

CROSSCURRENTS

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*LAW AND SOCIETY IN A NATIVE TITLE
CLAIM TO LAND AND SEA*

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Readers of this book should be warned that many of the people whose names appear, both Aboriginal and non-Aboriginal, have now passed away.

For Jamaji, Uju, Janjan and Wotjularr

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Preface and Acknowledgements

This book is about a native title claim to an area of land and sea in north-west Western Australia. The claim ('Sampi') was first determined by the Federal Court in 2005 (*Sampi v State of Western Australia* [2005] FCA 777) before proceeding to appeal in 2007. The appeal was determined in 2010 (*Sampi v State of Western Australia* [2010] FCAFC 26). Some of the issues that came to impact on the case along the path to its final resolution in 2010 included those that would have impacted any native title case in Australia during the same period; others were specific to the case.

I began writing this book knowing many of the people who have had direct involvement in the Sampi case may disagree with some or more of the analysis and interpretations of issues I offer here. To write about a case of this length and complexity with its many differently situated actors means there will inevitably be disagreement about certain aspects of the case. It would be strange if there were not. I have tried not to overload the reader with the complexity of native title nor the social and political lives of people as they are required to interact with it, though I hope the reader will emerge with a sufficient sense of these things without the detail becoming too overwhelming.

Like most other groups pursuing native title around Australia, Bardi and Jawi claimants had to rely on a Native Title Representative Body to pursue the claim on their behalf. Native Title Representative bodies are statutorily charged with representing the interests of local indigenous constituents in native title. These organisations are notoriously underfunded and overstretched, and many have considerable staff turnover. The Kimberley Land Council (KLC) represented Bardi and Jawi in the Sampi case. During the period of their claim, from when

they first issued instructions to pursue a claim in 1993 until the conclusion of the appeal in 2010, Sampi claimants frequently encountered new personnel who were dealing with their case. By my count, at least six instructing solicitors and five barristers represented Bardi and Jawi claimants' legal interests at different times, though there may have been more. I worked for the land council during 1994 and 1995, when I began research for the Sampi claim with Geoffrey Bagshaw, who was contracted to the organisation as the senior anthropologist on the claim. Between 1996 and 2007 the land council also engaged me for periods of time to work on various aspects of the case.

My postgraduate research also enabled me to spend time with Bardi and Jawi claimants. My fieldwork in 1997 and 1998 focused on the effects of participating in native title processes, research inspired by my early experiences of working with them in relation to native title. Historical and oral historical material presented in chapters Two, Three and Four is largely derived from research undertaken for my doctoral thesis (Glaskin 2002); I am grateful to the Australian National University and to the Kimberley Land Council for their support in conducting this research. Francesca Merlan, Tim Rowse and Ian Keen were my supervisors and I remain indebted to them for their feedback and encouragement throughout that process. I have previously published some of the material in Chapter Four (Glaskin 2007b) derived from this research.

This book also draws on my postdoctoral research, made possible through the award of the Berndt Foundation's inaugural postdoctoral fellowship at the University of Western Australia. This allowed me to pursue my interest in how the courts were dealing with aspects of native title. This research (2002–05) coincided with the period during which a number of significant native title determinations were handed down: *Yorta Yorta v Victoria* [2002] HCA 58, *Western Australia v Ward* [2002] HCA 28, *Neowarra v Western Australia* [2003] FCA 1402, *Daniel v Western Australia* [2003] FCA 666 and *Gumana v Northern Territory of*

Australia [2005] FCA 50 among them. During this period I was able to attend the Perth Registry of the Federal Court of Australia to hear the expert evidence in native title hearings *Harrington-Smith v Western Australia (no.9)* [2007] FCA 31, *Neowarra v Western Australia* [2003] FCA 1402, and *Bennell v Western Australia* [2006] FCA 1243. A University of Western Australia Teaching Relief Grant (awarded in 2012) granted me some time (in 2013) to begin drafting chapters for this book.

From the outset, the reader should be aware of what I have and have not sought to do. I have not sought to detail the contributions of all land council personnel during this period; for example, field and project officers were engaged with the claimants and the claim to differing degrees over a period of years. Nor have I examined the contributions made by all the instructing solicitors and barristers in the case. I do not discuss the material presented by linguists, archaeologists and historians, although the interested reader can find discussion of these in the 2005 judgment. Nor have I attempted to analyse the contributions anthropologists (Geoffrey Bagshaw and myself) made to the outcome of this case, although I do discuss some elements of the disagreements between the claimants' anthropologists and those acting for the respondent parties as relevant to the unfolding case. Justice French's review of Bagshaw's anthropological evidence (paragraphs 801–883) found 'the bulk of the anthropological evidence appears to have been based upon information provided by Aboriginal persons to the anthropologists', and that it was 'supported by reference to other writers' (*Sampi v State of Western Australia* [2005] FCA 777 at paragraph 801). Indeed, where the 2005 judgment in the case details aspects of Aboriginal land and sea tenure, it relies extensively on material found in Bagshaw's anthropological reports. It is the transcript of the applicant evidence, however, on which the findings about the case are mainly based.

I have not discussed the many meetings held at Djarindjin or One Arm Point in order for KLC lawyers to receive instructions

from their clients and to update them about the progress of the claim. Through the many years of legal process, it would be no surprise if claimants primarily thought about their native title experience in terms of the constant meetings to give instruction to solicitors, and the experience of court itself. Talk about ‘fighting’ for native title encapsulates these experiences and the constant efforts required in relation to them. Beyond this, the experiences that continue to have the most salience in regard to native title are a mixture of the conflicts that native title is considered to have generated, tempered only slightly by the humorous events that sometimes unfolded which were somehow connected with native title, and events that made a good story to be retold. The intensity of being involved in a protracted legal case has faded, but the politics about country that were also part of people’s experience, both before native title and during the years of focusing on rights and interests and entitlements and genealogical connections, remains. Some people have interests in adjoining native title claims that keeps them involved in native title processes and associated politics. My primary focus here though is on law as process, and in this, I am interested not only in legal reasoning but in how judicial precedent and case strategies interact with a claim’s history and recorded ethnography.

The reader will notice that my examination of the evidence in the case as against the evidence in transcript is confined to the islands that were excluded from the 2005 determination on the basis that these were considered to have been Jawi islands at the time of colonisation, but which the claimants had argued were Bardi. There are two reasons for this: first, it simply would not have been feasible to examine all the evidence in this way. Second, viewing all the islands as Jawi was fundamentally linked to the 2005 determination that limited native title recognition to the mainland and the intertidal zone, thus excluding any native title rights in the sea. This focus on specific islands means the evidence I look at is mainly connected to certain individuals, especially Bardi man Jimmy Ejai and Jawi man Khaki Stumpagee, both of

whom are now sadly deceased. It has not been feasible to discuss this evidence without naming them, and I hope doing so will not be distressing for any of their relatives who read this book. I also hope I have conveyed something of the enormous contribution to this native title case both men made over a number of years.

Others whose evidence I have not dwelt upon in the same way also made important contributions to the outcome of this case. Many of these people have now passed away and the reader should note that sensitivity should be exercised with regard to their names. They include, but are not limited to, the following (in alphabetical order): Phillip Albert, Bernadette Angus, Hamlet Angus, Laurel Angus, Mercia Angus, Vincent Angus, Freddie Bin Sali, Rosie Bin Sali, Charles Coomerang, Marie Coomerang, Dennis Davey, Frank Davey, Irene Davey, Joe Davey, Maryanne Doyle, Eugenia George, Kevin George, Madeleine Gregory, Aggie Ishmael, Victor James, Bella Lauder, Anna Phillips, Elizabeth Puertollano, Kevin Puertollano, Joe Rock, Lena Stumpagee, Leslie Stumpagee, Joe Sammat, Terry Sammat, Paul Sampi, Aubrey Tigan and David Wiggan. I have not dwelt on their evidence because it mainly concerned areas on the mainland that were subject to a positive determination of native title at first instance. Many others contributed to the claim in numerous ways although they did not give evidence. While it is not possible to name everyone, they include the following (in alphabetical order): Patsy Ah Choo, Laurel Angus, Maureen Angus, Violet Carter, Biddy Chaquebor, Brendan Chaquebor, Locki Coomerang, Lucy Coomerang, Audrey Davey, Henry Davey, Maggie Davey, Margaret Davey, Bessie Ejai, Peter Gregory, Eric Hunter, Maureen Hunter, Nellie Hunter, Adrian Isaac, Nancy Isaac, Elaine James, Julie Lauder, Brian Lee, Turkoï Mowarlajarlai, Sandy Paddy, Roma Puertollano, Bonnie Sampi, Patrick Sampi, Jacob Sesar, Peter Sibosado, Barry Stumpagee, Ingrid Thomas, Rosa Tigan, Douglas Wiggan, Jody Wiggan, Katie Wiggan, Margaret Wiggan, Roy Wiggan, Valerie Wiggan and Monty Wilfred.

Throughout this book, I have used English names when quoting documents already available on the public record (such as Federal Court transcripts) that identify individuals in this way. When referring to comments made by Bardi or Jawi people during fieldwork, I use personal ('bush') names rather than English names. Many Bardi and Jawi have more than one bush name, and some bush names are more private than others. I use the bush names other Bardi and Jawi freely use in relation to these individuals (rather than those that are more private) so that, whether now or sometime in the future, Bardi and Jawi can recognise these names in this book if they choose to read it, but their identities will not be readily identifiable to others.

With the exception of personal ('bush') names, language names, place names and outstation names, Aboriginal words appearing in this book are italicised. Unless stated otherwise, Aboriginal terms appearing in this book are in Bardi. The orthography I have used follows the reports submitted to the Federal Court in this case (Bagshaw 1999, 2001a, 2001b, Bagshaw & Glaskin 2000, Glaskin & Bagshaw 1999). This orthography was based on Robinson (1973) and Metcalfe (1975). The first Bardi dictionary (Aklif 1999) used a slightly different orthography (for example, a double 'o' for a long 'u' sound, such that, for example, the name Galalung would be written Galaloong), and this is the orthography used by linguists working in the area since (e.g., Bovern 2012). At the time of submitting initial reports to the Federal Court, though, the Bardi dictionary had not yet been published; it was published later that year. With the exception of mistranscriptions (see Chapter Eight), the orthography used in the anthropological reports is reflected in the transcript in the Federal Court. As I refer to the case's transcript on numerous occasions throughout this book, I have followed the orthography used in the case.

There are dialectical differences within the Bardi language, and this is not uncommon in the languages of Australia: for example, Hosokawa (1994, p. 497) distinguishes linguistic

varieties within the Yawuru language; Thieberger (1993, p. 156) identifies three dialects of Karajarri. Robinson (1973, p. 107) says the linguistic style attributed to Bardi who occupied the Pender Bay region was said to be ‘precisely articulated’ or ‘slow’, and was described as ‘slow Bardi’. Nyul Nyul referred to them as Barda or Bardu, and speakers of ‘slow Bardi’, who interacted closely with Nyul Nyul, would at times refer to themselves using these terms (Robinson 1973, p. 107). This linguistic distinction is rarely referred to today, although I heard small hints of it during the 1990s from some elderly people who are now deceased. The distinction more commonly made is between Bard and Bardi, and this also has historical dimensions through people’s associations with Lombadina and Sunday Island missions. ‘Light Bardi’ speakers speak quickly and tend to drop final vowels from their words and, as Robinson (1973, p. 108) says, ‘may refer to themselves as Bard rather than Bardi’. Today, the people who refer to themselves as Bard are usually those who are or have been associated with Lombadina mission. ‘Heavy Bardi’ speakers come from the northern and eastern regions of Bardi country and include those who lived at the mission on Sunday Island. Robinson (1973, p. 108) describes them as having ‘slower’ speech and occasionally incorporating Jawi words; they refer to themselves as Bardi. Today, most of that population lives in One Arm Point. These dialectical distinctions also appear in the ethnographic literature. Unless discussing specific distinctions between Bard and Bardi people’s perspectives, my references to Bardi throughout this book should be taken to refer to both.

The transcript of the hearing (Federal Court of Australia, Western Australia District Registry, Before Beaumont J. File No.: WAG49/98, Re: Paul Sampi and Others, Applicants, and The State of Western Australia and Others, Respondents) was produced by Transcript Australia. With the exception of the gender-restricted portions of the transcript, I had access to this as one of the participants in the case. A copy of the transcript usually remains on the court file at the appropriate Federal

Court Registry (in this case, Perth) where it may be possible to access it. The transcript of the appeal (Transcript of Proceedings, Federal Court of Australia, Western Australian District Registry, before Branson J, North J, Mansfield J, in Paul Sampi and Others and State of Western Australia and Others, No. WAD 188 of 2006) was produced by Auscript Australia. I attended the final submissions for the original case and made extensive notes of the arguments made; when I first drafted Chapter Seven, which draws on these arguments, I wrote it from these notes. In the interest of being as accurate as possible, I subsequently referenced the transcript rather than relying on these notes, but the fact that I could attend the final submissions in the Federal Court and make these notes underscores the public nature of Federal Court proceedings. I was not able to attend the final submissions in the Full Court appeal as I was then living in Tokyo, and rely wholly on transcript in relation to my discussion of that part of the case.

Toni Bauman, Paul Burke, Timothy Dauth, Tony Redmond, Michael Robinson, Moya Smith, Nick Smith, Celine Travési, David Trigger and James F. Weiner have all offered encouragement when I have mentioned the idea of this book to them at various times over the years. I am most grateful to Ingrid Ward, who drew the maps that appear in this book for me; Paul Davill, Peter Veth and Ben Ripper, who assisted me to clarify specific issues in their respective areas of expertise; Bruno Jordanoff for sharing his Kimberley collection with me; Nicholas Reid and Patrick Nunn for sharing their work on Aboriginal oral traditions and sea-level rise; the South Australian Museum for permission to publish an extract from Tindale's (1974, p. 146) map, and the State Library of Western Australia for permission to publish William J. Jackson's (1917) photographs included in this book. For their support and presence throughout the process of writing, I especially thank David Walker and Koto and Umi; for their encouragement in important moments, Rita Armstrong, Victoria Burbank, Dianne Carmody, Jim Campbell, Laurent Dousset, Catie Gressier, Kaye Johnson, Nicholas Harney, Mitchell Low,

Julie McCormack, Julie Potts, Graham Walker, Jill Woodman, Angela Zeck and my parents. I am indebted to Geoffrey Bagshaw, the senior anthropologist in the Sampi case, who generously read and commented on the draft of this book. As a recent graduate of anthropology, I learned enormous amounts through working with Geoff ('Juljinabur'). Over the course of working on this case, we shared some extraordinary experiences, both good and difficult. While I have not focused on these in this book, the reader will get a sense of some of the issues that became part of our experience in this case. All errors, of course, necessarily remain my own.

My greatest debt is to the many Bardi and Jawi people who shared their hospitality and spent many hours talking with me about things that must have seemed self-evident to them, who told me their stories, their jokes and their dreams, who showed me their country and taught me to see it in a different way. Many of the people I once knew have now passed away; I miss them still.

Native title they say it was for the Aborigine people, they know that was our traditional land and we know we owned that land. But in the *gardiya's* [European Australians'] way, we have to be really strong, fill in the papers and some documents to be recognised that we own that. But in Aborigine way, Law, we know that we own them (Galiwar, One Arm Point, 1 December 1996).

Chapter One

Law's Metaphysics

Records of the bare bones of judgments...do not by any means reflect either the judicial process or the substantive law. The record of a case involves the pleas of the parties, the evidence of the witnesses, and cross-examination, as well as the judges' decisions (Gluckman 1955, p. 35).

An Ethnography of Law

It is one thing to know what the law says: it is another to try to understand what it means and how it comes to be applied. In native title, which deals with indigenous relationships with country through the lens of a Western property rights regime, this complexity is seriously magnified. The resolution of a legal case can take years, and native title claims are no exception. When a determination is made, it becomes the defining feature of a claim. It comes to stand for all the actions and social relations that have each had their own effects that have, in some way, culminated in the litigation. In this way, a judgment can itself become a kind of history that produces 'facts' through which the past may be read and the future defined. This, I contend, is problematic because, although determinations reflect the cases that go to trial, they necessarily conceal most of their processual aspects, including those that have played a significant role in an eventual outcome.

This book centres on the claim to native title made to an area of land and sea in the north-west Kimberley region of Western Australia. I was one of the two anthropologists who worked on behalf of the applicants, the Bardi and Jawi people, who had brought the case. The case, *Sampi v State of Western Australia* [2005] FCA 777 ('Sampi'), was initially determined in 2005. As the judgment was delivered in the Perth District Registry of the Federal Court of Australia, it became apparent that the claim had only partly succeeded. Native title rights to Bardi country on the mainland had been recognised; native title rights to Bardi islands, Jawi islands and to sea country had not. The main reason for this was the finding that Jawi society had become incorporated into Bardi society.

As I listened to the judge explain his findings, a senior Jawi man's words replayed through my mind. *I'm not a Bardi, I'm a Jawi*. In 1997, when he had said this, we were sitting at an outstation in his country at a place called Guwarngun, located in the south of Sunday Island off the coast of the Dampier Peninsula, more than 2,000 kilometres away from the Perth Federal Court Registry. I was on the island doing fieldwork with my colleague Geoffrey Bagshaw and the old man and his wife and other members of his family. The events that had elicited his response were about tourism not about native title, but they came back to me at that moment because they were such a strong assertion of a distinct Jawi identity. *Have they got a song for this place*, he had asked rhetorically to anyone at his small outstation within earshot.

The Sampi determination of 2005 was the initial catalyst for me to write this book; both as a participant, and with an interest in native title processes more generally, I was concerned about how the concept of 'society' had been applied in the case. Jawi islands and sea country had been excluded from the native title determination, based on the view that Jawi society had been incorporated into Bardi society. These two things – the exclusion of Jawi country and the edict about Jawi society – were both a legacy of this one word, 'society', which had only been introduced

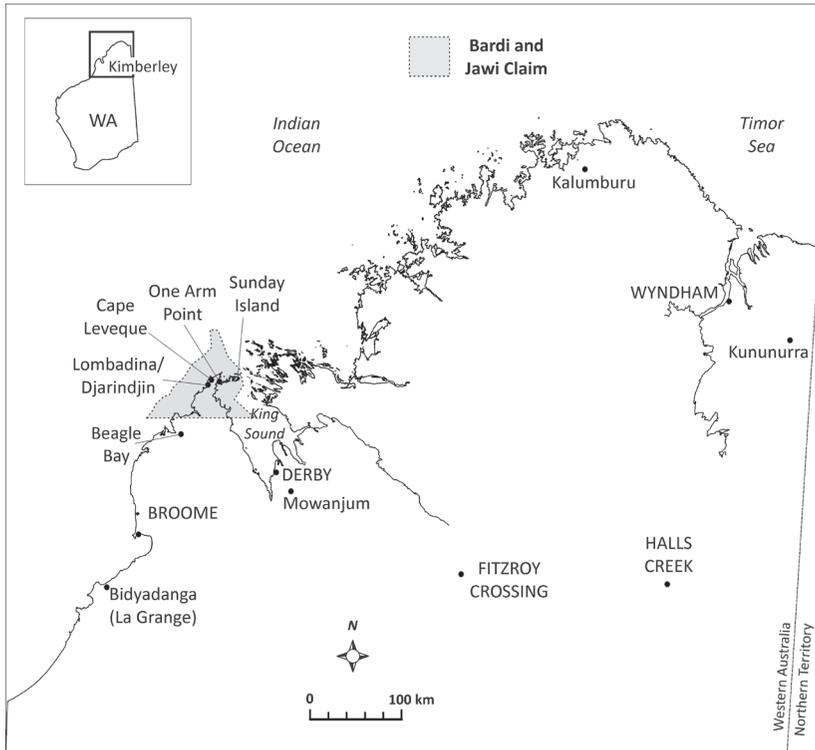


Figure 1: Location of Bardi and Jawi claim, Kimberley region, north-west Australia.

into native title jurisprudence in 2002 through a precedent set in the High Court of Australia's decision in the *Yorta Yorta* native title case (*Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58). Speaking about his identity as a Jawi person, the old man had said *I'm not a Bardi, I'm a Jawi. They see it wrong, that's why everything buckle up*. At this point, I was inclined to agree with him.

This book is an exploration of how the claim and its outcome were shaped by different events; some that occurred when the first non-Aboriginal people were settling in the area, others during the claim process itself. Its focus is on the relationships between different actors and events that led to the claim being made and

how they interacted to shape subsequent actions and events that preceded and accompanied the legal action. I approach the case not as a discrete thing, but as a series of interconnected and related events. When the 2005 determination was handed down, some explanation for what had occurred seemed warranted. Clearly, a number of others have thought so too (e.g., Brennan 2007; Burke 2010; Burns 2011; Strelein 2005; Redmond 2011). Legal and anthropological commentary focused on the way the concept of ‘society’ was applied in the case. A term introduced into native title law only in 2002, its deployment and effects in the Sampi case illustrate the impacts that evolving judicial precedent may have on a case in graphic detail: the legal crosscurrents in which this case was caught.

In this case, how the term ‘society’ was applied also became fundamentally connected with how the question of the claim to native title offshore would be decided. The Bardi and Jawi claim was made to an area of land and sea that included a number of islands, reefs and other marine features. The 2005 determination recognised native title on the mainland and in the intertidal zone, but contained no recognition of native title to the sea or the islands. The exclusion of Jawi country on the basis that Jawi were now part of a Bardi society was taken to mean that there was no recognition of native title offshore although, by my reckoning, this correlation did not follow. This was only justifiable if one took the view that Bardi had no customary interests offshore, something that appeared unsustainable (e.g., Akerman 1975; Green 1988; Rouja 1998; Smith 1984–85). How did this happen?

Law’s Metaphysics

In litigated claims, the facts upon which a judge will ultimately make their decision depend on a complex interaction between applicant and expert evidence, procedural issues (such as how applicant evidence is elicited, and how cases are run and argued), and interpretations of the ethnographic and historical record.

This means that what is taken to be a fact is necessarily already a judgment of some kind. As Burke (2011, p. 18–19) says, while ‘the work of the judge at trial level has long been conceived of as the application of law to facts’, facts themselves may be reconstructions of the past, ‘guesses on which basic legal rights depend’. Given that such facts have a subjective quality to them, how we understand the application of law also needs to be qualified. In contrast to the legal formalist view that law is ‘found or discovered, not made by judges’, legal realists argue that law alone does not decide cases (Donovan 2008, p. 91). Because no two cases are identical, rules drawn ‘from a preceding case can never be purely and simply applied to a new case’ (Bourdieu 1987, p. 826). Such rules, then, are inherently ambiguous, and cannot be applied in any ‘mechanical’ kind of way; cases can always be interpreted in various ways, and ‘the resulting indeterminacy of abstract legal concepts’ means they can be manipulated via precedent (MacLean 2012, p. 26). Consideration of how the concept of ‘society’ found expression in the Sampi case illustrates these points well.

One of my purposes in writing this book is to understand how judgments are made. This is not something I take to be separate to the many processes shaping the case that is ultimately decided. Another is to explore issues Aboriginal people face in having their rights in country recognised under the auspices of the Western legal system. These two matters are, of course, closely connected. For the most part, native title claims are examined from the vantage point of the determination and what this reveals about the judge’s reasoning and their application of law to the facts. Scholarly attention to specific native title claims then has focused on how judges have applied and interpreted native title law, the role of anthropology and its intersection with law, and on the relationship between the ethnographic archive and the determination.¹ What usually remains invisible, except to those who are participants in a case, is the historical context of claims and claimant groups, front and backstage aspects of the

hearing, the impact of evolving case law, and legal strategies and pleas that also contribute to the outcome of a case.

In their studies of litigation in the United States, O'Barr and Conley (1988) have pointed out that different actors hold different ideologies about the law. Disputants who bring their cases to be resolved usually understand the law to be about justice, whereas, they argue, for legal personnel the law is primarily about settling disputes (1988, p. 345). Bardi and Jawi, with whom I worked in relation to this claim, saw the case as being about justice, about the recognition of their pre-existing land and sea entitlements. Part of the context of this case, then, is that for most of those who were engaged in it the recognition of their customary land and sea entitlements was more than a legal issue; it had moral significance as well. O'Barr and Conley's (1988, p. 345) view that legal personnel might primarily see the law as about settling disputes (in contrast to applicants who largely see it as about justice) is not to deny the justice orientation of many who enter into the legal profession, nor the many who do so for the express purpose of 'making a difference'. Rather, it is to highlight the functional aspects of the law. Their studies revealed there is often a 'dissonance' between what claimants expect from a case in terms of their understandings of a just result, and its eventual outcomes. This is especially relevant, of course, to an adversarial system of law, as practised in the United States, Australia and Britain, as distinct from an inquisitorial system, practiced in some European countries, in which the judge would appear to have greater capacity to inquire independently into the truth of a matter, rather than being constrained by the pleadings and evidence put before them. Thus, in considering the outcome of the Sampi case in its initial (2005) determination, it is important to consider the constraints on the trial judge in these terms. Judges are also limited by the relevant legislation (in this case native title) and by case law. But judges interpret both legislation and precedent even as they weigh up the evidence before them in the light of the case put and the pleadings made. Given that the aim in the adversarial context is to

win the case, these pleadings and the evidence are themselves also shaped to greater or lesser extent by legal precedent.

This book describes and explores native title as a social process. Part of that process and the cultural basis that underpins it is the legal dispossession of Aboriginal people and the evidentiary requirements subsequently made of them through law to reclaim country their ancestors held. While legal processes may create a sense of a level playing field, they can also mask a range of inequalities inherent in the process itself, including that indigenous peoples can only make their claims 'in the language of the jurisprudence and property-rights regime of those responsible for their plight in the first place' (Dirlik 2001, p. 181). I therefore consider not only the context of the case but also 'the juridical field': the 'judges, lawyers and, at lower levels, witnesses, performing their roles in a court case', as formally 'recorded in court documents, transcripts and reasons for decision' (Burke 2011, p. 15). While it is not possible to access much of the 'less accessible informal dimension' Burke (2011, p. 15) identifies – 'the judge's private thought processes, corridor discussions with court staff, other judges and counsel appearing for the parties,' among other things – some parts of the formal dimension of the juridical field, such as transcripts and legal submissions, do provide insight into the approach of various actors, and are part of the overall context in which judicial weight is accorded to some aspects of a case or associated arguments in preference to others. Accordingly, the transcripts for the final submissions in the 2005 case and for the appeal to the Full Federal Court brought in 2007 are an important part of the material I examine in this book.

Native Title, Continuity and Society

In Australia, the Commonwealth passed the *Native Title Act 1993* in response to the High Court's decision in *Mabo* (*Mabo v Queensland (No. 2)* [1992] HCA 23). In *Mabo*, the Court found the Murray Islanders of the Torres Strait had common law rights

to the island of Mer ‘as against the whole world’, conferring exclusive possession.² This decision set a precedent that applied beyond the island of Mer in the Torres Strait, and established the existence of Indigenous Australians’ native title within the common law of Australia. The High Court’s finding that Indigenous Australians’ *sui generis* (unique) form of title had not necessarily been extinguished as a consequence of colonisation had a profound social impact in Australia more broadly. There were those who believed the existence of native title threatened to ‘fracture the skeleton’ of the common law of Australia; others greeted the recognition of Indigenous Australians’ prior ownership of land as being long overdue.³ The Australian Federal Government responded quickly to Mabo, and, having consulted and negotiated with various groups that would be most affected, passed the *Native Title Act 1993* (Cth) within eighteen months of the decision. The Act provides the legal framework for Aboriginal Australians and Torres Strait Islanders to make claims to their ancestral lands. It came into effect on the 1st January 1994.

Native title in Australia shares its English common law origins with Indian title law in the US and Aboriginal rights law in Canada (Connolly 2006, p. 39). The Mabo decision thus drew on Canadian and US legal cases, despite the ‘several juristic foundations – proclamation, policy, treaty or occupation – on which native title has been rested in Canada and the United States.’⁴ Judicial decisions about native title in both Canada and Malaysia have similarly drawn on Australian native title jurisprudence.⁵ In Australia, native title is established through the ‘traditional laws and customs that give rise to rights and interests in land and waters.’⁶ Other Commonwealth countries dealing with issues of aboriginal land title have similarly based their legal recognition of indigenous land rights on notions of ‘tradition’. As Connolly (2006, p. 28) has observed of the Canadian context:

The concept of tradition is semantically indeterminate enough to permit judges – and others – a significant degree of choice

in how they interpret and utilise it in their practices. One interpretative strategy a number of judges have taken in Canada and other common law jurisdictions in relation to the concept of tradition has been the so-called 'frozen rights' strategy, in which the concept connotes a substantial degree of identification between contemporary and pre-colonial indigenous practices.

In her discussion of the *Delgamuukw v British Columbia* case, Culhane (1998, p. 302) notes that Chief Justice McEachern, who heard the initial case (which went on to successful appeal), had taken the view that Aboriginal claimants had to demonstrate continuity between their activities and those their ancestors practised before the arrival of Europeans in their country. In Australia, a similar demonstration of continuity is required. Claimants have to demonstrate that the laws and customs they currently practise, and which give rise to rights and interests in land and waters, are the same laws and customs their antecedents practised at the time of the acquisition of sovereignty by the British Crown. This is what is meant by the formulation 'traditional laws acknowledged, and the traditional customs observed' which appears in Section 223(a) of the Native Title Act. In the Australian configuration of 'tradition', the effects of colonial history on a people's ability to sustain pre-colonial forms of law and custom are not taken into account. The onus is on groups claiming native title to demonstrate continuity; the question of how colonial policies of the nation-state may have made that a difficult task is not one that courts must ask.

All native title claims in Australia have to deal with the requirement to demonstrate cultural continuity. The issue of cultural continuity has several related aspects: how this can be demonstrated given the inherent dynamism of culture; understandings of 'culture', which inform appraisals of culture as showing either cultural continuity or demonstrating culture 'loss'; the challenges posed for some Indigenous groups to demonstrate

cultural continuity in the face of apparent change; questions of cultural revival and re-invention; questions of cultural and legal translation. These are issues that have preoccupied anthropologists (amongst others) since native title's inception (e.g., see Keen 1999; Macdonald 2001; Merlan 2006).

State governments have approached the issue of continuity from the perspective that they can ascertain what Indigenous traditions and customs were like at or close to the time of colonisation. For this they rely on written accounts, with those from the early colonial period being considered particularly useful as they are temporally closest to the time of the acquisition of sovereignty by the British Crown. This is a date that varies according to state. In Western Australia, where the Sarni claim is located, the date sovereignty was acquired was 1829. Differences between the contemporary traditions of Indigenous groups and earlier reported traditions are typically read by governments and others who oppose native title claims as evidence of discontinuity. Some anthropologists too have argued that, in terms of anthropological accounts, 'earliest sources are best' (Sansom 2007, p. 79), while others have chosen to interrogate these sources and the conditions of their production (e.g., Burke 2007; Glaskin 2007a; Keen 2007; Morton 2007; Palmer 2010; Sackett 2007; Sutton 2007). Native title in Australia has, consequently, produced many contests over history, and over whose account is to be relied upon. Similar contests over the interpretation of historical accounts have occurred in Canada (e.g., Ray 2011).

What is distinct about the Australian approach to native title in terms of the 'frozen rights' strategy is the addition of the potent word 'society' into the mix of what must be demonstrated to be continuous. This arose as a consequence of the High Court's decision in *Yorta Yorta*, which had a substantial impact on how courts approach issues of tradition and cultural continuity in native title cases. In *Yorta Yorta*, Justices Gleeson, Gummow and Haynes formed the conclusion that the term 'traditional', in the native title context, needed to be understood as referring to the

age and continuity of the laws and customs that give rise to native title rights and interests in land or waters:

The origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. It is only those normative rules that are 'traditional' laws and customs (*Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58, at paragraph 46).

The legal clarification that 'tradition' refers to the laws and customs acknowledged and observed prior to the acquisition of sovereignty by the British Crown has increased the difficulty many Indigenous groups have had in demonstrating their native title. The other significant tenet of *Yorta Yorta*, though, was its introduction of the concept of a 'society' into native title jurisprudence:

Law and custom arise out of and, in important respects, go to define a particular society. In this context, 'society' is to be understood as a body of persons united in and by its acknowledgment and observance of a body of law and customs (*ibid.*, at paragraph 49).

This emphasis on a rule-bearing society means that, in looking at applicant groups in subsequent native title cases, courts have asked questions about whether a claimant group forms a 'whole' society or 'part' of a society, and considers whether that society has had 'continuous existence and vitality since sovereignty'.⁷

'Society' is a term that has also appeared in Canadian native title. In the *Baker Lake* case,⁸ Justice Mahoney said, in order to establish native title, claimants had to show that an 'organised society' had exclusively occupied the claimed area at the time British sovereignty was proclaimed (Young 2009, p. 5). Ray's

(2011, p. xxiv) parenthetical comment about this doctrine highlights the problems with its underlying assumptions; he says, ‘rather than [that they lived] in what...Packs?’ In comparison to the Australian focus on ‘society’ following *Yorta Yorta*, Young (2009, p. 15) says that Canada’s emphasis on ‘society’ has now diminished, as evidenced in both the 1997 *Delgamuukw* and the 2007 *Tsilhqot’in* Canadian cases.⁹ Writing of the *Tsilhqot’in* case, Young (2009, p. 13) additionally notes that, in contrast to Australian native title, ‘a close reading of the case reveals that there was in fact very little attention to or interest in specific continuity...And there was certainly no concern about post-sovereignty cultural change’. This is in direct contrast to the way Australian courts have approached the continuity requirement in conjunction with the issue of society in native title claims.

In native title, requirements about continuity of law and custom and the society from which these stem raise further issues that need to be considered. Native title does not simply recognise pre-existing land entitlements; rather, it elicits the customary in particular forms. In order to be a group capable of the kind of recognition afforded by legislation such as the Native Title Act (1993), those making claims are required to present themselves in a certain way. This is a process that comes to influence not only the outward presentation of the group, but relations within those groups (e.g., Glaskin 2002, Weiner & Glaskin 2006, 2007; Smith & Morphy 2007; Glaskin & Dousset 2011). Anthropologists working in other colonial contexts have similarly shown that customary law is always in a ‘dialectical relation with state law, during the colonial period, and secondly, that this fact is crucial for the analysis of law, as a plural phenomenon, in post-colonial countries’ (Fuller 1994, p. 10; and see Chanock 1985; Moore 1986). Writing about the Canadian Subarctic, Nadasdy (2002, p. 258) too has argued that the process of bringing claims in terms of Western ideas of property and ownership requires people to engage with ‘a very different set of cultural assumptions’ that obliges people to articulate their claims in specific ways (the requirement to draw

'boundaries' around territories and peoples is one aspect of this; see Glaskin 2014). For these reasons, claims are often inherently transformative.

In order to understand what a native title claim really represents, then, it is necessary to move beyond 'judge and judgment oriented accounts' to consider the entire process in social context (Ubink 2008, p. 26).¹⁰ This necessarily includes the processes of colonisation experienced by claimants and their forebears, from which claims to indigenous status and associated rights arise in the first instance. Native title is, after all, the legal recognition of indigenous property rights based on their existence prior to colonisation and their continuation now. As a legal concept, it is enmeshed in history: the arrival of the British and their declaration of sovereignty over Australia; the interactions between coloniser and those they colonised that embodied or contradicted this larger act, and the relationships amongst and between indigenous and non-indigenous people with respect to the area claimed over time. In ideal terms, native title holds forth the promise of restorative justice, a recognition of the pre-existing rights of indigenous peoples whose property rights were legally usurped through the Crown's declaration of sovereignty. What a historical and processual examination of a native title claim shows, though, is that asymmetrical relationships of power that characterise the colonising experience remain unambiguously present in the very processes that purport, at some level, to rectify the imbalance colonisation precipitated. A claim to native title cannot, then, be considered simply as a self-contained legal case but, rather, as a more recent phase in the manifestation of a colonial relationship.

Numerous considerations have shaped the way this book has been written. Many of the people who were influential participants in this case, both Aboriginal and non-Aboriginal, are no longer with us. I have hoped to honour the contributions of those who gave so much to the case without glorifying them, and to discuss some of the real issues that emerged in the case

without partisanship. This is especially important, for in the political world of native title it is often the case that participants find themselves on one side or the other, and this political positioning can create a silo effect that can prevent serious scrutiny and analysis of the interaction between these different positions. There are considerations around confidentiality, privacy and necessary detail. There are also limitations imposed by my capacity to investigate, understand and describe the many facets that make up such a complex context, and which, in the process of description, necessarily reify and objectify a human sociality that is constantly in motion. Much of what occurs in a native title case is opaque, even to many of those who may be participants in it and of course each of the participants, because they are positioned differently, are likely to see things in different ways.

My understanding of the claim spans the period from 1994, before it was lodged, until its final resolution in 2010. When I have spoken with people in the Dampier Peninsula about their case being of interest to others because of the way in which the law was applied at a time when native title was still quite new, responses have varied, but not much. Amongst those with whom I have spoken about this, discussion about the technicalities of their native title case has not been something that has garnered special interest. What actually happened on the ground is more compelling, as is what has happened since. When I have said to people I planned to write a book about their native title claim, some complained that native title has not lived up to its promises anyway, and that in fact the technicalities of its recognition have not yet been properly implemented. In many instances agencies and people still act as though native title has not been recognised, they say. They also speak of the old people they have lost along the way, the people who fought so hard and so long to have their native title recognised. These are the people I had the privilege of working with, and it is because of them that I wanted to write this book.