We have the song, so we have the land:

song and ceremony as proof of ownership in Aboriginal and Torres Strait Islander land claims

Grace Koch

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About the author

Grace Koch came to Australia in 1974 after completing graduate studies at Boston University. The following year she became the assistant to Alice Moyle, the Research Officer in Ethnomusicology at the (then) Australian Institute of Aboriginal Studies. She later worked for the Central Land Council in Alice Springs over the course of five land claims, where part of her duties involved tracing song lines through claim areas. That experience led to her present position of Native Title Research and Access Officer at the Australian Institute of Aboriginal and Torres Strait Islander Studies.

A professional archivist, Grace has served on both the executive board and working committees of the International Association of Sound and Audiovisual Archives (IASA). In 2008 she received IASA'S Special Recognition Award for Outstanding Service and the Australasian Sound Recordings Association award for service to sound archiving and Indigenous collections. She was also appointed to the Foundation Board of the National Film and Sound Archive in Canberra.

Grace's books include *Kayteye Country: an Aboriginal history of the Barrow Creek area* and *Dyirbal song poetry* (with RMW Dixon). For the latter she won the AIATSIS Stanner Prize in 1999. She has written on the digitisation of recorded sound materials, songs from the collections of Luise Hercus and others, ethical issues arising from the management of Indigenous collections, and the use of songs and recorded sound material as evidence in land claims.

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A shorter version of this paper, with a different focus and co-authored by Alexandra Crowe, will appear later in 2013 in the journal *Collaborative Anthropologies*, vol. 6, published by University of Nebraska Press.

1 Introduction

> Whitefella got that piece of paper — might be lease or something like that — but Yanyuwa and Garrwa mob they got to have kujika. When whitefella ask them kids how you know this country belongs to you, they can say we got the kujika. Kujika, you know, like that piece of paper.[1]

These words were spoken by Dinny McDinny, an elder from the Borroloola area near the Gulf of Carpentaria, when telling the linguist John Bradley about educating children in the ways of the bush. *Kujika* are the epic song cycles from both the Gulf of Carpentaria and parts of Central Australia that trace the travels of creator spirits as they move through the land. If people knew *kujika* for an area, they had a title deed for the land, Aboriginal way.

This paper explores the importance of evidentiary references to song and ceremony in land claims under both the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA) and the *Native Title Act 1993* (Cth) (NTA) and analyses judges' reports to show how references to song and ceremony have figured in them.

The first section of the paper looks at how song and ceremony sit within Aboriginal and Torres Strait Islander societies. It will then move on to quantify the number of references in judges' reports for each state. Finally, there will be a detailed examination of how terms such as song and ceremony have been used in different ways as evidence for rights to country.

1.1 Some functions of song in Aboriginal and Torres Strait Islander society

In Australian Indigenous societies, the land and the songs associated with it are connected intimately. Singing is the main method of transmitting knowledge in an orally based society. Songs that are specifically land based come from ancestral beings, while other songs may be used for purposes such as healing. Some songs are used for social control; for example, publicising the actions of people who are cheating at cards. The songs composed by people themselves are the property of those who have created them.

There are many types of song in Aboriginal and Torres Strait Islander society, but this paper will concentrate upon the land-based songs that have been cited in land claims and native title claims. The culture heroes, or Dreamings, who gave the songs to people sang as they travelled, creating geographical features, native animals and plants (and human relationships with them). They also established rules or laws that form important elements of Indigenous society. The places where the songs reside on the land can often be mapped because they follow the trails of these culture heroes. When people sing these songs, they activate the force that enables ceremonies. These in turn generate power that nurtures the land and its people. The songs also provide a mnemonic device to guide people to geographical features, such as waterholes, thus helping people live well on the land. The owners of the songs and ceremonies have been recognised in Australian law as having ownership of the land through which the songs travel. Knowledge of these land-based songs has been accepted by Aboriginal Land Commissioners and Federal Court judges as proof of connection with land.

1 J Bradley, *Singing saltwater country: journey to the songlines of Carpentaria*, Allen & Unwin, Crows Nest, NSW, 2012, p. 29.

1.2 Background to the legislation and key terms

The ALRA arose from the *First report of the Aboriginal Land Rights Commission*, in 1973, which made a number of recommendations to the Australian Government on land rights for the people of the Northern Territory. The ALRA was created in order to recognise legally the Aboriginal system of land ownership within the Northern Territory. In 1974 the Northern Land Council and the Central Land Council were established to conduct the processes necessary to prove ownership of the land under claim by Aboriginal people and to administer the land trusts created after successful claims.[2] The ALRA defines the traditional Aboriginal owners in relation to land as:

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

Aboriginal Land Commissioners were appointed by the federal government to identify the traditional Aboriginal owners of the land under claim, to report findings to the minister and the Administrator of the Northern Territory, and to make recommendations for granting the land or parts of the land to the claimants.[4] For successful claims, an Aboriginal land trust made up of Aboriginal people with rights to the land would be granted the strongest recognised form of title over that land, known as inalienable Aboriginal freehold.[5]

The NTA arose from the findings of the High Court of Australia that overturned the concept of *terra nullius* (land belonging to no one), thus recognising that Australian Indigenous peoples had their own systems of law, which preceded white colonisation and under which they held rights to their lands. The court recognised that Australian Indigenous peoples had a form of entitlement to land based upon their traditional laws and customs, and this set of rights was referred to as 'native title'. The Act, in a rather circular way, defines native title rights and interests as:

> …the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
> (c) the rights and interests are recognised by the common law of Australia.[6]

2 In addition to the original two land councils, two offshore organisations covering islands to the north and east of the Northern Territory appeared later. The Tiwi Land Council was created in 1978 and the Anindilyakwa Land Council split off from the Northern Land Council in 1991.

3 *Aboriginal Land Rights (Northern Territory) Act 1976*, Section 3, http://www.austlii.edu.au/au/legis/cth/consol_act/alrta1976444/s3.html, accessed 12 March 2013.

4 See Aboriginal Land Commissioner, *Report for the year ended 30 June 2005*, Office of the Aboriginal Land Commissioner, Darwin, 2005, pp. 1–2.

5 For further information on inalienable Aboriginal freehold, see http://www.nlc.org.au/articles/info/bush-business, accessed 8 April 2013.

6 Native Title Act, s 223, http://www.austlii.edu.au/au/legis/cth/consol_act/nta1993147/s223.html, accessed 12 March 2013.

Unlike the ALRA, the NTA extends to all of mainland Australia, its islands and the Torres Strait. NTA claims are heard by judges from the Federal Court, who make judicial determinations about whether and where native title exists, who holds it, and what rights and interests it entails. State or territory governments have contested a number of native title claims; this can make the process take a very long time. Native Title Representative Bodies were created to assist native title holders in preparing their claims and to help with matters arising after claims. If a native title claim is successful, the rights stipulated in the judgment are recognised, but the native title holders do not have the same type of title as traditional owners under ALRA claims in the Northern Territory.[7] Table 1 shows the terms used by each Act for similar processes.

Table 1: Comparison of processes for the ALRA and the NTA

	Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)	*Native Title Act 1993* (Cth)
Preliminary research documents prepared for the hearings	'Claim book' (anthropology report) Genealogies Site map Claimant profiles	'Connection report' (anthropology report)
Judgment prepared by	Aboriginal Land Commissioner	Federal Court judges
Findings submitted as	Reports by the Aboriginal Land Commissioner	Federal Court determinations

Claim books, which are documents written by anthropologists and other consultants for ALRA cases setting out the basis for the claim, refer to regionally relevant rituals and songs where it is appropriate to do so. Genealogies, maps and other materials were also prepared to support the claim. Although these were not available for this study because of staffing and collection management restraints within land councils, they provided the Aboriginal Land Commissioners with important documentary evidence in the preparation of their final reports. Most reports refer to or quote specific sections from the claim books. All but four of the reports available online mention songs or ceremonies, usually in sections detailing common spiritual affiliations or primary spiritual responsibility.

Connection reports for the NTA present evidence closely aligned with the concepts of laws and customs and how these fit with rights and interests, thus differing in organisation from the claim books.

In addition, claims under the NTA may be conducted in several ways. Litigated determinations are made on the basis of a court trial. In such cases, the determinations are supported by written judgments, which often run to hundreds of pages. Consent determinations are made after agreement has been reached between the claimants, the state or territory government and any other parties with a material interest in the outcome. Unopposed determinations

7 For comments on the two acts mentioned above as well as other acts pertaining to native title, see L Strelein, *Compromised jurisprudence: native title cases since Mabo*, 2nd edn, Aboriginal Studies Press, Canberra, 2009.

are lodged by one applicant if other interested parties raise no objections. Unlike the other two processes, they are determined without a hearing. Unopposed determinations will not be discussed in this paper.

1.3 Proof of connection with land under both Acts

The Indigenous land claim processes in Australia allow for some unique types of evidence in support of claims, such as genealogies, oral histories, group evidence, gender restricted evidence and identifications of sites, to accommodate the requirements of both the Anglo-Australian legal system and traditional Indigenous law. Because the ALRA hearings were intended as inquiries, the formal legal doctrine of rules of evidence[8] was not as strictly applied as, for example, in the litigated determinations under the NTA, where traditionally submitted evidence has been contested.

For land claims under the ALRA, performances were often given on sites relating to the ceremonies as the Aboriginal Land Commissioners travelled through the land under claim. Although the ALRA itself did not specify the validity of these types of evidence, the Aboriginal Land Commissioners often stated in their reports that such cultural knowledge was vital to supporting the concept of 'primary spiritual connection' or 'common spiritual affiliations' with the land, which are factors required by the ALRA in determining traditional ownership.[9] Thus, performances of songs and ceremonies display knowledge of spiritual and physical aspects of the land under claim.

Indigenous people verify their claims to land in ways that differ substantially from those of European society. Noting this cultural divide, the Hon. Justice Peter Gray, formerly an Aboriginal Land Commissioner and a judge with the Federal Court of Australia, observed:

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

8 For a description of the rules of evidence see National Archives of Australia, *Evidence law in Australia*, http://www.naa.gov.au/records-management/strategic-information/standards/records-in-evidence/evidence-law-australia.aspx#section3, accessed 17 November 2012.

9 For example, on page 16 of the Timber Creek Land Claim Commissioner Maurice says: 'Expressions of responsibility for the sites and the surrounding country were commonplace. Part of the exercising of responsibility is no doubt involved in painting the designs, singing the songs, and performing the ceremonies for the country.' See FaHCSIA, Aboriginal Land Commissioner's Reports, http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/publications-articles/land-native-title/aboriginal-land-commissioners-reports, accessed 12 March 2013.

He went on to say:

> Aboriginal culture is reflected in ceremonies. These involve painting, singing, dancing and the use of sacred objects…Often ceremony, song, dance and design are the very title deeds to land. The ability to have a particular design painted on your body, or to paint it on someone else's body, to sing a particular song, or to perform a particular dance, is proof of entitlement to particular lands.[10]

Land-based songs come from ancestral beings and are passed on to traditional owners so that they can be performed to maintain the health of the land and, often, the people associated with it. Justice Gray equates controlling this knowledge to having proof of entitlement to land.

From statements by the Alyawarr people of Central Australia, with whom he worked for several years analysing and documenting the Alyawarr musical culture, the ethno-musicologist Dr Richard Moyle compiled a succinct set of arguments to show how songs connect with land ownership:[11]

- There are people who are said to own songs. Other people must ask their permission to perform those songs.
- The people who own those songs own the ceremonies where the songs are sung.[12]
- The texts of songs relate to Creation myths and other stories. These song texts can be shown on a map. The owners of the ceremonies own the places where the songs travelled through.[13]

In the Jawoyn (Gimbat area) Repeat Land Claim No. 142 (1993), Commissioner Gray recognised the importance of songs and ceremonies but did not see spiritual affiliation as contingent on regularity of performances. When people opposing the claim said that the ceremonies and the songs had not been performed for a 'considerable time', Commissioner Gray found that knowledge of songs and ceremonies was more important than regular practice:

> 4.19.4 The persistence of ceremonies and songs is not an essential condition of the existence of spiritual affiliation to sites and land contemplated in s 50(1)(a) of the Land Rights Act. No doubt the existence of ceremonies and songs makes the establishment of spiritual affiliation easier, but its absence is not fatal.[14]

10 P Gray, 'Aboriginal and native title issues', *Australian Law Librarian*, vol. 7, no. 1, March 1999, p. 6.

11 Moyle gave evidence for two claims under the ALRA, the Land Claim by Alyawarra and Kaititja, 1979, and the Anmatjira and Alyawarra Land Claim to Utopia Pastoral Lease, 1980.

12 Ownership of songs and ceremonies actually relates to the areas where the songs travel through and less so where the songs are actually sung. I thank an anonymous reviewer for clarifying this point.

13 R Moyle, 'Songs, ceremonies and sites: the Agharringa case', in N Peterson & M Langton (eds), *Aborigines, land and land rights*, Australian Institute of Aboriginal Studies, Canberra, 1983, p. 6.

14 *Jawoyn (Gimbat area) land claim no. 111, Alligator River area iii (Gimbat resumption – Waterfall Creek) (No. 2) repeat land claim no. 142: report and recommendation of the Aboriginal Land Commissioner*, http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/publications-articles/land-native-title/aboriginal-land-commissioners-reports, accessed 3 May 2013.

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

In his report for the Nicholson River (Waanyi/Garawa) Land Claim (1985), Commissioner Kearney described how different types of evidence would be presented during the hearing to establish common spiritual affiliation in relation to sites, estates and totemic significance:

> In practice, the evidence will involve song cycles (gujiga) [= *kujika*] commemorating the routes taken by totemic figures and the events which occurred in their travels; body painting, which represents the Dreaming; dance which re-enacts the travels of the totemic figures; and myth which summarises the songs and dances.[15]

The Aboriginal Land Commissioners became aware that often group or joint evidence recognising and demonstrating the authority of patrifiliates and matrifiliates could be best given 'on country'. The site itself sets the context for the testimony, presenting a visual prompt to describe the connection between the place and the stories and songs arising from it.[16] Traditional owners are able to demonstrate their connection and responsibility to the land as they give evidence in ways meaningful to them that affect the country as they speak or sing.

Evidence 'on country', including songs and ceremonies, has also been presented for native title claims. Songs and other art forms are included in a section on presentation of evidence of a cultural or customary nature in the *Federal Court Rules 2011*:

> If evidence of a cultural or customary nature is to be given by way of singing, dancing, storytelling or in any way other than in the normal course of giving evidence, the party seeking to adduce the evidence must tell the Court, within a reasonable time before the evidence is proposed to be given:
> (a) where, when and in what form it is proposed to give the evidence; and
> (b) of any issues of secrecy or confidentiality relating to the evidence or part of the evidence.[17]

Thus we see that evidence meaningful to Indigenous people within their law has been recognised as valid within the Western legal system and that it needs to be managed in an appropriate and fair way.

15 *Nicholson River (Waanyi/Garawa) land claim: report by the Aboriginal Land Commissioner, Mr Justice Kearney, to the Minister for Aboriginal Affairs and to the Administrator of the Northern Territory*, Australian Government Publishing Service, Canberra, 1985, p. 13.

16 See G Neate, *'Speaking for country' and speaking about country: some issues in the resolution of Indigenous land claims in Australia*, paper delivered to the Joint Study Institute, Sydney, 21 February 2004, http://www.nntt.gov.au/News-and-Communications/Speeches-and-papers/Documents/2004/Speeches%20Speaking%20for%20country%20Neate%20February%202004.pdf, accessed 27 February 2012.

17 *Federal Court Rules 2011*, rule 34.123, 'Evidence of cultural or customary nature', p. 325, http://www.fedcourt.gov.au/law-and-practice/rules-acts-and-regulations, accessed 13 March 2013.

This paper describes how songs have been referred to in land claim reports under both the ALRA and the NTA. Generally, NTA determinations differ significantly from ALRA reports. With a few notable exceptions, such as some of the litigated cases conducted in the Northern Territory and Western Australia, they contain less anthropological detail and concentrate on the two concepts of 'rights and interests' and 'law and custom'.

1.4 Methodology used for analysis

The paper is based upon reports available online for 67 land rights claims and 125 native title claims.[18] Much more material, such as anthropological reports, special exhibits and transcripts, remains to be examined and analysed for more detailed references as to how information on songs has been used as documentation for land claims. This paper provides a framework for further study of such documents.

Analysis of ALRA reports and native title determinations required that multiple search terms be used to ensure that references to song could be identified (see Table 2).[19]

Table 2: Search terms and definitions

Song/s	A melody with text that conveys a portion of cultural knowledge, often relevant to a site or sites
Songline/s	A series of songs that refers to the travels of an ancient cultural hero and that can be mapped to specific areas
Music	A more general term for songs
Inma	Western Desert language term for song
Manikay	Arnhem Land languages term for song
Ceremony/ceremonies	Social practice or organisational event in which songs are likely to occur
Corroboree	A social event with song and, often, dance
Dance	Movement accompanying song

The first five terms in Table 2 explicitly refer to song and the last three assume that song will be part of the event. For 'ceremony/ceremonies', not all are land based — for example, those performed for healing or initiation — but all are important as proof of connection to land because of the one-to-one correspondence between ownership of ceremony and ownership of estate.

18 The reports for native title include all cases held before the Federal Court as well as appeals. Because some claims were heard several times, the actual number of claims searched comes close to 150. Also, there were 24 unreported cases in the period covered by this study, but, as the reports were not available online, they have not been included.

19 The data for the section on NTA claims was assembled by Alexandra Crowe, formerly an intern with the Aurora program. A table was compiled showing the case number, the short name of the case as used by the National Native Title Tribunal, the complete case name, date of report, state, judge, outcome, legal process, and keywords with number of each used in each case. Separate files showing the context of each reference, highlighting the terms, were then created for each claim. Finally, tables were created for each state listing the judges' names and the frequency of each term for each claim.

2 Findings arising from searches on the terms

Most of the examples given in this paper will be from areas where the terms have been referred to most frequently: the Northern Territory, Western Australia and Queensland, including the Torres Strait. One major case study comes from South Australia. There were few references to the terms in New South Wales and Victoria, and the cases where they appear were not successful for the claimants.

2.1 ALRA claims

Reports for claims under the ALRA set out in detail how song, ceremony and ritual were important to Indigenous society and to connection with the land. Sometimes these explanatory sections became almost formulaic, especially in the reports by Commissioners Gray and Olney. All but three of the 67 ALRA reports referred to one or more of the search terms, usually in connection with how the terms related to sites on claim areas.

Performances for the judge became an important aspect of many of the ALRA land claim hearings. Fifty-seven per cent of the reports refer clearly to songs and/or ceremonies being performed during the hearings.[20] The Commissioners and their staff travelled to a selection of sites mentioned in the claim, and claimants often demonstrated their knowledge of song and ceremony at those places. Knowledgeable elders, land council staff and consultants explained to the Commissioner how these performances demonstrated the connections of the performers with the land under claim.

Justice Gray made one of the clearest statements by an Aboriginal Land Commissioner on how songs function as integral parts of Indigenous law when he spoke about common spiritual affiliations, primary spiritual responsibility and foraging rights in his report for the Warlmanpa (Muckaty Pastoral Lease) Land Claim in 1997:

> The connection between a group and a particular site of significance is provided by entities which are glossed as 'dreamings' in the English language. These are creatures which participated in the formation of the landscape, the naming of its features and the imparting to humans of the things which make up the law for a particular group, namely language, culture, song and ceremony. Dreamings may once have adopted human form but now appear as animals or other phenomena. Their continued presence and influence is acknowledged and the connection between dreamings, people and country is maintained through ceremony and song.[21]

The commissioner repeated this paragraph almost verbatim in his next three reports.[22]

It is interesting to trace the development of an Aboriginal Land Commissioner's thoughts on the importance of songs and ceremonies in the land claim process by examining

20 It is possible that this figure could be higher, because seven per cent of the reports were not clear as to whether or not performances were held.

21 *Warlmanpa (Muckaty Pastoral Lease) Land Claim No. 35: report and recommendation of the Aboriginal Land Commissioner, Justice Gray, to the Minister for Aboriginal and Torres Strait Islander Affairs and to the Administrator of the Northern Territory*, Australian Government Publishing Service, Canberra, 1987, p. 38.

22 Elsey Land Claim (1997), Tempe Downs and Middleton Ponds / Luritja Land Claim (1998), and Central Mount Wedge Land Claim (1998).

Commissioner Toohey's report for the Borroloola Land Claim, which was the first to be heard. The types of evidence to establish 'primary spiritual responsibility' were varied, especially as Indigenous law and proof of ownership differed from the practices of European law and, as such, required a special type of analysis. Commissioner Toohey reported that:

> Having heard evidence from an anthropologist, from individual Aboriginals and indirectly from a large number of Aboriginals through videotapes, it seemed to me that the most appropriate method of checking the claim was to submit the evidentiary material to an anthropologist, preferably someone familiar with the area.[23]

An examination of all reports on ALRA claims reveals that at least five musicologists and ethnomusicologists had been asked to give evidence or had been quoted in claim books. The small number of ethnomusicologists participating may be because many anthropologists working in Indigenous Australia generally had knowledge of the role of ceremony in society, and ethnomusicologists, for the most part, worked on land claims in areas where they had done in-depth research.

For the Borroloola Land Claim, two anthropologists and another person with extensive knowledge of the area were called to assist Commissioner Toohey. John Avery, who later served on many claims as the Commissioner's anthropological expert, provided information on songs and ceremonies that he had seen in the course of his fieldwork. For all subsequent claims it became standard practice for both anthropologists and lawyers to advise the Commissioners and the Northern Territory Government.

During the Borroloola claim Commissioner Toohey noted:

> The identification of places by Aboriginals was not merely an exercise in conventional geography. Very often it included pointing out dreaming tracks, that is paths taken by mythological characters involving songs and stories with which particular groups are especially linked.[24]

Although no songs or ceremonies were presented as part of the hearing for the Borroloola claim, ceremonies were performed for Commissioner Toohey during the hearing for the following one. He was particularly impressed with the 'capacity of people to identify places and describe dreaming paths' as reflected through 'ceremonies witnessed at Lajamanu and Yuendumu and from films shown of traditional ceremonies'.[25] Claimants were submitting evidence in their own way as well as presenting it according to the requirements of the European legal process.

23 *Boroloola Land Claim: report by the Aboriginal Land Commissioner to the Minister for Aboriginal Affairs and to the Minister for the Northern Territory*, 1979, p. 3.

24 *Borroloola land claim: report by the Aboriginal Land Commissioner Mr Toohey to the Minister for Aboriginal Affairs and to the Minister for the Northern Territory*, Australian Government Publishing Service, Canberra, 1979, p. 3.

25 *Claim by the Warlpiri and Kartangarurru-Kurintji : report by the Aboriginal Land Commissioner, Mr. Justice Toohey, to the Minister for Aboriginal Affairs and to the Minister for the Northern Territory*, Australian Government Publishing Service, Canberra, 1979, p. 12.

The ethnomusicologist Dr Richard Moyle was called to testify during the third claim. Commissioner Toohey accepted his conclusion about the evidential value of songs, quoting from the claim book:

> As far as the Alyawarra are concerned the songs and ceremonies…are thus considered sufficient evidence of traditional clan ownership.[26]

Several performances were given before the Commissioner during this claim, but he felt constrained to say in his report:

> Witnessing ceremonies, visiting sites and seeing sacred objects undoubtedly played an important role in identifying traditional country and in assessing the strength of traditional attachment. No doubt it will do so in some future claims. The privilege of being present on such occasions cannot carry with it any commitment on the part of the Commissioner to the outcome of a hearing. I hope those advising and acting for claimants will make that clear to them.[27]

Commissioner Toohey's advice did not deter the claimants. They continued to perform songs and/or ceremonies for seven out of the next 16 claims that he heard.

The search terms appeared most frequently in the reports of Commissioners Toohey, Kearney and Gray, while others took a more restrictive attitude to ceremonial performance. Although Commissioner Olney mentioned the terms in most of his determinations, the fact that he chose to leave during evidence for the McLaren Station Land Claim, where traditional owners performed a ceremony to show how several estates were connected, calls into question his commitment to the evidential importance of song and ceremony.[28]

Because the Aboriginal Land Commissioners held hearings on the land being claimed and spent considerable time travelling to specific sites, claimants had a clear opportunity to present their evidence in the form of the songs and ceremonies that were related to the sites. This process was possible because all claims were situated within the Northern Territory, and the Central and Northern land councils, which put forth land claims on behalf of the traditional owners, had built up contacts over a long time with communities throughout the area. Also, unlike parts of the rest of Australia, many claimants still lived on or near their countries and had maintained ritual and emotional ties.

2.2 Between the ALRA and the NTA — Mabo vs Queensland

The importance of the case to this paper required me to go beyond the various judges' reports; therefore the following section will summarise the findings from the transcript for the 1986 case and not for the final judgment handed down by the High Court of Australia, which has no references to the terms.

26 *Land claim by Alyawarra and Kaititja: report by the Aboriginal Land Commissioner to the Minister for Aboriginal Affairs*, Australian Government Publishing Service, Canberra, 1979, p. 22.
27 Ibid., p. 23.
28 The author was present at the hearing before Justice Olney in 1988.

The court case *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1 was the final hearing resulting from a long chain of events. These began with a court action brought against the state of Queensland in 1982 by Eddie Mabo, Dave Passi and James Rice, who asserted a kind of right to their land, the Murray Islands of the Torres Strait, that they defined as native title. After a number of court actions, the High Court determined that native title existed. The concept of native title was enshrined by law in the *Native Title Act 1993* (Cth) in December of that year. Although the legal processes began with claimants from the Torres Strait, the findings of the High Court extended the concept of native title to all of Australia.

The report of 1992 by the High Court referred only briefly to the importance of ceremony, but the court transcript for an earlier case, *Mabo v Queensland* (1986) 60 ALJR 255, included many references to song, ceremony and dance. This case, conducted in the Supreme Court of Queensland and lasting 67 days, consisted of volumes of documentary evidence and testimonies from claimants, anthropologists and government officials. The trial judge, Justice Moynihan, handed down a decision that discredited Eddie Mabo and denied his claims; however, it provided a basis for appeal to the High Court.[29]

Two issues, the passing on of traditional laws and customs and the long-term continuity of these practices, became important factors in determining the validity of claims under native title. Eddie Mabo and others gave testimony citing examples of how these laws and customs had existed before white settlement.

The counsel from Queensland and Justice Moynihan did not always see how the passing on of knowledge of songs and dances was relevant for the claim. For example, Bryan Keon-Cohen, counsel for the plaintiffs, questioned Eddie Mabo at length on his experience with Murray Islander initiation practices, songs and ceremonies. Eddie had seen some of these songs and dances performed by the large Murray Islander community in Townsville. When Keon-Cohen asked for details, an objection was raised by John Byrne, senior defence counsel for the Queensland government and by Justice Moynihan, who questioned the relevance of the evidence. Keon-Cohen explained:

> In my submission, sir, it is relevant to the continuation of custom in the extended community. The particular feature that the witness — and it will be put to other witnesses — continue to pass down these customs. That in itself is evidence of the strength or otherwise of the custom and it is also evidence of the content of it as understood by this witness…[30]

The cult of Malo-Bomai was the major religious belief system on Murray Island before the London Missionary Society arrived in the Torres Strait in 1871. Although the missionaries had tried to stop the ceremonies connected with the cult, it had continued in various forms and its values shaped practices of land care and land tenure. When asked about his initiation, Eddie Mabo spoke of how he was instructed in the Malo-Bomai songs and dances:

29 For a full description of the Mabo claim see B Keon-Cohen, *Mabo in the courts: Islander tradition to native title: a memoir,* Chancery Bold, North Melbourne, Vic., c. 2011.

30 Ibid., pp. 255–6.

> The session went for about four weeks and we went there, I think it was, four days a week…It was mainly instructions in terms of what the laws of Malo are and how it should be applied, and how men should behave towards their fellow men and towards the opposite sex, and how gardens are to be attended and what are the right season to plant, what signs to watch…The sacred songs and dances were taught to us. We were made to sit in front of — in a circle and the old men would sing sacred songs… the songs were about the sacred ceremonies.[31]

Several days later, during cross-examination by Margaret White on behalf of the state of Queensland, Eddie Mabo offered to show his knowledge of song to the Court.

> I remember when Tapi Salee was a baby as well and he used to sing songs — songs that were relating to that particular Malo and Bomai cult as well, and that's also stuck in my mind, and I can sing them for you if you want me to.[32]

The offer was declined because it might 'be difficult to put them on the transcript'.[33] This not only exemplifies a major issue of cultural and judicial inequity in regard to land claim proceedings but is especially interesting in the light of how native title claims were presented later.

There are numerous examples from the transcript about the long-term continuity of traditional knowledge in the form of song. The transcript refers extensively to reports from the Cambridge Expedition to the Torres Strait led by Alfred Cort Haddon in 1898, which described many aspects of Torres Strait Islander society, including traditional law, ceremony and song.[34]

The anthropologist Jeremy Beckett, one of the most knowledgeable experts on the Torres Strait, made much use of the Haddon reports in his research.[35] He testified to the long-term vitality of the Malo-Bomai songs and dances:

> Now, the songs clearly survived, I recorded them myself in 1960, and they were recorded also by Haddon in 1898. What Haddon says then is that the songs had not been heard for more than 20 years and the men were deeply affected when they heard them. Those songs were certainly sung then and it seems likely they were sung subsequently…they were performed in 1959 and again in 1961 and I saw them on the second occasion there…they are taken extremely seriously and there was some tension about the rights of certain individuals to play particular roles in the dances.[36]

31 Transcript of proceedings, *Mabo v Queensland*, Supreme Court of Queensland, 60 ALJR 255, Justice Moynihan, 1986, p. 251.
32 Ibid., p. 890.
33 Ibid.
34 Thirteen exhibits for the claim consisted of extracts from volume 4 of the *Reports of the Cambridge Anthropological Expedition to the Torres Straits*. In all, 40 volumes of documents from the expedition were tendered as evidence.
35 Beckett had published a recording edited from his field tapes made in the 1960s, *Traditional music of Torres Strait* (Australian Institute of Aboriginal Studies, Canberra, 1972), which included performances of some songs originally recorded by the Cambridge Expedition in 1898.
36 Ibid., p. 2231.

Beckett goes on to describe how the songs had been passed on with comparable melodies:

> …the recordings I made from the old men in 1960 were compared by Professor Trevor Jones — professor of music at Monash — with the transcriptions made by Myers from Cylinder Recordings[37]…and he pronounced the songs virtually unchanged. Now, I think in that case, there is a clear continuity despite the fact that the songs went underground for a period…[38]

These examples show how evidence relating to songs connects to the passing on of laws and customs and their long-term continuity. Although Justice Moynihan did not find in favour of the plaintiffs, the 1992 appeal to the High Court recognised the unique rights and interests of the Meriam people and established the legal concept of native title.[39]

2.3 NTA claims

The determinations for NTA claims examined for this paper include all claims from 1997 (*Deeral v Charlie* [1997] FCA 1408 (8 December 1997)) up to the end of 2010 (*Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v Queensland (No 2) (includes Corrigendum dated 9 August 2010)* [2010] FCA 643.[40] As mentioned under 1.3 under Proof of Connection, these determinations for native title cases proceeded according to the latest *Federal Court Rules*,[41] which accepted 'singing and other art forms' as evidence of cultural or customary nature.

The determinations differ significantly from reports by the Aboriginal Land Commissioners in that, with a few notable exceptions such as some of the litigated cases conducted in the Northern Territory and Western Australia, they contain less detail of an anthropological nature and concentrate upon two concepts: rights and interests, and law and custom. Most references to song and ceremony appear in connection reports prepared by anthropologists and historians; access to these requires permission from land councils and the Court. Further work needs to be done using those sources, as this paper deals only with the judges' reports available online.

Searches were done on reports for 86 consent determinations, 25 litigated determinations and 13 unopposed claims. Another 24 claims were not examined as part of this paper because they were unreported during the period of the writing of this paper and were not available online.

Of the 86 reports for consent determinations, just over a third referred to ceremony or ceremonies in their listings of rights and interests. Those with explicit references to song or songs referred to the connection between songs, stories and sites on the land. All but

37 See *Cambridge Anthropological Expeditions to the Torres Straits — reports*, vol. 4, 1908, pp. 244–5.
38 Ibid., p. 2356.
39 See P Burke, *Law's anthropology: from ethnography to expert testimony in native title*, http://epress.anu.edu.au?p=151301, 2011.
40 The reports were located on http://www.austlii.edu.au and include some reports with corrigenda.
41 *Federal Court Rules 2011*, rule 34.123, 'Evidence of cultural or customary nature', p. 325, http://www.fedcourt.gov.au/law-and-practice/rules-acts-and-regulations, accessed 13 March 2013.

one[42] of the litigated claim reports included one or more of the search terms, with some, especially in the Northern Territory and Western Australia, showing over 100 references. Reports for some claims in other states used the search terms more liberally, however, with the largest number of references to song (102) and ceremony (186) appearing in the report by Justice French for *Sampi v Western Australia* [2005] FCA 777.

For the consent determinations, 61 (or 71 per cent) of the reports used one or more of the search terms. This could have been because reports for consent determinations are written after all parties have agreed to a result, therefore judges do not need to write such detailed arguments for their findings as would be necessary for a litigated claim.[43]

Only two of the reports for unopposed claims[44] referred to ceremony, and in one of those, *Kennedy v Queensland* [2002] FCA 747, the reference was incidental in that an applicant stated that he had never 'seen or heard of any Aboriginal person participate in any Aboriginal ceremony'.[45]

In addition to performances before the judges, preservation evidence[46] that included song was referred to in many reports. For example, during *Hughes (on behalf of the Eastern Guruma People) v Western Australia* [2007] FCA 365, Justice Bennett stated:

> I have been provided with anthropological material in the form of reports by Dr McDonald and Ms Venz…The reports also considered the affidavits and preservation evidence taken by the Court in December 2004. That evidence included audiovisual material recording senior Eastern Guruma people speaking about their connection to various places within the claim area. They told stories about those places and sang songs about them.[47]

An examination of the frequency of the search terms for NTA claims shows that 'ceremony', 'ceremonies' and 'ceremonial' comprise 58 per cent of the total, followed by 'song' at 29 per cent, 'dance' at eight per cent, 'corroboree' at five per cent and 'music' at less than one per cent. Brief references to the terms often appear under listings of native title rights and interests as recognised by Federal Court judges. These may be expressed in a general descriptive way or actually codified in a specific listing, such as:

42 *Bodney v Westralia Airports Corporation Pty Ltd* [2000] FCA 1609.

43 The liberal use of the search terms in one consent determination, *Ward v Western Australia* [1998] FCA 1478 (first instance); (1998) 159 ALR 483, was a clear exception. Where there are a number of appeals, as for Ward, most of the terms appear in the initial determination.

44 *Peter Hillig in his capacity as administrator of Worimi Local Aboriginal Land Council v Minister for Lands for the New South Wales* [2005] FCA 1712 and *Kennedy v Queensland* [2002] FCA 747.

45 *Kennedy v Queensland* [2002] FCA 747, p. 19.

46 During the preparation of a native title claim, elders may be recorded in order to document their cultural and geographical knowledge. As claims may take a long time, this process ensures that their evidence will be available to the judge.

47 FCA 365, 11.

(g) the right to conduct and to participate in the following activities on the non-exclusive areas:
(i) cultural activities;
(ii) cultural practices relating to birth and death, including burial rites;
(iii) ceremonies;
(iv) meetings[48]

The above in most cases refer to land, but for several claims the rights and interests extend to both land and waters. Justice French, for example, in *Sampi v Western Australia (No 3)* [2005] FCA 1716 makes a distinction between rights existing for land and for water (s 225(b) and s 225(e)):

(e) the right to access, use and take any of the resources of the land and waters (including ochre) for food, shelter, medicine, fishing and trapping fish, weapons for hunting, cultural, religious, spiritual, ceremonial, artistic and communal purposes;
(f) the right to refuse, regulate and control the use and enjoyment by others of the land and its resources;
(g) the right to have access to and use the water of the land for personal, domestic, social, cultural, religious, spiritual, ceremonial and communal purposes.[49]

An examination of findings for NTA claims state by state follows.

2.3.1 New South Wales

For New South Wales, only two of the three litigated claim reports made any reference to the search terms. A claim for the Darug people referred to the importance of the kinship system under traditional laws and customs, including the ceremonial function of welcomes to country, but these would not usually include songs.[50] The only actual reference to song came from an affidavit by a claimant setting out personal recollections of 'our ceremonial ground', where the family 'would eat oysters and pippis and the initiated elders would dance and sing and tell stories'.[51] The finding for both of the claims cited was that native title did not exist.

2.3.2 Victoria

Of the three Victorian claims examined in this study, only the *Yorta Yorta* claim[52] included references to any of the terms. The findings against the claimants by Justice Olney, the trial judge, became controversial and the case was taken on appeal to the full Federal Court in 2001 and ultimately to the High Court of Australia in 2002[53], whose findings generally agreed with those of the trial judge.

48 *King v Northern Territory of Australia* [2007] FCA 944, 21.
49 FCA 1716, Order B — Determination.
50 *Gale v Minister for Land & Water Conservation for New South Wales* [2004] FCA 374, 24.
51 *Worimi Local Aboriginal Land Council v Minister for Lands for New South Wales (No.2)* [2008] FCA 1929, 90.
52 *Members of the Yorta Yorta Aboriginal Community v Victoria* (1999) 4 ALIR 91; [1998] FCA 1606.
53 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

2.3.3 South Australia

During the time period covered by this paper, eight native title claims were heard in South Australia, with all but one, *De Rose v South Australia (No 2)* [2005] FCAFC 110[54], resulting in consent determinations. Although the report on that claim contains 301 references to song and ceremony, paradoxically the site-based character of the songs, stories and dances was one of the issues cited by the primary judge in finding against the claimants because they had not been on the claim area for 20 years or more. See section 3.4.1 for a detailed discussion on *De Rose v South Australia (No 2)* [2005] FCAFC 110.

There were 20 references to the terms in the consent determinations for South Australia. One important reference was made by Justice Mansfield, who identified ceremony as one of the unifying elements among subgroups of the Adnyamathanha for *Adnyamathanha No. 1 Native Title Claim Group v South Australia (No 2)* [2009]. Section 3.5 of this paper has further examples.

2.3.4 Northern Territory

In the Northern Territory much anthropological research relating to native title cases had been conducted earlier under claims lodged under the ALRA. These had shown in some depth the connections among song, dance, ceremony and land. Native title determinations, especially those for litigated claims, often quoted from the Aboriginal Land Commissioners' reports for areas involving neighbouring cultural groups.[55]

Up until the end of 2010, the Northern Territory had the largest percentage of litigated claims (nine out of 14, or 64 per cent) of any state or territory.[56] All of the judges' reports for those claims referred to at least one of the search terms, with six mentioning song. The highest number of references to the terms, 290, was in the report for *Risk v Northern Territory of Australia* [2006] FCA 404, largely because it made many references to the evidence given during the various ALRA Cox Peninsula claims, known as the Kenbi claims.[57] The five consent determinations collectively made only 43 references to the terms.

2.3.5 Western Australia

By the end of 2010 there had been determinations for 25 native title claims in Western Australia. Twenty were consent determinations and 16 referred to one or more of the search terms. Some of these contained a wealth of references to the connection of ceremony and song to land.

54 See http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCAFC/2005/110.html for the online report for this claim.

55 See *Griffiths v Northern Territory of Australia* (with Summary) [2006] FCA 903, where at least three reports by the Aboriginal Land Commissioners are cited.

56 In 2007 Justice Mansfield attempted to move towards more consent determinations in the Northern Territory by scheduling a number of litigated claims that would establish common principles based upon cultural connections.

57 The Kenbi claims, *(Cox Peninsula) Land Claim No. 37* (2000), *Kenbi (Cox Peninsula) Land Claim* (1991) and *Kenbi (Cox Peninsula) Land Claim* (1984), took more time collectively than any other. They were heard from 1979, when questions relating to procedural issues were raised, to 2000, when the final report by Justice Gray was published.

Of the five litigated determination reports for Western Australia, four made substantial references to the terms and to the reports of the anthropologists and other experts. These reports are notable for:

- descriptions of song styles
- explanations of the linkages between various neighbouring groups through ceremony and song
- accounts of how song connects with traditional law
- descriptions of changes in song texts as ceremonies cross various language groups.

Specific points mentioned include the importance of song and ceremony in regulating claimants' control of the land, demonstrating linkages between groups and transmitting knowledge about the land to claimants and judges. See section 3 for examples of these points.

2.3.6 Queensland (other than Torres Strait)

Although the references to the search terms in the two litigated claims in Queensland were more detailed, the greatest number of references appeared in the reports for consent determinations. Of the 19 consent determinations for Queensland (other than Torres Strait), 13 referred to at least one of the search terms, the most common being ceremony. Six of the reports specified, under non-exclusive rights, the right to conduct various actions on the determination area, including ceremonies. Of these, two claims made a distinction between the rights recognised for land and those for water within the claim area.

2.3.7 Torres Strait

There were 26 consent determinations for the Torres Strait, each comprising a claim for one or more islands, and 18 of these included reference to one or more of the terms. Aside from brief references to welcome ceremonies and songs performed for the judges, three major points relating to the search terms arise in the reports.

First of all, consent determinations for the Torres Strait have more references to dance than those for other parts of Australia. Secondly, ceremony is mentioned as one of the elements that binds the societies of the Central Western Islands together, showing them as one native title group. Finally, Justice Drummond used a standard wording, including the term 'ceremonies', under rights and interests for the five consent determinations arising from *Kaurareg People v Queensland* [2001] FCA 657; (2001) 6(2) AILR 41 and for *Mualgal People v Queensland* [1999] FCA 157:

> The Native Title Rights and Interests, which are derived from and exercisable by reason of the existence of native title, include the following rights, duties and obligations to:
>
> …
>
> (d) exercise cultural, spiritual, religious, traditional and customary rights and discharge such responsibilities on the Determination Area including to:
>
> …
>
> (iii) conduct and maintain cultural, spiritual and religious practices and institutions through ceremonies and proper and appropriate maintenance and use of the Determination Area;[58]

58 FCA 657, 6.

The one litigated claim for Torres Strait, *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v Queensland (No 2) (includes Corrigendum dated 9 August 2010)* [2010] FCA 643 ('*Akiba*'), is particularly interesting because it extends traditional rights to the sea and has many examples of how song, dance and ceremony serve as proof of ownership. *Akiba* has more references to song (38), ceremony (22) and dance (14) than any other claim lodged in Queensland as a whole. Justice Finn was attuned to song and dance because performances were presented to him at each of the islands he visited during the hearings.

3 The role of song and ceremony in reports and determinations

The following section will give a classification of examples from both ALRA and NTA, indicating the Act from which they come. The list is not exhaustive but gives some of the clearest instances of each topic, with case studies for some.

3.1 Ceremonies and songs as evidence of Dreamings

In his report on the NTA claim *Sampi v Western Australia* [2005] FCA 777, Justice French explained how ancestral spirits pass on the song genre, *ilma*, to humans:

> The *ilma* is 'a specific category of publicly performed songs which together with their associated dances and ritual emblems serve to emphasise Bardi and Jawi affinity with and connection to the physical environment'. The songs, dances and emblems are held to be of extraordinary or supernatural origin. Men are believed to obtain *ilma* in the course of dream visits to particular locations or to receive them from various supernatural beings who reveal the relevant details in dreams. Again, the evidence of the Aboriginal witnesses bears out this observation. Many *ilma* songs focus on aspects of the marine environment.[59]

Another example, from Commissioner Olney in the ALRA North Simpson Desert Land Claim report no. 45 (1992), does not specifically mention songs, but in it the Commissioner comments upon the various forms of tracks the Dreaming beings took (as I said at the beginning of this paper, the Dreamings sang as they travelled):

> The travels of the Dreamings are called a 'story line' or 'track' in Aboriginal English. The tracks of some 'Dreamings' stretch over hundreds or even thousands of kilometres, travelling through the country of many landholding groups and language groups. Some 'Dreamings' travel but restrict their journeys to the one country, others are stationary and restricted their activities to the one site, while still other Dreamings, rather than travel, imbue a country or a region with their spiritual presence.[60]

59 FCA 777, 839.

60 *North Simpson Desert Land Claim Report No. 45: findings, recommendation and report of the Aboriginal Land Commissioner, Mr Justice Olney, to the Minister for Aboriginal Affairs and to the Administrator of the Northern Territory*, http://www.fahcsia.gov.au/sites/default/files/documents/05_2012/45.pdf, accessed 19 March 2013, pp. 7–8.

3.2 Ceremonies and songs as evidence of ownership of tracts of land and Dreamings

For long lines of songs there are sites where one group hands over responsibility to the neighbouring group. These points can determine the limits of estates and show connections between groups. In the ALRA Yingawunarri (Old Top Springs) Mudbura Land Claim (1979), Justice Toohey quotes from the testimony of Patrick McConvell, anthropologist/linguist:

> He [McConvell] explained that the boundaries of each clan's territory are defined mainly by reference to the ownership of songs (juju), particularly those relating to dreaming (puwawaja) that travel through the estates of several clans.[61]

3.3 Ownership of songs and ceremonies and rights to perform

The anthropologist Jeremy Beckett, in the transcript for the *Mabo* claim in 1986, spoke of personal ownership in relation to songs and dances:

> Stories were usually, I think, identified with particular people — particular groups of people — a tribe or a village, something of that kind…Songs were [*sic*]. There was something like a copyright on songs and even a rule that there was [*sic*] certain subjects on which only certain people could make a song or make a dance, and people might appear at a community dance and present a particular dance which represented a star or a particular story because this was theirs and they had a particular entitlement to do it.[62]

Other Torres Strait Islander witnesses, such as James Rice, Jimmy Wailu and George Passi, gave evidence about their knowledge of songs and the connection of songs with the Malo-Bomai cult.

The report by Justice Finn for the NTA claim *Akiba* contains the part of the hearing transcript where Robert Blowes SC asks claimant Alick Tipoti about ownership of songs and corresponding protocols:

> 149. Songs usually 'belong' to the island of the person who composed them. We can learn each other's songs and join in the singing if we know them…
>
> 150. If I picked up a song in the Central Islands, I would not bring it back and perform it at Badu or down on the Mainland; but I would join in singing and dancing of that song when it was being performed by Kulkalgal people. That way we respect each other's songs. This is the way my father taught me; and I have seen people respecting each other and their songs in this way on many islands.
>
> Even with my connection to Saibai through my mother from there, I have performed a lot of Saibai dances, but with the consent of the Saibai dance masters.[63]

61 *Yingawunarri (Old Top Springs) Mudbura Land Claim report by the Aboriginal Land Commissioner, Mr Justice Toohey, to the Minister for Aboriginal Affairs and to the Minister for Home Affairs*, http://www.fahcsia.gov.au/sites/default/files/documents/05_2012/05.pdf, accessed 19 March 2013, p. 7.

62 Transcript of proceedings, *Mabo v Queensland*, Supreme Court of Queensland, 60 ALJR 255, Justice Moynihan, 1986, p. 2255.

63 Ibid., p. 317.

3.4 Songs as evidence of ownership of sites

One of the clearest statements about the interaction between songs and sites is made by the anthropologist/linguist Bruce Rigsby in the report by Justice Dowsett for the NTA claim *Mundraby v Queensland* [2006] FCA 436:

> The most obvious examples of cultural property are the Story-Places (sometimes called "sacred sites") found on Mandingalbay Yidinji lands, together with their associated oral narratives. These, along with the paint designs, songs, dances and names associated with them, are the cultural property of the Mandingalbay Yidinji.[64]

For the NTA claim *Patta Warumungu People v Northern Territory of Australia (Corrigendum dated 6 September 2007)* [2007] FCA 1386 (3 September 2007), claimant Evelyn Nappangarti stated in her affidavit of 4 April 2006:

> Today, I still hold all the rights in *Patta* country and I am still exercising them…We are doing ceremony every year at Tingkarli, within the application area. I am helping with the ceremony for young ones and teaching all the kids about that business. My children, as *kurtungurlu* [custodian], must help out with that ceremony. I am always singing there and at Nyinkka Nyunyu with Kathleen Fitz. We are still holding sorry camp within the town at Tingkarli and Mulga camps.[65]

In the following case, aspects of the practice of song and ceremony were seen differently by the claimants, the primary trial judge, the pastoralists who leased De Rose Hill Station and the Federal Court judges for the appeal, who handed down the final determination in 2005. Their interpretations of how and where songs should be performed were crucial to the outcome of this claim.

3.4.1 Case study: De Rose v South Australia (No 2) *[2005] FCAFC 110*

De Rose v South Australia [2002] FCA 1342 was initially heard in 2001 by Justice O'Loughlin, who dismissed the claim; however, he recognised that there might be an appeal and offered his view of a possible determination should that be the case. The summary of his judgment included the following points:

- The ceremonies and rituals conducted at 13 sites of significance to the appellants established that the witnesses who gave the evidence and the people who participated in the ceremonies, stories, dances and songs once had a religious or spiritual connection with the site at which the particular activity was performed.
- The witnesses and participants in the ceremonies, stories, dances and songs showed that they possessed knowledge of the particular sites and of the activities in which they engaged at those sites. That knowledge would have satisfied the primary judge that there was a relevant connection between those people and the claim area were it not for the fact that there had been a virtual absence of all Aboriginal people from the claim area for 20 years or more.[66]

64 FCA 436, 15.
65 FCA 1386, 13.
66 FCA 1342, 380, 381.

- The rock art at Inyata, the songs, dances and ceremonies performed for the Court at Wantjapila, Alaylitja and Maku, the significance of rock pools at Kirara and Ilpaka and the restricted stories associated with Wipa were all examples of facts or events which, at one stage, would have answered the requirement of connection with the claim area laid down by s 223(1)(b) of the NTA. [67]

Justice O'Loughlin determined that the claimants had lost important elements of their culture after a 20-year absence, even though they were able to perform the correct songs and ceremonies associated for the claim area for him during the hearings. This time period was assumed by the judge to have been enough for people to lose their spiritual connection. He did not take into account some of the reasons that the people stayed away. In addition to needing to work away from the area in order to make a decent living, Peter De Rose, one of the major ceremonial leaders and the lead applicant, had been in dispute with the leaseholders of the station for damage they had done to some sacred sites. One of the pastoralists, Doug Fuller, had 'a demeaning attitude towards Aboriginal people, did not hesitate to intimidate them with firearms, was a strict disciplinarian and would not hesitate to physically assault people when he thought it appropriate to do so'.[68]

The Fullers interpreted Justice O'Loughlin's findings as showing that the claimants, while knowing the stories, songs, dances and ceremonies for the country, were not really observing traditional laws and customs.[69] Obviously the Fullers did not understand how these performances related to sites and to the rights and interests of the claimants.

The state (which had opposed the claim in the original trial) appealed to the Full Court, whose 2005 appeal judgment stated that Justice O'Loughlin had fallen into several errors of law. The Court recognised that native title did exist in all of the claim area. Most importantly for this paper, it also found that separation from the land for any length of time did not extinguish the rights of the claimants, who had most impressively demonstrated their ongoing connection with the land at the hearing by performing ceremonies and songs at the relevant sites. The report states that the Aboriginal witnesses had not lost their culture, and that there were many examples of ceremonies and conduct that showed that the Aboriginal witnesses retained knowledge of their traditional laws and customs.[70]

3.4.2 Songs and ceremonies as evidence of common group identity

Song and ceremony can unite several landholding groups if a single claim is made on their behalf. Justice French, for the NTA claim *Sampi v Western Australia* [2005], quoted claimant Paul Patrick Sampi as explaining how the Bardi and Jawi people are connected through traditional law:

> It's all one country. Bardi and Jawi are one people…The Law makes them one. They sing the same songs, make the same dances, do the same hunting and practise the same Law.[71]

67 Ibid., 900.
68 *De Rose v State of South Australia (No 2)* [2005] FCAFC 74*,* 42.
69 Ibid., 45.
70 Ibid., 903.
71 FCA 777, 343.

Justice Moore in the NTA claim *King v Northern Territory of Australia* [2007] FCA 944 found that the 15 estate groups from Newcastle Waters and Murranji Stations and associated stock routes were found to have close links in six different ways, two of which were 'shared initiation and other ceremonies' and 'joint responsibility for several important song cycles'.[72] Justice Moore accepted that all of these formed a single native title holding community.

The following two case studies, one from the Northern Territory and the other from the Torres Strait, show in detail how shared songs and ceremonies are important unifying elements among neighbouring groups.

3.4.3 Case study: Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group *(2005) 145 FCR 442; (2005) 220 ALR 431; [2005] FCAFC 135*

This NTA claim covered parts of the traditional estates of seven landholding groups who identified as one community. An appeal by the Northern Territory Government questioned the validity of this interconnection, but in the appeal in 2005 Justices Wilcox, French and Weinberg accepted that all formed a single community.

For the original hearing Justice Mansfield travelled to a number of sites, receiving evidence and viewing ceremonies. The Court had wanted the hearing to be held at Tennant Creek, but the applicants contended that they would be disadvantaged in certain ways if their evidence were heard away from the claim area. This paper has already discussed how presence 'on country' sets a context for people giving evidence. Justice Mansfield agreed that 'more graphic and descriptive evidence was given at "on country" sites'[73] and the ceremonies he witnessed, along with evidence tendered about them, influenced his findings that the claimants functioned in many ways as a single group.

His report stated:

> There were aspects of common ceremonial practice consistent throughout the claim area which did not differ by reference to separate estate groups. There was no significant evidence to indicate that individual country or estate groups functioned separately as communities with different rules or customs or with different ceremonies or with separate and isolated residential arrangements. They shared ceremonies and members of each of the four language groups would attend them… There was commonality of ceremonial and dreaming connections in the claim area between the four language or tribal groups and between the seven estate groups. Those connections extended across the areas of the different tribal estate groups. Ceremonies carried out throughout the claim area were and had been the same wherever the ceremonies were conducted and irrespective of estate groups. These included ceremonies relating to young man's business, womens' [*sic*] awely[74] ceremonies, mourning customs and the like.[75]

72 FCA 944, 17.

73 See T Keely, '*The Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory*', *Native Title News*, vol.6, no. 10, pp. 176–7.

74 *Awely* ceremonies, referred to earlier as *awelye* or *awulya*, are performed by women only and consist of songs, the preparation of ceremonial objects and body designs, and dances to nurture the land and the society.

75 FCAFC 135, 27.

The Northern Territory Government disputed the finding that the groups functioned as one society, arguing that claimants were not prepared to speak for estates other than their own and that there were:

> …handover points in the claim area where there was a shift in the responsibility of the land or dreaming stories so that the persons entitled to exercise comparable rights over the land moved from one landholding group to another. There was also evidence of certain dreamings passing from one group to another from the claim area and its surrounds to other groups unrelated to the four language groups or the seven estate groups within them.[76]

The report for the appeal disagrees with the Northern Territory's arguments, stating:

> …The evidence of extensive connections across the seven groups supports his [Justice Mansfield's] characterisation of them as one native title holding community. On the basis of his findings the necessary connection with the land in the claim area is shown to exist at a communal or claim group level. There was no error in the reasoning leading to the determination of communal rights. His Honour was correct to treat the relevant title as communal over the whole area rather than as severally held by the estate groups in respect of their particular estates.[77]

Justice Mansfield's findings on this point were influenced strongly by the common ceremonial practices shared among the seven groups.[78] With a few minor amendments, his original findings were accepted at the appeal and native title was found to exist in the entire determination area.

3.4.4 Case study: Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v Queensland (No 2) (includes Corrigendum dated 9 August 2010) *[2010] FCA 643*

This NTA claim covered the waters surrounding all of the islands of the Torres Strait. Justice Finn concluded that the Torres Strait Islanders made up a single society before sovereignty because they acknowledge a single set of traditional laws and customs. He found that the claimants have non-exclusive rights to the waters surrounding the islands. In his judgment he said:

> The Islanders clearly have a deep and historically laden knowledge of their respective marine environments. These permeate their songs and dances. The Applicant in oral submissions contends that "occupation" in Torres Strait ties up a people's history and locates their identity as well as simply reflecting present use by a present generation. It entails a "cultural occupation". There is justice in this characterisation.[79]
>
> A utilitarian criterion does not adequately characterise the way in which Islanders occupied the region, since their dealings with one another included the exchange of ceremonial objects, ceremonies, personal adornments, drums, songs and dance paraphernalia; as well as stories, so that one must also speak of cultural occupation.

76 Ibid., 30.
77 Ibid., 112.
78 The author worked on this claim and made several field trips to the area. Songs were sung at many of the sites and in the evenings.
79 FCA 643, 251.

> This occupation, economic and cultural, was facilitated by laws and customs which regulated social conduct within and between communities, particularly though not only in regard to trade.[80]

3.5 Songs as personal names and evidence of an individual's connection to country

Songs have deep personal significance to individuals. Justice Olney, in the ALRA Western Desert Land Claim, explains the link between specific sites and names of people.

> The vital link between people and place is manifested in personal names. Such names are either taken from a place, such as where they were conceived or from some aspect of the person's Dreaming as manifested in the songs associated with the estate.[81]

Another important point arises with taboos on singing a song after its owner dies. In reference to the ALRA Warumungu Land Claim (1988), Diane Bell, the anthropologist assisting Commissioner Maurice, described protocols for the way songs are treated after the death of a person intimately connected with those songs by name or other way. This was later included in the claim report:

> In the section of her report dealing with Group 3, Professor Bell observes that there is a period following a death when all the property, including the intellectual property, of the deceased is put to one side. During that time all mention of the names and songs associated with that person is taboo.[82]

3.6 Ceremonies as evidence of social categories

As mentioned earlier, the people who own the songs own the land, but song and ceremony can demonstrate different types of ownership. During ceremonies, roles taken by performers can demonstrate, for example, their relationship with their mother's or father's clan. This example from Commissioner Toohey's report on the ALRA Gurindji Land Claim to Daguragu Station (1982) explains some of these roles and shows the interconnections of song, decoration and other elements of ritual performance:

> 58. In ritual clan members are generally the actors; they wear ritual decoration and are thought to embody and bestow spiritual power during performances. It is they who usually lead in songs dealing with their clan's dreamings. Workers usually paint up the owners in readiness for ritual dance and action and perform many other important tasks. They are primarily responsible for ensuring that the dreaming designs are correctly produced in body painting and in other contexts and for ensuring that the clan members' dreaming designs are not stolen by another clan.[83]

80 Ibid., 227.

81 Western Desert Land Claim report no. 38: findings, recommendation and report of the Aboriginal Land Commissioner, Mr Justice Olney, to the Minister for Aboriginal Affairs and to the Administrator of the Northern Territory, Australian Government Publishing Service, Canberra, 1991, http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/publications-articles/land-native-title/aboriginal-land-commissioners-reports/western-desert-land-claim, accessed 3 May 2013.

82 *Warumungu land claim: report by the Aboriginal Land Commissioner, Mr Justice Maurice, to the Minister for Aboriginal Affairs and to the Administrator of the Northern Territory*, Australian Government Publishing Service, Canberra, 1988, p. 14.

83 *Gurindji land claim to Daguragu Station: 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, 1982, p. 11.

3.7 Songs as evidence of contemporary spiritual affiliation

Commissioner Gray's report for the ALRA Warnarrwarnarr-Barranyi (Borroloola No 2) Land Claim in 1996 added a section on contemporary spiritual and traditional observances, one of which involved song as a unifying force for the Yanyuwa community:

> Some of the younger generation of men, Philip Timothy, Daniel McKinnon, Samuel Evans and Warren Timothy have studied music in Adelaide. Conscious use has been made of their musical experience and ability to strengthen the community. They have written songs in both the Yanyuwa language and the English language, dealing with the islands and their association with them. I was fortunate enough to witness a concert in which these songs were sung one evening on the beach at East Neck.[84]

Songs and ceremonies also provide evidence of traditional practices that are longstanding within the claim groups. Some of these practices serve to maintain the health of the land and to initiate young men.

The wellbeing of estates is ensured by song and ceremony. Commissioner Toohey refers to this function in his report for the ALRA Yutpundji-Djindiwirritj (Roper Bar) Land Claim (1982), where the linguist/anthropologist Frances Morphy explained a gesture used by women for 'holding up the land' in relation to the song genre *djerada*:

> There was…an assertion that the performance of ceremonies helps the land (transcript, p. 343) and Mrs Morphy explained the gesture of women raising their hands to indicate one of the purposes of the djerada, 'to hold up the land' (transcript, pp. 426, 446)…there was a clear assertion that the performance of ceremonies was an important part of looking after the country.[85]

Another way that people look after country is by performing rituals that ensure food and water supplies. Commissioner Maurice in his report for the ALRA Ti-Tree Station Land Claim (1987) states:

> 158. Some of the most important Altyerrenge [Dreaming] ancestors associated with the claim area are major traditional food sources. These include kangaroo, honey ants, bush plums and mulga seeds. Many of the ceremonies spoken about by the claimants are aimed at ensuring the continuing supply of these foods. Some of the women spoke of Irrerenterenye which are beings that assist them to hunt successfully. These beings belong to the country and they must be asked for that assistance; newcomers must be introduced to the Irrerenterenye. Communication seems to be by way of Awelye songs which the women sing.[86]

84 *Warnarrwarnarr-Barranyi (Borroloola no. 2), land claim no. 30: report and recommendation of the Aboriginal Land Commissioner, Justice Gray, to the Minister for Aboriginal and Torres Strait Islander Affairs and to the Administrator of the Northern Territory,* Australian Government Publishing Service, Canberra, 1996, p. 55.

85 *Yutpundji-Djindiwirritj (Roper Bar) land claim: 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, 1982, p. 20.

86 *Ti-Tree Station land claim: report no. 24: report by the Aboriginal Land Commissioner, Mr Justice Maurice, to the Minister for Aboriginal Affairs and to the Administrator of the Northern Territory*, Australian Government Publishing Service, Canberra, 1987, p. 29.

Rainmaking ceremonies were cited in the ALRA North Simpson Desert Land Claim report (1992). These are often unique in that particular objects are used to assist in the ceremonies. Commissioner Olney explains how this works in relation to rain:

> RAIN: There are songs, objects (rainmaking stones) and designs for this Dreaming. According to the men, the knowledge and practice of Rain is alive and well.
>
> RAINMAKERS: Men have the responsibility for rainmaking, and this responsibility seems to form the core of men's business for this country. In addition to the male owners of this country, at least two animals were identified as rainmakers. Lindsay Bookie said that eaglehawk (irretye) is the main bird for the rainmaker (or, perhaps, the main rainmaker). During the course of a video presentation of a site visit at Ntyipere Lindsay Bookie and Juntu explained that the bat is a rainmaker, and that the name Ntyipere refers to this bat.[87]

Songs also assist in personal wellbeing, as shown by this example cited by Commissioner Maurice for the ALRA Jila (Chilla Well) Warlpiri Land Claim (1988):

> On the site visit to Yurnurrpa (Newland Cave), for instance, we were given an account of the mythology of the site and certain actions directly relevant to this were performed. In addition, two of the kirda[88] chanted verses used by all Warlpiri men to assist their wives giving birth.[89]

In the ALRA McLaren Creek Land Claim (1991), Commissioner Olney refers to the protection that songs can give by the *kurtungurlu* (owners of mother's country) to the *kirda* (owners of father's country), in this case for the estate, Mirtartu:

> The kurtungurlu must be present for a ceremony to be performed, and are immune to certain spiritual dangers to which kirta are prone: the kurtungurlu for Mirtartu have the song to keep the Rainbow Snake down and to stop it attacking the kirta.[90]

3.8 Songs as a method of transmitting traditional knowledge

During many land claim hearings, the ceremonies performed for the judges were presented not only as evidence but also as a chance to pass on knowledge to younger people. Often young people were coopted to sing and to dance with their elders before the judge. In the ALRA Nicholson River Land Claim, Commissioner Kearney commented on the ways in which information about country is imparted:

87 *North Simpson Desert land claim: report no. 45: findings, recommendation and report of the Aboriginal Land Commissioner, Justice Olney, to the Minister for Aboriginal Affairs and to the Administrator of the Northern Territory,* Australian Government Publishing Service, Canberra, 1992, pp. 15–16.

88 Kirda, also spelled 'kirta', are traditional owners of an estate who trace their rights through their father.

89 *Jila (Chilla Well) Warlpiri land claim: report by the Aboriginal Land Commissioner, Mr Justice Maurice, to the Minister for Aboriginal Affairs and to the Administrator of the Northern Territory*, Australian Government Publishing Service, Canberra, 1988, p. 94.

90 *McLaren Creek land claim: report no. 32: findings, recommendation and report of the Aboriginal Land Commissioner, Mr Justice Olney, to the Minister for Aboriginal Affairs and to the Administrator of the Northern Territory*, Australian Government Publishing Service, Canberra, 1991, p. 71.

> …there was considerable evidence of the dissemination of knowledge about country to younger members, through ceremony, stories and songs. Thus Limmerick Peter, of local descent group No. 1, has passed on to her sons the account of the Dreaming she had learned from her father (transcript, p. 117). Archie Rockland of local descent group No. 2 was told about his country by his father (transcript, p. 148); he has drawn his own detailed maps of his country (Exhibit 24).[91]

In *Akiba*, claimants presented songs and dances to Justice Finn at each of the islands where hearings were held. These performances were done in full view of each community, thus reiterating the importance of material and passing on the content to all people present.

Gender figures as a factor in how songs are transmitted. For example, the ALRA Anmatjirra and Alyawarra Land Claim to Utopia Pastoral Lease (1980) report by Commissioner Toohey includes a section on the testimony of the anthropologist Meredith Rowell, who commented on the differences in the ways boys and girls learn songs:

> 160. She described the different ways in which male and female children learn about country. When very young, both are present at awulya[92] and hear songs and see paintings. This relatively informal process of learning continues for girls as they grow older although in time they will take a more active part in awulya. But, at adolescence, male children are taught about their country by the men in what Miss Rowell described as a highly structured way through a series of initiations.[93]

In his report on the same claim, the Commissioner went on to describe how these different educational styles affect testimonies for land claims by men and by women:

> Through men's song cycles, site names along a track are committed to memory in a set sequence, while women's songs and awulya refer to sites in a different way. So when asked about sites on a dreaming track, men and women react differently. Men produce a string of names in a set order — usually the order in which they are sung, from hand-over point to hand-over point — while women give sites in a less strictly ordered fashion…[94]

3.9 Songs as evidence of historical events

The historical sections of claim books have been enriched by references to past events, especially those before Federation, that have been enshrined in song. Commissioner Olney gives a good example in his report for the ALRA Seven Emu Land Claim (2003)*:*

91 *Nicholson River (Waanyi/Garawa) land claim: report by the Aboriginal Land Commissioner, Mr Justice Kearney, to the Minister for Aboriginal Affairs and to the Administrator of the Northern Territory*, Australian Government Publishing Service, Canberra, 1985, p. 38.

92 A term used for a type of women's ceremony that may be used for healing, nurture of the land and other functions. Current spellings for *awulya* in this paper are *awely* (in Alyawarr and Anmatyerr) and *awelye* (in Kaytetye).

93 *Anmatjirra and Alyawarra land claim to Utopia Pastoral Lease: 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, 1980, p. 27.

94 Ibid.

> The Macassans visited the north Australian coast annually to collect trepang (*beche-de mer*), commencing as early as the mid 17th century and ending in 1907. Older claimants recall their parents talking about them. Jimmy Pyro for instance recalls his father telling him that the Macassans moored their praus near Centre Island, West Island and Vanderlin Island and collected trepang using dugout canoes. These activities are recorded in songs and dances still performed in the Borroloola area.[95]

Another type of oral history, where songs are associated with the earlier actions of elders and others, comes from the report of Justice Cooper for the NTA claim *Lardil Peoples v Queensland* [2004] FCA 298. He had queried a phrase used by the linguist Nicholas Evans about the Kaiadilt people regarding their territory as 'going out to sea as far as the eye can see'.[96] In the course of the discussion, Evans had given an example of how Kaiadilt people had explained the significance of some of their songs to him during his research on their language:

> People would also have often…sung songs whose content would be explained. These are always little pieces of musical oral history, if you like, and they might say something like, "Oh, that's so and so song, my old uncle who is now passed away, and he made that song up when he was out on his raft hunting turtle let us say at Mururrinji, for example, and he sung that song when he was out on the reef, and then they would say, "Well, he sung it because he was worried about his wife on shore. He couldn't see her. He wasn't sure if she could see him and know if he was all right."[97]

Finally, in *Akiba* Justice Finn makes a connection between history and performance in order to identify ownership of sites. He quotes Robert Blowes SC, counsel for the applicants, when he questioned claimant Alick Tipoti about the connection between history and places. Tipoti relied on the evidence shown by song and dance:

> MR BLOWES: So the sort of things you've been telling us about occupations, about travel and about stories and so on, do Badu people have, in your culture do you have an idea of history, do you have a history in your, any history of places?
>
> ALICK TIPOTI: To us, yes, and the history is told through dancing and storytelling.
>
> MR BLOWES: And does history have anything to do, your history have anything to do with ownership, of what places are yours or what places belong to Badu?
>
> ALICK TIPOTI: Yes. It is, the songs and the dance and the storytelling, or the stories are like our documents to prove that it belongs to us.
>
> MR BLOWES: So if you need to look up a document?
>
> ALICK TIPOTI: You would sing a song and other people would know, yes, he is related to that, they have songs about that.[98]

95 *Seven Emu Region land claim no. 186, Wollogorang Area II land claim no. 187 and part of Manangoora Region land claim no. 185: report and recommendations of the Aboriginal Land Commissioner, HW Olney, to the Minister for Immigration and Multicultural and Indigenous Affairs and to the Administrator of the Northern Territory*, Aboriginal and Torres Strait Islander Commission, Canberra, 2003, p. 41.

96 FCA 298, 121.

97 Ibid.

98 FCA 643, 608.

3.10 Changes of language along song tracks

In relation to songs travelling through various language groups, Justice Weinberg quotes the Central Land Council anthropologists in his report for the NTA claim *Griffiths v Northern Territory of Australia* (with Summary) [2006] FCA 903:

> The attribution of language to place by Dreaming is encapsulated in song. Language goes with country, consistent with the Dreaming narrative.[99]

Another example comes from Justice Merkel's report for the NTA *Rubibi Community v Western Australia (No 6) (Corrigenda dated 15 February 2006 and 10 May 2006)* [2006] FCA 82, which states how the Yawuru legal traditions, Wanji or Dingarri, and their songs change language as they travel through various countries:

> There is also a third tradition, which starts at Bilinnguru (Hidden Valley) in Yawuru country and goes out into the desert. This tradition is like a "song line" and is known as the Wanji or Dingarri. Peter Clancy, a Mangala man who gave evidence about the Wanji, stated that it speaks "Yawuru language in Yawuru country, Karajarri language in Karajarri country, and Mangala language in Mangala country. I know the songs for the Wanji right through."[100]

3.11 Persistence of language through song

Early forms of languages can be found in some songs, especially those of Central Australia, as has been shown by the work of TGH Strehlow, Luise Hercus, Myfany Turpin and others.[101] Justice Dowsett's report for the NTA claim *Mundraby v Queensland* [2006] FCA 436 includes comments by the anthropologist/linguist Bruce Rigsby on this topic:

> There have been no fully fluent speakers of the Yidiny/Yidiy language for some years, but people still identify as Yidinji. Many people of all ages know and use the Yidiny/Yidiy words and names for plant and animal species, place names, personal names, etc. and to sing songs in the language.[102]

3.12 Knowledge of songs and strength of oral tradition affecting outcomes of claims

Justice French identified strongly how knowledge of ceremony defines the exercise of authority by traditional owners in connection with the land. His report for the NTA claim *Brown v Western Australia* [2001] stated:

99 FCA 903, 309.

100 FCA 82, 60.

101 See: TGH Strehlow, Songs of Central Australia, Angus & Robertson, Sydney 1971; L Hercus & G Koch, 'Song styles from near Poeppels Corner', in *The essence of singing and the substance of song: recent responses to the Aboriginal performing arts and other essays in honour of Catherine Ellis*, eds L Barwick, A Marett & G Tunstill, University of Sydney, 1995, pp. 106–20; M Turpin, *Awelye Akwelye: Kaytetye women's traditional songs from Arnerre, Central Australia*, Papulu Apparr-Kari Language and Culture Centre, Tennant Creek, NT, 2003.

102 FCA 436, 15.

> The Applicants acquire land ownership unconditionally through birth, residence and descent but the capacity of a person to exercise authority over the land is mediated in proportion to their understanding of the ritual knowledge and ceremonial practise, which is one facet of that body of the Applicants tradition known to them as the "Tjukurrpa".[103]

The following case studies examine reports from two claims under the Native Title Act that explore this concept. They show how the understanding of ceremonial practice affected the findings, both positively and negatively.

3.12.1 Case study: Risk v Northern Territory of Australia *[2006] FCA 404*

In his report for this NTA claim Justice Mansfield makes many references to the evidence given during the various Cox Peninsula claims, known as the Kenbi claims,[104] which involved many of the same claimants. Much historical evidence was tendered that described the Larrakia as once having had a rich ceremonial and cultural life and said that ceremonial exchanges were held with neighbouring groups. Justice Mansfield emphasised the importance of ceremony to country, stating:

> …it was accepted that ceremony in an Aboriginal culture involves the celebration and reinforcement of the connection between people and country.[105]

> The first applicants also submitted that, if there was to be a finding that the Larrakia people did not have ceremony, a finding that no native title rights exist should not necessarily follow. The first applicants submitted that it had not been suggested that the existence of 'ceremony' is fundamental to the existence of rights and interests and that such rights and interests may exist in the customary association between Larrakia people and country and in the 'rightness' of Larrakia people regarding Larrakia country as 'their country'.[106]

The claimants testified that knowledge of stories, songs and ceremonies for sites is still developing. Bill Risk had said that the Larrakia people 'are still learning, with the help of Belyuen people and other tribes they're giving back knowledge to the Larrakia all the time'.[107]

Justice Mansfield commented upon what he saw as a loss of knowledge and connected some of the cultural revival with the process of the Kenbi claim:

> In my view, the evidence discloses that there is now little knowledge of the former apparently rich ceremonial life of the Larrakia people. That is a consequence of the virtual cessation of ceremony, although some Larrakia people have sought to re-enliven that process by learning of ceremony at remote places or at the

103 FCA 1462, 8.
104 The Kenbi claims, *(Cox Peninsula) Land Claim No. 37* (2000)*, Kenbi (Cox Peninsula) Land Claim* (1991)*, Kenbi (Cox Peninsula) Land Claim* (1984), took more time, collectively, than any other, and were heard from 1979, when questions relating to procedural issues were raised, to 2000, when the final report by Justice Gray was published.
105 FCA 404, 648.
106 Ibid., 651.
107 Ibid., 747.

> Cox Peninsula, including from the *Kenbi Claim* hearings. As a consequence, with some few exceptions, knowledge of the spiritual features of important Larrakia sites has greatly diminished. It has not been totally lost, because in part it has been retained in records which have been accessed and in part because in a few instances the general information has been acquired from older Larrakia people. I did not draw from the evidence material to support a finding of a normative society holding information about sites of spiritual significance in the Darwin area in accordance with traditional laws and customs…The same observation can be made about dances and songs of the Larrakia people.[108]

Justice Mansfield's report contained 208 references to ceremony and 18 to song, thus demonstrating their importance to him in formulating his determination. Unfortunately, his finding that the breakdown of the knowledge of song, dance and ceremony connected with the land under claim contributed towards his decision that native title did not exist.

3.12.2 Case study: Griffiths v Northern Territory of Australia *(with Summary) [2006] FCA 903*

The vitality of ceremony and song played a large part in Justice Weinberg's determination for this NTA claim. His report refers to the performance for the Court of site-specific songs for centipede[109] and dingo[110], and accepted the evidence that 'each Dreaming was related to a site through narrative, song and body design and other ritual attributes.'[111]

An interesting point arose as to the value of oral tradition as evidence. In speaking about his knowledge of country, claimant Alan Griffiths said that 'he had kudjingka [songs] in his head, and that songs were not written down'.[112] Also, in relation to the Dingo ceremony, 'he said that the ceremonies were not recorded in any written form. He tapped his head, and said that ceremonies were kept there, and passed on.'[113]

Professor Basil Sansom, the anthropologist for the Northern Territory Government, had disputed the reliability of oral tradition as shown by Griffiths and others, saying that it was extremely variable. His claims could have virtually discounted all evidence based upon song and ceremony.[114] Although Justice Weinberg agreed that caution must be taken in conjunction with the validity of evidence based upon oral tradition, he gave greater weight to the statement of the Northern Land Council anthropologist, Kingsley Palmer, that:

> The oral traditions at Timber Creek (narratives, song and ritual performances) are, in my understanding, a principal means by which owners of tracts of country assert their rights in their country…This oral tradition is practised in the company of others who usually have senior status either in the same country that is being celebrated or

108 Ibid., 828–9.
109 FCA 903, Schedule C: Outline of Site Visits, Site 6: Ritual Ground.
110 Ibid., Site 3: Kunuma (Blowfly Dreaming site at Boab Tree).
111 Ibid., 497.
112 Ibid., Site 5: Ridge / cleared area.
113 Ibid., Site 4: Wayatpayi — Wirip's helmet.
114 See the section on oral tradition in the determination, beginning at 'The Northern Territory's Anthropological Evidence', in particular paragraphs 398 ff.

> in a neighbouring area…Oral knowledge is thus not individuated. Its presentation is subject to group correction and validation. Performance and transmission is regulated by a jural public, ensuring continuity of content.[115]

In the face of the evidence presented, Justice Weinberg found that:

> …the members of the claim group continue to acknowledge traditional laws, and to observe traditional customs in much the same way as their ancestors did over many generations. I find that they continue to practise important ceremonial rites, including initiation and burial customs, in ways similar to those that were followed long ago. I find that they follow traditional practices regarding hunting and gathering of food. I find that they maintain cultural and spiritual beliefs relating to the Dreamings associated with the claim area.[116]

> It follows in my view that the senior claimants in these proceedings have established that they are the direct descendants of a group of indigenous inhabitants of the area around Timber Creek, and that they observe essentially the same rituals and ceremonies as were practised by their ancestors more than a century ago. I infer that those same rituals and ceremonies have been followed by indigenous people who are the direct ancestors of the claimants since before sovereignty. The rights and interests that have passed on through this system of descent are, in my view, recognised by the common law of Australia, and are therefore properly to be characterised as native title.[117]

3.13 Importance of song and ceremony within concepts of core and contingent rights

A distinction between 'core' and 'contingent' rights, placing rights over songs in the former category, was made by Justice Lander for the NTA claim *Eringa, Eringa No 2, Wangkangurru/ Yarluyandi and Irrwanyere Mt Dare Native Title Claim Groups v South Australia* [2008]:

> The evidence shows that a number of 'core' and 'contingent' rights arise from the traditional laws and customs of the claimants. The core rights include the right to claim country as ones [*sic*] own, the right to acquire ownership and authority over knowledge and songs associated with the country, the right to speak for country, the right to be asked for permission to access country by 'non-owners', and the right to make decisions about country. Contingent rights are said to include the right to access and occupy the country, and the right to use the resources of the country'.[118]

3.14 Song as a navigational aid

As I said at the very beginning of this paper, knowledge of land-based songs provides a mnemonic device to guide people to natural resources and features, such as waterholes, thus helping the people to live well on the land. Thus songs provide a map to help those who know them survive as they travel through their land and through the waters surrounding the land.

115 Ibid., 455.
116 Ibid., 471.
117 Ibid., 584.
118 FCA 1370, 32.

There is an excellent example of this in Justice Finn's report for *Akiba*, which includes this statement from claimant Alick Tipoti:

> There have been times in my life when the information in songs I know has played a part in my using the sea and my finding way from place to place. There are songs about dugong and turtle hunting; there are songs about different places close around Badu and Badu songs about places further away, for example places down on the three reefs between Badu and Thursday Island. There are also songs composed when families were journeying to visit relatives, like on the way to Top Western.[119]

In his conclusions, Justice Finn goes on to describe the relationship between laws and customs and song and dance and their connection with the sea:

> I equally have found there to be laws and customs relating to song and dance. The Islanders' evidence demonstrated that both song and dance have an obvious marine orientation and often embody maritime knowledge or relate to particular marine areas.[120]

4 Summary and conclusion

Throughout this paper I have shown that song and ceremony, with the associated terms of dance and corroboree, have been accepted as evidence in claims under both the *Aboriginal Land Rights Act (Northern Territory)* 1976 (ALRA) and the *Native Title Act 1993* (Cth) (NTA). In Aboriginal and Torres Strait Islander societies, song and ceremony serve as title deeds to land. Under the two Acts cited, European law has recognised that the rules of evidence can be broadened to accept song and ceremony as proof supporting Indigenous land claims.

Singing is the main method of transmitting knowledge in orally based societies found in Australia. Songs that are specifically land based are believed to come from ancestral beings who impart them to the traditional owners of specific sections of land. The tracks that the beings followed while they sang can be mapped, and many claims have had such maps tendered as evidence.

The paper is based upon examination and analysis of claims, both ALRA and NTA, lodged up to the end of 2010. Methodology for the analysis consisted of searches on both explicit and implicit terms for song and ceremony, after which statistics were compiled based upon the frequency of use and types of references made by the Aboriginal Land Commissioners and Federal Court judges. References, for the most part, have supported positive findings for the claimants, although there have been some cases, such as the *Yorta Yorta* claim (NTA) where such evidence has been detrimental.

The conclusions arising from the data can be summarised as follows:

- References to the search terms have been made in reports and determinations for the majority of ALRA and NTA claims lodged in the Northern Territory, Western Australia, Queensland (including Torres Strait) and South Australia. The incidence was highest for ALRA claims, where all but three of the 67 claims made references to the terms. For NTA claims, over a third of the consent determinations and all but one of the litigated cases

119 FCA 643, 317.
120 Ibid., 651.

referred to the terms. For New South Wales and Victoria, there were few references (three for New South Wales and one for Victoria).

- From the Northern Territory, Western Australia and Queensland there were only three NTA claims — *Risk v Northern Territory* of Australia [2006] FCA 404, *Bodney v Westralia Airports Corporation Pty Ltd* [2000] FCA 1609 and *Kennedy v Queensland* [2002] FCA 747 — where, during the final hearings, native title was found not to exist.
- Excluding New South Wales and Victoria, only two NTA claims that used the terms, *Risk v Northern Territory of Australia* [2006] FCA 404 and *Kennedy v Queensland* [2002] FCA 747, found that native title did not exist.

From these findings it is clear that where one or more of the terms are used the results are beneficial to the claimants.

All of the Aboriginal Land Commissioners made reference to the terms, with Commissioners Toohey, Kearney and Gray making the most references to the search terms in their reports. The picture for the NTA is different. Ten of the 14 judges who did not make references worked on unopposed claims in New South Wales, but the 24 who made determinations in the Northern Territory, South Australia, Western Australia or Queensland all used the terms in their reports to varying degrees. Two of the judges, North and Bennett, made no references in their findings for New South Wales and Victoria but used the terms for other determinations in Western Australia and Queensland. The largest number of references in NTA claims to song (102) and ceremony (186) appeared in the report by Justice French for *Sampi v Western Australia* [2005] FCA 777, with Justices Weinberg, Finn and O'Loughlin using the terms especially frequently. Of all references made for NTA claims, most appear near the beginning of the reports as rights to conduct and participate in various activities on the land.

Song and ceremony, along with related terms, have provided significant and, indeed, influential evidence for Indigenous land claims made in Australia. Further examination of references to the terms in claim books, connection reports, and various exhibits needs to be done so that the full import of song and ceremony can be established.

The final word comes from noted Torres Strait artist and performer Alick Tipoti, who gave compelling evidence in *Akiba*:

> …it is, the songs and the dance and the storytelling, or the stories are like our documents to prove that it [the land and waters] belongs to us.[121]

121 Ibid., 608.

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Claims to land by Aboriginal people and Torres Strait Islanders have included evidence based upon song and ceremony and their connections to land under claim. In traditional societies, song and ceremony serve as title deeds in land. This paper looks at the two main pieces of legislation governing land claims, the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and the *Native Title Act 1993* (Cth), citing examples from the reports of Aboriginal Land Commissioners and Federal Court judges where song and ceremony have been mentioned. The citations are then classified and analysed according to their contributions, both positive and negative, to the findings for the claims. This paper is the first study concentrating on the place of song as shown in judges' reports for land claims and native title claims and provides a methodology for studying the place of the arts in legal processes.

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