



Broader native title settlements and the meaning of the term 'traditional owners'

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Introduction

It has been clear for a number of years that many native title claimant groups will find it difficult to demonstrate that the relationship they have with their traditional country can meet the standard of proof required for a determination that native title exists. As a result, native title parties have increasingly considered alternative ways to settle claimant applications, sometimes achieved through a mixture of native title and non-determination outcomes, or non-determination outcomes alone. These outcomes have been referred to as 'broader settlements'.¹

An approach sometimes taken by state governments towards broader settlements is to offer them to those native title claimant groups which may not be able to satisfy that state's evidentiary requirements for a consent determination that native title exists. Consequently, the level of evidence expected by governments for agreeing to broader settlements is generally considered to be less than that required for agreeing to a consent determination of native title. Although written guidelines exist in some jurisdictions detailing the State's requirements for consent determinations, the precise content of the evidentiary thresholds for broader settlements has not generally been spelt out by these governments, and may vary across jurisdictions.² However, anecdotally, it appears to be the case that one of the requirements sometimes applied by governments in broader settlement negotiations is that the members of a claimant group must demonstrate that they are the 'traditional owners' of the country in question. At times this has been expressed in terms of those people showing that they are 'the right people for the right country'.³

But what does the term 'traditional owner' actually mean? It does not appear anywhere in the *Native Title Act 1993* (Cth), and yet it is common for many Indigenous Land Use Agreements, which are provided for under the Act, to name the Indigenous group or groups which are party to the agreement as those asserting 'traditional ownership' of the area of that agreement.⁴ The term is also found in a number of non-native title contexts.

¹ These settlements have also been called 'alternative settlements' and 'alternative agreements'.

² Although guidelines exist in several states explaining the information the government requires before it will agree to a consent determination of native title, to date only Victoria has detailed its evidentiary requirements for a broader settlement, as documented in its *Guidelines for Native Title Proof in Victoria*. These guidelines set out the general evidentiary requirements for both consent determinations of native title and Indigenous Land Use Agreements. The guidelines are currently under review.

³ This threshold has also been recognised by the Commonwealth Government. In his address to the Native Title Consultative Forum on 4 December 2008, the Attorney-General stated: 'Providing connection to a litigation standard should not be the starting point of a negotiation. Instead, the question should be whether a particular Indigenous group are the right people to engage in discussions about a particular area'. The Joint Working Group on Indigenous Land Settlements, which was established at the 2008 Native Title Ministers' Meeting to develop options for progressing broader and/or regional native title settlements, is currently developing guidelines to ensure 'right people for country' for broader settlements. It will prepare a report for the 2009 Native Title Ministers' Meeting.

⁴ See for example the South Australian Government's ILUA templates for Local Government and Outback Areas: <http://www.iluasa.com.au/info/templates.asp> (accessed 22 May 2009).

In this paper, I summarise some of the various meanings which have been applied to the notion of traditional ownership, based on a desktop review of the published literature on the subject. I will start with a brief summation of the various definitions which have been included in Australian State and Commonwealth legislation, before focusing on three issues which are the most relevant to broader native title settlements. These issues are:

- the extent to which interpretations of traditional ownership might accommodate a 'ranking' of associations to country;
- the distinction between traditional owners and 'historical people'; and
- conflicts between groups about traditional ownership.

My objective here is to highlight some (but by no means all) of the complexities which can be involved in any interpretation of traditional ownership. These observations will in turn provide some context to the negotiation of broader native title settlements across Australia, and could inform the development of any potential evidentiary thresholds based around this idea.

My intention is not to tell parties how they should be carrying out broader settlement negotiations or prescribe the content of those settlements. Each settlement will of course be a product of local circumstances and subject to a range of imperatives. Nor do I seek to dictate to governments the specific content of any potential guidelines relating to the evidence required of claimant groups before agreeing to broader settlements. These are all matters for the parties themselves to decide.

Statutory definitions: a brief summary

The term 'traditional owner' seems to have come into common use following the passage of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), which established mechanisms through which Aboriginal people could claim unalienated Crown Land in the Northern Territory on the basis that they are the 'traditional Aboriginal owners' of the land. The definition of 'traditional Aboriginal owners' in the Act is

... 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.⁵

This definition was replicated in full or in part in the subsequent *Aboriginal Land Act* (NT) and *Environmental Protection and Biodiversity Conservation Act 1999* (Cth).⁶ However, an examination of various other State and Commonwealth statutes reveals that the definition of 'traditional owners' or 'Aboriginal owners' can vary quite significantly, depending on the legislative context.⁷ For example, the two South Australian land rights acts state that a

⁵ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s. 3(1).

⁶ *Aboriginal Land Act* (NT), s. 3; *Environmental Protection and Biodiversity Conservation Act 1999* (Cth), s. 368(4).

⁷ For a more detailed summary of this legislation, see Jennifer Jude, 'The meaning of the term "traditional owner"', *Native Title News*, Vol. 6, No. 12, December 2004, pp. 226-228.

“traditional owner” in relation to the lands means an Aboriginal person who has, in accordance with Aboriginal tradition, social, economic and spiritual affiliations with, and responsibilities for, the lands or any part of them.⁸

A very similar definition can be found in the *Aboriginal Heritage Act 1988 (SA)*.⁹ Various other definitions can also be found in a number of Aboriginal land rights, heritage and conservation statutes and regulations.¹⁰

Traditional ownership and ‘ranking’ associations to country

What is particularly interesting about these definitions is that, despite the variety of terminology used, a ‘ranking’ or ‘hierarchy’ of Indigenous associations to land is often implied. For instance, the *Aboriginal Land Rights Act 1983 (NSW)* defines Aboriginal owners of land as

the Aboriginal persons whose names are entered on the Register of Aboriginal Owners because of the persons’ cultural association with particular land.¹¹

Section 171(2) of the Act states that the names on that Register are limited to those who

- (a) [are] directly descended from the original Aboriginal inhabitants of the cultural area in which the land is situated, and
- (b) [have] a cultural association with the land that derives from the traditions, observances, customs, beliefs or history of the original Aboriginal inhabitants of the land, and
- (c) [have] consented to the entry of the person’s name in the Register.

By implication, those Aboriginal persons who might have a cultural association with the land but who are not descendents of the original Aboriginal inhabitants of the area would not fit the definition of Aboriginal owners under this Act.

Similarly, the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* limits its definition of traditional Aboriginal owners to those people with a ‘primary spiritual responsibility for that site and for the land’.¹² Those claimants whom a Land Commissioner determines cannot demonstrate these primary responsibilities in country are implicitly excluded. Some of these statutes, in other

⁸ *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981 (SA)*, s. 4; *Maralinga Tjarutja Land Rights Act 1984 (SA)*, s. 3. The definitions in these two statutes are identical, aside from minor differences in punctuation.

⁹ *Aboriginal Heritage Act 1988 (SA)*, s. 3.

¹⁰ See for example *National Parks and Wildlife Act 1974 (NSW)*, s. 5; *Aboriginal Land Rights Act 1983 (NSW)*, s. 4; *Great Barrier Reef Marine Park Regulations 1983 (Cth)*, reg. 33.

¹¹ *Aboriginal Land Rights Act 1983 (NSW)*, s. 4.

¹² See above fn. 5.

words, appear to contemplate something of a hierarchy of associations to land, with the recognition of 'higher' or 'primary' rights holders as traditional owners to the exclusion of others who lack these associations.

This ranking invites a consideration of how this term has been treated in the anthropological literature. Peter Sutton has usefully addressed the complexity of Aboriginal rights in land by drawing a distinction between 'core' and 'contingent' rights. He argues that most Aboriginal groups distinguish between the kinds of rights held by people who possess an 'essential relationship of identity with the country', otherwise known as 'core' rights holders, and those who do not possess that relationship but who nevertheless hold more limited rights, or 'contingent' rights. Core rights might include speaking for an area or a requirement to be asked for permission to access it by non-core rights holders. On the other hand, contingent rights flow from core rights, and may be determined by the contingent rights holder's social relationships with core rights holders. A right to hunt and fish, for example, might be exercised on the grounds that one is married to a core rights holder. Sutton's distinction therefore asserts a layering of rights in country.¹³

Linking this layering of rights back to the idea of traditional ownership, Sutton appears to suggest that there is a strong correlation between those people who assert traditional ownership over a particular country and those people who hold core rights there, by contrast to those individuals with purely contingent rights in that land. He argues:

People may often express ... non-primary connections by the use of the terms 'just' or 'only' – for example: 'We are not the traditional owners, we are just the custodians', or 'That's not main place for us, we only half owner'. By contrast, I have never heard anyone say 'We are only the traditional owners of that area'. As a vernacular English expression, often constituting a not completely happy translation of some indigenous expressions, 'traditional owner' is a term of *first rank* when specifying who has rights and interests in country. On the other hand, many people with some traditional rights in a country – even some very strong rights – normally will deny that they are 'traditional owners' of it if they lack a primary connection to it based on identity ...¹⁴

The distinction highlighted here between core and contingent rights, and the seemingly strong correlation between the notion of traditional ownership and core rights in land, could be relevant to some broader settlement negotiations, as it might help inform the identification of those who are the 'right people for the right country'. Indeed, a review of some native title agreements indicates that variant rights in country have been taken into account during the negotiation of some of these agreements. An interesting case in point is the Argyle Diamond Mine Indigenous Land Use Agreement in Western Australia, which was signed in 2004 between Aboriginal

¹³ Peter Sutton, *Kinds of Rights in Country: Recognising Customary Rights as Incidents of Native Title*, National Native Title Tribunal, 2001, pp. 4, 15, 23. Sutton (p. 40) acknowledges that the core and contingent rights distinction 'probably suffers from the oversimplifying effects of dualism, or the tendency to want to break things down into contrasting pairs.' But he maintains that 'in so many cases it seems that such a distinction or one very like it, is a part of Aboriginal customary systems of land tenure and land use'.

¹⁴ *Ibid.*, p. 9. Emphasis added.

groups, the Kimberley Land Council and Argyle Diamonds. The ILUA addresses the doing of Future Acts, the relationship between native title and other rights, compensation, and

provides the support of the *Traditional Owners* for Argyle's current and future mining operations, including the development of underground operations. The ILUA also recognises Indigenous interests and directs resources toward community and economic development.¹⁵

During the negotiation of this agreement, ethnographic and genealogical studies were conducted in order to identify the traditional owners of the agreement area. The research suggested that members of several local estate groups had differential rights and interests in the area, and the agreement reflected this variance. While the families of one group were identified in the ILUA as having primary traditional rights over the entirety of the area, the families of another estate group were listed as having primary traditional rights over just a specific portion of the area, and secondary rights over another portion. The families of additional estate groups were stated to have no primary rights in the agreement area, only possessing secondary rights, including the right to access, hunt and gather in the area and the right to be informed about decisions in relation to one of the other estates. The agreement also recognised the secondary right of some other Aboriginal people to be included in, and be informed about, decisions in relation to areas of spiritual and ceremonial significance within the ILUA area.¹⁶

What is noteworthy about this agreement is that all of the rights holders, both primary and secondary, were collectively defined as 'traditional owners', even though their rights in country were ranked and listed differently. The agreement underscores that the definition of traditional ownership is somewhat vague and confusing. While there may well be a strong correlation between traditional owners and those judged to be core or primary rights holders, the Argyle ILUA demonstrates that contingent, or secondary, rights holders may be incorporated into a single collective description of traditional owners. It appears that, without any fixed meaning, the term is liable to take on various connotations. This reality might need to be borne in mind during the development of broader native title settlements.

Traditional owners and historical people

Even though a universal definition of 'traditional ownership' may elude us, there does seem to be some agreement within the anthropological literature broadly distinguishing traditional owners and those who are sometimes referred to as 'historical people'. According to David Martin, the 'traditional' people of a particular region

... are recognised as members of the 'tribal' groups whose lands lie within the region; that is, they are accepted as belonging to one of the relevant 'families', primarily through socially validated genealogical connections. They are the ones who can legitimately 'talk for country', and thus should be consulted

¹⁵ 'Argyle Diamonds Indigenous Land Use Agreement (ILUA)', summary at The Agreements, Treaties and Negotiated Settlements (ATNS) database: <<http://www.atns.net.au/agreement.asp?EntityID=2591>> (accessed 22 May 2009). Emphasis added.

¹⁶ *Argyle Diamond Mine Participation Agreement – Indigenous Land Use Agreement*, Freehills, Perth, pp. 40-41.

about its use. The 'historical' people include those who are living in a particular area now, but who are from elsewhere in this region, and those who have moved here from outside the region entirely ...¹⁷

Historical people, in other words, 'are living where they are because of historical factors such as migration and deportation, ... usually assert themselves to be 'traditional owners' of country elsewhere, and assert only contingent rights in the country of current residence'.¹⁸ The native title process highlights this distinction between traditional people and historical people, as it is usually the former who lodge native title claims.¹⁹ Consequently, many broader native title settlement negotiations are carried out, first and foremost, with people who might generally be categorised as 'traditional', as opposed to 'historical', people.

But is a binary distinction between the 'traditional' and the 'historical' necessarily so neat and clear-cut? Some observers, including Martin himself, have pointed out that traditionally-based links to country can exist on something of 'a continuum with those of an 'historical' nature, rather than being of a fundamentally different order'.²⁰ That is to say, the line between the two can be blurred, as people may express and identify with land on both historical and traditional grounds.²¹

By way of example, Sarah Holcombe has pointed to the concept of community-country *anangu* – or the 'Whitefella's traditional owners' – in the Northern Territory. She explains that these people have been resident in certain locations for a long time and are active in looking after the country there, often assuming an important role in the decisions about it. But they are not members of any local descent group, and their traditional country is sometimes located quite some distance away from their place of residence as a consequence of long-term migrations from that country. They therefore occupy something of a 'shifting ground' between traditional owners and historical people.²² Seen from this perspective, the task of distinguishing these groups in the context of broader settlement negotiations might not be straightforward.

In addition, it is important to remember that historical people do not live in a 'cultural vacuum' absent of any cultural traditions about their relationship to land. Not only may they assert very strong ties with the region of their residence, but, as I have already alluded to, they also may assert rights in the traditional region from which they have moved (either forcibly or

¹⁷ David Martin, 'The incorporation of 'traditional' and 'historical' interests in Native Title Representative Bodies,' in D.E. Smith and J. Finlayson (eds.), *Fighting over Country: Anthropological Perspectives*, CAEPR Research Monograph No. 12, Canberra, 1997, p. 157. See also Sutton 2001, pp. 19-20 and Gaynor McDonald, 'Recognition and justice': the traditional/historical contradiction in New South Wales, in D.E. Smith and J. Finlayson (eds.), *Fighting over Country: Anthropological Perspectives*, CAEPR Research Monograph No. 12, Canberra, 1997, p. 69.

¹⁸ Sutton, pp. 19-20.

¹⁹ See McDonald, p. 78.

²⁰ Martin, p. 160.

²¹ McDonald, p. 69; David S. Trigger, 'Land rights legislation in Queensland: the issue of historical association', in Nicolas Peterson and Marcia Langton (eds.), *Aborigines, Land and Land Rights*, Australian Institute of Aboriginal Studies, Canberra, 1983, pp. 192-193.

²² Sarah Holcombe, 'Traditional owners and 'community-country' *anangu*: distinctions and dilemmas', *Australian Aboriginal Studies*, No. 2, 2004, pp. 64-71.

voluntarily).²³ Tellingly, the strength of historical associations with country of residence has been recognised under certain legislative schemes. For example, under the *Aboriginal Land Act 1991* (Qld), land can be granted to claimants not only on the grounds of traditional affiliation, but also on historical association and economic or cultural viability. In instances where two or more groups establish claims on different grounds, claims established on traditional affiliation are given preference over claims established on historical association, which in turn are given preference over claims established on economic or cultural viability.²⁴ Interests other than purely traditional ones have also been acknowledged as a legitimate means for Aboriginal people to apply for land and property under the Indigenous Land Corporation's land acquisition program.²⁵

These observations are important because they highlight the possibility that historical people, though perhaps not being able to demonstrate strong *traditional* links to an area, might still become a party to a native title agreement on the basis of possessing historical connections to it. A case in point is the Western Cape Communities Co-existence Agreement, also called the Comalco ILUA, which included eleven 'Traditional Owner' groups, four Indigenous Community Councils, Comalco Aluminium Limited, the Queensland Government and the Cape York Land Council on behalf of the Native Title Parties. The ILUA was 'a comprehensive regional agreement, inclusive of Traditional Owners and other Indigenous people with historical connections.'²⁶ Another example is the Hopevale Heads of Agreement between eleven clans in the Hopevale area on the Cape York Peninsula. The Hopevale community is home to both traditional people and historical people who had been moved to the area during its time as a mission settlement. The eleven clans agreed

to make a single native title application together while agreeing to respect each others' rights over individual clan estates ... The Agreement recognises the rights of the clans to conduct activities on each other's clan estates as well as confirming that Aboriginal historic residents of Hopevale are entitled to enjoy access to clan estates for specified purposes.²⁷

These agreements reveal that the social interaction between 'traditional owners' and 'historical people' could have an important bearing on the negotiation and construction of some native title settlements, however imprecise the definitional boundary might be between these two broad groupings.

²³ Trigger, pp. 197-198.

²⁴ *Aboriginal Land Act 1991* (Qld) ss. 53-55, 61. Under s 53(1), a claim is established on the ground of 'traditional affiliation' if the Land Tribunal is satisfied that 'the members of the group have a common connection with the land based on spiritual and other associations with, rights in relation to, and responsibilities for, the land under Aboriginal tradition'.

²⁵ See Indigenous Land Council, 'Applying to the Land Acquisition Program': <<http://www.ilc.gov.au/site/page.cfm?u=125>> (accessed 22 May 2009).

²⁶ 'Comalco Indigenous Land Use Agreement (ILUA) (Western Cape Communities Co-existence Agreement)', summary at The Agreements, Treaties and Negotiated Settlements (ATNS) database: <<http://www.atns.net.au/agreement.asp?EntityID=453>> (accessed 22 May 2009).

²⁷ 'Hopevale Heads of Agreement', summary at The Agreements, Treaties and Negotiated Settlements (ATNS) database: <<http://www.atns.net.au/agreement.asp?EntityID=467>> (accessed 22 May 2009).

Conflict and disputation

The last theme I wish to highlight is the conflict and disputation which may arise within or between Aboriginal groups which are seeking recognition as traditional owners. This recognition can clearly be very important for Aboriginal people, as it is one means of acknowledging their identity and strong links with their country. Indeed, in instances where native title claimants have difficulty meeting the standard of proof required for a determination that native title exists, recognition of their traditional ownership of country may serve as an important avenue for meeting some of their aspirations. Recognition can often be reflected in the terms of a native title agreement itself. This might, for example, formally acknowledge the group as traditional owners, include traditional owner entities on state land title systems, or provide for the erection of signage in locations on country that acknowledges a group as the traditional owners.²⁸

Precisely because this symbolic recognition can be so important, disputes and arguments sometimes arise amongst Aboriginal groups about which people can rightfully assert traditional ownership of a particular area of country.²⁹ Indeed, given that some broader settlement negotiations may also involve important other benefits to these groups, such as grants of land, employment, economic opportunities and roles in the management of those areas, the very process of identifying traditional owners might bring to the surface some strong disagreements about who can speak for that country.³⁰ This disputation might be even more marked in areas where there has been a high degree of social dislocation and movement caused by the forces of European settlement.³¹

The Finnis River Land Rights Claim in the Northern Territory provides a useful example of the conflicts which can arise between groups seeking recognition as traditional owners. This claim, not far south of Darwin, involved three Aboriginal groups all asserting traditional ownership over parts of the claim area. Two of the groups, the Kungarakany and Warai, joined in making a claim to the whole of the land, while the Maranunggu claimed traditional ownership of land in the western section of the claim area. As was summarised by Justice Toohey in his Land Claim Report:

²⁸ See Graeme Neate, 'Improving and using the native title scheme – visions and dreams for the future', National Native Title Tribunal, speech delivered at the Negotiating Native Title Conference, Melbourne, 19 February 2009, p. 49.

²⁹ See for example John Reeves, *Building on Land Rights for the Next Generation: Report of the Review of the Aboriginal Land Rights (Northern Territory) Act 1976*, Second Edition, Commonwealth of Australia, 1998, pp. 175-176. Reeves here noted the frequency of disputes in the context of the ALRA: '[T]he nature of the [land] claims and the arguments [about traditional Aboriginal ownership] go to peoples' spiritual beliefs and to their sense of identity as Aboriginal people as members of a particular group, community or region'.

³⁰ Reeves (pp. 176, 189) made a similar observation about disputes which have arisen in the Northern Territory over benefits which can be acquired by Aboriginal groups through the recognition of their status as 'traditional Aboriginal owners'. This reality was also recognised by Justice Toohey in *Seven Years On: Report by Mr Justice Toohey the Minister for Aboriginal Affairs on the Aboriginal Land Rights (Northern Territory) Act 1976 and Related Matters*, Australian Government Publishing Service, Canberra, 1984, p. 38.

³¹ Martin, p. 157.

For the first time in a land claim hearing there were two groups of Aboriginals, the Kungarakany and Warai on the one hand and the Maranunggu on the other, each asserting, to the exclusion of the other, traditional ownership of the same land. This added to the difficulties of a claim that was in other respects sufficiently complicated. It resulted in the presentation of evidence, not only from the claimants themselves, but from anthropologists propounding views as to the nature of traditional ownership.³²

One of the complexities faced by Justice Toohey in this case was that the resident group, the Maranunggu, had migrated to the area of their claim and had lived there for a number of years, asserting strong traditional attachments to it. The Kungarakany and Warai claimed traditional ownership to that same land on the basis of what they asserted was a more longstanding right.

The Land Commissioner ultimately found that the Maranunggu were the traditional Aboriginal owners over the area in which they were permanent residents, but was not satisfied that the Kungarakany and Warai were also the traditional Aboriginal owners of this area. The 'Wagait dispute', as it later came to be known, continued to play out over a number of decades, becoming the subject of bitter disputation and litigation.³³

Another form of dispute which is relevant to the concept of traditional ownership is that which can sometimes occur between traditional owners and those I have already referred to rather loosely as historical people. In many communities, residential Aboriginal populations are comprised of a mix of both traditional and historical people, which often has the effect of complicating local intra-community politics.³⁴ According to Martin,

[t]hose who have lived [in an area] for many years, but who do not claim to have their ancestral lands in the region, in my experience always acknowledge the primacy of the rights of the 'traditional people'. ... At the same time, [historical people] frequently express the strong view that ... they should be involved along with traditional owners in any negotiations regarding [some decisions about country].³⁵

As a result, even though precedence to rights in land might be widely acknowledged as those which are rooted in traditional associations, disagreements can still arise between traditional and historical people over matters concerning that land.³⁶ Some scholars have argued that these disagreements often play out in terms of competing claims of 'recognition' and 'equity'.³⁷ This perspective holds that

³² John Toohey, *Finniss River Land Claim Report: Report by the Aboriginal Land Commissioner, Mr Justice Toohey, to the Minister for Aboriginal Affairs and to the Administrator of the Northern Territory*, Australian Government Publishing Service, Canberra, 1981, para 58.

³³ For a short summary of this dispute, see Reeves pp. 180-183.

³⁴ Martin, p. 158. For an excellent discussion of this phenomenon in an area of central-eastern New South Wales, see McDonald, pp. 71-73.

³⁵ Martin, p. 158.

³⁶ *Ibid.*, pp. 157-158.

³⁷ See for example McDonald pp. 73-81; David Martin, 'The Reeves Report's assumptions on regionalism and socioeconomic advancement', in J.C. Altman, F. Morphy and T. Rowse (eds.), *Land Rights at Risk? Evaluations of the Reeves Report*, CAEPR Research Monograph No. 14, Canberra, 1999, pp. 157-158; Peter

[t]raditional people base their claims on the demand for recognition of their rights as traditional owners: they seek land to which they are entitled by tradition; recognition of their status as traditional owners by non-Indigenous Australians as well as by non-local Aboriginal people; and the right to maintain cultural practice.³⁸

By contrast, historical people tend to focus more on social equity issues such as education, housing, health and employment.³⁹ Though traditional people can and do aspire to principles of equity as well, 'the politics of recognition are primarily and increasingly the politics of traditional people' as opposed to historical people.⁴⁰

If one accepts this interpretation, it is not difficult to contemplate that the discourses of recognition and equity may come into conflict during the course of broader native title settlement negotiations. For example, a situation in which historical people are left out of discussions concerning their place of residence could be the cause of some concern to them, even if they acknowledge that the traditional owners possess primary rights and interests there. By the same token, traditional owners might resist the notion that historical people should be included in a native title agreement covering their traditional country. In areas where traditional owners and historical people both assert strong associations to country, these tensions could present barriers to the making of some native title agreements.

Conclusion

What I have attempted to do in this presentation is to draw attention to a number of nuances associated with the notion of traditional ownership. Though that term is today frequently used, the meanings which are ascribed to it are by no means fixed or uniform. While some perspectives tend to invite conclusions about rankings of Aboriginal associations to land, others point to the intricacies involved in distinguishing between traditional owners and historical people. Another complexity relates to the tensions and disputes which can arise within and between Aboriginal groups seeking recognition as traditional owners, or between traditional owners and historical people concerning decisions about country. A wider understanding of these complexities offers the prospect of informing the development of future broader native title settlements.

Sutton, 'The Reeves Report and the idea of the 'community'', in J.C. Altman, F. Morphy and T. Rowse (eds.), *Land Rights at Risk? Evaluations of the Reeves Report*, CAEPR Research Monograph No. 14, Canberra, 1999, p. 41.

³⁸ McDonald, p. 74.

³⁹ *Ibid.*

⁴⁰ *Ibid.*