had clear roots in anthropological theorising about traditional land tenure which focused on relatively small patrilineal clan estates. Such was the influence of this idea that it precipitated all sorts of misguided critiques of the definition of traditional owner, wrongly assuming that the anthropological antecedents of the terms in the definition would somehow continue to constrain its interpretation in the legal field. Even the long-serving first Aboriginal Land Commissioner seemed to have felt similarly constrained until clarification in the full Federal Court (as to the originally unrecognised anthropological openness of the legal definition of traditional owner, see Maddock 1980).

25. I think a similar thing is happening with 'normative system' and 'society' particularly among anthropologists trying to work out how to respond to it. Now I find it interesting that the Issues Paper (paragraphs 106-113) reports that native title jurisprudence seems to be moving in the direction of the assertion of an ordinary meaning and disavowal of the importation of technical meanings from other disciplines. But I do not know whether that direction is enough to halt the runaway train that 'normative system' and 'society' have become in native title trials and in the legal shadow lands of connection reports and mediated consent determinations. The system of pleadings and limitations on change of pleadings means that one wrong move in describing the scope of the relevant 'society' could potentially lead to disastrous results for the claimants of having failed to establish an essential element of their claim. Although it is probably too late now to change the essentially adversary approach of native title trials, it seems to me that a more active judicial approach of enquiry would ameliorate the problem of taking procedural advantage of the uncertainty surrounding 'society'.

26. It should be apparent from these remarks that I do not agree with the statement in paragraph 106 of the Issues Paper that the existence of a society is a discrete element to be established in native title claims (if I may be permitted to stray onto strictly legal territory for a moment). Note: there are at least two senior counsel specialising in native title law who hold this view. Obviously there is a growing (unstoppable?) jurisprudence in Federal Court decisions suggesting that ‘normative system’/‘society’ is indeed a newly elaborated, additional element in the legal doctrine of native title. But, for reasons derived from the views of senior counsel and set out in my 2010 paper, I do not think that the High Court in *Yorta Yorta* was intending to add another fundamental element to the proof of native title but were instead explaining in other words the concept of the need for continuing traditional connection. On this view, the idea of there being a society is always implicit in there being a continuing acknowledgement of traditional laws and a continuing following of customs and does not require further separate proof.

27. Accordingly, I wish to clarify the intent of my 2010 paper lest it be thought I was suggesting a re-definition of normative society as that group of people who are responsible for enforcing traditional obligations to land. This was an

attempt to assist myself and other anthropologist in grappling with the runaway train. As I explained in the paper, although my suggested formulation is better able to generate concrete evidence, it tends to generate a variety of groups ('overlapping jural publics') depending upon the severity of the infraction of traditional obligations. So, even under this formulation, pragmatic justifications for choosing one 'society' over another would have to be made. The best solution to the 'society' problem is to stop the runaway train and avoid the terminology of 'society' altogether. In a similar way, 'normative system' should not be a new impost on claimants, rather it is another way of talking about continuity of laws acknowledged and customs observed that cannot be revived once lost.

Question 11. Should there be a definition of traditional or traditional laws and customs in section 223 of the Native Title Act? If so, what should this definition contain?

28. For reasons which are probably becoming clear now, I do not think it is possible for anthropology to make the straightforward contribution question 11 presupposes is possible. It may, however, help clarify what would seem to be the implicit limits in developing a common sense legal doctrine to contrast those limits with recent theorising about tradition. Francesca Merlan's article 'Beyond Tradition' is a convenient starting point, not least because it is specifically orientated towards a critique of native title (Merlan 2006).

29. Drawing upon the work of sociologists and cultural theorists, Merlan distinguishes an objectivist account of tradition from a more critical one. In objectivist accounts 'tradition' is used to describe and explain the recurrence, in approximately identical form, of the structures of conduct and patterns of belief over several generations. These accounts seem to overlap with the presumptions in native title legal doctrine and the process judicial fact-finding. The more critical approach assumes that 'tradition' always includes forms of awareness of and accommodation of selective aspects of the past into the present. On the critical view, 'tradition' is always reflexive (not unconscious, but requiring a degree of knowledgeable responses to one's social environment) because it involves the objectification of a past-present relationship viewed and evaluated from the present. Also inherent in the critical approach is the expectation that what is incorporated from the past will be different from present practice.

30. Within objectivist approaches there can be further distinguished those that are modelled upon the transmission of objects (including social objects like systems of land tenure) and those modelled upon the process of transmission itself thereby attributing constancy to underlying social processes. These two approaches have their counterparts in the developing jurisprudence of land rights and native title which, on the one hand, looks for a fairly exacting transmission of objects (such as clan estates) and, on the other hand, allows for continuity at higher levels of generality (such as language groups) or some limited recognition of continuity in social processes of adaptation to changing circumstances (such as mechanised means of hunting). It is this limited acknowledgement of social processes of adaptation which is behind the

codification proposed in clause 18 of the Native Title Amendment (Reform) Bill 2014 referred to in paragraph 123 of the Issues Paper.

31. Moving to a critical view of 'tradition', however, enables a clearer view of what is threatening or problematic for the objectivist/legal approach namely that all tradition involves some sort of reflexivity and recognition of continual change. Thus native title is seen to be undermined if too much intercultural history is acknowledged and transformations of traditional identities and practices are seen to be a product of relations between the Indigenous and the settlers rather than a separate Indigenous domain. A safer course in native title is to demonstrate continued separation, especially as unintended consequences of the congregation of Aboriginal people on pastoral stations or their concentration in reserves and settlements. Similarly, too much reflexivity such as admitting to changes in the basis of attachment to land over contact history (for example, in conflicts between so-called 'historical people', who may be knowledgeable about the country, and those that can establish deep genealogical connection but may not be so knowledgeable) or who admit to a knowledge of the anthropological archive and are seen as undermining their claims to be traditional in the sense that seems to be demanded in the native title process.

32. The unrealisable solution is to take out reference to tradition from the definition of native title. But it is obvious that the inclusion of an objectivist view of tradition is central to the broader task of native title which is precisely to separate out a select group for whom it is assumed there is broad political support for their recognition.

Concluding comment

33. I realise that some of the points made in this submission are in a rather condensed form. I would be happy to further explain these ideas verbally if you wish. It struck me in writing this submission the problems with recognising traditional succession within the native title framework exemplifies many of the concerns raised in the submission but I do not have the time to fully tease out the issues and the implications for amending legal definitions.

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