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Songlines and Land Claims; Space and Place

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Abstract
The Songlines of the Indigenous peoples of the country now called Australia are an invisible web of pathways which trace the journeys of ancestral spirits as they created the earth, seas, creatures and plants. They contain information about the land, encoding the locations of resources across the landscape throughout the seasons, and mapping sacred spaces and notable places. In addition, Songlines have also been of central significance in claims concerning title to land, taken under both the Aboriginal Land Rights (Northern Territory) Act, 1976 and the Native Title Act 1993 (Cth) (Commonwealth Native Title Act, 1993). Songlines have been 'translated' and 'interpreted' by experts, including historians and anthropologists, for use in land claims under the common law and have been recognised as symbols of land ownership. This article provides a discussion of the Songlines, discusses their status in the legal system of Australia as evidence of title to land, and analyses the role of experts in decoding Songlines in legal proceedings.

Keywords Music · Identity · Justice · Culture · Land claims

1 Introduction

The Songlines of the country now called Australia constitute a vital aspect of Indigenous life. These routes were established long before the period of colonisation by the Indigenous creation beings of *Tjukurpa*. They consist of a series of invisible, interconnected routes across the State, which mark significant sites for Indigenous peoples and map paths between such sites. While these ancient tracks across the land date back millennia, the term 'Songline' is a relatively modern one, having come to prominence with the publication of a book, entitled *The Songlines* in 1987 by Bruce Chatwin [13]. However, the term had previously been used by anthropologists Theodor Strehlow and Robert Tonkinson [41, p. 26].

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To appreciate the meaning of Songlines, one must understand the Dreamtime, which lies at the core of 'Aboriginal existence and spiritual life' [43, p. 32]. The Dreamtime connotes the earth's creation, and the inter-relationships 'between spiritual, natural, and moral elements' [43, p. 32]. Each Indigenous group has unique Dreamtime stories, depending on its surrounding environment. Parrinello comments that in the majority of Dreamtime stories, 'the ancestor spirits, huge semi-human beings and creatures, came up from under the earth. They walked and sang across the flat, uninhabited land. Whatever they sang was created–the animals, plants, land, and people' [43, p. 32]. These spirits set out laws, regulating how people should live, including how they should treat each other and the land. The spirits journeyed throughout the land, stopping at various sites along the way, thus '[t]he land became a record of their activities with the formation of rocks, mountains, rivers and other landforms, creating these sacred places' [29, pp. 32–33]. This early verbalized mapping covers enormous swathes of space and place [47].

These Dreaming tracks are 'mnemonically signposted in song' [27, p. 31] by means of the Songlines, and thus, as stated by Ellis, 'music is the central repository of Aboriginal knowledge' [16, p. 83]. James comments that '[e]lders…cannot see this landscape without hearing song' [27, p. 32]. By learning Songlines Indigenous peoples become familiar with thousands of sites across the country, even though they may have never visited them, and all of the sites 'become part of their cognitive map of the desert world' [51, p. 104]. People knowledgeable of the Songlines can travel extensive distances across country following the routes of the original spirit ancestors, which are signposted by 'stanzas in the song saga that link sources of water and food essential for survival' [27, p. 33]. Some knowledge of these ancestral cultural routes of the Indigenous peoples of Australia has been shared with others, however, 'the complexity and beauty of their oral heritage of song and story is not widely appreciated' and the heritage of Indigenous peoples has not, to date, been adequately valued [27, p. 31; 32].

Songlines have played an important role in the lives of Indigenous peoples in Australia for millennia, as repositories of culture and myth, and as indicators of natural resources. However, Songlines have another significant role within the legal sphere, as they have been acknowledged as evidence in land claims under the Australian common law system. As Gray J, former Aboriginal Land Commissioner, and judge with the Federal Court of Australia, commented 'ownership of knowledge of the Songlines is proof of entitlement to land' [21, p. 6].

Experts, including anthropologists and historians, have played a significant role in respect of Indigenous land claims, interpreting and translating the Songlines system and practice into evidence of land ownership in legal proceedings. These non-legal experts have borne a great responsibility in distilling Indigenous legal practices into information acceptable as evidence under the common law–a vastly different legal system–acting as mediators between two very different cultures. Without such expertise Indigenous law would be incomprehensible to common law lawyers and the sophisticated Indigenous land ownership system would remain outside of, and disregarded by, the common law. Ultimately, this expertise has facilitated the acceptance of native title in Australian law.

This article provides a discussion of the Songlines system and analyses the role of Songlines in the legal system of Australia, as symbols of land ownership. The next section focuses on land law in Australia and includes a discussion of the principle of *terra nullius*, which was utilised to justify colonisation of Indigenous lands, in addition to an explanation of how this principle was finally rejected by the Australian courts as native title was recognised. This section also refers to Indigenous land ownership laws. The following section provides an analysis of two important pieces of legislation impacting on Indigenous land ownership, the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA) [3] and the *Native Title Act 1993* (Cth) (NTA) [14]. The article then focuses on the significant role played by experts on Indigenous culture in interpreting the symbols encapsulated in the Songlines to prove native title. This section underlines the need for Indigenous expertise in the legal system, to facilitate valid and legitimate interpretation of Indigenous symbols of land ownership. The final section discusses how the common law has been modified to facilitate customary Indigenous evidence of land ownership and discusses the relationship between the common law and Indigenous customary law.

2 Land Law in Australia—from *terra nullius* to native title

James Cook arrived on the shores of *Terra Australis* in 1770 and he claimed the land for Britain, under the legal principle of *terra nullius*. This principle, meaning 'nobody's land', emanates from Roman sources of European-based international law [31, p. 92]. It connotes territory which was not subjected to the sovereignty of a Westphalian-style State, or over which a previous Westphalian-style sovereign has relinquished sovereignty [31, p. 92]. Colonisers applied the principle to possess foreign lands and declare sovereignty over them, including 'Australia'.

The application of the principle of *terra nullius* to Australia necessarily meant that the existence of legal systems of the Indigenous peoples was denied or ignored. However, Indigenous customary law pre-dated the practice of common law in Australia by millennia. This law, including law regarding land and land ownership, was handed down from generation to generation through Songlines. Colonisation led to the imposition of common law, a legal system ignorant of the importance of the relationship of Indigenous peoples to the land [54, p. 471]. Lilienthal and Ahmad comment on the nature of customary Indigenous law, particularly in respect of the land, stating that it is

> so sophisticated that, the most ancient of lore, integrated with the time of creation, is effectively programmed into the land itself as a library in perpetuity. It cannot possibly be extinguished, unless by military-style scorched earth actions. Taken together, at this level of development of the human consciousness, government officials have insufficient connection to Australian land to be able to understand their ancient environment. [31, p. 101].

Despite its antiquity and sophistication, the application of the principle of *terra nullius* meant that Indigenous land ownership was not recognised until the 1990s, when

this colonial framework began to be dismantled. One important tool in its dismantling was the Songlines, as they held within them Indigenous law on land ownership.

2.1 The *Mabo* Case

The seminal case of *Mabo v Queensland No. 2* [34] marked a vital shift in thinking about land title in Australia. According to Webb, this decision 'was truly a watershed moment in Australian legal history, shifting the foundation of land law on which British claims to possession of Australia were based' [55, p. 31]. Legal proceedings began on 20 May 1982, when a group of Meriam men, Eddie Koiki Mabo, Reverend David Passi, Celuia Mapo Salee, Sam Passi and James Rice, brought an action against the State of Queensland and the Commonwealth of Australia, in the Australian High Court, claiming 'native title' to the Murray Islands. They asserted possessory, proprietary and beneficial ownership rights over their traditional lands on Murray Island in the Torres Strait, claiming that the source of these rights, described as 'native title', emanated from Meriam law, which predated British colonisation and survived the imposition of Crown sovereignty.

The Chief Justice, Sir Harry Gibbs, sent the case to the Supreme Court of Queensland to hear and determine the facts of the claim on 27 February 1986, with Moynihan J appointed as judge. After some initial reluctance Moynihan J accepted the plaintiffs' request that the court adjourn and reconvene on Murray Island for three days, to take evidence from witnesses, who were mostly elderly and frail, and also to view the disputed land. A significant aspect of the claim focused on the traditional laws and customs and the long-term continuity of these practices in determining the validity of claims under native title. Eddie Mabo had offered to provide some evidence as to Indigenous culture and customs in the form of song, but this offer was declined, as, it was felt that it may 'be difficult to put them on the transcript' [33, Transcript of proceedings, p. 890]. However, a significant amount of documentary evidence and testimonies from claimants, in addition to government officials and anthropologists, including in respect of the connection between the songs and land ownership, was submitted. Moynihan J delivered his determination of facts, which ran to 3 volumes, to the Australian High Court in Canberra on 16 November 1990, in which he concluded that Murray Islanders had an enduring relationship to their land that could be categorised as 'customary land ownership', however he discredited much of Mr Mabo's evidence unless corroborated by other reliable witnesses, and his claim was denied.

The Australian High Court then began its hearing of the legal issues in the case. On 3 June 1992, a majority ruled that Australia was not *terra nullius* at the time of colonisation, and they inserted the legal doctrine of native title into Australian law. It was recognised that Indigenous peoples had a system of law and ownership of their lands before European colonisation and settlement. The Court held that the people of Mer had successfully proved that Meriam customs and laws are fundamental to their traditional system of ownership and underpinned their traditional rights and obligations in relation to land. The Court found that native title exists on land if a connection to the land and surrounding waters has been maintained from before the

time Australia was annexed as part of the British Empire and that the land has not been alienated, or transferred legally to another person, corporation or other entity. Native title allows access for the maintenance of laws and customs and the exercise of usufructuary-type rights. While the plaintiffs had only claimed their ancestral land on the small island of Mer in the Torres Strait, the High Court extended the findings of this case to all of Australia and its islands. Native title has since been written into statute, in the NTA [14], however it often falls short of full beneficial ownership, and as highlighted in later decisions, is vulnerable to extinction [6, 40, 49, 50, 57, 58].

As stated above, the *Mabo* case before the Supreme Court of Queensland, heard by Moynihan J, determined the facts in the case, and this subsequent High Court case focused on legal issues. In spite of the copious amount of evidence presented by Murray Islanders and anthropologists as to local customs, laws and relationships with the land in the former, the High Court referred only fleetingly to the importance of Indigenous traditions and ceremonies in its decision, and did not refer to songs, or Songlines at all. Much time was spent discussing important legal principles such as *terra nullius*, sovereignty, and native title, but there was, unfortunately, no attempt to engage at a deep level with the nature of Indigenous law, or the interaction between Indigenous and common law.

2.2 Indigenous Land Ownership Laws

Despite the lack of engagement with the contours and content of Indigenous law in the Australian High Court in *Mabo*, significant analysis has been undertaken in academia, particularly among anthropologists, many of whom have been called on for expert opinions under the ALRA and the NTA. The reflection of Indigenous land ownership in Songlines and related ceremonies is explained by Koch, who states that '[l]and ownership is very complex, but a general principle of descent-based connection applies' [29, p. 159]. Generally, there are two groups with rights in the land who participate in Indigenous ceremonies, i.e. the land owners, whose rights derive from their fathers, and the managers, whose rights are inherited from their mothers. The owners are painted with traditional symbols for their land or country, and dance during the ceremonies, and managers sing, while also ensuring that the dance is done properly. Moyle seeks to explain the relationship between songs and land ownership, based upon research carried out working with Alyawarr people [8] of Central Australia, stating that:

> There are people who are said to own songs. Other people must ask their permission to perform those songs. The people who own those songs own the ceremonies where the songs are sung. The texts of songs relate to Creation myths and other stories. These song texts can be shown on a map. The owners of the ceremonies own the places where the songs travelled through [37, p. 6].

Lilienthal and Ahmad compare Songlines to common law, stating that

> [i]ndigenous narratives may well serve a similar common law purpose, in Indigenous Australia, to that of the English legal and equitable maxims, in

> England, namely as containing and transmitting widely accepted customary laws [31, pp. 80–81].

In a similar vein, Bradley relays the words of Dinny McDinny, an elder from the Borroloola area near the Gulf of Carpentaria, who stated that

> 'Whitefella got that piece of paper — might be lease or something like that — but Yanyuwa and Garrwa mob they got to have *kujika*. When whitefella ask them kids how you know this country belongs to you, they can say we got the *kujika*. *Kujika*, you know, like that piece of paper' [11, p. 29].

Songlines, therefore, are central to land ownership, operating as a symbol of the relationship between the singer, the dancer and the land. Knowledge of a Songline symbolises connection with, and ownership of, the land and if people know the *kujika*, i.e. the Songlines, for an area, they have a title deed for the land. This understanding is now reflected in land law legislation adopted in Australia.

3 Land Law Legislation in Australia

Several pieces of legislation have granted Indigenous people rights to particular tracts of land, however, the ALRA [3] and the NTA [14] have been the most influential and significant in this regard [28, p. 157].

3.1 The ALRA

The ALRA was the first attempt by an Australian government to recognise the Aboriginal system of land ownership in legal form and to enshrine the concept of inalienable freehold title in the Australian legal system. This piece of legislation was adopted in 1976, predating the decision of the Australian High Court in *Mabo No. 2* [34], and follows on from the First Report of the Aboriginal Land Commission, adopted in 1973 [5], which contained recommendations to the Australian government regarding land rights in the Northern Territory, and legally recognised the Aboriginal system of land ownership within the Northern Territory. In 1974 the Northern Land Council and the Central Land Council were set up to facilitate the process of establishing land ownership by Indigenous peoples and to manage the land trusts. Under this Act, the traditional Indigenous owners of land are defined as:

> …a local descent group of Aboriginals who: (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and (b) are entitled by Aboriginal tradition to forage as of right over that land. [3, Section 3].

Aboriginal Land Commissioners were appointed by the federal government, tasked with the job of identifying the traditional Aboriginal owners of the land under claim, and of reporting their findings to the minister and the Administrator of the Northern Territory, as well as producing recommendations for granting the land or parts of the land to the claimants. If a claim is successful, a land trust,

which consisted of Indigenous people with rights to the land is granted inalienable Aboriginal freehold. Decisions in respect of land claims under the ALRA prepared by Aboriginal Land Commissioners are based on a form of an inquiry, rather than a court case. However, the approach of the Northern Territory Government has been adversarial, with 'intense' cross-examinations of witnesses and experts [28, p. 157; 39].

The ALRA process involves both common and Indigenous law, and allows for the admission of atypical types of evidence, such as oral histories and song in support of land claims. As hearings under the ALRA were intended as inquiries, evidential rules were not applied as strictly as with regard to litigated determinations under the NTA, discussed below. 'Claim books', prepared by anthropologists and other consultants which set out the basis for the claim, are utilised in ALRA hearings. These contain documentation of: continuous connection with the land (either by living there, or regular visits or by maintaining the land); genealogies and lists of traditional 'owners' of the land; knowledge of the laws of the land, customs, rituals and songs in the area of the land claim [28, p. 157]. Most Aboriginal Land Commissioner reports reference, or quote from sections of the claim books, and the majority of the reports include references to song in respect of the land claim [2].

While the ALRA does not refer to the validity of these types of evidence, numerous statements by Aboriginal Land Commissioners highlight that such cultural knowledge was vital to support the concept of primary spiritual connection or common spiritual affiliations with the land, which are factors required by the ALRA in determining traditional ownership. This is evident from the *Timber Creek Land Claim*, where Commissioner Maurice stated that

> [e]xpressions of responsibility for the sites and the surrounding country were commonplace. Part of the exercising of responsibility is no doubt involved in painting the designs, singing the songs, and performing the ceremonies for the country [50, p. 16].

The value of this type of evidence is highlighted by Koch, who states that 'performances of songs and ceremonies display knowledge of spiritual and physical aspects of the land under claim' [29, p. 8].

The reports on ALRA land claims describe in depth the importance of songs, as well as ceremonies and rituals to Indigenous peoples and are central to connection with the land [42]. There is a significant amount of repetition in the reports on this matter, to the point where '[s]ometimes these explanatory sections became almost formulaic, especially in the reports by Commissioners Gray and Olney' [29, p. 12]. Songs have often been performed in such land claims, with land commissioners and staff travelling to a number of sites referred to in the claim, and claimants attempting to prove their title to land through knowledge of song and ceremonies at these sites. The performances have been supported by explanations from community elders and other experts as to the connection between the performances, the performers, and the land.

The need to allow the admission of evidence non-typical under the common law was underlined by Gray J, who stated:

> I sometimes think that there is value in adopting a mirror world approach, turning things on their heads and seeing how they look. I have a vision in which a number of pastoral leaseholders are required to prove their title to land. The pastoral leaseholders are required to do so before a group of old Aboriginal people who are sitting around. The pastoral leaseholders produce their pieces of paper, their title documents. The old Aboriginal people say that these are no good. They ask, "Where are your songs? Where are your stories? Where are your dances? Where are your body paintings? We don't recognise these pieces of paper." The pastoral leaseholders object. They say, "By our legal system these are our title deeds." The Aboriginal people respond, "Well, they are not ours" [21, p. 6].

He also commented:

> Aboriginal culture is reflected in ceremonies. These involve painting, singing, dancing and the use of sacred objects…Often ceremony, song, dance and design are the very title deeds to land. The ability to have a particular design painted on your body, or to paint it on someone else's body, to sing a particular song, or to perform a particular dance, is proof of entitlement to particular lands [21, p. 6].

Gray J emphasised the importance of songs to Indigenous peoples, in addition to other customs, such as painting, dancing, and the use of sacred objects in ceremonies, commenting that such ceremonies were celebrations of connection with the land, but concluded that they are much more than that. He stated that the ceremonies

> are very much involved with the passing on of knowledge to those who are entitled to receive it, the rehearsal of knowledge already gained to ensure that it is kept in the correct form, the social organisation of communities and who is entitled to say and do what. …..Often ceremony, song, dance and design are the very title deeds to land. The ability to have a particular design pained on your body, or to paint it on somebody else's body, to sing a particular song, or to perform a particular dance, is proof of entitlement to particular lands [21, p. 6].

However, while Gray J was accepting of such evidence in land claims, he nevertheless illustrated that the common law legal system grappled with such unconventional evidence, commenting that '[i]t is … difficult … to write reports on land rights claims when you cannot actually say what the evidence was in some respects' [21, p. 8].

3.2 The NTA

The NTA was passed in response to the findings of the High Court of Australia in *Mabo No. 2* [34]. Unlike the ALRA [3], this Act applies to all of mainland Australia, its islands and the Torres, and defines native title rights as:

> …the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where: (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and (c) the rights and interests are recognised by the common law of Australia [14, Section 223].

There are several ways in which claims under the NTA are determined; litigated determination, consent determinations and unopposed determinations. Litigated determinations are made on the basis of a trial, with determinations supported by written judgments. Consent determinations are made once an agreement has been reached between the claimants, the state or territory government and any other parties with a material interest in the outcome. Unopposed determinations are lodged by one applicant if other interested parties raise no objections and are determined without a hearing.

Under Section 223(1)(b) of the NTA [14] it is required that a connection with the land must be proven for a native title claim to be successful. 'Connection reports' are submitted to support the land claims. Such reports 'present evidence closely aligned with the concepts of laws and customs and how these fit with rights and interests, thus differing in organisation from the claim books' [29, p. 7]. The NTA did not provide guidance as to how connection is proved. However, this was clarified by the decision of the High Court in the *Yorta Yorta* case [58]. The majority determined that native title rights and interests 'originate in a normative system' which controlled the observance of the traditional system of law and custom [58, para. 43]. The Court stated that if said normative system had ceased to exist after colonisation, the rights and interests which owe their existence to that system will have ceased to exist [58, para. 47]. In addition, it was held that the normative system could not be revived once it had ceased to operate [58, para. 47]. The majority noted that a 'society' for the purposes of native title 'is to be understood as a body of persons united in and by its acknowledgment and observance of a body of law and customs' [58, para. 49]. Thus, in order for native title to be recognised, a group had to show that they formed a society, substantially the same as that which existed at sovereignty, and had continued to observe a system of laws and customs which were substantially unaltered from those observed by their ancestors at sovereignty. In this regard, Brandis comments that 'proof of native title can be a difficulty and lengthy process' [12, p. 49].

Claims under the NTA are heard by judges from the Federal Court, who make judicial determinations about whether native title exists, to whom this title belongs, and which rights are entailed. Native Title Representative Bodies were created to support Indigenous peoples in preparing their claims and to assist with matters arising after claims. If a native title claim is successful, the rights stipulated in the judgment are recognised. In general, NTA determinations differ in a number of ways from Aboriginal Land Commissioners reports, made under the ALRA. Koch states that

> [w]ith a few notable exceptions, such as some of the litigated cases conducted in the Northern Territory and Western Australia, they contain less anthropological detail and concentrate on the two concepts of 'rights and interests' and 'law and custom [29, p. 10].

In respect of Songlines, most of the references to song are included in connection reports prepared by anthropologists and historians under the NTA. However, access to these is restricted and requires permission from land councils and the Court, with only judges' reports available online.

4 Interpreting the Symbols

Because native title involves the interplay between two very different legal systems, the Australian common law and Indigenous customary law, it is necessary that an intermediary exists between the two in land claims, in order to ensure this appreciation of Songlines as a source of land rights. Experts have been asked to assist in legal proceedings concerning land since the *Gove* case in the 1970s. Anthropologists provide vital evidence as to the nature and meaning of Songlines for Land Commissioners and judges, and 'interpret' Indigenous law in respect of land rights. As highlighted by Koch,

> [e]vidence in the form of song and ceremony needs to be explained in a way that fits both the Indigenous and Anglo-Australian legal systems. The operative word here is 'legal', and lawyers have taken the upper hand in conducting the claim process. However, anthropologists are vital because they can operate as mediators between the two systems of law, ensuring that the value of evidence presented traditionally will be fully appreciated and supportive of the case — or the opposite in the case of anthropologists employed by the state [29, p. 10].

The importance of the evidence of anthropologists in respect of the symbolic meaning of Songlines has been central to the success of land claims in Australia and cannot be overstated. Commissioner Toohey, the first commissioner to hear a land claim under the ALRA, in the *Borroloola Land Claim*, underscored their importance, stating:

> Having heard evidence from an anthropologist, from individual Aboriginals and indirectly from a large number of Aboriginals through videotapes, it seemed to me that the most appropriate method of checking the claim was to submit the evidentiary material to an anthropologist, preferably someone familiar with the area [9, p. 3].

For the *Borroloola Land Claim*, two anthropologists and another person with extensive knowledge of the area assisted Commissioner Toohey regarding songs, ceremonies and other customs, and for all subsequent claims it was standard practice for Commissioners, and the Northern Territory Government to be advised by both anthropologist and lawyers. Without such aids in interpretation of Indigenous

culture, these land claims could have failed, as the meanings encapsulated in the Songlinges and their relationship with land ownership would have been undecipherable in the common law legal system. Without such expertise the complexities and operation of Indigenous law could have remained ignored by the common law system.

4.1 Indigenous Expertise

Cultural expertise is defined by Holden as 'the special knowledge that enables socio-legal scholars, experts in non-European laws and cultures, or, more generally speaking, cultural mediators—the so-called cultural brokers—to locate and describe relevant facts in light of the particular background of the claimants and litigants and for the use of the court' [25; 26, p. 29]. Interactions between the common law and customary Indigenous law are challenging, given the numerous differences in nature and form between the two. Interpreting the meaning and significance of Songlines for the purposes of non-Indigenous lawyers, judges and commissioners poses challenges, and given the importance of Songlines as evidence of title to land, the role of the anthropologist and other experts is very significant. However, in many cases, such experts have been, and are, non-Indigenous. There has been significant critique over how 'Western', non-Indigenous anthropologists and researchers have interpreted aspects of Indigenous life in various realms. Nakata *et al*, for example, focusing on the field of astronomy, state that

> [o]ne must…explore ways of re-examining and reinterpreting Indigenous astronomical knowledge collected by early anthropologists and missionaries that are culturally sensitive and that recognise the contexts in which the knowledge was collected [38, p. 4].

The same holds true in respect of customary Indigenous law and Songlines. While non-Indigenous experts have contributed greatly to Indigenous land rights, one must still wonder if anything has been lost in the 'translation' of Indigenous law for use in common law courts? Can the true meaning of the Songlines be adequately conceptualised and / or expressed by someone of a different culture?

Anthropologists are required to prepare an anthropological report in line with instructions from lawyers, and can be required to give evidence in Court, normally in relation to this report. The reports contain numerous facts, but also contain a discursive or analytical dimension, where the anthropologist interprets the facts for consumption by non-Indigenous people. This focuses on the Indigenous system of social organisation with regard to ownership of, and connection to, land and sea; the continuing relationship of Indigenous groups with land and sea and their customary practices regarding land and sea; and the nature of laws and custom regarding land and sea. This evidence aligns with the legal requirements for recognition of legal title. In engaging in cross-cultural discourse, anthropologists provide an interpretation of Indigenous custom, tradition, and laws for a non-Indigenous audience which may lead to the development of anthropological constructs, i.e. the use of terms or concepts not necessarily recognised by the Indigenous group [36]. Morphy

comments that the NTA is an exercise in 'cross-cultural translation' and 'an attempt to take account of aspects of Indigenous Australian law in relation to land, within the umbrella of Australian law, and it uses concepts that are not themselves an explicit part of Aboriginal law, such as continuity of tradition' [36, p. 138].

This highlights the importance of Indigenous expertise in legal proceedings concerning Indigenous peoples, including land claims, in order to ensure an authentic and valid explanation of Indigenous law. Indigenous expertise can be defined as

> the special knowledge and experience of Indigenous peoples which locates and describes relevant facts in light of their particular history, background, and context, and facilitates the explanation of Indigenous concepts to a non-Indigenous audience [24, n. p.].

In order to ensure a true interpretation of Songlines for the purposes of legal claims, it is important that the process promotes and facilitates the input of Indigenous anthropologists and experts.

5 Using the Symbols

As has been noted above, there are difficulties in applying two co-existing legal systems, and many questions persist as to the relationship between Indigenous customary law and the common law in Australia and how they are to be implemented effectively to ensure justice. The question of the relationship between Indigenous and common law had been raised in some early cases in Australia. In the case of *R v Ballard* (1829) [45] Forbes CJ and Dowling J recognised a plurality of laws in Australia and the obligation of English law to both recognise and protect those other laws, including with respect to the property of Indigenous peoples. In this case there was some uncertainty as to whether common law applied to Indigenous peoples. Ballard, an Indigenous person, had been committed to trial for murder of another Indigenous person, and the question arose if he could be tried in a common law court. It was held that it would be unjust to apply English law to a crime committed by one Indigenous person against another, as Indigenous peoples make laws for themselves, and, therefore, common law had no right to intervene. However, it was also found that common law applied to intercultural cases. However, in 1836 Forbes CJ and Dowling J changed their minds, and concurred with the decision of Burton J in the case of *R v Murrell*, where it was held that Indigenous peoples had no law but only 'lewd practices and irrational superstitions contrary to Divine Law and consistent only with the grossest darkness' [46]. This case dismissed the reality of the co-existence of two laws, and worse, denied the existence of Indigenous law completely.

It was not until the *Gove* land rights case (*Milirrpum v Nabalco Pty Ltd*) [35] in 1971 that an Australian higher court once again acknowledged the existence of Indigenous law. However, the relationship between the two legal systems and how they can validly interact in respect of subjects of law is a question which has been ignored by Australian courts. The decision of the Australian High Court in *Mabo* continues this trend, failing to address in depth the nature of Indigenous law, its sources—including Songlines—or its relationship with the common law.

Some modifications have been made to the common law to facilitate Indigenous customary law in the area of the law of evidence. Customary evidence, including songs and ceremonies, has been presented for claims under the NTA. The submission of this type of evidence is provided for in the Federal Court Rules 2011 [19], which states:

> If evidence of a cultural or customary nature is to be given by way of singing, dancing, storytelling or in any way other than in the normal course of giving evidence, the party seeking to adduce the evidence must tell the Court, within a reasonable time before the evidence is proposed to be given:
>
> (a) where, when and in what form it is proposed to give the evidence; and
>
> (b) of any issues of secrecy or confidentiality relating to the evidence or part of the evidence [19, p. 325].

The importance of the amendment of the hearsay rule in respect of Indigenous land claims has been highlighted by Gray J, who comments that '[t]he hearsay rule stands in the way of indigenous attempts to prove their legal systems precisely because within Aboriginal systems these kinds of statements present no difficulty' [21, p. 9]. Under the Australian legal system, the hearsay rule is dealt with in the Evidence Act 1995 [18], which allows first-hand hearsay in a number of situations. However, as stated by Gray J,

> …first-hand hearsay is not enough for an Aboriginal oral tradition, because often information has come from a person's father and grandfather and great-grandfather and so on .. It seems to me that the circumstances in which the court will 'otherwise order', that is will dispense with the rules of evidence, are likely to be very controversial over the next few years in applications for determinations of native title [21, p. 9].

The use of oral evidence concerning Indigenous customs in land claims has also been accepted in other jurisdictions [10], including in case of *Delgamuukw v British Columbia* [15], where the Canadian Supreme Court rejected the trial judge's dismissal of oral traditions and accepted them as having inherent value independent of any written evidence. Analysing the use of oral testimony in both Canada and Australia, Akhtar highlights the importance of the acceptance of such testimony in the context of justice and the right to a fair trial, stating:

> The western-centric logic of documentary evidence has certainly been found to not be the only means of arguing a case that includes native people. However, the courts in common law countries have yet to adopt the receptive theory. The theory is based on granting a fair hearing to the claimants and adopting the rule against bias, which are themselves part of natural justice that is intrinsic to the common law. The process will greatly facilitate admissibility if the oral testimony is considered with its epistemology [4, p. 424].

International human rights law protects the right to a fair trial and to fair procedures, with Article 14 of the *International Covenant on Civil and Political Rights*

(ICCPR) [52] stating that '[a]ll persons shall be equal before the courts and tribunals.' However, it does not delve into the issue of Indigenous law or indeed of legal pluralism. In the context of the rights of Indigenous peoples, however, Article 40 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) [53] states:

> Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

This is not a particularly strong provision; although it requires Indigenous 'customs, traditions, rules and legal system' to be considered by States, it fails to address if, or how, Indigenous law can be applied by non-Indigenous courts. States may 'consider', and dismiss, Indigenous law. The issue of land claims is also dealt with in Article 27 of UNDRIP, which provides that States are to establish and implement processes to recognise and adjudicate the rights of Indigenous peoples related to their land, territories and resources. Again, this provision is silent with regard to implementation.

The issue of access to justice of Indigenous peoples has been highlighted by a number of UN bodies. For example, the Expert Mechanism on the Rights of Indigenous Peoples adopted a report in 2013, entitled 'Access to justice in the promotion and protection of the rights of Indigenous Peoples' [17]. Paragraph 6 states that

> [a] particular dimension of access to justice relates to overcoming long-standing historical injustices and discrimination, including in relation to colonization and dispossession of indigenous peoples' lands, territories and resources.

Paragraph 28 states that 'the cultural rights of indigenous peoples include recognition and practice of their justice systems, as well as recognition of their traditional customs, values and languages by courts and legal procedures.'

Australia's practice has, to an extent, been in line with Paragraph 28, with the adoption of the ALRA and the NTA and similar pieces of legislation, in addition to the subsequent modification of rules on evidence, and recent land rights cases. However, mere 'recognition' of Indigenous legal procedures is not enough. States, including Australia, must identify how Indigenous law can co-exist and be implemented alongside other legal systems effectively, in order to ensure de facto access to justice for Indigenous peoples. The Australian Law Reform Commission produced a report, originally tabled in 1986, thus pre-dating the decision in *Mabo No. 2*, as to whether it would be desirable to apply, either in whole or in part, Aboriginal customary law to Indigenous peoples [7]. The report originally concluded that customary laws had a significant influence on the lives of many Indigenous people, but highlighted that, with only a few exceptions, Aboriginal

customary laws have never been recognised by general Australian law. The report also recognised that there was no one 'authentic version' of customary law, because customary law was dynamic and constantly changing. The Report contained numerous recommendations on various legal areas, including criminal law, family law, hunting and fishing, but did not make specific recommendations with regard to land, apart from recognising traditional marriages in respect of the distribution of property on death. The Report did not recommend the establishment of Indigenous courts but rather developed criteria to apply to any local justice systems in Aboriginal communities. Focusing on how customary law should be recognised, the Commission concluded that as far as possible, it should be recognised by existing judicial and administrative authorities, rather than creating new and separate legal structures, unless the need for these was clearly demonstrated. It also found that the recognition of Aboriginal customary laws should be carried out by means of federal legislation applicable in all States and Territories, and that governments and Indigenous groups should work together to decide on the methods by which Indigenous customary laws are recognised.

The implementation of the Report's Recommendations was very slow and little was done until the 1990s. Updates to the Report on the Commission's website focus on the reception of customary law in Australian courts, stating that '[t]he courts have been reluctant to confine the principle involved in *Mabo* and thus the common law has to a greater extent embraced the recognition of customary law' [7], and referring to the Australian High Court's decisions in *The Wik Peoples v Queensland* (1996) [56] and *Yanner v Eaton* (1999) [57]. The updates also note that legislation has been adopted which implements some of the changes recommended, including the NTA.

There has been strong support among Indigenous peoples for the recognition of Indigenous rights in the Australian legal system, however, very little progress has been made in creating a solid structure for the implementation of a dual system of law. While the legislation and cases in respect of Indigenous land claims discussed here illustrate that the legal system recognises that Indigenous customary law exists, effective mechanisms for its implementation are yet to be established. In respect of land claims, Indigenous law is implemented via the common law structure. While the common law has been modified a little to accommodate Indigenous law in respect of the submission of oral evidence etc, the relationship between the two legal systems, and the implementation of Indigenous law needs further examination in Australia. This is part of a wider question of the place of Aboriginal and Torres Strait Islander peoples within the political and legal structures of Australia. The ongoing Uluru process, which began with the adoption of the Uluru Statement in 2017 by delegates to an Aboriginal and Torres Strait Islander Referendum Convention, calls for a 'First Nations Voice' in the Australian Constitution and a 'Makarrata Commission' to oversee a process of 'agreement-making' and 'truth-telling' between the government and Aboriginal and Torres Strait Islander peoples. This initiative draws on previous recommendations for constitutional recognition of Indigenous peoples in Australia. The Statement begins:

> Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it

> under our own laws and customs. This our ancestors did, according to the reckoning of our culture, from the Creation, according to the common law from 'time immemorial', and according to science more than 60,000 years ago [1]

As part of the ongoing Uluru process, the role of Indigenous customary law should be an important issue to address and constitutional recognition of Indigenous peoples would hopefully trigger an indepth examination of how the two systems of law can be adequately implemented. A number of recommendations have been made in the fields of policy and academia as to how Indigenous and non-Indigenous systems of land ownership work together [22, 23]. It is now up to politicians to put an effective and fair system in place.

6 Conclusion

Shaw states that

> [a]lthough symbolic forms such as music and fiction can be distinguished from legal and factual 'truths' by means of a diverse array of peculiarities; specifically, they have the unique ability to usefully indicate beyond particular facts and even laws. Engaging with a wider sensory set of human capacities, they are often able to articulate a deeper truth which transcends the bare application of rules and, rather, requires lawmakers to look beyond particular facts to the bigger picture [48, p. 302; 44].

In the context of Indigenous peoples in Australia, traditions, ceremonies, dances, and song are symbols of the Indigenous truth of land ownership. The ALRA [3] and the NTA [14] and the flexibility accorded to rules concerning evidence in land claims has been of paramount importance in assessing not just facts, but the bigger picture of custom and native title. This has fostered the implementation of a more just legal framework for Aboriginal and Torres Strait Islander peoples. However, while the validity of Indigenous customary law [30] has been recognised in cases and legislation, much more attention must be focused on the relationship between customary law and the common law in order to ensure effective and just implementation of these systems of law. Gray J, speaking in 1999, acknowledged the significance of the relationship between the two legal systems. He stated:

> What the Anglo-Australian legal system is attempting to grapple with is the intermeshing of Aboriginal legal systems with it by recognising native title, and by recognising indigenous legal systems for that purpose, the High Court made it necessary for those involved in the Anglo-Australian legal system to understand indigenous legal systems. There can be no doubt that in this respect there remains abysmal ignorance [21, p. 5].

Over 20 years later, this remains the case. Customary Indigenous law has been recognised by Australian courts and in legislation, but has been implemented via the common law, rather than as a legal system in its own right. Australia needs to readdress the question of the relationship between customary and common law and how

most effectively to implement both systems in order to ensure a fair and just legal process for all. Attention must be refocused on issues such as if Indigenous courts could or should be established to implement customary law and the impact of such a move on the principle of equality before the law and the right to fair procedures. Given the Uluru process, the time is now ripe for such scrutiny. In the meantime, attention must remain on Songlines and music as a vital source of Indigenous customary law in respect of land ownership and their valid translation as Indigenous truth [20].

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