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ALICE SPRINGS LAW AND ANTHROPOLOGY WORKSHOP 2019

**Conflict, Compensation and Cultural Shifts in Native Title
Anthropology**

**14-15 March 2019, Mercure Hotel,
Alice Springs, Northern Territory**

Centre for Native Title
Anthropology
ANU College of
[Arts and Social
Sciences](#)

CONFERENCE PROGRAM

Session One: Native Title in Danger

Time	Event
8:30—8:45	Acknowledgment of Country and Opening of Workshop
	Law, Anthropology and Policy Speaker: Nic Peterson
8:45—9:15	Is the more or less take-for-granted application of Australian property law and legal thinking to the Indigenous population of remote Australia the best we can do in helping Aboriginal people adjust to their encapsulation? Does it make for good social policies and the best outcomes? And what, indeed, are good social policies or the best outcomes?
	Recognition of Native Title - Revision and problem solving Speaker: Susan Philips Chair: Katrina Budrikis
9:15—10:00	<p>A significant proportion of the Australian continent is now subject to an interest held by Indigenous people from a range of state legislation providing some form of land rights or under the Commonwealth's <i>Native Title Act 1993</i>. Apart from the first 20 years of land rights in the Northern Territory, most of the land grants made and native title claims resolved, have been achieved through negotiation and agreement rather than trial. In all instances where agreement has been reached there has been heavy reliance on anthropological material and, inevitably, compromise.</p> <p>There is a second and third phase of native title work now requiring arguably more accurate and sophisticated models of recognition of Indigenous interests:</p> <p>In the <i>second phase</i> are current and future claims affected by</p> <ul style="list-style-type: none">> hard to solve issues caused by overlapping claims,> the contest between groups about who should fill in the gaps between recognised areas; and> The incentive created by the prospect of compensation for post-1975 extinguishment. <p>In the <i>third phase</i> we have the post determination space in which PBCs tear themselves apart dealing with problems arising from membership controversies which consume their resources, energies and further disillusion people who worked so hard to achieve recognition and/or who have territorial ambitions beyond the formally recognised areas.</p> <p>Contributing to the intractability of these issues are three illusory criteria which masquerade as certainties in the life of the claim and determination:</p> <ul style="list-style-type: none">> The boundaries of the claim area;> The description of the native title holders; and> The definition of the rights and Interests. <p>In order to resolve a claim by consent each of these categories will have been shaped by the compromises and adaptation called for in negotiation. The definitions adopted for the sake of reaching agreement may collapse once they come under pressure but appear locked in by force of the determination orders. In my presentation I explore what options are available to the clients, their lawyers and experts, to respond to these challenges and how to make changes.</p>

10:00—10:30	<p>Going back to ethnographic basics in analysing continuities and transformations</p> <p>Chair: Patrick Sullivan Speaker: David Martin (on behalf of Carmen Cummings and Nyssa Colquhoun)</p> <p>This presentation arises from work on two WA Native Title claims undertaken by myself and my YMAC colleagues Carmen Cummings and Nyssa Colquhoun, in a region where the primary original researchers were Bates and Radcliffe-Brown. It demonstrates how reinterrogating the work of Radcliffe-Brown, as well as being more alert to the spiritual dimensions of the 'lexicon of connection' which claimants used in describing their relationships with their country, allowed us to frame continuities, adaptations, transformations and attenuations in local organisation against key continuities in the underlying religious system informing local organisation. While not yet tested in the Federal Court, we argue that innovative but defensible anthropological analysis can assist in establishing a productive engagement between anthropological and legal reasoning.</p>
10:30—11:00	Morning Tea

Panel Session, followed by open discussion

David Trigger: Expert anthropology research: document availability, research fatigue and timing, and documenting change.

Anthropologists preparing expert reports can face several challenges when legal approaches may differ from research perspectives.

1. Researcher expectation that all relevant documents will be available. What are the legal considerations when providing documents and is the anthropologist free to seek access to documents independent of what has been provided by lawyers? Is the importance of experts accessing all relevant documents, including unpublished reports, generally agreed subject to privilege and confidentiality issues?
2. Anthropological studies may produce results that lawyers, whether for applicant or respondent parties, prefer were not written in reports. One illustration is possible differences between research results and witness statements / affidavits prepared by lawyers for applicants. What is the appropriate timing for the research inquiries and the taking of witness statements respectively? Do legal timeframes risk anthropologists facing claimant responses that they've already delivered their thoughts to lawyers prior to the carrying out of research? What is the relationship between opinions based on research results and witness statements prepared by lawyers?
3. Do anthropologists and lawyers approach cultural change differently? The best anthropology avoids analysis that is overly focused on traditionalism to the exclusion of cultural change in traditional law and custom yet brings a sophisticated understanding to the reproduction of connection to country. Are lawyers interested as much in change as continuity or is such an approach contrary to an advocacy role?

11.00—12.30

Paul Burke: Should group acceptance be an inviolable criterion for membership of the ownership group?

Panel Chair: Anna Kenny

Current discussion of the relevance of group acceptance in membership criteria seems to be based upon relatively clear-cut examples of long separated individuals making dubious assertions of the tribal identity of very distant ancestors. I want to raise the counter examples in which the attempted exclusion of particular families seems to relate to ulterior motives, for example not wanting to share mining royalties or the judgement that the particular family is not practising a sufficiently Aboriginal lifestyle. Such examples raise the possibility that an expert anthropological opinion about the inclusion of a particular family within the ownership group could be at odds with the majority of that group. Thorny issues arise about expert independence, the rough-and-tumble of intra-Indigenous politics and the limits of research to resolve such issues. The widespread contemporary assertion of a strict no-adoption rule raises similar questions as well as finely balanced interpretations about the adaptation of traditional rules to contemporary circumstances.

Session 2: The practice of conflict management and resolution

12:30—1:30	Lunch
1:30—2:30	<p>Arbitration to resolve a complex native title dispute: Legal and anthropological perspectives Speaker: Justice Mansfield and Kim McCaul Chair: Tamara Cole</p> <p>We will discuss a number of points arising from our role as arbitrators of a dispute between three Aboriginal parties in Queensland. After providing some context, both specific to the case at hand and to arbitration as a standard legal process, we consider the advantages and limitations of arbitration as a tool to resolve native title disputes and will discuss questions such as:</p> <ul style="list-style-type: none">• How does it fit into the overall claim resolution process, including mediation and trial?• What are the benefits of combining legal and anthropological expertise on the arbitration panel?• Is there a role for active claimant participation?• How does the approach to the evidence differ to that at trial?• How does arbitration compare in terms of time and money to a trial process?
2.30-3.00	<p>Doing things differently: legal procedure is not ‘process’ Speaker: Toni Bauman Chair: Gay English</p> <p>This presentation is informed by work over many years including in Victoria where the work was carried out in partnership with various traditional owner corporations, the Right People for Country (RPfC) program and AIATSIS. Some of the work resulted from requests to RPFc for assistance for traditional owner corporations to strengthen relationships with members in family engagement processes. The presentation will describe the engagement process model and discuss issues arising including how misunderstandings of specialised communication processes can exacerbate conflict and re-traumatise people in what are complex systems.</p>
3:00—3:30	Afternoon tea
3:30—4:30	Group discussion: What strategies are successful in your experience with disputes and why?
7:00	<p>Workshop Dinner— Double Tree by Hilton Hotels Alice Springs <i>Dinner will be a buffet with a cash bar. It is priced at \$49.00 per head to be paid to the venue.</i></p>

Session Three: Cultural Shifts: From determination to PBC

Time	Event
9:00—9:30	<p>Dispute Resolution in Prescribed Bodies Corporate and the intersection between traditional law and custom and Native Title law Speaker:Registrar Chris Fewings (NNTT) & Mick O’Kane (NNTT) Chair: Nic Peterson</p> <p>In 2018, the NNTT completed an anthropologically informed report addressing issues and challenges concerning dispute resolution and decision-making within Prescribed Bodies Corporate (PBCs). The report also investigates the significance for the NNTT of the reforms to the NTA proposed by the Attorney-General’s Department. This paper is a discussion of that work and the implications of its findings in relation to the broader legal context of the NTA. It is particularly concerned to explore the relationship between the exercise of traditional Aboriginal modes of authority and decision-making within the context of the realities of Native Title law.</p>
9:30—10:30	<p>Bringing effective governance to Indigenous Trusts and PBCs Speaker: David Evans Chair: David Martin</p> <p>Good organisational governance lies at the heart of building long term sustainability and value for Indigenous communities. However, establishing effective governance systems and processes in Indigenous Trusts and PBCs presents complex challenges in comparison to non-Indigenous environments. With over ten-years direct experience working with Indigenous boards I will share key issues identified through practical approaches to matters that can frustrate implementing effective governance standards on Indigenous boards today. With consideration of what I’ve learnt and with reference to Indigenous First Nations Principles I’d like to propose specific recommendations for developing effective governance in Indigenous Trusts and PBCs.</p>
10:30—11:00	Morning Tea
11:00—12:30	Group discussion: How do we prepare—based on specific anthropological knowledge—for critical governance challenges?
12:30—1:30	Lunch

Session Four: Compensation

	<p>Compensation for extinguishment or impairment of native title—legal and anthropological frameworks</p> <p>Speaker: Stephen Wright, Tamara Cole and Wendy Asche</p> <p>Chair: James Nugent</p>
1:30—2:30	<p>This session will overview the legal principles and procedures, and some practical issues, in respect of claims under the <i>Native Title Act 1993 (Cth)</i> for compensation for extinguishment or impairment of native title. The session will focus on the Griffiths (Timber Creek) compensation claim. A solicitor, a counsel and an anthropologist involved in the proceedings will share some of their experiences and reflections on the case, including the issues that have been and will be decided in the Griffiths (Timber Creek) Federal Court and pending High Court judgments, issues that remain to be determined in future cases, and how lawyers and anthropologists may approach future cases in light of the Timber Creek experience. The session will also explore more generally some methodological and practical issues concerning the assessment of compensation, including: the bifurcation of the assessment into economic and non-economic loss, what those terms mean, and how they may be assessed in future cases; and possible alternative methodologies for assessing compensation.</p>
2:30—3:30	<p>Open Discussion on anthropological methodologies for native title compensations</p> <p>Introduction from David Trigger</p> <p>Chair: Petronella Vaarzon-Morel</p> <ul style="list-style-type: none">• Compensable acts and the scale of compensation;• Lumping or splitting of compensation recipients;• Traditional ‘use of land for any purpose’ & implications for compensation.
3:30—4:00	<p>Afternoon tea</p>
4:00—4:30	<p>Wrap Up session: Approaches to compensation issues – Three perspectives</p> <ul style="list-style-type: none">• Is there an interface between law and anthropology in compensation?• What will/should be the content of compensation –compensation for what?
4:30	<p>Closing remarks and close of conference</p>

SPEAKERS

Wendy Asche

Wendy Asche was Senior Anthropologist - Native Title at the Northern Land Council for 15 years. She worked on most of the native title applications, future acts and ILUAs across the Top End of the Northern Territory, including the eight native title applications that went through to a Federal Court Hearing. She became an anthropological consultant in 2009 and expanded her research and fieldwork experience to Queensland and the desert regions of the Northern Territory, South Australia and Western Australia.

In 2004, Wendy was co-researcher, co-author and expert witness with Kingsley Palmer for the successful Timber Creek native title application. In 2012 Wendy and Kingsley began research for the Timber Creek compensation application. In 2016 she was one of three anthropologists giving evidence for the successful claim.

Toni Bauman

Toni is an anthropologist, mediator, facilitator and trainer who has published widely and made presentations to a range of national and international audiences.

She has over thirty years' experience in Indigenous matters including land and native title claims, consensus building, agreement-making, decision-making and dispute management processes, co-management of protected areas, government policy, program evaluation, feasibility studies, and governance training. Toni was the chief investigator for the Indigenous Facilitation and Mediation Project at AIATSIS and acted as adviser to the Federal Court project that produced the publication *Solid work you mob are doing: case studies in Indigenous dispute resolution and conflict management in Australia* (Federal Court of Australia, 2009). In 2011, Toni was appointed as a Research Affiliate at Harvard University's Kennedy School of Government and as a visiting scholar at the Udall Centre for Studies in Public Policy at the University of Arizona.

Dr Paul Burke

Dr Burke is a reformed lawyer who converted to anthropology. His first book, *Law's Anthropology* (2011), was a Bourdieuan analysis of anthropologists in native title as a conflict of habitus of two social fields. His most recent work, *An Australian Indigenous Diaspora: Warlpiri Matriarchs and Refashioning of Tradition* (2018) analyses the cultural implications of Indigenous migration.

Tamara Cole

Tamara Cole is the Legal Practice Manager — Native Title at the Northern Land Council. She has extensive experience in native title law and practice and had the fortune of working on the Timber Creek compensation claim from the hearing to the High Court appeal.

David Evans MBA, BCom, FAICD, FCPA, F FIN

David is a management consultant and an accredited facilitator with the Australian Institute of Company Directors delivering corporate governance, Indigenous governance, strategy, risk and finance training programs for board directors and executives throughout Australia and the Asia-Pacific and Middle East regions. He has also been active in the not-for-profit and Indigenous sectors for over thirty years holding positions as President and Board director for the National Heart Foundation, President Fiji-Australia Business Council, Independent Directors of an Indigenous Trust in Western Australia and Trustee of Murdoch University Veterinary Trust. He is currently an Independent Director of an Indigenous foundation in the Pilbara, a Non-Executive Director of Aboriginal Hostel Ltd in Canberra, a non-executive director of Vision Investments Limited, one of the largest publicly listed companies on the South Pacific Stock Exchange and an Independent Member of the Queensland Police Service Audit & Risk Committee.

As a career banker and consultant, David has worked throughout Australia and the Asia Pacific region. He has held executive roles as the Chief Manager Westpac Fiji Islands, Chief Credit Officer Westpac, Senior Manager Indigenous Banking Westpac and Director, Risk Advisory KPMG. David provides consulting services in board governance, risk and strategy areas across all business sectors.

In 2003, David was awarded a Centenary Medal by the Australian Government for his services to health as President of the National Heart Foundation, Western Australia.

Chris Fewings

Ms Fewings was recently appointed the Full-Time Native Title Registrar within the National Native Title Tribunal. Her appointment as Native Title Registrar is for a period of five years, and commenced on 13 March 2018.

Ms Fewings has extensive native title experience and expertise through her previous work as a native title practitioner in private practice and has served for a decade as a Registrar of the Federal Court of Australia, including most recently as National Registrar, Native Title. In her current role Ms Fewings is responsible for maintaining the National Native Title Register, the Register of Native Title Claims and the Register of Indigenous Land Use Agreements. The Native Title Registrar is also responsible for assessing native title claimant applications for registration, giving notice of native title applications and Indigenous Land Use Agreements, and registering Indigenous Land Use Agreements.

Kim McCaul

Kim provides expertise in anthropology, linguistics and mediation. He spent 10 years as anthropologist at the Native Title Section of the South Australian Crown Solicitor's Office and one year as anthropologist (Principal Project Manager) at the South Australian Aboriginal Heritage Branch of the Aboriginal Affairs and Reconciliation Division. He has worked in urban and remote contexts on researching, presenting, analysing and assessing ethnographic and linguistic information for native title and heritage processes; has conducted cross-cultural mediations; and facilitated negotiations, expert conferences and community meetings. He also has a long-standing research interest in cross-cultural notions of health and spirituality. Kim has developed and delivered several cross-cultural training and education programs, including cross-cultural training for staff of the South Australian Department of Justice, Aboriginal heritage awareness training for various industry bodies and an undergraduate course called Language and the Law at the University of New England.

Dr David Martin

David Martin is Director of Anthropos and Senior Anthropologist, based in Canberra. He has extensive field-based experience with Aboriginal groups in rural and remote areas, including eight years in community development. He has also worked at senior management level within government, and provided high level advice to Aboriginal organisations, government agencies and the private sector on such matters as developing effective Aboriginal organisational structures, native title and land rights, and addressing alcohol issues.

Dr Martin has published on a range of native title issues, including a major co-authored book on prescribed bodies corporate (PBCs). He has also published on issues such as accountability, corporate governance, and developing effective organisational structures for service-delivery bodies which take account of Aboriginal political and economic values. He has expertise in working with Aboriginal groups to develop effective corporate structure, including PBCs and trusts.

John Mansfield AM QC Australian Jurist

John Mansfield, AM QC Australian jurist, is a former Justice of the Federal Court of Australia. He served from 1996 to 2016 and sat in the Court's South Australian registry.

He was educated at Saint Ignatius College, South Australia before graduating from the University of Adelaide with Honours in Law. He was admitted as a practitioner in 1969 and later appointed Queen's Counsel for South Australia in 1985 and for the Northern Territory in 1988. He was appointed to the Federal Court of Australia in September 1996. John Mansfield has served as President of the South Australian Law Society in 1988–89, President of the Law Council of Australia from 1993–1994 and Chairman of the Legal Aid Committee for the Law Council of Australia from 1986–94. Additionally, Justice Mansfield is the Chair of the Art Gallery of South Australia Foundation, a position he has held since 2003.

In the Queen's Birthday Honours 2009, John Mansfield was appointed as Member of the Order of Australia For service to the law and to the judiciary, to a range of professional associations, and to the arts community of South Australia. On 1 June 2009, Justice Mansfield was appointed as an additional Justice of the Supreme Court of the Northern Territory.

Dr Michael O'Kane

Dr O'Kane is the Senior Research Officer at the NNTT for 12 months (2017-18) and has since returned to his previously held role of Senior Anthropologist at NTSV/FNLRS.

Mick has considerable experience in Native Title anthropology in Victoria, and in the Pilbara region of Western Australia. He has worked extensively in South Australia, Victoria, Western Australia and southern New South Wales, and conducted field research with environmentalists in the Republic of Ireland and with Dairy Farmers throughout Victoria. He has held lecturing, tutoring and research positions at Monash University, Latrobe University, the University of Melbourne, and Victoria University.

Professor Nicolas Peterson

Professor Nicolas Peterson is Director of the Centre for Native Title Anthropology: This Centre, established in 2010, has been funded by the Attorney-General's Department, Canberra, to contribute to the professional development of anthropologists working in the native title area and to attract younger scholars into making a career in native title work. The Centre has been refunded for a further three years till 2019. Day to day the Centre is run by Dr Julie Finlayson.

His research interests cover social organisation, economic anthropology, ritual and symbolism, land and sea tenure, fourth world people and the state, social change and applied anthropology, anthropology of photography, ethnographic film, history of Australian Anthropology, anthropology of native title. Nic's expertise is in the following areas:

- Studies of Aboriginal and Torres Strait Islander Society
- Social and Cultural Anthropology
- Other Studies in Human Society

Susan Philips

Susan Phillips is a barrister specialising in native title. She has published and worked in that field since the Mabo decision was handed down in 1992. Susan has been counsel to applicants and parties to native title claims all over Australia appearing on their behalf in the NNTT, Federal Court and in mediations and negotiations with local, State and Commonwealth governments and other parties. Susan also works on Indigenous cultural heritage issues including by providing reports to the Federal Minister for the Environment where applications seeking protection of sites at risk of injury or desecration have been made.

Susan lectures and has taught courses about Indigenous people and the law at the Universities of Sydney, NSW and UTS and is responsible for 2 chapters in Lexis Nexis Native Title Service and other publications. She recently gave a paper at the AIATSIS NTRB Masterclass on the revision of native title determinations and will be presenting at a section of the Annual AIATSIS native title conference in Broome, June 2018.

Professor David Trigger

David Trigger is Professor of Anthropology and formerly Head of School of Social Science at The University of Queensland. He retired in 2018. His research interests encompass the different meanings attributed to land and nature across diverse sectors of society. His research on Australian society includes projects focused on a comparison of pro-development, environmentalist and Aboriginal perspectives on land and nature. In Australian Aboriginal Studies, Professor Trigger has carried out more than 35 years of anthropological study on Indigenous systems of land tenure, including applied research on resource development negotiations and native title. He is the author of more than 60 major applied research reports and has acted as an expert witness in multiple native title claims and associated criminal matters involving Aboriginal customary law. Professor Trigger is the author of *Whitefella comin': Aboriginal responses to colonialism in northern Australia* (Cambridge University Press) and a wide range of scholarly articles. His most recent book is a co-edited cross-disciplinary collection titled: *Disputed territories: land, culture and identity in settler societies* (Hong Kong University Press).

Stephen Wright SC

Stephen Wright SC is an experienced barrister specialising in native title, taxation, trusts and mining law.

He has a wealth of experience in native title related issues, dating back to 1996 when he left Mallesons and joined the Western Australian State Solicitor's Office. After 11 years there, he established a private practice, Wright Barristers & Solicitors, before joining Francis Burt Chambers at the beginning of 2010.

Stephen is a leading native title barrister having been counsel in many native title claims and in 'future act' litigation and arbitrations at all levels (National Native Title Tribunal, Federal Court, Full Federal Court and High Court), representing native title parties and representative bodies, government and mining interests. He is an experienced and effective negotiator having provided advice and representation to various parties involved in numerous ILUA and other native title agreement negotiations, including in relation to the establishment of benefits management (trust) structures and taxation issues.

Stephen provides stamp duty and other tax advice (including income tax and GST) and appears in tax cases in the Court of Appeal (WA), Federal Court, and State and Commonwealth Tribunals.

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