

## Practising in Native Title: The Lawyer as God, But What About Country?

Kate Galloway<sup>1</sup>

The *Native Title Act* and *Mabo* speak in terms of justice for indigenous people of Australia. The assumption is that the law built around them will protect and preserve customary land title, however this understanding has been challenged by many authors. Golder for example, argues that Australian native title law constitutes Indigenous Australians as 'other' through functioning as an Orientalist legal discourse. He supports this argument through analysing 'otherness' in landmark decisions rejecting native title claims. Recently however the Federal Court has awarded native title to claimants. Building on Golder's argument, through an analysis of *Bennell* this paper suggests that regardless of the outcome of a native title claim, the 'otherness' of Indigenous claimants remains central to the native title process and outcome and is promoted by the claims process. Applicants' otherness either disqualifies them from success (*Yorta Yorta*), or success is predicated on the applicants' implicit assumption of dominant norms (*Bennell*). This paper focuses in particular on the nature of the adversarial model of legal practice where the lawyer is 'god', and how this reinforces a common law 'narrative of reality' of customary title – the deconstruction of 'country' in terms of the dominant paradigm.

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# Practising in Native Title: The Lawyer as God, But What About Country?

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## Introduction

The *Mabo*<sup>2</sup> decision and the preamble to the *Native Title Act 1993* (Cth) ('NTA') talk in lofty terms about 'contemporary notions of justice and human rights'<sup>3</sup> and of 'just and proper ascertainment of native title rights and interests'<sup>4</sup> leading to much jubilation that finally the Anglo-Australian legal system could accommodate traditional rights and interests. The 15 or so years since *Mabo* reveal that the system of law, policy and process that has evolved in the bringing of a native title claim sets the bar high for traditional owners in the ascertainment of native title rights and interests. The fact that these laws, policies and processes are derived from the exercise of power of the Anglo-Australian legal system reveals the inevitably skewed nature of the way in which native title will be conceived and in which it must be proven. This is borne out by critical readings of the discourse of native title in the judgements<sup>5</sup> and by an interpretation of the legal processes and rules under which claimants' onus of proof be discharged.<sup>6</sup> Indeed the identification of traditional interests as 'native title' belies the common law nature of the rights as property, rather than either an Aboriginal law title (which they certainly are not)<sup>7</sup> or their identity as an autonomous body of law expressing human rights.<sup>8</sup>

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<sup>2</sup> *Mabo v The State of Queensland (No 2)* (1992) 175 CLR 1 ('*Mabo*').

<sup>3</sup> *Ibid.*, 30.

<sup>4</sup> *Native Title Act 1993* (Cth), preamble.

<sup>5</sup> See eg Ben Golder 'Law, History, Colonialism: An Orientalist Reading of Australian Native Title Law' [2004] *Deakin Law Review* 2.

<sup>6</sup> See eg Peter R A Gray 'Do the Walls Have Ears? Indigenous Title and Courts in Australia' [2000] *Australian Indigenous Law Reporter* 1.

<sup>7</sup> See eg Noel Pearson 'The Concept of Native Title at Common Law' in Yunupingu (ed) *Our Land is Our Life: Land Rights – Past, Present and Future* (1997) 150, 154.

While it is possible to conceive of native title as representing the ‘recognition space’ inevitable in ‘cross-cultural legal interaction’<sup>9</sup> it is equally clear that the emphasis in ‘native title law’ lies not on human rights but on property rights and debates about customary law in terms of common law proprietary interests.<sup>10</sup> In *Western Australia v Ward* for example, the court describes its task as ‘identifying how rights and interests possessed under traditional law and custom can properly find expression in common law terms’.<sup>11</sup>

Native title is a common law concept, but it is one which encompasses customary laws and culture. Native title:

has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.<sup>12</sup>

It represents the interface of two distinct cultures: one dominant and the other dominated. While native title can be conceptualised in terms of the ‘fragmentation of proprietary interests’<sup>13</sup> thus suggesting the possibility of an interest independent of the common law, this occurs rather within the dominant common law framework and not as a devolution of

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<sup>8</sup> Such a human rights approach appears to be taken in *Mabo v The State of Queensland (No 2)* (1992) 175 CLR 1, 30; and is the basis of the *United Nations Declaration on the Rights of Indigenous Peoples* adopted by General Assembly Resolution 61/295, 13 September 2007, articles 2, 3, 26 amongst others. NB Australia refused to ratify the Declaration along with the US, Canada and New Zealand – see Information Media Report GA/10612 of the Sixty-first General Assembly Plenary 107th & 108th Meetings at United Nations <<http://www.un.org/News/Press/docs//2007/ga10612.doc.htm>> at 10 March 2008.

<sup>9</sup> *Ibid.*

<sup>10</sup> See eg discussion in Janice Gray ‘Is Native Title a Proprietary Right?’ (2002) vol 9, No3 *Murdoch University Electronic Journal of Law*.

<sup>11</sup> (2002) 213 CLR 1, 93, Gleeson CJ, Gaudron, Gummow and Hayne JJ.

<sup>12</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1 [64] per Brennan J.

<sup>13</sup> See eg the approach taken in MA Neave, CJ Rossiter, MA Stone *Sackville & Neave Property Law Cases and Materials* (7<sup>th</sup> ed, 2004) ch 3.

either common law notions of property, or of dominant cultural and institutional norms. The power differential permeates every aspect of the law and the process of law.

Ben Golder argues that ‘Australian native title law can actually be read as an Orientalist legal discourse which continues to colonise and oppress Indigenous Australians’.<sup>14</sup> Golder, through an analysis of the decisions in *Members of the Yorta Yorta Aboriginal Community v The State of Victoria*<sup>15</sup> (which at trial and on two appeals denied the existence of applicant native title and indeed implicitly, denied the validity of their customary law) identifies the western conceptualisations of title, of culture, of tradition, of evidence and of connection that render the claimants silent and invisible. A textual analysis of decisions since *Yorta Yorta* would result in similar findings. However in 2006, the Federal Court found in favour of the Noongar people of Western Australia, in *Bennell v Western Australia*.<sup>16</sup> Does this apparently positive decision mean that Australian native title law has ‘delivered results for Aboriginal people’?<sup>17</sup> Or does this outcome still affirm Golder’s analysis of native title law as maintaining the colonisation and oppression of Indigenous Australians?

This paper seeks to apply Golder’s analysis to confirm that even where the common law admits ‘native title’, it keeps claimants silent and invisible through subsuming their

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<sup>14</sup> Golder, above n5.

<sup>15</sup> *Members of the Yorta Yorta Aboriginal Community v The State of Victoria* [1998] FCA 1606; *Members of the Yorta Yorta Aboriginal Community v The State of Victoria* (2001) 110 FCR 244; *Members of the Yorta Yorta Aboriginal Community v The State of Victoria* (2003) 194 ALR 538 (collectively, ‘*Yorta Yorta*’).

<sup>16</sup> *Bennell v State of Western Australia* [2006] FCA 1243 (unreported, Wilcox J, 19 September 2006). The decision is under appeal to the Full Court of the Federal Court, but at 7 April 2008, there is no next listed hearing date.

<sup>17</sup> Golder, above n5, Part VI.

stories and law and custom within the common law.<sup>18</sup> The very nature of native title law and process means that regardless of the outcome, it will fail to afford Indigenous applicants self-determination that would acknowledge the autonomy of their traditional laws and rights. On this analysis, while *Yorta Yorta* explicitly rendered the applicants unheard and invisible, even where applicants are successful in convincing a court of their claim this represents an ‘othering’ in terms of the Orientalist discourse of the judgements and what they reveal about legal process.

This paper reflects on how the Anglo-Australian processes of law in general transform traditional culture and land systems that come into contact with it and by implication, those yet to come in contact. It demonstrates that these processes deliberately position that culture within the dominant common law system which is apparently ready to admit native title only where it is inducted into the common law construct. Overall this paper will highlight one view of ‘how an explanation and narrative of reality [is] established as the normative one’<sup>19</sup> – identifying the role of the legal practitioner (lawyer and judge) in cementing, if not establishing, the common law native title process as the normative narrative of reality of Indigenous land rights, to the repression or erasure of the customary law from which it is given life.

In Part I this paper will analyse *Bennell* to identify how the decision retains the alienating processes and translated conceptualisations of Indigenous life and values. The test is whether this decision that affirms native title will confirm that the Orientalist discourse identified by Golder continues to exist even where the claimants experience ‘success’.

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<sup>18</sup> See eg Margaret Davies *Asking the Law Question* (2<sup>nd</sup> ed, 2002), 275.

<sup>19</sup> Gayarti Chateravarty Spivak ‘Can the Subaltern Speak’ in Patrick Williams and Laura Chrisman (eds) *Colonial Discourse and Post-Colonial Theory: A Reader* (1994) 66, 76.

As the induction of customary law to common law starts with the contribution of the legal practitioner (if not before), in Part II this paper reflects in particular on the issues arising from the dual relationship between lawyers and their traditional owner clients, and lawyers and the legal system, and will focus on the role of the lawyer within the native title claim process in translating the traditional paradigm of rights and interests into the common law paradigm.

This reflection looks at the implications of the traditional ‘adversarial advocate’ model of lawyering, and will identify an alternative conceptualisation of legal practice as an ethic of care, that may reduce the invisibility of Indigenous clients within the common law system.<sup>20</sup> The ethic of care approach will ideally result in promotion of ideals of self-determination that might better approach ‘human rights and contemporary notions of justice’.<sup>21</sup>

## **Part I: Orientalism in Practice: Common Law Adopts Customary Law**

The case put by the Meriam people in *Mabo*, using the common law, subverted the legal conceptual framework hitherto applied in Australia in favour of the colonisers in relation to land ownership. In *Mabo* the applicants sought to use the common law to further their own customary law ends. Importantly, the court did not expressly seek to absorb the traditional law and custom of the Meriam people within the common law: it recognised the applicants’ ‘native title’ as unique, derived from a separate (customary) legal system. As a result of their action, the Meriam people became a people whose own laws were

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<sup>20</sup> See eg Christine Parker ‘A Critical Morality for Lawyers: Four Approaches to Lawyers’ Ethics’ (2004) 30 *Monash University Law Review* 49; Ysaiah Ross *Ethics in Law* (4<sup>th</sup> ed, 2005).

<sup>21</sup> Cited in *Mabo v The State of Queensland (No 2)* (1992) 175 CLR 1, 30.

recognised by common law. The nature of native title as *sui generis* has since been affirmed by the Australian courts:

*Mabo [No 2]* was a brave judicial attempt to redress the wrongs of dispossession. But its ‘recognition’ of native title has involved the courts in categorising and charting the bounds of something that, being *sui generis*, really has no parallel in the common law.<sup>22</sup>

Richard Bartlett has argued that where the courts identify native title as having this unique nature (ie unique in terms of the common law) they impose a barrier to according native title ‘full respect’ under the law:<sup>23</sup> if native title is regarded as *sui generis*, the law can impose on traditional owners the burden of proving that the title exists. Likewise however, consideration of customary law in terms of common law proprietary interests will require a translation of customary law into common law.<sup>24</sup> Either way, common law native title is necessarily other than a ‘mainstream’ common law right and is a product of the dominance of the common law system.<sup>25</sup>

Lisa Strelein has pointed out that native title ‘is not simply the incorporation of Aboriginal law into the common law system. It does not approach Indigenous law as an equal partner in negotiating recognition and producing space in which both laws can operate.’<sup>26</sup> She examines a range of approaches to conceptualising native title, but ultimately the case law supports interpretation of native title not just according to

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<sup>22</sup> *Western Australia v Ward* (2002) 213 CLR 1, 397.

<sup>23</sup> Richard Bartlett *Native Title in Australia* (2<sup>nd</sup> ed, 2004) 102.

<sup>24</sup> See eg discussion in Gray above n10.

<sup>25</sup> In spite of then Prime Minister John Howard’s reported declaration that ‘The future for Aborigines lies in mainstream Australia’. Ashleigh Wilson ‘PM Leads Aborigines to Mainstream’ *The Australian* (online) 29 August, 2007 < <http://www.theaustralian.news.com.au/story/0,25197,22325321-601,00.html> > at 10 March 2008.

<sup>26</sup> Lisa Strelein ‘Conceptualising Native Title’ (2001) 23 *Sydney Law Review* 95, 115.

common law, but according to common law *property* standards. The very uniqueness of ‘native title’ is so defined because of its ‘otherness’ in relation to common law land title.

The framework of analysis of Strelein,<sup>27</sup> and Golder<sup>28</sup> in exposing this ‘orientalist’ approach, appropriately focuses on the text of the judgements, and commentary on the theoretical nature of the concept of native title. This approach will now be adopted in analysing the status of the customary title, determined to constitute native title, in the decision in *Bennell*.<sup>29</sup>

### **Native Title Determination: A Hollow Victory?**

Unlike the applicants in *Yorta Yorta*, the applicants in *Bennell* were successful in aspects of their native title claim over Noongar country in south western Western Australia notably in respect of ‘land and waters in, or near to, the Perth metropolitan area’.<sup>30</sup> The applicants claimed that

1829 rules governing the occupation and use of land... were the laws and customs of that community; ... [that] the Noongar community continues to exist, and they are part of it; and that its members continue to observe some of the community’s traditional laws and customs (including in relation to land), although with changes flowing from the existence and actions of the white community.<sup>31</sup>

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<sup>27</sup> Ibid.

<sup>28</sup> Golder, above n5.

<sup>29</sup> *Bennell v State of Western Australia* [2006] FCA 1243 (unreported, Wilcox J, 19 September 2006).

<sup>30</sup> Ibid, Statement of Wilcox J.

<sup>31</sup> Ibid.



The decision follows the format of other native title decisions. It commences with a statement by the Judge summarising the case and the findings, followed by the decision proper.

One of the first striking aspects of this decision, like many other native title decisions, is the list of respondent parties. This of itself highlights the success of the adversarial system in providing a forum for contesting Indigenous claims. The identity of the respondent parties emphasises the otherness of the applicants and their claim. Respondents include all layers of government – the State of Western Australia, the Commonwealth and municipal councils as well as government entities such as Australian Maritime Safety Authority; major corporations eg Billiton Aluminium (BRA) Ltd and Telstra; community organisations such as Fremantle Sailing Club Inc and the Australian Red Cross; and religious institutions – the Roman Catholic Archbishop of Perth. These represent the bastions of modern Australian institutional life – a broad spectrum of the dominant hegemony. In opposing the claim, they reinforce the narrative of reality for the applicants as those who are different, identified clearly as the ‘other’ within an otherwise homogenous system.

The text of the decision then addresses the background to proceedings. In *Bennell*, the rights and interests sought were a general but non-exclusive right of ‘occupation, use and enjoyment of the lands and waters...’<sup>32</sup> and also a claim for ‘an exclusive possession, occupation, use and enjoyment of six specified types of land’.<sup>33</sup> The court observed that ‘none of the asserted rights and interests is “antithetical to fundamental tenets of the

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<sup>32</sup> Ibid, [810].

<sup>33</sup> Ibid, [812].

common law”. All of them are identical or similar to, rights and interests that have been recognised in earlier determinations of this Court.’<sup>34</sup>

While this process highlights the ethnocentric nature of the legislation in seeking to recognise those interests which ‘by resort to the processes of the new legal order, can be enforced and protected,’<sup>35</sup> the role of the applicant’s legal representative becomes relevant also. The lawyer’s skill in conceptualising the applicant’s interest in terms of the ‘settler legal order’ runs the risk of denying expression of traditional conceptions of customary rights and interests, and instead ranks native title rights and interests according to common law perceptions of proprietary interests. As a consequence ‘traditional relationships and procedures [cannot have] effect outside the dominant... system.’<sup>36</sup>

Once the claim is outlined, the judgement looks at elements of the native title claim and for most of the balance then of the 265 page decision, addresses the factual issues. In this part of the case (by far the majority of the decision) the Court effectively provides its own narrative of the Noongar people. It talks about language, laws and customs concerning land and customs and beliefs,<sup>37</sup> and whether there has been a ‘continuation of Noongar laws and customs from 1829 to the present day’.<sup>38</sup> This narrative is based on ‘source material’<sup>39</sup> and ‘historical summar[ies]’.<sup>40</sup> In these instances, such material is that *written* by colonisers about the colonised. In each aspect of the Court’s narrative of Noongar life, there is reference to the evidence of Drs Thieberger, Palmer and Brunton,

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<sup>34</sup> Ibid, [814].

<sup>35</sup> *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 454.

<sup>36</sup> BA Keon-Cohen ‘Aboriginal Land Rights in Australia: Beyond the Legislative Limits?’ in Roman Tomasic (ed) *Legislation and Society in Australia* (1979) 382, 404.

<sup>37</sup> Ibid, [191]-[391].

<sup>38</sup> Ibid, [455]-[799]

<sup>39</sup> Ibid, [85]-[118].

<sup>40</sup> Ibid [118]-[190].

‘Aboriginal evidence’ and to applicants’ and respondents’ submissions. The evidence is weighed up by Wilcox J and a conclusion is reached. From a (common law) lawyer’s perspective, this approach is logical and methodical, and follows the legitimate deductive reasoning of formalism.

In spite of the court finding for the applicants in this case, this process of analysis of ‘evidence’ of the applicant group’s identity is a reflection of an imposition of a particular view of the status and identity of the applicants. As (colonial) law, the decision imprints on the successful applicants the (colonial) court’s own interpretation of their identity. Irene Watson has written that ‘[f]or more than two hundred years the colonial state by way of force has imposed its own idea of what our identity is upon us.’<sup>41</sup> Irene Watson’s illustrations of the misinterpretation by the (common) law of Indigenous conceptions of world, law, custom and land highlight the Orientalist nature of the interface between Indigenous and colonial systems.<sup>42</sup> There is implicit in the process for ‘determination’ of native title (involving the weighing up of expert evidence about identity and culture that is primarily external to the claimants themselves) a view of the otherness of such a claim.

In explaining to the state... of [sic] our passion and desire to protect our law and our territories, we have had to translate into the English language ideas that have been alien to westerners for thousands of years.<sup>43</sup>

It is acknowledged that success in a court of law may offer a range of opportunities for engagement in ‘mainstream’ (dominant) discourse. This is reflected in the right to negotiate in the *NTA* and in the possibility of a belated community-wide

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<sup>41</sup> Irene Watson ‘Indigenous People’s Law-Ways: Survival Against the Colonial State’ (1997) 8 *Australian Feminist Law Journal* 39, 49.

<sup>42</sup> *Ibid*, 50-4.

<sup>43</sup> Watson, above n41, 53-4.

acknowledgement of the status of traditional owners.<sup>44</sup> However it is implicit in each such judgement will be an outsider's interpretation of what is essentially foreign to it, of information that has been translated to fit within the common law framework. To this extent, within the common law there is a usurpation of Indigenous identity and culture. This occurs not only in claims that lose in the courts, but also in those that are successful.

One contentious issue in *Bennell* that illustrates the dynamic between coloniser and colonised was that of the existence of a single Noongar community – in 1829 through to the present. This element was essential for the success of the claim. Traditional owners gave evidence that they identify as Noongar and the basis of that identification. Some of this evidence is particularly personal, and demonstrates a way of thinking about identity different from a western conception.

I am Noongar... I was taught by my grandmother, Ollie, that Noongars go from up near Jurien Bay... No one told me that I was Noongar, I just knew because of the way that we spoke to each other and other things, like hunting and fishing and camping that was all done together...<sup>45</sup>

[Mr Shaw said] his four sons, who were all born in Perth, 'are Noongar because I am Noongar and I brought them up that way'.<sup>46</sup>

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<sup>44</sup> See eg 'Native Title Forum Organisers Plan More Events' (12 April 2007) *ABC News Online* < <http://www.abc.net.au/news/stories/2007/04/12/1895378.htm> > at 7 April 2008, citing Debra Bennell: 'I hope [the forum on native title in south west Western Australia is] a way forward in negotiations, basically negotiations with commerce, with industry, family and community, black and white to improve the situation [of native title claims' impact on the broader community].' See also Robert Bropho for Nyungah Circle of Elders 'Carpenter Government's Shameful Record of Neglect' (2008) *Swan Valley Nyungah Community* < <http://www.nyungah.org.au/documents/AlanCarpe.html> > at 7 April 2008. Status as a successful applicant may provide the context necessary to bring otherwise alien groups together for the benefit of traditional owners, or to make representations on behalf of the now acknowledged traditional owners.

<sup>45</sup> *Ibid*, [460], evidence of Mr WW.

<sup>46</sup> *Ibid*, [468], evidence of Charlie Shaw.

My lads tell me that they feel good on their country...All of us Noongars are connected, like one. The spirits of our old people are in the trees, the rocks, the hills, the waterways and the sea. That is why my *boodj* [his particular country, or run] is so important to me and my family.<sup>47</sup>

In spite of this kind of evidence of a feeling of unity within a community or society, the Commonwealth argued that evidence of rituals in the claim area was ‘an indication of disunity, rather than unity’<sup>48</sup> amongst the claim group.

In the Judge’s discussion on evidence about the single claimant application, he says that he is ‘conscious of the danger of putting excessive weight on the evidence of contemporary Aboriginal witnesses in identifying the 1829 society’.<sup>49</sup> He was aware of

an effort to preserve, and teach to younger people, some of the Aboriginal languages and culture... Moreover, the witnesses who gave evidence in these cases were all aware that the Single Noongar application depends upon a finding that there was, in 1829, and is, today, a single community occupying the whole of the claim area...<sup>50</sup>

This echoes Golder’s comment that in the Full Court appeal of *Yorta Yorta*, the court denied the Yorta Yorta the tools to represent themselves and to challenge history ‘[u]nder cover of the spectre of fictitious claims – a horrific fantasy of specious Aborigines parading their manufactured tradition before the courtroom’.<sup>51</sup>

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<sup>47</sup> Ibid, [469], evidence of Charlie Shaw.

<sup>48</sup> Ibid, [752].

<sup>49</sup> Ibid, [449].

<sup>50</sup> Ibid.

<sup>51</sup> Golder, above nError! Bookmark not defined., Part IV.

While Wilcox J did acknowledge that he was nonetheless ‘impressed with [the traditional owners’] evidence’<sup>52</sup> the paramountcy of contemporary (white) written records is affirmed: to find for the claimants, he

comes back to matters about which [he] can be certain... the explicit assessments of Moore and Bates, and the inference to be drawn from the silence of the other early writers in relation to the question of whether or not there was a single community; ...the evidence of Dr Thieberger and others...<sup>53</sup>

In this judgement, the court may appear to have given ‘...claimant groups the right to narrate their own story, the right to challenge the normative meta-narrative’,<sup>54</sup> and it did ultimately accept that there was a single Noongar society at 1829: ‘the evidence of the Aboriginal witnesses in this case is not inconsistent with the Applicants’ case concerning the 1829 position.’<sup>55</sup> However the framework within which the finding was made affirms Golder’s view that

native title law can actually be read as an Orientalist legal discourse which continues to colonise and oppress Indigenous Australians to this day through representational practises [sic] which constitute them as other and inferior, as barbaric and traditional, as invisible and vestigial.<sup>56</sup>

In these examples, the native title process – both its identification of the nature of the claim, its adversarial process and its formalist pronouncements – gives voice to the dominant perspective and tests at every turn the very nature of indigeneity within the

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<sup>52</sup> *Bennell v State of Western Australia* [2006] FCA 1243 (unreported, Wilcox J, 19 September 2006), [450].

<sup>53</sup> *Ibid*, [452].

<sup>54</sup> Golder, above **nError! Bookmark not defined.**, Part IV, speaking in relation to the Full Federal Court decision in *Yorta Yorta*.

<sup>55</sup> *Bennell v State of Western Australia* [2006] FCA 1243 (unreported, Wilcox J, 19 September 2006), [451].

<sup>56</sup> Golder, above **nError! Bookmark not defined.**, Part I.

claim context. Where the judge interprets the evidence, he accepts the translated version of the applicants' claim, and highlights what is relevant to him to make his decision. This becomes the 'official' version. As Keon-Cohen has observed in the context of the *Aboriginal Land Rights (NT) Act 1976* (Cth), 'the act...does not allow traditional relationships and procedures to have effect *outside* the dominant positivist system established'.<sup>57</sup> Where a court (such as that in *Bennell*) does accept the claim, those traditional relationships and procedures will subsequently have effect within the dominant positivist system rather than within their own framework. Claimant identity is thereby officially rewritten becoming the new common law reality, the 'true' image<sup>58</sup> – once this recognition is given, traditional title becomes in reality a common law title articulated as such, rather than one operating outside the dominant positivist system.

The effect of this new reality upon traditional owners is expressed by Muir, who points out that '[i]t is critical to understand that Australian law does not and simply can not extinguish Indigenous law, however it does impact on the ability of Aboriginal and Torres Strait Islander peoples to maintain a way of life free of oppression, marginalisation and injustice'.<sup>59</sup> While a decision like *Bennell* may well be celebrated as delivering justice to Aboriginal people and may well bring benefits of recognition by the

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<sup>57</sup> BA Keon-Cohen 'Aboriginal Land Rights in Australia: Beyond the Legislative Limits?' in Roman Tomasic (ed) *Legislation and Society in Australia* (1979) 382, 404.

<sup>58</sup> Harris has made a similar observation in respect of the Royal Commission into Black Deaths in Custody, in Mark Harris 'Deconstructing the Royal Commission – Representations of "Aboriginality" in the Royal Commission into Aboriginal Deaths in Custody' in Greta Bird, Gary Martin and Jennifer Nielsen (eds) *Majah: Indigenous Peoples and the Law*, (1996), 191, 198.

<sup>59</sup> Kado Muir 'This Earth has an Aboriginal Culture Inside: Recognising the Cultural Value of Country' *Land Rights Laws: Issues of Native Title* Native Title Research Unit Australian Institute of Aboriginal and Torres Strait Islander Studies Issues Paper No 23 July 1998; 4, from an institutional perspective, see also *Aboriginal and Torres Strait Islander Justice Commissioner Native Title Report 2004*.

dominant legal system, in the context of self-determination within the processes of the law the victory may well be a hollow one.<sup>60</sup>

## **Part II Traditional Culture meets Legal Culture**

Anglo-Australian legal culture is both formed by and contributes to common law processes. It is adversarial, deductive, impartial, objective, logical – an apparently closed system.<sup>61</sup> Legal practitioners – solicitors, barristers and judges – are trained to think and behave in a way that supports this framework. This prevailing and dominating culture and processes are alienating and foreign to the average citizen, and are recognised as being particularly unforgiving to Indigenous peoples.<sup>62</sup> As cited above, this alienation is compounded for native title applicants in the context of having to prove customary laws.<sup>63</sup>

In addition to the cultural perspectives that inevitably influence the way in which the applicants' evidence is construed by the court, this in turn will be based on the construction of the argument of the lawyers representing the claimants and respondent parties. Wayne Atkinson writes that the “native title industry” has usurped Indigenous voices and has empowered itself on the backs of Indigenous claimants’.<sup>64</sup> In addition to politics, policy, process and community hostility, Atkinson singles out the legal profession and its prevailing culture as one factor ‘exacerbating the battle’.

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<sup>60</sup> See eg Watson, above n41.

<sup>61</sup> See generally Margaret Davies *Asking the Law Question* (3<sup>rd</sup> edition, 2008), ch2.

<sup>62</sup> See eg Australian Law Reform Commission, *The Recognition of Aboriginal Customary Law*, Report 31 (1986) ch 23 in particular.

<sup>63</sup> *Ibid*, [622].

<sup>64</sup> Wayne Atkinson “‘Not One Iota’ of Land Justice: Reflections on the Yorta Yorta Native Title Claim, 1994-2001’ [2001] *Indigenous Law Bulletin* 12.



There are three main aspects of common law adversarial legal practice in native title that will be considered. Together, these contribute to the courts' construction of a transformed customary law that fits within the Anglo-Australian parameters of common law native title. These are the lawyer's repackaging of traditional owner knowledge as evidence; the manner of exercise of the lawyer's duty to the traditional owner client in the framework of common law process; and the quality of the instructions obtained from traditional owner clients in bringing a native title claim. In each case the dominant legal culture implicitly affirms traditional owners as 'other' in the legal system through use and therefore transformation of knowledge and stories within a system foreign to and dismissive of that of customary law. Each of these will be addressed in turn.

### ***Repackaging Traditional Owner Knowledge***

In the 1979 film *Kramer vs Kramer*,<sup>65</sup> the Dustin Hoffman character admitted to his estranged wife that he had felt responsible for their son's accident in a playground. Both parents came together when the son was being treated for his injuries, and engaged in a tender exchange. Later in the courtroom custody battle, the father was cross examined by the mother's counsel about the playground incident. "Didn't you admit to feeling responsible when your son was injured?" This evidence was adduced to indicate that the father was not suitable to take custody of the child. The Meryl Streep character looked crestfallen: she had obviously disclosed the incident to her lawyer without realizing the potential for it to be used against the father.

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<sup>65</sup> Directed by Robert Benton, Columbia Pictures Corporation, 1979.

This scenario illustrates how lawyers use evidence. It shows that to a lawyer, your story, your identity, your feelings, are all available to support your case in court. It shows that once this enters the public legal domain, the character of the story or identity or feeling is irreparably altered. It also shows how a client or witness can lose control, lose ownership of their story and become invisible in the process in deference to the lawyer.<sup>66</sup>

This is a useful analogy to describe lawyering in native title. Lawyers are trained to collect evidence, select the ‘best’<sup>67</sup> and present it in support of their client’s case. For a traditional owner client, identity and culture provide the evidence for a native title claim and giving that evidence over can change things as it did in *Kramer vs Kramer*.

Lawyers therefore implicitly have a different concept of traditional culture. To a native title lawyer, regardless of their respect for or commitment to traditional owners’ struggle to get their land back, the stories, activities and culture of traditional owners constitute evidence in an adversarial trial. These activities and stories will be evidence in support of the claim, or they will be evidence against the claim. For the native title representative body (‘NTRB’) lawyer, in the latter case this ‘evidence’ must be explained either in terms which bring it within the framework supporting the claim, or at least as not destroying the integrity of the claim (ie when a respondent party raises this issue, how can we respond?).

Crown representatives too contribute to the ‘othering’ of traditional culture where they fail to use information about activities and stories judiciously in their interactions with traditional owners. In the traditional model of lawyering (the ‘adversarial advocate’

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<sup>66</sup> See also reference to this risk in Australian Law Reform Commission Report 31, above n62, [622].

<sup>67</sup> According to the criteria of satisfaction of the laws of evidence, of trial strategies and according to the lawyer’s own conceptualisation of that information.

model) interactions between Crown representatives in mediation and negotiations as well as in the court room are designed to further the interests of their client, the State. In an adversarial contest, the client's interests are to be advanced and by definition the interests of one client fail to converge with those of their adversary. It is only natural for Crown lawyers to deny or challenge connection to land, a common law element necessary to prove native title,<sup>68</sup> where in contrast traditional owners feel connection as an inherent part of their identity.<sup>69</sup> Atkinson points out in relation to the *Yorta Yorta* mediation that '[r]espondents were unwilling to recognise the Yorta Yorta as a group'.<sup>70</sup> Likewise, 'discrepancies' in evidence in *Risk* of the practice of the custom of avoiding a deceased's name was considered by the respondent Northern Territory as indicating that 'the tradition ...had simply been copied from other Aboriginal tribes as a "badge of Aboriginality"'.<sup>71</sup> These examples not only represent a suppression of Indigenous voices, but in silencing the traditional owners they also highlight the power differential between applicant and respondent inherent in native title claims and the treatment by the law and its processes of personal and group identity within respondent strategy. Where this strategy forms the framework of a native title claim – including how the applicants themselves develop their own strategy – it highlights the otherness of the claimant parties in the eyes of respondent advocates and their otherness within a system that supports this kind of approach.

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<sup>68</sup> See Bartlett, above n23 110-21 for an overview of connection.

<sup>69</sup> See eg Watson, above n41.

<sup>70</sup> Atkinson, above n64.

<sup>71</sup> *Risk v Northern Territory of Australia* [2006] FCA 404 (unreported, Mansfield J, 13 April 2006), [554]. The case was unsuccessfully appealed in the Full Court of the Federal Court in *Risk v Northern Territory of Australia* [2007] FCAFC 46 (unreported, French, Finn and Sundberg JJ, 5 April 2007)

This adversarial strategy and its reinforcement of the parties' power differential is particularly useful for the State respondent where the State prescribes its own guidelines for preparation of connection reports as a pre-requisite for commencement of native title negotiations.<sup>72</sup> This adversarial respondent party tactic sets parameters within which the applicant story is told. The Queensland *Guide* sets out the method of proof expected by the State before engaging in negotiation,<sup>73</sup> from the perspective of the State. The *Guide* states for example, that 'the review process does not favour European written documentation over that of Indigenous oral testimony, although it should be recognised that the documentary records have been, and are, extremely important.'<sup>74</sup> In endnote 2 of the *Guide*, the reader is referred to an 'excellent' discussion from 'an anthropologist's perspective' and a 'classic statement' from 'a historian's perspective'.<sup>75</sup> The perspective of the traditional owner about the respective merits of written documentation and Indigenous oral testimony is conspicuously absent.<sup>76</sup> Applicants therefore must apparently package their evidence in a way that satisfies the State. This influences (or dictates) the way in which the applicant claim is brought and renders the applicants themselves invisible.<sup>77</sup>

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<sup>72</sup> See eg Queensland Government Native Title and Indigenous Land Services *Guide for Compiling a Connection Report for Native Title Claims in Queensland* October 2003 ('*Guide*').

<sup>73</sup> 'In considering the evidence and argument contained in the connection report, the State is assessing whether or not the case presented by the native title claim group is likely to meet the requirements of the Commonwealth *Native Title Act 1993* [NTA] were the matter to proceed to trial.' Ibid, 1.

<sup>74</sup> Ibid, 3.

<sup>75</sup> Ibid, 26.

<sup>76</sup> See generally comments by Atkinson, above n64 and Gray, above n6. See also discussion above in the context of the Court's approach in *Bennell* above, n53.

<sup>77</sup> See discussion in Golder, above nError! Bookmark not defined..

To the extent that the *Guide* represents one respondent party's interpretation of the law<sup>78</sup> (ie Queensland's) it is clear that there is an expectation that customary law fit the parameters of common law and begin its transformation before that customary law is given space within the common law system. The dominance of the colonial power and the requirement to conceptualise customary title in terms of common law constructs is reinforced from the earliest days of a native title claim. This leads us to question the duty of the lawyer to their traditional owner client: work within the dominant system to achieve a native title outcome, or continue to challenge the system to impose the stamp of customary law?

### ***Lawyers' Duty to the Traditional Owner Client***

We can envisage the NTRB lawyer and their client in an inevitable clash of culture in the same terms as that between customary and common law itself: the lawyer will instinctively translate native title into common law concepts and will instinctively work within the common law (including statutory) process to achieve what is after all a legal outcome. This is necessary to oppose respondents' claims and answer their criticisms, as much as to find a concrete and substantial interest in common law terms, to maximise the benefit to their clients. The lawyer is conditioned to think that if they can find some kind of right to exclusive use and occupation of land, this is the biggest kind of right known to the common law and they can therefore secure a better and more extensive form of title for the traditional owners. The approaches of the courts and the development of common

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<sup>78</sup> *Guide*, above n72, 1. 'Native title claim groups should recognise that the State's understanding of native title, and for demonstrating native title, might differ to those of other parties to a native title claim.'

law understandings of native title in terms of the ‘bundle of rights’ analogy are evidence of this.<sup>79</sup>

There are two aspects of the traditional or ‘adversarial advocate’ model of lawyering practice that result in and reinforce this behaviour. First, as has been seen, this model promotes vigorous advocacy of the client’s interests within the bounds of the law;<sup>80</sup> and secondly (and this modifies the first aspect somewhat) the client normally ‘instructs’ the lawyer.<sup>81</sup> In a traditional lawyer-control model of practice, Ysaiah Ross identifies that ‘the lawyer is in control because of their expertise’.<sup>82</sup> This model of lawyering also assumes a level of competence in the client themselves to ‘understand, exercise and protect their own rights in a complex legal and administrative world’.<sup>83</sup> Ross points out that this model is ‘inapplicable in dealing with Aborigines’<sup>84</sup> who face a range of simultaneous issues.

This model is recognised as one of two ‘most dominant ethical approaches cited in public statements about lawyers’ ethics’.<sup>85</sup> Parker observes that it arose in the context of protection of citizen’s rights against the ‘superior power and resources of the state’.<sup>86</sup> In this context, the adversarial advocate might be well placed to protect the Aboriginal or Torres Strait Islander client from such power. However the State (as respondent party) itself applies such a model of practice against the applicants, and the overwhelming

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<sup>79</sup> See eg Strelein, above n26; Pearson, above n7, 152.

<sup>80</sup> Christine Parker ‘A Critical Morality for Lawyers: Four Approaches to Lawyers’ Ethics’ (2004) 30 *Monash University Law Review* 49, 56.

<sup>81</sup> Christine Parker ‘Regulation of the Ethics of Australian Legal Practice’ (2002) 25 *University of New South Wales Law Journal* 676, 679.

<sup>82</sup> Ysaiah Ross *Ethics in Law* (4<sup>th</sup> ed, 2005) 249.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*, 40.

<sup>85</sup> Christine Parker and Adrian Evans *Inside Lawyers Ethics* (2007), 22.

<sup>86</sup> Parker ‘Critical Morality’, above n80, 57.

culture of such practice by both respondent and applicant lawyers does not serve to liberate the Indigenous client from the power imbalance implicit in the legal system and processes itself. It is a representational practice that is part of what Golder maintains is an Orientalist legal discourse: a ‘Western means of representing, knowing and (ultimately) exercising power over, the [Aboriginal or Torres Strait Islander people].’<sup>87</sup>

Such practice, representing as it does a legalist Western model of engagement, if adopted uncritically, runs the risk of obscuring the voice of the client through dominance of the culture of the lawyer as expert. The adversarial advocate implicitly recognises the traditional owner client as the ‘other’ – an outsider to legal culture and in need of an imposed legal expertise. Compounding the outsider status of the client in the lawyer-client relationship, this model impacts on the design of the claim where the client is silent as to the expression of traditional interests. It risks a ranking of native title rights and interests according to common law perceptions – lawyer perceptions – of proprietary interests. It might also have a related impact on prioritisation of claims within the NTRB where this is undertaken on recommendation of NTRB lawyers. If a right can be characterised as one of a fuller extent (eg right to exclusive use and occupation) then that right might be pursued in preference perhaps to one which is characterised as a lesser right (eg right to pass over land seasonally). This reflects a ranking of common law-style proprietary rights which will not necessarily reflect the priorities of traditional owners themselves.

An alternative conceptualisation of lawyering is described by Christine Parker – this is the ethic of care, or relational approach. This approach focuses on ‘responsibilities to

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<sup>87</sup> Golder above nError! Bookmark not defined., Part II.

people, communities and relationships'.<sup>88</sup> It has been argued that this approach responds to 'a need for legal counselors (sic) to have an alternative counseling and mediation model that protects the client from unnecessarily negative affects of the adversarial system.'<sup>89</sup> Some of these 'unnecessary negative effects' on Indigenous Australians in native title claims, are described above.

It is argued that this approach would be represented by practitioners who seek to promote the self-determination and autonomy of their client through the lawyer-client relationship. Zwier and Hamric point out that within the traditional model, 'the lawyer is tempted, in his (sic) role as expert problem solver, to over-step his boundaries and [impinge] on the client's autonomy...'<sup>90</sup> The client autonomy referred to here is not that in the sense of the adversarial advocate approach that separates the lawyer from the client (in the interests of client autonomy) but rather an approach that allows the client to engage fully in the legal process on their own terms.

An ethic of care approach implicitly requires the lawyer to promote the self-determination of their client through participatory approaches to lawyering.<sup>91</sup> Ross describes this in terms of a 'cooperative model' of practice. In his view, this model would promote an 'exchange of moral views' between lawyer and client.<sup>92</sup> The model for example 'emphasizes listening and restatement of what has been said in order to fully understand the client's views. In the lawyer model, the lawyer manipulates the client into

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<sup>88</sup> Parker 'A Critical Morality for Lawyers', above n80, 56.

<sup>89</sup> Paul J Zwier and Ann B Hamric 'The Ethics of Care and ReImagining the Lawyer/Client Relationship' (1996) 22 *Journal of Contemporary Law* 383, 388.

<sup>90</sup> Ibid.

<sup>91</sup> Parker 'A Critical Morality for Lawyers', above n80, 70. See also in a different context, Ian Kerridge, Michael Lowe, Johan McPhee, *Ethics and Law for Health Professions* (2<sup>nd</sup> ed, 2005) ch 4.

<sup>92</sup> Ross, above n82, 40.



revealing the information in order to evaluate the lawyer's interest in the case.<sup>93</sup> Either way, to act ethically under this style of lawyering the lawyer must ensure that their client is in an informed position from which to make decisions in their best interests, or which at least advance what is the client's own perception of their best interests.

It is the duty of the lawyer to ascertain what those client perceptions are, and to identify how they can best be met by the law as it exists (hence the exchange of moral views). The lawyer is at the interface of the system of customary law of the traditional owner, and the common law. To achieve the aims set out in the preamble of the *NTA* but also to fulfil the lawyer's ethic of care to the client, the lawyer must provide the means by which traditional owners' custom and knowledge and feelings are presented as an independent system adhering to its own values. If a lawyer presents the knowledge repackaged by the common law system in terms foreign to the applicants as interpreted by lawyers and anthropologists, or presented in the way done by the defence in *Kramer vs Kramer*, this represents a transformation of the customary law and traditions into something other than customary law and tradition. Repackaging denies the voice of the traditional owner in their own terms.

### ***Taking Instructions***

At the very least, and even within the framework of lawyer-control model, a lawyer must get instructions. If the client is unaware of the stages in the legal process, their prospects of success and the consequences of failure, and of how client information is used, then

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<sup>93</sup> Zwier and Hamric, above n89, 410.

the likelihood of proper and informed instructions is remote. Each of these will be examined in more detail.

### ***Stages in the Process***

Information about native title processes will empower the traditional owner client to the extent that they have the opportunity to become more engaged in these processes on their own terms. It is observed that traditional owners can be keener than clients in other fields of law, to engage actively with all aspects of the process. For example in a recent matter, an NTRB lawyer took for granted a directions hearing and its administrative nature, and failed to invite their traditional owner clients to attend. This represented the lawyer's view of legal process as administrative, of little substance and of a routine nature. This view failed to appreciate the empowering effect on the client of active participation in legal processes. It reinforces the 'lawyer as expert' and the client as other, invisible within the familiar terrain of the common law court.

In the focus on land rights and the common law, stakeholders can become goal oriented and ignore the steps taken to achieve that end. This inevitably means that they are subsumed by the process. This is where the 'relational' NTRB lawyer would owe a duty of care to listen to and to maintain their clients' voice: if they fail to give voice to what is important to their client at each step of the process, they reinforce the dominance of the common law which becomes the normative narrative of reality of indigenous land 'ownership'.

In reality many traditional owners continue to question the processes and system. However the common law system, supported by traditional legal practice, suppresses

their voices and reinforces their invisibility. Their lawyers work within the system, they are of the system, and they themselves often do not hear. This is likely to be particularly so where a lawyer-control methodology of practice occurs.

In failing to listen to these voices, and where lawyers fail to present this perspective in the context of native title processes and practice, there will be an ongoing assertion by the law and its actors that Indigenous rights to land are indeed a creature of the common law. Echoing Noel Pearson's comments of 1997, the way advocates prosecute the law on native title will not give common law native title its 'optimum share'.<sup>94</sup> This confirms the 'otherness' of the title and its claimants and the centrality of the dominant system.

Paradoxically, any suggestion that a traditional owner group adheres to the norms of the common law rather than to customary norms by definition cannot meet the standard of proof of connection to their pre-sovereignty normative position. Traditional owner groups around the country have formed incorporated associations for any number of purposes – promoting arts, language and culture, promoting land issues, receiving royalties, or to be a prescribed body corporate under the *NTA*. Most NTRB's are Aboriginal corporations incorporated under the *Aboriginal Councils and Associations Act 1976* (Cth). Incorporation is often required by law before benefits can be received, and most legal practitioners would not hesitate to recommend such a familiar and acceptable structure. Many corporations are set up within the common law but according to traditional decision-making structures. However for any number of reasons, the formal decision-making structures of the incorporated association may operate otherwise. That

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<sup>94</sup> Pearson, above n7, 152.

will not necessarily preclude traditional decision-making from taking place but so far as the common law is concerned, the documents of incorporation will be definitive.

While the establishment of such a body may provide the lawyer with evidence of modern application of traditional decision-making, it also may not. In *Risk* the court found that the entity making the decisions for the Larrakia people was Larrakia Nation Aboriginal Corporation. '[I]ts composition [was] not traditional' however, as it was not universally accepted by all families, it was a democratic process and there was no evidence of involvement of a 'superior elder reflecting the sort of status reported by the "King" figures referred to in earlier literature'. The court did 'not consider that process reflects the carrying on of the traditional method of decision-making by the Larrakia people'.<sup>95</sup>

While on the one hand often being required (by the dominant paradigm) to use modern decision-making structures, applicants on the other hand risk presenting to the court a departure from traditional law and custom. In the case of the Larrakia, the burden of proving that their decision-making was undertaken in a traditional way was too great.

This places a duty on the native title lawyer to think carefully about taking instructions and setting up traditional owner corporations. The real seat of power may in fact be outside the common law governance structure of the organisation. To the extent that traditional owners use modern corporate structures, they run the risk of providing evidence contrary to their claim. The dominant norms are simultaneously applied to traditional owners, yet where traditional owners conform to dominant norms, they are seen as assimilated to the dominant culture and their own culture is denied. The double

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<sup>95</sup> *Risk v Northern Territory* [2006] FCA 404 (unreported, Mansfield J, 13 April 2006), [832].

standards in the common law processes render the traditional owner identity invisible before the law.

### ***Prospects of Success***

The corollary to the *NTA*'s process of recognition and protection of native title is that if the court finds there are no native title rights and interests, the claimant group has no standing in the eyes of the common law as the people of that land. This is in stark contrast to how the traditional owners would perceive themselves, within their own norms: norms which the common law has declared do not exist. This non-recognition of customary title represents the erosion or destruction of 'native title'. It is possible to understand this result of common law legal process as a 'tacit denial of Aboriginal people's unique spiritual connection with the land'<sup>96</sup> thus affirming the othering of Aboriginality and the Golder's assertions of Orientalism in the native title process.<sup>97</sup>

To work towards deconstructing the otherness of the native title claimant – in promoting self-determination<sup>98</sup> – the duty of the ethic of care practitioner is to ascertain the client's expectations of the process and outcome and to inform the client as to the realistic prospects of success as well as the risks inherent in the process. In *Ward*, Callinan J acknowledged that: '[t]o these drawbacks flowing from the recognition of native title may be added others ... I fear, the expectations of the indigenous people have been raised

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<sup>96</sup> Wendy Bradey and Michelle Carey '“Talkin’ up Whiteness:” A Black and White Dialogue' in John Docker and Gerhard Fischer (eds) *Race, Color and Identity in Australia and New Zealand*, 270, 277.

<sup>97</sup> Golder, above nError! Bookmark not defined..

<sup>98</sup> This reflects the human rights ambitions of *Mabo* and the preamble of the *NTA* as well as conforming to best practice legal practice promoting client autonomy.

and dashed'.<sup>99</sup> The implication is that these issues had not been addressed with claimants.

The process in which a claimant group elects to participate in a native title claim is the first part of the process of intersection between customary and common law. Where the cooperative or ethic of care model of practice is adopted at this point, and where traditional owners have made a choice reflecting their own priorities, in their own voice, the decision to make a claim will arguably represent more an adaptation by traditional owners rather than a submission to the common law or a repression of customary law by the dominant paradigm. Such a decision will begin the deconstruction of the 'otherness' of traditional ways.

On the other hand, where lawyers fail to properly apprise their clients of the true prospects and the possible outcome of the process, through failing to listen to their clients' needs and their clients' own stories, they remove that choice. In doing so, they contribute to the new normative reality of traditional ownership as something determined by common law, reinforcing the predetermined place of traditional owners as outsiders in the system.

## **Conclusion**

This reflection has attempted to raise the consciousness of legal practitioners in the field of native title law about their role in maintaining the otherness of their Aboriginal and Torres Strait Islander clients through traditional and dominant Anglo-Australian methods

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<sup>99</sup> *Western Australia v Ward* (2002) 213 CLR 1, 398.

of legal practice – both in its incarnation as a decision of the court and within the processes of legal practice itself.

It is clear from a reading of *Bennell*,<sup>100</sup> in which the applicant traditional owners were apparently successful, that even success represents an Orientalist discourse that implicitly denies the true voice of Indigenous people. The applicants remain ‘other’ during the judgement even as they are inculcated into the common law of native title. Once their legal position is declared then by the court, their voice becomes that of the common law. Native title law, common law, provides an ‘explanation and narrative of reality’<sup>101</sup> as the norm for customary land title. This norm denies customary title its identity as such, subsuming it within the dominant common law which processes customary laws into a list of rights and interests intelligible to the common law. Where the common law process rejects native title, traditional owners have nothing recognised by common law. They are dispossessed forever of their rights within the dominant paradigm. Their native title is destroyed and they remain the other.

In addition to the text of a decision, the practice of lawyers in native title contributes to the othering of traditional owners who come in contact with the system. This is achieved not only through formal processes of the law but also through the mode of behaviour of the lawyer towards their client.

To challenge native title as an Orientalist discourse, it is incumbent on each practitioner to reflect on how they practise, how they are instruments of the dominant culture – and how this impacts on their clients, traditional owners. A lack of awareness will draw them

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<sup>100</sup> *Bennell v State of Western Australia* [2006] FCA 1243 (unreported, Wilcox J, 19 September 2006).

<sup>101</sup> Spivak, above n19.

into the processes which in turn relentlessly pull traditional law and custom into the gravity field of the common law. Legal practice adopting an ethic of care approach focussed on listening and giving voice to the client and their needs – an exchange of moral views<sup>102</sup> – may provide an opportunity for raising the voice of the Indigenous client of their own narrative of reality.

Is all lost? If there is any chance of delivering a beneficial impact of native title for traditional owners, practitioners in the field must practise more critically. It will only be with insight as to their own standing within the common law system and their own practice that they may provide traditional owner clients with the means to provide the common law system with their own voiced ‘narrative of reality’ of traditional land ownership.

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<sup>102</sup> See Ross above n82.