AAS Distinguished Lecture in Anthropology

QSNTS
Queensland South Native Title Services

TOPIC: **NATIVE TITLE: IMPLICATIONS FOR AUSTRALIAN SENSES OF PLACE AND BELONGING**

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DISCUSSANT COMMENTS BY KEVIN SMITH, CEO QUEENSLAND SOUTH NATIVE TITLE SERVICES:

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Congratulations to Professor Trigger for evocative lecture.

My comments are confined to the 'elephant in the room' – the risks of cultural appropriation. I want to address that risk through three different lenses.

1. **As an indigenous person, I do consider comparisons of non-indigenous senses of belonging with native title connection as cultural appropriation**.

Native title is part of the lexicon of the 'Aboriginal struggle', a euphemism that describes a battle for cultural survival that has been fiercely fought since colonisation. A battle that is not finished yet. Our connection to Country is unique, underpins who we are and is central to this struggle. This struggle is all about the appropriate recognition of who we are as First Peoples and our unique connection to country. The struggle is gaining broader awareness and building momentum in other related movements:

- International recognition as per the Declaration on the Rights of Indigenous Peoples (UNDRIP)
- Treaty
- Constitutional Recognition and the 'Voice to Parliament'

We should not be putting the brake on that momentum by having similar conversations about non-Indigenous senses of belonging to place.

We need to remember it was only a short 27 years ago that Aboriginal Peoples and Torres Strait Islanders were legally invisible as a collective by virtue of the legal fiction of *terra nullius.* That fiction continues to have real, daily consequences in the lives of Indigenous Australians as we are statistically reminded annually in the *Closing the Gap* reports. Continuous connection to Country rebutted that legal fiction and while there is statistical overrepresentation across all the social indicators of disadvantage, caused by deliberate attempts by successive governments to sever that connection, it is inappropriate to elevate and seek to draw comparisons for non-Indigenous senses of belonging to country.

At this point, some reminders of the gauntlet that native title claimants have to run is important:

- *Mabo #2*[1] may have been a watershed moment, but let's not forget that native title claims are determined within a contested space where the bar of proof was set remarkably high in the *Yorta Yorta*[2] case and that state and territory governments insist upon that burden being discharged before it accepts connection;
- Despite the ravages of colonisation, its affects cannot be relied upon in mitigation to ameliorate the challenges in making out connection to the *Yorta Yorta* standard (see *Bodney v Bennell*)[3];
- Even when connection is proved, native title rights and interests will always be read down in favour of an inconsistent non-native title rights and interests (see *Wik)*[4] which frequently prompts comments from traditional owners that we get the 'crumbs';
- The next big thing in native title is compensation (see *Griffiths*)[5] where connection still needs to be proved before a right to native title compensation can be claimed (it is noteworthy that the High Court affirmed a new head of damages for cultural loss which attempts to address the deleterious effect that extinguishment has on spiritual connection);
- Further on compensation, a right to legal redress is limited to acts done after the enactment of the Racial Discrimination Act 1975 – poignantly reminding us that it wasn't unlawful to sever cultural connection prior to 1975 whilst also underscoring there is much 'unfinished business' on pre-1975 dispossession.

A blunt reality is that many respondents to native title claims are the very people who want their rights and interests and presumably their 'sense of belonging' to countermand or diminish the 'sense of belonging' of native title claimants.

In summary, the lexicon of the 'struggle' for maintaining cultural connection is the only thing we have and until we redress some of the consequences of its denial than, as traditional owners, we are not in a space to equate or even rank senses of belonging by others or to treat such assertions as legitimate.

2. **As a lawyer, I have some problems with using the native title framework as an appropriate comparator with universal concepts of belonging**

From a substantive perspective, native title is the common law recognising the remnant rights and interests of Aboriginal Peoples that survived the acquisition of radical title to land upon the assertion of sovereignty by the British. Those recognised native title rights and interests have their origins in another legal system that ceased law-making capability upon sovereignty but nonetheless continued by virtue of the continuity of the body of people who, bound by those same laws and customs, continued to exercise those rights and interests specifically in connection with respect to land and waters (see Mabo #2)[6].

[1] *Mabo v Queensland (No 2) HCA 23, [1992] 175 CLR 1*
[2] *Members of the Yorta Yorta Aboriginal Community v Victoria [2002] HCA 58*
[3] *Bodney v Bennell [2008] FCAFC 63; 167 FCR 84; 249 ALR 300*
[4] *The Wik Peoples v State of Queensland & Ors [1996] HCA 40*
[5] *Northern Territory of Australia v Griffiths [2017] FCAFC 106*
[6] *Mabo v Queensland (No 2) HCA 23, [1992] 175 CLR 1*

This complex, interwoven continuity of connection of people, laws and customs and land and waters is critical. This goes far beyond any concept of a universal sense of belonging to place – native title is *sui generis* and it difficult to discern how these two concepts are comparable, even remotely. Native title is an *in rem* right that runs with the land forever and can only be surrendered to, or compulsorily acquired by, the State. The sense of belonging evident from a native title claimant perspective goes far beyond concepts of people coming to an area for solely or primarily individual economic reasons and their sense of belonging developed by virtue of making that place their home, even after many generations!

From a procedural perspective and as indicated above, native title claims are conducted in an adversarial, multi-party litigation context where many of those respondent parties, some trenchantly, oppose the connection of native title claimants. Those respondent parties do not bear the burden of proving connection but they have the right to test the claimants' assertions; and they do frequently noting that their inconsistent rights and interests will be always be favoured (see *Wik*). It would seem procedurally unfair for respondents to assert senses of belonging without having to undergo a rigorous objective test and withstand similar robust forensic examination.

3. As a Chief Executive Officer and Change Agent, I concede there might be merit in a paradigm shift

I make this concession on the basis that progress sometimes requires us to transcend the language of struggle that keeps us locked in past conflict and the language of rights that has a tendency to entrench positions.

A paradigm shift is necessary because we currently have 394 native title determinations many of which are non-exclusive native title rights and interests, which by definition means co-existence. There are hundreds of indigenous land use agreements and thousands of sectoral and project agreements that add to the many layers of co-existence.

Many of these indigenous and non-indigenous rights and interests are not well known or understood by those who possess them, fewer still are managed comprehensively, let alone leveraged beyond the four corners of the agreements. This is because native title rights and interests are negotiated transactionally with an eye to compliance with little focus on the transformative capacity of building enduring relationships that should underpin them.

The paradigm shift might mean a strategic focus upon the interrelationship of people, place and partnerships. Such a discussion might explore the things we have in common to identify and build shared values and how we can respect, manage and leverage diversity.

For it to work, rights need to be understood and respected, the 'truths' in native title connection reports must be openly discussed with empathy between native title holders and respondent parties – something that the current system doesn't facilitate – and only then can a shared plan as to how coexistence of people and place can proceed.

The native title system has produced an enormous body of work that records how this country was settled and having a further conversation that builds on recognition with coexistence in mind is vital to this nation's maturation. A broader discussion about a sense of belonging is critical to this process and papers like this challenge us to start that difficult conversation.