CHAPTER 7

'Competing narratives' versus 'interest-based negotiation' and the bar of evidence

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Introduction

Litigation dominated the resolution of native title claims for some time after Eddie Mabo took his case to the High Court,[2] and many of today's seasoned anthropologists in the land rights field have developed their practice in this contested arena. Litigation is built on what could be described as a competing narrative system. Each party interprets 'facts' to construct a narrative that benefits its position and damages that of the other party. In native title claims, anthropological 'facts' are drawn into this mix and become, themselves, points of dispute.

Over the past seven years, however, the manner in which parties approach the settlement of native title claims has changed considerably. All states now express a preference to settle claims by negotiation rather than litigation. Queensland, South Australia and Western Australia have all developed explicit frameworks by which to settle claims without going to trial. All three states have published guidelines setting out these non-litigation frameworks.[3] But while these guidelines set out a process, they are silent on the way that evidence is approached and, in particular, on the principles that might inform the assessment of any evidence.

This is not surprising. The move from litigation to negotiated settlements has been an organic process. In most jurisdictions the two are actually operating in parallel; that is, while some matters are being negotiated, others are being litigated for various reasons, and often the same lawyers and anthropologists are involved in both activities.

Shifting the rhetoric from litigation to negotiation was a big step for governments and other respondents. Part of that step was to provide an indication as to the kind of evidence governments were looking for before they would

consent to a determination in favour of the claimants, which was achieved by the publication of the guidelines referred to above. This was a significant shift, because, previously, claimants had to pursue their case in a vacuum, knowing that they would be challenged on just about every point, but not knowing what the respondents actually thought the law with regard to 'connection' was.

While I think the processes by which native title claims are being managed have improved considerably over the past seven years or so, I think it would be appropriate to start considering more explicitly whether there are implications for the *legal tests* and the *anthropological facts* according to whether a matter is being negotiated or litigated. In this paper I explore the differences that arise when taking a 'competing narrative' approach in litigation or an 'interest-based negotiation' approach by exploring two related questions.

- How do the features of a trial-based relationship influence negotiations?
- Does interest-based negotiation have an impact on the ethnographic information needed for native title?

Before turning to these questions, it is worth pointing out that native title is a unique legal space. This is because (among many other reasons) one of the negotiating parties (that is, the state or territory government) is also considered responsible for safeguarding the interests of the public (that is, all other land users) and for ensuring the appropriateness of Federal Court orders of native title *in rem* (that is, as against the whole world) through a proper legal assessment of the cogency of the evidence.

The distinguishing structural features of native title settlement negotiations

All lawyers I have ever heard commenting on native title note, in one way or another, that native title is not like other areas of law. In saying this they may be referring to many things; the fact that Court timetables are routinely ignored; the way in which rules of evidence are routinely ignored; the number of issues that need to be considered and the number of witnesses called; the cross-cultural communication issues that impact on almost every aspect of the process; or the way in which politics and history are so closely entwined with the legal proceedings.

Here I am concerned with another distinguishing feature of native title processes; the dynamics between the parties. An experienced barrister once suggested in a working group that states should treat native title negotiations like any other commercial negotiations.[4] By this I understood him to mean that parties focus on their interests and, weighing up the costs of a trial and the uncertainty of the outcome, seek to arrive at a deal that satisfies both parties' interests as much as possible.

In a native title context, this type of negotiation would mean limited attention to so-called 'connection evidence' as stipulated in s 223 of the *Native Title Act 1993* (Cth). Instead, the focus would be on compensation, extinguishment, land access protocols and other issues regarding mutual co-existence that either states or applicants may wish to settle before agreeing to a determination of native title. In such a 'commercial' approach to native title, it would be a defensible argument that a sufficient connection test would simply require proof of the existence of an identifiable Aboriginal community whose members can show descent from those who owned the land in question at the time of sovereignty, rather than a full treatise on the system of law and custom of the contemporary community.

Such a 'commercial' approach seems appealing from a moral, historical and social perspective. Importantly, it avoids adding insult to injury, as can occur when, following the past 200 years of colonisation and all that it has entailed, respondents challenge the 'authenticity' of contemporary claims of Aboriginal identity and connection to land in a native title trial. There are numerous examples where the adaptability of Aboriginal people to the changes wrought by colonisation has been held against them as signs of 'loss of connection' in the courts.[5] Rather than polarising parties and focusing energy on negative arguments, a 'commercial' approach could provide a mechanism for achieving a range of positive social outcomes for Indigenous communities and for community relations generally. For example, rather than spending extensive energy and resources on connection, such resources could be expended on developing sound governance structures and processes for the harmonious co-existence of Indigenous and non-Indigenous rights and interests.

There are a number of reasons why such an approach has not been widely adopted. The main reason I want to focus on in this paper is based on judicial statements that highlight the unique position of state and territory governments in the native title process, and which mean that the latter cannot simply adopt a commercial negotiation approach to native title claims, at least not in any straightforward way.

Governments are not just parties that can simply act in their own interests. The Federal Court has made it very clear that states and territories are expected to have the interests of all other respondent parties in mind and must ensure that they consent to determinations only when they have given appropriate consideration to the evidence:

> The Court may need to be satisfied that the State has in fact taken a real interest in the proceeding in the interests of the community generally. That may involve the Court being satisfied that the State has given *appropriate* [my emphasis] consideration to the evidence that has been

> adduced, or intended to be adduced, in order to reach the compromise that is proposed. The Court, in my view, needs to be satisfied at least that the State, through competent legal representation, is satisfied as to the *cogency* [my emphasis] of the evidence upon which the applicants rely.[6]

There is a certain ambiguity here that needs exploring if we want to understand where the bar to the proof of native title sits in negotiated resolutions of claims; what may be seen to be *appropriate* and *cogent* in one case may not be considered as such in another. 'Appropriateness' is not an objective category but depends on numerous factors, such as, for example, the other respondent interests, historical circumstances, intra-Indigenous disputes and the legal personalities involved. All of that goes well beyond *evidence*, which itself is not an objective category, as can be seen, for example, in the way that the opinions of anthropologists from the 1950s are treated as 'facts' by many lawyers and in the disputes that can surround the interpretation of claimant evidence. A key factor influencing what is seen as 'appropriate' and 'cogent' is whether the context is one of litigation or of negotiation.[7]

Litigation: Competing narratives

It is easy for outsiders to be critical of the litigious Court process. There is a range of reasons why litigation is not ideal for dealing with cross-cultural matters such as native title claims[8] and there are fundamental questions about the ability of an adversarial system to generate positive outcomes in such a complex context.

It is useful, however, to be aware of the historical and cultural context of the adversarial system and its emic logic. It is worth noting that this system of law arose to protect people from being falsely sentenced and from arbitrary punishment by royal or church powers, and to provide each party with a competent advocate to argue its case to the best of his or her ability before an impartial arbiter.[9]

Some legal textbooks spell out the attitude a good advocate should adopt: 'Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case';[10] 'Ultimately you are there in the interests of the client and you are paid…to represent that client's interests unashamedly, firmly, vigorously, persuasively and relentlessly.'[11]

In reading these and other accounts of the principles of advocacy, I have gained a much better understanding of the logic underpinning the barrister's approach to cross-examination of anthropologists I observed in *De Rose Hill*[12]

and heard about in cases like *Jango*.[13] In doling out a verbal and psychological battering to expert anthropological witnesses, barristers are merely fulfilling their professional role as confirmed by the High Court, which expressed the view that 'confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial'.[14]

The dynamic of the courtroom, with evidence in chief followed by cross-examination, is based on what I call the competing narrative approach. Lawyers representing claimants will try to provide all the reasons why claimants have native title, while the state and other respondents will provide all the reasons why they do not. I have heard expert anthropologists (and others) complain that the cross-examining barristers simply did not seem to understand the arguments they were making. The litigation environment, however, is not about understanding. The point is that cross-examining barristers are not trying to understand. If the anthropologist's arguments support the claimants' case, the opposing barristers will try to distort and undermine the credibility of those arguments, challenge the anthropologist's credibility or question the overall relevance of the anthropological contributions. Agreement is not a part of the litigious conversation.[15]

Leaving this adversarial dynamic behind is one of the great benefits of resolving claims by negotiation. There are, however, certain interactional dynamics that can carry over from the litigation context into negotiations. In the following comparison between litigation and negotiation, I draw on classic texts by Fisher and Ury[16] and Fisher and Brown[17] concerning interest-based negotiations, focusing on communication and positioning.

Interactional dynamics in negotiation and litigation

We can conceptualise an interactional dynamic as consisting of a bundle of interrelated memes, a concept proposed by biologist Richard Dawkins as a cultural equivalent to biological genes.[18] A meme denotes a unit of cultural ideas, symbols or practices that can be transmitted from one mind to another through speech, gestures, rituals or other imitable phenomena. Some of the memes developed in and useful to litigation lose their evolutionary value when the dynamic shifts to negotiation. However, because these memes are carried by individuals who often operate in both the litigation and negotiation context, redundant litigation memes may persist, tainting the negotiations with old patterns and potentially contaminating negotiations with a 'litigation vibe'. I will look in particular at the impact this can have on communication and positioning.

Communication in litigation and interest-based negotiations

Communication during litigation is formal at best, and can easily deteriorate to become aggressive, snide or rude. Statements are often interpreted in the worst possible light (for example, 'they are having a go' or 'they are trying it on'). Little attempt is made to clarify meaning. Communication in litigation is strategic, usually minimalist and at times deliberately designed to antagonise.

In interest-based negotiations, communication should be regular, courteous and frank. I am not suggesting people communicate just for the sake of it, but rather that there is much to be gained in terms of mutual understanding, enhanced mutual acceptance, building working relationships and dispelling negative stereotypes of 'the other side' through regular, personal (that is, voice to voice rather than written) communication. Communication in negotiations does not mean having to agree, but it is precisely when parties do not agree that frank and courteous communication is important. A key challenge to a successful negotiation process and one that is easily cast aside during litigation (and even in debates on the Australian Anthropological Society email network) is the ability of stakeholders to operate from positions of mutual respect even where there is disagreement.

Positioning in litigation and interest-based negotiations

In litigation, parties are often operating from unarticulated or semi-articulated positions. For example, lawyers and anthropologists working on behalf of claimants often share the sentiment of their clients that the state is continuing colonial repression through the native title process. Connection inquiries are seen as continuing the history of the state prying into the private lives of Aboriginal people, and the fact that claimants must prove their connection is perceived as yet another example of the colonising state challenging the traditional owners of this land. While rarely stated outright, these sentiments can manifest as mistrust of the state's motives ('they are trying to do the Aboriginal people over once again') and, in the extreme, give rise to conspiracy theories.

This perception of state and territory governments, common among anthropologists and lawyers who are employed by the Native Title Representative Bodies who represent claimants, results not only in careful information management, such as the withholding of family details and the extremely limited release of cultural information. In extreme cases it can lead anthropologists, influenced by their theoretical predilections (including, at times, a fundamental dislike of particular early ethnographers), to share the factual myopia of legal advocates and hinder alternative interpretations of data. At its worst it leads to

obtuse, arcane and irrelevant arguments (boxing at shadows) and reluctance to see alternative points of view.

States and territories and other respondents also can have preconceived ideas about claimants, including that claimants are making cynical land grabs and are exaggerating their connections to land. They may be fundamentally cynical about the persistence of traditions in an area that has seen substantial Europeanisation of the countryside, perceiving claimants to be engaging in a (re)creation of tradition (that is, a reviving of traditional customs that were considered lost), which is inauthentic. Anthropologists working for states and territory governments may also be basing their approach on unstated, theoretical underpinnings that lend rigidity to their arguments, but are not necessarily explicit.

Finally, lawyers representing claimants and those representing the states and territories may remain resentful of each other because of previous altercations and positions taken in other cases. Litigation is an ideal environment for this sort of positioning, but the poor communication patterns and unarticulated positions produced in litigation can be memes that are carried into the negotiation process. There such underlying interests, positions and motives may bubble along unarticulated, giving rise to miscommunications and, potentially, to conflicts that can detract from the actual interests being pursued; that is, an agreed outcome to a native title negotiation.

In contrast, negotiation requires open communication, including a commitment to self-aware positioning. In the first instance, this involves parties becoming clear about their own, until now unarticulated underlying positions. Ideally, these underlying drivers are articulated during negotiations so that they can be addressed or at least clearly understood. In some cases, a skilled mediator could play a very valuable role at the early stages of the negotiation process by creating an environment that allows these underlying issues to be brought to the fore without confrontation.

Possible impacts on ethnographic evidence of interest-based negotiations

Having considered the impact of litigation and negotiation on relationships, I now turn to the question of whether interest-based negotiation has an impact on the ethnographic information needed for native title. The native title inquiry can be seen as an inquiry into cultural change or, more aptly, into cultural continuity in the face of change. A classic cartoon, produced in response to the 2002 *Yorta Yorta* High Court decision,[19] is a useful reminder of the kind of exercise in traditionalism[20] that is a native title inquiry.

In the litigation context we usually see representatives for the claimants arguing for cultural continuity and respondents arguing against it. Arguments

Figure 1: Mabo native title Yorta case fails big ask, cartoon by Nicholson from *The Australian* newspaper (reproduced courtesy of Peter Nicholson, <www.nicholsoncartoons.com.au>)

against cultural continuity are likely to include references to any one of the following, all of which have a clear focus on *breakdown*, *cessation* and *loss*:

- claimants' involvement in the workforce;
- the cessation of a mobile lifestyle and development of permanent settlements constituted of non-traditional residential units;
- the impact of white settlement, including alteration of the natural environment and alienation from land;
- the impact of Christian beliefs;
- cessation or reduction of ceremonial life;
- cessation of rules surrounding marriage and other rules governing kin relationships;
- breakdown of rules regulating hunting and gathering;
- breakdown of rules regulating rights and interests in land;
- loss of language;
- loss of site-based knowledge and traditional names for country;
- the recreation or invention of site-based and other ritual traditions;
- the physical absence from some or all of the claim area; and
- the opportunistic basis of a claim.

During litigation, these arguments may be constructed by the respondents into a narrative in which the contemporary Aboriginal society is portrayed as substantially *assimilated* or at least so alienated from the society of its ancestors that it can no longer be considered *traditional* for native title legal purposes.

Meanwhile, the anthropologist working with the claimants will commonly seek to draw out the continuities and distinctly Aboriginal behaviours, interactions and relationships with the land.

So what differences are there if a matter is settled by negotiation rather than by litigation? The first fundamental difference is that the respondent parties, ideally, would not be constructing a negative narrative, in the sense of negating the claimants' case. In a negotiated process, there is no need for governments to assume that any of the factors used in litigation to emphasise breakdown and cessation raise *prima facie* doubts of cultural continuity.

The quest for a 'Yorta Yorta moment', a distinct point in time at which 'tradition ceased',[21] has no place in a negotiation process, if the desired outcome is an open exploration of whether a positive determination of native title is possible. The focus should be on the continuities in the present and this has a significant impact on the management of evidence or what I refer to as the directionality of evidence. By this I mean the question of whether the historical inquiry in native title starts in the present and works backwards, or starts in the past and works towards the present.

Black CJ eloquently discussed this issue in his dissenting *Yorta Yorta* Full Court reasons, where he reasoned that evidence should begin with the present, by looking at the kinds of behaviours that could be interpreted as traditional today.[22] The majority view differed and since then it has become established practice in trials to start the inquiry in the past; that is, by defining the traditional system of laws and customs, and then tracing its continuity to the present. This approach easily emphasises disruption rather than continuity.

The minority view of Black CJ arguably offers a better approach to inquiries made as part of negotiation rather than litigation. A past to present approach may be required when there are doubts about the historical connection of the claimants to the land in question. In that case the early historical ethnographic literature will be crucial. However, whilst such early accounts will, of course, also play a role in negotiations, it is possible in negotiations that the lines of inquiry can and should be determined by the present situations of the claimants rather than their history. It is then possible to trace backwards and find the historical manifestations for contemporary behaviours, thereby anchoring them in tradition. If claimants no longer practice ceremonies, there is little point in spending much time on historical accounts of ceremonies. The focus should be on continuity, not cessation.

The emphasis in the High Court's *Yorta Yorta* determination on a 'society bound by its laws and customs'[23] has led to a broadening of the native title inquiry beyond the land tenure system to a wholesale inquiry into all aspects of social organisation in attempts to demonstrate a contemporary yet traditional society. Given the past 200 years of colonisation, it is self-evident that demonstrating the continuity of an Aboriginal society that has survived in

parallel to the dominant society is a very onerous task. Because in negotiations parties are not bound by the processes of the Court, negotiating connection allows parties greater freedom to determine what aspects of native title law to focus on than they would have if they were in litigation. Arguably, of the many aspects of traditional law and custom one could consider, the focus in negotiations should be on the traditional land tenure system, as it provides the basis from which native title rights and interests in land arise.

A common pattern observed across Australia is what Sutton has described as a process of 'conjoint succession'.[24] Sutton coined this term to describe the process whereby the original richly patterned system of land tenure, usually with fine-grained localised interests and interlocking and complementary levels of rights and interests, evolved into regional, often language group-based land holding units. Significantly, the unit that traditional ethnography[25] depicts as the land owning unit, the 'clan' or 'estate group', is in many instances no longer present.

Anthropology, it seems, is well equipped to draw out parallels between what Sutton refers to as the 'classical system' of land tenure and contemporary occupation of and relationships to land, and can interpret and explain contemporary associations to land as arising from and reflecting the traditional relationship. The question that arises, then, is whether such adaptation is still sufficient to establish native title as understood by the law. This brings me to the last point regarding the evidentiary bar and how it might be set for negotiation purposes.

The evidentiary bar in negotiation and litigation

A number of Federal Court judges have now said that the evidence required for a negotiated determination of native title is not the same as that for a litigated one.[26] In the absence of more specific guidance, the vexed question for state and territory governments concerns the evidentiary threshold that they should be applying in making their decisions about moving towards consent determinations.

Without specific statements by the Federal Court about the difference in evidence between a litigated and negotiated determination, the legally logical approach to this question is to seek guidance in the precedence of trial-based Court determinations. However, the Court threshold in that context is very high and the positive determinations made after litigation have largely been confined to areas where the contemporary community is still quite clearly 'traditional', with obvious markers such as language, ceremony and on-country living. Taking the litigated bar as a starting point for negotiations is, therefore, not ideal for two reasons: first, because it can easily introduce litigious memes; and, second, because it creates a situation where most claims in more settled Australia are likely to flounder.

Regardless of whether the context is one of litigation or negotiation, a claim still needs to address s 223 of the Native Title Act to qualify for a determination of native title. In particular, the following requirements have to be established:

- that rights and interests are possessed under traditional laws and customs; and
- that claimants have a connection to land and waters by those laws and customs.[27]

I believe that, outside the competing narrative context of litigation, sophisticated anthropology can establish even highly urbanised Aboriginal communities as holding rights and interests under an, albeit evolved, system of law and custom. It can also construct logical arguments for contemporary connections to country that persist, despite the absence of classical markers such as localised land holding groups, site-based rituals and detailed knowledge of songlines. For example, even in urban and regional communities Aboriginal people value the use of traditional resources, such as hunting, gathering and manufacturing traditional objects. People also often have strong beliefs about spiritual powers inherent in the land and knowledge of important places, both historical and cultural.

But what does 'connection to land and waters by [those] laws and customs' in s 223 actually mean? My view is that in a negotiated process as a minimum it means:

- a connection (whether by descent or legitimate cultural succession) to the owners of the land at sovereignty;
- an intimate, traditionally informed knowledge of the land in question; and
- that such knowledge is held by and transmitted to a cross-section of the community (vibrancy of the system as required by *Yorta Yorta*).

The latter two points are important, since the holding of native title places people in a position where they can influence future land use, and, for this to occur meaningfully, it is essential that the Aboriginal people know the country in question. With all three points established, it seems to me that respondents and the Court could be fairly certain that a determination is being made for the right people over the right area of land.

Conclusion

In this paper I considered two related issues: the potential impact of trial-based processes on negotiations and the question of whether settling native title claims by negotiation has an impact on the level of evidence required. The key point I sought to make regarding the first issue is that there is significant potential for professionals who engage in both litigation and negotiation to be influenced in the latter by processes and issues arising in the former. Avoiding this influence

requires all participants to be self-aware and to not allow deep-seated attitudes or opinions to detract from the bigger goal of reaching native title settlements.

In relation to the second issue, I have proposed that the approach to historical evidence in negotiation be different from that in litigation in terms of the directionality of evidence and have suggested that the focus of the inquiry be more limited. Rather than engage in a full-scale 'society inquiry', as one would in litigation, in negotiations the inquiry could be confined to the 'connection to country' issue. It is difficult to specify in the abstract the 'quality' of knowledge and the number and demographic spread of claimants who hold such knowledge that might be required to demonstrate a system of law and custom that connects people to land. However, there seems to be more room for inference in negotiation than there is in litigation.

In the end what constitutes sufficient evidence for a consent determination of native title is a policy question that depends as much on the position of government and of other respondents as on the cogency of the evidence presented in its support.

Post-presentation discussion

***Participant*:** When we commence business with the state, we need to keep in mind that at any moment it could turn ugly, that everything is discoverable and that it may turn to litigation. I recently attended a connection conference and various anthropologists were reticent in coming to an agreement because of the thought that it might go to trial. Their concerns were that if they were prepared to compromise too much in terms of agreeing with a particular point, then they may one day be cross-examined in Court and challenged to explain why they had conceded a certain point. Therefore, it is sometimes difficult to sort out where you are in terms of negotiation in that continuum of negotiation and litigation.

***Kim McCaul*:** Yes, it is a difficult situation. In South Australia, in theory at least, negotiation is privileged and is without prejudice. Should the negotiation fail, parties cannot be cross-examined on anything that they have said during those negotiations. I think that the leadership, both in the government and within Native Title Representative Bodies, needs to break the link between litigation and negotiation. Otherwise, the threat of litigation really destroys any possibilities in any negotiation process.

***Participant*:** A lot of the disputes and arguments in native title cases are between Aboriginal groups rather than between the state and a claimant group: claimant groups are not always cohesive and in agreement. Therefore, there is a need for our writing to be directed towards our clients — the claimants and

the Traditional Owners — in order to allow them to understand and reshape their own narratives regarding their deep past, some of the details of which they are often unaware. So it is important to consider that the conversation must also be very much with our clients in thinking about how to resolve these matters of competing narratives.

***Kim McCaul*:** I am aware that in writing a connection report, anthropologists are really playing to some very distinct audiences and that it is important to remain aware that claimants will also be informed by the report. From a government perspective, we would recommend that the report focus on the government as the audience, whilst having in mind that the material might be revised into something more appropriate for claimants afterwards.

***Participant*:** It occurs to me that Aboriginal societies are more about affiliation than linear descent models. Therefore, if we use an affiliation model as a guide when we are thinking about the relationships between 'the parent culture' and 'the child culture', there is a congruent set of metaphors for the laws and customs and how tradition is related to innovation. I often use Roy Wagner's notion from *The Invention of Culture* that 'all cultures are structures, or structures are the result of the sedimentation of a failed series of innovations'.[28]

***Participant*:** I'd like some comment on whether, with time, we will have enough case histories to be able to look at the risk of litigation versus negotiation? Are we moving towards a third level of expertise, beyond that of the lawyer and the anthropologist, which is about risk assessment? This would require advice as to whether claimants should enter negotiation or litigation, taking into account the likelihood of a native title outcome and the nature of a determination or agreement outcome, both of which seem to be highly variable.

***Kim McCaul*:** I don't think there will be a new category of expert because, in theory, the lawyer is supposed to be the risk assessor deciding upon questions such as how a case should be run, whether to take it to trial, how to participate in negotiations etcetera. In South Australia the emphasis of all parties is on negotiation rather than litigation. The Court Docket Judge has explicitly said that he doesn't expect to be hearing any other claims. I think litigation is a gamble and never the preferred option — unless, of course, a claimant group has been stymied and litigation is the only viable option available.

***Participant*:** I think it is time to have a major discussion about the relationship between litigation and mediation/negotiation. There has to be some way of breaking the link between personalities and outcomes to ensure that those who are negotiating or mediating are not adopting a litigation mentality. I think there needs to be an understanding about where risk assessment falls within the negotiation process. It is something that needs to be taken into account by

the claimants and other parties as to the best alternative within a negotiated agreement — is it litigation or something else? I think a major discussion needs to happen around the language and discourse of negotiation and mediation. Perhaps the lawyers who are involved in native title claims, both in governments and in representing applicants, could be trained in principles of negotiations and mediation, which they can then bring to the settlement table whilst leaving behind their litigation skills.

NOTES

1. The opinions expressed in this paper are solely the author's and are not endorsed by the South Australian Crown Solicitor's Office, where the author is employed.
2. *Mabo v Queensland (No. 2)* (1992) 175 CLR 1.
3. Government of South Australia, *Consent Determinations in South Australia: A Guide to Preparing Native Title Reports*, Crown Solicitor's Office, Adelaide, 2004; Government of Western Australia, *Guidelines for the Provision of Information in Support of Applications for a Determination of Native* Title, Office of Native Title, Perth, 2004; Queensland Government, *Guide to Compiling a Connection Report for Native Title Claims in Queensland*, Department of Natural Resources and Mines, Brisbane, 2003.
4. This comment was made during discussions as part of a workshop organised by the Australian Institute of Aboriginal and Torres Strait Islander Studies and the National Native Title Tribunal in 2007, which resulted in the publication of Rita Farrell, John Catlin & Toni Bauman, *Getting Outcomes Sooner: Report on a Native Title Connection Workshop Barossa Valley July 2007*, National Native Title Tribunal, Perth, and Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2007.
5. See, for example, the implicit significance O'Loughlin J appears to have given to claimants being involved in Christianity in *De Rose v State of South Australia [2002]* FCA 1342 and the more explicit significance attached to a petition by Yorta Yorta people in an attempt to obtain land in the 19th century in *Members of the Yorta Yorta Aboriginal Community v Victoria [2002]* HCA 58.
6. *Munn v Queensland* [2001] 115 FCR 109 at [29]; see also *Smith v State of Western Australia* [2000] 104 FCR 494 at [38] and *Thudgari People v State of Western Australia* [2009] FCA 1334 at [25] for similar comments.
7. See comments made by Barker J in *Thudgari People v State of Western Australia* [2009] FCA 1334.
8. See, for example, Frances Morphy, 'Performing law: The Yolngu of Blue Mud Bay meet the native title process', in Benjamin Smith & Frances Morphy (eds), *The Social Effects of Native Title: Recognition, Translation, Coexistence*, ANU E Press, Canberra, 2007.
9. For example, John Phillips, *Advocacy with Honour*, Law Book Company Ltd, Sydney, 1985.
10. Lord Reid in *Rondel v Worsely* [1997] 1 QB 433 in G E Dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand*, 2nd edn, LBC Information Services, Sydney, 2001, p. 445.

11. Keith Tronc & Ian Dearden, *Advocacy Basics for Solicitors*, Law Book Company Limited, Sydney, 1993, p. 23.
12. *De Rose v State of South Australia* [2002] FCA 1342.
13. *Jango v Northern Territory of Australia* [2006] FCA 318.
14. *Lee v The Queen* (1998) 195 CLR 594 in David Ross, 'Criminal law practice: Defending Aboriginal people', *Criminal Law Journal* vol. 31, 2007, p. 340.
15. In my experience of working with barristers, an essential skill of a good barrister is to be fully convinced of the superiority of their own narrative over that of the other side. This skill can leave the barrister impermeable to any evidence that may go against their argument.
16. Roger Fisher & William Ury, *Getting to Yes: Negotiating Agreement Without Giving In*, Penguin Books, New York, 1981.
17. Roger Fisher & Scott Brown. *Getting Together: Building Relationships as We Negotiate*, Penguin Books, New York, 1988.
18. Richard Dawkins, *The Selfish Gene*, Oxford University Press, Oxford, 1976.
19. *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (*Yorta Yorta* HC).
20. See Francesca Merlan, *Caging the Rainbow: Places, Politics and Aborigines in a North Australian Town*, University of Hawai'i Press, Honalulu, HI, 1998.
21. In the Yorta Yorta case the trial judge and subsequent courts considered a petition of 1881 as strong evidence for the cessation of laws and customs from that point onwards. In the petition, 42 Aboriginal people, ancestors of the Yorta Yorta claimants, sought a grant of land to pursue agricultural activities. See, for example, *Members of the Yorta Yorta Aboriginal Community v State of Victoria* [2001] FCA 45 (*Yorta Yorta* FC), paragraphs [185]–[187].
22. *Yorta Yorta* FC, above n 21, paragraph [50].
23. *Yorta Yorta* HC, above n 19, at [49].
24. Peter Sutton, *Native Title in Australia: An Ethnographic Perspective*, Cambridge University Press, Cambridge, 2003, p. 6.
25. For example, Alfred R Radcliff-Brown, 'The social organization of Australian tribes', *Oceania* vol. 1, no. 1, 1930, pp. 206–46; William E H Stanner, 'Aboriginal territorial organization: Estate, range, domain and regime', *Oceania* vol. 36, no. 1, 1965, pp. 1–26.
26. See, for example, North J in *Lovett on Behalf of the Gunditjmara People v State of Victoria* [2007] FCA 474 and Barker J in *Thudgari People v State of Western Australia* [2009] FCA 1334.
27. *Native Title Act 1993* (Cth), s 223.
28. Roy Wagner, *The Invention of Culture*, Prentice Hall, Englewood Cliffs, NJ, 1975.