

Land, Rights, Laws: Issues of Native Title



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The common law recognition of native title in the High Court's Mabo decision in 1992 and the Commonwealth Native Title Act have transformed the ways in which Indigenous peoples' rights over land may be formally recognised and incorporated within Australian legal and property regimes. The process of implementation has raised a number of crucial issues of concern to native title claimants and other interested parties. This series of papers is designed to contribute to the information and discussion.

This paper examines the connections to country and kin asserted by 'local' and 'diaspora'¹ peoples in the central Cape York Peninsula, focusing on the relationship between these assertions and the land claims within which they are commonly embedded. Distinctions in the forms of Aboriginal land tenure and kinship between the two sets of people are discussed, examining historical differences which have led to their development and the ways in which these distinctions can become the focus of schisms in land claims. It is suggested that, beyond past commonalties and connections, fundamental contemporary principles can be seen as common to both groups, providing a useful focus for claims in which such schisms are apparent.

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'Local' and 'Diaspora' Connections to Country and Kin in Central Cape York Peninsula²

Benjamin Richard Smith³

Anthropologists working on land claims in central Cape York Peninsula⁴, as elsewhere in Australia, have been faced with the problem of reconciling the claims to 'country'⁵ made by two relatively distinct sets of Aboriginal people – those people whose forebears were removed from the region by government intervention, and those

whose families have remained on or nearby the land in question. These two groups, when involved in a land claim, often manifest relationships marked by initial distrust and antagonism. Further, it is clear from my anthropological experience that the ways in which they assert connections to kin and country demonstrate what appear to be marked differences which present practical and conceptual problems for those running land claims.

The appearance of these tensions is inseparable from the advent of the 'Native Title era' (cf. Fingleton and Finlayson 1995) and the advent of claims under the *Aboriginal Land Act 1991* (Qld) which immediately preceded *Mabo (No.2)* and the *Native Title Act 1993* (Cth). The return of removed families to the country that they associate with their forebears has typically occurred within the frame of land claims. Simultaneously, anthropological engagement with the two sets of people has been predominantly within land claim literature, both through the preparation of 'claimbooks' and in academic writing on the subject.

One of the earliest approaches to this topic in Queensland is Trigger, who differentiates between 'traditional' and 'historical' people (and land claims) in Queensland, the latter group being "not in command of such systematic traditional knowledge which associates people with land" (Trigger 1983:193). Trigger further distinguishes two forms of 'historical association': "associations with the traditional region from which populations were removed... [and] associations with the region populations are currently resident in" (Trigger 1983:196-97).

This differentiation has, more recently, been criticised by Rigsby, who notes that he:

has become uneasy...with the view that Diaspora people in Queensland have only relationships of historical association to land...many Diaspora people and resident traditional owners contest that view strongly... (1995:26)

Implications of terminology

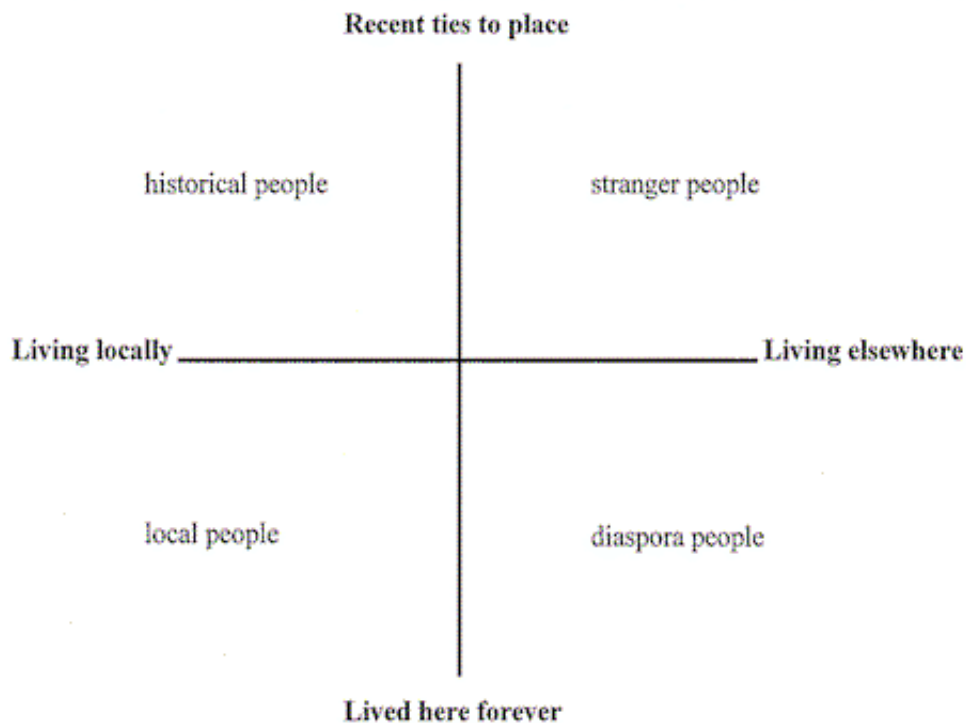
Rigsby uses the term 'diaspora', rather than 'historical', to designate those Aboriginal families dispersed across Queensland (and other States) as a result of government policies and their local administrative implementation (cf. Kidd 1997, Rowley 1970-71 a, b & c).⁶ However, other authors (for example, Martin 1997) have continued to use 'historical' when describing both those people who are living in a particular area but who are from elsewhere in the region and those who have moved away from an area into another region entirely. Differing understandings of the term 'historical' have also been apparent between Queensland Land Tribunal members and Aboriginal claimants in *Aboriginal Land Act 1991* (Qld) claims (Rigsby 1999).

I believe there is an important distinction to be made between 'diaspora' people on one hand, and 'historical' people on the other, although, like Rigsby, I am uncomfortable with the implications of the latter term as it is commonly used.⁷ It seems important to separate the dimension of location from that of substance of ties.⁸ Differentiating those historical people, whose origins lie elsewhere and who reside within a region in which they have few ties of any depth, from local and diaspora people and from those who are 'strangers'.⁹ Here, 'local' people are those who have continued to live on or near the country with which they identify, in the company of

kin with similar connections in the region. ‘Diaspora’ people are those that have physically removed from an area or region in which they hold a substantial identity (and the Aboriginal people who remain there), but who themselves maintain a sense of this connection and knowledge of forebears and country which acts to substantiate it. All of these terms are relational. A family whose Kaanju forebear was removed from Coen and married into a Birigaba family in Bowen might be considered as a diaspora person from a Coen/Kaanju perspective, but local from a Bowen/Birigaba viewpoint.¹⁰ ‘Historical’ is similarly a relational term.¹¹

A distinction between substantial and locational ties creates two spectrums of association with a particular place or region. Substantial ties range from those ‘traditional’ ties, commonly expressed by Aboriginal people as having ‘*been here forever*’, or ‘*since the dawn of time*’, to ties based only in recent association. These substantial ties articulate against the closeness or distance of the current location of a person or family from the country in question. The articulation of the two kinds of tie result in four broad categories of Aboriginal people, relative to a particular place, as illustrated in Diagram 1 below.

Diagram 1: Locational and substantial ties to Country¹²



Central Cape York Peninsula

In the central Cape York Peninsula, problems of perspective commonly arise between local and diaspora groups – those typically concerned with land claims – which can create difficulties in running claims. Diaspora people often reject a distinction between their connection and those of local families, asserting that, regardless of location, they hold equal interests in (and connection to) the country of their forebears.¹³ In such cases there is a

marked difference in approach to connections between local people and their diaspora counterparts. Amongst the former, interests in land tend to be seen as inseparable from continuing relationships with other local people and with the country itself. Diaspora people, on the other hand, commonly view such connections as a link to place inherited through substance and knowledge passed down from forebears.

This distinction is also reflected in knowledge held about country¹⁴ and understandings about group through which connection to country is defined. Senior local people tend to hold a body of knowledge about place far in excess of diaspora people, including (and interweaving) cosmological knowledge and personal histories of themselves and their forebears (cf. Smith, forthcoming, a). This body of knowledge is seen as inseparable from a direct geographical understanding of place – to know about a ‘*Story (Dreaming) Place*’ means nothing if you don’t know the place itself. Diaspora people’s knowledge tends to be more limited and abstracted from any ‘on the ground’ knowledge of place. Local understandings tend to stress particular relationships of people and groups to particular places and tracts of land, whereas diaspora understandings usually emphasise the connection between language-named ‘*tribes*’ and the entirety of country associated with a particular language.

The right to speak for country

These disparate understandings emerge, often antagonistically, within the process of land claims. From early claimant meetings onwards, local and diaspora people may clash over asserted knowledge, ownership and the right to ‘...*speak for country*...’. In more than one claim in the central Cape York Peninsula, diaspora people who have recently returned to the region have demanded knowledge about country from local members of the same (language-named) tribe (cf. Smith, forthcoming, b), a phenomenon productive of mutual offence. On the one hand, these local people are often unsure of the descent credentials of diaspora people and are thus unwilling to divulge information to them. They also perceive these returnees as being in a position which necessitates respect towards themselves as those holding knowledge and authority, and expect the demonstration of a sense of responsibility towards information that has already been given (Rigsby 1995:26). On the other hand, diaspora people commonly regard such information as their birthright and heritage, and see themselves as holding the same rights towards such information as local people.

Many diaspora people complain of having experienced a ‘double rejection’, first through racist treatment by white/mainstream Australia, and then in their rejection by their estranged Aboriginal kin. For them the unwillingness of local people to divulge information, recognise them as kin and acknowledge their equal property rights is a

form of selfishness and rejection. In response, their increasingly strong demands and anger inflame local tempers, with local people regarding these demands as the opposite of ‘*proper*’ behaviour. Worsening relations strengthen the wedge driven between both groups.

Kinship and territoriality models

When discussing the distinctions apparent between local and diaspora understandings, it is useful to elaborate on the models held within the two groups about kinship and territoriality. As noted by Trigger (1983:197), both sets of land/people relationships have transformed themselves to deal with the consequences of European-Australian colonialism. In examining contemporary Aboriginal land tenure it becomes apparent that, whilst tenure has developed from ‘classical’ or ‘pre-contact’ forms in different ways, disparities are not absolute,

demonstrating fundamental similarities with other forms, including ‘classical’ ones.

I have discussed the contemporary forms of local territoriality and land-holding groups in central Cape York Peninsula elsewhere (Smith 2000; Smith, forthcoming, b; see also Sutton 1998). In brief, local forms have shifted away from an emphasis on patrilineally-recruited corporate groups (‘clans’) with common interests in well defined tracts of land and their associated bodies of knowledge and tradition (‘estates’), towards increasingly cognatically oriented forms, incorporating cross-cutting interests in country and involving areas and groups of varying size manifested in differing social and temporal contexts. Nonetheless, and in spite of an increasing emphasis on (language-named) tribal identities, there remains a primary emphasis on groups of a size reminiscent of classical land-owning groups. Thus, rather than a move to fluidity (cf. Sutton 1999) there have been marked continuities in particular families’ associations with specific places and areas, including, though certainly not limited to, transformations of previous clan-estates.¹⁵

Among diaspora people, the shift towards a tribal identity has been far greater – due, it would appear, to the linked factors of removal and the necessity of establishing and maintaining identity-based groups on settlements to the south. Thus, amongst the Kaanju people removed to Palm Island,¹⁶ a common Kaanju identity rather than differentiated clan and intra-linguistic differences¹⁷ were stressed and reproduced in assertions of territorial and territorially-based identity amongst generations born away from the Peninsula.¹⁸ Moreover, people belonging to less well represented linguistic groups with local connections to Kaanju people appear, in some cases, to have amalgamated to the Kaanju identity-group. This common identity was reinforced through shared residence away from the main settlement in what is now called ‘*Kaanju camp*’ or ‘*Kaanju creek*’ to the north of Palm Island. Whilst detailed knowledge about country and fine-grain socio-territorial distinctions were lost, other aspects of Kaanju social and cultural life – including language, secular dancing and funerary practice – were maintained to a greater or lesser extent. On visiting Palm Island in February 1999, I was struck by the ability of younger Kaanju people (in their 30s) to ‘*hear*’ (understand), and even speak some of their language.

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It is not primarily on the grounds of linguistic or ‘cultural’ maintenance by which diaspora people are (initially at least) excluded by local families. The main factor is their social and genealogical removal from the field of familiarity in which shared interests in country are locally constituted. In general, diaspora people were removed one or more generations previous; the majority of removals apparently occurring in the early 20th century. Given that the horizon of local kinship memory extends back only to close relatives in the parental or grandparental generation (Smith 2000; see also Finlayson and Curthoys 1997), memories of many of those removed have been lost in the region. Whilst diaspora families have retained knowledge of themselves as coming from the region, the kin from whom they trace these links have often been forgotten by local families. Similarly, it is not only at a conceptual level, but more importantly at a level of day-to-day familiarity and association, that diaspora families are ‘*stranger people*’ to local families.

Underlying this is the local inseparability of continuing association with, and links between, people and country (Smith, forthcoming, a). Moreover, the country to which the forebears of these diaspora families belonged has usually been reassigned – in terms of ownership, or at least ‘*holding*’ (regency) – amongst local families. As these families have maintained forms of tenure predicated on ranges of culturally appropriate minimum and maximum numbers of people to ensure socially viable territoriality (Smith forthcoming, b; Smith 2000), the re-appearance of others also asserting such interests is problematic, even beyond the question of

their recognition.

In this way, local resistance is three-fold: first diaspora people may not be recognised as having known local forebears; second they may be unfamiliar, or '*stranger people*' to local families; and third, the country over which they wish to assert property rights is commonly replete with local interests. In Sutton's terms, from a local perspective, many returning diaspora people are recognised as holding neither proximate title, nor being as part of the group in which underlying title is constituted (cf. Sutton 1996). This does not, however, preclude their inclusion into local tenure. Over time, within land claims, diaspora people become incorporated into both the locally-conceived system of 'underlying regional tenure', and develop a locally recognised 'proximate' identity. At the same time, notions of tenure and identities held by diaspora people tend to be transformed.

Initially, diaspora people's conceptualisations tend to be broadly 'tribal' in terms of landed interest, and similarly extensive in their kinship-based sense of position in the local region. The former is reflective of a sense of language-named tribe as the basic form of organisation of 'traditional' Aboriginal society.¹⁹ With this model, returning diaspora people tend to presume that each tribe holds homogenous rights over a '*tribal area*' of language-associated country. Although a similar tribal model exists in some instances amongst local people,²⁰ it is somewhat differently constituted, not least in the personnel associated with such country (cf. Smith, forthcoming, b). In terms of kinship, many diaspora people hold a map of extended kin relations (often focussed on genealogical research conducted by particular family members) in which sets of extended kin of a more or less classificatory nature are collapsed into actual sibling relationships, particularly in senior generations. Although such inclusivity reflects some aspects of local practice (for example, kinship norms²¹), when it is mapped onto

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land-family relations it becomes problematic, tending to enforce a homogenous tribal model at odds with local perspectives.

Recognition within land claims

In the process of land claims, the forum for most initial interaction between local and diaspora families, such perspectives become problematised. Simultaneously, relationships between local and diaspora groups are developed, both ideationally and in terms of day-to-day interaction. Anthropologists have tended to play a key role here, with genealogical research establishing links between local and diaspora antecedents recognisable to both groups, which allow the structuring of particular kin relationships between the descendants of these forebears. This process has, however, tended to rely on the recall of diaspora forebears, assisted by access to earlier anthropological data, by older local people.²² As these older people '*finish up*', it seems that this process of recognition may well become more problematic, or at least change its form.

With the acceptance of these prior ties, it becomes possible for local people to recognise diaspora people as kin. This process of recognition appears to be linked to local realisations that the permanent return of diaspora people to the region is unlikely, hence contemporary Indigenous property distribution is fundamentally unthreatened. Spending time with people simultaneously serves to establish bonds of familiarity; exchanges of conversation facilitating the sharing of histories and knowledge. Local people – particularly where they are treated with a degree of respect mirroring their expectations – will begin to reveal knowledge about kin relationships and country, including more specific local-level territorial distinctions, into

which the diaspora people begin to be figured. As this process occurs, diaspora people begin to revise their understandings of kin relationships and relationships between people and country. Over time, the two relatively distinct groups, and their understandings, reconfigure each other.

Shared fundamentals between diaspora and local people

This regeneration of a more unitary form of contemporary land-tenure is made possible by fundamentals shared between diaspora and local people. This is better understood if the recent (and not so recent) emphasis on potential extension of interests in country to larger-scale groups is considered. As Merlan (1997:11) notes, there is an 'epistemic openness' apparent in Aboriginal connections to country, such that both smaller-scale/more locally specific and wider-scale/extended frames of connection and interest may be manifested. Evidence on eastern Cape York, in which clan-estate and overarching broader links to country were (and remain) apparent (Chase 1980) suggests this is not merely a post-contact phenomenon. In the Coen region, the evidence suggests that the emphasised level of extension has reflected available numbers of personnel and the underlying form of day-to-day land-person relationship (Smith, forthcoming, b). This being the case, it should not come as a surprise that many local people have retained a smaller-scale identification with country and a more detailed knowledge of kinship links between remembered family, as well as a present oriented rather than historical emphasis on these relationships. Diaspora people, on the other hand, present an expectable tendency to foreground wider relationships to country and kin, and a historical relationship to both. These are

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not simply matters of cultural erosion or lack thereof (Merlan 1998; Smith, forthcoming, b). Rather, they represent two distinct trajectories of cultural continuity articulating with changing contexts.

On these grounds, treated separately, I would suggest that both local and diaspora assertions of continuing customary law and practice could form the ground for land claims on Cape York Peninsula. It is important, however, to realise that these assertions are not embedded in separate systems. They both apply to the same areas of country and are descended from a common systemic ancestor. In practical terms, it is apparent that local and diaspora groups, although often initially antagonistic, are commonly able to resolve their differences in the process of land claims. A historical approach to the local/diaspora situation makes it apparent that, despite differing emphases on level of extension of interests in land, similar principles of people country relations are common to both.²³ It is such principles that form the basis for reconciliation between the two groups. The differences between local and diaspora relations to country and kin are thus differences of emphasis, rather than being fundamental.

Conclusion

In conclusion, whilst it is my belief that diaspora and local assertions of ties to country and kin in the central Cape York region are both recognisable as manifestations of continuing Aboriginal tradition, they are, despite their differences, best understood as two (spatially separated) branches of the same system and as variations on a common underlying structure. Both in the preparation and the presentation of claims involving local and diaspora people, anthropologists and lawyers need to take care to encompass not only both groups' interests, but also the diversities and underlying commonalities of their connections to country and kin. Although this process can be fraught with difficulties, I believe it is a professional, ethical and practical necessity to include the diversity of contemporary Aboriginal understandings within

land claims. My experiences in central Cape York point to the potential outcomes of this approach. Whilst the process of reconciliation between local and diaspora groups in central Cape York has tended to involve deference to the generally more detailed and authoritative knowledge of older local people, acceptance of the rights of diaspora people in the region has been an simultaneous outcome of this process. In this light, it becomes apparent that land claims in the region have involved the re-adjustment of two sets of people, as one set of kin and shared interest holders, within the local frame. Claimant groups that begin (in recent history at least) as separate diaspora and local 'mobs' are transformed into a single, wider mob of claimants. Diaspora is made local, and local is extended to encompass the wider group of descendants of common forebears within a continuing local descent group and a developing body of Aboriginal customary knowledge, law and practice.

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1. The term 'diaspora' refers to the dispersal or scattering of an ethnic group away from their homeland. The use of the term in an Aboriginal Australian context is explained and discussed further below.

2. This paper is a short version of a longer work in progress. The research on which the paper is based took place mostly in and around Coen, Far North Queensland, in 1996 to 1999 and was supported by a Study Abroad Studentship from the Leverhulme Trust, a Research Grant from the Australian Institute of Aboriginal and Torres Strait Islander Studies, the Emslie Hornimann Fund of the Royal Anthropological Institute and the University of London Research Fund. It also draws on my experiences working on the Mungkan Kaanju National Park (*Aboriginal Land Act 1991 (Qld)*), Batavia Downs (*Native Title Act 1993 (Cth)*) and Silver Plains (*Native Title Act 1993 (Cth)*) Land Claims on behalf of Aboriginal claimants and the Cape York Land Council. Comments by Bruce Rigsby, Peter Blackwood and Athol Chase on earlier drafts are greatly appreciated, as are the comments of the two anonymous referees. I am also grateful to Jess Weir at the Native Title Research Unit for her assistance and encouragement. The final responsibility for the paper's contents is mine.

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4. The Aboriginal people of the region have been involved with claims under both the *Native Title Act 1993 (Cth)* and the *Aboriginal Land Act 1991 (Qld)*. Similar issues have been apparent in both cases where, notwithstanding differences in the legislative requirements of the two acts to recognise/recommend the grant of tenure, the claims have involved groups of local and diaspora claimants holding different understandings of the relationship between people and land.

5. 'Country' is (broadly) land as property within an Aboriginal system of land tenure. Here, as elsewhere in this paper, italicised terms in inverted commas are used to denote terms (and concepts) drawn from Indigenous usage in 'Aboriginal English' (cf. Arthur, 1996).

6. Rigsby (1995) estimates the total number of such 'internal deportations' in Queensland number 'perhaps 10,000'.

7. These implications stem from the distinction of 'tradition/traditional' and 'history/historical', which presents profound problems in its applications – both academic and legal – to Aboriginal life. I intend to discuss this issue at length in a future paper.

8. This distinction, in essence, is closely related to that between 'core' and 'contingent' interests recently raised by Sutton (forthcoming).

9.At the same time, it should be remembered that all Aboriginal people possess a history in the regions in which they live.

10.Kaanju people own language and country in the inland region of central Cape York Peninsula between Moreton Post Office and Coentownship (cf. Chase 1980; Chase and Chase 1994; and, Smith 2000).

11.In the rest of this paper I focus on diaspora and local interests in land claims. In the central Cape York region, historical interests, as I have defined them here, appear peripheral to what Sutton (forthcoming) has described as 'core' rights in country. Certainly, in the process of recognising native title rights, or granting land through land claims, such historical interests have been (at least formally) excluded in this region. Nonetheless, I believe that Sutton's case for the recognition of historical ties in terms of 'contingent' rights in native title determinations bears consideration.

12.This diagram, and the terms used within it, represent a combination of my own analysis and Aboriginal terms and understandings. Thus 'local' and 'diaspora' are terms drawn from the literature and my own work, whereas the idea of having 'lived here forever' and of 'historical' and 'stranger' people are both commonly used by Aboriginal people in the central Cape York region.

13.In other cases, diaspora witnesses in *Aboriginal Land Act 1991* (Qld) claims (for example, the *Cape Melville* and *Lakefield* claims) have placed themselves in dependent/secondary relationships to more knowledgeable locally-based claimants.

14.Such knowledge, for local people, usually combines physical geography, history, cosmology and ecology/husbandry, and is based either in direct experience of country, and/or the oral transmission of such knowledge from someone who has such direct experience. In this local Aboriginal sense of 'knowing', place knowledge is directly linked to the sense of country as having agency, privileging those who have direct personal experience of and a relationship with the place in question. For diaspora people, knowledge about country tends to be more abstract, framing identity through a language name and associated territory ('tribal land'). The names of one or two places (in my experience either English names or 'language names') commonly act as a focus for diasporic knowledge of place. Nonetheless, it is clear that knowledge of country, as held by local people, is something that many diaspora people wish to gain, both through receiving knowledge held by local people and through visiting the country.

15.Much of this change in the local system is the result of having to 'cover' (in local Aboriginal English usage) large reaches of country with only a relatively small Aboriginal population, lessened again when experiential knowledge and relationship with country is taken as a factor. In most areas, even where 'classical' definitions of estate are recalled, there is a marked extension of interests across larger areas than would previously have been the case.

16.Palm Island was a notorious penal settlement (and later government settlement) off the North Queensland coast, some 600 kilometres south of central Cape York, to which many Cape York people were removed in the early to mid 20th century.

17.In particular a locally stressed differentiation between 'Northern' and 'Southern' Kaanju people, who appear to have formed prominent blocks in social interaction across the last century and, given linguistic/dialectic differentiation, perhaps since before contact (cf. Chase and Chase 1994). This differentiation features strongly in contemporary local Kaanju discourse and social interaction, but is (often adamantly) refuted by diaspora Kaanju people.

18. However, other important group identities – most notably ‘families’ (cf. Sutton 1998) – show clear affinities with the clan-groups from which they have typically developed. As one of the anonymous referees of this paper noted, it is through membership of such a family that diaspora Kaanju people lawfully assert a Kaanju identity, but such groups tend not to recognise themselves as holding separate estates, though they may identify with one or more key places in their region of origin or ‘tribal country’.

19. Such a view has much in common with the tribal model espoused by Tindale (for example, 1974). In fact, it is apparent that Tindale’s work – and his tribal map (in Tindale 1974) and genealogies in particular – has been an important source of information for diaspora people in northern Queensland, and have become embedded within the body of Aboriginal knowledge for diaspora groups. Many diaspora families with whom I work have accessed relevant Tindale genealogies through institutions such as the John Oxley Library, or the Community and Personal Histories section of the (Queensland) Department of Families, Youth and Community Care in Brisbane, or through other anthropologists and researchers. See also Finlayson and Curthoys (1997) on Tindale’s work as an Aboriginal resource.

20. Particularly younger and less knowledgeable people.

21. But see McKnight (1971) for ‘actual’ and ‘classificatory’ distinctions in local practice.

22. They have also tended to depend on long-running relationships of trust between local people and particular, familiar anthropologists, seen as trusted friends and authoritative sources of information, in particular gathered from now deceased older people.

23. For example, despite differences in form, local and diaspora people hold common ideas and practices regarding country that include inalienable ownership of country founded on principles of descent and life history rather than sale or exchange, territorial identities interwoven with such ownership, fundamentally communal ownership of country which is acceded to at birth and/or developed during a person’s lifetime (rather than on the death of former owner/s), and the differentiation of ‘core’ property rights from ‘contingent’ rights gained through association with country or its owners. I am indebted to one of the anonymous referees of this paper for the development of this point.

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