

Claiming Inheritance

**Aboriginal People, Native Title and Cultural Heritage: a Story from Dubbo,
New South Wales**

Helena Onnudottir

A thesis submitted in fulfillment of the requirements for the degree of
Doctor of Philosophy.

Department of Anthropology

Macquarie University

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Summary

In 1992, the *Mabo* (No. 2) ruling introduced the term 'native title' as one appropriate to the situation of Australian Aborigines' claims to rights over lands they regard as theirs by tradition, and where entitlement to land was in accordance with traditional laws and customs. The term 'native title' became a legally recognised concept, at Australian common law, with the introduction of the *Native Title Act 1993* (Cth) (*NTA 1993* (Cth)). Since its introduction, the *Act* has undergone certain crucial amendments, which Aboriginal leaders have described as detrimental to the success of native title claims in many parts of Australia. This thesis explores the historical, legal, political and social context of native title claims in New South Wales, through the experiences of the Aboriginal people of Dubbo.

Particular emphasis is placed on the political and legal processes which constructed the current social and historical context of the lives of Aboriginal people in Dubbo. The discussion focuses on the impact of political and ideological changes on Aboriginal affairs in Australia in the last few decades, and specifically upon the social and political organisation of the Aboriginal community of Dubbo. It explores the avenues that are available for Aboriginal people (New South Wales) for claiming native title in today's social, legal and political climate. Furthermore, it focuses on the routes that the Aboriginal people of Dubbo have chosen to take in their attempts to gain rights to, and authority over, local Aboriginal heritage.

Acknowledgements

At the outset, I wish to acknowledge and express my gratitude to a large number of people for their various contributions to the writing of this thesis. I would like to begin by recognising the people of Dubbo, both past and present, to whom I extend my gratitude for having me as a guest on their land. I want to thank all of the Aboriginal people of Dubbo who, since late 1997, have allowed me to participate in their endeavours to claim recognition of their cultural heritage. I am especially indebted to the people who invested their trust in me, who took the time to disclose the various aspects of their personal lives and experiences. I would like to extend an expression of thanks and love to Sue and Kev Mitchell and their family, to Will Burns, Vicky and family, Coral Peckham, her brother Wayne and her sister Narelle. Also to Dot Burns, Ruby McGuiness and daughters Kathy and Shirley, Pat Doolan, Deborah Ryan, Merle Pearce, and to Diane McNaboe and her sister Lynette Riley-Mundine.

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Finally I would like to thank my family and friends in both Australia and Iceland. Thanks in particular to you, Mom, and to Gulli, Petur, Linda, David, Judy, Arlette, Kim and Bev.

It is my heartfelt wish to dedicate this thesis to the two most important women in my life, my partner Dr. Mary L. Hawkins and my mother Anna Gudjonsdottir.

Chapter One

Introduction

Australia is the present home and refuge of creatures, often crude and quaint, that elsewhere have passed away and given place to higher forms. This applies equally to the aboriginal as to the platypus and the kangaroo. Just as the platypus, laying its eggs and feebly suckling its young, reveals a mammal in the making, so does the Aboriginal show us, at least in broad outline, what every man must have been like before he learned to read and write, domesticate animals, cultivate crops and use a metal tool. It has been possible to study in Australia human beings that still remain on the cultural level of men of the Stone Age (Spencer (1927) quoted in Attwood 1996: xiii).

1.1. 'Nothing of Interest'

Aborigines ... face the unending task of resisting attempts, on one hand to cut them off from their 'heritage', and on the other to bury them within it as 'a thing of the past' (Beckett 1988: 212).

I first visited Dubbo,¹ New South Wales, in December 1997. The purpose of my visit was to talk to some of the local Aboriginal people,² introduce myself and my research plans, and seek the approval of the local Aboriginal people to conduct field-work for my proposed study. I had already spent over twelve months in Sydney, researching the literature and attempting to produce an appropriate research proposal for this thesis. In November 1997, I came to the conclusion that my main areas of interest were: Aboriginal women and native title. I had come from Iceland to Australia already with the aim of exploring some aspects of the lives of Aboriginal women. The attractive proposition of addressing this interest in the context of native title research was extended to me by another anthropologist, an acquaintance of mine, who had long experience of anthropological research in Aboriginal communities in New South Wales, and who

¹ There is a detailed discussion of the history of Dubbo and its Aboriginal population in Chapters Five and Six.

² Of the people I met, some were heavily involved in local politics, both the Local and Regional Land Councils, while others did not see themselves as politically active in any way.

had conducted extensive work as a consultant in the area of native title. Not long after, while deliberating an area for my field-work, I was fortunate enough to be introduced to a very friendly, if intriguing, Aboriginal woman from Dubbo, who promised to arrange for my initial introduction into the Aboriginal community in that area.

Among the first people I met in Dubbo was a group of five Aboriginal women who all worked for one of the many Aboriginal organisations in town. Their first comment to me was: "You're not *Aboriginal*" (Personal communication, December 1997). I found this introduction into the Dubbo Aboriginal community quite unique: during the first half hour, and after I had explained my hope to be able to conduct my research among the Aboriginal people of Dubbo, these women were actively discouraging me from proceeding with my plans. I finally realised that the principle reason was not one of non-Aboriginality, but of their self-assumed lack of 'real Aboriginality'. These women were astounded to learn that I had even considered Dubbo, as, according to them, the Dubbo Aboriginal community is both 'fractional' and 'factional', being composed of people whose lives have 'nothing of interest' (for a researcher): people who have lost their culture. They asked me why I did not go to some of the communities/settlements further north or northwest of Dubbo, where people lived in houses with earthen floors and ate emus, possums and lizards: 'people with culture'. Or, they asked, why did I not go to Wellington, where the Aboriginal population is much greater (proportionately) than that of Dubbo and where the Aboriginal people were claiming native title over the town common?³ The five women declared that there was nothing of interest to me in their lives: they did not live a 'traditional' lifestyle, nor were they involved in any Aboriginal politics;⁴ they just lived their lives, worked, raised their kids and did their washing.

My initial reaction to their claims was that 'yes', most likely I would have to go somewhere else. I had no first hand experience of the lives of the Aboriginal people in New South Wales (Australia), and while claims that there was 'nothing

³ E.g. *Koori Mail*, 09.08.2000: 9 on the Wellington native title claim.

of interest' in the lives of the Dubbo group did not sound encouraging for my potential study, I nevertheless asked them to tell me something about the lifestyle of the Aboriginal people of Dubbo. The next two paragraphs present a brief summary of the notes I took that afternoon.

Dubbo is a very racist town which has its own branch of the 'Ku Klux Klan', involving mostly local white businessmen. The City Council is, and has been, mostly white and its policies similarly pro-white. One of the hottest issues at the time of my visit was a recent proposal, moved by the Federal Government, for new reforms or rulings enabling police to pick up unaccompanied children off the streets. According to the women, this was a thinly veiled move against black youth. Two of the women had attended meetings to discuss these issues. These meetings were attended by both Aboriginal and non-Aboriginal persons. Two of the women, from this group of five, regularly attended these meeting, along with five other Aboriginal people. The seven of them were supported by only one white person in speaking against the proposal. This account of the meetings led the women to talk about past dealings with the City Council and other local authorities. Some of them had been involved in the opening of a drop-in youth centre some years back, a centre that was promptly closed down by the local authorities on the basis that black youth 'tended to congregate there'. Another attempt had been made by some of the younger women of Dubbo to rent the local Police Boys Club as a venue for dances for the town's youth. It was also short-lived, as the Bingo played by senior citizens created a much greater revenue. The state of affairs of Aboriginal youth was obviously of great concern to all the women and, in their opinion, was a reflection of both uninformed decision-making and the lack of action of the part of the City Council. The woman I spoke with earlier that day had expressed similar concerns as she talked about Dubbo developing 'big city problems' like the emergence of street kids over the last few years.

On the subject of land claims, native title, Aboriginal cultural heritage and the role of the Local Aboriginal Land Council (LALC), the women claimed to have little

⁴ It is interesting to reflect on the fact that although these women were working at, and some of them managing, Aboriginal services, they did not associate that with being political in any sense.

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knowledge, few opinions and lacked participation in such affairs. However, when I asked about the Aboriginal population in Dubbo - e.g. demographic location - and if they were all one big 'happy family', I elicited very interesting responses. Earlier that day, one woman outside the group had described the Aboriginal population of Dubbo as a 'slightly split community' that pulled together around the 'important issues' and was equally dispersed around Dubbo. Now I learned of a community of 'us' and 'them', or more correctly 'our community (Wiradjuri)' and the 'others'. The 'others' were the non-Wiradjuri people who had moved to Dubbo, where many had been placed in Aboriginal housing (in the west of Dubbo). All the women with whom I spoke were Wiradjuri, and they had no qualms about telling me how foolish the executives of the LALC were when allocating houses. 'Traditional enemies' were housed in dwellings next to each other and incidents of conflict and house burning were not infrequent. In fact, only recently two houses had been burned down. This led to discussion (among themselves mostly) about Aboriginal politics, rights to land in Dubbo as 'traditional owners' and/or 'original occupants'⁵ before white settlement, the 'Stolen Generation', John Howard and his refusal to 'say sorry', the general powerlessness of Aboriginal people, and some of the consequences of white settlement for Aboriginal people of the area. I had a local history lesson, including accounts of the massacres of Aboriginal people.⁶ Then the women promptly asked me to tell them about the indigenous people of Iceland. So we compared histories. What began, on my part, as a somewhat nervous confrontation, ended up being a fairly enjoyable and informative afternoon. By the time I left the women that day, my hopes for doing field-work in Dubbo appeared not to have been thwarted. I had the distinct feeling that some of the women were no longer so adamant about the 'non-interesting' nature of their lives

This thesis explores the lives of these women, the lives of other Aboriginal people of Dubbo, the lives of their ancestors, and, to a certain extent, the future prospects

⁵ They used both terms.

⁶ The women were referring to the 'Myall Creek massacre' which took place in 1838, when a group of twelve stockmen murdered at least twenty-eight Aboriginal people, mostly women and children, at Henry Dangar's Myall Creek outstation. This massacre is well known among Aboriginal people in Dubbo, bearing witness to how it has become a part of Aboriginal folklore in the area (Encyclopaedia of Aboriginal Australia 1994).

of their descendants. However, it is not simply about 'Aboriginal women and native title', the topic I originally set out to study. I gradually realised that although Aboriginal women's participation in various forms of cultural and political activism in New South Wales is proportionately high, when compared to most other parts of Australia, this has still not been of significant importance in native title claims as gender specific evidence is not of the same importance as in other parts of Australia.⁷ Instead of focusing specifically on Aboriginal women's role in the native title process, this thesis addresses the whole historical, politico-legal and social context of native title and cultural heritage claims in Dubbo, and by extension, long settled Australia. As I learned more about the Aboriginal people of Dubbo, I found that my plans, some of my focus, and much of my knowledge of Aboriginal people in Australia were limited and frequently skewed.⁸ Some of the issues I had identified as important in my proposal gave way as I realised the depth and the complexity of native title issues and the importance of cultural heritage for the Aboriginal people of Dubbo. This realisation forced me to devote both time and writing to the historical depth needed when discussing native title in New South Wales. This depth is not achieved by merely burying oneself in the State library: it also calls for a detailed account of the local oral history (Aboriginal and non-Aboriginal); it needs an understanding and analyses of past and present documentation (written accounts by missionaries and travellers, reports made by government officials, newspaper reporting and the writings of amateur scholars), and it needs careful scrutiny of historical and anthropological writings produced over the last hundred and fifty years. Furthermore, it is essential to gain some understanding of the history, traditions and structure of the Australian legal system, as well as the history, framework, operations and conventions of Australian politics (State and Federal). Eventually what transpires is that although state policies and legislation during the last two centuries have supposedly placed all New South Wales Aboriginal people under the same hat, the historical reality of the implementation and effects of the various policies and legislation differs greatly.

⁷ The use of gender specific knowledge ie. 'women's business' and 'men's business', combined with questions of authority and authenticity, have even been seen as detrimental to the causes of some Aboriginal people in long settled areas: e.g. the Hindmarsh Island Bridge affair (Weiner 1995, 1999).

⁸ I have since realised that I shared this lack of knowledge with a significant number of non-Aboriginal Australians.

Hence, the specific local historical and political context is of great significance when conducting a study into historically and politically sensitive issues like native title.

I was fortunate indeed to be able to share aspects of the exploration of these issues with members of the Aboriginal community of Dubbo during their initial venture into the native title arena. Guiding this study are the questions, complexities and problems which either arose, became significant and/or were tackled before and after I first met the Aboriginal people of Dubbo. This thesis is nothing like I imagined it would be in 1997. Themes have come and gone, and the emphases have changed as the reality of native title in Australia unfolds. Some of the ongoing themes, many increasing in importance, are as follows: (a) The history and tradition of the legal system in Australia, and its structure and processes, which give native title in Australia its specific nature. This aspect is increasingly of concern to a number of Aboriginal leaders who are calling for a detailed examination of the incompatibility of Australian Commonwealth law and Aboriginal customary law, and who protest that this incompatibility represents an obstacle for many native title claimants. It is important to explore past and present interaction between Aboriginal people and the State, especially how various Aboriginal policies and/or land legislation have affected the recognition of native title; (b) The historical context of the native title claimant group, which frequently determines the options, choices, complexities and potential success involved in a native title claim. This context is of essential importance when taking into account the dispossession and dispersal of many Aboriginal people and how these factors may have contributed to ongoing internal conflict between different groups, possibly caused overlapping native title claims; (c) The dominant discourse of what constitutes 'Aboriginality' and general notions about Aboriginal rights to land and cultural heritage (native title). This calls for detailed analyses of the roles of both anthropologists and historians in the construction of what constitutes an Aboriginal person at each time in history.

All these themes are addressed in the thesis, some in more detail than others: this is only a reflection of the importance of each specific issue at the time this thesis was written. There can be no doubt that the emphasis would have been different had I

written this thesis two years ago; similarly, I would very likely have produced a different study were I commencing my studies in 2001. Before beginning to address the aforementioned themes, there are several important ethical and methodological issues which must be addressed in all research into Aboriginal Australia.

1.2. Methodology: Implications, Explanations and Definitions.

The choice of the Aboriginal community in Dubbo as the background for this study was in part accidental. I had embraced certain ideas as the focus of my study, but the location was determined in the first instance by a casual friend who put me in touch with an Aboriginal woman from Dubbo. Next came the initial responses I received from a small number of Aboriginal people who took time out during a few very hot days in December 1997. However, the direction of this study was not determined until early February 1998, when I met with some members of "Wirrimbah" Direct Descendants Aboriginal Corporation.⁹

My original friend from Dubbo invited me to my first "Wirrimbah" meeting, introduced me and outlined my interest in what was taking place among the Aboriginal people of Dubbo (the Direct Descendants) in relation to native title. I should point out here that even though my friend had very limited knowledge of the meaning of the term 'anthropologist' she, nevertheless, whispered to me just before going into the meeting that I should not worry too much about being white and speaking with a funny accent, 'but maybe we should not tell them that you are an anthropologist'. I did tell them anyway, but it intrigued me at the time and I only realised later how many Wiradjuri people were, and some still are, quite cynical when it comes to anthropologists and social research. However, as later transpired, the term 'anthropologist' was one of the reasons why the members of "Wirrimbah" agreed to my requests.

⁹ "Wirrimbah" is discussed in details in Chapter Seven (7.2.).

The initial response at the meeting, while not unfriendly, was certainly reminiscent of my first meeting with the group of Aboriginal women discussed above. I explained some of my plans (based on my ideas at the time), explained to a certain extent what anthropological research consisted of, and made a request: I would work with them on compiling their genealogies, in return for 'participating' and 'observing' the procedures at "Wirrimbah" meetings. After making this request I was asked to step out while the meeting considered my proposal. After approximately fifteen minutes I was allowed back in and was informed that the members present had accepted my proposal. Later I was told about the issues which were raised during their decision taking.

The first issue was the fact that I am white; but, eventually the fact that I am not an 'Australian white', evident to an extent through my accented English, was found to work in my favour. What transpired later, demonstrating the reality of internal community tension at the time, was the fact that if I, as a white person and an anthropologist, was working with "Wirrimbah" it was accepted that I was not working with another Aboriginal group in Dubbo. This tension had also been evident in December, when most of the people I spoke with had made sure that they knew who I had spoken to previously, before revealing their own thoughts.

The second issue was my personal agenda, and at the same time a questioning about the practice of social sciences in relation to New South Wales Aborigines. I had been faced with this issue, the previous December, when the group of women, alluded to previously, had these questions and comments for me: What are you doing this for? What do you intend to do with the information/material you collect? How will it be used? What will be our (the local Aboriginal people) roles/involvement? We are so tired of being the most studied people on earth. What is so interesting about our lives? Would there be any feedback for their community? The members of the "Wirrimbah" meeting also addressed all of these issues. Fortunately I had read, and completed, forms including the 'Ethical guidelines concerning Aboriginal and Torres Strait Islander research', so I could recite the ethical obligations concerning my work. Similarly, I told them that I was collecting information for the purpose of writing an academic thesis and that any material I collected would be available to them, that all genealogical information

was the property of "Wirrimbah", and that they could 'toss me out' if my conduct was in any way inappropriate. This concern about 'ownership of knowledge', which I first came across in December 1997, has become even more entrenched in the conduct of "Wirrimbah", whose members are increasingly realising that through various forms of legislation they can protect some of their traditional knowledge (e.g. through copyright laws) and, by extension, their claims to, and control over, their cultural heritage (e.g. past and present history, photographic material, local myths and the recording of oral history). I placed significant emphasis on the fact that, apart from needing their approval for my study, I also had sought approval from Macquarie University's Ethics Committee, which to a certain extent recognised and respected the authority of the Aboriginal people of Dubbo.

The third issue was that, in spite of a long-lived suspicion of social scientists (anthropologists), some of the people at the forefront of "Wirrimbah" had recently realised, through their very recent work with the Native Title Unit of the New South Wales Aboriginal Land Council (NSWALC), that anthropologists could be useful when it came to native title claims and issues relating to cultural heritage. In retrospect I realise that it was the official recognition of their authority, plus the growing realisation that in order to lodge a native title claim and/or gain recognition as the authority on local Aboriginal cultural heritage, "Wirrimbah" needed formal recording of legitimate membership (i.e. genealogy), which granted me the approval of the "Wirrimbah" members.

My methods of collecting data in Dubbo were as follows: (a) observing and note-taking at general and annual meetings of "Wirrimbah", as well as other meetings taking place in Dubbo in 1998 relating to Aboriginal affairs; (b) interviews - semi-structured (for genealogical information) and open-ended (thesis-related). These interviews were anonymous, they were taped and transcribed and made available to the interviewees (c) casual conversations at social gatherings/visits (d) information gathered while being shown the traditional sites/grounds around Dubbo by various members of "Wirrimbah"; (e) researching local documents, i.e. the local newspaper, (*The Daily Liberal and Macquarie Advocate*), documents available at the Dubbo Museum and Historical Society, other documents, microfilms and CD-

rooms (genealogical database) at the local library and maps in the Lands Offices (Dubbo and Sydney).

The major sources for secondary information, before, during and after my fieldwork, were as follows: The Mitchell State Library and the New South Wales Archives for both anthropological and historical documentation (old journals) and official documents relating to government policies relating to Aboriginal affairs in New South Wales (e.g. Minutes taken at Aborigines Protection Board Meetings); Sydney University Library, which holds A. P. Elkin's collection of correspondence and unpublished papers (*The Elkin Papers*) and a collection of personal correspondence and papers of some of the earliest white settlers in Dubbo (*The Dulhunty Papers*); The Australian Institute of Aboriginal and Torres Strait Islander Studies' Library in Canberra, for information relating to Aboriginal land claims (primarily in the Northern Territory); Newspaper and other media resources for the 'political climate' at various times; papers given at workshops and conferences (i.e. at the Native Title Research Unit in Canberra and the Australian Anthropological Society's Annual Conferences) and by individual academics (referred to in bibliography); and, increasingly, the various Internet sites ranging from those of individual Aboriginal Land Councils to the various government institutions.

Throughout the thesis, extracts from interviews (taped and transcribed) are used and indicated by a number and a date (e.g. Int.#01, 23.09.1998), while other information is referred to as a dated 'personal communication'. There are also references to the procedures and certain issues addressed at "Wirrimbah" meetings. Where there is a direct reference to either the minutes or spoken comments of a member of the meeting, it is specifically indicated as such. In order to protect the identities of the people who contributed information to this thesis I have used pseudonyms and/or referred to people according to age, gender and personal/professional role within the community.

There are various terms which have been used in both spoken and written language when referring to Australian Aboriginal people, e.g. native, indigenous, Aborigine, First people, Koori, Murri (Murrie) and 'blackfella'. For this thesis I have chosen

to use the terms 'Aboriginal' and 'Aborigine(s)' except when citing other sources or referring to indigenous people outside Australia. The main reason for my choice is based on my experience in early 1998, when Pauline Hanson was making some Aboriginal people of Dubbo - at that time working on definitions for their incorporation papers - quite nervous, by referring to herself as an indigenous Australian. The Aboriginal people of Dubbo overcame their nervousness and used the term 'indigenous' in the membership conditions, but as they generally refer to themselves as either black or Aboriginal I decided, also for uniformity, to use the term 'Aboriginal'. Likewise, I generally use the term 'non-Aboriginal', when referring to people other than Aboriginal, except when the term 'white' has accurately described the individual(s) being discussed. I use the terms 'direct descendant(s)' and member(s) of "Wirrimbah" (and on occasion 'traditional owner(s)') interchangeably for the direct descendant(s) of the Aboriginal population of Dubbo at the time of white settlement. Otherwise, the use of various terms are defined and discussed as they appear in the text. Following current convention I use lower case letters for the term 'native title'.

The following is a list of abbreviations used throughout the thesis:

ATSIC	Aboriginal and Torres Strait Islander Commission
AFVRS	Aboriginal Family Voluntary Resettlement Scheme
<i>ALRA (NSW) 1983</i>	Aboriginal Land Rights Act (NSW) 1993
<i>ALRA (NT) 1976</i>	<i>Aboriginal Land Rights Act (NT) 1976</i>
APA	Aboriginal Progressive Association
APB	Aborigines Protection Board
APL	Aborigines Protection League
AAL	Australian Aboriginal League
AAPA	Australian Aboriginal Progressive Association
AGL	Australian Gaslight Company
ALP	Australian Labor Party
CLC	Central Land Council
DAA	Commonwealth Department of Aboriginal Affairs
CDEP	Community Development Employment Projects
FCCA	Federal Council for Aboriginal Advancement

FCAATSI	Federal Council for the Advancement of Aborigines and Torres Strait Islanders
NACC (later NAC)	National Aboriginal Consultative Committee
<i>NTA 1993 (Cth)</i>	<i>Native Title Act 1993 (Cth)</i>
NTAA 1998	Native Title Amendment Act 1998
NSWALC	New South Wales Aboriginal Land Council
NLC	Northern Land Council
NSW NPWS	NSW National Parks and Wildlife Services
<i>RDA 1975</i>	<i>Racial Discrimination Act 1975</i>
RALC	Regional Aboriginal Land Council

Most of the information in the thesis based on primary sources was collected during the period from December 1997 to December 1998, all of which I spent in Dubbo.¹⁰ From early 1999, I made a few official 'follow up' visits (especially when there have been some major "Wirrimbah" meetings), I have made several non-official 'follow up' visits (catching up with friends and news), the collection of the genealogies is on-going, and I made future plans to work with "Wirrimbah". It should be pointed out that the bulk of the personal information; i.e. the information which draws on people's actions and conceptualisation of local history, contemporary political activities and individual and community expectations of legislative changes and judicial rulings, were collected between December 1997 and November 1999. There are some more recent references to what has taken place in Dubbo since November 1999, especially regarding the processes of the Terramungamine and the possibility of purchasing Jinchilla Gardens,¹¹ which draw on information made available to me over the telephone or during social encounters with some "Wirrimbah" members in both Dubbo and Sydney.

The Aboriginal community in Dubbo is a complex community made up of people from various different 'tribal' backgrounds. This complexity, and the inevitable internal tension caused by diverse interests, the struggle for political authority and 'rumours' of potential material benefits included in gaining recognition of native title, set its mark on my field-work. The following section is an extract from an

¹⁰ I did spend five weekends in Sydney during this period

interview conducted with one of the oldest, female 'traditional owner' in Dubbo (M) and her daughter (D), concerning the issues of the lack of political power among the direct descendants of the original Aboriginal population (see 'historical' and 'traditional' people, discussed in Chapter Six), some of their ideas about the implication of native title and their concerns over who wields the political power among the Aboriginal population on the local level (i.e. the LALC).

M.: You know I got thrown out of the Land Council, the other day, the actual Land Council ... **D.:** What are going to do about it? Nothing? **M.:** I don't know who else got thrown out, but I know I did ... but, ah, you see, this is all these young people [young and middle age, most are not direct descendants], they don't even know me, would they? [What, they threw you out?]. **D.:** Yeah, and mom is one of the oldest of the people of the Mission {Talbragar Reserve}. **D.:** It's all got to do with the Elder's groups [traditional and historical people], they're always splitting all the time. **M.:** They're all jealous of one another, they don't like to see any ... anybody ... that was on the news ... they reckon there's ten, like seven people out of ten in, like in this money business [referring to media reports on native title and possible monetary benefits for successful native title claimants]. They reckon ... there's big money, they reckon there's big money to be spread out. **M.:** You know what I'd do with this here lot in Dubbo ... You see there's all these young ones ... you've got to watch this mob ... never, never, never been right in Dubbo ... you know, they would grab all... **D.:** But you know which family is in [power in the Local Land Council]. **M.:** Yeah, they're all in it...they're all married in, you know, they're all in together ... The [family name] were in there, they probably got all the [funds from the NSWALC ... then the [family name] ... all in there ... oh, that was big money ... he did three years, got caught with the big money [for fraud] ... the only one got caught was him, because he took it all at once, you see ... but he did his three years and they've gone [to a different part of Australia] (Int.#09, 07.07.1998).

During my first few weeks in Dubbo, upon learning about the tension and conflict within the Aboriginal community, I decided I had to choose sides. The choice of the group of people who classify themselves as the 'direct descendants of the original Aboriginal population of Dubbo', meant that I had limited access to first hand information from people outside that group. Furthermore, on the rare occasions when I did communicate with people outside the 'direct descendants'

¹¹ Discussed in Chapter Nine.

group, I was conscious of the possible limitations vis-a-vis the information I received. At the same time, especially early on in my field-work, there was some 'difference of opinion' within the direct descendants group itself. However, this 'difference of opinion' was confined to the basis of the structure and aims of "Wirrimbah". Essentially some people were interested in the possible material benefits of native title, while others - the majority - were concerned with cultural heritage, cultural and historical authority and recording, and with gaining recognition of the local Aboriginal culture. These tensions were mostly resolved in the first two years of "Wirrimbah's" operation. Notably, there are still a handful of direct descendants who are not active members.¹²

Partly due to these tensions between the direct descendants and other Aboriginal people, and within the direct descendants group, I resided, for the period of my field-work, at a local boarding-house. In retrospect, I realised that the benefit of this choice lay in not being overtly attached to specific local individuals or families and, at the same time, it gave me an insight into another side of life in Dubbo. The majority of the residents at this boarding-house were white males of all ages, who had either come to Dubbo from neighbouring areas seeking work, or simply lived there at the taxpayers expense. I had many interesting conversations with some of the residents, most of them not reluctant to make strong (mostly negative) statements about the local Aboriginal population. At the same time the manager of the boarding-house was one of the more outspoken members of Pauline Hanson's One Nation Party.¹³ On the second day of my stay there, while talking to some of the residents about the reasons for my stay in Dubbo, one of the residents claimed that: "The only black thing [he] like[s] is this black bitch here [referring to his dog]" (Personal communication February 1998). This statement immediately brought to mind statements about the 'Ku Klux Klan' and racism in Dubbo, which I had heard in December 1997. Inevitably, my stay at this boarding-house opened

¹² As will be discussed in Chapter Seven, there are hundreds of direct descendants in and around Dubbo.

¹³ Pauline Hanson was elected to the Federal Parliament as an independent member for Oxley (Queensland) in 1996. In a controversial Maiden Speech (10.09.1996) she called for, among other things, the abolition of both the Aboriginal and Torres Strait Commission (ATSIC) and of multiculturalism. In April 1997, Hanson launched a political party - the Party of Truth: Pauline Hanson's One Nation - which still upholds all the principles introduced in Hanson's Maiden Speech (www.onenation.com.au).

up an additional view of the lives of the Aboriginal people of Dubbo, something which certainly impacts on their current struggle for recognition of native title and claims to authority regarding the Aboriginal cultural heritage of Dubbo.

I would also like to make a comment about what might be seen as a lack of ethnographic detail of internal conflict and tension. I do realise that I could have chosen to include some more ethnographic material, but, due to a number of reasons, I find it quite problematic to include very detail accounts of tension and confrontation between both individuals and groups. Firstly, what I write in this thesis will be available to all the people who gave direct or indirect information (to people I never met for that matter) for the study. In order to avoid creating further tension I have mostly avoided discussing and describing specific incidents and comments where people involved might be identified (despite pseudonyms). Even though some of these incidents might be quite commonly known among many Aboriginal people in Dubbo, it might be seen as inappropriate, for both the informant(s) and the 'culprit(s)', for them to be discussed (analysed) in a 'book' (bound thesis). Secondly, there are sometimes varying accounts of past antagonism and I have only used those accounts which have been given to me by a number of different sources and the accounts which more or less correspond with one another. I also want to point out that the discrepancy in tales of past, and even ongoing present, tension and conflict, exists both within the direct descendant group as well as between them and other groups of people (i.e. different families, historical people and traditional people). Finally, in light of future native title claim (and "Wirrimbah" is currently working on a blanket claim for Dubbo) I find it increasingly problematic to include directly some information from personal interviews (I did give a guarantee to the interviewees that their anonymity would be protected), i.e. realising that anything I write might become a public/legal document. I did thus avoid using some very specific, personal information of some of the more private/personal conflicts and tension which I did not see absolutely essential to the discussion in the thesis. I realise that I might have either directly or indirectly used or drawn on some of this information, i.e. made some claims which would not seem fully substantiated in the thesis

In the year 2001, there will still be Aboriginal people in Dubbo who might casually claim that there is 'nothing of interest' in their lives. However, it is more likely that people have recognised the significant changes that have occurred during the last few years. Only recently a meeting of approximately 200 Aboriginal organisations from in and around Dubbo met over a three day period with the aim of "setting aside differences and working in a unified way to ensure the best services for the community" (reported in the *Koori Mail*, 08.08.2001: 34). Not only was this a meeting between local Aboriginal people, attending the meeting also were New South Wales Deputy Premier and Minister for Aboriginal Affairs, Andrew Refshauge, New South Wales Attorney-General, Bob Debus and Federal Minister for Reconciliation and Aboriginal and Torres Strait Islander Affairs, Philip Ruddock. This meeting was described by a Dubbo resident and the chairman of the NSWALC as "the first time in history, we got all of the Kooris and Murris together to talk as one" (reported in the *Koori Mail*, 08.08.2001: 34).

It appears that the diverse Aboriginal community in Dubbo can, in fact, pull together, 'lobby' for improvements in community services, and call attention to various social problems. However, when it comes to issues like native title and cultural heritage rights, additional complications and complexities arise. These problems which arise on the local (micro) level, as well as on the state/national (macro) level, derive from political, historical and legal contexts. What is taking place in Dubbo today can only be understood by analysing the present in the historical, legal, political and social context of the past.

The discussion in Chapter Two begins with the introduction of the concept of native title. I then outline some of the complications and complexities which are emerging as native title is put to the 'test' in the various parts of Australia. The discussion proceeds with an examination of a selection of anthropological writings on the notion of Aboriginal 'ownership' of, and connection to, land. In the following chapter the focus is on New South Wales: I explore the influences and the role of anthropology, and to a lesser extent history, in the construction of Aboriginality since the late 1800s. Furthermore, the discussion addresses the significant role that some anthropologists played in the development of various government policies regarding Aboriginal affairs, at different times in history.

Chapter Four picks up that theme, then proceeds to examine the recognition, or rather the lack of recognition, of Aboriginal people's active participation in, and organisation of, demands for rights in and access to their ancestral lands. In addition, this chapter addresses the establishment and the characteristics of Aboriginal reserves in New South Wales. In Chapter Five, the focus is centred to Dubbo. This chapter addresses the historical and social processes of white settlement of the Dubbo area and introduces the Aboriginal people of Dubbo, past and present. The discussion in Chapter Six draws, to a certain extent, on many issues addressed in Chapter Four, i.e. the introduction and implementation of various governmental policies pertinent to Aboriginal affairs in New South Wales, and how these policies have contributed to the current complexity of politico-legal matters on the local level. The main focus of Chapter Six is the internal political tension (conflict) which exists among many groups of Aboriginal people in Dubbo. Chapter Seven follows that discussion, examining how the introduction of the *Native Title Act 1993* (Cth) has affected this tension. In Chapter Seven, I also explore the methods and processes which the direct descendants of the Aboriginal population at the time of white settlement have adopted in order to seek recognition of their status as native title claimants. In addition, the Chapter introduces Alice, one of the driving forces behind the activities of the direct descendants. I proceed to explore, through some of her lived experiences, the various aspects of a New South Wales Aboriginal person. The aim of this exploration is to establish how the various pieces of government legislation have influenced and affected the lives of countless Aboriginal people, and to throw light on some of the different issues associated with current claims to native title and Aboriginal cultural heritage in New South Wales. Chapter Eight examines aspects of the debate about the existence and nature of Aboriginal customary law partly in comparison to Australian common law. The discussion is partly based on an interaction between a mid-1800s white settler in the Dubbo area and some members of the local Aboriginal population at that time. The main aim of Chapter Eight is to demonstrate that the recognition of Aboriginal customary law is a very recent event. Furthermore, it addresses the fact that due to the subordinate status of Aboriginal customary law, under the Australian common law, native title in many parts of long settled Australia is in danger of either being extinguished or of expiring. Chapter Nine focuses on some notion of connection to, and 'ownership'

of land among the Aboriginal people of Dubbo. By exploring the native title claim experiences of the Dunghutti and the Yorta Yorta people, the discussion reveals the fact that under current native title legislation, hopes for a successful native title claim in Dubbo are dwindling. The emerging picture appears to be one where negotiations are losing out as the 'preferred' medium to assess native title claims. Non-claimants are realising that by taking the claimants to court, there are increasing prospects of findings in favour of non-claimants. The question that remains is: Has native title legislation failed the Aboriginal people?

Chapter Two

Native Title: A Brief Overview

[W]hen the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of law and customs based on tradition cannot be revived for contemporary recognition (Bartlett 1993: 43).

The concept of 'native title' has existed for nearly two centuries. It was first adopted by members of the US Supreme Court in 1823, and was firmly incorporated into British colonial law by the mid-1800s (Bartlett 2000; Hunter 1996; Reynolds 1996). However, it represents a recently introduced concept for most Australians. This chapter will address the introduction of the concept of native title within Australia and the legal and political implications which the *Native Title Act 1993* (*NTA 1993* (Cth)), along with subsequent legislative changes to the Act, have had for individuals, groups and, by extension, all Aboriginal people in Australia. The aim of this chapter is to introduce and raise some of the issues which - eight years after the introduction of the *NTA 1993* (Cth) - are influencing, formulating and determining the emerging processes and structures of native title in Australia.

In the first section, I will discuss the nature, meaning and context of native title in Australia. This discussion will introduce some important terms and concepts relevant to the topic. In the second section, I will examine some of the characteristics and complexities that are emerging as more native title cases are determined. In the last section, I will address anthropological writings on Aboriginal ownership of, and rights to, land.

2.1. What is Native Title?

It is important not to lose sight of what extinguishment of native title is. It is an act of colonialism. It is the racist appropriation of property by the dominant culture on the basis that it has the power to do so. It is no less an act of colonial racism today than it was 210 years ago and the mere fact that it has been sanctioned

by Australian law will add little to the legitimacy of the exercise of that power in the eyes of those being dispossessed. Governments and industries must find solutions to land conflicts that respect indigenous human rights. This involves moving away from legal theories based on discrimination and looking at the day to day reality of indigenous peoples (Dodson, M. 1998: 7).

In 1971, the Yolngu people of Gove (Yirrkala) in the Northern Territory became the first Aboriginal people in Australia to attempt to have their rights to land recognised at common law. In an attempt to stop the mining of their country, the Yolngu people claimed ownership of their traditional lands and challenged the rights of Nabalco¹⁴ to undertake bauxite mining of their lands on leases issued by the Commonwealth Government.¹⁵ In his ruling, Justice Blackburn acknowledged that Aboriginal people indeed had a 'spiritual' link to land. However, he did not consider this link sufficient to indicate either a social or economic relationship with the land - or that 'property rights' should be recognised by Australian law. According to Blackburn, Australian common law did not recognise any Aboriginal rights to land (e.g. Goodall 1996; Merlan 1998; Reynolds 1999; Williams N. 1986). In order to determine whether the Yolngu had developed a system of property rights to land, Blackburn tested the Aboriginal system vis-a-vis the requirements of the common law of Australia (Commonwealth), i.e. "the right to use and enjoy, the right to exclude others, and the right to alienate". He found, as a fact, that the Yolngu had no direct economic relationship to the land and subsequently "reduced the land-owning units' relations to their spatial area as an uneconomic spiritual link only ... [He further stated that their] relationship with the land could not be characterized as proprietary" (reported in Parliament of New South Wales, 1980: 33). Blackburn's ruling was based on the fact that the common law did not recognise notions of communal ownership according to Aboriginal law, as opposed to individual property rights; therefore, "[t]he right to alienate ... would be impossible ... because ownership was not vested in the individual members but rather in the corporate unit over time" (Parliament of New South Wales 1980: 33). Thus Blackburn could not overturn the long accepted

¹⁴ The Nabalco bauxite and alumina operation is located on the Gove Peninsula.

¹⁵ *Milirrpum and Others v. Nabalco Pty. Ltd. And The Commonwealth of Australia*, 17 Federal Law Reports (1971: 268-274).

legal principle that Australia was a ‘settled’ colony and not a ‘conquered’ one. In Chapter Eight I will discuss the significance of the Blackburn ruling for the nature and the eventual passing of the *Aboriginal Land Rights Act (NT) 1976 (ALRA (NT) 1976)*. Blackburn’s ruling was overturned in 1992 with the *Mabo (No. 2)* ruling.

The first, eventually successful, attempt to have a form of indigenous proprietary rights at common law recognised was lodged in 1988. *Mabo & Others v the State of Queensland* (No. 1) (1988) was brought forth as a challenge to the Blackburn (Gove) 1971 ruling. The state of Queensland invalidated that challenge by passing the Queensland Coast Island Declaratory Act 1985 (Qld.). In 1988, the plaintiffs won a challenge to that piece of legislation before the High Court of Australia, claiming racial discrimination. This success enabled the original challenge to continue, ultimately resulting in a victory before the High Court: *Mabo & Others v State of Queensland* (1992) or *Mabo (No. 2)* (Aboriginal and Torres Strait Islander Commission 1993; Iorns Magallanes 1999; Sharp 1996). The *Mabo (No. 2)* ruling found that:

[T]he common law of Australia recognises a form of native title which, in the cases where it has not been extinguished, reflects the entitlements of the indigenous inhabitants, in accordance with their laws and customs, to their traditional land (*Mabo v State of Queensland (Mabo No. 2)* (1992) 175 CLR 1 at 15).

This ruling introduced the term ‘native title’ as one appropriate to the situation of Australian Aborigines’ claims to rights over lands they regarded as theirs by tradition. From this point on, ‘native title’ has been taken to represent accurately the underlying relationships of Aboriginal people with their ancestral lands according to traditional law and customs. However, the nature and extent of traditional law and customs varies greatly, and because of this, the *Mabo (No. 2)* ruling has been described as having “opened a can of worms on the question of native title” (Editorial *Sydney Morning Herald* 03.07.1998: 14; also Editorial *Sydney Morning Herald* 09.07. 1998: 14). Thus the issue of native title has been forced onto the political agenda and into the general discourse of the nation. These dramatic statements are based on the fact that *Mabo (No. 2)* achieved what the Yolngu had not managed to achieve. It overturned the long accepted legal doctrine that, when

the British Crown assumed sovereignty, the land mass of Australia was declared *terra nullius*: a place without people, a place without settled law, a land belonging to no-one. According to this doctrine, "the British Crown became the first sovereign and the first proprietor" of Australia (Reynolds 1998a: 208; also Aboriginal and Torres Strait Islander Commission 1993; Attwood 1996; Neate 2000). With the *Mabo (No. 2)* ruling, the common law recognised for the first time that Aboriginal people held rights and interests in land, rights that should be protected by the law of Australia.

The term *terra nullius* derives from the term *res nullius*, which means 'a thing with no owner' (Reynolds 1992: 14). This term was coined in the seventeenth century by Dutch legal scholar Hugo Grotius, who, in the early days of European exploration and conquest, developed "international laws of possession" in order to justify and legalise European conquests in other parts of the world (quoted in Reynolds 1992 (1987): 14). However, Grotius was also concerned about the need to "promote rights for the indigenous peoples of the New World and the applicability of the doctrine of discovery solely to truly uninhabited places (*terra nullius*)" (Havemann 1999c: 14; see also Attwood 1996: ix¹⁶). The term *terra nullius* has two meanings. In the first instance, it means a country without a sovereign power recognised by European (Western) authorities. Secondly, it means a territory where there is no form of recognised tenure, where nobody owns any land (Reynolds 1992 (1987): 12). The international laws of the seventeenth century enabled the sovereigns of Europe to acquire new territory, either by conquest or force, or through voluntary 'cession by treaty', thus giving them valid, legal title over the territory. In cases where a territory was considered to be *terra nullius*, the title was open to "all states under the doctrines of discovery and occupation" (Hunter 1996: 6). Furthermore, when a European sovereign gained domination over a new colony where there was recognition of pre-existing indigenous ownership of, and rights in, land, these rights continued to exist unless and/or until the ruler extinguished them (e.g. Hunter 1996: 9). So the important question may well be posed: why was Australia classified *terra nullius* in the first place?

¹⁶ Attwood discusses how Grotius, like Pufendorf, Locke and other contemporaries, considered hunter-gatherers ('savages') to have no concept of property, as they were in "the original state of nature".

The legal justification for classifying the island continent of Australia *terra nullius* was based, to a large extent, on Emerich de Vattel's work *The Law of Nations* (1760). According to Vattel, the precondition for a definition of an inhabited territory was cultivation of a settled land and some form of legal and/or political system validating possession/ownership of the land (e.g. Attwood 1996; Hunter 1996; Reynolds 1992 (1987)). The subject of popular reference, Vattel states in his work that following his observations of European colonisation in North America, "given the Divine injunction to subdue the earth the Indians could not expect to remain forever in exclusive possession of the whole North American continent" (quoted in Reynolds 1992 (1987): 17). This ideological justification for European colonisation of various parts of the world reflects the then contemporary Western notions of progress and prosperity, and validated the seizing of land for the ever-increasing populace in various parts of Europe.

Based on the testimony of Sir Joseph Banks to a House of Commons committee in 1785, the British Government utilised the notion of *terra nullius*, and, in 1785, determined that New Holland (Australia) was 'uninhabited territory'. Banks had been a member of Captain Cook's expedition on the *Endeavour* in 1770, and by 1785 he was considered to be the greatest authority on this 'newly' discovered continent (Attwood 1996; Reynolds 1999). In his journals, Banks described a land which was "thinly inhabited even to admiration" (quoted in Reynolds 1992 (1987): 31) and, despite having only set foot on coastal Australia, Banks concluded that except for these thinly populated coastal fringes, the continent was uninhabited (Reynolds 1992 (1987)). Banks reported that he had not observed Australian Aborigines either cultivating or making productive use of the land; thus, according to international law, the continent did not meet the legal classification of habitation. Furthermore, Banks concluded, due to the very small number of people on the continent, and an apparent and absolute lack of materialism (notions of ownership), these people would beat a hasty retreat with the arrival of the colonisers (King, R. J. 1986; also see footnote no. 72). Banks thus effectively used Vattel's definition of inhabited territory to declare Australia *terra nullius*, by extension recommending colonisation on the basis of discovery and occupation (e.g. Attwood 1996; King, R. J. 1986; Reynolds 1992 (1987), 1999).

Contemporary historians have pointed out that Australia was declared *terra nullius* because "its owners were conceived as belonging to a particular historical time or to no time at all (and thus prehistorical)" (Attwood 1996: ix; also Hunter 1996). Thus, it remains problematic to fathom why, after coming into contact with, and gaining some understanding of, the nature and size of the Aboriginal population, so few attempts were made to implement legal justification for the white occupation of Australia. Henry Reynolds, upon addressing this issue, brought forth yet another aspect of Vattel's writings. According to Reynolds (1992 (1987)), Vattel, like Grotius, did recognise (property) rights for nomadic people and, in order to overcome the controversy surrounding his work, he advocated "limited right of settlement" (p. 18). Reynolds claims that this aspect of Vattel's work was, and has been, both grossly distorted and deliberately overlooked.¹⁷ The dire consequences of this "European ignorance and European philosophical and political ideas" (Reynolds 1996: 18) have been, among other matters, the removal of Aboriginal people to the fringes of settlements (1820s-1860s) and a continual dispossession and dispersal of Aboriginal people.¹⁸ The result of centuries or decades of dispossession are evident in the complex and confusing debates over native title today (Reynolds 1996: 18, 22; also Collmann 1977, 1988).

Before addressing some of the more complex aspects of native title as it is currently recognised in Australia, it is essential to examine the *Native Title Act 1993 (NTA 1993 (Cth))*. The *NTA 1993 (Cth)* was passed in December 1993, after the longest debate in the history of the Australian Senate. It is the main source of legislative provisions regarding native title in Australia, and contains a definition of native title which has been incorporated into the statutes of every State and the Northern Territory.

¹⁷ There were attempts both in England and Australia to seek legal recognition of Aboriginal rights in land (Reynolds 1998b), but the legal doctrine of *terra nullius* was (is) immensely persistent, reasons for which are still being debated and explained.

¹⁸ The Pintubi, who recently settled at Kiwirrkura in Western Australia, are an example of a group of Aboriginal people who are still being 'shipped back and forth' (reported in the *Australian* 28 - 29 July 2001: 19, 22).

The expression native title or native title rights and interests means the communal, group or individual rights and interest of Aboriginal people 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 (*Native Title Act 1993*, s 223(1)).

As will be discussed later, these conditions have been narrowed considerably since the implementation of the *Native Title Amendment Act 1998* (Cth) (*NTAA (1998)*), one of the conditions of which was the introduction of a 'registration test'. It should be pointed out that all States and the Northern Territory legislation has been amended to make provision for native title, especially in relation to mining. The main objectives of the *NTA 1993* (Cth) are defined as follows:

To provide for the recognition and protection of native title; and
to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings; and
to establish a mechanism for determining claims to native title; and
to provide for, or permit, the validation of past acts, and intermediate period acts, invalidated because of the existence of native title (*Native Title Act 1993*, s 3).

In June 1998, the Federal Government passed the *Native Title Amendment Act 1998* (Cth) (*NTAA (1998)*) (often referred to as the 10-point plan during its formulation).¹⁹ The passing of this act was partly in response to demands from farmers and pastoralists who were reacting to recognition by the High Court of the co-existence of native title with pastoral leases in the Wik ruling (*Wik Peoples v. State of Queensland Others. Thayoree People v. State of Queensland & Ors* (1996)).

Furthermore, it was partly a response to the opportunities given to native title holders in the *NTA 1993* (Cth) to negotiate on proposed developments on their lands (e.g. mining). The *Native Title Amendment Bill* was passed in 1998, following one of the most exhaustive and passionate parliamentary debates since the establishment of the Federation in 1901. During a period of 'deadlock' between the Senate (Senator Brian Harradine) and the Government (Prime Minister John Howard), there were serious prospects of a double dissolution election (e.g. Nettheim 1998b). The major obstacle to the 'smooth' passing of the *Native Title Amendment Bill* was the unwillingness of the Government to accept the Senate's amendments - often referred to in the media as the 'four sticking-points' - especially those regarding Aboriginal people's rights to negotiate.

The 'rights to negotiate', a part of the key compromise in the original negotiations around the *NTA 1993* (Cth), were never veto rights: they gave the native title holders the opportunity to negotiate - within set time limits - proposed developments and governmental plans to grant, vary or extend mining interests within their ancestral lands (e.g. Haven 1998-2000; Nettheim 1998b). Aboriginal leaders, at the time of the passing of the *NTAA (1998)*, were both infuriated and disappointed. Firstly, despite promises from representatives of the Government and the Senate, there was minimal consultation, almost no participation, and certainly no consent given by Aboriginal people during the developmental procedures; secondly, the final outcome meant that in a number of situations the 'rights to negotiate' were eliminated. The ultimate power for the procedures of negotiation was given to the States and Territories (Dodson, P. 2000; Haven 1998 - 2000). Furthermore, the effective limitation to the protection afforded to Aboriginal people under the *Racial Discrimination Act 1975* (Cth), which was introduced in the *NTAA (1998)*, proved of grave concern to Aboriginal people. Effectively, the *NTAA (1998)* has "created [further] legal certainty for governments and third parties at the expense of indigenous title - violating articles 2 and 5 of the Convention on the Elimination of All Forms of Racial Discrimination" (Schurmann-Zeggel 1999: 20). Additional

¹⁹ Most of the amendments to the *Native Title Act 1993* (Cth) were effective from 30 September 1998. Others relating to representative Aboriginal/Torres Strait Islander bodies came into operation on 30 June 2000 (*Native Title Act Amendment Act 1998* (Cth) s. 2(4).

matters of contention included the changes to the 'registration test'. Today, the 'registration test' comprises

...a set of conditions applied to native title claimant applications by the Registrar of the National Native Title Tribunal. A native title claimant application must satisfy the conditions of the registration test in order for the claimants to get certain rights, such as having a say about some proposed developments (future acts) in the claim area ... If a claim satisfies the conditions of the registration test, details of the application are entered onto the Register of Native Title Claims ... Registration means that the claimants gain the right to negotiate, the right to oppose non-claimant applications, and certain other rights while their claim is pending ... They may also gain confirmation of rights of access to places within the claim area to carry out traditional activities, if they already have had regular access to that area (Native Title Tribunal 24.07.2001).

While many Aboriginal leaders, and in particular the National Indigenous Working Group, generally agreed that there was a need for stronger, more specific, registration tests for native title claims, the 'Registration test', which was introduced in the *NTAA* (1998) has been heavily criticised by most Aboriginal leaders. The major concern of the National Indigenous Working Group focused on the requirement, implemented in the *NTAA*, of a "continuous physical connection with the land, regardless of the [past] circumstances ... which goes beyond the [requirements of the] common law" (Haven 1998 - 2000: 16). While this condition is of some concern to many Aboriginal communities in Australia, it is of particular concern to Aboriginal people in long settled Australia where dispossession and dispersal have been the most severe. This concern became apparent in late 1998, when a representative of the New South Wales Aboriginal Land Council claimed that

[a]bout 80 of the 115 NSW claims before the Native Title Tribunal are set to be tossed out when they are subjected to a registration test which starts today under the new 10-point plan legislation ... seven out of 10 of the NSW claims will not make the grade under the stricter test (*Sydney Morning Herald* 30.09.1998: 6).

Another matter of concern for Aboriginal people is the fact that the registration test which was introduced in the *NTAA (1998)* now applies retrospectively to all native title claims lodged since the implementation of the *NTA 1993 (Cth)*, instead of being valid from June 1997, as first proposed (Haven 1998 - 2000).

It is only eight years (2001) since the implementation of the *NTA 1993 (Cth)*, but already some significant legislative changes have taken place. As I have pointed out, these changes have not, in most cases, benefited native title claimants; rather, the threshold test for lodging a native title claim has been raised. The implementation of the registration test has meant increased demands on resources, including both funds and time, required to lodge and/or re-lodge claims (Haven 1998 - 2000). However, concurrently there is a clearer picture emerging of the processes and structures involved in lodging a native title claim. As more claims come before the Federal court, the legal issues are clarified. Claimants and their assistants (e.g. lawyers, anthropologists, archaeologists, genealogists and historians) are becoming more familiar with the processes, expectations and requirements involved in determining the existence of native title. At the same time, as requirements become more familiar to people working for claimants, non-claimants and the judicial system, the processes become more focused and streamlined. The following paragraph presents a summary of some of the statements pertinent to the nature of native title that have appeared in the media, as well as in academic and legal writings, tabling various claims and findings by people debating and/or taking part in native title processes.

Scrutiny of but a fraction of the literature which exists on native title today reveals quite a few 'facts' about native title, facts established during the processing of native title claims in the various parts of Australia. Native title is not a grant created through legislation, thus it has no statutory definition. Native title is not a freehold ownership of land: native title is a recognition of the existence of a certain kind of entitlement to land; native title has always existed; native title lacks many of the certainties of the processes and the definitions of land rights claims (especially in the Northern Territory); native title is fragile and largely theoretical because increasingly native title determination on long settled areas has shown its vulnerability to statutory extinguishment (vulnerable before the interpretation of

legal representatives); native title may be lost through abandonment; native title has been extinguished by the imposition of freehold title in the major part of long-settled Australia (Athanasίου 1998; Bartlett 2000; Gray, P., 1996; Langton 2000; Merlan 1994; Neate 2000; Sutton 1998; 2001a,b). Furthermore, there are aspects of native title which are often referred to as being, or appearing to be, both contradictory and complex, particularly the manifestation of inherent inequality between Aboriginal and non-Aboriginal people. For example: Native title has always existed, but native title needs to be discovered: native title is what Aboriginal people say it is, but their claims/evidence have to be accepted by non-Aboriginal people; 'native' is a colonial concept, and the land was lost through colonisation; 'native title' is ultimately a product of the common law of England; native title rights are derived from Aboriginal customary law which pre-exists the colonisers, but native title must, of necessity, be recognised in the 'colonisers' courts; native title holders and native title incidents are verified by Aboriginal customary laws, but these laws have to be proven as a matter of fact in an Australian court; where native title co-exists with other valid rights and interests; non-native title rights prevail over native title rights to the extent of inconsistency (e.g. Dodson, M. 1994, 1996, 1998; Langton 2000; Neate 2000; Pearson 2000).

Native title can thus be described as either a positive or a negative concept, depending on where, when, with and for whom one speaks. Graeme Neate (2000) states that the High Court has confirmed the following:

[T]here is a common law of Australia as opposed to a common law of individual States ... and [c]onsequently, as more cases are determined, ... a comprehensive, national picture will emerge of what native title is (p. 4).

Essentially, what has emerged since 1993 is a legislative framework that is frequently open to interpretation by the judiciary. It is a framework that is complex, one that often creates more uncertainties than certainties, a framework that is still emerging. At the same time it must be recognised that these processes and frameworks are structured by the hegemonic value systems of the Australian state. Consequently, the processes and outcomes of most of the native title determinations to date have given rise to controversy (legal interpretation), uncertainty (before the

law) and frustration (emotional claims of powerlessness and/or inequity). The following section will address only a fraction of the controversy, complications and claims of injustice that have emerged as more native title claims are processed. In this section, focus will centre on the legal conceptualisation and interpretation of native title in Australia.²⁰

2.2. The Emerging Picture

Aboriginal and Torres Strait Islander peoples have no treaty-based rights or rights entrenched in the Australian Constitution. Their Aboriginal rights are to be found scattered in an eclectic selection of Commonwealth and state legislation. For example, statutory recognition of common-law native title after the *Mabo (No. 2)* decision of the High Court in 1992 is to be found in an ordinary Commonwealth statute, the *Native Title Act 1993* (Havemann p. 7 or 9).

At a native title symposium convened at the University of New South Wales in June 1998, Mick Dodson, one of the most prominent and respected Aboriginal leaders in Australia today, reflected on the 1992 *Mabo (No. 2)* decision. He identified as one of its most crucial findings the fact that a

sovereign government carries the power to extinguish native title [and that] ... in the Native Title Amendment Bill 1997 (NTAB) a sovereign government [was] poised to exercise that power (1998: 1).

Mick Dodson claimed that

[t]he manner in which a government can remove the property interests of its citizens raises a number of human rights issues. This is particularly so where the interference with property interests threatens the cultural heritage of those dispossessed (1998: 2).

²⁰ The discussion in Chapters Six, Seven and Eight will address the various legal, social and political aspects of native title on a local level in Dubbo.

Dodson's claims were fuelled by the fact that despite being two centuries old, the concept of 'native title' has only been legally recognised for a few years, and is thus relatively 'new' to both Aboriginal and non-Aboriginal Australians. More importantly, it is both a controversial and misinterpreted concept. Dodson's claims strongly illustrate the emotional importance which Aboriginal people place on native title, i.e. issues such as human rights, identity, cultural heritage, ancestral tradition and Aboriginal history. This 'emotional' aspect of native title - albeit often reversed - can also be easily identified among the general public. Since the introduction of 'native title', and the subsequent recognition of the concept in Australia, there have been various 'scare tactics' employed by different interested parties, aided by media frenzy and complicated legal jargon articulated by lawyers and other 'experts' involved in the processing of native title claims. These tactics suggest that there is no limit to the range of claims that might be lodged. Consequently, the greatest fear of many farmers and pastoralists, as well as of many urban Australians in the first few years after native title was recognised, was that potentially the whole of the continent, including people's backyards, were subject to native title (e.g. Woodford 1997; Woodford and Millett 1997).

These fears were mostly based on misconceptions whereby people equated native title with freehold entitlement to land. Some of these misconceptions - which came about because people compared the *NTA 1993* to the *ALRA (NT) 1976*, which would imply a special statutory form of inalienable freehold of 'Aboriginal land' - became evident following some of the first major native title claim determinations, *Mabo (No. 2)* (1992) being the first. Public debate and discussions in the media failed to reveal an informed understanding of the fact that native title does not have a statutory definition. Native title claims do not have any of the "general characteristics of most forms of land title [which] are reasonably well known" (Nettheim 1997: 13; also Editorial *Sydney Morning Herald* 24.01.1997: 14).

It is interesting to note that State and the Northern Territory leaders, in conjunction with the Prime Minister, openly participated in maintaining this general misconception and misinterpretation (Millett 1997; Millett and Woodford 1997; Robert 1997). However, these fears can be explained to a certain extent. Opponents of native title protest the fact that in 1998, approximately forty-one percent of the

Northern Territory was held as Aboriginal freehold title under the *ALRA (NT) 1976*. This figure has risen to forty-nine percent in 2001, and there are still some outstanding, unresolved claims (Athanasίου 1998; Central Land Council, website 28.03.2001). There is little likelihood of a decrease in numbers because the *ALRA (NT) 1976* grants freehold title to successful claimants, and is thus inevitably the preferred option for Aboriginal people in the Northern Territory who fulfil the traditional owner definition. Another important aspect which makes the *ALRA (NT) 1976* the preferred option for Aboriginal people in the Northern Territory is that it has been in operation, albeit with some amendments, for a quarter of a century. Consequently, much of the doubt and confusion associated with *ALRA (NT) 1976* claims has been dealt with already. Claimants, lawyers, anthropologists, judges and non-claimants have worked through various legislative challenges and uncertainties, and have adopted and accepted quite settled and familiar operating procedures (e.g. Athanasίου 1998). Native title, on the other hand, has only been recognised for eight years in Australia (2001) and, as I have pointed out before, a comprehensive understanding of what constitutes native title on a national level is still emerging (Neate 2000; Nettheim 1997). The fact nevertheless remains that native title is not a question of 'emotional' issues or demands for 'human rights': it is a legal concept that is interpreted through the Australian legal system.

Today, hundreds, if not thousands of articles, books and reports have been written on native title. Undoubtedly there is much writing still to come, pending the resolution of complications inherent in native title, and pertinent to the hundreds of native title claims which have been lodged in Australia to date (2001). The following discussion focuses on the findings of people who have been involved in native title claims (discussion and/or determination) subsequent to the passing of the *NTA 1993* (Cth).

Describing the significance, origins and conditions of native title - understood in 2000 - Richard Bartlett writes:

[This is a] concept [which] delineates the land rights of indigenous people that a colonising power is prepared to give effect to in its courts ... Native title has its origin in traditional indigenous society. It seeks to give 'full respect' to those rights

recognised in or held by that society. The existence of a society is essential. And the rights claimed must be recognised by that society (2000: 73, 77).

A first question might well be raised: what are these 'rights' which the colonising powers are prepared to give? In effect, there is no complete defined list of what these rights actually represent. When deliberating these rights, Justice Brennan outlined very clearly the most significant aspects as follows: "given its content by the traditional laws acknowledged by, and the traditional customs observed by, the indigenous inhabitants of a territory".²¹ But it is important here to emphasise that some anthropologists involved in native title claims state that native title rights may change over time, and may differ within and between different communities at different times in history (e.g. Sutton 2001b). There is no defined list of rights of a specific group of people held under native title. Hal Wootten (1995) pointed this out after examining the Australian Commonwealth law, stating:

Imagine the absurdity of trying to define say, freehold title under modern Australian law, by looking at the day-to-day activities of particular landowners. Imagine also trying to list exhaustively the rights existing in land held under freehold title in Australia without incorporating into the description the constantly changing system of Australian law (p. 111).

The second question one must pose is: where does native title exist? The most recent list of the variety of lands and waters where native title may exist includes: Vacant (or unallocated) Crown land or other public land, national parks and public reserves, forests and beaches, some types of pastoral leases, land held by government agencies, land held for Aboriginal communities, oceans, seas, reefs, lakes, rivers, creeks, swamps, and other waters that are not privately owned. This list might at first sight seem to include everything *but* freehold land, but a closer look reveals that successful native title claims have included only some areas of vacant Crown land, a few Aboriginal reserves, and some pastoral leases held by the native title holders (National Native Title Tribunal, <http://www.nntt.gov.au> 24.07.2001 (from now referred to as 'NNTT web')). Native title cannot be claimed

²¹ Judge Brennan in *Mabo and Others v. Queensland* 1992, p. 42, also section 223 (1) (a) of the *NTA* 1993.

(has been extinguished) on privately owned land, residential and commercial leases, and in areas where governments have built roads, schools and public facilities. Generally, a successful native title claim means coexistence and/or compensation (NNTT web 30.05.2001).

The third question I want to pose is: what is this 'colonising power' which determines native title? Only the Federal Court, the High Court of Australia and certain other courts²² can approve determination. The National Native Title Tribunal tests for registration, notifies non-claimants (other interest parties) and mediates. Not all native title claims go to the courts, however, leaving three possible processes towards a native title determination. Firstly, if a native title application is not contested, the court may make an 'unopposed determination'. Then, if everyone involved in the mediation reaches an agreement over native title, then a 'consent determination' may be made. Next, a 'litigated determination' is made when an application is contested in court, during which appearance the parties have to argue their cases before a judge. There are two types of determinations (or decisions). In the first instance, there are the native title determinations, which decide whether or not native title exists. Secondly, future act determinations will determine whether or not a future project (usually mining or exploration) can be undertaken (NNTT web 30.05.2001). To date (May 2001), there have been twenty-four native title determinations in Australia, fourteen 'by consent' determinations (including one conditional and one part), ten determinations by litigated outcome (five determined that native title did not exist, three that native title did exist, one that native title partly exists, and one draft determination. Three of these determinations are under appeal). There were no unopposed determinations (NNTT web 30.05.2001). The powers of the court, the (Commonwealth) law, and the non-claimants - and the fact that every claim has to be validated (is 'opposed') through a registration test - ensure that no native title claim is accepted (determined) unopposed.

The fourth point in question is the existence of different categories of native title claims. These categories, outlined by the National Native Title Tribunal, are not a

²² The Supreme Court of South Australia and Environment Resources and Development Court of South Australia (National Native Title Tribunal 24.05. 2001).

legal classification per se, but can be used to recognise some of the diverse objectives behind lodging a native title claim. These categories include: claims that are lodged (a) with the support of the whole (majority) of the community of native title holders; (b) by individuals without extensive community consultation; (c) in response to possible 'development' (private and public enterprises) of traditionally important areas; and (d) by non-claimants (parties to a native title application) (e.g. NNTT web 30.05.2001; also Morris, J. 1995). Non-claimants include State, the Northern Territory and local governments, national and state organisations (e.g. Telstra Corporation Limited and Australian Gaslight Company), any Aboriginal person(s) who has/have made a native title claim over the same area, or part thereof, and people who may be affected by the claim; i.e. pastoral leaseholders, mining leaseholders and fishing licence holders. Non-claimants, who are advised of native title claims over areas in which they might express interest, can make application to try and establish whether or not there is existing native title in such areas (NNTT web 30.05.2001). The existence of the category of 'non-claimant' inevitably means that their interests are not likely to coincide with those of native title claimants. However, the most important point of note, when discussing different claimants in native title cases, is the political, legal and financial strength of different interest groups. In order to give some idea of this strength it would suffice to consider the estimates of the expenditure of the Victorian (Kennett) Government in (twice successfully) opposing the Yorta Yorta native title claim.²³ The Victorian Government alone is said to have "spent four million dollars, not to mention [money] expended by the New South Wales government" to fight the Yorta Yorta claim (*The Age*, Melbourne, 8 March 2000; *Riverine Herald*, Shepparton, 28 April 2000, both quoted in Atkinson 2001: 22).

The fifth point in question highlights the different reasons for the lodging of native title claims. These vary from moralistic reasons of correcting injustice and/or claiming rightful inheritance (legal rights), to gaining identity, culture and/or history (rights through recognition), to the prevention of destruction of culturally and spiritually sacred heritage/sites (rights of future generations), and finally, to financial

²³ The Yorta Yorta native title claim is mentioned in Chapter Eight and discussed in detail in Chapter Nine (9.2.).

compensation (rights derived from loss of economic/material resources). It can, of course, be argued that in many instances all of these reasons apply, and equally that the motive for lodging a native title claim might simply come down to 'because we can'. It should be mentioned here that some national corporations become automatically a non-claimant party to all native title claims lodged in Australia (e.g. Telstra Corporation Limited).

The last question I raise bears directly on Bartlett's quote above, regarding the essential need for the 'existence of a society'. The term 'society' here, has also been used with reference to a 'society in occupation', a 'community of native title holders' or 'a set of native title holders' (see Sutton 2001a: 4 -5). There are three important terms to which these phrases give rise: 'claimants' (traditional owners), 'communal' (title) and 'country' (rights in). The first term will be addressed in the discussion surrounding 'membership' in Chapter Seven, but the term 'traditional owner' - as it has been adopted by native title claimants in long settled areas - needs further elucidation.

The term 'traditional owner' derives from the *ALRA (NT) 1976* (e.g. Morphy 1999).²⁴ In the *ALRA (NT) 1976*, the term is used as a legal concept whereby traditional owners are persons of

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 (*ALRA (NT) 1976, section 3(1)*).

The introduction of the *NTA 1993* (Cth) saw the use of the term 'traditional owner', which up until the early 1990s had only been used to refer to Aboriginal people in the Northern Territory, become widespread among other Aboriginal Australians. Despite initial concerns about its use in a legal context (e.g. Gumbert 1984), it has been adopted and given meaning, albeit different from the legal definition, by

²⁴ The terms 'tradition' and 'traditional' will be discussed further in Chapter Nine (9.2.) in the context of the Yorta Yorta native title claim.

Aboriginal people in most parts of Australia (Morphy 1999; Sutton 2001b). For example, many Aboriginal people of Dubbo refer to themselves as 'traditional' people/owners, especially when emphasising their specific rights as opposed to those of 'historical' people.²⁵ However, as the concept of 'traditional owners' appears to be a relatively non-limited category within the *NTA 1993* (Cth), its everyday use by Aboriginal people, and its use in the literature, needs to be defined. Peter Sutton (2001b) defines 'traditional owners' as

[t]he living holders of specific traditional land interests, often now called the 'traditional owners' in a vernacular sense across much of Australia, [who] hold title to those [traditional] lands in the proximate sense, while underlying titles are maintained by the wider regional cultural and customary-legal system of the social networks of which they are members (Sutton 1996: 11).

In this passage, Sutton is referring to the 'dual systems' (1996: 11) nature of traditional Aboriginal land tenure, distinguishing between what he calls 'core rights' and 'contingent rights' (2001b: 23). This distinction becomes very important - with reference to the second term mentioned (communal title) - when recognising that native title is in fact a communal title,

an exclusive title, held by the community of native titleholders "as against the world" ... [but it] also has an "internal dimension" - which differentially allocates rights and interests according to Aboriginal law and customs (Sutton 2001a: 6).

So while the *NTA 1993* (Cth) calls for a determination of the existence of a communal native title, it does not pre-determine the nature or the extent of any 'internal dimension' of communal title. The term 'traditional owners', as used by many Aboriginal people outside the Northern Territory today, refers to a person whose rights are grounded in original occupation by purported ancestors (at the time of annexation), regardless of current residence. Consequently,

[in today's] common Aboriginal usage, 'traditional owners' are deemed to have rights to assert a relationship with their country as a matter of their origin there, whether they live there or not. They 'really come from' or 'properly belong to' their country in an intrinsic sense. The 'traditional owners' are those with

²⁵ The terms 'historical people' and 'traditional people' are discussed in Chapter Six.

proprietary relationships to the country, possessors of core rights as well as contingent ones (Sutton 2001b: 23).

Inflexible assumptions about static Aboriginal traditions (re-)enforce notions of native title rights as rights to hunt, fish and gather, and to possibly have the right to participate in discussions and determinations pertinent to developments on traditional land(s). However, the reality is not so simple. The rights and interests which Aboriginal people hold in their traditional lands, under traditional law and customs, can vary greatly. Sutton (2001b: 26 - 27) emphasises this variation, claiming that any lists of such rights are "usually [put together] by a non-Aboriginal person for a bureaucratic-legal process ... [and thus] bound to be artificial" (p. 26). However, Sutton does present a list of rights held under native title, which he claims might be useful and/or applicable for some native title applicants. The list reads as follows:

Core Rights and Interests:

The claimants are entitled to exercise the following rights over the area subject to the native title application, in accordance with the traditional laws and customs of the [named] people:

- (a) assert valid proprietary claims over the area
- (b) speak for, on behalf of and authoritatively about the area as cultural property
- (c) acquire and transmit the core traditional rights and interests over the area
- (d) assert a requirement to be asked for permission to access, use or alter the area by those who are not holders of core customary rights and interests
- (e) acquire and transmit to other core rights holders the contingent rights listed below
- (f) bestow on non-holders of core customary entitlements whether by permission or agreement the contingent rights listed below
- (g) resolve as amongst the claimants and, where relevant, non-holders of core customary entitlements, including members of the regional jural Aboriginal public, any decisions or disputes concerning the use of the area or the content of customary laws that define rights in the area

Contingent Rights and Interests:

Contingent rights are those which flow from or rest upon core rights. The claimants are entitled to exercise the following rights

over the area subject to the native title application, or to permit others to exercise them whether by specific permission or standing agreements, whether such rights be limited or qualified as to time, place, or manner of being exercised, in accordance with the traditional laws and customs of the [named] people:

- (h) physically access and occupy the area
 - (i) use and enjoy the area
 - (j) live on and erect residences and other infrastructure on the area
 - (k) hunt, fish, gather vegetable foods and otherwise collect food from the area
 - (l) take from and use the natural resources of the area
 - (m) dig for, take and use minerals and quarry materials such as flints, clays, soil, sand, gravel, rock and all like natural resources from the area
 - (n) manufacture materials, artefacts or other products from the resources of the area
 - (o) dispose of products of the area by trade, exchange or gift
 - (p) learn and communicate cultural, natural and spiritual knowledge, traditions and practices concerning the area
- [and so on] (2001b: 26 - 27).

Sutton (2001b) outlines the change in terminology and the distinction which has been incorporated into anthropological writings about Aboriginal rights and interests in country as follows:

[L]ocal individual or family rights versus tribal overrights and rights granted through intertribal territorial comity;²⁶ rights versus privileges; primary versus secondary rights; unmediated versus mediated rights; presumptive versus subsidiary rights; actual versus inchoate versus potential rights; generic versus specific rights; and, more recently, core versus contingent rights (p. 4).

Sutton prefers to use the terms 'core' and 'contingent' rights when looking at contemporary Aboriginal communities in the context of native title claims. He emphasises the importance of identifying how Aboriginal people

maintain a distinction between the kind of rights and interests held by those who have what they see as an essential relationship of identity with the country or some other kind of ancient and intrinsic connection with it, and those rights enjoyed by others

²⁶ i.e. courtesy, mutual respect.

who lack such identity or such close or ancient connections (2001b: 4).

This distinction between core and contingent rights is a very useful conceptual tool that can be used to gain an understanding of some aspects of what is taking place in Aboriginal communities like that of Dubbo, when issues of ownership and native title rights to land are being debated.²⁷ While this distinction is not a creation of the Australian legal system, it is certainly a reality for the Aboriginal people of Dubbo. The usefulness of this distinction between core and contingent rights - especially when exploring the list above - is evident when looking at the following quote made by a 'direct descendant'.

One of the oldest resident of the Talbragar Reserve, born and brought up on the reserve, made these comments when discussing a woman of a similar age and questioning her right to be included in the family-tree (genealogy) - which was in the first stages of compilation - and, more importantly, her rights to speak with any authority and give any information on the people of, and the life on, the Talbragar Reserve:

These people are claiming all these bloody things. You know, they get on my nerves, they do. But you can put her in there [the family-tree] I suppose. She was never been born there [the reserve] ... they²⁸ brought her down there when she was about twelve years old (Int.#09, 07.07.1998).

The problem posed by the interviewee was not only that this woman had not been born on the reserve, but the interviewee also revealed enduring controversy about the paternity of the woman in question. These two factors, an unquestionable connection to the Talbragar Reserve (i.e. direct blood relation to the first people moved onto the reserve) and/or indisputable recognition of blood relations (through mother or father) to the original Aboriginal people of the Dubbo area, are the essential factors when identifying 'direct descendants'. Apart from a few local Aboriginal families who never lived on the reserve (except for some individuals who

²⁷ There are of course a number of different ways, within and between different parts of Australia, which can be applied to people connection(s) to and right(s) in land (some discussed in Sutton 2001b).

²⁸ Members of her family who were hiding her from the authorities after her mother had died.

married into a family residing on the reserve), the 'direct descendants' are all 'descendants of the reserve'. There are of course other areas of land of great historical and cultural importance for the 'direct descendants' within the Dubbo area (discussed in Chapters Eight and Nine), but the reserve is the central focus for most people - from where people derive their rights in country - especially among the older generations. And while there is some form of hierarchy enforced in the employment of these rights (discussed in Chapter Eight), the distinction is more quantitative than qualitative. In other words, apart from the respect and some authority bestowed on Elders, patrification/matrifiliation, place of conception, place of birth, residency and, sometimes, gender and age, do not prescribe individual rights and interests in country like in many remote parts of Australia.²⁹ These rights to country are given to all who fall within the category of a 'direct descendant', but the implementation or the operation of these rights depend more on politics and personality than inherent rights to do so. Furthermore, Sutton distinction between core and contingent rights is particularly applicable in parts of Australia where Aboriginal individuals and groups have been subject to "bureaucratic and voluntary relocations" (Sutton 2001b: 4). Consequently, the application of Sutton's distinction between core and contingent right in country is quite feasible in long settled areas like Dubbo, and allows for simplifying notions of rights in country, within the otherwise complex development and process of native title claims.

Just as on a national level the nature, existence and complexities of native title are emerging, there are also complex and specific structures and processes emerging at grass-roots level. The important issue is to gain an understanding of - and to conceptualise and contextualise - these processes within both the past histories of these local communities as well as within the politico-legal processes taking place at the national level. In effect, it is imperative to embark upon an exploration of the past histories of the local Aboriginal community in question (Dubbo), while maintaining the wider context of state and/or federal legal and political influences. The next section looks briefly at selected anthropological writings on Aboriginal ownership of land. This examination is partly a recognition of the importance - for current recognition of native title - of past and present Aboriginal notions of

²⁹ Sutton 2001b discusses some of these different rights in country.

connection to, and ownership of, land. It is also in part a recognition of the influences which anthropologists have brought to bear on the overall construction of what constitutes an Australian Aborigine. This construction will be discussed in more detail in Chapter Three, in which I examine anthropological (academic) writings on Australian Aborigines, with particular focus on the Aborigines of New South Wales.

2.3. On Aboriginal Land Ownership

[I]n no realistic sense is this [the Aboriginal] control 'ownership' or even 'habitation'. The aborigines' use of 'his' land is much closer to that of the wild beasts than that of other non-agricultural hunting and gathering people. None of the characteristics associated with ownership - occupation, temporary or permanent, exclusive occupation and title is possessed by aborigines living in traditional style (Nicholas, P. W. 1979).³⁰

Interference with our titles to land directly affects and damages our cultural heritage. This is a natural consequence of the special relationship that indigenous societies have with our land. Land is essential not just to ensure economic subsistence, but it is also central to indigenous religious and social activities. Our human right to have our cultural heritage recognised and protected is intertwined with our need to have our land ownership recognised and protected (Dodson, M. 1998: 4 - 5).

The large volume of anthropological research into Aboriginal customary law, local organisation and traditional rights to land has revealed diversity, uniqueness and flexibility. Aboriginal conceptualisation of ownership of land and Aboriginal local organisation have been deliberated and argued among anthropologists since 1913, when Radcliffe-Brown published his article "Three tribes of Western Australia" (also a series of articles in *Oceania* 1930 - 1931).³¹ Today, the nature and size of Aboriginal 'landowning' groups, the various traditional connections to land, the various contemporary connections to land, organisation of land-owning groups, the

³⁰ P. W. Nicholas, "No Clear Title", *Quadrant*, Jan.-Feb. 1979: 70, quoted in Reynolds 1992: 164.

³¹ Howitt and Fison were the most influential writers on Aboriginal local organisation of the late 1800s. They published an essay titled "From Mother-right to Father-right" in 1883, which was quite influential in conceptualising Aboriginal territoriality.

varying contemporary meanings of Aboriginal ownership of land, Aboriginal control of land, and altering demands and claims by Aboriginal people to legitimate rights to land, are the focus of academics, lawyers, politicians and journalists alike. The major issues for 'traditional owners' remain the nature and extent of both core and contingent rights to land, and, most importantly, the legal recognition of the survival of these rights through the frequently turbulent period of colonisation.

While the concept of 'ownership' derives its meaning from both a cultural and an historical context, it will be noted that the meaning has varied throughout history and place, depending on the categories of the 'owned' objects. C. M. Hann (1997), when discussing the concepts of 'property' and 'ownership', quotes Honore (1961), who states that 'ownership' is "the greatest possible interest in a thing which a mature system of law recognizes" (p. 6). Hann notes that various forms of property relations have come and gone since the days of the earliest human societies, but during the last two centuries there has been in existence a dominant form of relations based on

rigorous specification of private property ... almost everywhere thought to be a necessary condition not only for improved economic performance but also for healthy societies founded on civil and political liberties (Hann 1997: 1).

These rigorous notions of ownership are often assumed to be straightforward, based on Western values, and guarded by various legal and economic institutions. However, when these dominant notions of ownership are applied to differently ordered societies (different social values, social orders and belief systems), inevitably problems arise. In Chapter Nine I will discuss the differences between some Aboriginal and non-Aboriginal notions of 'ownership' of land, with examples from the Aboriginal people of Dubbo.

For the last two centuries, Australia has had its share of problems vis-a-vis debates surrounding the ownership of land. Frequently during the period of white settlement in Australia, questions often leading to conflict arose over ownership of land. This conflict tended to take place between white settlers and representatives of the Crown. The introduction of Aboriginal land rights and native title has brought change to this particular type of conflict. Nowadays, contests frequently take place

between Aboriginal people and (a) the State, Territory and Federal Governments; (b) state and national corporations; and (c) other Aboriginal and non-Aboriginal interest parties. These struggles are dictated by two very different notions of 'ownership'; firstly, Aboriginal customary notions of ownership of land, and, secondly, by the consequences of specific (Western/Australian) legislation defining what in effect constitutes 'ownership'. Furthermore, these battles are imprinted with the complex and still emerging picture of both political and financial benefits, which might accrue to the group of people who successfully meet the criteria of native titleholders. Today, with the rights of Aboriginal people now being recognised at law, the balance of political power, along with general knowledge and public opinion about Aboriginal rights (to land, history, culture and heritage), has undergone marked change. Previous conceptions of Aboriginal land-owning systems, or the lack thereof, are being both recognised and/or revisited.

Anthropologists and anthropology have contributed significantly to various legal, political and academic debates surrounding Aboriginal land tenure and Aboriginal notions of land ownership. It is essential here to introduce some academic debate on Aboriginal social organisation and land ownership. The following discussion presents a brief review of some of the earliest anthropological writings on social organisation, land tenure and land ownership in Aboriginal Australia, beginning with a brief outline of sections of A. R. Radcliffe-Brown's work on Aboriginal social organisation.³²

Bruce Rigsby (1997) suggests that the "contributions from anthropologists ... on property and land tenure [among Aborigines] for the period up until 1955 ... [are] descriptive, historical and/or encyclopaedic, rather than rigorously analytical" (p. 32). Up until 1955, most anthropological writings focused on territoriality, the nature and the organisation of land-owning groups, and the various rights and obligations of members of land owning groups (spiritual vs. material). Radcliffe-Brown initiated this paradigm following his introductory fieldwork in Western Australia (among the Kariara tribe near Port Hedland). His (1913) article describes

³² There is also a brief mention of Radcliffe-Brown's work on Aboriginal political and social organisation in Chapter Six (6.2.).

a patrilineal group, located in an area where ownership of land was held collectively. Each group's territory was well defined, and, despite strict rules pertinent to hunting and gathering rights, there was evidence of some fluidity within and between the groups (also 1930-31). Radcliffe-Brown has been criticised for his generalising, one-dimensional, and sometimes contradictory descriptions of local, social organisation among Australian Aborigines. More especially, he has been criticised for failing to recognise a flexibility between land-owning and land-using groups (e.g. Hiatt 1962). However, he has also been given credit for bridging the

opposition between [the] so-called primitive and civilised by giving territory a new relevance as the basis of Aboriginal political society ... [and by placing] emphasis on clan-level structure, [having] formulated social organisation in a way that poised a jural dimension of Aboriginal landholding (Merlan 1996: 167).

L. R. Hiatt was yet another influential writer on Aboriginal land ownership and territoriality. His 1962 paper 'Local organisation among the Australian Aborigines' represented an influential critique of previous anthropological writings on Aboriginal land ownership, in particular Radcliffe-Brown's. Hiatt's work introduced new ideas and perspectives on Aboriginal local organisation. He was mainly concerned with differentiating between, on the one hand, Aboriginal spiritual and ritual relationships to land, and, on the other, Aboriginal economic and material rights to land. According to Hiatt, these forms of relationships to land were not necessarily connected and, furthermore, could vary between different groups of people (also Hiatt 1966a,b, 1984). Hiatt's separation of Aboriginal land-use and Aboriginal land ownership, presence or residence on land (material) and rights, and obligations to land (spiritual), became firmly entrenched in anthropology. His work opened up new ways of conceptualising Aboriginal spiritual and material life, subsequently influencing future legal and political debates surrounding Aboriginal ownership of, and rights to, land (e.g. Peterson, 1983). It should be emphasised here that the majority of the anthropological research conducted during this period (1910s - 1960s) focused on so-called hunter-gatherer or traditional societies. As discussed previously, the Aboriginal spiritual relationship to land was first recognised by Australian law in 1976. This finding, influenced undoubtedly by anthropological

research, has today resulted in the return of land title to the original owners in an area covering almost half of the Northern Territory.

During the early 1960s, anthropological research into Aboriginal relationship to land began to identify two levels of ownership and/or access: the primary, spiritual one, and the secondary, economic one. According to this paradigm, the primary land-owning group is defined according to the descent (both patrilineal and matrilineal)³³ of its members. Through birth, the members of the group are associated with spiritual sites within a particular territory (e.g. Maddock 1983a,b). This association confers certain rights upon group members, and imposes particular ritual obligations on them as regards sacred sites within their territory. While some of these rights and ritual obligations are frequently gender-specific, the ritual responsibility and the ownership of the land can be shared by men and women alike (e.g. Bell and Ditton 1980). Not all members of a descent group hold the same rights and obligations in common (to the same area): gender, age and prestige are determining factors. Again, not all members of a descent group hold the same rights outside their specific tract of land: birthplace and rights through affiliation and kin can vary (e.g. Berndt, R. M. and Berndt, C. H. 1988 (1964); Maddock 1981, 1982). Economic or material rights of access to land differ from spiritual rights/obligations in that they are extended to a much wider and larger group, wherein rights are sometimes based on conditions and always on consent (e.g. Berndt, R. M. and Berndt, C. H. 1988 (1964); Morphy 1999). These rights are not a fixed constant but arise from, and are mediated by, kinship (child of a female landowner or through other kin), residence (conception, birth or burial in the area), or both (e.g. Peterson 1983). It appears, therefore, that there is no absolute definition of either a fixed 'bundle of rights' in land or a defined parcel of land which can be strictly united in, and belong to, any one person. The rights in, and the ownership of, land appear to be an ongoing, fluid process, which is adherent to acceptance, validation and consent. This fluidity has proven a major obstacle, especially for Aboriginal people when attempting to apply Aboriginal (legal) notions of land ownership within a Western legal system, a system that operates on the notion of established rights and fixed boundaries.

³³ It should be pointed out that there has been an ongoing debate within anthropology since the 1930s about claims that matrilineal descent formed "any kind of country-holding group...[w]ithin classical Aboriginal Australia (Sutton 1998: 40).

In recent years, and especially since the recognition of native title, anthropologists, lawyers, politicians and Aboriginal people have come to realise that there is a need for more sophisticated analyses when defining Aboriginal relationships to land. This sharpening of awareness has proved essential to the incorporating of changes in local organisation; i.e. attachment to, and notions of, ownership of land among Aboriginal people who have suffered dispersal, dispossession and forced transformation for expressing traditional Aboriginal notions of being in the world. Furthermore, these changes in local organisation have not always brought a shift in Aboriginal people's fundamental conceptualisation of Aboriginal ownership of, and connection to, land. Traditional and contemporary notions are still fundamentally the same, but the influences of additional terminology (i.e. Sutton earlier) along with non-Aboriginal conceptualisations and interpretations of Aboriginal social organisation, have to be recognised. Non-Aboriginal conceptualisation and interpretation of what constitutes an Aboriginal individual group, community, culture, tradition, history and connection to land - i.e. academic and non-academic writings - has drawn considerable attention in some areas, while in others it may not have attracted much attention at all. The following chapter addresses anthropological and historical writings on Aboriginal people of Australia, with specific focus on what has been written on New South Wales Aborigines.

Chapter Three

The Most Studied People on Earth? - The Anthropology of New South Wales

When people talk about 'the history of Australia' they mean the history of the white people who have lived in Australia. There is a good reason why we should not stretch the term to make it include the history of the dark-skinned wandering tribes who hurled boomerangs and ate snakes in their native land for long ages before the arrival of the first intruders from Europe ... for they have nothing that can be called a history (from a 1917 school primer, cited in Attwood 1996: xii).

The position demands that if he [the Aborigine] is to survive, he must pass with great rapidity from the food-gathering stage of complete dependence on nature, and from the socio-mystical organisation of tribal life, to a stage in which nature is exploited, and in which mechanisation and economics control the outlook on nature and society (A. P. Elkin 1932c: 38).

Chapter Three – Part I

3. 1. Anthropology and the 'Primitive'

Following Captain Cook's³⁴ voyage along the east coast of Australia in 1770, the native inhabitants of the continent soon became the subject of considerable interest among a number of European scholars, as well as generating a degree of fascination among some members of the general public in many parts of Europe. The early years of European colonisation in Australia produced various accounts of contact between the Aboriginal people of Australia and the European settlers. The reports of these encounters inspired the writings of academics, news reporters, writers of fiction and children's literature, as well as appearing in anthologies by collectors of folklore, myths and exotica. Today these records and manuscripts are both relics and vestiges

³⁴ James Cook (1728 - 1779), English navigator and explorer who led three celebrated expeditions to the Pacific Ocean (1768-71; 1772-75; 1776-80). He was the first European to explore the east coast of Australia in the *Endeavour* in 1770 (*The Macquarie Dictionary* 1991 (1990)).

of their time, but for researchers working with contemporary Aboriginal people it is important to understand the influences of these past writings. One of the major effects of these early texts arose from a general assumption of homogeneity among Australian Aborigines, an assumption which in time gave birth to a post-colonial notion of a sense of shared identity among many Aboriginal people. This notion was based on the latter's individual and collective experiences of being identified as 'different' and 'inferior'.

The late 1800s saw the birth of a new academic discipline, anthropology, which in conjunction with the discipline of history has had an extensive influence on the construction of 'Aboriginality', as well as on the development of general discourses on Aboriginal people and Aboriginal communities. This chapter takes the form of a review of the development of public discourses on Australian Aborigines since the early 1900s and will be explored through works of both anthropologists and historians (and amateur scholars). The general emphasis in this review is placed on literature pertinent to culture, sameness and difference, especially in relation to Aboriginal people in New South Wales. This chapter will examine the nature of anthropological writing during three different periods in time: firstly, the predominance of ethnographies and ethnologies of the late 1800s and early 1900s in delegating Australian Aborigines to the lowest level of the human species; secondly, the influence and authority of anthropological literature of the 1930s-1970s and its role in the formation of government policies (NSW) and assimilation; and, thirdly, the role of anthropology and history in the last decade of the 1900s, the era of native title, in reassessing both the methods and theoretical approaches utilised in anthropological research in Aboriginal Australia.

Earlier writings on the Australian Aborigines are now being revisited by scholars around the world. One example is the renewed interest in Emile Durkheim's *Elementary Forms of Religious Life*. Durkheim completed this work in 1912, when, based on the information from various 'armchair anthropologists', he brought forward the issues of the relationship between theory and ethnography (Morphy 1998: 13). At the same time Durkheim's work bore witness to the relative richness of early ethnographies of Central Australian Aborigines (especially Spencer and Gillen 1899, 1904). Durkheim wrote his monumental work during a period when evolutionism was

in decline, marking the earliest phase of a paradigm shift within anthropology towards functionalism (structural-functionalism). However, the influences of evolutionary thought are apparent since Durkheim selected the Arunta of Australia because they were considered the most primitive people and the most simple society known to scholars at that time (Allen N. J. et al. 1998). The current resurgence of interest in Durkheim's work highlights two interesting factors, which are relevant to this review. The first factor is the increased interest in the works of many eminent scholars of the past, and the re-analysis and re-interpretation of their theoretical perspectives and methods. The second factor is the influence of re-interpretation of earlier works on the inflexible construction of indigenous peoples as primitive and stagnant (e.g. Morphy 1998). The examination of earlier thought and writings on indigenous peoples extends back at least forty years.

In 1968, Professor W. E. H. Stanner presented the annual Boyer Lectures.³⁵ Thirty years later, these lectures still retain their relevance in respect to Aboriginal affairs in Australia. Stanner's lectures examined the status of Australian Aborigines and the nature of race relations in Australia during the three previous decades. His greatest concern was the total lack of place or presence of Aboriginal people in most historical works on Australia. While giving an overview of historical writings of the twentieth century, Stanner even ventured so far as to describe his own earlier work as that of a person "who can safely be presumed never to have heard of the aborigines, because he [Stanner] does not refer to them and even maintains that Australia has 'no racial divisions like America'" (Stanner 1974: 23 (1969)). Stanner's second lecture, *The Great Australian Silence*, provides a review of historical literature and public discourses on Aboriginal affairs from the 1930s to the 1960s. Stanner contends that despite changes in studies, attitudes and policy makings involving Australian Aborigines during this period, these changes were largely contained within a small group of scholars and government administrators. Thus they did not influence the general discourse on Aboriginal affairs until the late 1960s, following the Referendum of 1967. Furthermore, Stanner claims that while there were changes in policies and

³⁵ Each year the ABC invites a prominent Australian to present the results of his (her) work and thinking on major social, scientific or cultural issues in a series of radio talks, known as the Boyer Lectures. The series was inaugurated in 1959, as the ABC lectures, but in 1961 the series were re-named in honour of the late Sir Richard Boyer.

attitudes during this period, there was insufficient research into how these changes actually affected the Aborigines themselves. Consequently, the studies failed to recognise old problems in new disguise (Stanner 1974: 21 (1969)). In his third lecture, *The Appreciation of Difference*, Stanner focused on how anthropology had influenced the general image of Australian Aborigines since the late 1800s. According to Stanner, early anthropological work in Australia followed the intellectual trends of British scholars of the time, who influenced by the writings of Herbert Spencer, embraced a doctrine, which later became known as Social Darwinism.

The frequently patronising, ethnocentric and racist doctrine of Social Darwinism can be detected in one of the first volumes of *The Australasian Anthropological Journal* (later *Science of Man*). In an 1896 volume, the leading article discussed the “usefulness of anthropology”. In attempting to briefly outline the aims and objectives of the new discipline, the anonymous author starts by describing the usefulness of anthropology for identifying and describing the processes of historical classification.

Anthropology began, as its students still begin, by studying how man first came into existence, what he was like at first, of how many species and races mankind was originally composed. How these crossed and amalgamated into hordes, nations, and mixed peoples. What kind of social systems they adopted: What religion, laws, politics, and modes of government they each formed and carried out. What were their relations with their neighbours, or with any other nations. What was the history and the general circumstances of each of the hordes, nations and mixed peoples. How long did each of these survive. Were they prosperous, happy, wealthy, poor, or distressed. Were they conquerors or the conquered, and what were the general results of each instance. Then the white, yellow, red, brown, and black *species* of men are studied, and the characteristics and the capabilities of each of these are made out, and their histories from their first ages discovered (The Australasian Anthropological Journal vol. 1, no. 2, 1896: 3).

The author of this quote is clearly familiar with the work of the pioneering American anthropologist, Lewis Henry Morgan, and his then recent publication, *Ancient Society* (1877). The article proceeds to uphold the ethnocentric tone of Social Darwinism by applying Morgan’s classification system of human races.

After learning by these researches the anatomical, the physiological, the pathological, the psychological, the sociological, and other peculiarities and characteristics of the several species, races, and mixed people of the past ages of mankind, we are in a position to commence our studies of the people of the present or the existing nations, and to learn why some are advancing, some are not progressing, and others receding or diminishing ... To the ignorant and uninformed the question of Race is not as important as it is to those who have studied fully, and will thus understand the different qualities of characteristics of the various races in the relations to the advancement or permanent progress and prosperity of each nation ... The muscular blondes become sea-kings, or adventurers, or colonisers of savage lands, or subduers of the wilderness; thus they become country dwellers, pastoralists, agriculturists, and similar seekers of new enterprises. The brunettes become town dwellers, traders, merchants, commercial or business men, or professionals, and generally shrink from the rough work of adventure or new enterprise in the wilds or ... (The Australasian Anthropological Journal vol. 1, no. 2, 1896: 3 - 5).

When discussing ‘blondes’ and ‘brunettes’, the author is referring to Australians of European descent. There is no reference to settlers of non-European descent; thus the whole of Aboriginal Australia is placed in a category of semi-savage, hapless collectivity, as opposed to the civilised, prosperous individuals of European descent. Furthermore, the author of the article is convinced that anthropology is the answer to the misfortunes of savages, and that through their studies, anthropologists will find “the causes of all this ... and the remedy [will be] proposed or provided by the methods of this science [i.e. anthropology]” (p. 4).

Published works of the time generally portray Australian Aborigines as displaying the lowest levels of social organisation and kinship systems (e.g. Fison and Howitt 1880; Spencer and Gillen 1904; Howitt 1904). However, while today’s analysis of these early ethnological works undertaken in Australia discloses an obvious ethnocentric slant, the writings are also seen to be an increasingly valuable source of information for researchers. This is especially true in long settled areas, where, through dispersal and dispossession, numerous Aboriginal communities have lost various aspects of their traditional cultural knowledge. Aboriginal and non-Aboriginal researchers are increasingly using local ethnological material, collected in the late 1800s and early 1900s, in an attempt to restore and compile the history of local Aboriginal traditions and cultures, which were affected in the process of European colonisation. The

possible use of these records for the ‘claiming’ of local Aboriginal history and culture, and its use in claims for recognition of land and native title rights, will be discussed in Chapters Five and Eight.

The earliest ethnological work conducted in north-western New South Wales was carried out by surveyor R. H. Mathews around the turn of the twentieth century. During his travels, Mathews collected descriptions and tales of traditional customs and rituals of the Aboriginal people he encountered. His records include published descriptions of his first hand experience of some traditional ceremonies (e.g. 1894, 1895, 1896b), as well as work based on secondary sources of past events, collected from both Aboriginal people and non-Aboriginal officials in the employment of the colonial government (1896a, 1998, 1901). Mathews’ work was published in anthropological journals in Australia, Europe and North-America. Articles include detailed descriptions of some of the last initiation ceremonies of the Wiradjuri and the Kamilaroi people, along with some analysis and interpretation of Aboriginal social organisation (see Elkin 1975). Many of Mathews’ articles include both maps and physical descriptions of the local landscape, as well as detailed narratives outlining every aspect of the process and ‘meanings’ of the ceremonies. Mathews also produced some more philosophical work on folklore, myth, social organisation, and the class system of Australian Aborigines .

Mathews was the most prolific researcher into the lives of the Wiradjuri and Kamilaroi people of Eastern Australia at the turn of the twentieth century, publishing over 170 articles in less than two decades (see Elkin 1975). However, there were a considerable number of amateur ethnologists who, driven by a combination of furthering the (social) sciences and salvaging some knowledge about a dying race, collected several accounts of traditional customs and myths in New South Wales (e.g. Garnsey 1946; Langloh Parker 1905, 1953). There were also numerous less qualitative ethnological studies conducted during this time, mostly in the form of lists of words and placenames, some mythical narratives, and descriptions of people on the land. These can be found in personal journals and correspondence, as well as in early publications of the *Australasian Anthropological Journal* (later *Science of Man*). Until very recently, these records have only been used by a very limited number of academic researchers (see e.g. Goodall 1990, 1996; Grounds n.d.; Macdonald 1986), but current

legal investigations have prompted a renewed interest in them. The word lists published in the journal *Science of Man* are of varying quality. Certainly the accuracy of spelling, the methods of collection and the meaning of words is a matter for debate. However, besides the few words and terms which have been adopted into the English language, these word lists are frequently the only surviving source of their 'lost' language for many New South Wales Aboriginal people. These compilations give explanations and meanings of various placenames in their traditional lands; some lists have also preserved forms of phonetic terminology for local flora and fauna.

Some of the information provided by this old ethnological work corresponds with the knowledge held by the Aboriginal Elders of today's communities, and is thus relatively easily accepted and used by Aboriginal and non-Aboriginal researchers. However, it has become increasingly common to scrutinise the accuracy and the authenticity of these documents. The result of this scrutiny is threefold. In the first instance, most disputes about the authenticity of early documentation tend to generate an increased interest in local history and local culture among a great number of people in the community. Consequently, oral historical accounts become frequent topics of discussion and old photos and various old documents are pulled out of storage places. The display of historical accounts can serve to either challenge or authenticate earlier accounts of local history and culture. The second aspect is the fact that the introduction of Aboriginal land rights and the recognition of native title have raised issues concerning the authenticity, and by extension the usefulness, of old ethnological work for legal purposes. This is especially evident in areas with a long history of colonial government, where 'traditional knowledge' has often been transformed by a long history of contact with non-Aboriginal people and institutions. This possible limitation to the usefulness of old documents applies equally to written work revealing both secular and profane aspects of pre-colonial and colonial Aboriginal communities, and features geographical descriptions and maps of landscapes and territories. Finally, both written documents and oral history, as well as documents which define boundaries of the traditional lands of mobs and tribes, do not always support the claims of all the Aboriginal Elders in a given local community. This has been evident in the Aboriginal community of Dubbo, members of which have, since the introduction of land and native title rights, been introduced to a limited collection of early local ethnological work, with old maps dating back to the mid- and late 1800s,

defining the territory of each of the local mobs. The Elders of the community have not only had some difficulties in agreeing on the outlining of the traditional areas of local mobs but also they have challenged the accuracy of works like N. B. Tindale's *Tribal Boundaries in Aboriginal Australia* (1974). Notwithstanding, it remains evident that old ethnological work and maps of places and boundaries serve an important role in the process of reassembling traditional local culture and knowledge; as well, this material is of importance to Aboriginal people in the process of claiming back land and gaining recognition of native title. The surviving historical and ethnographical accounts of the Dubbo area will be addressed gradually and in relevant places, throughout this thesis.

When looking at early ethnographical work among Aborigines in New South Wales there are two points which become evident. Firstly, due to the domination of Social Evolutionism in the late 1800s, most research failed to include Aboriginal perspectives or Aboriginal meanings in its discussion and analyses. Similarly, while much information was gathered directly through observation and discussion from Aboriginal people themselves, interpretation and knowledge was filtered through European constructions of an inferior race. However, it must be recognised that in many areas of New South Wales, these early ethnographical accounts continue to be of value to the local Aboriginal people who are re-claiming their histories and cultures. The second point I raise is that many of these records influenced later anthropological research in New South Wales. These influences varied from a total lack of interest in a people who were considered to have lost their cultures, a limited interest in recording the last aspects of disappearing cultures, an interest in studying, and possibly advising on, the growing numbers of 'mixed-blood' Aborigines who by the early 1900s were increasingly being perceived, by both official authorities and the majority of the white population, as a social problem. The last aspect became increasingly the topic of anthropological research in New South Wales, as methods and analytical focuses changed, and structural-functionalism became the dominant paradigm.

3.2. A. P. Elkin and the New South Wales Aborigines

Elkin, one would have to say, lived a life of monumental dullness and his writing, although of course careful, sensible and typical of its time, was hardly fascinating, and certainly avoided any deep philosophical and moral issues (Hamilton 1997: 2).

Social evolutionism was gradually replaced by structural-functionalism as the dominant paradigm in British social anthropology during the first two decades of the twentieth century (e.g. Markus 1994). In Australia, the foremost scholar to challenge the evolutionary framework was A. R. Radcliffe-Brown, the first professor of anthropology at Sydney University in 1926. His approach was to dominate Australian anthropology for the next few decades (e.g. Gray 1997). Radcliffe-Brown encouraged a break away from “hypothetical reconstruction” of the history of Aboriginal social organisation towards the “more important task of trying to understand what the organisation really is and how it works” (1930 - 31: 426). As a result, anthropology became a burgeoning discipline, producing numerous accounts of the social organisation of Aboriginal communities, at the same time placing emphasis on descriptive rather than analytical narratives (e.g. Cowlishaw 1986). In 1934, A. P. Elkin who succeeded Radcliffe-Brown as Professor of Anthropology at Sydney University, soon set out to make anthropology a practical discipline. Elkin’s emphasis was on advising and assisting governments in the humane administration of the Australian Aborigines (e.g. Elkin 1934a,b, 1935, 1938a, 1939), while simultaneously collecting and cataloguing the remaining cultural aspects of the Aboriginal communities that had survived colonisation (e.g. 1964 (1938); also see Gray, G. 1997, 1998). Elkin’s approach has been described as ‘dull’ and ‘typical of its time’ (opening quote); and he has been named as one of the major forces in the construction of what has been identified as a ‘discourse of usefulness’ in anthropology, a discourse that lacked any criticism of government policies (Cowlishaw 1990: 2; see Firth 1998 for opposing view). He has, in addition, been accused of effectively ignoring anthropological research into New South Wales Aborigines, on the basis of their loss of culture(s) (Ross 1997). Despite these criticisms this review must recognise the influential and intervening role which Elkin played in the development and extent of the anthropological research undertaken in New South Wales from the 1930s - 1960s, as well as his influence on the development of government policies during this period.

Hence, before entering a discussion on Professor Elkin there are a few points I want to make:

The major aim of extensively reviewing Professor Elkin's works is to establish a number of points:

- 1) The period, the length, the directions and the influences of Professor Elkin on anthropological research into Aboriginal Australia.
- 2) The influence his work/opinion, and the works of his colleagues/students had on various governmental policies on Aboriginal affairs during the early/mid-1900s.
- 3) The initial view of Aboriginal culture(s)/people dying out - i.e. the construction of general notions of homogeneity and stagnancy of Aboriginal culture(s) - and, when this extinction did not transpire, the subsequent focus of much anthropological research on Aboriginal people as social problems, consequently overlooking surviving distinctiveness, difference and continuity (within change) of their cultural practices (especially so in long settled areas).

I do realise that there is limited analyses of Elkin's work (albeit I do refer to his influences outside the literature review chapter), but my main concern is to avoid one-sided negative approach to Elkin's work by. recognising his place in history, i.e. dominant notions and paradigms and changes during his working life, and the fact that the fate of Aboriginal people (individual and groups in different parts of Australia) became increasingly an internal aspect of his work.

Born in New South Wales in 1891, Elkin was ordained as an Anglican priest in 1916 and later went on to complete a BA Honours thesis (*Australia's National Consciousness*) and a Masters thesis (*The Religion of the Australian Aborigines*) at the University of Sydney. In 1925, Elkin enrolled as a PhD candidate at London University.³⁶ He returned to Australia from England in 1927 and was at that time the only anthropologist in Australia with a PhD (Wise 1985). Elkin spent most of 1930 doing survey fieldwork in West Australia; to date, this was the longest time spent in the field by any anthropologist in Australia. Initially Elkin endorsed the dominant

³⁶ Elkin did his PhD with Professor Grafton Elliott Smith in physical anthropology (archeology) (Wise 1985: 42).

notion that Aboriginal society(ies) were rapidly disintegrating, and that the Aboriginal race was near extinction (e.g. Elkin 1932a,b; also see McGregor 1993). Consequently, it has been claimed that Elkin did not see fit to apply Malinowski's fieldwork methods in Australia (Gray 1997); rather, he advocated ethnological surveys in order to salvage the remaining traditional aspects of the disappearing Aboriginal culture(s) in settled Australia (Elkin's papers to Radcliffe-Brown, cited in Gray 1997: 32 - 33). During the early years of his professorship at Sydney University, Elkin, like his colleague Franz Boas in North America, became engaged in 'salvage anthropology'.³⁷

However, during the 1930s and 1940s, it became apparent that the Aboriginal population of Australia was not going to vanish, for while the number of 'full-bloods' was decreasing, the number of 'mixed-blood' Aborigines was on the increase. In order to fill the in gaps in older surveys, Elkin encouraged a more intensive form of anthropological research, with the aim of formulating solutions to the 'Aboriginal problem' and advancing further assimilation into white society (Elkin 1938a: 310-311, also 1932a, 1932b). It is important to note that Elkin's notions regarding assimilation were still affected by evolutionist notions. In a 1928 interview, on being asked to reflect on the status and the place of Aborigines within Australian society, Elkin considered it possible that Aborigines might never reach the level of the civilised culture of white Australians (see Gray 1997: 9). While Elkin's observations bear an obvious mark of evolutionist thought, he was at the same time deliberating the possible actions and policies which would assist Aboriginal people to reach the perceived level of Western civilisation. It is during this time that Elkin developed a new perspective within Australian anthropology which would greatly affect the future assimilation policies of the Aboriginal Welfare Board. His deliberations vis-a-vis the Aboriginal people's place within Australian society were thus influenced by an utilitarian/functionalist perspective, which was aimed at both understanding Australian Aborigines and aiding them to assimilate. However, a closer look might see Elkin's approach tainted with camouflaged evolutionary anthropology, what has been

³⁷ 'Salvage anthropology' is a term first associated with Franz Boas (1858 - 1942) and his method of brief visits to the field (Native American) with the aim of gathering as many artefacts as possible (often in a relatively haphazard way) before the inevitable decline and disappearance of Native Americans and their cultures. When focusing on 'primitive' societies, salvage anthropology did not work on the functional assumption that all aspects of societies were interrelated, striving to maintain cohesion and

described as a “dual-race Australia - two races living side by side with equal right in a white Australian culture ...” (Wise 1985: 179). It appears evident that according to this hypothesis, Aboriginal culture(s) would thus be either subdued or absorbed into the white Australian culture, wherein the “black man [might add] his own unique flavour to the whole” (Wise 1985: 179; see also Elkin 1947a, 1947b). The assimilation policy of the next three decades was an attempt to speed up a natural process of evolution, implemented through government policies, and based on the ethnocentric assumption that Australian Aborigines would eventually adhere to Western notions of culture, values and behaviour (e.g. Gray 1997, 1998; Ross 1997).

The assimilation of Aborigines into Australian society became the official policy of the New South Wales Aborigines Welfare Board in 1940. Elkin was not only one of the strongest advocates for assimilation, but he also sat on the Aborigines Welfare Board for a number of years. In the late 1930s in co-operation with Jack McEwan, the Minister for the Interior, he drafted a prototype for the assimilation policy, namely “the New Deal for Aborigines” (McGregor 1996: 124). There have been claims that Elkin’s close relationship with various government officials, along with his lack of criticism of government policies and agencies, retarded the development of policies on Aboriginal welfare. These claims have been based on an analysis of Elkin’s early writings which assumed that the ‘Aboriginal Problem’ derived from Aborigines themselves and their lack of conformity to Western civilisation (e.g. Gray 1996, 1997). Not until the 1950s did it become apparent in Elkin’s writings that he had revised his perspectives on the nature of the ‘Aboriginal Problem’, and, although still working under the hat of racial categorisation, he changed his views on conditional citizenship, and campaigned for full citizenship rights for Aborigines (e.g. Attwood and Markus 1997; Gray 1998). Due to Elkin’s active role in promoting the practical function of anthropology in the administration of Aboriginal affairs, and his power over the theoretical and methodological direction of the discipline in Australia, anthropology became established as a means of providing advice pertinent to the assimilation policies of the Australian government. At the same time, Elkin became the principal influence on the discipline in Australia, directing to a large extent the funding of

structure, but that the social and cultural fabrics of traditional societies would crumble before change (Lawrence 1998).

ethnographic work, thus setting the standards for anthropological research for the next two to three decades (e.g. Gray 1994, 1997, 1998; McGregor 1996).

In the early years of 'salvage anthropology', anthropological research focused almost entirely on Aboriginal people and communities in remote areas, but as assimilation became the official policy of the Aboriginal Welfare Board there was a slight increase in anthropological research into what Rowley (1972: v) called 'settled Australia'. However, it is important to point out that due to Elkin's influence, most anthropological research in long settled areas (in the 1930s-1960s) did not focus on the cultural aspects³⁸ of Aboriginal communities. Most research was aimed at analysing social problems, which were perceived as hindering complete assimilation into white society. The following section will outline the nature and the extent of anthropological research in New South Wales through the 1930s to the 1960s.

3.3. Dying Cultures? - New South Wales Ethnographies/Anthropology, 1930s – 1960s

In 1938 Elkin wrote the following:

We, as a people ... have adopted in far too many instances an attitude of superiority, and sometimes of race-prejudice, conveniently forgetting that these aborigines, with often more white than black ancestry, are related to some of our own number (1938b: n.p.).

Almost ten years later, Elkin wrote about the 'mixed-blood' Aborigines who were living in "our midst, and partly of our blood, but they are not yet 'of us'" (1947c: 11). Although Elkin is sympathetic towards the plight of 'half-caste' Aborigines in their struggle against racism, his statements clearly outline the inherently contradictory

³⁸ This point, admittedly based on speculation, is made in order to emphasis the fact that due to both a lack of academic interests in New South Wales Aboriginal cultural life and general assumptions of a near absolute demise of traditional customs among New South Wales Aborigines, surviving elements of ancestral knowledge and customs were frequently not recorded by scholars at this time. Anthropological research at this time might thus have overlooked various aspects which might have either sparked or maintained interest in some surviving traditional aspects among New South Wales

views, expressed in his writings, held towards New South Wales Aborigines, views based on notions of blood and skin colour. At a certain stage Elkin absolutely denied the existence of traditional Aboriginal culture(s) in New South Wales, claiming that the Aboriginal people had lost their language(s), traditional knowledge, and beliefs and customs (1939). What is more astounding is the fact that Elkin claimed that no culture(s) had taken their place (Elkin 1964 (1938): 381). At the same time, he insisted on the important role of anthropology in advising how to govern the partially 'traditional' Aborigines of New South Wales; furthermore, he claimed that the cultivation of their "potentialities for living worthily, intelligently and happily ... depend[ed] on us [white Australians]" (Elkin 1947c: 15 – 16, also 1939). Consequently, the growing population of 'half-caste' or 'mixed-bloods' in New South Wales were considered by Elkin and most of his students to be outside the scope of academic anthropology, due to their 'non-traditional' status. Due to lack of conformity they were classified as outcasts within white Australian society: they had become the 'Aboriginal Problem' (Elkin 1938a; also Ross 1997; Rowley 1971a).

This liminal status allocated to New South Wales Aborigines met with resistance among many Aboriginal people and communities. There were claims by Aboriginal people that they did not need anthropologists to run their lives since New South Wales Aborigines were not 'classified' as traditional people (see Goodall 1996: 235-6). At the same time this 'non-traditional' status caused problems for some New South Wales Aboriginal people vis-a-vis their displaying, maintaining and practicing of traditional customs, which would inevitably affiliate them with the more 'primitive' Aborigines of remote areas (Patten and Ferguson 1938 (?)). While there is recognition in the anthropological literature from the 1930s through the 1960s of an essential need to conform to white Australian culture and social values, there is little recognition of the possible effect this conformity had on the maintenance and performance of traditional practices and loss of traditional knowledge (these issues will be addressed in Chapters Seven and Eight) (see McGregor 1996: 123). As a result, anthropological research undertaken in New South Wales during the period of the 1930s to the 1960s was coloured by contradictions surrounding the need and justification for conducting

Aborigines themselves, as well as potentially providing recorded links between the present and the past.

research, with work being frequently characterised by hostility and suspicion from the subjects.

Caroline E. Kelly was one of Elkin's first students to conduct anthropological research among Aboriginal communities in New South Wales. During the period 1930 to 1937, Kelly undertook an investigation on Aboriginal reserves in Queensland and New South Wales, partly with the aim of establishing anthropologists as expert advisers on Aboriginal administration. While Kelly's findings were essentially 'paternalistic', focusing on both the advancement of assimilation and the establishment of anthropology as a scientific discipline, they also acknowledged that beneath the observable surface of adopted European lifestyles, there were still strong elements of traditional thought, knowledge and culture embedded in daily life (Kelly 1944). While this acknowledgment of surviving traditional cultural elements can be useful in today's battle for recognition of native title rights, in the mid twentieth century it was merely considered by government agencies to be an obstacle to the assimilation process, and an excuse for unneeded interference in the lives of New South Wales Aboriginal people.

Kelly was not the only anthropologist who recognised the existence of some traditional knowledge, laws, thought, and language among New South Wales Aborigines. During the 1940s, under the auspices of Elkin, Marie Reay conducted anthropological research in several rural New South Wales Aboriginal communities. At that time Reay observed a manifestation of some surviving traditional trends, but nevertheless formed the conclusion that there existed a 'pathological condition of disequilibrium' due to the fact that New South Wales Aboriginal people had failed to "adjust to radically changed external conditions" (1949: 112, also 1945). Furthermore, this failure to adjust did not necessarily have to result in disequilibrium, but due to the fact that among the communities which Reay studied the "culture of the group [was not] adequately structured...[and] a strong institutional structure was lacking", this inevitably took place among New South Wales Aborigines (1949: 112). While these people were, in truth, (partially) dependent on the white society, they lacked the willingness to adapt. Their links to social institutions, which were essential if they were to function in a Western society, were either broken or non-existent. The answer had to be acculturation. Consequently, Reay, like other anthropologists working in

New South Wales at this time, focused on acculturation, where the emphasis was placed on studies of race relations (e.g. Reay and Sitlington 1948), the nature of Aboriginal solidarity (Calley 1957), the rejection of the dominant white society (institutions) (e.g. Calley 1957, 1959, Reay 1949) and various obstacles to the assimilation process (e.g. Bell J. H. 1964, 1965; Fink 1957, 1964). Despite the fact that some of these studies acknowledged surviving elements of Aboriginal culture, the general assumption was (a) that traditional culture among New South Wales Aborigines was either dead or dying; (b) that social organisation (tribes, mobs) had been dismantled; and (c) that traditional customs were a memory of the past (e.g. Berndt R. M. 1947, 1948).

It is interesting to note that much anthropological writing of this period assumes that the 'liminal' existence and status of so many Aboriginal people in New South Wales was solely due to their own stubbornness and inability to adapt completely to the dominant way of life (e.g. Bell J. H. 1964, 1965; Reay 1949). It is further interesting to note how writers of the time expected the process of acculturation to be complete and one-way, and how essential assimilation was deemed to be for all people of Aboriginal descent. In 1964, J. H. Bell claimed as follows:

Generally speaking, the part-aborigines of New South Wales have no culture of their own to preserve. There is the odd exception of a settlement where a few attenuated features of traditional life hang on, but these have little relevance to the people's way of life. The traditional social structure and culture have long since vanished ... [m]ost part-aborigines today have no interest in the old life and little if any knowledge of it; and questions put to them concerning it bore them (p. 64).

The overall assumption which can be drawn from analyses of the anthropological work undertaken during the period of the 1930s to the 1960s is that the 'part-Aboriginal' population of New South Wales did still retain some form of social identity, which united them as Aboriginal people. Although they seemed to lack an observable culture, they were nonetheless differentiated as 'outsiders' to white society. Whether or not the anthropologists of the time fully subscribed to the general view, it is clear that for policy-makers and the popular culture, authentic Aboriginal culture was peculiar to simple, static hunter-gatherer societies, a form of culture which

inevitably gives way when exposed to superior Western culture. Aboriginal culture was, in a sense, defined as an unchangeable construct, an untouchable umbrella, which folded under the first showers of European cultural (colonial) influences.³⁹ Some anthropologists challenged this construction in the late 1950s, but the challenges did not become clearly noticeable until the 1970s. Following socio-political changes in the aftermath of the 1967 Referendum,⁴⁰ research in Aboriginal Australia underwent considerable change. This change resulted, firstly, from increased funding for research into Aboriginal issues, and secondly, the conceptual, methodological and analytical changes that took place that were attributable to increased criticism from within academic and intellectual cultures, as well as from Aboriginal people themselves. Despite the establishment of the Australian Institute of Aboriginal Studies in 1964, the main focus remained on traditional Aboriginal life in remoter parts of Australia. However, some very important work was carried out in New South Wales in the latter half of the twentieth century.

Notions of homogeneity and a lack of distinctive culture(s) among New South Wales Aborigines were first challenged by academics in early 1960s (e.g. Stanner 1964). These challenges were the result of the rise of international civil rights movements demanding equal rights for indigenous people (e.g. Attwood and Markus 1999). While many scholars in Australia turned their focus towards the demands of these movements, it is inevitable that the direct participation of Aboriginal people themselves greatly influenced the disputing of stagnant concepts and 'truths', at the same time encouraging a new awareness of, and focus on, the lives, histories and cultures of Aboriginal people in Australia. Furthermore, the open participation of Aboriginal people from different parts of Australia in national movements, along with a call for the Referendum of 1967, threw a new light on the previously assumed persistence of Aboriginal identity (Aboriginality), the inadaptability of Aboriginal social practices and notions of homogeneity and difference. The voices of Aboriginal Australians began actively penetrating the 'ivory' tower of the academic studies surrounding their lives. This was followed by the introduction of Aboriginal land rights in the Northern Territory and the reclaiming of Aboriginality with a new legal

³⁹ These notions would fall under what Marshall Sahlins (1999) describes as 'despondency theory'.

⁴⁰ The 1967 Referendum is discussed in Chapter Six (6.1.).

status. In this new political and legal climate, some anthropologists began focusing on different ways of thinking about Aboriginal distinctiveness and continuity, wherein the key terms included were: cultural continuity, social change, historical context and adaptation.

Jeremy Beckett was one of the first anthropologists to conduct anthropological research among New South Wales Aboriginal communities which challenged the rigid portrayal of homogeneity among Aboriginal people in 'settled Australia'. In 1957, Beckett began working in the far west of New South Wales, focusing on relations between Aboriginal people and non-Aboriginal people. Beckett found that while there were very few 'full-bloods' left in the region, the overall pattern showed that people of mixed blood (half-caste) were almost always brought up by their mothers in Aboriginal camps (1958). Consequently, people of 'mixed blood' were exposed to, and in turn incorporated into their thought, the various aspects of the traditional culture and values of their ancestors. Beckett challenged the assumption of a 'culture vacuum', looking instead at the possibility of social change and cultural continuity. He argued that many aspects of common interaction and general conduct of everyday life among New South Aborigines was distinctively different from that of the general (white) community. Furthermore, Beckett, one of the few anthropologists who initiated the debate on the Aboriginal assimilation policy in the 1960s, questioned its ethical basis, calling for self-determination for Aboriginal people (Beckett 1958, 1959, 1964, 1965, 1967; also Barwick 1962, 1963; Reay 1964). It should be pointed out here that all these works were written before discussion pertinent to, and recognition of, native title. But the theoretical and analytical direction of these works is extremely important for today's anthropology in both Aboriginal Australia and 'purely' native title anthropology. In later years the focus of Beckett's studies has been on the "conscious effort to maintain continuity with the past" among Aboriginal people, and on questions of cultural continuity and authenticity after the introduction of land and native title rights (1987: 111 - 112, 1993, 1994, 1995).

In recent years there has been a renewed interest in intensive anthropological, historical and archaeological work in New South Wales on a local level, albeit that much of this interest has been directly influenced by the native title context. Two anthropologists, whose work was conducted in Aboriginal communities in New South

Wales in the last two decades, have remained actively involved in local community research up to the present day. Barry Morris works with the Dhan-Gadi (Dunghutti) people in Kempsey, the only Aboriginal group in New South Wales whose native title claim proved successful by the end of 2000.⁴¹ Morris's work centres on the relationship between the Dhan-Gadi and the (colonial) government, focusing on government policies, the construction of Aboriginal identity, the construction of Aboriginal history, and demands for Aboriginal self-determination (1986, 1988, 1989). Gaynor Macdonald, who has worked continuously with the Wiradjuri people in New South Wales since the 1970s, has become an anthropological authority on many aspects of New South Wales Aboriginal people's lives today. Macdonald's thesis, *The Koori Way*, explores kinship, socio-cultural dynamics and cultural distinctiveness in a New South Wales Aboriginal community. In her thesis, Macdonald argues that members of this community have a definite sense of their own traditional law and culture, which they perceive as a distinctive system. Furthermore, the thesis looks at social relations. In the words of Macdonald:

Complex kin relations and the value system upon which they appear to be based are often used as means of both explaining (and explaining away) intra-Aboriginal as well as Aboriginal/European relationship dynamics in south-eastern Australia (1986: 190 - 191).

Macdonald's later work analyses socio-cultural changes within various New South Wales communities over the last few decades, with special emphasis on cultural continuity and the process of, and the context for, land and native title claims (e.g. 1997a, 1997b, 1998). In her work as a consultant, Macdonald has focused both on anthropological analysis of the lives of New South Wales Aborigines, and the processes within the various Aboriginal communities who are fighting for recognition of native title.

⁴¹ The Dhan-Gadi claim will be discussed in Chapter Nine (9.3.). Duffy Forest (near Sydney, NSW) (NN97/15) and Darkinjung LALC (near Gosford, NSW) (NN99/10), are the other two New South Wales native title claims which had been determined by the end of 2000. In both cases, litigated outcomes found that native title does not exist (<http://www.nntt.gov.au/nntt/determin.nsf/area/homepage>).

3. 4. New South Wales and Native Title Anthropology

Today many New South Wales Aboriginal people welcome anthropological, historical and archaeological research into their communities. Furthermore, on a personal level, they have become actively involved in challenging both fixed notions of homogeneity and claims that they have lost their traditions and are lacking in history. This increased interest in recording local Aboriginal history and culture is hampered not only by a paucity of existing ethnographic research, but also by the disruption of natural transmission of knowledge through generations. Irrespective of the fact that anthropological studies into Aboriginal Australia have been undergoing change in theoretical and ideological approaches during the last few decades, New South Wales Aborigines are still facing a limited attraction as anthropological subjects, and, by extension, limited representation in the literature. However, in the course of the introduction of land and native title rights, New South Wales Aborigines have managed to utilise, often to their advantage, both the changes in government policies and legislation, as well as changes in the gaze of anthropologists, in order to collect, substantiate and promulgate their histories and their cultures.

Most current anthropological work in the native title context draws on the development of processes and mechanisms which have managed Aboriginal land claims in the Northern Territory, and which have subsequently influenced the process of land and native title claims around Australia (Merlan 1995).⁴² And, as mentioned in the previous chapter, many native title claims are still in various stages of hearing, with some before the High Court. The outcome of these hearings will have a major effect on how subsequent claims will be presented (examples and cases will be discussed in detail in Chapter Nine). However, due to the severe impact of colonisation, Aboriginal people in long settled areas of Australia are often faced with specific legal and political hurdles that differ from those of Aborigines in the more remote areas of Australia. Some of the more important complications and obstacles faced by both anthropologists and native title claimants in New South Wales derive

from the powerful construct of Aboriginal homogeneity and non-Aboriginal status of Aborigines in long settled Australia (see Chapter Seven). The common assumption of the lack of, or the loss of, traditional cultural practices and knowledge, has to be challenged before an acceptable claim for native title can be lodged. Questions of legitimate membership of a claimant group, continued traditional use of the area which is being claimed, and proof and authentication of existing traditional practices are but a few aspects which New South Wales native title claimants share with native title claimants in other parts of Australia. In addition, internal community conflict between different descent groups, often caused by earlier dispersal and dispossession, disputes over political and cultural authority, along with the struggle for control over financial resources, all shape the process of land and native title claims on the ground. Recent work by anthropologists in the native title context in Australia today will be addressed in Chapters Six, Eight and Nine, but at this stage it is important to introduce some of the specific challenges met by anthropologists working with New South Wales Aboriginal people on issues relating to land, culture, history and native title.

Gaynor Macdonald (1997a) focuses on the rise of intra-community conflict within New South Wales Aboriginal communities over the last decade and a half. She claims that there are various reasons behind this conflict, and splits them into two fundamental categories: (a) economic, based on a shifting focus from resource management located in kinship and alliance, to one of equity and need; and (b) structural, the products of Aboriginal migration and the nature of traditional links to country. Macdonald (1997a) uses the term 'traditional people' to describe the direct descendants of the Aboriginal population at the time of white contact, and 'historical people' for Aboriginal people who have for varying reasons moved into the area during the last few decades (pp. 65-66; see also Martin 1997).⁴³ Conflict, which can be found both within and between these groups, affects the determination of a claimant group: it frequently hinders and delays the process of all stages of native title. However, while this intra-community conflict can be found within most New South

⁴² The legal, procedural and practical difference between the *ALRA (NT)* 1976, the *ALRA (NSW)* 1983 and the *NTA* (1983) are addressed in Chapters Eight and Nine

⁴³ Discussed in details in Chapter Six. Also, Sutton (2001b) discusses the initial use of the term in Queensland, after the passing of the *Aboriginal Land Act 1991*, whereby it was possible to make a claim to "certain lands based on historical association as well as, or instead of, traditional affiliation" (p. 23).

Wales Aboriginal communities, it is not unknown in more remote 'heterogeneous' Aboriginal communities. There is increasing research into the various formations of claimant groups throughout Australia (e.g. Morris, J. 1995; Peterson 1994; Sutton 1995) and analyses of Aboriginal authority systems (e.g. Edmunds 1995a; Sullivan, Patrick 1997). Intra-community conflict and local political authority within the Aboriginal community in Dubbo will be discussed in Chapter Six, while the nature and the formation of claimant groups and the various aspects of membership (categories) will be discussed in detail in Chapter Seven.

Apart from Macdonald's work, not much anthropological work has focused especially on New South Wales Aboriginal people in relation to land and native title claims. However some anthropologists, when discussing native title processes in other parts of Australia, have made reference to, and drawn comparisons with, the New South Wales Aboriginal communities. Marcia Langton (1997) explores the consequences of white settlement in New South Wales on traditional land tenure systems vis-a-vis traditional Aboriginal law. Langton uses the term "grandmothers' Law" when referring to "transformation in land-holding patterns", and highlights the important role that women play in contemporary Aboriginal land tenure systems in long settled areas like New South Wales (p. 86). Langton writes about a shift from patrilineal to cognatic systems regarding traditional land ownership, and emphasises the custodial responsibilities of senior women in the case of land. According to Langton, it is absolutely essential to recognise this post-colonial form of connection to land and transmission of rights to land when defining local group membership in relation to rightful native title claimants. Similar views have been put forward by Francesca Merlan (1996). Merlan claims that a recognition of the multiple ways of identifying with country, and the various purposes behind claims to rights in country, should be central to any study of Aboriginal social organisation (1996, also 1998). However, while Langton emphasises the importance of female ancestors, and their role in the transmission of traditional knowledge, Merlan focuses on 'socio-territorial identity'. She identifies three types of socio-territorial identity, wherein the third type is based on a system of 'cognatic descent' using 'genealogical pathways' (1996: 175).⁴⁴

⁴⁴ The first type, is the "clan-level" model of relationship to country, the second is the "language group" relationship to country (Merlan 1996: 167 - 168).

Merlan sees the recognition of cognatic descent as a flexible response to a relatively non-limited category of a traditional owner in the *NTA 1993* (Cth). According to Merlan, this analysis of identity formation might prove to be the most useful when documenting native title claims in long settled parts of Australia, where the colonial process has caused considerable disruption within local Aboriginal groups. This realisation has resulted in discussions about the problematic nature of earlier paradigms of legal processes which assume a certain model of transmission of knowledge within Aboriginal communities (i.e. according to the *ALRA (NT) 1976*). Consequently, when other models of proving the existence of traditional knowledge and land ownership are put to the test, they might fail to meet the requirements of the current judicial system (also Rigsby 1996, Rose 1995, 1996).

The nature of Aboriginal kin relations, the sources and the persistence of Aboriginal law, and the rights to land through descent, have also become increasingly important when determining native title claims. Peter Sutton has addressed all of these issues, suggesting that by studying and analysing certain aspects of modern Aboriginal traditions and customs, various traditional elements of personal connection to country along with traditional forms of governance can be identified. Sutton claims that "[t]he survival of the classical Aboriginal emphasis on descent, among the shattered and then later self-reconstructing groups of rural and urban regions, should not be surprising" when realising the premium importance and the strength placed on kin relations in Aboriginal communities (1998: 123). Furthermore, as Sutton claims:

there is still a gap in detailed ethnography on local organisation and land tenure in non-remote Australia ... and that the more we find out about such systems ... the less casually can we resort to notions of 'fluidity', 'indeterminacy' and 'ambiguity' and reject out of hand the 'systems thinking' of past studies in Aboriginal kinship and social organisation (1998: 54).

When focusing on long settled areas, Sutton emphasises the importance of recognising and understanding that transformation in tradition and customs is not just a result of dispossession and the breaking down of culture, but a sign of adaptation and persistence of Aboriginal law, in turn a sign of continuing identification and relations

to country. These relations can be on the basis of individual and/or group interest in country, and the degree of these relations can vary (Sutton 2001b).⁴⁵

Foremost among the challenges facing anthropologists and native title claimants today is the question of 'authenticity'. However, the question of authentic culture and history is not a recent phenomenon. Ever since Edward Leach coined the term 'ethnographic fiction' in 1954, the authenticity of cultural phenomena, in the form of political and cultural units, has become increasingly important in anthropological discourse on tradition, social change and cultural continuity. The publication of *The Invention of Tradition* in 1983 (Hobsbawm and Ranger) and *Imagined Communities* (Anderson 1986 (1983)) drew further attention to anthropological understanding of the relationship between tradition and cultural identity, and as a consequence, questions of authenticity. Increasingly, the notion that identities and histories are social constructions affected by limitations of self-determination, powers of interpretation, and abilities of adaptation and inventiveness, is becoming part of anthropological studies of all indigenous peoples. However, this notion can have contradictory results for native title claimants in Australia. On the one hand, with respect to land and native title cases, such a notion can be used to argue before a court of law that while various aspects of a 'submissive' culture (e.g. religion, law, language) can and do change and adapt according to external influences (e.g. colonisation), they are still recognised as the genuine, authentic and distinctive culture of a group of people. On the other hand, members of the dominant culture, as well as other groups competing for (or against) native title, may claim that culture has been objectified: anthropologists and other researchers have become the 'experts' used to construct political weapons of history and heritage; i.e. the creation of identities and traditions which can not be proven as authentically ancestral (see Haley and Wilcoxon 1997). To this end, the question of authenticity has become an integral part of both anthropological discourse in Australia, and the general process of establishing membership of a claimant group and, by extension, traditional ownership of land (e.g. Beckett 1995; Fielder 1994; Merlan 1996; Weiner 1995).

⁴⁵ Discussed in further details in Chapter Nine.

This challenge to the authenticity of culture, and to the validity of claims of traditional ownership of land, culture (Aboriginality) and history, has been especially rigorous in New South Wales. Due to the practice of placing a greater value on static tradition, rather than on change, in the research undertaken on Aboriginal Australia, Aboriginal people in New South Wales can lay claim to having been victims in the clash between an academic construction of what constitutes authentic Aboriginal culture and a legal system which demands conformity and legal definitions derived from Western laws and practices (e.g. Attwood and Markus 1999, 1992). The rigorousness of the Australian legal system can be disastrous when 'proof' of native title is based on a particular commonsense understanding of 'tradition',⁴⁶ where the term

refer[s] to a set of beliefs and practices that share (or are believed to share) some relationship to the past. The beliefs are either about the nature of life in the past or about the origins of current practices in the past ("since time immemorial"). Traditional practices are those that are believed to have originated in the past and are seen as the thread of continuity between past and present (Turner 1997: 347).

Consequently, it is important to account for the role that earlier anthropology had in the creation of social distinctions and objectification of tradition and debate about authenticity of tradition and cultural practices.

⁴⁶ The term discussed further in Chapters Six and Nine.

Chapter Three – Part II

3.5. Anthropological Debates on ‘Authenticity’, ‘Culture’ and ‘Tradition’

In too many narratives of Western domination, the indigenous victims appear as neohistoryless peoples: their own agency disappears, more or less with their culture, the moment Europeans irrupt on the scene ... [U]ntil Europeans appeared, they [indigenous peoples] were isolated - which just means we [Europeans (anthropologists)] weren't there (Sahlins 1999b: 2).

The task of researchers was to recover to the fullest possible extent the patterns of life, practices, customs, and beliefs of Aboriginal people, *as if* there had been no historical disruption, no state control, and no significant influences on their essentially *Aboriginal* lives ... [T]oday ... many anthropologists continue, almost incredibly, to write within this tradition (Hamilton 1997: 3).

The above quotations outline some of the false divisions, or even oppositions, which previous anthropological works have constructed between Aboriginal history (culture) and non-Aboriginal history in Australia. The claim that Aboriginal culture(s) are dying, very evident in Elkin's earlier, and to some extent later, works, are inevitably constructed against the notions of a superior, dominant European culture. In essence the work of the early anthropologists such as Elkin supported the notion that real history (culture) belonged to the West and the Dreamtime, the nearest equivalent for the Australian Aborigine, was not in any sense 'real' history. To a large extent, the strength of this division, between 'real' history and the Dreamtime, has resulted in a very powerful notion which in essence deems any change or adaptation by Aboriginal people to Western/European way of life (history/culture) as evidence of forfeiting their own history/culture. Consequently, like so many of the 'neohistoryless' peoples referred to by Sahlins, the Aboriginal people have mostly been analysed, described and defined in comparison to, and as under the influences of, European culture(s). In this discourse, the 'people without history', to borrow Wolf's (1984) famous phrase, are defined by what they lack – history. What they have is 'culture' and 'tradition'.

The meaning and fixity of 'culture' and 'tradition' is not, however, uncontested in contemporary anthropology. One of the major debates of the last 20 years revolves round the notion of 'authenticity' in relations to traditions and cultures. Haley and

Wilcoxon have succinctly outlined the problematics of this debate when claiming that:

the “great ironies of contemporary anthropology” [is] that having convinced the world at large that culture has a stable, ontological reality, many anthropologist are now abandoning the traditional culture concept in favor of processual and constructivist models (1999: 19).

In large part, this is due to the fact that many anthropological subjects are now actors in decidedly non-traditional contexts, such as native title courts, and it is simply impossible to view their cultures and traditions as either exotic museum pieces, or as somehow divorced from ‘our’ shared history. In this section I will address what I characterise as three different positions in the ongoing debate on the authenticity of various aspects, if not the whole of, cultures and traditions, with specific emphasis on Aboriginal culture(s). These position or approaches are:

- 1) the disappearance of culture (loss of authenticity, loss of authentic cultural practices)
- 2) the adaptation and flexibility of culture (continuity within change)
- 3) the creation of culture (questionable authenticity and invention of traditions)

These positions may be found among the practitioners of various academic disciplines (e.g. anthropology, history and law), and become contested and politicised when they appear before judicial institutions, as definitive statements of what constitutes ‘authentic’ indigenous culture.

The first position, which has already been discussed to some extent in the first part of this chapter, has lead to claims that traditional culture(s) and customs of Aborigines in long settled Australia have all but disappeared. This view is reflected in media headlines which refer to Aboriginal culture(s) as ‘frozen in time’ or having passed on the ‘tide of history’ (this will be discussed further in Chapter Nine) (see Atkinson 2001 on the ‘tide’ euphemism; also Bartlett 1993). Such an approach does not allow for much change, adaptation or flexibility in what is classified as Aboriginal culture (tradition). Of course, and as I have previously discussed, this is

not a new notion. The loss of, the disappearance of, the death of and the subduction and absorption into white culture of Aboriginal culture(s) has been predicted and debated since the early 1900s, especially among scholars working with Aborigines in long settled Australia. However, as will be outlined in the following discussion, contemporary definitions and interpretations of what constitutes an authentic (Aboriginal) culture, and what constitutes an 'inauthentic' culture (how much social change is too much?) has become crucial in many Aboriginal peoples' quest for recognition of native title and cultural heritage.

The second approach, which has also been discussed to some extent in the first part of this chapter, grants Aboriginal people some form of both agency, self-representation and self-determination (definition) and does recognise change to customs, rituals and lifestyles, while still apprehending a continuity of authentic traditional practices and customs. While the first position looks more at the entirety of cultures (either alive or dead), this approach focuses more on the survival of certain traditional practices and beliefs (modified or not) as evidence of cultural continuity over time. To date, this approach has been the most popular approach among indigenous people themselves, especially those living in long settled areas (will be discussed further in Chapters Seven, Eight and Nine).

The third approach, not always easily distinguishable from the first approach, draws the most heavily on the question of authenticity, and revolves around issues of revival, (re-) invention and creation of tradition(s)/culture(s).⁴⁷ This approach has become increasingly dominant since the early 1980s when the focus of a number of anthropologists, in line with social and political changes among a number of indigenous Peoples, turned towards the topic of 'tradition' (especially in a number of Pacific Island societies(e.g. Keesing and Tonkinson 1982; Linnekin 1983, 1991). As mentioned in the last section, this was the same time that the discipline of anthropology was going through a critical scrutiny of its own practice and the legitimacy of its own knowledge, typified in the publication of a number of still influential works. *The Invention of Tradition* (Hobsbawm and Ranger 1983), *Writing Culture* (Clifford and Marcus (eds.) 1986), *Anthropology as Cultural Critique: An*

Experimental Moment in the Human Sciences (Marcus and Fischer 1985) and *Invention of Culture* (Wagner 1981) were among a number of works which placed 'tradition' as central to identity, based on a collective past providing both a subjective and objective basis for the present. These writers debated whether tradition is a fluid, shifting process of interpretation, rather than a defined collection of 'things' (e.g. Linnekin 1983, 1991), if all tradition (even culture itself) is invented by combining and recombining some selected, fundamental symbolic elements of the past (e.g. Wagner 1981), or if it can be identified and analysed as a form of inauthentic fabrication (e.g. Keesing 1989). However, what united all these writings was the emphasis on the dismantling of the current day commonsense understanding of 'tradition' and their analysis of the 'production' of tradition as a historically reflective process (self-conscious or not), drawing on some identifiable subjective and/or objective aspects of the past, frequently, if not always, political in nature, driven towards the acquisition of power over self-representation and autonomy. Consequently, this approach assumed that there is some distinguishable, unadulterated and recoverable past, which can/need to authenticate present practices/beliefs. Hence began the debate about 'culture as a way of life and 'tradition' (practise/beliefs) as the representation of that way of life and who is qualified to determine the authenticity of current 'traditions'. The following discussion will address these three positions, with specific emphasis on the last one.

One of the more distinguished scholars in current anthropological debate about the culture and traditions of indigenous people of the world is Jonathan Friedman (e.g. 1992, 1994, 1997). Friedman sees culture as sometimes a 'subjective' product, as a concrete social and cultural form and when addressing the question of 'cultural continuity' Friedman describes it as not merely a question of

cultural things, objects, [and] reified traditions ... but a certain organization of experience and of general life strategies ... a continuum of phenomena ... [and these] continuities in social life are closer to what some have called ontologies as opposed to more variable and superficial cultural products such as particular objects, rituals, and texts (1997: 20 - 21).

¹⁴⁷ Clifford (2001) has warned about the use of the term 'invention' and encouraged the use of the terms 'articulation' or 'reconfiguration' instead.

Friedman argues that

it is such continuities that make movements for the establishment of cultural identities successful -- the degree to which people can harness representations of the world, however contestable, to their ordinary experiences, their existential conflicts. And it [is] this that lies behind the formation of traditionalisms ... (1997: 21).

While Friedman's argument focuses on the formation and expression of 'traditionalism' as found among a number of indigenous groups fighting for their rights today, his argument also concerns notions about 'culture' as 'exclusive property'. Friedman argues that this notion of 'culture' as 'property', and thus formation of 'traditionalisms', can throw sand in the eyes of researchers, that is, lead to a skewed comprehension of how living people claim and use the past. Other researchers have warned about similar problems associated with this application of the terms 'culture' and 'tradition', by indigenous people, pointing towards the difficulty in analysing/identifying when such use is driven mostly by political motivation to gain various forms of power (e.g. over land, sites and other form of cultural heritage) (e.g. Keesing 1989), and when these terms are merely expressions of people desires to define themselves in the world (claim difference) (e.g. Fielder 1994; Haley and Wilcoxon 1997; Weiner 1995, 1999).

However, there is still another dimension which must be addressed when looking at culture and traditions as exclusive property; the separation between spirituality and materiality when discussing and debating the meaning of the term 'traditional'. When claiming self-determination and self-representation, most indigenous Peoples do not only emphasis the difference between the material and spiritual aspects of their culture/tradition, they inevitably place principal importance on the spiritual domain (e.g. Merlan 1997). It should be recognised that this dichotomy is not necessarily the creation of indigenous philosophies, but can rather be attributed to the last four hundred years of Western thought. Hence it is essential to explore this dichotomy between the spiritual and the mundane especially among Aboriginal people in long settled Australia, as Merlan has claimed that when it is "attribute[d] to many Aborigines this kind of ideological separation of materiality and spirituality in their contemporary dealings with land appears to be empirically wrong" (1997: 6;

also Morris 1988 on universal versus historically and culturally specific epistemologies/ontologies).

When looking at the process of native title claims in Australia today, it appears that the authority of self-representation, to be able to define and declare the 'ownership' of traditional practices and knowledge, has fallen almost totally under the interpretational powers of the academic experts and the judicial supremacy. Inevitably this lack of self-representation and thus 'property rights' (ownership) of ancestral traditions has removed all authority over traditional culture away from the people who claim these traditions as their own and placed it in the hands of 'experts' on traditions (e.g. anthropologists, historians and linguistics) and representatives of the dominant judicial authority (judges and lawyers). This process has not only rendered many Aboriginal people powerless, it has also created a situation where a genuine comprehension cannot be established of how Aboriginal people define themselves and how they claim and use the past through contemporary practices (i.e. the processes?).

It has to be recognised that these claims, by Aboriginal people, to self-representation and to the past are frequently influenced by the dominant discourse on what constitutes traditional culture. When discussing recent anthropological challenges to the reification of culture, Marshall Sahlins has claimed that

it appears that people - and not only those with power - want culture, and they often want it precisely in the bounded, reified, essentialized and timeless fashion that most of us [anthropologists] now reject (1999a: 402).

Consequently, Aboriginal people are just as influenced by these notions of culture as being either genuine or spurious, as are non-Aboriginal people, perhaps more so. Hence, since the 1970s (as will be discussed in Chapters Four and Eight) Aboriginal people in long settled areas have appropriated many of the fixed characteristics of their ancestors in order to contextualise their own experiences and lay claims to their past (history). To a certain extent it can be asserted that many Aboriginal people/groups have reified their past to validate contemporary values and practices and thus their own ontologies. However, experiences before the courts of Australia are showing that subjective claims to the past do not suffice (will be discussed in

details in Chapters Nine and Ten). When objective evidence of direct links between current day realities and ancestral traditions and practices is lacking in some way the courts do not recognise the existence of native title. This lack of recognition, as mentioned before, has become known in anthropological literature as the ‘frozen in time’ approach.

This expression was applied to the ruling of Justice Olney in the Yorta Yorta native title claim (as will be discussed in Chapter Nine). Based on the various interpretations, by anthropologists, historians, linguists and genealogists (experts), of the Yorta Yorta traditions, the Judge found that the ‘tide of history’ had wiped out every trace of traditional customs, knowledge and practices of the Yorta Yorta. According to the findings of the Justice, all links to the past (practices and customs) had been lost, leaving the Yorta Yorta without any authority or claims to the traditions and practices of their ancestors. Hence, the concept of ‘frozen in time’ was applied to ancestral practices, which, according to experts’ findings are not in the possession of the contemporary Yorta Yorta. While this kind of ruling was initially presented as an extreme case scenario (e.g. Black CJ 2001) it appears, as more native title claims are being processed, that this approach to Aboriginal culture(s) as fixed, static and unchangeable, are becoming a convention in native title process in long settled Australia. That is, it seems that the courts of Australia, as well as popular primitivist images (among both Aboriginal and non-Aboriginal people) have created a confining situation for Aboriginal people in long settled Australia, where there are only two possible ways of being: as bounded, fixed and ‘neohistoryless’ (thus possibly qualifying for specific, conditional material returns), or as flexible, adaptable and modern (thus gaining the same status as other citizens). As mentioned earlier, and as I will discuss in Chapters Six, Seven and Eight, most Aboriginal (non-Western) people do not belong to either of these two categories, although they may belong to both, simultaneously. They are frequently constructing, displaying and claiming the rights to self-representation, self-identification, agency and authority, either through the use of some recognisable, recognised and accepted practices of their ancestors (fixed), or through reinstituting or reinforcing some primitivist imaginary. The refusal by Aboriginal people to fit snugly into of the two categories, is frequently (mis)recognised as evidence of inauthenticity.

It can be argued that terms like ‘cultural identity’, ‘tradition’ and ‘customs’ have become perceived as fixed entities among the general population, and the result has been the objectification of ‘culture’. Having been objectified, cultural identity and tradition can thus be ‘appropriated’, ‘expropriated’ and declare ‘lost’ through the use of power (see Haley and Wilcoxon 1997; also Fielder 1994); in the case of native title in Australia, through the exercise of judicial powers. The different relational characters of culture in general and the judicial ‘appropriation’ of the definitional authority of (authentic) culture is described very well in this example by James Weiner:

Let us assume that what we describe in our accounts is not 'the culture of the X' but something more like 'an account of the culture of the X as revealed by my mode of questioning and rendering in terms of my own language'. While anthropologically appropriate, this is singularly inappropriate to the purpose of Heritage legislation, which grants autonomy to Aboriginal custom and makes invisible the mutually constitutive arena wherein white and Aboriginal cultures define each other (1999: 13; see also Fielder 1994)

Another important aspect to the debate about the authenticity of cultures, has been raised by Marshall Sahlins who claims that there is “a failure to comprehend tradition and ethnic identity as modern products ... judgement of authenticity is dependent upon neither being too modern” (Sahlins 1999a: 404). Subsequently, the terms ‘tradition’ and ‘traditional’ do not only imply primitivist stagnancy and immovability, they can also not exist in an authentic form within modern society. What is increasingly becoming evident is that before the Australian courts, when ruling on native title, greater value is being assigned to static tradition than to change. Hence, not only is ‘modernist hegemony’ refusing the rights of native title claimants to self-representation, i.e. by identifying its source as ancestral traditions (e.g. Attwood 1996), but, furthermore, denying some fundamental ontological claims of both belonging and being in the world (e.g. Haley and Wilcoxon 1997; also Weiner 1995).

However, while the Australian judicial system seems to have embraced this notion of static, fixed traditions, many scholars are calling for different analytical

approaches to the focus on culture and tradition, away from the focus on authenticity, towards that of flexibility and adaptation. This approach has already been mentioned in section 3.3., i.e. the call for the recognition of cultural continuity through social change (e.g. Beckett 1988). This approach does not only recognise tradition as a modern product, it also recognises that meanings, values and practices are continually adjusted and modified in correspondence with societal changes. This approach, focusing on adaptation and flexibility of culture (change and continuity) has become evident within the most recent work of anthropologists working with land and native title claimants (eg. Edmunds 1994, 1995c; Merlan 1996; Rowse 1998).

Merlan claims that

the ‘frame’ [Dreaming as a construct] which constitutes a relevant subjective dimension for some Aborigines and, to some extent, in their relations to place, is not one of immobility and inherent fixity. What is fundamental is the orientation towards the possibility that significant things can be newly perceived and interpreted, yielding new, or partly new, social objectifications of varying durability and negotiability (1997: 9)

Merlan uses the term ‘co-construction’ when analysing what she claims are “Aboriginal modes of invention ... an epistemic openness to relevance in the social production of meaning” (1997: 8). Merlan’s observation reflects a growing anthropological literature which places primary importance on what is modern, flexible and ‘inventive’, as opposed to that of timelessness, fixity and stagnancy (e.g. Keen 1994, 1999, Merlan 1998; Weiner 1995). These claims fly in the face of the dominant discourse/notions, which influence(s) both the general public, bureaucracies and judicial institutions, on what constitutes an authentic indigenous (Aboriginal) culture/tradition. These dominant notions do not allow for the ‘application’ of the term ‘traditional’ within the post-colonial context of modern society. What Merlan argues is that there is no room for understanding flexibility and continuity within the current dominant constructs of Aboriginal tradition(s). Merlan claims that in order to understand how Aboriginal people relate “past to present” and in order to understand the “vitality and the adaptability” of Aboriginal cultures we “must realise that we are in the presence of different modes of relating past and present” (1997: 10).

Robert Tonkinson argues along the same lines as Merlan, claiming that the

problem for Aboriginal people about 'tradition' is the tendency of non-indigenous Australians to limit it to the past and to things 'cultural', and to exclude the possibility that its authenticity is retained when it includes components that clearly post-date the European invasion and/or have economic significance (1997: 15).

Furthermore, Tonkinson cites the frequently quoted line from Beckett (1988) of how

Aborigines ... face the unending task of resisting attempts, on one hand to cut them off from their 'heritage', and on the other to bury them within it as 'a thing of the past' (1997: 15).

Hence, there are complex and controversial issues at stake for Aboriginal people when attempting to define the meaning of the authentic tradition(s) underpinning everyday life, within the context of everyday modern society (legally or against public opinion). It appears that this definition comes down to assumptions, based on general, public discourse and legal authority, based on interpretations made by academic and legal 'experts' on tradition/culture. Subsequently, there are a number of questions which arise; in the last two decades, in the course of the recognition of Indigenous rights, has the cultural and legal importance of 'tradition' been elevated (to unreachable heights), and if so by whom? If there are strong, persistent claims that the invention of tradition goes on all the time, is there anything 'authentic'? Are all groups and nations modern, invented and imagined? What are the processes of negotiating invention? I do not intend to answer these question here, most of them are addressed throughout the thesis, I am simply going to leave the concluding comments of this section to one of the major authorities on culture and traditions, Marshall Sahlins. Sahlins comments are aimed at North American cultural anthropology, but do not need to be limited to that part of the world:

0[I]t is astonishing from the perspective of ... anthropology to claim that our intellectual ancestors constructed a notion of cultures as rigidly bounded, separated, unchanging, coherent, uniform, totalized and systematic. Talk of inventing traditions ... - the invention of a tradition - ... whence comes its meaning and its particularity? One may as truly speak of the inventiveness of tradition (1999a: 404, 410).

The following section attempts some absolution for anthropology through a brief look at the role of the discipline of History in the construction of the dominant discourse on Aborigines.

3. 6. History and the Australian Aborigines

For several decades, a number of social scientists in the disciplines of anthropology and history have addressed the 'Aboriginal Problem', or helped revise government perceptions of the problem, and set agendas for its attempted resolution. As with anthropology and the anthropologists, the discipline of history and the role of historians in the study of Aboriginal people had been criticised. Indeed, there are several varying views on the role of history in Australia. Firstly, historians have been accused of creating the problem in the first place through seemingly patronising and often bigoted research (e.g. Yardi and Stokes 1998). Secondly, there is recognition of the importance of detailed historical studies in the native title process (see Foster 1999). Finally, there are claims that historians began much earlier than anthropologists to study and analyse the colonial process from an unbiased perspective, i.e. not through the filters of Eurocentric and evolutionary frameworks (e.g. Attwood 1996). This section will briefly discuss aspects of the critiques of earlier historical approaches, and the importance of historical works in the context of land and native title claims today. I will also examine the associated influences that contribute to the determination of such claims.

It has been argued that much of earlier historical and anthropological work on Aborigines was not a study of Aborigines per se, but an account of the arguments and the different perspectives and views which the white majority of Australia held on who was Aboriginal and what should be the fate of Australian Aborigines (Hasluck 1980).⁴⁸ This critique of anthropological and historical studies can be compared to the conduct of theological studies, where the subject of the studies remains a mystery: the studies merely add to the knowledge of the arguments people have used about the subject(s). This critique is based on claims that it is not a history of Aboriginal Australians which is being presented in most scholarly writings, but rather the history

of textual representation of Aborigines. The best known author of this critique is Edward Said, who, in his 1978 collection of essays titled *Orientalism*, attacked Western intellectual traditions, claiming they were ethnocentric and lacked historical sensitivity. Said was not the only scholar who called for a critique of practices of historical writing.

In 1968, Eric R. Wolf wrote that anthropology needed to discover history. In 1982 he published *Europe and the People Without History*, emphasising the importance of uncovering the histories of 'the people without history' (Wolf 1982: ix - xi). At the same time that Wolf called for the need to analyse the present in the context of the past, W. E. H. Stanner called for a greater recognition of historical aspects of the 'Aboriginal Problem' in the writings of young anthropologists in Australia (1964: viii). This recognition has become increasingly important in anthropological research into Aboriginal Australia. However, it is important to recognise that historians were extremely slow to recognise the implications of the Aboriginal presence in Australia. Until recently, historians routinely took the view that 'Australia' was no more than 200 years old, its existence being established following Captain Cook's voyage in 1770. Historians overlooked and denied the prior existence of Aborigines in Australia (e.g. Attwood 1996; Goodall 1996).

Manning Clark, one of Australia's best known historians, wrote *The History of Australia* in six volumes, each of which covers different periods of white settlement history. Due to political and ideological changes taking place when Clark was writing volumes IV and V, he later recognised that he had left out a significant portion of the Australian population, namely women and Aborigines. Thus he produced a sixth volume.⁴⁹ Both (white) women and Aboriginal people had only represented a frame for the private accounts and achievements of the white male colonisers, women generally portrayed as civilising influences and the Aborigines as either exotic challenges or a social problem (Clark 1962 (Vol. I), 1968 (Vol. II), 1987 (Vol. VI)). Charles Rowley was another influential historian who wrote extensively on the topic of Aboriginal Australia. Rowley, a great advocate of 'value-free' social sciences,

⁴⁸ With reference to Rowley 1978 and Coombs 1978.

⁴⁹ *Late Night Life* Radio National (ABC) 24.06.1999 (Short History of Manning Clark).

argued that previous anthropological and historical studies of Australian Aborigines had been influential in constructing and maintaining general assumptions about Aboriginal inferiority (1972: 5-6, also 1970, 1971b). In 1963, Rowley was commissioned on behalf of the Social Science Research Council of Australia to carry out the first large scale research project of its kind, the 'Aborigines in Australia Project', with the aim of examining the relationship between Aboriginal people and white Australia. The outcome of this project was published in three volumes (1970, 1971a,b). Rowley was one of the first Australian historians to offer critiques of social sciences and government policies regarding Aboriginal affairs, and to identify various issues which today are focal points of Reconciliation.

The 'new' critical version(s) of Australian colonial history (historiography) has/have been labeled as "a black armband view of history" by distinguished historians like Geoffrey Blainey (Marr 1998: 7s; also Pearson 1996; Yardi and Stokes 1998). Furthermore, this 'new' approach and analysis has been rejected by the current Prime Minister of Australia (Reynolds 1999: 129). Influential historians continue to challenge earlier 'white versions' of Australian history. These historians include Henry Reynolds, Bain Attwood, Andrew Markus and Heather Goodall (aspects of their individual works will be examined in the next chapter). These scholars emphasise the importance of recognising that the current context of Aboriginal affairs is very much a product of past history, and that the past is becoming increasingly important in view of native title and Aboriginal historical and cultural heritage.

Historians and anthropologists today are deliberating terms and concepts such as historical 'truth', the meaning of paradigms and historical studies (e.g. Attwood 1996; Beckett 1993; Yardi and Stokes 1998). There are claims that the new Australian history had become so compelling that the High Court of Australia was forced to abandon old legal narratives and overturn the two centuries old notion of *terra nullius* in the *Mabo (No. 2)* ruling in 1992 (Hunter 1996).⁵⁰ These recent (controversial) rulings of the High Court, i.e. *Mabo (No. 2)* in 1992 and *Wik* in 1998, have also been traced to the influences of Aboriginal people writing their own history in the past two decades (Attwood 1996; Hunter 1996). However, there are claims that due to the very

⁵⁰ The *Mabo (No. 1)* and the *Mabo (No. 2)* rulings will be discussed in Chapter Nine (9.1.).

“special emphases [on] survival, continuity and difference” in Aboriginal narratives, they not only challenge conventional Australian history, but also the new Australian history (Attwood 1996: xix). While arguments pertinent to the appropriateness and utility of various historical paradigms and theoretical frameworks for Aboriginal experience and conceptualisation of the world are important in intellectual debate (e.g. Coltheart 1988), the reality remains that various land rights acts and the *NTA 1993* (Cth) call for representation of valid historical evidence before the court. And while there is increasing recognition of different historical (meta-) narratives, i.e. oral history, history expressed through dance, song, performance and paintings, as well as the confidential nature of much Aboriginal history (see e.g. Neate 1997), the validity of such paradigms is still met with scepticism in Australian courts, which are deeply influenced by earlier historical paradigms based on positivism and Western epistemology (and ontology). As a result, Aboriginal people who have little or no documented ‘proof’ of their version of history, are faced with difficulties in providing credible evidence against documented historical ‘truths’, including many based solely or largely on the writings of nineteenth century male, Victorian scholars. And while the Australian legal system is increasingly accommodating various ‘Aboriginal versions’ of history as evidence in land and native title claims in more remote Aboriginal communities (e.g. Fingleton et al. 1994; Rose 1995), Aboriginal people in ‘settled Australia’ are still faced with doubts about the authenticity of their ‘oral histories’ (Foster 1999: 17).

Today, at the dawn of a new Millennium, the nature and the role of anthropology and anthropologists regarding Australian Aborigines and Aboriginal affairs has changed considerably. The authority of anthropology in the construction of the Australian Aborigines has been replaced by the joint input of historians, archaeologists, anthropologists, sociologists and political scientists, and by the increasing contribution of the Aboriginal people themselves. The role of anthropology in Australia has changed markedly since the days of A. P. Elkin. Notwithstanding, it must be recognised that anthropologists today provide direct, and often private, input into land and native title hearings. It is not unlikely therefore, in some cases at least, that anthropologists exercise equal, if not more influence on the findings of judges, than written documents and evidentiary statements. And while the role of anthropologists, historians and lawyers is still vital in a society based on Western traditions, the social

role of Aboriginal people is becoming increasingly important. Aboriginal agency is essential in the process of (re-) interpreting Australian/Aboriginal history in order to avoid the pitfalls of earlier analyses, which mostly overlooked Aboriginal voices. Increasingly Aboriginal people are participating in the ongoing validation of their heritage, the objectification of their traditions, and the negotiation of their own identities and difference wherein one of the major aims is the recognition of Aboriginal peoples' rights to land in Australia. People fighting for Aboriginal rights in New South Wales have to attack several historical constructs and 'facts' in their quest for recognition of Aboriginal rights to land. The various notions behind the persistent claims that Aboriginal people in New South Wales are not 'real' Aborigines (i.e. loss of culture and language, fair skin and modern lifestyles equals loss of Aboriginality) must be successfully challenged before an understanding and acceptance of Aboriginal rights to land, among both the general public and political powers, is achieved. These challenges can only be resolved by general recognition of Aboriginal experiences of white settlement in New South Wales (Australia) and the effect that over 200 years of colonisation has had on Aboriginal people and Aboriginal culture in New South Wales. It is thus essential to look at past colonial history, along with the past and present fight for land (and native title) rights, through the eyes of Aboriginal people. The connection between past and present events must be established and the experience of Aboriginal people must be brought to the fore. One of the ways to establish this connection is through the rethinking of the balance between anthropology and history in the native title context, which ultimately provokes an encounter with a different kind of history; i.e. ancestral or genealogical history. Work on this kind of history has never been carried out before among Aboriginal people in Australia. Its essential focus must be on the consequences of the colonial process on Aboriginal people and communities: social organisation, transmission of knowledge, social change, adaptation and cultural continuity. This type of history must be based on total recognition of the experiences of Aboriginal people, their definition of their own culture, their claims of connection to ancestral lands, and their experience of difference.

Chapter Four

'This Is Our Ancestors' Land!'

And the other day he said 'Mom, I feel so proud'. And I said 'what about son'? He said '*this* is our ancestors' land, they walked this land and we're walking it now'. And he's starting to want to do things, you know. And he's getting an identity. He knows where he comes from. And he tells all the young fellows. This is his land, you know (Int.#12, 17.09.1998).

When looking at the white settlement history of Australia, it appears, at first glance, that from the perspective of New South Wales Aborigines, the colonial process has been one of overall loss. The most significant loss appears to be that of links, i.e. cultural knowledge, traditional law, language and identity, which in the current day legal and political climate equals rights to claim recognition to ancestral land and native title. This loss is discussed in academic studies: it is displayed in public opinion and is part of both political and legal debates. New South Wales Aborigines are often considered to be 'people without a history', people who surrendered their lands (i.e. did not fight for them) and at the same time people who have not completely assimilated. They are still referred to as 'Aboriginal'. New South Wales Aborigines are people who both are, and are not, different; they have been thought to have no specific history, but at the same time they do not share the same history as non-Aboriginal Australians. These aspects have become very important in recent years since without a demonstrable history and an identifiable 'culture', Aboriginal people in New South Wales cannot prove their links to their ancestors and ancestral lands. In recent years, these constructions have been openly challenged and Aboriginal people in New South Wales have been claiming their specific links to ancestral lands and traditions, thus asserting their cultural heritage, history and differences.⁵¹

In an attempt to link past to present, this chapter will trace both the history of Aboriginal resistance towards white settlement and Aboriginal dispossession in New

⁵¹ There were of course earlier challenges by Aboriginal people as will be discussed in this chapter.

South Wales, with special emphasis on issues of land and land ownership and, by extension, the historical context of government policies and legislation. The focus will be (a) on the history and the nature of British land seizure in New South Wales and (b) on the responses of Aboriginal people. The aim is to bring to light some aspects of the origins of political conflicts, and to provide historical accounts of the activities of key groups and individuals in the fight for Aboriginal land rights.

The first section will look at some of the historical aspects of the colonisation of Australia, especially the lack of recordings of the early interaction between the white settlers and the Aboriginal population, the limited recognition of Aboriginal resistance to the invasion of their lands and the scant recognition of Aboriginal connection to their ancestral lands. All of these aspects, or rather the lack of them, have had significant impact on many native title claims in New South Wales (Australia) today.

The supposed 'loss' of tradition and customs among Aboriginal people in long settled areas has become one of the most debatable in influential 'device' in native title determinations today. This supposed 'loss' is the direct result of the introduction and implementation of various government policies - controlling most (all) aspects of the lives of Aboriginal people - since the mid-1800s. The second section outlines these policies, and the impact they have had on the maintenance and survival of Aboriginal tradition, customs and knowledge.

The third section addresses an issue which is sometimes overlooked by scholars, politicians and the general public, i.e. Aboriginal resistance to the seizure of their lands. The discussion outlines the historical development of various organisations, which have been instrumental in Aboriginal demands for land and other rights. It is essential to present and include this history in any discussion which attempts to explore the current politico-legal context and development of land and native title claims.

The aim of the last section is to lay grounds for further discussion about the connection, and sometimes notions of 'ownership', that the Aboriginal people of Dubbo have with their land (the reserve and other grounds in and around Dubbo). By reflecting on some of the aspects involved in the establishment and running of the

Talbragar Aboriginal Reserve in Dubbo, the discussion brings to light some of the distinct characteristics of most New South Wales reserves.

In order to stress the importance of various events, individuals and groups, which have collectively influenced the historical relations between New South Wales Aborigines and the Federal and State Governments, the following discussion is divided into separate sections, that are not always in historical sequence. This chapter covers more than a hundred years of the history of the Aboriginal fight for rights in New South Wales. My aim is to indicate the historical and social processes which have been particularly important in creating the current context of Aboriginal claims to land, and more recently native title, in New South Wales.

4. 1. Colonisation and the Australian Aborigines: A Very Brief Overview

With respect to cultural pluralism, in the production of knowledge about the past of minority groups, the state becomes the possessor and producer of the collective representations of transgenerational knowledge. In effect, minority groups lose the right to speak for themselves as the production of their past, their history, is invested in experts and authorities and mediated by institutions of the state system (Morris 1989: 203).

Since the early days of white settlement in Australia, there has been constant Aboriginal resistance and a continuous claim for human rights. Increasingly, since the late 1800s, there have been even louder demands for self-determination and for rights to land (e.g. Attwood and Marcus 1999: 6 - 7). Resistance comes in many forms. During the early decades of colonisation, resistance in the form of fighting and open warfare occurred in most areas where white settlers invaded (e.g. Hawkesbury, Nepean, and Bathurst) (Coe 1989; Goodall 1990; Read 1988). However, the discussion in this chapter does not address the period(s) of violent frontier clashes between Aborigines and white settlers. Rather, it focuses on non-violent resistance, with the term 'activism' being used for resistance based on 'peaceful' political pressure, written appeals and petitions, and 'stand up' strikes and protests.

There is an abundant literature on the history of white settlement in Australia, the legislation enacted and actions taken by governments in handing out land, and the actions of squatters, pastoralists and farmers in order to gain land. But there are few publications which focus on Aboriginal perspectives, experiences and voices (Attwood and Markus 1999: xx – 1). While oral histories of past efforts to hold onto country, tradition and resources are frequently known and transmitted between generations within Aboriginal communities, non-Aboriginal Australians are less likely to be either exposed to or seek knowledge about these stories. Indeed, until recently, most scholars have shown limited interest in them. This lack of general acceptance of, and more frequently interest in, Aboriginal experiences and perspectives was addressed in Stanner's *The Great Australian Silence*. Referred to as a "cult of forgetfulness practised on a national scale" (Stanner 1974: 25 (1969)), it has been identified as a 'reinventi[on] of the past', conveniently overlooking Aboriginal resistance to loss of land in the past. Thus it apparently strengthened the ideas behind the legal doctrine of *terra nullius* (Goodall 1996: 104). This 'forgetfulness' and/or ignorance of Aboriginal resistance has strengthened assumptions of the racial inferiority of Aboriginal people, consequently predicting and justifying the inevitable extinction of the Aboriginal race, i.e. Aboriginal people, culture, knowledge, philosophy and history.

The lack of public information demonstrating earlier interaction between white settlers and Aboriginal people, and the non-recognition of the variety and richness of Aboriginal cultures, has resulted in a persistent popular discourse depicting Australian Aborigines as prehistoric nomads who were dispossessed of their lands without offering any resistance (e.g. Fletcher 1999). Furthermore, the importance of land, the nature of systems of land tenure, and notions of ownership and connection to land, were not generally recognised until fairly recently in the history of colonisation in Australia. Admittedly, by the 1920s, there was a recognition of these issues - that Aboriginal people had some form of legal/land tenure systems - but there was a complete refusal to countenance that these should be brought into recognition by white Australian law. There was little or no recognition among the general public of Aboriginal legal/land tenure systems. In recent years however, following the *Mabo* (No. 2) ruling (1992) and the *NTA 1993* (Cth), some among the younger generations of educated urban non-Aboriginal people have acknowledged that Aboriginal Australians had sophisticated systems of land tenure at the time of colonisation, albeit

fundamentally different from Western notions of such systems. This recognition, which is still fundamentally informal, only reflects the fact that both the State and Federal governments have not come up with a "uniform and comprehensive response" to the 1986 report of the Australian Law Reform Commission report of 1986, which concluded that "customary law had survived in many parts of Australia 'as a real force'" (Reynolds 1999: 138; also Bartlett 1999). At the same time, the new version of Australian history (discussed in the previous chapter), publication of archival documents and the increasing number of biographical works on past and present Aboriginal activists (e.g. Brewster 1996; Davis 1994; Morgan 1987; Read 1990; Smith and Sykes 1981), have begun to reveal that Aboriginal protests against the acquisition of their land date back to the early 1800s. And while there is still some speculation about when the term 'land rights' was first used, it becomes apparent that the early protests focused on demands for human and/or citizenship rights and access to lands (Attwood and Markus 1999: 5 – 6; Goodall 1996: 160 – 162).

The second and the third sections of this chapter will discuss the roles of agencies and legislation in the acquisition of Aboriginal land, and the Aboriginal responses to the loss of their land. However, before discussing the socio-political and historical context of Aboriginal loss of land, and the specific agencies and legislation which shaped and influenced the development of the New South Wales land tenure system, it is necessary to cast light on some Western notions of ownership and use of land, and on some of the characteristics of the British colonisation of Australia.

Australia, Canada and New Zealand were all colonised by Britain, as a result of which all of these nations are built on the foundations of British common law (Havemann 1999a). While commonalities exist between all indigenous peoples of these countries, the process of colonisation was not the same, and the histories of relationships between the indigenous populations and the state differ between all three. Several particular factors in Australia's colonial history, especially those relating to acquisition of land (and consequent Aboriginal loss) need to be addressed before endeavouring to provide a more specific local analysis.

The major impediment to the recognition of Aboriginal local entitlement has been the original presumption that all land in Australia became Crown land by virtue of

'discovery' in 1776 (Havemann 1999b: 25).⁵² This assumption was quite contrary to both British and international policies towards indigenous people of colonised countries at that time. Questions have been raised regarding the fact that while Captain James Cook had orders to acquire the 'consent of the natives', orders which he conveniently overlooked (Havemann 1999b: 25), Governor Phillip was not instructed to 'gain the consent of the native' as was the case in other British colonies (Reynolds 1999: 130). Some plausible explanations for this 'oversight' have already been addressed in Chapter Two, but it is important to emphasise how the native inhabitants of this continent were denied equality before the law from the first day of white settlement. Since prior to 1788, only vacant lands could immediately be claimed on behalf of the British Crown, Governor Phillip's declaration of British sovereignty over Australia effectively denied both the existence of human inhabitants on the continent, and any concomitant existence of native title, categorically declaring Australia *terra nullius*⁵³ (e.g. Bartlett 1999; Reynolds 1999). This decision, to treat the new colonies in Australia as *terra nullius*, conveniently served the international law of that time, which stated that all land occupied by native inhabitants could only be settled by a treaty or by conquest (Iorns Magallanes 1999; Reynolds 1999). In this way Australia was settled, with neither records of official conquest of an Aboriginal population and Aboriginal land nor any form of treaties entered into with the native inhabitants of the continent. This ambiguous settlement of Australia is still an impediment for Australian Aborigines seeking recognition of their past histories and their rights as the original inhabitants of Australia.

When comparing the colonisation of Australia to the colonisation of parts of north America and Canada,⁵⁴ the political powers and the legal statuses of the indigenous populations appear to have been markedly different. On the American continent (eastern USA today), the indigenous populations were given 'communal native title' under the common law (Hunter 1996: 8 – 9). In parts of Canada, the population engaged in treaties "consenting to relinquish land in exchange for recognition of

⁵² 'Discovery', based on Captain Cook's landing in Botany Bay (Sydney). Henry Reynolds states that it is a "generally accepted view that Australia became British by 'discovery' as a result of Cook's voyage along the east coast in 1770" (1992 (1987): 9), and he further outlines that Cook did in fact claim the eastern part of Australia, i.e. in accordance with the eastern coastline he sailed along, for the Crown.

⁵³ Uninhabited land (discussed in Chapter Two).

distinct status and rights ... [while t]reaties of 'cession' form the formal legal basis for New Zealand" (Havemann 1999a: 8).⁵⁵ The Australian Aboriginal population had no legal rights to their ancestral lands, which had been appropriated under the legal doctrine of *terra nullius*. While there were limitations to the sovereign rights of American and Canadian indigenous peoples, they still had the advantage over the Australian Aboriginal population of being able to negotiate and establish treaties between the nation state and their own native nations (e.g. Morris 1988; also Rowley 1966). Even though the existence of native title in Australia was recognised before the High Court in 1992, the significance of a history of limited legal status and the lack of political power of Aboriginal people in Australia is still evident. In 1996, the Prime Minister of Australia and his Cabinet released an *Outline Paper Towards a More Workable NTA* (Bartlett 1999: 423). In 1998, the worst fears of Aboriginal leaders were confirmed when the final version of that paper became law with the passing of the *NTAA 1998* (Cth). As mentioned before, the amendments significantly weakened the negotiating power of native title holders and, furthermore, brought about legislative changes in most States. These legislative changes were a direct reflection of the terms of the *NTAA*, which allowed for a much wider interpretation of extinguishment of native title, thus creating legal certainties for governments and other interested parties at the expense of Aboriginal rights (Burke 1998: 16 – 17).

Another example of the lack of legal and political power of Aboriginal people re-emerged in May 2000 during Corroboree 2000.⁵⁶ As 200,000 Australians walked for Reconciliation across the Sydney Harbour Bridge, Geoff Clark, the chairman of ATSIC, revived the idea of a treaty as the natural next step towards Reconciliation. But John Howard, the Prime Minister of Australia, had other ideas. The Prime Minister's response to Aboriginal calls for negotiations and a treaty between Aboriginal and non-Aboriginal Australians was that "[a] nation, an undivided nation, does not make a treaty with itself" (reported in the *Sydney Morning Herald*,

⁵⁴ British North America (now eastern USA and Canada) (Havemann 1999b: 25).

⁵⁵ This does, of course, not mean that the treaties, entered into with the Indigenous people of the Americas and of New Zealand, were of lasting and/or beneficial nature for some or all of the Indigenous populations.

⁵⁶ "Corroboree is a synonym of ceremony, derived (in various spellings) from a word in one of the languages of the Sydney region. Originally it was probably the name of a single ceremony, but its use in the pidgin that developed in NSW gave it a wider meaning and usage" (Encyclopaedia of Aboriginal Australia, 1994).

30.05.2000: 18; also the *Australian*, 27-28.05.2000). These words support an assumption that there is not, and has never been, a division between Aboriginal and non-Aboriginal people in Australia. In effect, they deny the international legal rights of indigenous peoples to survive as a group (Iorns Magallanes 1999: 264), and they overlook the initial purpose of Reconciliation, i.e. the negotiation of a treaty (Langton 2000; Reynolds 2000). The Prime Minister has failed to recognise that treaties between indigenous and non-indigenous peoples have been negotiated since the 1840s, without threatening the nation state (Havemann 1999a: 9; Jull 1999: 4 - 7; Langton 2000). Through his outright rejection of the Draft Document of Reconciliation, the Prime Minister refuses to recognise the pre-existing rights of Aboriginal people in Australia. In turn, Aboriginal leaders have recognised that until there is more unity among Australian Aborigines, and until there have been governmental changes and preferably an even stronger support from the general community, there will be little advancement in Reconciliation, negotiation and treaty talks within Australia (Dodson, p. 2000).

Even more important issues for Australian Aborigines are rights to, access to, and increasingly, legal titles to ancestral lands. Due to the nature of colonisation in Australia, many Aboriginal people have to a large extent been occupying Crown land since 1788. This occupation has either been in the form of residence on small reserves (some self administered to a certain extent), residence on bigger reserves and missions administered by white managers or missionaries, encampment on the fringes of growing urban settlements, or temporary or long-term residence on pastoral leases, often in exchange for labour (e.g. Collmann 1988; Goodall 1996; Rowley 1971b). Some reserves and stations were initially established to meet Aboriginal demands, often on ancestral lands. Some reserves and stations were partly run by Aborigines themselves. However, there was no legal recognition of their native (title) rights (Goodall 1996). There are records in existence of a few Aboriginal families in New South Wales who had managed to secure their 'own' plots of land for farming by the end of the 1800s, but such title usually took the form of individual freehold title, not traditional communal title rights (which did not exist at that time according to English law) (Goodall 1996: 85). It was not until the passing of the *Aboriginal Land Rights Act (NSW) 1983*, and later the *NTA 1993* (Cth), that New South Wales Aboriginal

communities acquired communal title to the few pockets of Crown land that still existed on their traditional lands.

Another important aspect of the European colonisation of Australia is the extent to which settlements (e.g. Sydney Cove) were penal colonies, rather than agricultural and/or pastoral settlements. As a result, limited demand for Aboriginal labour in the early days of the colony greatly affected the relations between the settlers and the Aboriginal population in the south-east of the continent (Rowley 1971b). There was little or no need for native labour. Apart from the land which had already been seized, the Aboriginal people were not seen as having material goods to trade: as a consequence, the surviving Aboriginal population was soon pushed to the fringes of the settlement (Collmann 1988, 1977). This initial distancing, created in the early days of colonisation, aided by assumptions of racial inferiority and that Aborigines were a dying race, created great barriers vis-a-vis social relations that have persisted between the Aboriginal and the non-Aboriginal populations, and which largely persist today (e.g. Monk 1972: 5, 66-67; Rowley 1966, 1971b, 1978). Another less recognised result of the lack of demand for Aboriginal labour is the absence of attempts to protect the reproduction of an Aboriginal labour supply: emphasis was on “maintain[ing] the value of the colonial asset”, which would affect both general attitudes towards the survival of Aboriginal people and government policies, and legislation deciding the fate of the Aboriginal population (Rowley 1971b: 14 – 16). The actions adopted by the colonial authorities were thus greatly influenced by a general notion of an inferior race on the brink of extinction, resulting in stabilising, protective segregation and later in the assimilative institutionalisation of the survivors of colonisation. However, it should be made clear that this aspect of colonial process in Australia - the availability of convict labour and lack of demand for Aboriginal labour - has both an historical and a spatial context. Mostly affected were the more urban areas of early white settlement, not so much the northern parts of the colony where pastoral industries were evolving (Rowley 1971b: 14-17).

The process of the colonisation of Australia has created a current system of land ownership, titles and leases unique to Australia. This system, which evolved primarily to control the activities of squatters on Crown land, and supposedly to protect the (rights of the) Aboriginal population, gave the colonial authorities both flexibility and

control over vast areas of land. Today this control over land varies between Australia's states and territories and has very different effects on Aboriginal land rights in different areas of Australia. The Aboriginal people of the more intensely settled areas of Australia, especially New South Wales, Victoria and South Australia, who suffered the greatest dispossession, are faced with particular challenges in their attempts to claim land and/or native title rights. The history of relations between the colonisers and the colonised in these three States differs from that in other parts of Australia. This has been pointed out in recent historical works on Australian Aborigines and is clearly outlined by Attwood and Markus (1999), who suggest that

in [the] 1870s and 1880s Aborigines in South Australia and New South Wales were petitioning government for grants of land, in Victoria they were protesting to retain land previously reserved, in Queensland many were resisting the invasion of their lands, and in the Northern Territory and much of Western Australia most had yet to come into contact with the colonisers (p. 9).

One of the consequences of this different history of contact is the extent to which the importance and the meaning of the term 'land', and the connection to ancestral lands, can differ between urban and rural Aboriginal people and communities in the different states and territories. The disruption and destruction of the social organisation of Aboriginal communities in urban areas of New South Wales has greatly changed the nature of traditional ties to country for the members of these communities. The loss of some traditional knowledge and traditional law has affected the ability of most New South Wales Aborigines to establish evidence to support their claims to native title, as well as to procure recognition of cultural and historical heritage. However, it is important to emphasise that while 'land' might have a different meaning for most urban Aborigines of south-eastern Australia, when compared to the situation of most Aboriginal people of rural Australia, this difference is an historical, economic and legal construction. Many Aborigines in south-eastern Australia claim that despite disruption and dispossession, their spiritual connection to their country/land has not been affected. The examination and 'verification' of these claims are of great importance in cases of native title determination and will be examined further, citing examples from Dubbo, in Chapter Eight. However, it remains evident, when examining the process of colonisation of New South Wales (Australia), that insufficient recording and

recognition of the earliest periods of white settlement, as well as the specific historical and legal aspects of that process, has greatly affected the general knowledge and understanding of the nature and the meaning of Aboriginal connection to land in many places. There was limited recording of Aboriginal people and their customs prior to the establishment of the first missions and reserves (Goodall 1996). Furthermore, as the population of the colony and the need for more land, grew, so did the Aborigines on the land become a problem. It was thus essential to 'learn' more about Aboriginal people, especially with the aim of controlling their movements on the land. Consequently, by the 1840s, the first pieces of legislation regarding Aboriginal people were being passed (Reynolds 1992).

4. 2. From 'Protection' to 'Welfare'

I don't know what happened ... I don't even know what year it was, but the Welfare went out [to Talbragar Reserve] and just told them that they had to move to town. And that was the end of everyone living out there (Int.#08, 29.07.1998).

One of the main foci of this thesis is on demands for land in an Aboriginal community in western New South Wales. For this reason, it is necessary to introduce the government agencies and some of the legislative processes that have affected the lives of the Aboriginal people in this community and consequently created today's context for local native title and land claims. As white settlement expanded, and competition for pastoral and agricultural land grew among white settlers in the early 1800s, the Aboriginal population became an increasing 'problem'. Various land-related legislative acts were passed in New South Wales in the 1800s, and although the 1842 and 1846 Acts did allow for the creation of Aboriginal reserves, the major aim was to control squatters and to protect the Crown land (Reynolds 1992). The authorities in Port Phillip District (later Victoria) and South Australia, had already responded to calls from British humanitarians in 1838 to establish Aboriginal Protectorates to deal with Aboriginal affairs. This was the first official acknowledgment of Aboriginal culture in Australia, and at that time no attempt was made to change Aboriginal economic and social use of land (Attwood and Markus 1999: 7 – 8; Reynolds 1992: 94 – 96,

144 - 146). However in 1840, following the appeal of British reformers, the colonial authority introduced new policies in Aboriginal land use/rights (Goodall 1996: 44). As a part of renewed attempts to improve the management of access to land and maximise economic profit in the colony, small grants of land were to be made to Aboriginal farmers (individuals and groups). This fundamental change in land use for Aboriginal people carried an expectation of a gradual transformation from a nomadic to an agrarian society, with no recognition of traditional Aboriginal land tenure and land use (systems). Henry Reynolds claims that this humanitarian movement of the 1840s was the first land rights movement to recognise native rights to land in Australia (1992: 81 – 102). Heather Goodall, on the other hand, claims that these attempts to secure land for Aboriginal Australians did not recognise native (title) rights to land; rather, they were based on the legal doctrine of an ‘emerging bourgeois state’ in England, which stated that land should be cultivated (1996: 47). Another explanation might simply be that if the Aborigines could be successfully ‘settled’ on plots of land, they might become self-supporting small farmers and thus rid the colonial authority of the ‘Aboriginal problem’. However, the colonial authorities of the mid-nineteenth century had a hard time persuading Aboriginal people to take up the sedentary life of farmers. Furthermore, with the discovery of gold in New South Wales in 1851, when many working men flocked to the gold fields, another factor entered the relations between Aboriginal and non-Aboriginal people. Suddenly there was an increasing demand for Aboriginal labour, and, where previously Aboriginal people had been forced off their traditional lands, they were now invited back and allowed to reoccupy their traditional lands in return for their labour. Heather Goodall refers to this pattern of land use as “dual occupation” (1996: 58).

By the late 1800s, the gold in New South Wales was largely depleted: former gold prospectors were seeking both land and work; the pastoral industry was being restructured, and Australia experienced an economic depression. At that time, it had become evident that the extinction of the Aboriginal ‘race’ was not to eventuate as fast as had earlier been predicted: the government of New South Wales was forced to take action regarding the ‘Aboriginal problem’ (see Rowley 1971a: 10). In 1882, the colonial Government appointed George Thornton as the Protector of Aborigines. One of the positive recommendations that Thornton made

was that ten to forty acres of land should be handed over to Aboriginal farmers. This land could be handed out as either “Crown land reserved for the use of Aborigines”, or preferably as “*grants* of land for aborigines” (Goodall 1996: 90) with the aim of “provid[ing] a powerful means of domesticating, civilizing and making them [the Aborigines] comfortable” (Reports of Protector, 31.12.1882:2-3, 14.8.1882:2, cited in Goodall 1996: 89, n368). Alexander Stuart, the new Premier of New South Wales, approved Thornton’s recommendations. In 1883, following an inquiry from both Aboriginal and non-Aboriginal people into the workings of two Aboriginal Missionary Stations at Warangesda and Maloga, the Government decided to appoint a Board for the Protection of the Aborigines (Attwood and Markus 1999: 7, 51; Parliament of New South Wales 1967: 6, Part I). The Aboriginal Protection Board saw its primary role as follows:

- (a) to civilize, Christianize and above all train Aborigines on stations established for the purpose;
- (b) to remove as many children as possible from their 'bad' environment and parental 'influence' to training homes and thence to 'situations' with white families;
- (c) to maintain at a minimum standard by means of the provisions of rations and blankets those Aborigines living on reserves, usually in self-built shelters.⁵⁷

Working on the basis that protection equals segregation from white people, the Board established policy guidelines that were to remain in operation for the next fifty years. The Board immediately set out to establish reserves for the surviving Aborigines in New South Wales. However, for the first few years, the Board was severely handicapped by lack of statutory power. It was not until 1909, when the *Aborigines Protection Act (1909)* was passed, that the Board acquired the same powers that the Victorian Aborigines Protection Board had gained in 1869 (Goodall 1996: 88 –97). The *Aborigines Protection Act (1909)* gave the Board significant power to control the movements of Aboriginal people, and with the

⁵⁷ From a *Report on Aborigines Protection*, 16 August 1938, by the State Public Service Board, quoted in Parliament of New South Wales 1980-1981: 28.

amendments of 1915 and 1918, the Board gained total control over the lives of a growing number of Aborigines in New South Wales (Goodall 1996). During this period, Aborigines basically lost their remaining human rights, i.e. freedom of movement, unquestioned custody of children, and control over personal property and finances.

During the 1930s there was a revival of public concern regarding Aboriginal affairs. These concerns were not only evident among certain sections of the white community, but were also increasingly voiced by Aboriginal people themselves. The main criticism was aimed at the role and the workings of the Aboriginal Protection Board (Long 1970: 30-31). The feelings of New South Wales Aborigines towards the Board were published by the Aborigines Progressive Association in 1935, the year in which white Australians celebrated their sesquicentenary. The Aborigines Progressive Association stated as follows:

The arbitrary treatment which we receive from the A.P. Board [Aboriginal Protection Board, NSW] reduces our standard of living below life-preservation point, which suggests that the intention is to exterminate us. In such circumstances it is impossible to maintain normal health. So the members of our community grow weak and apathetic, lose desire for education, become ill and die while still young (Patten and Ferguson 1938 (?): 6).

In 1938, the Public Service Board carried out an investigation into the protection and development of Aborigines in New South Wales.⁵⁸ What they found was that it was not the "persons with a preponderance of Aboriginal blood" who constituted the Aboriginal problem: it was the part-Aboriginal people, and the solution was to "ensure, as early as possible, the assimilation of these people into the social and economic life of the general community" (Parliament of New South Wales, 1967: 6, Part I). In 1940, the Aborigines Welfare Board took over from the Aborigines Protection Board, following a Public Service Board inquiry in 1938. Prior to 1940, the work of previous boards had followed a policy of protection based largely on the system of segregated reserves. But in September 1940, the assimilation of

⁵⁸ Report on Aboriginal Development in New South Wales, referred to in Parliament of New South Wales 1967: 5 - 7, Part I.

Aborigines was formally added to the Aborigines Welfare Board's objectives through an Amendment to the *Act* 1940(12), 3(b)(1) (see Read 1996: 209; Parliament of New South Wales, 1967: 4, Part II).

The policy of assimilation seeks that all persons of aboriginal descent will choose to⁵⁹ attain a similar manner and standard of living to that of other Australians and live as members of a single Australian community, enjoying the same rights and privileges, accepting the same responsibilities and influenced by the same hopes and loyalties as other Australians. Any special measures taken are regarded as temporary measures, not based on race, but intended to meet their need for special care and assistance and to make the transition from one stage to another in such a way as will be favourable to their social, economic, and political advancement (Parliament of New South Wales, 1967: 24, Part I).

On the surface, the shift from a policy of segregation and exclusion to a policy of assimilation and inclusion appears to represent a significant transformation in the relations between the State and the Aboriginal people. However, it has been pointed out that "assimilation was not a policy in itself, but a refinement of the continuing and much older policy of dispersal" (Read 1996: 209). In practice, assimilation did not mean a 'transition' for Aboriginal people from the Aboriginal way of live ('primitive') to the non-Aboriginal way of live (white, civilised). What Read claims is that in essence the opposite was taking place in many parts of Australia, i.e. the assimilation policy was cause segregation and dispersal, and furthermore, this dispersal was causing further breakdown within the social organisation of many Aboriginal communities. These 'hidden' effects of the assimilation policy were commented on by anthropologists⁶⁰ while the policy was still being enforced. Dr. D. F. Thomson of the Department of Anthropology of the Melbourne University, stated in a letter in the "Age" (23/5/63):

The policy of 'assimilation' which is being implemented in this State and elsewhere in the Commonwealth appears to be directed at the breaking down of the communal and family life of the Aborigines, and in Victoria, of dispersing them over the State ... I believe that our paramount concern must

⁵⁹ The term 'will choose to' was not in the initial act.

⁶⁰ Paul Hasluck, former Governor - General of Australia, claimed that "the only opposition to the assimilation policy [came] from anthropologists and communists" (cited in Davey 1963: 7).

be for the welfare of these people and that their dispersal throughout the State is not consistent with this objective (cited in Davey 1963: 7).

Furthermore, A. P. Elkin commented on Aboriginal resistance to assimilation claiming that

[a]ssimilation is going on but it is just a trickle. The main bulk [of Aborigines] is adopting voluntary segregation or withdrawal. They do not want assimilation in the form of dispersal amongst the white community ... They want to keep their own identity. This trend is not new but has lately become vocal (cited in Davey 1963: 6).

Stanner also addressed this aspect of the 'failure' of the assimilation policy claiming that the introduction of the concept of 'assimilation' and the actual process of assimilation itself did not go hand in hand (1974: 19 – 20 (1969); also Rowley 1971b). The assimilation policy of the mid-1900s was not always understood by those it was aimed at: fears of forced removal of children, the realisation that assimilation often meant regular and/or temporary separation from family, and an experience of segregation (differentiation) within the wider society were familiar. This confusion is evident in the recollections of a woman, now in her fifties, as she reflects on her younger days:

Things that I don't or can't understand ... why they were the way they were, without even having a look at those government policies that came in ... without even looking at those ... I *do* know for a fact that dad worked damn hard to stop the Welfare from taking us away from mom. And that's why he spent a lot of time away from home. He was working ... on the railways [and] ... him and a group of about five other Aboriginal men, all cutting down trees and making fences-post for the cockies⁶¹ to put up fences around their properties (Int.#05, 26.03.1998).

Earlier historical work by C. D. Rowley, following along similar lines to that of Read and Stanner, claimed that the segregation policy of the late 1800s and early 1900s had the "broad aim ... to segregate Aborigines from white society, and, by destroying Aboriginal language and culture, simultaneously prepare them for assimilation into it" (1970: 2; also Morris 1989: 157). When the histories of

⁶¹ The term 'cocky' means a farmer, usually a dairy farmer.

various Aboriginal communities in New South Wales are examined, it becomes clear that both Rowley's and Read's claims have substantial support. Apart from the few Aboriginal communities who have the benefit of nineteenth century ethnographic recordings of languages, sites, rites and other aspects of their traditional culture, most New South Wales Aboriginal people today have only managed to preserve fragments of their language. The loss of knowledge of land and culture is significant. Until the passing of the *Aboriginal Land Rights Act (NSW) 1983* and the *NTA 1993* (Cth), the history of the New South Wales Aboriginal people was one of dispersal (segregation) and institutionalisation. The implementation of an assimilation policy did not result in a painless immersion into urban settings. What frequently transpired was even further separation, combined with the loss of the emotional, economic and social support that accompanies living within an extended family on a reserve. However, the failure of the assimilation policy is not surprising when one considers its inherent contradictions. The target population of the assimilation policy was classified by the factor which the policy set out to demolish (i.e. percentage of Aboriginal blood); at the same time, people 'of Aboriginal blood' were encouraged to assimilate into white society, in other words to become 'white'. In order to become a part of the policy, one had to be Aboriginal, but the intent of the policy was to demolish Aboriginality. The contradictions and complications inherent in the assimilation policy become apparent in the following account of a woman who, in her early teens, sought work outside the home to support her sick mother. This took place when assimilation had been the active policy for nearly two decades (late 1950s), a time when this woman frequently 'passed' as white. However, her Aboriginality caught up with her. The woman recollects:

Then I went out and got a job and when I mentioned that my father was an Aboriginal man that got run over by a train at Geurie, I got the sack.

Her employer had hired her because she 'passed' as white. He fired her because she had been 'found out' to be 'part-Aborigine'. However, simply firing the woman was not sufficient. She continues her story, remembering that

[t]he [employer] rang the [Aboriginal] Welfare the next morning and told them that I'd walked off the job. So, the Welfare came down the next morning to see mom ... and they said 'we've heard that [X] ... left the job'. Didn't want to know the reason why. Or how it came about. They wanted to ship me off ... like a lot of the young girls around here ... (Int.#12, 17.09.1998).

From this woman's experience it is obvious that no, or almost no, (part-) Aboriginal people in New South Wales had the experience of smooth assimilation into the wider society, where colour of skin and percentage of Aboriginal blood were not a classifying factor. The system that told Aboriginal people to 'break out' of categories and assimilate, applied these same categories to classify prospective 'assimilatees'. The clearest example of these inherent contradictions can be seen in the introduction of the 'Certificate of Exemption'. The following account was given by a woman who is now in her forties:

My parents had the Certificate of Exemption. It's a little brown booklet, it's about so big, like a passport and on the front cover is the Coat of Arms ... and it has a Certificate of Exemption, and you open it up and it has the year and all those sort of things, and it has the person's full name and age, and it says what sort of caste you are ... whether you're half-caste or ... and you have a little photo in it. And you had to carry that on you all the time. If you wanted to get off the reserve or mission, you had to have the passport, the Certificate of Exemption. And the Certificate basically meant that you were exempt from being Aboriginal. And, so you could get a job. Your kids could go to school (Int.#11, 10.09.1998).

Aboriginal families, who were seen to reflect to some extent the morals and values of the dominant white society, were rewarded with a 'Certificate of Exemption', which meant that they had easier access to the various benefits available to non-Aboriginal citizens. These benefits included education, Commonwealth pensions, unemployment benefits, public housing in town, and access to/consumption of alcohol. The following is the response given by the woman in the previous account when I asked her to explain further this 'Certificate of Exemption':

Well, what you had to do was, you had to go to the Welfare Officer in town, or the Mission manager, to apply for one [Certificate of Exemption]. Then you had to get references from three white people, you know, a teacher, a policeman, whatever.

And they had to say that you were a good person, in white terms. And then if you got one of those then you had to leave the reserve or the mission, where you were living, and you weren't allowed to make contact with those people any more. We were not allowed to talk to them, even if they were your brothers and sisters, you weren't allowed to talk to them. And, mom and dad both got one, and I said to them 'why did you get them, because I think they're disgusting'. And dad said 'well, we wanted you to be able to go to school'. So when I grew up, and I started to learn about the policies, from Aboriginal studies, I could look back at that situation and go 'oh'. And suddenly realise that all the kids ... if you went to the school I went to, all our parents had Certificates of Exemption (Int.#11, 10.09.1998).

The condition for gaining and retaining the 'Certificate of Exemption' was the cessation of all contact with less assimilated Aboriginal relatives and friends who still lived on reserves (Goodall 1996; Gray 1998). This certificate became a token of assimilation into white society, authorising clearly a conditional and possibly a temporary 'white status'.⁶²

The 1960s were a period when formal colonial institutions ceased to have a role in the governance and management of Australian society at large. By the mid 1960s, the assimilation policy was being rejected in many circles. There were voices calling for 'integration', government policies on Aboriginal affairs were being challenged, and the calls for Aboriginal rights and self-determination were becoming louder (Attwood and Markus 1999: 8). The amendments to the Australian Constitution, implemented in the 1967 Referendum, represented the first steps towards what can be seen as somewhat more positive forms of discrimination. The 1970s saw a period of marked increase in Aboriginal activism, a time when further legislative changes took place, aimed at bringing to an end the racial discrimination of the colonial period. Following the legislative changes to citizenship in the 1970s, and the introduction of land rights in the 1970s and 1980s, there was an increased (re)awakening of cultural and historical identity among Aboriginal people in New South Wales. The 1980s saw the introduction of an official policy of

⁶² It should be noted that this account is based on the recollection of a single person in reference to her own family. The importance of the Certificate of Exemption might thus appear to be overemphasised. There were individuals and families who lived outside reserves and mission who did not hold the Certificate (e.g. Alice's family, discussed in Chapter Seven never held this Certificate).

‘multiculturalism’ which included recognition of the particular needs of Aboriginal people. From the early 1980s until the mid 1990s, the policies of the Federal Government were shaped by the promotion of cultural pluralism.

While the voices of Aboriginal people in New South Wales are increasingly being heard on various levels in the governmental structure, they still have not accomplished their goal. They still seek the right to define and control their own difference and the fundamental human right to survive as a group. This fight for self-determination and full human rights is being carried out in all areas of Australia by various organisations and interest groups made up of individual activists, Aboriginal and non-Aboriginal. However, this activism is not a recent phenomenon, for its roots reach back to the early 1800s.

4. 3. Inheritance Rights, Justified Rights: Aboriginal Activism in New South Wales

Now that we're educated and we do understand that we have rights, the same rights as the white people have, and that ... the legal system we're fighting under is their [white] legal system, ah, for our inheritance rights ... they're finding it very difficult to come to terms with it. Because we're using their law to get what is our justified rights. And they can't cope with it. Because they thought they had everything cut and dried, where they'd just, where they owned the country, and could continue to expand without concern or consideration for Aboriginal rights. And I think that's the biggest problem. And that's why I think ... there's a lot of ... problems arising now with Pauline Hanson's coming out. It's because people are now suddenly realising that Aboriginal people are actually fighting for their rights, and getting somewhere. I mean if we fought for our rights and got nowhere, it wouldn't be the stink there is now. Or if we just didn't fight for our rights and accepted the status quo, there wouldn't be the stink there is now (Int.#11, 10.09.1998).

Radical and sensationalised ideas and claims by the leader of the One Nation political party,⁶³ and the subsequent political following of One Nation in parts of Australia, may be seen by some as having forced the Federal Government to act on

issues that people fighting for Aboriginal causes have failed to get onto the agenda for over 200 years. Similarly, Aboriginal active participation in the fight for Aboriginal rights might appear to be the result of increased emphasis on education and welfare for Aboriginal people over the last three to four decades, followed by the legal recognition of land and native title rights. However, Aboriginal rights today are not just the result of governmental 'concern and consideration' for Aboriginal people: they are not just the side-effects of sensationalised claims by radical politicians; they are not just accidents of history; they are marked by active Aboriginal participation over the last 150 years.

In the period 1860-1880, Aboriginal people started taking matters into their own hands. In the early 1860s, Aborigines in the eastern part of the colony asked for land to be set aside for them. Land was duly set aside by the Lands Department in the 1870s and the 1880s ('Crown Land for the use of Aborigines') (Rowley 1971b: 62 – 63). Goodall (1996) gives a lengthy and well-supported account of this early Aboriginal land rights movements in New South Wales in the early 1860s. According to Goodall, this form of activism did not consist of a formal or a central organised body, but functioned basically on three distinct strategies: a direct approach to a government or press; the recruitment of a local white figure (i.e. a policeman, priest or missionary); direct action, (buying, leasing, reoccupying or squatting on traditional land) (1996: 75 - 84). At this time in history, the demands for land were to a great extent coming from Aboriginal people themselves, who had by that stage been interacting with white settlers for one or two generations. From this interaction they had gained an understanding of the different legal and ideological notions of land ownership held by the white settlers. Explanations vis-a-vis the failure of the Aboriginal reserves (farms) established between the 1820s and 1840s⁶⁴ were no longer valid. This time, the Aboriginal people themselves were demanding land (e.g. Attwood and Markus 1999). Between the 1860s and 1884, there were thirty-one Aboriginal reserves created, twenty-six in response to Aboriginal demand (Goodall 1990: 8 - 9). By 1891 there were seventy-eight reserves (22,242 acres), supporting over two thousand people (Long 1970). The

⁶³ Pauline Hanson's Maiden Speech in Pauline Hanson's One Nation, Vol. 1, July 1998: 1 - 2.

⁶⁴ The early missionary reserves, see section 4.4., and some attempts to turn Aborigines into farmers in the early 1840s, see section 4.2. (Attwood and Markus 1999; Reynolds 1992).

height of Aboriginal holding of land was in 1910, when there were 115 reserves in New South Wales (25,700 acres) (Goodall 1990).⁶⁵ However, by the early 1900s, land had become scarce in New South Wales, most having been taken up by white farmers and pastoralists. In most parts of New South Wales, Aboriginal people were now in direct competition with white settlers over access to land. Following the depression of the late 1800s, changes in land use among the settlers, and the increasing population in the colony, prompted the Aboriginal Protection Board to turn the page in 1911. By 1915, moves were in place to re-seize Aboriginal reserve land and rent it to whites (Goodall 1990: 21).

New groups and organisations, with more extensive memberships and more formal politics, were born out of this recurrence of pushing Aboriginal people to the fringes of white settlements (Goodall 1996; 230 – 246, also 1982). The Australian Aboriginal Progressive Association (AAPA) was formed in New South Wales in 1925. The chief spokesperson for the organisation was Fred Maynard, while the Organising Secretary, the only white member and a volatile spokesperson for Aboriginal rights, was Elizabeth McKenzi-Hatton. (Attwood and Markus 1999: 58 – 60). This organisation was the first to create links between the various Aboriginal communities in New South Wales. By late 1925, eleven new AAPA branches had been set up along the north coast of the State. The two central demands of the AAPA were “enough good-quality freehold land for each Aboriginal family to sustain themselves by farming and the immediate cessation of the removal of children from their families” (Goodall 1996: 153). However, matters regarding land soon became more dominant within the organisation, and by late 1925 the AAPA was publicly calling for freehold land and full rights of citizenship. In addition, they demanded the abolition of the Protection Board (McGregor 1997: 115-116; Wilkie 1985: 6).

In the final analysis, the AAPA did not gain much support from either the media or the general public and, after a very active year in 1927, it disbanded without any apparent explanation. A further organisation, with more radical ideas, attracted substantial media attention in 1926-7. This organisation, founded by Colonel J.

⁶⁵ There are some disparities about these numbers, Long (1970: 28) claims there were about 170

Genders in 1925, was known as the Aborigines Protection League (APL) (Attwood and Markus 1999). The organisation consisted of several influential people who petitioned the Commonwealth in 1927 for the creation of an experimental Aboriginal State, wherein Aboriginal people could live as they wished with minimal intervention. The idea was that this Aboriginal State, which should be established in Arnhem Land, would be run along the lines of Western values (non-compulsory) and administered initially by white people, but with the option of eventually gaining self-governance (Attwood and Markus 1999: 16). While the original idea was that the residents of this state would be 'tribal' or 'full-blood' Aborigines, it did not exclude Aborigines located in more densely settled areas, who "have no regular approved employment or are hangers-on to the fringe of civilization [and] should be removed far away from possible contaminating contacts" (quote from the Petition for a Native State, cited in Goodall 1996: 161, 374). The most striking component of the APL's proposal, based on an argument that Aboriginal people had entitlement to land, was the recommendation that Aboriginal people would define the boundaries of this State, that they would be self-governed and in control of whosoever entered their land. It took over three decades for these recommendations to become a part of any discussion about Aboriginal affairs among policy makers in Australia (Rowley 1970; see also McGregor 1996). Various aspects, like entitlement in land and questions of a treaty, are still the major issues in the Reconciliation process in 2001 (1991 – 2001) (e.g. Dodson, P. 2000; Langton 2000).

The 1930s and 1940s witnessed a time of great economic and social change in Australia. While demand for access to land remained a key issue for Aboriginal activists, they were now forced to change their tactics in order to retain political and moral support for their cause during times of depression and war. Despite claims that government policies and legislation became increasingly harsh and discriminatory during this time (Attwood and Markus 1999: 58), this was also a time when Aboriginal affairs in Australia ceased to be a 'domestic affair'. Australian governments were increasingly forced to take into account international human rights legislation (Reynolds 2000).

There were three major Aboriginal organisations established in the 1930s, all with firm regional bases, led by Aborigines, but supported by non-Aboriginal activists (Attwood and Markus 1999: 58). The Australian Aboriginal League (AAL), led by William Cooper, was established in 1934. The AAL grew out of the protests of the Cumeragunja Aboriginal people, who were being denied the dole on the basis of being 'too black', while at the same time being refused Aboriginal rations on the basis of being 'too white' (Goodall 1996: 185). Although the AAL was established as a community-based organisation, its campaign was on a national level, and aimed at the Federal government. Later research has revealed that William Cooper, along with Arthur Burdeu, the only non-Aboriginal member, wrote numerous letters to both the Commonwealth and the New South Wales governments, to other political organisations, and to the newspapers in Australia and Britain. In addition, he sent the following petition to King George V:

TO THE KING'S MOST EXCELLENT MAJESTY, IN COUNCIL

THE HUMBLE PETITION of the undersigned Aboriginal inhabitants of the
Continent of Australia respectfully sheweth: -

THAT WHEREAS it was not only a moral duty, but a strict injunction, included in the commission issued to those who came to people Australia, that the original inhabitants and their heirs and successors should be adequately cared for;

AND WHEREAS the terms of the commission have not been adhered to in that –

(a) Our lands have been expropriated by Your Majesty's Governments, and

(b) Legal status is denied to us by Your Majesty's Governments;

AND WHEREAS all petitions made on our behalf to Your Majesty's Governments have failed.

YOUR PETITIONERS humbly pray that Your Majesty will intervene on our behalf, and, through the instrument of your Majesty's Governments in the Commonwealth of Australia –

Granting us the power to propose a member of Parliament, of our own blood or white men known to have studied our needs and to be in sympathy with our race, to represent us in the Federal Parliament

AND YOUR PETITIONERS WILL EVER PRAY.

This petition was written in 1933 and signed by more than 1800 Aboriginal people across Australia. The Federal government, however, refused to forward the petition to England (Attwood and Markus 1999: 144; also Goodall 1996: 187).

The AAL fought for just recognition of Aboriginal participation in the economy of the Australian society. It called for equal human rights, the foundation for their demands being based on access to land as the prior owners of Australia. The AAL claimed that equal access to land was the means towards Aboriginal self-sufficiency and future development in Aboriginal communities (see Goodall 1996: 230; also Peterson and Sanders 1998: 10 - 11). At the same time, Aboriginal people in the west of the State were uniting under the name of the Aboriginal Progressive Association (APA). The APA was formally established in Dubbo in 1937 by William Ferguson, Jack Patten and Pearl Gibbs. While the APA, like the AAL, campaigned for equal rights for all Aboriginal people, by virtue of its operational base being in Dubbo, its agenda was influenced by the special needs of Aboriginal people in the west of the State (1982: 287; Rowley 1971b: 196 - 200). There is limited knowledge or recognition of nineteenth century activism among Aboriginal people of Dubbo, but the activism of the 1930s and 1940s is well known and remembered. The APA was especially vocal in the years just prior to World War II. C. D. Rowley (1971b: 199) emphasised the fact that three decades later, the protests of 1938-9 were still remembered by local Aboriginal people. Six decades later the names of William Ferguson, Jack Patten, Pearl Gibbs, Tom Peckham and Ted Taylor remain household names among most Aboriginal people of Dubbo.

Well, our uncle was an activist ... he was on the first movements for Aboriginal rights in Sydney and ... then our mother married a man called Alan Ferguson, who was a son of William Ferguson, that [who] ... secured the right for Aboriginal people in the Referendum in 1967. So we've been very close to all the activism ... things that happen (Int.#07, 24.04.1998).

In early 1938, another branch of the APA was established, incorporating Aboriginal communities on the eastern coast of New South Wales. This new branch was officially the revival of the Australian Aborigines Progressive Association (AAPA) of the 1920s with Jack Patten as its main spokesperson. In late 1937, these three

organisations (the AAL and the APAs) set up public campaigns and press interviews which, combined with the general attention which the 1938 Day of Mourning attracted among the white population, set in motion the aforementioned inquiry into the workings of the Aborigines Protection Board (Attwood and Markus 1999; Goodall 1996)

There are four important points that should be made here pertinent to the operation and the effects of the aforementioned organisations. Firstly, although the AAL and both divisions of the APA were united in representing all Aboriginal people who shared the experience of the oppression and the dispossession of the colonial process, each operated on the basis of different regional experiences and needs. Secondly, while the AAPA and the APL of the 1920s placed importance on difference when arguing the needs of - and seeking human rights for - the Aboriginal people, the movements of the 1930s were calling for civil and economic rights on the bases of equity. All these organisations based their demands on the basis of being original owners of the land. The third fact is that the political activities of these organisations were effectively tilted more in the interests of Aboriginal people in settled Australia, as opposed to the interests of Aborigines in the more remote areas of Australia, who were affected more by the decisions of station owners (pastoralists) than directly by government policies and agencies. The fourth aspect, which has proven very significant in the ongoing fight for Aboriginal rights, is the emergence and shaping of a shared conscience and identity, based on a collective experience of colonial history. This emergence of a shared 'Aboriginality' became especially strong in the 1960s and 1970s. As Aborigines in settled Australia gradually came into contact with Aborigines in the more remote areas, the notion of a shared history gave support to notions of a shared culture that was increasingly represented as 'traditional' (Attwood and Markus 1999: 20; Goodall 1996: 230).

During the 1960s and 1970s, there was a resurgence in Australian Aboriginal land rights movements. This was a time of increasing civil rights movements, such as those among African Americans in the United States and Women's Liberation in Western countries. The demands of these movements greatly inspired Australians fighting for Aboriginal rights, resulting in the foundation of various national organisations, which among other things focused on establishing a new relationship

between Australian Aborigines and the Australian State. This was a time of evolving Aboriginal “ethno-politics ... [which had] their own discourse regarding indigenous rights and unceded sovereignty, characterising them as moral levers for reclaiming indigeneity as a basis for Aboriginal-State reconstruction” (Fleras 1999: 215). One of the most important organisations founded at this time was the Federal Council for Aboriginal Advancement (FCCA, later Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCAATSI)) which was formed in 1957 (Willmot 1986: 12-13). In the beginning, FCAATSI advocated Aboriginal citizens’ rights based on equality rather than difference: it played a major role in the campaigns that led to the constitutional changes in the 1967 Referendum. In the late 1960s, the agenda of FCAATSI underwent significant change, rejecting the policy of assimilation and insisting on a policy based on ‘integration’, whereby Aboriginal people would retain their identity and difference (Attwood and Markus 1999: 20). Some of the outcomes of these ideological and conceptual changes included alterations to claims for Aboriginal rights to land, as well as increased support from left wing social groups. In 1966, Aboriginal station workers of the Gurindji language group went on strike and walked away from the Wave Hill station in the Northern Territory, demanding the return of the land which had always been theirs. This action of the Wave Hill people immediately gained the support of leftist unions and social groups, which had been sympathetic to Aboriginal rights since the 1930s (Doolan 1977; also Goodall 1996: 324 - 326). This was also the first time that Aboriginal people’s demands for land were labelled with the term ‘land rights’ (Attwood and Markus 1999: 20). Whereas earlier demands had been based on either humanitarian protective ideals, or demands for civil, human and citizen rights, in the 1960s there was a definite shift towards ‘Aboriginal rights’ and ‘land rights’. It was not until the 1960s that the present day concept of ‘Aboriginal land rights’ was first introduced (Attwood and Markus 1998, 1999; Goodall 1996; Merlan 1998).

In 1983, the Hawke Federal Labor Government came to power with a commitment to legislate for Aboriginal land rights. The Government introduced a five point package, which included inalienable title to vacant Crown land, compensation for lost land, protection of sacred sites, access to mining royalties and a right of veto to mining on Aboriginal land (see Jennett 1990; Griffiths 1995). These five points, which were to be implemented on a national level, immediately met with strong

protests. These protests were especially strong among members of the Central Land Council (CLC) and the Northern Land Council (NLC) in the Northern Territory, due to the fact that if these points were implemented, the inevitable result would be a significant 'watering down' of their rights under the *ALRA (NT) 1976*.⁶⁶ All States and the Northern Territory claimed independent rights to land. As a result of which Prime Minister Hawke promptly watered down his five point plan to a 'preferred model'. In 1988, the Hawke administration backed away from national land rights, on the basis that the wider community was supposedly out of sympathy with the Aboriginal cause. The government introduced a new policy known as *Foundations for the Future*. This lack of sympathy was based on a national poll whereby the majority said 'No' to any treaty with the Aboriginal people that recognises their prior ownership and occupation of the land (Griffiths 1995). Although the nation refused to recognise Aboriginal land rights on a national level, most individual States had notwithstanding passed some form of Aboriginal land rights legislation.⁶⁷

In 1983 the New South Wales Government passed the *Aboriginal Land Rights Act (1983) (ALRA (NSW) 1983)*, establishing a three-tier system of land councils to represent Aboriginal interests in land (Ridgeway 1997). The *ALRA (NSW) 1983* has

⁶⁶ Similar concerns have been raised in relations to the fact that the rights obtained under the *ALRA (NT) 1976* are much greater than the rights obtained under the *NTA 1993* (Cth) (see Chapter 9.1.).

⁶⁷ - Victoria (1970) the establishment of the Framlingham and Lake Tyers Aboriginal Trusts, where each community was given the responsibility to manage their former reserves - (1987) The Aboriginal Land (Lake Condah and Framlingham Forest) Act returns Aboriginal land;

- Northern Territory Aboriginal Land Rights Act (1976), where land reverted to Aboriginal ownership under freehold title (federal legislation);

- Queensland (1982) introduction of a system of land ownership for Aboriginal and Torres Strait Islander communities under a title called Deeds of Grant in Trust – Aboriginal Land Act (1991), provided inalienable freehold title to lands held under the Deeds of Grant Trust (Aurukun & Mornington Islands);

- South Australia set up a Land Trust in 1966 and introduced Land Rights Acts, Pitjantjatjara (1981), interests vested in body corporate, and Maralinga Tjarutja (1984), interests vested in traditional owners;

- New South Wales set up a Land Trust in 1974. In 1983 New South Wales introduced the Aboriginal Land Rights Act (1983), a three-tier system of land councils (state, regional and local) to represent Aboriginal interests in land;

- Western Australia (1972) The Aboriginal Affairs Planning Authority Act creates the Aboriginal Land Trust - (1985) The Aboriginal Land Rights Bill is defeated - (1993) The Land (Title and Traditional Usage) Act attempts to subvert the Mabo findings (invalidated by the High Court in 1995);

been described as a form of ‘compensation legislation’ which does not recognise “the continued existence of traditional Aboriginal rights to land and resources” (Ridgeway 1997: 65). The *Act* fails to grant New South Wales Aboriginal people any mineral rights, and offers very little protection over heritage sites. Following the passing of the *ALRA (NSW) 1983*, the Local Aboriginal Land Councils (LALCs) were given the power to claim Crown land from the State Government in accordance with the Act. The *ALRA (NSW) 1983* differs in fundamental ways from the Acts of the other States and the Northern Territory, in that it favours economic use over cultural and social use in relation to Aboriginal ownership of land. This difference is due to both the extent and impact of white settlement in NSW and the impact of resettlement in the 1960s and 1970s, reflected in the fact that under the *ALRA (NSW) 1983*, the claimant LALCs are not required to show any traditional attachment to the land to which they lay claim. The *Act* was amended in 1990, with a shift of focus to a centralised New South Wales Aboriginal Land Council.

The major Aboriginal institution on a national level today is the Aboriginal and Torres Strait Islander Commission (ATSIC), which was established in 1990 after a few years of intensive calls for improvements to the situation of Australian Aborigines. These years were characterised by highly vocal and visible Aboriginal activism, focusing on the broken promises of the Hawke government and leading up to the 1988 Aboriginal ‘Year of Mourning’ as white Australia celebrated its Bicentenary. The Minister for Aboriginal Affairs spent much of 1987 consulting with Aboriginal political leaders about restructuring the Aboriginal administration. In 1988, a new body of administration (ATSIC) was formed, with the aim of negotiating and implementing new forms of understanding about Aboriginal affairs. While ATSIC effectively operates under the Minister for Aboriginal Affairs, it wields some executive powers over government programmes and funding. ATSIC incorporates elected regional councils and is controlled by a board of seventeen elected commissioners and two government appointees (see <http://www.atsic.gov.au>; also Bell, D. 1990; Peterson and Sanders 1998).

- Tasmania (1995) Aboriginal Lands Act, establishes the Aboriginal Land Council of Tasmania and an Aboriginal Land Fund; certain sites vested in the Land Council in perpetuity (Encyclopaedia of

The major body for Aboriginal land rights in New South Wales today is the New South Wales Aboriginal Land Council (NSWALC). The NSWALC consisted of representatives from the thirteen Regional Aboriginal Land Councils in New South Wales (RALC). These thirteen RALC were comprised of representatives from 118 Local Aboriginal Land Councils (LALCs), which serve nearly the whole land area of New South Wales. The LALCs are autonomous community organisations with wide-ranging powers in regard to land and related assets. The executives of the LALC are voted into office by adult Aboriginal people in the community. It is important to note that the NSWALC differs from similar organisations in other States. Because of the intensity of colonial impact on many areas of New South Wales, the NSWALC was guaranteed funding by law under the *ALRA (NSW) 1983*. This funding consisted of 7.5 percent of the State land tax for fifteen years (from 1983-1997). Half of this income was to be spent annually on housing and on the acquisition of land within Aboriginal communities in the State. The other half was to be invested by a special commission with the aim of the NSWALC reaching financial independence by the end of 1997. These fifteen years of guaranteed funding have given the NSWALC more political freedom than other Aboriginal State Councils, which have to renew their agreements with their State and Territory governments annually (Ridgeway 1997; Rowley 1986). However, this financial arrangement came to an end in 1998 with the introduction of the Sunset Clause.⁶⁸ And while the NSWALC is still the major body for Aboriginal land rights in New South Wales, the nature and the running of the LALCs differs throughout the State. The nature of local politics and the role of the LALC in Dubbo will be discussed in Chapter Six (6.2).

Thus since the 1970s, Aboriginal political activism in New South Wales has been characterised by a politics of identity and difference. While demands for land have provided a principal focus for activists, the claim for Aboriginal cultural heritage has also been of major importance. Growing significance has been given to establishing the history of the Aboriginal people and Aboriginal communities; similarly, there has been a great increase in the use of the judicial system to challenge colonial

Aboriginal Australia 1994; Havemann 1999b)

⁶⁸ Sunset Clause is a "clause in a bill which terminates the act or brings it up for review at the end of a specified period of time" (Macquarie Dictionary 1991 (1990)).

history (e.g. Attwood and Markus 1999: 23). Since the *Mabo (No. 2)* ruling in 1992, and subsequently the *NTA 1993* (Cth), Aboriginal affairs have become one of the most important issues facing both politicians and the general community in Australia. The last decade has seen Aboriginal leaders for the first time being able to sit down at the same table as the governing authorities of Australia, negotiating the needs and the rights of the Australian Aboriginal people. And, while the politics of identity, Reconciliation, demands for equal rights and recognition of the specific needs of many Aboriginal people and communities are the main issues facing Aboriginal leaders today, the problem of land rights remains an underlying factor in most arenas. The majority of Aboriginal communities in New South Wales are faced with the fact that there is very little left of their traditional lands to which they can legally claim rights and titles. Apart from some small pockets of vacant Crown land, the only lands that they can rightfully claim are the areas that housed their ancestors on reserves and missions.

4. 4. New South Wales Reserve Policy: The Dubbo Perspective

The first land which colonial Australia set aside for Aborigines was in the form of land grants to missionaries. In 1825, 10,000 acres near Lake Macquarie were set aside for an Aboriginal settlement. In 1832, a mission was established at Wellington Valley (Woolmington 1973, also Wilkie 1985). While the missionary reserves grew out of land management policies, their aim was also to ‘civilise and Christianise’ the local Aboriginal population (Attwood and Markus 1999: 8). While the colonial administration saw both the management and distribution of land as a means of social control in the colony (basically over squatters), the establishment of missions and reserves was a way of controlling the Aboriginal population (Goodall 1996). These early institutions were thus intended to actively suppress Aboriginal social organisation, i.e. tribal law and customs. They were informed by ‘paternalistic’ ideas and often denied Aborigines the rights which they had previously enjoyed (Attwood and Markus 1999; Goodall 1996; Long 1970). As has been discussed earlier, these objectives were also embodied in later ‘protective’ legislation, combined with the increasing problematisation of Aboriginal people on the land in the wake of increased pastoral expansion

(Attwood and Markus 1999: 7-8; also Parliament of New South Wales, 1980: 41-42).

Heather Goodall (1990) emphasises the difference between the creation of, and the nature of, Aboriginal reserves established in the period between the 1860s-1890s, and the reserves established in the second quarter of the twentieth century. Goodall claims that Aboriginal holdings of reserve lands were at their height in 1910, with a total of 115 reserves. Over half of these reserves (65 percent) were established by Aboriginal initiative, and until 1920-30, the majority were controlled by Aboriginal people themselves.

At this time, an Aboriginal reserve was defined as

an area of land reserved from sale or lease under any Act dealing with Crown lands, or given by or acquired from any private person, for the use of aborigines ... [u]nder this policy the Aborigines Protection Board provided shelter, food and clothing for aborigines gathered together on reserves, often situated well away from towns (Parliament of New South Wales 1967: 4, Part II).

This definition clearly suggests that although a number of Aboriginal reserves were established because of Aboriginal initiative, the final administrative decisions came from the government, with policies of protection and segregation still in force. It is important then, to recognise that people of Aboriginal descent did not necessarily choose to live apart from others in New South Wales (see Long 1970). While the establishment of reserves was not necessarily seen as a negative process by many Aboriginal people, the policy of segregation was another matter. This policy was the direct result of demands from white settlers, albeit signified by a double standard. Goodall has pointed out that since the policy of segregation was meant to keep Aboriginal people out of towns (and off the land), the Aboriginal reserves in New South Wales were generally located just out of sight, but close enough to offer ready access to a domestic work force (1990: 13; see also Attwood 1999: 8; Long 1970: 28 - 29; Parliament of New South Wales 1980: 43; Read 1996: 30). Reserves were often located on rivers outside country towns, and varied in size from camping reserves to large blocks, which were farmed and provided support for many families. Reserves in New South Wales were generally smaller than

reserves in less densely settled parts of Australia, being designed to meet the needs of relatively small numbers of Aboriginal people in local areas. Due to the participation of many residents in the general local labour market, no Aboriginal reserve in New South Wales became a fully institutionalised closed community (Long 1970: 90; also NSW National Parks & Wildlife Services, 1988).

While New South Wales Aboriginal reserves differed in size, degree of institutionalisation and self-sufficiency from reserves in more remote areas of Australia, there was also diversity within the State. Goodall (1990: 10 - 13) discusses the difference between various areas in New South Wales, and how reserves were limited to a few regions, being based on local social, economic and demographic conditions. On the coast and in the south-east of the State, Aborigines had been forced into camps on the fringes of towns when their labour was not needed, and as the white demand for land increased. It was during the 1860s and 1870s that the earliest demands for land arose among Aboriginal people. These demands eventually led to the establishment of reserves. However, in the Central Division where there was still a demand for labour, it was convenient for white pastoralists to have Aboriginal people living on their land. Furthermore, Aboriginal people were able to collect some of their own subsistence and to construct their own housing. In the Western Division, Aboriginal employment may have fallen as stock levels were reduced in the late 1800s: changes in land use and technological advancement proved slower here than in the coastal areas, so Aboriginal people were able to retain access to land as the overall organisation of the farming industry did not alter much. There was thus a very different form of pressure brought to bear on Aboriginal people in the west and north of the State, where pastoral activity lasted well into the 1900s, and where Aboriginal people lived on small reserves or on pastoral stations within their traditional lands. On the other hand, in the east and south of the State, where small-scale agriculture was on the increase, Aboriginal people were actively being pushed off their ancestral lands towards the fringes. Due to these differences, Aborigines in the north-western part of the State rarely requested land, nor did they attempt to reoccupy specific patches of land, since the land was rarely suitable for small-scale agriculture. Areas large enough for pastoral use were not made available as reserves. At the same time, most Aboriginal people in the north-western part of the State maintained their connection to their ancestral

lands (Rowley 1971a: 173).⁶⁹ For this reason, many Wiradjuri traditional owners claim to

have continuous histories in place, despite restrictions on the use of the lands with which they identify ... genealogies ... have ... link[ed] ancestors of direct descent with the place where their descendants are now living, and [the genealogies] go back to the beginning of the nineteenth century and thus before extensive European occupation ... (Macdonald 1997a: 67).

A very brief sketch of the establishment of the Talbragar Aboriginal Reserve in Dubbo might illustrate how this specific context has come into being.⁷⁰ The people who lived on the Aboriginal reserve in Dubbo can trace their ancestry, and by extension their connection to the land, back to the mid/late-1800s. The Talbragar Aboriginal Reserve in Dubbo was established in 1898, nine kilometres north of the town. There are few surviving records which explain the decision behind its establishment, but what can be gathered from local historical accounts is that the reserve was established as a segregated spot for the protection of the surviving Aborigines of the area (Dormer 1988). However, while the Talbragar Reserve was established outside the town, thus possibly indicating a removal of an 'Aboriginal problem' from the town, the people of the reserve frequently sought employment in Dubbo.

The history of the establishment of Aboriginal reserves in New South Wales reflects both the demands and the needs of Aboriginal people at various times, as well as the responses of the government of the day. However, the composition of the population on the reserves varied greatly through time. Various accounts provided by the people and the descendants of the people who lived on the Talbragar Reserve outline how government policies at each time defined and controlled the populations on New South Wales reserves. After 1909, when the Aborigines Protection Board gained power over the movements of Aboriginal people, the Board developed several approaches to reduce Aboriginal reserve populations. The most common ones were designed to prohibit 'non-Aborigines'

⁶⁹ It should be pointed out that pastoral activity lasted into the 1970s in the far West, and is not quite dead yet (Goodall 1996).

⁷⁰ The history of the establishment of the Talbragar Reserves is discussed in Chapter Five.

from entering or remaining on reserves (e.g. Read 1996: 206). The residents of the Talbragar Reserve were not exempt from this policy. One of the matriarchs of the reserve, Sarah (Taylor) Burns and her husband fell under this mandate. Sarah's grand daughter recalls:

[My grandmother's] second marriage was to a white man ... and his father owned a lot of land back out there, outside of [Dubbo, on] the other side of the river. And then he [grandfather] moved on to the reserve with her. But government policy, I think, told him to get off the Aboriginal land. So, what he did was, he had a bit of land, just outside the boundaries ... so he fenced in a little area outside and lived there (Int.#05, 26.03.1998).

Most men who lived on the reserve had to seek work outside the reserve, frequently outside the Dubbo area. Consequently, the daily running of life on the reserve was often in the hands of the women. The role and the power of the women, and a few older men, is apparent when talking to the descendants of the people of the reserve. The major figures in any account about life on the reserve are the mothers and grandmothers and a few older men. Grandfathers and fathers are not necessarily absent from these accounts, but their influences are mostly based on their knowledge about the wider society outside the reserve, as well as knowledge about the land. Transmission of traditional knowledge such as oral histories, myths and beliefs were mostly conveyed through women and older men who had little or no contact with the white world outside the reserve.

Towards the end of the 1940s, the Aborigines Protection Board started to pressure the residents of smaller Aboriginal reserves to move onto larger reserves as many of the smaller reserves were revoked (Parliament of New South Wales 1980: 43). After 1940, following the implementation of assimilation policies, larger reserves were gradually reduced in size, so that by the 1960s, all were less than 1000 acres (Long 1970). In 1966, the total area of Aboriginal reserve land was some 6000 acres supporting approximately 6000 residents (Parliament of New South Wales, 1967: 19, Part II; Rowley 1986: 55). By the 1970s, many reserves had been revoked, the land often going to local white farmers. The surviving reserves were transferred to the NSW Aboriginal Lands Trust. The Aboriginal Lands Trust was incorporated by the *Aborigines (Amendment) Act 1973 (No. 35)*, with the aim of

transferring to Aboriginal people the title to lands classified as Aboriginal Reserves in New South Wales. Following the *ALRA (NSW) 1983*, titles to these reserves were transferred to the Minister for Aboriginal Affairs pending their transfer to relevant Aboriginal Land Councils (*Aboriginal Land Rights Act (NSW) 1983*).

The major reason given for the closure of Aboriginal reserves was that the reserves hindered assimilation (Long 1970). However, the majority of residents on Aboriginal reserves did not wish to leave the reserves and move into towns (Parliament of New South Wales, 1980: 45). This becomes very evident when discussing the Talbragar Aboriginal Reserve in Dubbo with local people.

Well, people would probably still be living there today, only ... ah, the Council decided that we were, that it was an eye-sore out there, or something ... they just sent a bulldozer in and knocked them down and people had to move into town. They had no say. And the only house that was left standing was Uncle Alec's. And I think the only reason they left that standing was because of his work in the Police ... But everybody's else's house got bulldozed down .

When the houses were bulldozed down ... I remember that really clearly, because all the aunts and uncles were really upset ... because they had to leave their homes and ... and at that stage it was the, ah, now that I can look back at it, it was the salt and pepper housing, you know, they called it. They peppered Aboriginal people amongst the white community. And, in the hope that it ... forcing them to live next to white people they'd take on the cultural values of the white people around them. And they weren't allowed to live next door to any other Aboriginal people ... so, yeah, interesting (Int.#11, 10.09.1998).

Following the passing of the *ALRA (NSW) 1983* all remaining Aboriginal reserve land in New South Wales reverted to Local Aboriginal Land Councils. As mentioned earlier, there were only a few thousand acres of land that were still reserved for the use of Aborigines in the late 1960s. Before the passing of the *ALRA (NSW) 1983*, there were other forms of legislation passed that allowed non-Aboriginal people to retrospectively claim land for farming, sporting and other activities (Rowley 1986: 97). So most Aboriginal communities in New South Wales had very limited areas of land which they could legally claim in 1983, something which has not changed much with the implementation of the *NTA 1993 (Cth)*.

These limitations to legally claimable land, and the process and obstacles encountered in claiming land and title, will be discussed in Chapters Eight and Nine.

The specific history and process of colonisation in Australia has created the context for today's claims to history, culture, land and title by the Aboriginal people of New South Wales. From the early days of white settlement in Australia, colonial authorities, later governments, and even the High Court have introduced and implemented various laws and policies designed to deal with Australian Aborigines. These forms of legislation and policies vary from initial neglect by early colonial authority, to policies of assimilation, integration and self-management, to calls for (and against) self-determination, treaty and reconciliation, and finally to judicial overruling of 'legalised' myths. The *Mabo (No. 2)* ruling of 1992 ostensibly destroyed the myth of *terra nullius* in Australia. However, a decade after the *Mabo (No. 2)* ruling, Aboriginal people are still fighting various legal, historical, social, political and cultural constructions which continue to obstruct the full recognition of their rights as the original people of Australia. Furthermore, the recognition of native title has added a new dimension to a history extending over more than two centuries of Aboriginal demands for land.

Both economic and legal relationships to land in New South Wales (Aboriginal and non-Aboriginal) have changed since the time of colonisation. But, as mentioned before, many New South Wales Aboriginal people still claim special relationship to their lands.⁷¹ While the experience of oppression among Aboriginal people across New South Wales is similar in ways, thus serving to unite the people in a common struggle, there is also both an historical and regional diversity between different groups and their experiences of the colonial process. Any comprehensive historical and contextual analyses of Aboriginal activism and demands for land rights need to take into account adaptation, the strength and persistence of Aboriginal cultures, and differences in specific local and historical context. For the purpose of this thesis it is, therefore, essential to examine the local historical context of white settlement in Dubbo since the early 1800s.

⁷¹ This relationship/connection among the Aboriginal people of Dubbo will be discussed in Chapter Nine.

Chapter Five

Dubbo - the 'Hub of the West'

This chapter outlines the historical, social and economic process of white settlement on the banks of the Macquarie River, specifically where the town of Dubbo stands today. I will examine various existing documents and records describing encounters between the first white settlers and the local Aboriginal population. The discussion seeks to raise and compare issues relating to the natural and cultural environment in the Dubbo area both at the time of white settlement and today. This chapter will also provide descriptions of the establishment of the Talbragar Aboriginal Reserve, the people who lived there, and the development of the reserve. The aim of this chapter is to establish a base for discussion in the following chapters of social relations, along with the internal social conflicts that beset the Aboriginal community in Dubbo. In addition I will examine the historical and social processes which have formed the political power bases, the internal diversity, and the infrastructure of the Aboriginal community in Dubbo today.

5. 1. The Arrival of the 'New Comers',⁷²

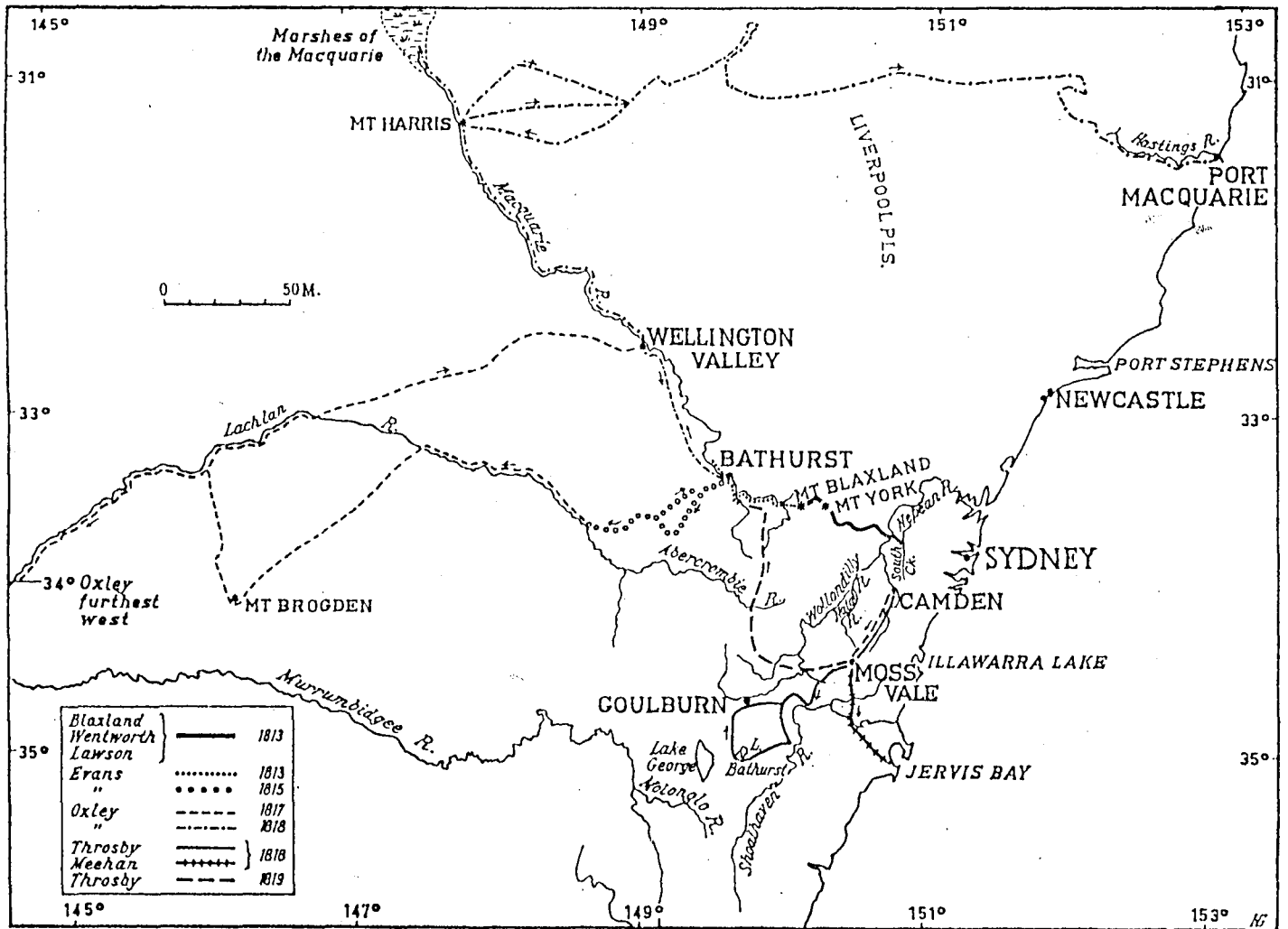
I shall not in this place attempt to describe the rich and beautiful country that opened to our view in every direction. Alternate fine grazing hills, fertile flats and valleys, formed its general outline ... as far as the eye could reach, in every direction, a rich and picturesque country extended, abounding in limestone, slate, good timber, and every other requisite which could render an uncultured country desirable ... whilst a noble river of the first magnitude affords the means of conveying its productions from one part of the country to the other ... [W]e indulged ourselves in the probable speculation, that where limestone was found in such

⁷² Joseph Banks reported that "there was no probability while we [the English] were there of obtaining anything either by cession or purchase as there was nothing we could offer them they would take except provisions and those we needed ourselves". According to Banks, the local Aborigines had no apparent attachment to the land and would "speedily abandon the Country to the New Comers" (quoted in King, R. J. 1986: 77).

abundance as in this country, quarries of marble would also be discovered not far beneath the surface, as is usual in other countries most abounding in this useful stone (Oxley 1820: 189-193, 374).

One quarter of a century after the establishment of the penal colony at Sydney Cove, land started to become scarce. The influx of free settlers, and the continuing arrival of convicts, resulted in a significant increase in the population of the colony. All land suitable for cultivation or grazing had been given as grants to officers and convicts in return for their good conduct and loyalty; as well, land was given to increasing numbers of free settlers. The droughts of 1812-1813 took a toll on grassland, with pastures for sheep becoming inadequate. Further expansion to the south-west was hampered by the scrubby nature of the hill country at Picton, while to the west, the Blue Mountains stood as a seemingly impenetrable barrier. The need to find a passage through the Mountains in order to expand the settlement from the coastal plains – an expedition previously motivated by adventure and fame - now became essential for the survival of the colony. In a private endeavour undertaken in 1813, Gregory Blaxland (1778 - 1853), William Wentworth (1790 - 1872) and William Lawson (1774 - 1850) finally managed to find a route through the mountains. In early 1814, William Cox was enlisted by Governor Macquarie to build a road across the mountains. Two years later, the Governor and his entourage set out from Emu Plains and travelled the newly constructed road through the Blue Mountains down to the plains, where Governor Macquarie promptly proclaimed the town of Bathurst (Clark 1968: 277-278; Barnard 1969 (1963)).

Following the establishment of Bathurst, Governor Macquarie commissioned John Oxley to explore the interior of the continent further to the west. Oxley made two journeys into the interior, the first, in early 1817, taking Oxley and his party west along the Lachlan River. Initially this expedition proved a great disappointment, the land they passed through consisting of mainly desolate, dry wilderness or waste barren morasses (Clark 1968: 297-302) (see map page 111). After travelling for more than three months, and dogged by diminishing provisions and low spirits, Oxley and his men decided to head towards the Macquarie River, planning to



This map is taken from Manning Clark (1968: 301). *Land Exploration*

return to Bathurst. However, two weeks after Oxley and his party commenced their return journey, they came across fields of grassy and fertile country. Oxley and his men had reached the Macquarie River in the vicinity of today's town of Wellington. Due to the discovery of this fertile land, and in the hope of discovering inland waters and river systems that would greatly advantage further settlement, Oxley was commissioned to lead a further exploration in 1818. This journey took him further west along the banks of the Macquarie River, through the Wellington Valley into the present day area of Dubbo.

The passages at the beginning of this chapter are taken from Oxley's journals that were written during his explorations in 1817-18. Apart from providing a valuable topographical description of both the Wellington Valley and the country beyond, these extracts bear witness to the pressing call for more grazing land for the colony, hence the importance placed on the exploration of the interior of the continent. However, Oxley's words not only attest to the fundamental needs for the survival of a growing population in the colony. They also bear testimony to the cultural baggage carried by the new arrivals. Oxley, genuinely taken by the beauty of the country, became the first person to refer to the landscape and the flora and fauna around Dubbo as a 'commodity' (Rowley 1966, p. 75). He acknowledged the presence of Aboriginal people on the lands he passed through, but he basically referred to them as part of the landscape and the native fauna, not as fellow human beings. Coming from England, which stood at the dawn of industrialisation, Oxley had great visions for utilising this newly discovered country. By means of mining, logging, and the developing of the land for grazing and agriculture, he envisioned the 'uncultured' transformed into the 'cultured' (and the cultivated). Oxley anticipated that the country around Dubbo could successfully become a centre of livestock and crop products for the colony, given the prospect of using the Macquarie River for trade and transportation. Much of his vision has come true, and, as a result, the ecology and the nature of the country around Dubbo today is dramatically different from what it was one hundred and eighty years ago. However, these changes were to occur slowly. The colonial authorities and the first settlers gradually realised that European technology and knowledge could not always be applied in the same manner and as successfully as in the Old World (see Goodall 1996: 36). Furthermore, the prevailing ambience in the colony, which

reflected the political, legal and economic situation in the Old Country when mixed with outback survival and a struggle for capital gains, created its own special historical context for white settlement in western New South Wales.

In the first few years after the route to the grasslands of the west had been opened, the numbers of settlers and stock remained relatively low due to restrictions on pastoral expansion. These restrictions were put into place in order to limit the practice of squatting on Crown lands, presumably as part of an attempt by the British Government, via the colonial office, to protect the remaining Aboriginal tribes. However, these restrictions were brief and were eventually lifted in 1821. In 1829, new boundaries were drawn at a 150-mile radius from Sydney. The boundaries of the restricted land, referred to as the 'limits of location,' and consisting of 'nineteen counties', reached the site of the town of Wellington today. In conjunction with continuing illegal squatting, and more importantly the demands of people of the upper classes and people with capital for access to pastoral land, the 'limits of location' proved a short-lived exercise. In 1836, squatting on lands beyond the 'limits of location' was permitted with the purchase of annual Ten Pound Squatting Licences. In 1839, squatting was legalised with the passing of the Squatting Act (Bernard 1962; Goodall 1996; Parliament of New South Wales 1980: 38-39).

It was not until 1824 that occupation of the land beyond Wellington was attempted. In the Dubbo area, for the first two decades this occupation was symbolised by 'gentlemen pastoralists', for whom access to lands around Dubbo was merely one part of their business ventures. The nature of their occupation was limited to a 'Ticket of Occupation', which principally restricted them to running sheep using convict labour largely in the form of itinerant shepherding of flocks from one grazing ground to another. By 1840, most of the river frontage, and much of the adjoining country around Dubbo, had been consumed by squatting runs. Thus, for the next fifty years, the country around Dubbo resembled one vast sheepwalk (Clark 1973; Grounds 1984b: 66-73). The random grazing of 'waste lands' had very limited environmental impact, but the second half of the nineteenth century saw great changes occurring in the use of land around Dubbo.

There were various reasons behind the changes in land use, both material and ideological. Regarding the ideological reasons, there was a widespread conviction at the time that squatting on land meant occupation of land without possessing it, not dissimilar to the Aboriginal occupation of the land. And due to the erratic use of the land, and the wandering lifestyle of pastoral squatters, the latter were often seen as standing outside the moral and social structure of civilised society. These ideas were supported by a conviction - strongly held by eighteenth and nineteenth century Europe - that civilisation, and moreover, the eminence of the British empire, rested on agriculture and its technology. It was thus a widely held conviction, perhaps more a demand, that squatting was merely a transient epoch in the development of the colony that would soon be modified along the lines of an ideal orderly society (according to Western thought) (Goodall 1996: 40-42; Williams M. 1975: 74).

The Gold Rush in New South Wales, which started in 1851, was another major force behind the changes in land use and land distribution. On the one hand, it affected the availability of labour, since a great number of people were drawn to the gold fields. Consequently, pastoralists were forced into more intensified grazing of smaller portions of land, where fences tended to replace shepherds. On the other hand, the Gold Rush attracted a great number of people to Australia; in one decade, close to three quarters of a million people came seeking to pan gold (Williams M. 1975). In due course, those who were less successful in the goldfields voiced their demands for land for their livelihoods. Great pressure was brought to bear on the government, by the now growing working class, to overturn older land laws that favoured pastoralists with big sheep runs. Government was pressured to introduce a new legislation designed to break up the big squatting runs and redistribute the smaller sections of land. In the latter half of the nineteenth century, various controversial and partly successful Land Acts were passed, aimed at further securing the tenure of the holders of sheep runs, and opening up possibilities for changes in land use over a wide area of New South Wales (Goodall 1996; King 1957; Williams M. 1975). The 1870s and 1880s saw a substantial growth in pastoral activity around Dubbo, but the Depression of the 1890s, along with a concomitant dramatic fall in wool prices on the world market, promptly set back that progression. At the same time there was a growing demand for wheat on

the world market. The development of new wheat varieties (like the Federation variety), plus advances in technology, encouraged farmers in the Dubbo area to take up wheat growing. Despite years of crippling droughts, and the severe depression Australia experienced in the last decade of the nineteenth century, Dubbo and the surrounding areas showed substantial prosperity primarily based on wheat farming. At the turn of the twentieth century, the town of Dubbo was described as a “quiet, prosperous, well-ordered town”. And although it has had its share of environmental cataclysms and economic set-backs throughout the course of the last century, the description still stands true (Dormer 1981: 10).

Today Dubbo is one of the most prosperous rural towns in New South Wales, with one of the highest populations of Aboriginal people in New South Wales i.e. six thousand out of a total population of forty thousand. The arduous overland travel of the early eighteenth century has become a relaxed overland train or car journey taking six hours from Sydney to Dubbo. The extension of the railway was first accomplished in Dubbo in 1881, creating new social needs and an increased demand for land. It also brought new groups of people into the area. And, with the redistribution of some of the big squatting runs, the population gradually grew in size. At that time, Dubbo was still on the verge of transformation into an agrarian region, with minimal alteration to the local native ecology by the activities of those running sheep. However, people who arrive in Dubbo today travel through a fundamentally altered landscape featuring different flora, fauna, and a different distribution of native species.

The Aboriginal people of the Dubbo region are known to have used fire to regenerate the land (Kelton 1998b). However, their use of fire is not considered to have had significant effect on the equilibrium of the ecology of the land. It was not until the end of the nineteenth century that crucial environmental changes started to occur. As more land was taken for pastoral use, and the Aboriginal population ceased their use of fire, new inventions in agrarian practices and technology were introduced. Native vegetation is known to have been extensive at the time of the first European settlement in the region, but by the early 1900s, fire was being used to clear huge portions of land (an activity known as ‘grubbing’). Today it is estimated that 95 percent of all old-growth (native) timber has been removed from

the Dubbo area for the purpose of commercial crop cultivation and for clearing grazing land for domestic stock (Grounds 1984a,b; Kelton 1998b).

Native fauna is another aspect of the natural environment, which has undergone transformation in the course of the history of white occupation in the Dubbo area. Minimal numbers of kangaroos, wallaroos, wallabies, echidnas and possums are included among the surviving wildlife of the area, while species like wombats, dingoes and koalas can only be found in the Western Plains Zoo, located on the outskirts of Dubbo. These animals have been either hunted to near extinction in the Dubbo area, or they have been forced out of the fenced strongholds of domesticated grass eaters. Along with the fish from the river, the great significance of these animals lies in their role as food and material resources for the Aboriginal population: most have been replaced by supermarket chain products and fast food outlets (Garnsey 1946; Kelton 1998a, 1998b).

In the course of white settlement and the assorted developments in the area, the river has undergone notable transformation: seasonal rain has a minimal effect on its flow. The 'noble river', described so poetically in Oxley's journals, is today only a petty rivulet during the greater part of the year. In 2001, the flow of the river is controlled by the Burrendong Dam, and while around 10 percent of the water from the river is used for general consumption, around 80 percent of the flow is used to irrigate crops. The Macquarie River, once described as a potential artery for transportation of products across the country - and a possible tributary of an interior sea - now feeds cotton, the thirstiest plant of all, in one of the driest landscapes on earth. When new arrivals and locals alike lay eyes on the frequently barren riverbed during dry periods, it is difficult for them to visualise the greatness of the river that last showed its unbound power when it deluged the town in 1955 (Dormer 1988, 1998; Kelton 1998a,b).

Over the last twenty-two years, Dubbo, often referred to as the 'Hub of the West', has had the biggest population growth of all of the inland cities in Australia, up by fifty-five percent (Salt 1999).⁷³ This growth has been attributed to the city's

⁷³ *Population Growth and Tanking in Australia*, reported in the *Daily Liberal* 26.05.1999: 1,2.

strategic positioning (geographical location), its climate, its lifestyle amenities and its strong agricultural and manufacturing base. The Salt report (1999) describes Dubbo as the 'de facto capital of the north west' due to its important administrative, industrial and commercial role in western New South Wales. The town is the site of conferences and annual conventions of firemen and farmers alike, host to countless State and intra-State sporting events, a centre for health, social services and employment opportunities, and the location of a growing tourist presence. While some other towns in western New South Wales have shown a decline in population numbers, along with a gradual deterioration, Dubbo sits conveniently on the crossroads connecting transport and travel between Queensland, Victoria and Southern Australia. The countryside around Dubbo has fulfilled most of the expectations placed on it by the colonial officials who instigated the exploration of western New South Wales.

This brief account of white settlement in Dubbo can be read as a typical example of the way in which the settlement of various regions of Australia occurred: exploration, early utilisation, closer settlement, development, and prosperity. Such an account, of course, ignores the presence of the Aboriginal inhabitants of the land and the inevitable impact of patterns of white settlement. I will now attempt to piece together the few existing segments of written information on the Aboriginal population of Dubbo at the time of white settlement, and will introduce the present day descendants of the local Aboriginal people.

5.2. The 'Red Ochre People'

There are contradictory accounts of the names and numbers of the Aboriginal tribes and 'mobs' located in the Dubbo area at the time of white contact. Practically all historical work on Dubbo and the surrounding area focuses on white settlement (e.g. Dormer 1981; Hornadge 1975). These histories are often based on contemporary documentation and letters written by early white settlers, letters that usually depict the local Aborigines as a kind of wallpaper, exotic but of little value, which came with the land. John Oxley makes a few references to the local

Aborigines in his writings, mostly in the form of ethnocentric comments on the small number of people occupying such fertile lands.

Few traces of native have been observed, either on the river, or since we quitted it. The population of this country must be extremely small (Oxley 1820: 196).

Oxley further notes the extremely primitive lifestyle of the native people. He likens the Aboriginal people to the native wildlife, describing them as people who rarely venture into the open country, or onto the riverbanks, and who share the scrub with their diet, i.e. “opossums, squirrels and rats”. He observes as follows:

[In this] primitive, pre-technological state the natives are only capable to kill kangaroos and emus through sheer luck/accident and they are totally ignorant about the sophisticated techniques involved in catching a fish (1820: 196 - 197).

Ten years later, when Charles Sturt passed through the area on his way to the interior, the local Aborigines appeared to have attained a more human status. Sturt remarks especially on the kindness and friendliness of the natives. However, the natives Sturt came across in the Dubbo area had already been in limited contact with white people and were at that stage attached to a sheep running station located on the site where Dubbo stands today. At that time of white exploration into the interior of Australia, sheep runners and squatters told lively tales about the fierce and treacherous nature of the Aboriginal people further west, making the Dubbo Aborigines look quite peace-loving and ‘tame’. While Sturt made some favourable comments about the few Aborigines with whom he had direct contact, his general observations were not dissimilar to Oxley’s. He often referred to the local Aboriginal people as a somewhat exotic part of the local environment (Sturt 1833).

Early settlers provided a further record of relations between the white settlers and the Aborigines. The Dulhunty brothers, Robert and Lawrence, are generally held to be the first white settlers of Dubbo as opposed to the illegal squatters.⁷⁴ By 1832, the brothers occupied a sheep run in the area and, in 1837, Robert took out a

⁷⁴ The Dulhuntys did start out squatting illegally.

squatting license under the name of Dubbo (Garnsey 1946). There are still in existence a few personal letters and reports from this early white settlement period – *The Dulhunty Papers* - which describe some of the white settlers' encounters with the Dubbo Aborigines (Dulhunty 1955). There are, however, contradictory accounts of the nature of these encounters between the new arrivals and the local Aborigines. Most local historical work tends to emphasise the good relations that existed between these two groups of people, based on the humane and amicable treatment of the Aboriginal people by the white settlers. Marion Dormer (1981) claims that in 1842, Robert Dulhunty gave evidence in Sydney "that he had never seen a hostile incident in his pioneering days on the Macquarie" (p. 36). However, in *The Dulhunty Papers* there are accounts of some near escapes of the first white settlers following clashes with the local Aborigines. There is a vague if somewhat frightening description of a Corroboree involving 600-800 participants, held by the Macquarie tribe at Dundullimo, and further reports of raids by the natives on shepherd's huts. According to some reports in *The Dulhunty Papers*, the Dubbo area was, for a few years at least, the outpost of white settlement, where the few white settlers were "compelled to contend against hordes of savages, as wily as foxes and as treacherous as Judas Iscariot", and beyond which no white people could venture for fear of "blood-thirsty hordes of savages" (referenced, footnote 94). While *The Dulhunty Papers* do make reference to some peaceful individuals among the Aboriginal population, it is clear that for the first two decades, there were sporadic periods of conflict between the new arrivals and the natives of the area. However, by the 1860s, there were few reports of violent conflict between the Aboriginal and non-Aboriginal people in Dubbo, and after three decades of 'mixing' with the white settlers, the Dubbo Aborigines were perceived as peaceful, compared to the 'bad blacks' further out west (Norton 1907: 64). While *The Dulhunty Papers* are obviously written from the perspectives of the new settlers, they are at the same time records which show that the Aboriginal people of the Dubbo area were not pushed off their lands without resistance.

According to Tindale (1974), at the time of European settlement, the Dubbo area was occupied by the Wiradjuri-speaking Aboriginal people. The Wiradjuri nation, one of the largest tribal groups in Australia, and the largest in New South Wales, represents a distinctive language group made up of geographically diverse peoples

(e.g. Gammage 1983; Read 1988). The traditional country of the Wiradjuri takes in a large part of central New South Wales, extending over the major river systems of the Murrumbidgee, Murray, Lachlan, Bogan and Macquarie rivers. It has been estimated that before European contact, twelve thousand people spoke the Wiradjuri language (Kabaila 1998; Tindale 1974). R. H. Mathews compiled the oldest ethnological recordings of these people over a period of two decades at the turn of the twentieth century. According to Mathews, the Wiradjuri people were, in a sense, a group of allied tribes mainly connected through language, with each tribe retaining its own social organisation on a more local level (1894).

The tribe occupying the Dubbo area was known as the Warrie (Warree, Wariaga). Apart from personal correspondence, reports (such as *The Dulhunty Papers*), and some very limited official documentation, there is only one other written source on the culture and history of the Warrie tribe of the late nineteenth century. Edward J. Garnsey, who was born in Dubbo (1874-1949), began to show interest in the local Aboriginal people around 1890. In 1946, he completed his manuscript *A Treatise on the Aborigines of Dubbo and District: their camplife - habits - & customs*, based on his own interaction with the local Aboriginal people, and on information gathered by his father. The Garnsey manuscript describes a late contact period; it is, therefore, important to take into account the authenticity of the information it presents. The author himself raises the question of the reliability of his sources, especially when questioning the natives, and, distinctive to his time, only makes statements “when he [Garnsey] considers them to be correct” (1946:1). It must, therefore, be made clear that the following account of the Warrie tribe, and the names of places and mobs of the Dubbo area, is based on very limited, possibly fairly unreliable, and sometimes contradictory information, both written and oral.

Although it is not critical to this thesis to establish the meanings of place-names and other local terms, the following section aims at providing an insight into the difficulties associated with the task of establishing and authenticating various cultural and historical aspects relating to the New South Wales Aboriginal people. It seems appropriate to begin with the origin and the meaning of the name ‘Dubbo’. The official, and the most plausible explanation today, cited in tourist guides and by most local people, is that ‘Dubbo’ means ‘red earth’ in the local

Aboriginal language. The Garnsey manuscript describes the red pigmentation - known as 'red ochre'⁷⁵ - as a highly sought-after commodity among Aborigines over wide areas of Australia, one that is thought to have given its name to the people of the area. *The Dulhunty Papers* provide a further (if less likely) explanation: "Dubbo is called after [the writer's] grandfather's house, which to the blacks looked like the shape of a man's hat & their word for a hat is *tibbu*, and that is the origin of the name of Dubbo" (Dulhunty 1955: nn). Yet another meaning was given by one of the Elders of the Dubbo Aboriginal community (Personal communication 17.04.1998). He told a story about little grubs called 'Bilgung' that live in the earth. Once a year, at the end of February, they crawl out in their thousands, turn into moths and cover the windscreens of every car in town. What these little grubs leave behind them on the earth, i.e. at the mouth of the opening from where they crawl out, is a little shell-like formation which is called 'Dubba' or 'Dubbo' in local Aboriginal terminology. The following explanations have been compiled from lists of the meanings of various Aboriginal words appearing in the journal *Science of Man*, published in the late 1800s and the early 1900s. According to A. Dulhunty (1900), 'Dubbo' means 'a head covering': R. B. Mackenzie (1904) claims that a 'skullcap' made from "the skin of the breast of an eagle hawk, the feathers plucked off, and the down left on" gives 'Dubbo' its name; J. J. D. Narrandere (1896) gives the term 'Dubbo' the meaning of 'foggy', and 'Dubba' as 'water grass', while an unnamed source (1904) explains the term 'Dubbo' as "a band worn round the forehead by blacks/an ornament". This list is by no means complete and, as the researcher further explores the meanings of place names and old Aboriginal terms in and around Dubbo, the picture only becomes more complex. Warrie (Warree, Wariaga) is another name that poses difficulties when discussing the original population of Dubbo. Based on personal communication, Grounds (1984a: 61) refers to the Warrie as a sub-tribe of the Wiradjuri, thus embracing all of the Aboriginal mobs or bands of the Dubbo area (also Garnsey). In other sources, 'Warrie' is defined as 'one of the mobs of the Dubbo area' (Dormer 1981); today, the "Wirrimbah" Direct Descendants

⁷⁵ Ochre is a "class of natural earths, mixtures of hydrated oxide of iron with various earthy materials, ranging in colour from pale yellow to orange and red, and used as pigments" (Macquarie Dictionary 1991 (1990)).

Aboriginal Corporation⁷⁶ defines 'Warrie-Gah' as 'one of the original mobs of Dubbo'. Present day use of the term 'mob' among the people of Dubbo is always in the sense of referring to kin (blood). It can be used to refer to a group (family) in both a negative or a positive sense: it is used to differentiate between non-Aboriginal and all Aboriginal people (black mob); it is used affectionately (with exceptions) to refer to one's own extended family, and it is used to refer to the different groups of Aboriginal Australians (through time and space).

According to the "Wirrimbah" Constitution, six Aboriginal mobs occupied the greater Dubbo area: the Dubbo-Gah, Warrie-Gah, Mur-Gah, Eumal-Gah, Bul-Gah and Mun-Gah.⁷⁷ At the time of white settlement, the Dubbo-Gah 'red ochre people' were the largest of the local mobs, comprising around fifty adult members and occupying an area of approximately sixty square kilometres. According to Garnsey, the Dubbo-Gah was a mob of some prestige. The Eulomogo (spirit man) resided with the Dubbo-Gah, his presence establishing the group and their country as the centre of tribal rites and ceremonies. Furthermore, the widely sought red ochre was within Dubbo-Gah traditional land. Yet another factor contributing to the size and prestige of the Dubbo-Gah was the richness of the Dubbo marshes, all of which enabled the Dubbo-Gah to maintain a substantially greater membership than most of their neighbouring mobs, and allowed them to maintain a fairly sedentary lifestyle (Garnsey 1946; Grounds 1984a).

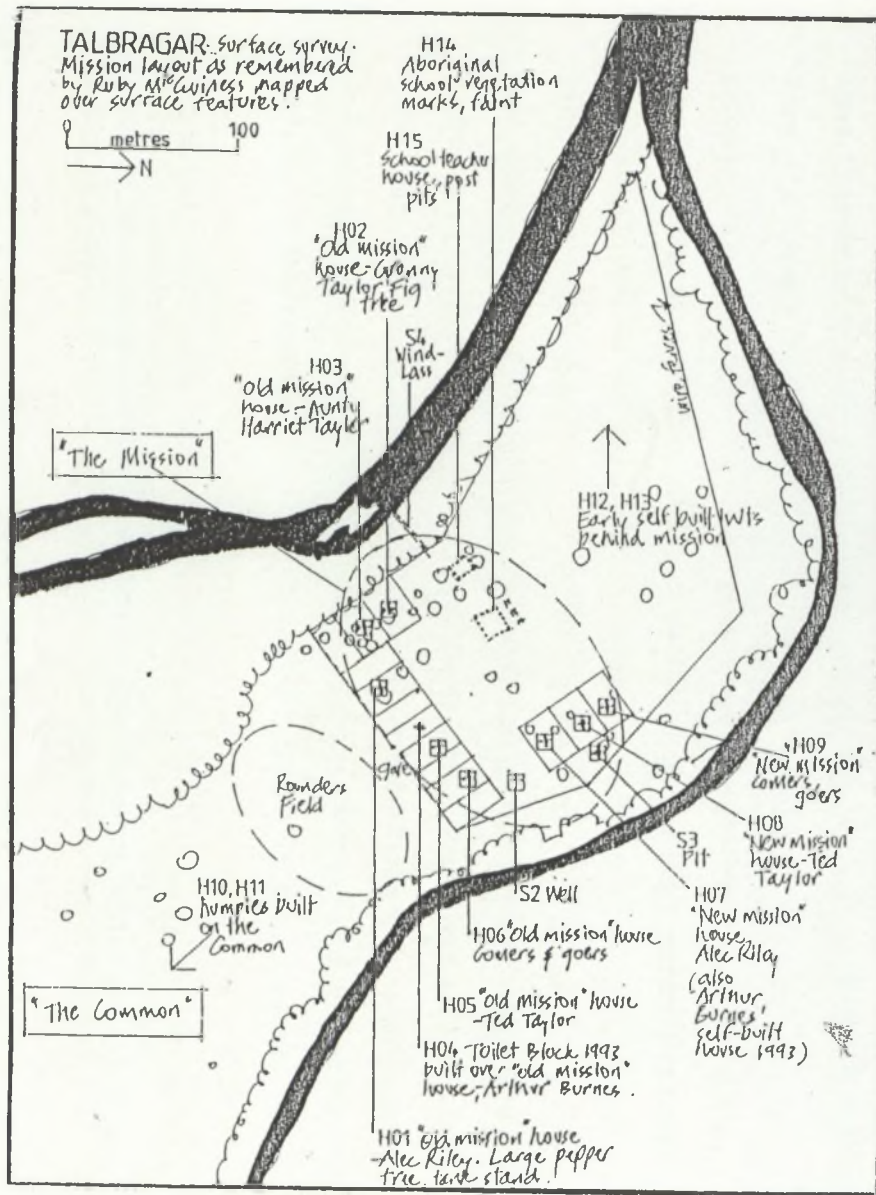
The tribal lands of the Eumal-Gah, Warrie-Gah, Dubbo-Gah and Mur-Gah people were located on the eastern side of the Macquarie River and south of the Talbragar River, the Mun-Gah on the northern side of the Macquarie River and east of the Talbragar river, and the Bul-Gah on the western side of both rivers. Apropos the names of places and mobs, there is no consensus regarding either the boundaries of the land of each mob, or of the tribal territory. There are various reasons behind this lack of consensus. One notes, when looking at old documents and manuscripts, that the information about boundaries of land depends totally on who was giving the information to whom and for what purpose. According to Garnsey

⁷⁶ "Wirrimbah", the prescribed body corporate (PBC) of the descendants of the Dubbo Aboriginal people, is discussed in Chapter Seven.

(1946), the traditional land of the Dubbo-Gah lay between the Eulomogo Creek to the south, the Macquarie River to the west, and the Talbragar River (named 'Erskine' by Oxley) to the north (also Dormer 1981) (see a map on page 124). There are no written sources on the nature of the local organisation and land use in the area before and during the early days of white settlement. The various definitions and forms of establishing boundaries and ownership of traditional lands in more recent times will be discussed in Chapters Seven and Nine.

As the number of white settlers in Dubbo grew, it was inevitable that their activities and land developments would interfere with Aboriginal activities. The attractiveness of various places in their natural surroundings, which had very likely influenced the Dubbo Aborigines' choice of location for camps, ceremonial sites, workshop grounds and burial places, was also very appealing to the new arrivals. The first choice of a location for a homestead tended to be an Aboriginal camping ground. A Squatter named Palmer set up two sheep stations in the late 1820s, one at the junction of the Macquarie and Talbragar rivers. A few years later, Dulhunty built his farmstead on one of the bigger local Aboriginal camping grounds (Dormer 1988). By the 1840s, almost all of the Macquarie and Talbragar river frontages had been taken up as squatting runs. Another disruption to the Aboriginal community was the rapid and often misguided destruction of woodlands, aimed at opening up more grazing land. The result of this destruction was, firstly, a continual shortage of wood in the area, and, secondly and more importantly, a permanent loss of the important carved and scarred trees, which were of great cultural significance to the local Aboriginal people (Kelton 1998a & b). The preparation for the arrival of the railway line dealt yet another blow to the landscape in Dubbo. Before the opening of the railway station in 1881, the northern section of the Wingewarra swampland, the central site of the Dubbo-Gah, was transformed into Victoria Park. The rest of the marshes were soon swallowed up by the construction of the Dubbo Railway Yards. The loss of the marshland

⁷⁷ There are variations in the spelling of these terms.



Left: Sketch map of Talbragar showing locations of remembered households and material evidence listed on database printout below. The list and map separate the "old" or early mission houses from the "new" mission rebuilt after the 1930s floods.

Loc	Alt	Code	Age	Material	Description
AA				settlement	Talbragar govt settlement, households 1930s-50s (with Ruby McGuinness)
H01	1	A	M20	household	"Old house" Alec Riley & Ethel Taylor (born Talbragar), 8 children
H01	2	A	M20	planting	Pepper tree, 1000 diam
H01	3	A	M20	water tank	Conc foundation wall 200h
H02	4	A	M20	household	"Old house" Grannie Taylor (Ruby's gran), daughter in law Emily Taylor
H02	5	A	M20	planting	Cedar trees, several
H02	6	A	M20	planting	Fig tree, 5m diam spread
H02	7	A	M20	water tank	Conc foundation wall, 150h
H02	8	A	M20	lamp	Kerosene lantern part
H03	9	A	M20	household	"Old house" Aunt Harriet Taylor, 2 sons and their children
H04	10	A	M20	household	"Old house" Sarah Taylor (Ethel T.'s sister) & Arthur Burnes, 10 children
H04	11	A	M20	new bldg	Recent toilet block built over old house site
H05	12	A	M20	household	"Old house" Ted Taylor & Mary Weldon, 4 children
H06	13	A	M20	household	"Old house", comers and goers (temporary stays)
H07	14	A	L20	household	"New house", Alec Riley & Ethel Taylor, children
H08	15	A	L20	household	"New house", Ted Taylor & Mary Weldon, children
H09	16	A	L20	household	"New house", comers and goers (temporary stays)
H10	17	A	L20	household	Arthur Burnes' humpy on the Common
H11	18	A	L20	household	Johnny Hill's humpy on the Common
H12	19	A	E20	household	Early self-built huts, Jimmy Governor & other people behind mission
H13	20	A	E20	household	Wally Byre & Mary Byre, behind mission
H14	20	A	M20	school	Aboriginal school, 3 pit toilets: teacher, boys', girls', post holes (drawn)
H14	21	A	L20	household	Alec Riley & Ethel Taylor, moved in after school closed
H14	22	A	L20	planting	Cedar tree
H15	23	A	L20	stump	Chopping stump, 300diamx800h, bolts, nails
H16	24	A	L20	household	Arthur Burnes place self built 1993, vacated 12 months ago, demolished
S1	25	A	M20	scatter	Glass & ceramic fragments exposed by vehicle tracks
S2	26	A	L20	well	Filled well, 2000diamx800d, no shoring visible

This map is taken from Kabaila (1998: 54).

was a great blow to the Aboriginal population,⁷⁸ since it had been a great source of food, including eggs, birds and fish. The loss of the marshes, the loss of traditional grounds and ceremonial sites, along with alterations to the landscape, caused rapid disintegration and displacement among the local Aboriginal mobs. Garnsey notes that by the 1850s, many of the local Aboriginal men were working as stockmen and trackers, and that around 1880 there were very few men left who had been initiated and bore the tribal markings.

I should mention here a further aspect that influenced the swift breakdown of the local Aboriginal mobs. This is the Australian Aborigines' initial indifference to material wealth, and their uniquely different attitude towards people, possessions and the natural environment. Early documentation and later literature has shown that as conditions changed, this 'different' ontology would prove a handicap for most Australian Aborigines. The number of white settlers increased, as a result of which the Aboriginal population was pushed towards the edges of the growing new settlement.⁷⁹ The consequences included not only the loss of their traditional lands and some aspects of their culture, but also a rapid shift from being self-sufficient occupants of their own lands to fringe-dwellers in a new social order (Dormer 1988; Fielder 1994; Morris 1988; Rowley 1966). And in view of the different characteristics of this new social order, and the consequent dispossession of Aboriginal people, there are frequent claims by scholars, politicians and the general public alike that Aboriginal culture has disappeared. The Aboriginal people of New South Wales, who have had the longest history of contact with white people, and by extension lengthy exposure to Western social and cultural traits, are frequently perceived as a people who have lost their culture and even their identity (Aboriginality). There are claims that all that is left of New South Wales Aboriginal history and culture are names on a tribal map (Hercus 1989: 45). In the case of Dubbo, it is certainly true that names like Dubbo-Gah mainly exist on paper today. Names like Eulomogo and Dundullimo have survived as names of locations of homesteads. However, as will be shown in later chapters, the

⁷⁸ Today there are still voices among Aboriginal people claiming that the marshes were deliberately filled in and covered over in order to remove the last resort of the local Aboriginal population.

⁷⁹ However, Goodall (1996) writes about Aboriginal people/families who actively sought land for farming, but generally lost out in competition with the white working class population (p. 43).

Aboriginal people of Dubbo do have their history, and, furthermore, still preserve various aspects of their traditional culture. The members of the earlier Aboriginal mobs of Dubbo, who have up to now been a limited part of the discussion, represent the many nameless and faceless Aboriginal people of Australian colonial history. Notwithstanding, the names and the existence of the people in the section that follows are not lost to history. They are alive, either in the memory of their descendants, or they themselves are walking on their ancestral lands.

5.3. The Talbragar Reserve⁸⁰

It is hardly possible to avoid contrasting the busy and bustling township of Dubbo with the Dubbo of a few years back ... The aborigines roamed about, consorting and carousing with the civiliser, who after invading his territory, taught the illiterate savage in the fashion of modern civilisation to drink the much-beloved fire water and so put an end to his reign on the banks of the rapid-rolling Macquarie River (The *Sydney Morning Herald*, 01.05. 1866, cited in Dormer 1988: 16).

Forty-two years after the first white men entered the country of the Warrie tribe, the Aboriginal people of the area had been dispossessed of most of their lands and, according to the *Sydney Morning Herald*, by 1866 they had adopted some of the more wicked habits of the new settlers. The quote at the beginning of this section is an eye witness account of the sad state of Aboriginal affairs in Dubbo at a time when the area was entering the age of 'European civilisation' and local entrepreneurs were building the first bridge across the Macquarie River. This was the time that notions of a 'dying race' and demands for the peaceful 'passing of the Aborigines' became a strong component in the general discourse on the fate of the Australian Aboriginal population. And as discussed in previous chapters, the official solution to the 'Aboriginal problem' came in the form of 'paternalistic' government legislation and guidelines commanding 'separation' as the solution and salvation for both black and white people (Goodall 1996; Reynolds 1992; Rowley 1971b).

According to the limited documentation on white settlement in Dubbo, the breakdown of the traditional ways of life among the Aboriginal population was swift. Similar to most other rural settlements in New South Wales, the local Aborigines became the urban 'fringe-dwellers' (e.g. Morris 1988, Rowley 1971b). According to local historian Marion Dormer, the surviving Aboriginal inhabitants of the Dubbo area were "segregated on the Talbragar Mission Station" at the end of the nineteenth century (1988: 254). However, at that time and place in the history of white settlement in New South Wales, there was a continual shortage of labour and, as a result, some Aboriginal people were employed as station hands, horse breakers and hut keepers. There remains little documentation on the fate of the Dubbo Aborigines who became attached to the various stations, but some local families trace their ancestors to specific local farmsteads. The largest group within "Wirrimbah" are the direct descendants of the people who moved onto the Talbragar Reserve in 1898, many of the group themselves having been born on the reserve.

Like most New South Wales Aboriginal reserves, the Talbragar Reserve was established in the late 1800s, after most of the land in the area had been taken up by white farmers and pastoralists. The first official documents referring to the establishment of the reserve can be found in the minutes of the Aborigines Protection Board (APB), dated 16th of December 1897.⁸¹ It was noted in the minutes that Mr. S. Phillips recommended that about one hundred acres on the Macquarie River should be "set apart for the use of aborigines". In March 1898, the Department of Lands was willing to reserve twenty acres of land, while the Board recommended no less than fifty acres. On the 5th of November 1898, eighteen acres of land on the Macquarie River in the Parish of Dubbo were gazetted as an Aboriginal Reserve (McGuigan 1984 (?)).

The Talbragar Reserve is located about nine kilometres north of the centre of town, at the junction of the Macquarie and the Talbragar rivers (see a map on page 124). Although official documents state that the area of the reserve land was just

⁸⁰ Also referred to as 'the Mission'.

⁸¹ New South Wales State Archives - AO Reel 2783 - No. 4/7112 - 7115.

eighteen acres in the late 1800s - the same as today - some local Aboriginal people claim that the reserved land was bigger earlier in the twentieth century (Personal communication September 1998). Several local Aborigines claim that on at least two occasions in the past, the Pastures Protection Board has appropriated portions of the reserve land in order to run sheep on the land. These claims are not recent contrivances of Aboriginal people today: they were also being made forty-five years ago when C. D. Rowley visited the Talbragar Reserve (1971b: 197). However, like their parents and grandparents before them, the local Aboriginal people have no way of substantiating these claims today, due to a lack of supporting documentation.

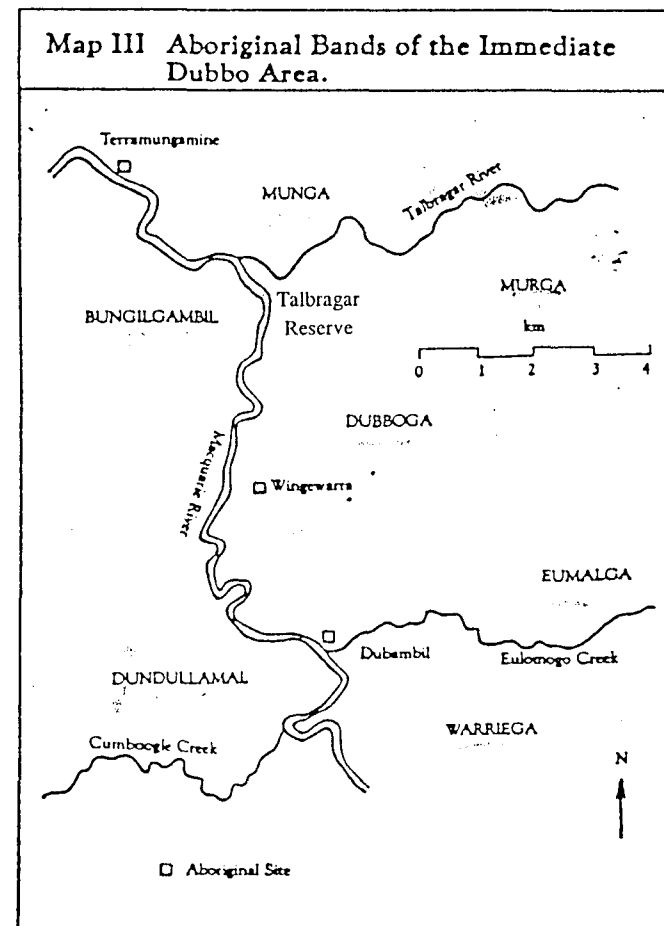
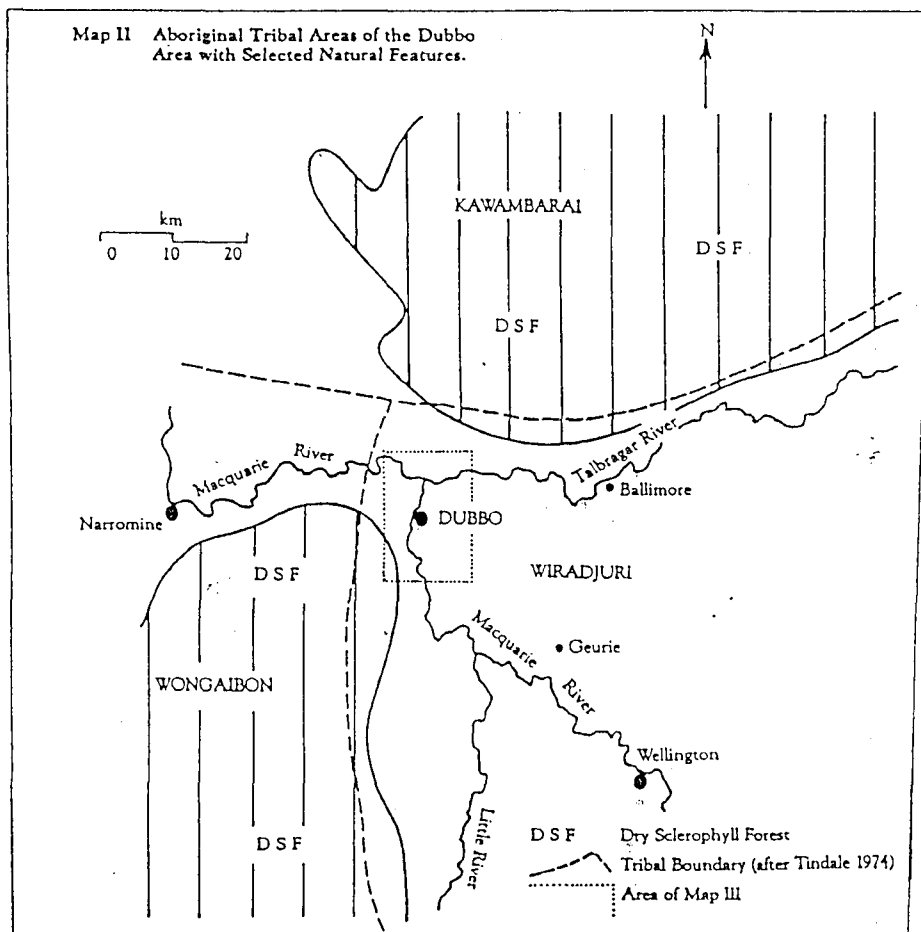
There are very few existing records of the size of the local Aboriginal population before the establishment of the Talbragar Reserve. Marion Dormer (1988) claims that in the late 1880s, the "Talbragar Aboriginal Reserve became home to about 500 Aborigines" (p. 26-27). Apart from the fact that the reserve was not officially established until 1898, it is highly unlikely that there were so many people identified as Aboriginal at this time in the Dubbo area.⁸² A more credible figure can be found in a survey conducted by the Aborigines Protection Board - *Returns of Aboriginal People 1886-1887* - where the number of Aboriginal people of Dubbo is given as eighteen 'full-blood' (9 male, 4 female and 5 children) and thirty-six 'half-caste' (12 male, 9 female and 15 children).⁸³ In 1928, the local newspaper cites the current Census and gives the number of the local Aboriginal population as twenty, out of a total population of 8,328 (see Dormer 1988). However, there are a few reasons why these numbers should be treated with caution. Firstly, Aborigines were not counted in any censuses. The only existing records of individuals, apart from a few births, deaths and marriage records, are criminal records and court or crime cases reported in the newspapers. Secondly, it can not be fully established if people classified as 'mixed blood' were included in all surveys and censuses as Aboriginal people. Thirdly, it is a fact that Aboriginal

⁸² It is possible that a number of Aboriginal people had already moved, or been moved to the Talbragar area, especially when considering that the railway came into Dubbo in 1881 and the marshes were filled in. Furthermore, there does not appear to have been any discussion about other areas around Dubbo as a choice for an Aboriginal reserve in the minutes of the Aborigines Protection Board. However, there are no known documents to confirm this speculation.

⁸³ (Reference number 5/18423.2 - in the Board's Tabulated expenditure at Aboriginal stations)

people were frequently not identified by names and occupation, and, despite restrictions on the movement of Aboriginal people, there were still a number of individuals who moved between different reserves and stations. The inclusion of these 'unsettled' people would have distorted the official count of Aboriginal people in the area. It can thus be assumed that most of the people identified as Aboriginal in the 1928 Census were living on the Talbragar Reserve at the time of the survey: there were quite a number of people attached in various ways to the reserve who did not appear in the 1928 Census. Estimates of the numbers of Aboriginal people in the Dubbo region at any given time vary greatly, and if the 1928 Census is to be taken as fact, the Aboriginal population has undergone a phenomenal growth in a few generations: from twenty to six thousand people. Therefore, a closer look at the first people on the Talbragar Reserve and their descendants might lead to a clearer understanding of numbers, population growth, and the proportion of direct descendants as opposed to later arrivals (see a map on page 130).

The following is a very brief account of some of the Aboriginal people and their families who first moved onto the Talbragar Reserve. It is by no means a complete list of the people and the families who have lived on the reserve. Rather, the aim of this account is to introduce the ancestors of the people who are the focus of this thesis: to introduce some other Aboriginal families (names) of the Dubbo area, and to attempt to address and clarify some of the confusing statements about the numbers of Aboriginal people of Dubbo in different periods in time (and today). It is important to emphasis here that some information about the earliest generations is based on oral knowledge, and on the memories of the oldest people living today. The spelling of names, the actual blood relations of people, and the order and number of siblings/off-spring has not always (yet) been confirmed through written sources. Among the first people who (were) moved onto the Reserve were four sisters, namely Sarah, Ethel, Phoebe and Rose, and their brother Bob. There is very little known about their parents, but the names Jane and Amy have been used for their mother according to both written (older genealogies) and verbal accounts. Rose had only one son, but the other four siblings each had between five and ten children (Bob (five), Phoebe (five), Ethel (nine), Sarah (ten)). Apart from two children who died before reaching adulthood, all but two



These maps are taken from Grounds (1984a: 60 - 61).

had children of their own (Grandchildren - Bob (twenty-five grandchildren), Phoebe (thirteen plus),⁸⁴ Ethel (thirty-seven), Sarah (forty-four)). The oldest living survivors among these grandchildren are in their early seventies, and have great-grandchildren of their own. Jane (Amy) had a sister Harriet, who had five children - Alfred (Alf), Edward (Ted), Esther, Henry and Walter (Noot). This part of the genealogy - Harriet's descendants - is still being collected and compiled, but it appears that while the overall number of Harriet's descendants is a little less than that of Jane's (Amy's), it is not far behind in numbers. So, a fleeting look would give an estimate of descendants numbering in the hundreds. Jane's (Amy's) and Harriet's children were known as the Taylors (the daughters married Riley, Burns and Smiths). Not all of the Taylors lived on the Talbragar Reserve. There were also people other than the Taylors who lived there, or on Troy Crossing, adjacent to the reserve, i.e. the Hill family. A further name, that of Jack 'Turrong' Taylor, is always referred to by the oldest living residents of the Talbragar Reserve, who remember Jack "Turrong" warmly. Some claim that he was Jane's (Amy's) and Harriet's brother, and what is also important is that he is generally referred to as the last 'full-blood' in the area. On account of sharing their name and appearing to be of the same generation, it is not unlikely that Jack, Harriet and Jane (Amy) were either siblings or cousins. However, it is not known where the name 'Taylor' came from. When one of the oldest living residents of the reserve spoke about her ancestors, she did not have any explanation for the name, but it was intriguing to notice how this informant - like others of her generation - referred to the first (oldest) generation on the reserve as being 'very black':

Old Jack ... there was my granny and them cousins, you know, auntie Harriet and old granny (Jane/Amy),⁸⁵ the three old people. He was Jack Taylor too. They all went under Taylor, I don't know why ... You see my granny, my granny was real black and old auntie Harriet was real black ... and he [Jack] was real black, real black ...

[Was Jack your granny's brother?]

⁸⁴ The line of Phoebe's descendants is not yet completed.

⁸⁵ It should be pointed out that this informant did not recall the name of her 'granny', who is assumed here to be Jane (Amy).

No, no, they were cousins, mom said they were cousins, they were just cousins ... anyway mom was telling us about, you know, about them, and yet they all went under the Taylors ... mom said her grandmother was real white, they were real white, and the old grandfather he was fair. And that's how my mother and them never came out real black, like they're the same colour that I am, they all come out that colour.

Other Aboriginal families (names) in the Dubbo area are Shipp, Nolan, Callen, Dunn, See, Carr, Carney, Fuller, Nixon, Peckham, Chatsfield, Ryan, and Weldon. This is by no means a complete list of names of Aboriginal families in Dubbo: many of these families (individuals) are descendants of the original inhabitants of the Talbragar Reserve.

Today there are approximately six thousand Aboriginal people living in Dubbo. While some of these people are the direct descendants of the original Aboriginal population of the Talbragar Reserve, and others are the descendants of the original population of neighbouring areas, some are descendants of both. However, many Aboriginal people in Dubbo moved there in the 1970s due to the 'Relocation' scheme (see later): some moved to Dubbo from outside of New South Wales, and some are simply 'moving through'. Furthermore, a large percentage of the direct descendants of the Talbragar Reserve families live outside Dubbo. It is thus not possible to give an accurate number of potential native title claimants today.⁸⁶ However, it is essential to recognise the importance of family names when discussing the descendants of the original population on Talbragar Reserve, and, by extension, native title claimants in Dubbo. Martin (1997) discusses some major changes that have taken place since white settlement in the systems which Aboriginal people use to relate to land. Martin claims that

'families' are essentially restricted cognatic descent groups, defined by shared common descent from specific ancestors. Larger families may themselves be comprised of recognised subgroups identified by particular surnames and defined as descendants of nodal ancestors from generations below those of the earliest remembered forebears (1997: 155).

⁸⁶ Genealogical records are still being collected.

Because these notions of 'cognatic descent groups' are very evident among the Aboriginal community in Dubbo, aspects of 'cognatic descent' – vis-a-vis connection to, and notions of, 'ownership' of land - will be discussed in Chapter Nine. As for 'cognatic descent and membership, there is a general recognition among most Aboriginal people of Dubbo today that the descendants of Jane (Amy) and Harriet Taylor are the rightful native title claimants.⁸⁷ This large group of people, who today bear varying surnames but who all have one thing in common, are the descendants of Jane (Amy) and/or Harriet. A part of their native title claim is to the 'Taylors' Land', a name which some of the Elders in the community say was often used to refer to the Talbragar Reserve.

Despite the reserve being frequently referred to as “the Mission” by local Aboriginal people, it was never under missionary control. Like many other reserves set up in the late 1800s, it was partly a response to pressure from Aboriginal people and their supporters for access to land (as discussed in Chapter Four). It was also the outcome of requests by local and governmental authorities for the segregation of Aboriginal people (Dormer 1988). The Talbragar Reserve was established under the authority of the Aborigines Protection Board, but unlike the large Aboriginal reserves and stations established in the late 1800s in New South Wales, it did not have a white manager in residence.⁸⁸ The reserve was classified as ‘Crown land reserved for the use of Aborigines’, and, although it was under the supervision of Welfare Officers, it was run by the residents themselves.

The reserve consisted of self-built huts and houses. The quality of the housing varied, but long term residents lived in good houses which were all dated pre-WWII (Parliament of New South Wales 1967: 9, Part II). A female informant recalls:

Well we moved out there [early 1950s] and we lived out there, we had a room right next to his mum. And there was three bedrooms and a veranda that was closed in, so there was plenty of room. And then there was another room outside our room that

⁸⁷ Group membership is discussed further in Chapters Six (6.2.) and Seven.

⁸⁸ However, there are some claims from old residents that Mrs. Mitchell (the teacher) or her husband (see forward) were titled managers of the Reserve.

had a bed in it, but it was open sort of thing ... and a lounge-room (Int.#08, 29.07.1998).

Throughout the whole time that the people lived on the reserve there was never any provision for electricity or running water. A windlass was put up in the early 1920s to draw water from the Macquarie River. Some of the residents grew their own vegetables: most people of the older generation remember Arthur Burn's vegetable garden.

He had a vegie garden over here and that was ... mustard and cress ... it was seeds and herbs, mustard and cress, water-cress ... there was ... buggered up the driveway going into the garden and he would get stones from over near Brocklehurst, the quarry and he'd take them and put them on the driveway, and they were beautiful round stones (*Peckham Recordings* 1997).⁸⁹

The people of the reserve were fairly self-sufficient, not seeking much from the town except entertainment. Both men and young women sought employment outside the reserve. Early in the twentieth century, children of the reserve families attended school in Brocklehurst. However, by the mid-thirties, following new direction from the Aborigines Protection Board, Aboriginal pupils were being excluded from the Brocklehurst Public School. In 1935, the Aborigines Protection Board erected a schoolhouse on the reserve (Board for Protection of Aborigines 1935; also Goodall 1996: 183). A retired schoolmistress, Mrs. Mitchell, was sent from Sydney to run the school. For the first few years, Mrs. Mitchell travelled from Dubbo to the Reserve every day, but in the early 1940s she and her husband took up residence on the Reserve.⁹⁰ The school on the reserve closed shortly before 1950, after which the children travelled on the school bus to attend Dubbo Central Public School.

Life on the reserve was generally a happy one and there is little mention of hardship from the surviving residents. According to the latter, there were two very

⁸⁹ Recordings from the Peckham Family Reunion on the Talbragar Reserve, Easter 1997 (see bibliography).

⁹⁰ There are varying accounts about the popularity of the white couple, their roles on the Reserve (sometime referred to as managers), and the quality of the teaching (personal communication, Dubbo 1998).

positive aspects about living on the Talbragar Reserve. First was the low cost of living. The residents did not pay rent and were not faced with most of the utility bills of the town-dwellers. This aspect becomes very evident when talking to people about the problems they faced when they moved off the Reserve.

And we were in town ... we couldn't stand it, we couldn't stay there, we couldn't handle the bills ... you see, you had to pay rent, and as I said, you've got a gas bill, you've got an electricity bill and you haven't got a lot of money coming in ... like living on the Mission you had no rent, no electricity, because you had kerosene light and wood fire and wood stove ... (Int.#07, 14.04.1998).

Secondly, there was the security of living among their own people and their own extended families. As discussed earlier in this thesis, most of the population of the Talbragar Reserve were either kin or had some kind of affinity with each other. In Kabaila (1998), one of the oldest surviving residents describes the people of the Reserve as 'one big family', with occasional long-term visitors: "everybody knew everybody, everybody was related to one another" (p. 56). Although descriptions of their past lives on the Talbragar Reserve may have become somewhat golden reminiscences, the overall retrospective accounts of former residents depict a tough, but gratifying and untroubled lifestyle.

Notwithstanding, there are contradictory accounts about the quality of life at the reserve, most of which come from outside. When C. D. Rowley visited the area in 1964, he remarked on the changes that had occurred over the last three to four decades. He described what he saw as "a place mainly for the unemployed and the old, and their children and grandchildren", with people living in "old shacks of the worst type", quite different to the photographs in the Dubbo museum taken early in the century, which "suggest[ed] that here was a community which thought well of itself" (1971b: 168-187, 197). While Rowley's dreary description differs greatly from the perceived happy and easy family life described by the former residents, it can be assumed that his account would correspond with that of other 'outsiders'. At the time of Rowley's visit, Dubbo had the appearance of a fast growing and industrious town, so the rudimentary lifestyle of the thirty-three residents at the reserve paled in comparison (see Parliament of New South Wales, 1967: 9, Part II). However, it must be kept in mind that when Rowley visited the Talbragar Reserve,

assimilation and closure of Aboriginal reserves and stations had been the main policy in Aboriginal affairs for two decades. Great pressure had been brought to bear on the people of the reserve to move into town. And while many of the younger generation had been tempted by modern conveniences and the close proximity to schools, the cost of living was often overwhelming as the previous quote bore witness to. It was thus not infrequently that people moved back to the reserve, especially during spells of unemployment. Another factor supporting views such as those of Rowley was the fact that due to assimilation policies and a push towards the urbanisation of Aboriginal people, the Aboriginal Welfare Board did not fund any improvements to the reserve, i.e. requests for electricity and improved water supplies, teachers and housing. Take the time that Arthur Burns established his garden, for example:

He [Arthur] organised that we make a vegetable garden here. He was trying to make us make a vegetable garden here. But all we wanted ... from the Welfare Board was a diesel pump to put on over there ... there is a natural flow, in the land, from the Macquarie River bank there, across ... you can see it there ... and all we had to do was just to put the plough in there and reign it right across. Everything was planned. But we *couldn't* get the pump from the Aboriginal Welfare Board. The Welfare Board sent a pump, like one of them old pumps you pump the petrol up in ... with a big long handle on it. And it was down on the bank there, over there ... just down from old auntie Mitchell, that old cottage over there, where Boyken was living ... with a three inch pipe on it, and we used to wear most of our trousers out, slipping and sliding down that ... down there. It was way down ... you had to climb down that big bank, and then pump's up, which is impossible ... (*Peckham Recordings* 1997).

Indeed, through the eyes of an outsider, life on the reserve might well have appeared dreary compared to life in town.

There is no official date marking the closure of the Talbragar Reserve, and, furthermore, there are various conflicting reasons given for the departure of the residents. These reasons vary from declarations that the people were forced off the reserve by officers of the Aboriginal Welfare Board to claims that the younger generation gradually moved out, seeking the social and economic comforts of

urban living. What appears to have been the case, as with many other New South Wales reserves, is that while the people of the older generations were allowed to live out their days on the reserve, younger people were encouraged and persuaded by various means to move into town under the hat of the Assimilation Policy. The last two (male) residents of the Talbragar Reserve, Bucky Burns and Alec Riley moved into town around 1975.

As I have previously mentioned, the Aboriginal population in Dubbo has increased significantly since the early 1900s. There are factors - apart from a natural process whereby there is a tendency among Aborigines of Dubbo to have larger families - that could explain this rise in population numbers. An increase in self-identification as an 'Aboriginal person', along with improvements in methods of census taking, have also contributed to the rapid increase in the Aboriginal population (see Dormer 1988). However, while many Aboriginal individuals and Aboriginal families have moved to Dubbo for the same socio-economic reasons as non-Aboriginal people, there are other factors which have to be recognised when looking at the number of Aboriginal people in the area. One of the greatest factors was the 'Aboriginal Family Voluntary Resettlement Scheme' (AFVRS) in the 1970s,⁹¹ aimed at relocating Aboriginal families into urban areas with greater employment opportunities.

The AFVRS was described by its instigators as

a social action research which is unique in Australia and in many respects without real precedent in the world. Whereas in other sponsored internal migration projects the Government induces the move, encouraging the whole of a particular population, this programme offers assistance to related families who themselves seek help migrating and adjusting to a new environment (Mitchell and Cawte 1977: 29).

Mitchell and Cawte claimed that the programme was a response to requests for assistance from Aboriginal people in Bourke who wanted to move to areas with

⁹¹ The Scheme was launched "under the research auspices of the Arid Zone Project organized by the University of New South Wales, with generous funding from the Federal Government and staffing assistance from the New South Wales State Government authorities" (Mitchell and Cawte 1977: 29).

better housing, education and employment opportunities (these included Bathurst, Dubbo, Orange and Wagga Wagga). The only 'sociological' information that Mitchell's and Cawte's paper supplies is that between 1972 and 1975, seventeen households (102 people) were assisted to move, with five families returning to Bourke within twelve months: the programme "expanded quickly from the initial venture so that it ... embraces five axes from declining centres in the west of New South Wales ..." (p. 29 - 30). Otherwise, the paper consists of an academic assessment of a programme that was 'essentially action-oriented', whereby the results are provided in the form of statistical medical and psychological data of a selected sample of 'relocated' people. Despite an extensive search, I have not found any follow-up research by either Mitchell or Cawte, nor have I found any official reporting on the development of the programme. However, it finally occurred to me that the 'relocation', which many people in Dubbo referred to when discussing the changes and the development of the demographic composition of the Dubbo Aboriginal community (people moving in from the far west of the state) was, in fact, the AFVRS of the 1970s.

There are at least two negative consequences of the 1970s 'Relocation' programme. Firstly, this programme was supposed to be based upon a voluntary move, but there have been reports of various forms of manipulation ordered to encourage people to move (Goodall 1996: 334). As a result, Aboriginal people of different historical backgrounds were forced to live in the same neighbourhood, often resulting in what can be called 'clashes' between 'traditional enemies'.⁹² So, when considering the resultant internal community conflicts in Aboriginal Dubbo today, caused (at least partly) by the implementation of this Scheme, one questions the lack of any follow-up research. Secondly, due to the recession of the early eighties, and a concomitant decrease in the availability of manual and factory work, the 'Relocation' programme never achieved at least one of its goals, i.e. that of moving Aboriginal people to areas of increased employment opportunities.

Notwithstanding, the rapid growth and increasing diversity within the Aboriginal population of Dubbo is not all negative. As the population has increased, so have

⁹² Discussed in Chapter Six (6.2.).

services and social assistance programmes especially designed for Aboriginal people. There is an increased recognition within the general community of the presence (in numbers) of Aboriginal people, and, by extension, an awareness of their political, social and legal rights.⁹³ While individual efforts and qualifications have seen Aboriginal people achieve a few high positions in business and political venues, there is also power in numbers. There are over thirty Aboriginal organisations in Dubbo today, mostly run by Aboriginal people. Apart from the Local Aboriginal Land Council and "Wirrimbah" Direct Descendants Aboriginal Corporation there are groups and organisation which address various needs, ranging from childcare and health, to housing and employment.

There are organised Aboriginal sporting bodies, and arts, crafts and performance bodies, aimed especially at young people. There is also a commercial arts & crafts enterprise which, apart from selling the artwork of already established Aboriginal artists, supplies work space, guidance and supervision for young Aboriginal people exploring their artistic talents. While the membership of some of these groups and organisations reflect some concentration of members of certain families within some of these groups (both 'traditional' and 'historical'), there is generally - possibly apart from times when there is some competition over funding - some form of cooperation between them. The only form of hostility I came across was when some of the 'traditional' people, a few of them associated with the major local Aboriginal art enterprise, expressed their disgust at some non-Aboriginal people who have for a few years run an 'Aboriginal' tourist venue where they sell their own home made 'genuine Aboriginal' boomerangs and didgeridoos. Other organisation like the Allira Aboriginal Child Care Centre, which also assists with disabled children and adult, and the Aboriginal Medical Co Op, open to all Aboriginal people, are each, to some extent, operated by blood related individuals (e.g. sisters), but they draw on funding from both local and state sources. The internal community tension (discussed in the next chapter) is not displayed in the operation of these organisations, but there have been occasions when these organisations have had to justify their existence against voices in the general

⁹³ There are, of course, also the constant claims of how Aboriginal people 'have it easy' and misuse the system. The Dubbo area (electorate of Parkes) is one of Pauline Hanson's One Nation Party

community, questioning the 'need for' demarcated Aboriginal organisations of these nature (terms like 'Apartheid' have been used by non-Aboriginal people to describe these organisations/their operators (Int.#01, 12.12. 1997)). There is a local group of Elders (Wiradjuri people), who are also members of the council of Wiradjuri Elders, who, apart from occasional, minor personal strives, represent the holders of local Aboriginal knowledge and history. These people meet regularly for social events and a number of them are always present when young people and visitors are bussed between the various traditionally important Aboriginal sites in and around Dubbo. In the last few years members of this group are the ones welcoming visitors to the various sporting, social, commercial and cultural events taking place in Dubbo. There is an Aboriginal pastor who holds regular services for Aboriginal people. Some of these services combine traditional Christian service with traditional Aboriginal customs of 'smoking'.⁹⁴ The Western Aboriginal Legal Service is located in Dubbo, and, furthermore, Dubbo is one of the major centres in New South Wales for trials of various forms of improvements and restructuring of the Juvenile Justice system and its handling of Aboriginal youth (families). The direct consequences of this focus on trials in Dubbo have been increased training of local Aboriginal people as convenors and mediators within the Juvenile Justice system. Today, Dubbo has a diverse, but strong Aboriginal community. And while the focus of most Aboriginal people in Dubbo is on everyday living, many are also involved in various cultural and political activities. These activities have usually been in the arena of sport and other community events, but due to political and legal changes over the last few years, new issues have arisen.

In the course of the *Mabo (No. 2)*, the *Wik* High Court rulings, and the *Native Title Act (1993)*, issues of rights to land, ownership of land, and recognition of local Aboriginal culture and heritage have come increasingly to the fore. The settlement history (post-1788) of Dubbo has thus become one of the focal points when debating these issues. However, this history is a complex one, wherein the early periods are covered by one-sided versions of white settlement in which the fate of

strongholds.

the Aboriginal population is not always clear. Historical records compiled during the last century depict a growing, often prosperous town, with the history of the Aboriginal people fairly well recorded (significant knowledge still in oral form). However, this last century was also a time when various government policies (i.e. protection/welfare) and 'action oriented' academic research (i.e. 'Relocation') had an immense influence on the development and composition of the Aboriginal population. The complex settlement history of the Dubbo area has created three major challenges for today's native title claimants. Firstly, native title claimants have to scrutinise and piece together the fragmentary history of their nineteenth century ancestors, in order to establish connection and proof of native title; secondly, they have to probe and analyse the complex 'mixing pot' of Aboriginal people (families) in Dubbo which has emerged during the last few decades; and thirdly, as native title claimants, they have to establish both legal and political recognition (intra-community) of a valid membership. Current day local politics are thus only understood and analysed within the historical settlement context of Dubbo.

⁹⁴ A number of local Aboriginal people have their children 'smoked'. In this current (church) context this ceremony is more a statement about Aboriginality than a form of initiation.

Chapter Six

The ‘Mixing-Pot’ - Politics and the Aboriginal People of Dubbo

In the previous chapter I showed how the basis of local Aboriginal identities in Dubbo has evolved during the last century, and the various ways in which the Aboriginal community has grown in scale since the early/mid-1900s. This growth has created a very complex internal political structure within the community. In this chapter, I will examine and analyse this political structure by discussing some aspects of the (socio-) political history of New South Wales, especially since 1967 when the power over Aboriginal affairs was transferred from the States to the Commonwealth. I will then explore the complex composition of the Aboriginal community in Dubbo, the development of grass-roots politics after the recognition of native title, and the consequent emergence and increasing importance of the categories of ‘historical’ and ‘traditional’ people. The geographical context for most of the discussion on Aboriginal politics at a local level is the Dubbo area. The nature and the processes of local politics will be viewed through both local histories and the personal accounts of some members of the local Aboriginal community.

6.1. A Recipe For Trouble?: Government Legislation and the Aboriginal People

Every human society has some sort of territorial structure. We can find clearly-defined local communities, the smallest of which are linked together in a larger society of which they are segments. This territorial structure provides the framework, not only for the political organization, whatever it may be, but for other forms of social organization also, such as the economic ... (Radcliffe-Brown 1940: xiv).

I don't understand what ... you have your Local Lands Council, you have your Regional Lands Council and you have your State body, which is based in Sydney ... and I really don't know the roles or how they connect and what the actual State can do for the

Land ... for the Local [Land Council] ... apart from giving them out their budget every year (Personal Interview with an Aboriginal woman #01, 12.12.1997).

Due to the Aboriginal Family Voluntary Resettlement Scheme of the 1970s (AFVRS), and the earlier dispossession of the original Aboriginal population of Dubbo, the city can today be described as a 'mixing-pot' of Aboriginal people of various 'tribal' backgrounds. The AFVRS of the 1970s, and the continuing influx of Aboriginal people into the Dubbo area, has created a tension within the Aboriginal community. This tension has caused both lengthy and brief bouts of internal conflict and disputes relating to issues such as: Who should have political authority in local Aboriginal affairs? Who are the legitimate people to make decisions relating to local Aboriginal culture and heritage? Who have the right to make decisions regarding the financial, educational, and physical welfare issues of the Aboriginal people of Dubbo?

Gaynor Macdonald (1997a) has identified an escalation in intra-community conflict within New South Wales Aboriginal communities since the early 1980s. This, she claims, is mostly due to "changes in resource allocation", as well as to structural changes within the communities (p. 65). Macdonald makes a distinction between the members of the community who identify themselves as direct descendants of the original Aboriginal population, i.e. "traditional people", and people who, for various reasons, have moved into the area, and who trace their descent to other parts of the country, i.e. "historical people" (also Martin 1997). This notion of 'historical' and 'traditional' people has become very apparent in Dubbo, especially when discussing either access to resources or matters relating to a local Aboriginal cultural and historical heritage. The failure of the *ALRA (NSW) 1983* to distinguish between 'traditional' and 'historical' has effectively created one legal category out of an otherwise socially, historically and legally (Aboriginal law) different people (also Sutton 2001b). Today's distinction between 'historical' and 'traditional' people is not based on whether people are Wiradjuri or not, but on whether people can trace their descent to the traditional local mobs of the Dubbo area. People who classify themselves as the descendants of the Aboriginal population of Dubbo at the time of white settlement, frequently express concerns regarding Aboriginal people and families who have either moved to, or been

relocated to Dubbo. People use terms such as 'Aboriginal immigration' and 'take-overs' and fear that the culture and the history of the local traditional people might be affected or transformed by the cultural baggage of the 'immigrants'. The use of terms like 'tradition' and 'traditional'- and the distinction drawn between various groups in Dubbo - will be discussed in the second section of this chapter; but, it is worth noting here that in the last few years, people (especially the 'traditional' people) are increasingly using the terms 'tradition' and 'traditional'. In 1999, I heard a community leader use the term 'historical' to refer to Aboriginal people who are not descendants of early inhabitants of the Dubbo Area.

At the same time, Dubbo has one of the largest Aboriginal populations outside the metropolitan area in New South Wales, with over thirty established Aboriginal organisations. And after the passing of the *NTA 1993* (Cth), issues of membership, authenticity, authority and political control have all become increasingly important. The passing of the *NTA 1993* (Cth) has been described by members of the Aboriginal community as both positive and negative. While some people claim that recognition of native title in Australia - and the introduction of possible 'native title holders' into the area - has caused even further splits within the community, others claim that it has united both individuals and groups. Could it be that these changes will eventually benefit the whole of the Aboriginal community of Dubbo?

The second part of this chapter will address certain aspects of contemporary local organisations. I discuss the nature and process of local internal politics, along with the socio-historical basis influencing the construction of various forms of community membership within the Dubbo Aboriginal community. However, first I will briefly discuss the political developments on both the Federal and New South Wales State levels that have impacted Aboriginal affairs since the 1960s.

The second quote that appears at the beginning of this section is taken from an interview I conducted with a local Aboriginal woman, who, despite years of working for various Aboriginal community groups in Dubbo, still fails to understand the nature and workings of some of the most important Aboriginal organisations in New South Wales. This lack of knowledge is relatively consistent within the Aboriginal community in Dubbo, vis-a-vis both contemporary and

historical political institutions and political affairs. Among the prime examples are the obscure accounts given by many members of the Aboriginal community of the most important political event in the history of the relations between Aboriginal people, the Federal government and the non-Aboriginal Australian society in the last century. Over thirty years after the event, there are still great misconceptions among the general public about what the Australian people were voting for in the 1967 Referendum. These misconceptions can be found on all levels among both Aboriginal and non-Aboriginal people in Dubbo (and in Australia generally) (see Attwood and Markus 1998). I am a relative newcomer to Australia, and a total novice when interacting with Aboriginal people. So at first I found the various accounts which people gave me of the 1967 Referendum to be not only confusing, but also quite intriguing. The most common accounts held that in 1967, Aboriginal people had been granted either Australian citizenship, the right to vote, or both. These misunderstandings, along with a general lack of knowledge about what takes place in the political arena in Canberra, might not be considered to be of great importance for a people perceived to belong to the lower level of Australian society, who are more likely to be preoccupied with meeting the daily needs of their families. In previous decades, knowledge about the nature and function of the Social Welfare system, as well as of the services of various local Aboriginal organisations, were sufficient for most of the Aboriginal people of Dubbo. However, aspects of Federal politics and the rulings of the High Court of Australia are becoming increasingly important in the everyday lives of many Aboriginal people of Dubbo today.

In order to establish some historical context for what is taking place in Australian Aboriginal politics today, it is necessary to briefly revisit the 1967 Referendum. In 1967, more than ninety percent (90.77 percent) of the Australian public voted in favour of giving the Commonwealth the capacity to make and administer laws to address and advance the interests of Aboriginal people and to include them in the census (Attwood and Markus 1997, 1998, 1999; Peterson and Sanders 1998). In truth, the Referendum was neither about giving Aboriginal people the right to vote

nor was it about handing out citizenship.⁹⁵ In 1948, the Commonwealth Government passed a *Nationality and Citizenship Act*, replacing the legal category of 'British subject' with 'Australian citizen' (Peterson and Sanders 1998: 13). This new category applied equally to Aboriginal and non-Aboriginal Australians, but earlier discriminatory legislation was not altered by the passing of this Act. Most States not only lacked the funds but sometimes the will to address the frequently appalling living conditions and sub-human existence of many Aboriginal people. Midway into the twentieth century, most Aboriginal people were still denied the right to vote: many had their movements restricted, financial decisions were limited, the fate of their children often rested in the hands of welfare officers, and most of them did not receive social welfare benefits (e.g. Sanders 1998). Until 1967, the decisions surrounding these issues invariably lay with the governmental bodies of each State. However, there were considerable variations between the States regarding the rights and welfare of the Aboriginal population; by 1967, Western Australia and Queensland were the only States that had not given Aborigines the right to vote (on a state level) (Attwood and Markus 1997; Peterson and Sanders 1998: 13 - 14).

To some extent, the 1967 Referendum can be seen as an amendment to an oversight in the writing of the Constitution of 1901, which excluded Aboriginal people from the State. The Constitution gave the Commonwealth the power to make decisions pertinent to the destinies of people based on some 'racial' categorisation,⁹⁶ but mostly overlooked the existence of an Aboriginal population in Australia. The only mention of Aborigines was in Section 127, where it stated that the Aboriginal people of Australia should not be counted in the Census, and in section 51, where State Governments were given complete administrative power over the Aboriginal population within their state (e.g. Attwood and Markus 1997; Langton 2000).⁹⁷ However, in 1967, after more than a decade of battles fought by

⁹⁵ The right to vote had been legislated for Commonwealth elections in 1962 (National Archives of Australia, web site).

⁹⁶ eg. Chinese and South Sea Islanders in Australia (Dodson P. 1998: 13).

⁹⁷ Section 51 stated that:

The Parliament shall, subject to this Constitution have power to make laws for the peace, order, and good government of the Commonwealth with respect to:- ... (xxvi)
The people of any race, other than the aboriginal people in any State, for whom it is necessary to make special laws.

both Aboriginal and non-Aboriginal activists for constitutional change, all legislative rights were transferred to the Federal Government (Peterson and Sanders 1998). The outcome of the 1967 Referendum was the determination to eliminate racial discrimination and establish equality for Aboriginal people. However, the complexities of implementing the provisions of the 1967 Referendum are not always recognised (e.g. Attwood and Markus 1998) and for this reason it is necessary to examine how Federal Governments have exercised their powers during the last three decades. For the purpose of this thesis there are four aspects which need investigation: Aboriginal rights to land, recognition of Aboriginal culture, the construction of Aboriginality (identity) and the revision of Australian/Aboriginal history. The following is an account of some of the legislative decisions made by Federal Governments over the last three decades, and of how these decisions have influenced the aforementioned aspects vis-a-vis the lives of some of the Aboriginal people of Dubbo.

Immediately after coming to power at the Federal level in 1972, the Australian Labor Party (ALP), headed by Prime Minister Gough Whitlam, set out to “legislate to give Aborigines Land Rights” in the Northern Territory (Howie 1981: 28-29). However, despite various reforms of national Aboriginal affairs, succeeding Federal Government leaders were not successful in legislating on nationwide Aboriginal land rights. The Fraser Coalition Government's resolution was to leave land rights legislation to individual states (see footnote 67). The major achievement of the Whitlam Government was the establishment of a Commonwealth Department of Aboriginal Affairs (DAA) and the National Aboriginal Consultative Committee (NACC, later NAC, which was replaced by ATSIC in 1988); in addition, in 1975 the Government passed the *Racial Discrimination Act*. The subsequent Federal Coalition Government, headed by Malcolm Fraser, introduced the Community Development Employment Projects (CDEP) Scheme in 1977 (Sanders 1998). Robert (Bob) Hawke's Labor Government, which came to power in 1983, failed to deliver on its pre-election

Section 127 stated that:

127. In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives should not be counted (National

promises of Aboriginal land rights (see Chapter Four (4.3.)). Rather, it introduced an improved Aboriginal Employment Development Policy, as well as establishing a Royal Commission into Aboriginal Deaths in Custody in 1987 (Peterson and Sanders 1998). Until 1992, no Federal Government leader adequately met the persistent call for Aboriginal land rights: the Federal Government had only been successful in gaining such legislative rights in the Northern Territory. However, following the *Mabo (No. 2)* ruling, Paul Keating's Federal Labor Government, which came to power in 1991, once again placed Aboriginal land rights on the national political agenda with the *NTA 1993* (Cth).

There are various explanations given for the strong stance taken by the individual States over rights to land, the most convincing argument attributing the attitudes of the States to Australia's dependence on primary production (Young 1995). This dependency became very apparent during the 1997 debate on the 10-point native title plan. While arguing for the 10-point plan, Prime Minister John Howard frequently emphasised the importance of primary production to the economy of the country. This prompted Aboriginal leaders to allege that the Government was planning to upgrade pastoral leases to full primary production leases and thus extinguish native title over a vast area of Australia⁹⁸ (Woodford and Roberts 1997: 1). Other explanations have been grounded in conflicting interests between mining companies and other forms of resource development on the one hand, and environmental and cultural conservation groups on the other hand (e.g. Bell, D. 1990; Young 1995). This has been very apparent in Queensland and Western Australia, where the influence of mining companies is very strong (e.g. Pearson 1997b). It has also been suggested that if it were not for the fact that Australia became a signatory to the International Convention on the Elimination of All Forms of Racial Discrimination, which was ratified by the enactment of the *Racial Discrimination Act 1975* (Cth) (RDA), native title would have been wiped out over

Archives of Australia, web site). The Referendum amendment removed the underlined part of section 51 and the whole of section 127.

⁹⁸ 42 percent of the Australian Continent was under pastoral leases in April 1997 (4,250 grazing leases (1,500 properties)), on perpetual terms with no Aboriginal access rights (e.g. reports in the *Australian* 10-11.05. 1997:1, 6; the *Sydney Morning Herald* 30.04.1997: 17). Furthermore, it is interesting to note that pastoral leases were created in Australia to meet the special needs of the emerging Australian pastoral industry, a situation which was absolutely unknown in England; ie. pastoral leases come from Australian statute law, not English Common law (Dodson M. 1998).

the whole continent (Nettheim 1998a; see also Burke 1998; Schurmann-Zeggel 1999). Today, each State is responsible for its own Aboriginal land rights - under the Federal legislation and subject to appeal to the High and the Federal courts - with decision-making often based more on pragmatic rather than practical policy making.

As I have discussed in Chapter Four, New South Wales passed its first Aboriginal Land Rights Act in 1983. Between 1983 and 1993, all issues relating to Aboriginal land in Dubbo were handled by the Local Aboriginal Land Council (LALC), acting under the auspices of the New South Wales Aboriginal Land Council (NSWALC). However, as with most other Aboriginal communities in New South Wales, the land that is claimable as Aboriginal land in the Dubbo area is very limited. So apart from developing and managing Aboriginal land which has already been returned or acquired, the major role of the LALC is to invest in and allocate Aboriginal housing, as well as deal with community and human rights issues. While some would claim that various 'ruling' families in Dubbo have more input than others into the running of the LALC - and that some benefit more than others vis-a-vis allocation of housing and funding - the policy requires that assistance be given on an 'equity and need' basis (see Macdonald 1997a: 66; see also Merlan 1994). Up until 1993, the internal politics of the Aboriginal community in Dubbo were more affected by State policies and influences within the local and regional Aboriginal institutions than by Federal Government policies and legislation. However, this changed in 1993 with the passing of the *NTA 1993* (Cth).

At the time of the passing of the *NTA 1993* (Cth), land and heritage rights were, to some extent, an important issue for many Aboriginal people of Dubbo. However, the passing of the *Act* has had two major consequences for the Aboriginal community in general. Firstly, questions about land ownership, status as rightful claimants to native title, and the nature and the authenticity of local Aboriginal cultural heritage and history are increasingly being debated on local, as well as national levels. These debates had not been readily identifiable before the *Mabo* (*No. 2*) ruling in 1992, or more accurately, these debates had not taken place within the framework of terms like 'native title' and '(local) Aboriginal cultural heritage. Federal government legislation over the last three decades has focused on

eliminating racial discrimination. In an attempt to make amends for past discriminatory attitudes, it has addressed various issues of social inequality among Aboriginal people at the national level. But the policies of the State governments required the ultimate force when deciding the fate of people at the local level. The policies implemented by the New South Wales government were usually based on the assumption that the Aboriginal people of New South Wales were just one distinct minority group (e.g. Macdonald 1997a; Morris 1988, 1989; Read 1988). Ignorance of the diversity among the New South Wales Aboriginal people and communities in the State was an inadequate recognition not only of local Aboriginal cultures but also of the distinct history, identity and heritage of each Aboriginal community in the State. The second consequence of native title legislation lies in the general conception that the term 'native title' implies some form of financial benefits and freehold ownership of land.⁹⁹ Due to this misconception, there have been instances where people in Dubbo have voiced expectation of some form of financial gain or compensation, thus assigning a positive 'spin' to this aspect of the legislation. These ill-conceived expectations have led to new conflicts and tensions within Aboriginal communities. This becomes evident in areas where people are redefining their connection to the land, (re-)establishing the local Aboriginal history, and, to some extent, creating new categories of inclusivity and exclusivity (based on authority and authenticity) influenced by possible financial gain.

While the political processes at the national level are becoming increasingly important, so too are the processes on the local level. Local politics are being transformed. While *Mabo (No. 2)*¹⁰⁰ and *Wik* have made Aborigines the focus of urban politics on a national level, at the same time there has been a marked increase in political participation among Aboriginal people at local levels (e.g. Merlan 1997: 1-2,13). This increase has nurtured a rejuvenation of Aboriginal activism, the birth of 'part-time' politicians, and an overall emphasis on re-empowerment among various sections and groups within the community. However, at the same time it must be recognised that sudden and rapid government

⁹⁹ Native title is discussed in detail in Chapter two.

action, legislative changes and unpredictable judicial findings, while contributing to new forms of conflicts and tension, are also proving major influences in the construction of the new, emerging structure of Aboriginal politics at a local level. So it is here that one becomes aware of the ongoing dynamic interplay between white Australian concepts, Aboriginal responses to policy change, further government policy changes and further aboriginal responses. The perceived unity and political identity of the early Aboriginal inhabitants of the area has been transformed perhaps irrevocably by a series of new and frequently controversial legislative changes.

6. 2. Stirring the Pot: Local Politics, Local Conflicts

Although the first woman formally interviewed for this research was not born in Dubbo, she has lived there most of her life. She and her husband are both involved with the LALC and other 'semi-political' community affairs, as well as having been party to a successful land claim negotiation (Bourke Hill).¹⁰¹ The informant runs one of the many Aboriginal organisations in Dubbo, but, as many people told me later, she considered the LALC to play the major role as an Aboriginal political organisation in Dubbo.

The Lands Council itself is, as I see it, *the* most important organisation in [Dubbo]. Because it is the only place that we all come together as community people to discuss the issues. You know, like here at [organisation] we have our monthly meetings that concern people here ... the Lands Council, ah, it deals with issues of a much more wider range ... I see it as the most important organisation in our town. Because, as I said, it is the only place where this community comes together to discuss certain issues, whether it be land, whether it be housing, whether it be State Land Council issues, ah, land claims, anything ... it all comes from there (Int.#01, 12.12.1997).

¹⁰⁰ The implications and outcomes of the *Mabo (No. 2)* ruling will be discussed in Chapter Nine (9.1.).

¹⁰¹ Outside the Dubbo area.

This woman described her own involvement as that of ‘just a member’: she went to meetings, moved motions, basically “just being involved there”. However, when asked why she used the past tense when describing her involvement with the LALC, she outlined some of the internal conflicts and tensions taking place at LALC meetings. She claimed that she had

... stepped out of it for a while, because there, for a time, you had to pick a side of for whom you were going to vote for certain issues ... I just could not be bothered, ah, jumping into those type of fights (Int.#01, 12.12.1997).

This woman was referring to conflicts and ‘divisions’ within the community, which emerged and found voice during LALC meetings. Community conflicts and divisions are not unique to the Aboriginal community in Dubbo. However, this division in Dubbo, as in many other New South Wales towns with an Aboriginal population, has a strong family base. Divisions are structured around extended families that are competing for positions of power within the LALC.

In late 1997, there was an operation under way to change this family-constituted stronghold of power within the LALC. The woman who provided me with my first information about the Aboriginal community in Dubbo informed me that in a few days time the LALC would hold their Annual General Meeting. The news that the LALC was to hold their AGM was of some interest, but the fact that this was to be the second AGM in two weeks was even more intriguing. When I sought clarification from other people regarding this unusual procedure, I received different versions of what had gone wrong at the first AGM. At the second AGM, a motion was passed for constitutional change, prohibiting close relatives to sit simultaneously on the board of the executive of the LALC. This change to the rules was aimed at minimising the strong powers of some ‘ruling’ families, in order to make the LALC more community based.

These recent structural and legislative changes within the LALC, and the accompanying tension within the community, are not simply consequences of the passing of the *NTA 1993* (Cth). Like the other 117 LALCs in New South Wales in

1998, the Dubbo LALC was facing the Sunset Clause.¹⁰² That year was the last year wherein the LALC operated on tax-based funding administered by the New South Wales Aboriginal Land Council (NSWALC). Some of the internal tension may thus be linked to prospects of an uncertain financial future, especially amidst rumour and media speculation of misappropriation and mismanagement of finances within the NSWALC (see reports in the *Koori Mail* 02.06. 1999: 3 and 30.06. 1999: 2).¹⁰³ However, at the same time the LALC administers funds for housing, as well as giving financial assistance to people who have fallen on hard times; for example, they provide the payment of, and assistance with, utility bills and travel expenses (i.e. to funerals, for health reasons). The identity of those sitting on the Board of Executives is therefore of great concern for both individuals and the community as a whole.

Another significant factor is that until 1996, the LALC came under non-Aboriginal administration. However, during 1997, it embarked on a test run with an all-Aboriginal administration. Autonomy and independence, two of the major characteristics of Aboriginal politics and decision-making (e.g. Myers 1986), were very evident in Dubbo. The prospect of ensuring all-Aboriginal control was of paramount interest to most members of the LALC. But, there was still family-based internal competition for the seats vacated by the non-Aboriginal representatives. It is thus not surprising that even in times of uncertain financial future, there would be friction and some contest over exactly which groups and individuals should wield power within “the most important Aboriginal organisation in town” (Int.#01, 12.12.1997).

The political power structure in ‘traditional’ Aboriginal societies has been described as “largely informal and loosely organised” (Monk 1972:44). Maintenance of law and order was based, on the one hand, on religion and, on the other hand, on a kinship system, which specified rights and obligations of

¹⁰² A clause in a bill which terminates the Act or brings it up for review at the end of a specified period of time (Macquarie Dictionary 1991 (1990)).

¹⁰³ The NSWALC split after a meeting in Dubbo in May 1999 and underwent an investigation by the Independent Commission against Corruption (ICAC) (over 200 allegations of corruption, mostly from Aboriginal people). A new Board of Executives was elected in January 2000 immediately

individuals (e.g. Berndt, R. M. 1965). In a contemporary Aboriginal community like Dubbo, although the nature of local politics has little to do with religion, kinship is still of great importance to the nature of the political power structure. While the importance of kinship (ties) in traditional societies was based on the management of resources among people who lived self-subsistent lives, today the focus has shifted to notions of equity and need, in a community which relies heavily on the social welfare system (e.g. Macdonald 1997a). This means that the people authorised to assess who are 'in need', i.e., the people who control the funds of the LALC, are the people who wield real power. But the power of the LALC executives does not merely extend to financial delegation to individuals on a 'need' basis: it also effectively controls other funds held by the LALC for various developments within the community. Little remains of the informal organisation of so-called 'traditional' Aboriginal societies, the socio-economic structure of contemporary Aboriginal communities having become formal and organised. As a consequence, a great deal of politicking takes place, with the major focus centred on getting friends and family into positions of power. One of the Elders in the community describes her experiences as follows:

When they get down there [LALC] to vote, you see, they get all their people ... this one married to this one, this one related to this one and duh, duh, duh (indicates with her hand). You've got to be related to them ... and that's how it goes. It's like if you went and got your little tribe together and come down and vote for me. And they only turn up when the voting comes. You don't see them any other time (Int.#10, 30.08.1998).

While this process of seeking political power is as old as the term 'democracy', many members of the Aboriginal community in Dubbo have never been directly involved in political processes. Until recently, participation in any political process was not perceived as resulting in either political or financial gain and was likely to cause only minimal friction within the community. However, in the last few years, partly due to changes in the funding of the LALC, but more importantly to the rapid political and legal changes on a national level, there has been increased friction within the community regarding who wields actual power. Media hype

setting out to address corruption findings as well as internal conflicts and division (various reports in

and speculation about financial compensation for Aboriginal people, and the debate about who are the legal recipients of such compensation, further contributes to increasing friction within the community. This increased tension has given rise to new questions about identity, authority, authenticity and group membership. And here again we see the disruptive impact of schisms wrought by (usually) non-aboriginal media hype and political and legal changes on the Australian Aboriginal people who writers of the eighties saw as having functioned for centuries as bonded groups living in a conflict-free, personal and spiritual relationship.

In his 1995 article, Peter Sutton describes a certain tension in Aboriginal sociality (politics), something which has recently grown more intense as people are required to provide evidence as rightful land or native title holders. Sutton's analysis focuses on the formation of groups in land claims, and discusses the tension between "atomism" and "collectivism", which appears during the land claim process (1995: 1). According to Sutton, this tension appears where

smaller landed groups belong to larger congeries, and also may overlap considerably in membership and geographical scope, subgroups may pursue their interests rather atomically unless convinced that their interest are better served by forming of coalition (1995: 1)

He claims that when analysing the socio-political processes of Aboriginal communities today, the atomist approach applies more to coastal communities due to their having different pre-colonial traditions and having experienced post-colonial dispersal and dispossession. The collectivist approach is more useful when focusing on desert people with their less socially and culturally disruptive history. Furthermore, Sutton emphasises the increased tension between atomism and collectivism in both urban and remote Aboriginal communities since the introduction of the *NTA* (1993) (see also Edmunds 1995c). Other anthropologists have addressed this notion of 'atomism' and 'collectivism', among them Francesca Merlan, who claims that "there is a perception that recent land rights and native title opportunities have stimulated the putting forward of claims on behalf of smaller Aboriginal interest groups, as opposed to more broadly defined ones"

(1997: 2). While Dubbo is not a coastal community, it is still apparent, when analysing the social structure and the socio-political relations within the Aboriginal community, that it can be described as ‘atomist’. Or perhaps more correctly, the ‘atomist’ versus ‘collectivist’ approach highlights the difference between the implementation of the *ALRA (NSW) 1983* and the *NTA 1993* (Cth). As will be discussed in Chapter Seven, it has become quite evident that after the introduction of native title, the ‘landed group’ (native title claimants) have adopted an atomic approach, while the introduction of the *ALRA (NSW) 1983* did not affect the collectivism (of course recognising previous, existing and ongoing individual and groups tension/conflict as discussed in this chapter) of approach to material resources (before the split into ‘traditional’ and ‘historical’ people appeared as discussed below). It is important, however, to look at the specific colonial, political and historical processes which have produced, or more correctly lead to this more recent atomist nature of the local politics in Dubbo, and, more importantly, at the effect that land rights and newly introduced native title have had on the local political power structure.

Since Radcliffe-Brown theorised about the political and social organisation of Australia’s Aborigines in the early 1930s, groupings and the nature of membership in a group have been the subject of continual study by anthropologists (1930 - 1931). The words of Radcliffe-Brown at the beginning of this chapter describe what he saw as constituting the larger political structure of Aboriginal communities. Radcliffe-Brown believed that the basic political unit was the “local horde or clan ... and order ... [was] maintained by the authority of the old men” (1940: xix). His work has been criticised as “one-dimensional ... and [as failing] to relate cultural concepts to the multiple dimensions of social reality” (Myers 1998 (1987): 31; also Hiatt 1962). It has also been judged as an “outdated ... view of the Aboriginal world as composed of socially and spatially bounded and autonomous units like clans” (Merlan 1998: 166). Theoretical responses and revisions pertinent to Radcliffe-Brown’s oversights in the 1950s and 1960s, drew heavily on environmental anthropology, focusing on availability, the use of resources, and the flexibility of groups and group membership (e.g. Lee and De Vore 1968). However, these approaches have been criticised for their lack of an absolute definition of what constitutes a ‘band’ or a group and its relationship to land (e.g.

Gumbert 1981; Peterson 1983). The work of Radcliffe-Brown, and the critique of his work, has limited theoretical relevance for this thesis, since the focus of the bulk of his work was exclusively directed towards hunter-gatherer societies. And due to the fact that until fairly recently New South Wales Aboriginal people were considered people with lost traditions and cultures, there are very few extant anthropological studies and analyses of social and political life, identity, and group formation within contemporary New South Wales Aboriginal communities (see Macdonald 1998). There is one aspect of Radcliffe-Brown's work, however, that is still of major concern when analysing the nature of politics (identity) and group formation in Aboriginal communities today. This is his recognition of a larger body within the Aboriginal political structure, namely that of a 'tribe' (1913 as A. R. Brown, 1930 - 1931). Radcliffe-Brown's theoretical conceptualisation of this larger body, which he defined not as a political but as a territorial unit sharing language and name, was a flexible and undeveloped concept in the 1930s. It continues to present a dilemma for scholars working among Aboriginal people today. However, there has been some recent re-conceptualisation of group and identity formation among anthropologists working in Western Australia and the Northern Territory. Francesca Merlan uses the term 'socio-territorial identity', which involves the "products of relations of representation in which social practice is immersed" (1998: 118). Merlan's framework has interesting connotations when applied to the Dubbo Aboriginal community.

The term 'Wiradjuri' is used collectively by people from approximately twenty communities in New South Wales who share "classical" Wiradjuri culture, have a common history of resistance to colonisation and political activism, and trace their descent to ancestors who shared cultural practices and beliefs (Macdonald 1998). As a member of the Wiradjuri nation, people identify with a certain territory within the nation; as well, they recognise a (sort of) political unity where the highest authority lies with the council of Wiradjuri Elders. People of Dubbo frequently use the term 'Wiradjuri' for social differentiation, to show commonality (i.e. language, history) with all members of the Wiradjuri nation. Consequently, the term 'Wiradjuri' might be seen as constituting a socio-territorial identity and be described as the "'default' condition [as] it appears to be authentic, a kind of structure which has an undisputed pre-colonial origin" (Merlan 1996: 167).

However, in the socio-political context (reality) today, this collective identity may be considered very trivial when compared to what constitutes a 'socio-territorial identity' in many remote Aboriginal communities in (post native title) Australia. Any analysis seeking to display political unity among New South Wales Aboriginal people today would have to draw on (the history of) political activism, going back to the 1930s and 1940s, wherein the key concept would be the concept of 'Aboriginality'. When revisiting the quote at the start of this chapter, it becomes apparent that while there is a notion of 'territorial structure' among Wiradjuri people, this structure is based both on a communal history of political activism, and the construction of (new) identities of 'Aboriginality'. This communal history of political activism can not reduce the disintegration caused by the colonial processes. As a result, the political processes in many (not all) Wiradjuri communities have to be analysed through atomism and fission, rather than corporateness and collectivism. The introduction of land and native title rights has further complicated this picture.

There is a prevailing assumption that conflict and friction are endemic at the local level in New South Wales Aboriginal communities, while on higher (State/national) levels there exists some form of corporateness (e.g. Merlan 1997: 3 - 4). This notion is further enhanced by media reporting - or claims by the ATSIC team of legal experts on native title - of how "NSW is of particular concern ... because of intra-indigenous disputes, and refusal of different parties to accept mediation in order for the NSW Government to agree to determinations" (reported in the *Sydney Morning Herald*, 07.03.1998: 2). At the same time, there is recognition of the fact that conflict and competition over land is a normal part of socio-political life, and not necessarily a sign of fragmentation within a community of people who have lost various segments of their tradition, culture and history (e.g. Peterson 1995a: 8). Some anthropologists working on land and native title claims insist that lesser conflicts are merely evidence of either socially reproducing systems (Peterson 1995a), or evidence of "continuing vitality of relations to country" (Merlan 1997: 1). The fact remains that in Aboriginal communities such as the one in Dubbo, the conflict has taken on some new features. Included among these is the notion that due to the introduction of the native title concept, "the material and symbolic stakes have been raised" (Edmunds 1994: 39) and have even

been transformed (Macdonald 1997a). Anthropologists working with Aboriginal people claiming land and native title today have to increasingly acknowledge the fact that “the Aboriginal expressions of relationship to land have a constantly shifting, unstable quality which makes needed certainty and finality impossible” (Merlan 1997: 1). Thus it is not sufficient to simply look at the colonial and historical processes when discussing conflict and tension within the community. It is also important to look at the increased attention which members of the community are paying to whoever holds power in the local political arena, and at the growing emphasis, arising out of the *NTA 1993* (Cth), which is placed on ancestral identity (descent) and relationship to the land.

As discussed in Chapter Three (3.4.), Merlan identifies three types of socio-territorial identities (1996: 175). It is the third one, based on “cognatic descent”, which might prove useful when analysing the processes taking place in Dubbo today. The key word in Merlan's analyses is ‘flexibility’, which inevitably comes to the fore when the construction of boundaries and process of social differentiation are studied. This flexibility becomes further evident upon looking at the response at the community level when government legislation gives specific rights and influences to a group of people within the community vis-à-vis certain decisions over an area. A kind of moral authority arises on the basis of demonstrating an unbroken link with the country, a link sustained by known genealogical ties to particular ancestors. The ‘stakes have been raised’: former ways of identifying with country and drawing up of boundaries are reconstructed. People are still Wiradjuri, but now they are not only from the reserve (Talbragar). As the direct descendants of the original population, they are also likely to identify as Dubbo-Gah. Increasing participation in the native title process, and increasing exposure to whatever past knowledge has been collected in the process, continues to shift, change and/or strengthen people's ‘socio-territorial identities’. This process has inevitably put increased focus on internal conflict, and has re-emphasised the difference within the ‘mixing-pot’ between ‘historical’ and ‘traditional’ people.

In the last section of Chapter Five, I discussed the Aboriginal Family Voluntary Resettlement Scheme of the 1970s. As a result of this scheme, a large number of Aboriginal families were moved from far western New South Wales into towns

like Dubbo (see Attwood and Markus 1997; Macdonald, 1997a). The combination of the Family Resettlement Scheme in the 1970s, the assimilation policy of the Aboriginal Welfare Board in the 1950s and 1960s (which saw the last families move(d) from the reserve into town), earlier dispossession of the original population, and Aboriginal migration to Dubbo over the last two decades, has created the aforesaid 'mixing-pot' of Aboriginal people with various "tribal" socio-historical backgrounds. This diversity is well recognised within the Aboriginal community, but the non-Aboriginal population of Dubbo does not always show an understanding of this diversity when discussing local Aboriginal affairs. Because of the dramatic impact of historical factors on the current diversity of the population, it is not surprising that there is considerable conflict over many issues. As a result, the new image of the Aboriginal community, held by many non-Aboriginal people of the area, is one of a very troubled and disunited community typified by internal antagonism, particularly in the area of West Dubbo where there is a large concentration of Aboriginal housing.

One of my first experiences of this negative image of Aborigines (in West Dubbo) took place in early 1998. I had recently arrived in Dubbo for the second time, and had taken up residence in one of the local boarding houses. One afternoon, I was talking to some of the residents, mostly young non-Aboriginal men, and the talk turned to the reason for my stay in Dubbo. When I told them I was researching the Aboriginal people of Dubbo I received mixed replies. Most of the men identified West Dubbo as the geographical location of the Aboriginal community, and, furthermore, described the area and its inhabitants in terms which I would have associated with rioting ghettos of minority groups in the western world. When I told them I had not yet been to the heart of West Dubbo, a few of the men immediately offered to chauffeur me on a guided tour around the area. Their excitement was not lessened by the content of a news-related programme that had been aired on one of the television stations the previous night, describing the turbulent situation in West Dubbo. This programme had depicted a community of people drinking and fighting in the streets, burning cars and houses, and shouting abuse at police and TV news crew alike. To the disappointment of my escorts, an early evening tour of the area did not reveal street violence or any forms of conflict. However, there were burned out and boarded up houses, arising no doubt

from the event that both the news programme and the boarding house residents had reported. This image of West Dubbo, which ostensibly reflects the behaviour of the majority of the Aboriginal population in Dubbo, is further reinforced by front page articles in the local newspaper reporting on the interaction between Aborigines and the police. Headlines like “Softly, softly in West Dubbo: Station opens up to a new approach”, revealed the words of a police superintendent claiming that “we [police] want to go away from confrontationalist policing and take on board the concerns and priorities of the community” (cited in the *Weekend Liberal* 14.03.1998: 1). This clearly outlined both past approaches and the need for reform. The severity of the problem is even further demonstrated by the fact that the police station building was burned down before it opened. This representation of West Dubbo depicts a community riddled by conflict and trouble; furthermore, it constructs an image of a foreign terrain within the city (separateness). This conceptualisation of an Aboriginal community, as distinct or separate from the rest of the ‘mainstream’ Dubbo population, has various implications for Aboriginal groups and individuals seeking social and economic security for their families. The Aboriginal people of Dubbo are depicted as a specific community characterised by conflict and lack of political unity. For this reason, it will be hard for Aboriginal individuals and groups to gain any form of assistance for economic or political development within the Aboriginal community, from either local city authorities, local private entrepreneurs, and/or from State and Federally funded enterprises for Aboriginal people. The problem lies partly in the use of the term ‘Community’.

The majority of the Aboriginal people providing interviews and information for this thesis used the term ‘community’ and talked about one ‘Aboriginal community’ in Dubbo.¹⁰⁴ There are various definitions that have been commonly used when speaking of Aboriginal people. These explanations mostly draw on the structural changes that took place in the process of colonisation. Juanita Sherwood (1999) explains ‘community’ as “a term that Indigenous people use fairly regularly to explain where they are from and the status of their culture” (p. 4). Sherwood

discusses the persistent lack of comprehension among non-Aboriginal people regarding the term 'community', and highlights the breakdown of communal cultural structures within Aboriginal communities following the introduction of capitalism. According to Sherwood, the use and the need for the term 'community' derives from a fundamental distinction between an Aboriginal "consciousness of community and the current western ideology of society" (1999: 5). While Sherwood's focus is on New South Wales Aboriginal communities, there are, however, similar reports from other parts of Australia. Tim Rowse (1998), focusing on remote Aboriginal communities, explains the term 'community' as "a category of both administrative discourse and Aboriginal governance" (p. 93). Rowse's focus centres on the transition from the 'paternalistic' policies of the colonial government based on rations, to policies of self-determination within the contemporary cash economy. According to Rowse, the notion of a community and communal facilities are now "essential to *livable* traditions ... [and the] reproduc[tion of a] ... social order" (p. 95). The Sherwood and Rowse discussions focus on Aboriginal communities with very different colonial histories. However, the common elements of their analyses include a history of social disruption, separateness between Aborigines and non-Aborigines, and the necessity for unity among an extended group of Aboriginal people against non-Aboriginal oppression.

The Aboriginal community in Dubbo clearly demonstrates these elements of separateness and unity. Aboriginal informants frequently describe how the community, despite its internal conflicts, usually pulls together around important issues. The Aboriginal people do experience a very similar notion of one distinct Aboriginal community within Dubbo, especially when there are either political or community issues which have to be addressed. However, their experience of an Aboriginal community is more complex than that of most of the non-Aboriginal informants. When the talk turns away from discussing the Aboriginal, as opposed to the non-Aboriginal community of Dubbo, the definition given by most Aboriginal informants is of a community consisting of 'us' local Wiradjuri people,

¹⁰⁴ Smith (1989) talks about a 'geographic community', which would include all Aboriginal people within a certain geographical area, not taking into account the possible diverse backgrounds or

and 'them' Wiradjuri people from outside the Dubbo area, as well as Aboriginal people from other parts of Australia. The problems within the community are essentially traced to conflict between these groups of people, conflict that is rooted in a lack of cooperation at both grass-roots and local political levels, and that sometimes results in physical confrontation. These confrontations are usually blamed on poor administrative decisions made by both Aboriginal and non-Aboriginal local authorities, as well as on trouble-seeking thugs from out of town. Reports about these conflicts are found in the local newspaper, usually reflecting not only the severity of the problem but also the inefficiency of the police.

In 1994 the Dubbo grandmother and her family were terrorised for days by a drunken, armed mob who invaded the ... premises as her mother - then aged in her 90s - sheltered inside ... When appeals for help fell on deaf ears, she begged her young male relatives to come to their aid, and protect her and their great grandmother. After a series of armed confrontations and continuing threats, the relatives bashed the chief tormentor to within inches of his life ... as a result [her] three grandsons and one son are serving jail terms for the attack she say was the only escape from the terrifying ordeal ... There's five generations of us in Dubbo, we've been here all our lives, and the mob threatening us - carrying sticks and bats, screaming filth - had just come in from out of town (cited in the *Daily Liberal* 03.11. 1998:2).

The last sentence clearly reveals the notion of distinct groups of Aboriginal people, those who have either lived in Dubbo for generations, or claim to be descendants of the original people of the area, and recent arrivals or people passing through.

There is another interesting aspect which reveals both the repercussions of the Aboriginal Family Voluntary Resettlement Scheme of the 1970s and the perpetuation of diversity among Aboriginal people in New South Wales. In December 1997, I talked to women who manage and work in one of the Aboriginal organisations in Dubbo. When we were talking about local politics, they introduced me to the term 'traditional enemies'. All of these women were Wiradjuri: they described West Dubbo as being mainly occupied by non-Wiradjuri people who had either moved, or been moved, to Dubbo and placed in Aboriginal

interests of those people.

housing.¹⁰⁵ One problem we discussed was the fact that the LALC had been very foolish in their allocation of houses. According to them, 'traditional enemies' are placed in houses next to each other. They referred to non-Wiradjuri people as 'traditional enemies', people of different 'tribal' backgrounds who still entertain hostile attitudes which can be traced back to pre-colonial times. Thus hostility, physical conflict and house burning were traced to clashes between non-Wiradjuri and Wiradjuri people. However, while some violent clashes are blamed on rash administrative decisions and 'outsiders', most conflict does not involve physical confrontation; rather, it exists within the politico-economic structures of the community. This conflict can be traced to both the past socio-history of the community (demographic composition), as well as to contemporary political and economic decision making. Furthermore, as will be discussed in the following pages, this conflict is essentially caused by concern for, and struggle over, who has (taken or been given) the power to make these decisions. The essential questions have become: Who are the traditional people of the area? Who has the authority to make both political and economic decisions which might influence the distribution of official and governmental funding (both state and federal), and thus possibly determine development relating to local Aboriginal land rights, native title and cultural heritage issues?

There is no simple way of defining terms like 'traditional' and 'Aboriginal community': nor is it simple to analyse the nature of local Aboriginal politics in rural New South Wales today. The introduction of the *NTA (1993)* has created a great contradiction within today's political and cultural agendas. This contradiction lies in the legal implications of, on the one hand, a State Aboriginal Land Rights Act, which operates on the basis of returning procurable Aboriginal land to a community of people on the basis of their Aboriginality, and, on the other, on a national Native Title Legislation, which recognises native title rights on the basis of continual connection to the country of one's ancestors. This

¹⁰⁵ There are a number of Wiradjuri individuals and families, both 'historical' and 'traditional', who live in West Dubbo. However, as discussed in the last chapter many direct descendants of the population were 'peppered' into town around the time of the closing down of the Talbragar Reserve and subsequent building of Aboriginal housing has concentrated on housing more recent arrivals ('historical' people) and mostly taken place in West Dubbo, thus resulting in larger numbers of 'historical' people concentrated in West Dubbo.

contradiction is particularly evident in long settled parts of Australia, because the two groups may not necessarily coincide.

There is a further issue of great concern to many ('traditional') people of Dubbo. Due to the recent changes in legislation, and a general discourse regarding Aboriginal history and heritage that has brought forth both financial compensation for loss of land and economic development assistance, 'historical' people are often perceived to compete with 'traditional' people for control over these funds. This is a matter of grave concern to many 'traditional' people since availability (and use) of financial resources for people is often based on their Aboriginality and not on their ancestry. Consequently, 'historical' people, often through their being attached to a certain Aboriginal organisation in Dubbo, have been approached as the rightful authorities on various projects where, in effect, the legal consent of the local Aboriginal people (native title holders) is needed for the project to proceed. Similarly, 'historical' people may be approached either as authorities on, or the permit givers for, research and recording of local Aboriginal culture and history. This is seen as detrimental to the recording of and the protection of significant cultural heritage and sacred sites in the Dubbo area. In addition, it fails to give due recognition to the 'traditional' people of the area (and their specific culture). So ever increasing attention is paid to the nature of people's membership in the Aboriginal community, and to how individuals and families establish their rights and authority against other people in the community (e.g. Edmunds 1995b; Merlan 1996). The questions of 'socio-territorial' identity and connection to land become increasingly important. Aboriginality, as an identity and a differentiation from non-Aboriginal people, is placed second to an identity which is constructed on identification (by blood/relatives), knowledge (past history and present politics), and differentiation (based on strictly defined land area, not language) from other Aboriginal people in the area.

The term 'traditional' has thus taken on a new meaning for people who a decade ago used the term to refer either to their ancestors, or to Aborigines in remote Australia. And while anthropologists working in Aboriginal Australia today are faced with the necessity to revisit theoretical approaches to notions of identity, cultural/political authority, historical authenticity, and group membership within

Aboriginal Australia, Aboriginal people of Dubbo continue to deal with the same issues (e.g. Finlayson 1997; Merlan 1996, 1998; Morphy 1999; Weiner 1999: 21). It has become increasingly apparent that in order to gain some understanding of various, often very complex forms of legislation, and to fulfil the current criteria of a native title holder, the 'traditional' people must organise themselves. This organising process is essential in order to seek advisory and financial assistance from various State and national bodies, as well as to gain knowledge and distribute information about the new 'status' of native titleholders. One of the main tasks faced by the 'traditional' people of Dubbo is that of (re-)establishing the meaning of terms like 'tradition' and 'traditional'. The primary task is a formulation of recognised membership definitions within the community, as well as establishing means of conflict avoidance and notions of co-operation and general welfare for the community as a whole. "Wirrimbah", Direct Descendants Aboriginal Corporation is the primary organisation in Dubbo that addresses these issues. While the Local Aboriginal Land Council is the representative for the whole of the local Aboriginal population, "Wirrimbah" has come into being with the aim of guarding the interests of the 'traditional' people. The members of "Wirrimbah" are the direct descendants of the Aboriginal population living at the time of white settlement in Dubbo. While this organisation was established as recently as 1998, its aims and objectives have been in existence for a long period of time. The next chapter will trace the history of "Wirrimbah" through the lived experience of one of its founding mothers.

Chapter Seven

“Wirrimbah”- Ancestors and Descendants

For almost a decade, groups of Aboriginal people in many parts of New South Wales (Australia), have been organising certain processes and activities in order to fulfil the conditions of the *NTA 1993*(Cth). Much of this organisation involves previously unfamiliar activities and conditions, while some - like recording family/community history - have been taking place for quite some time. Many Aboriginal people in long settled areas like Dubbo have been involved in tracing the history of their families for the last few decades. Most Aboriginal Elders in Dubbo have a fair knowledge of the history of, and the myths associated with, the various Aboriginal sites within their traditional lands. This knowledge has been handed down to them from parents and grandparents. Several Aboriginal people of Dubbo, especially the older generations, have a fairly clear understanding of the nature of, and the relationship between, extended Aboriginal groups within the Wiradjuri nation. Very few Aboriginal people of Dubbo had, until very recently, considered the various abstract implications involved in land and native title claims, i.e. traditional ownership of land, continuous connection to the land, definition of a membership of a native title claimant group, and definition of Aboriginality. However, since the introduction of the *NTA 1993* (Cth), there has been a great intensification in the search for, and the recording of, family and local Aboriginal histories among Aboriginal people of Dubbo, as well as increased involvement in this search. The aims of this search are to establish people's ancestry and family relations, to confirm people's connection and rights to land (membership) and claims for recognition of local cultural heritage and native title rights.

Another development within Aboriginal communities has been the establishment of 'native title corporations'. Mantziaris and Martin (2000) claim that by

[f]ollowing in the footsteps of existing indigenous corporations, native title institutions are likely to become new sources of legitimacy and authority within both the indigenous and non-indigenous domains ... [and f]rom the perspective of social

theory, indigenous corporations can be said to possess a metaphoric form of 'dual incorporation'; they achieve legal status through formal incorporation under the processes of the Australian legal system, and they achieve socio-political status through incorporation into indigenous society (p. 274).

"Wirrimbah" Direct Descendants Aboriginal Corporation is one such 'native title institution' which has come into being in Dubbo.

7.1. The Birth of 'Wirrimbah' Direct Descendants Aboriginal Corporation

"Wirrimbah" Direct Descendants Aboriginal Corporation traces its roots back to May 1995 when a small group of people met to discuss the importance of guarding the interests of the direct descendants of the original Aboriginal population of Dubbo when decisions were being taken relating to local Aboriginal affairs. These people were the direct descendants of people who had either moved voluntarily or had been moved to the Talbragar Reserve in 1898 (the Taylors). It is important to note here that it is generally accepted among the Aboriginal community that the people who moved onto the Reserve in 1898 were descendants of the original inhabitants of Dubbo at the time of white settlement. As a consequence, their descendants fall into the category of 'traditional' people of the area. For the first two years there was minimal activity limited to a few people, but, by late 1997, the group had been in contact with the native title unit of the NSWALC, as a result of which events started to escalate. By early 1998, more direct descendants had become involved in meetings and other activities: the group was meeting regularly with representatives from the native title unit. The first aim of the group was to become legally incorporated. With the help of advisers and a lawyer from the native title unit, and basing the incorporation process on a similar incorporation by the only successful native title claimants on the Australia mainland at that time (the Dunghutti of Crescent Head in New South Wales), "Wirrimbah" Direct Descendants Aboriginal Corporation was successfully incorporated by mid 1998.

The aims and objectives of "Wirrimbah" are outlined in rule (no.6) of the corporation as follows:

- (a) To bring together the indigenous people of Dubbo¹⁰⁶ for the purpose of making decisions and acting on any matters affecting the indigenous people of Dubbo
- (b) to co-ordinate the native title claims of the indigenous people of Dubbo
- (c) to liaise with neighbouring groups of Aboriginal people in relation to native title claims
- (d) to become a registered body corporate in relation to native title claims made by the members of the Corporation
 - (i) to hold native title on trust for the indigenous people of Dubbo
 - (ii) to deal with native title in accordance with the wishes of the indigenous people of Dubbo
 - (iii) to hold compensation paid in relation to native title for the indigenous people of Dubbo
 - (iv) to act as agent for native title holders from among indigenous people of Dubbo where no trustee is appointed, and to perform the prescribed functions of a registered native title body corporate under the *NTA 1993*
- (e) to advance the health, welfare and self-determination of the indigenous people of Dubbo in any manner agreed by the members
- (f) to protect and maintain the cultural heritage of the indigenous people of Dubbo.

Members of the groups gave three major reasons as fundamental to the need to incorporate “Wirrimbah”. The first was the need to gain political authority and recognition in local Aboriginal political affairs as the representatives of the descendants of the original population. It was necessary to clearly define who comprised the direct descendants - or the ‘traditional’ Aboriginal people - of Dubbo, as distinct from the ‘historical’ Aboriginal people (see Chapter Six (6.2.)). This is clearly outlined in the words of one member of “Wirrimbah”, taken from the minutes of a “Wirrimbah” meeting in June 1998: “What we as a group of direct descendants are doing is to stop misrepresentation of the local area by non-direct descendants. This has caused a lot of problems in the past for direct descendants, after decisions have been made without consultation” (“Wirrimbah”, minutes 24.06.1998). It was, therefore, necessary to

¹⁰⁶ ‘Indigenous people of Dubbo’ as opposed to Indigenous people not of Dubbo.

clearly outline the criteria for membership of “Wirrimbah”. According to rule (no.8,1) of the corporation, membership is open to adult Aboriginal persons who are:

- (a) members of the indigenous people of Dubbo;
- (b) natural or adopted children of members of the indigenous people of Dubbo; or
- (c) current legal or defacto spouses of members of the indigenous people of Dubbo

Furthermore, the rules define “indigenous people of Dubbo ... as the direct descendants of the indigenous people who occupied the Dubbo area as at 7 February 1788 and as at the time of white contact” (“Wirrimbah” Constitution 1998). All potential members have to apply to the board of “Wirrimbah” and, at the next meeting, members decide if the applicants meet the criteria. This process, in which direct descendants are readily recognised by each other, is usually very straightforward. During the process of drafting the rules of “Wirrimbah”, and while discussing the definition of a membership in the corporation, people placed great emphasis on blood relations, at the same time recognising the role of spouses and adopted children within the group. Spouses are bestowed full membership in the corporation, but in the event of a break up of the relationship, their membership is automatically revoked.¹⁰⁷ However, adopted children receive and maintain a lifelong membership. This decision was made after long and lively discussion during which the great majority attending the meeting agreed that adoption had been a common event among their ancestors, and that adopted children had not been considered different to biological children. Consequently, while membership of the corporation is based on direct biological descent, both ‘historical’ Aboriginal people, as well as non-Aboriginal people are eligible for membership through affiliation.¹⁰⁸

The second reason for becoming incorporated lies in the need for recognition of “Wirrimbah” before the law. Emphasis was thus placed on becoming a legal official body, able to negotiate on behalf of all ‘traditional’ Aboriginal people of Dubbo. This would consequently reinforce the need to distinguish between ‘historical’ and ‘traditional’ people. The fundamental reason for the need for official legal recognition

¹⁰⁷ This applies to both Aboriginal (non Direct Descendants) and non-Aboriginal spouses.

¹⁰⁸ It should be pointed out that there are no specific conditions placed on non-Aboriginal spouses, they simply fall under the same condition as Aboriginal spouses who are not Direct Descendants in regards to the rights of legal and defacto spouses (rule 8,1 (c)).

derives from the fact that the board of the Local Aboriginal Land Council is frequently occupied by 'historical' people. Concern for the constant lack of representation by 'traditional' people is evident in the words of the 1998 chairman of "Wirrimbah" who stated: "I think we all realise that for a lot of years the Land Councils have been the only bodies recognised in communities by non-Aboriginal organisations ... a lot of the people still feel that way" ("Wirrimbah" minutes 24.08.1998). "Wirrimbah", therefore, needed legal power to become recognised as a negotiating body in relation to land and native title claims in Dubbo.

The final reason for the incorporation of "Wirrimbah", apart from gaining political and legal power, was to gain the recognition of both the general community, as well as of local and national institutions and organisations. It had to be a recognised authority on what constitutes the traditional Aboriginal history and Aboriginal culture of Dubbo. This has been stated very clearly by the Public Officer of "Wirrimbah": "We wish to be consulted on *everything* on cultural heritage within Dubbo" ("Wirrimbah" minutes 24.08.98). Furthermore, the all-important aspects of this recognition are outlined in section 8 (f) of the rules of "Wirrimbah": "to protect and maintain the cultural heritage of the indigenous people of Dubbo". This determination to protect local Aboriginal cultural heritage is evident in the English meaning of the term "Wirrimbah"; i.e. to preserve.

"Wirrimbah" is gradually accomplishing its aim of gaining recognition and authority. The Dubbo City Council, various local Aboriginal, non-Aboriginal, and national organisations, are increasingly recognising the role and authority of "Wirrimbah" when undertaking projects which affect the Aboriginal population of Dubbo. One of "Wirrimbah's" successes as concerns their dealings with the Australian Gaslight Company (AGL). In 1996, AGL proposed to construct a gas pipeline through the Western Plains area of New South Wales. This line was to be 255 kilometers long, running from Marsden, through Forbes, Parkes, Peak Hill, Narromine, to Dubbo. AGL conducted an Aboriginal archaeological study of the proposed pipeline easement as a component of the Environmental Impact Assessment for the project (Navin and Officer 1997: 1). However, due to changes in the route of the line, and increased concerns of possible disruption to Aboriginal sites expressed by Aboriginal communities along the line, AGL concluded that

further studies and Aboriginal consultation needed to be undertaken (Navin and Officer 1997: 4). At this stage, representatives of the direct descendants contacted AGL with claims that archaeological studies should be undertaken through consultation with Aboriginal people from within the traditional boundaries of each area. Before, the pipeline entered the traditional area of the Dubbo-Gah, representatives of the direct descendants were appointed to advise and negotiate on behalf of the traditional owners of Dubbo. The following narrative, describing the negotiation process, was given at one of “Wirrimbah’s” meetings, by one of the representatives from Dubbo:

AGL weren’t taking seriously enough the consultation process with the [six] Aboriginal communities ... what they offered was two scholarships for Aboriginal students ... two to be divided between here and Marsden ... one-off, worth fifteen hundred dollars each (people laugh). And we walked in and we said ‘No! We want a million dollars, each community’ (more laughter). We worked it out immediately ... you see, they forced our hands. We said ‘we don’t want to talk about money, we don’t want to talk about money’. That’s what we said from the start. ‘We want to talk about culture’. Basically the feedback we were getting from them was that we [Aboriginal people] don’t understand, we only understand money. So we gave them money. We said ‘okay, give us a million dollars each’ (laughter). And they shit! And then we came back and then the negotiation took another few months ... First we did negotiate on cultural heritage, that took the most [time] ... we negotiated that document there (indicates document) for the management of cultural heritage ... And we put in places then the procedures and what they should do for our sites and a part of that package was the employment ... of Aboriginal Monitors in each of the communities. And they did that. And the last thing we did, when we got all that cultural heritage looked after and secured some employment, we said ‘okay, now lets talk about money’. And what we ended up getting, instead of three thousand dollars between six communities, we got thirty thousand dollars each ... in a trust fund (“Wirrimbah” minutes, 24.08. 1998).

Subsequently, the Aboriginal communities in Dubbo, Narromine, Peak Hill, Parkes, Forbes and West Wyalong reached an agreement with AGL that provides for the protection of Aboriginal cultural heritage during construction. In addition, employment and training opportunities were provided for Aboriginal people, along with the establishment of trust funds for community development purposes. The

Cultural Heritage Management Plan, which was developed during these negotiations, will become a part of AGL policy in similar situations in future projects.

“Wirrimbah” became incorporated during negotiations with AGL. It has been recognised by them as one of the essential Aboriginal agencies which needs to be consulted regarding any projects in the Dubbo area. In cooperation with the LALC, “Wirrimbah” was involved in the appointment of the Aboriginal Monitors who surveyed the site of the proposed pipeline. “Wirrimbah” has also become recognised by national organisations such as Telstra Corporation Limited and the Roads and Traffic Authority NSW (RTA), as an essential Aboriginal body to be included in all operations within the Dubbo area. “Wirrimbah” is thus fast achieving its aims of becoming a recognised body among national institutions and organisations. In July 2000, “Wirrimbah” achieved one of its aims when its members list was accepted into a new register of traditional owners. This register was developed by the New South Wales Government, its aim being to collect all "traditional owners of land - people directly descended from the original inhabitants of an area" in New South Wales (reported in the *Koori Mail* 31.05.2000: 9).

Some further achievements and recognition of “Wirrimbah”, especially relating to land and native title, will be discussed in the second part of this chapter. However, there is one feature of “Wirrimbah” which needs to be addressed in this section; that is, its emphasis on conflict avoidance on a local level. Conflict avoidance has been an underlying factor in the operation of “Wirrimbah” since the first group of direct descendants set out to establish the corporation. The obvious reason for this emphasis on conflict avoidance is directly related to internal conflict as it exists within the Aboriginal community (discussed in Chapter Six), and, furthermore, to the inevitable exclusion of some members of the wider Aboriginal community who do not fulfil the membership requirements of the corporation. Consequently, “Wirrimbah” has made strategic attempts to invite representatives of other local Aboriginal organisations in Dubbo to its meetings. Representatives of “Wirrimbah” have addressed meetings of the LALC and the aims and objectives of “Wirrimbah” have been formally made available to heads of local families, as well

as to other Aboriginal groups, e.g. the Wiradjuri Council of Elders, local Elders groups, and the Dubbo LALC.

“Wirrimbah” is also being recognised on a local level, equally among Aboriginal and non-Aboriginal people. In October 1999, during the NSW Aboriginal ‘Knockout’¹⁰⁹ and coinciding music festival, members of “Wirrimbah” were for the first time recognised as the rightful group of people to welcome visitors to Dubbo. By the end of 1999, “Wirrimbah” Direct Descendants Aboriginal Corporation received the ‘Duubuu Kooris of Achievement’ excellence award for cultural and community services (see *Koori Mail* 26.01.2000: 25). As members of the Dubbo Aboriginal community gradually realise the possible general benefits for all Aboriginal people in Dubbo which derive from the achievements of “Wirrimbah”, initial suspicions about its operation are dwindling.

“Wirrimbah” has been successful in many of its dealings with non-Aboriginal organisations and institutions. The rapid legislative changes implemented during the last decade of the second millennium have, by extension, resulted in enormous changes to the power and status of the people who now define themselves as the direct descendants of the original Aboriginal population of Dubbo. Less than a generation ago, these people would not have considered making demands for both recognition and the extent of authority they claim today. Most of the people who are now at the forefront of “Wirrimbah” recall different times when their Aboriginality, families, land, history and their culture were not able to be negotiated by them. Generally, they were neither on an equal level, nor did they share the negotiation table with non-Aboriginal people. Consequently, most members of “Wirrimbah” are faced with a number of challenges that have been of little or no concern to them in the past. These challenges, most of which are the direct result of the introduction of legislative changes and new procedures for handling Aboriginal affairs over the last (two) decades, have arisen with surprising rapidity and frequency. The Aboriginal people of Dubbo have responded to some of these challenges by establishing “Wirrimbah”. However, the members of “Wirrimbah” have also come to realise that the sometimes tedious and complex

¹⁰⁹ Highly popular annual Aboriginal Rugby League Competition.

process of becoming incorporated was merely the tip of the iceberg. What lies ahead for “Wirrimbah” are a number of new challenges, as well as new forms of old problems, all of which need to be overcome before “Wirrimbah” has fulfilled all its aims and objectives.

7.2. Alice's Story¹¹⁰

The difference between the processes and context of Aboriginal land claims in the Northern Territory and New South Wales have already been mentioned in Chapter Three (3.4.) and will be discussed further in the next chapter. However, when fighting for recognition of native title, all Aboriginal Australians have to fulfil the same legal requirements, irrespective of the nature and length of non-Aboriginal influences within their communities. These legal requirements for lodging a native title claim, Aboriginal people's awareness of them, and associated procedural complexities were outlined and discussed in Chapter Two and will be addressed further in Chapter Nine. Due to different histories, however, these legal requirements raise different issues for Aboriginal people in different parts of Australia. In this section, I will explore four issues that have to be addressed by all native title claimants. These include: their ancestral connections and the establishment of their continuous occupation; previous and current relationships with traditional neighbours; the existence and importance of traditional sites; and increased awareness of the complexity of claiming native title (e.g. Merlan 1994, 1997; Ritchie 1995; Weiner 1999). These issues have become very important for the members of “Wirrimbah” over the last few years. The discussion will be partly based on some of the lived experiences of Alice, the woman who was the driving force behind the establishment of “Wirrimbah”. It will also introduce some additional complications, and will examine the increase in awareness of cultural and historical (legal) issues which has taken place among members of “Wirrimbah”. Most of these issues will be addressed in further detail in the following chapters.

¹¹⁰ In accordance with the conditions on the interviewees consent form, I have changed Alice's name.

The first issue to be addressed is the need to be able to identify one's ancestors and thus prove prior occupation of land. The key process of the *NTA 1993* (Cth) is to determine whether or not native title exists (sections 13 and 61). In order to do this, native title claimants have to prove that they have maintained a 'continuing connection' with their lands and waters since white settlement. In areas like Dubbo, for example, which have had white settlement for 170 years, it is essential to be able to establish genealogical evidence of past generations on the land, reaching back to the original Aboriginal inhabitants. In order to meet this criteria, native title claimants in Dubbo need written evidence, preferably documentary, to link them with the original inhabitants of the area.

As already mentioned in Chapter Five, the first white settlers arrived in Dubbo in the 1830s and the Talbragar Aboriginal Reserve was established in 1898. Like most Aboriginal people in New South Wales today, the people of Dubbo have very few documents which refer to a nineteenth century ancestor by name. There are a few families who can trace their families back to people who worked on cattle and sheep stations, but these references are primarily verbal accounts. White station owners rarely kept any records of their Aboriginal workers. Thus, there are very few written documents in existence that refer to individual Aboriginal people in the area prior to the early 1900s. Most written documents, which record marriages, deaths and births of people of Aboriginal descent in the late 1800s, merely refer to them by first names. In place of a surname, there is either the name of the owner of the station where people resided and worked, or the synonym 'Aboriginal' is used in place of a family name. Apart from these fragmented documents tabling the Aboriginal population of Dubbo in the 1800s, there are two other written sources detailing Aboriginal people's names. One is the local newspaper, first published in 1875, in which reports are not always complimentary towards Aboriginal subjects. The second source is the records found on display in the Old Dubbo Gaol, which, although by no means supplying sympathetic portrayals of Aboriginal inmates, at the same time may provide names and formal affiliation which can fill in missing parts of genealogies. Aboriginal people of Dubbo are thus faced with extensive problems when they are required to present accurate genealogical documentation in order to prove their direct link to the original inhabitants of the land almost 200 years ago. There are still gaps in the genealogical records of the generations that

first came into contact with white people in the period spanning the 1830s to the 1860s. And while “Wirrimbah” is still working on the extended genealogy of the direct descendants, it is reasonable to assume that some of these gaps may never be filled. The effects that these missing links might have on “Wirrimbah’s” native title claims have not been fully explored, since there has not yet been a successful native title claim in Dubbo.

However, as people commence to research their genealogies, further issues and obstacles come into view. These issues frequently reflect the importance of contextual, historical sensitivity when analysing native title claims in long settled Australia. One of the most marked obstacles to be contended with when compiling a family history, derives from the separation and later assimilation policies of the early and mid 1900s, i.e. the breakdown of generational flow of information and traditional knowledge. This breakdown of traditional flow of knowledge is evident in Alice’s account when she talks about visiting her grandmother on the Talbragar Reserve (Mission) when she was a little girl.

When we were kids, ... we followed ... we had a mother and a father, but it was always important for us to go by our mother’s culture ... my mother and all of her family followed what granny did ... And my grandmother, she wouldn’t talk in the lingo to us [kids], but she would talk it to the women ... to her daughters ... [but she] would never ever talk ... it off the Mission, you know, in her tongue ... and I guess that was a fear of, you know, somebody heard her, they probably would have rounded her up, and took her away and shot her (Int.#12, 17.09.1998).

When Alice talks about her grandmother, her account is an obvious reflection of the effects of segregation policies which confined both people and practices within the boundaries of Aboriginal reserves in the first half of the twentieth century. The flow of traditional knowledge, passed on using their own traditional language, was still, to some extent, taking place in secrecy between Alice’s mother and grandmother. However, by the time it was Alice’s turn to be taught traditional knowledge, her immediate family had been ‘assimilated’ into town, and subsequently encouraged to abandon their traditional culture. The flow of traditional knowledge that continued to take place during the times of protection

(in the form of segregation) was effectively broken in times of welfare policies based on assimilation.

Alice's account captures further aspects, frequently mentioned by other Aboriginal people of her generation. These aspects become very important when defining the analytical context of traditional Aboriginal knowledge systems in New South Wales. Firstly, it is necessary to note the important role of women, i.e. grandmothers, in everyday decision making, and secondly, the importance of matrilineal descent in connection to ownership of land. When asked about this role and the importance of mothers and grandmothers, Alice replied:

... [M]om always said 'your descendancy came down through your mother'. Because it was wherever the mother was born, it kept that, your descendancy, in the one area ... 'the name comes from the father, but your descendancy comes from your mother' (Int.#12, 17.09.1998).

The importance of matrilineal descent, and the transmission of traditional knowledge through women, has been raised as an important issue in discussions about native title in long settled areas like New South Wales (e.g. Langton 1997). However, as mentioned in Chapter Two there has been a long standing debate among anthropologists working within Aboriginal Australia about the importance, if any, of matrilineal descent in regards to ownership of land (Sutton 1998: 40 - 44). This debate focuses specifically on classical Aboriginal Australia, and Sutton, while recognising that matrifiliation can certainly be a means to transmit rights and interests in land, he claims that:

The only people of whom [he is] aware as having an ideology of matriliney in relation to landed (tribal) identity are some people of western and northern New South Wales, but their ideology is not at all convincingly matched by their actual models of acceptable and regular practice (1998: 40 - 41).

According to Sutton, there is no evidence that Aboriginal people acquire land either through "serial *matrifiliation*...or matrilineal descent (1998: 40). Hence, the importance of matrilineal descent expressed by Aboriginal people in long settled

areas, is most likely explained as a post-colonial form of connection to land and transmission of knowledge (see Chapter 3.4. on 'cognatic descent').

However, it is important to note here that irrespective of modes of transmission of traditional knowledge, transmission was interrupted by the implementation of the assimilation policies of the 1940s. While Alice's grandmother spoke in the 'lingo', she only did so with her own daughters in the security of her own home, away from the prying ears of white welfare officers and law enforcement officials. As a result, the local Aboriginal language, as it is spoken today, exists only in the form of fragmented terms that have been incorporated into English. This loss of the local Aboriginal language is most evident when people talk about members of past generations and lament the fact that those people were the last to speak the 'lingo'. This loss of segments of traditional cultural knowledge is of great concern to most Aboriginal people of Dubbo. However, during the last few years, especially since the establishment of "Wirrimbah", there has been an upsurge in attempts by many direct descendants to collect and preserve the remnants of the local Aboriginal language.

The suppression of traditional Aboriginal knowledge and the concomitant suppression of Aboriginality had a profound effect on Alice at a young age. She recalls that:

You weren't allowed to say that you were, and identify as, an Aboriginal at school. And instead of not talking about it I started drawing it. I started drawing ... and I got the cane for drawing this old Aboriginal man leaning on a spear looking down at some kangaroos. And that stopped me from drawing ... And then I went out and got a job and when I mentioned that my father was an Aboriginal man that got run over by a train at Geurie, I got the sack. So, that was a type of suppression too. They stopped me from talking about who my parents were and where they'd come from. So I didn't say who my parents were after that ... or where I came from ... I just kept it to myself (Int.#12, 17.09.1998).

When listening to Alice, it became clear why she and her family might face problems when required to provide documentary evidence of their ancestry. It does not appear that Alice was given much room to articulate (openly) about her

descent, hence the preservation of documents referring to Aboriginal descent would not have been a priority, even if there had been such records kept in the first place.

Like many Aboriginal people of her generation, Alice grew up in times when the policies of the New South Wales Aboriginal Welfare Board defined - and to a large extent controlled - the lives of the Aboriginal people of Dubbo. She frequently had to face various forms of racism, and quite early in life had to confront questions regarding her identity (Aboriginality), difference, and her place within the wider community/society. Alice, like so many Aboriginal people of Dubbo, was conscious of her 'difference', and although her ancestors had been relegated to a past epoch by white authorities, they were still an important part of her life.

I knew we were Aboriginal, I knew my grandmother was Aboriginal, and the unity was there ... when we'd go out to the bush and my stepfather would show us all the artefacts and things lying around, I thought it was another world that he was talking about, the traditional Aboriginal people. And he'd tell us about the axe heads and the stones and all ... and that's when I'd come back in and go to school I'd start drawing those things, because my mind was still there, on the traditional ... but, it didn't seem like we were Aboriginal ... full Aboriginal people, here in Dubbo and out at the Mission. Because that's the way the Government was pushing us. Pushing it out of our minds, you know. But it was there, it was always there. The knowledge was passed down verbally, but never written (Int. #12, 17.09.1998).

There is still a significant amount of traditional local knowledge held by the Elders of the community, albeit mostly in oral form and inevitably in danger of disappearing with the passing of the older generations. There is, however, an increasing move towards recording oral history, myths and traditional knowledge.

Alice traces her growing interest in her ancestral background to the political changes of the late 1960s.

And then as I got older we started ... all Koori people started talking about who they were and where they were from and things like that ... and Aboriginal rights and the votes ... (Int.#12, 17.09.1998).

Her interest in Aboriginal affairs and in her own Aboriginal ancestry increased when Alice moved from Dubbo and thereafter lived and worked for a period of time in various places in Australia. Eventually, in 1993, when her role as an ATSIC officer took her to Darwin, Alice met some 'full-blood' Aborigines. This encounter raised new questions in her mind.

[In Darwin] I saw the traditional full-bloods, still doing their traditional thing ... and I thought ... I felt at home. Because they were still doing their traditional ... like their ... making their spears and things like that, you know, and it really, it amazed me that they still had that in contact ... together, you know. And I thought 'wouldn't it be lovely if we still had that down in Dubbo?' ... I was thinking 'where has all the traditional people gone from Dubbo?' (Int.#12, 17.09.1998).

During the last few years, Alice has been tackling these questions. The process of her analysis and the conclusions she subsequently drew are very interesting. Early on, Alice's interests stemmed from her increased desire to document the history of her own ancestors. This desire derived mostly from her observation of the changes which took place in Dubbo while she lived in other parts of Australia, the passing of the older generation and the importance of preserving the knowledge and history of her forbears in order to hand them down to her own children.

I went all over Australia ... and I always thought 'my heart's back in Dubbo', you know. I often and always thought of Gran and all of her children. And every time we'd come back here someone would be gone, had passed on. And then, I looked at it one day and I thought 'djeer ... we're the next generation and time is getting away, and if we don't start documenting our history here in Dubbo ... (Int.#12, 17.09.1998).

Some of the most interesting aspects of Alice's account about setting out to compile the history and knowledge of past generations lie not only in her scrutiny of her own background and experiences but also in what she sees as constituting Aboriginality (traditional). It is interesting to observe how Alice draws a correlation between, on the one hand, the 'traditional full-bloods' of the Northern Territory, based on the fact that they still produce and use traditional Aboriginal tools; and, on the other hand, the ancestors of the Aboriginal people of Dubbo

today, who had created and used the axe heads and artefacts which had been shown to Alice when she was a little girl. Gradually, through her work on both the family history and with “Wirrimbah”, Alice has come to the conclusion that ‘traditional’ people do not necessarily need to be ‘full-blood’, nor do they have to have maintained the classical static version of what constitutes an Aboriginal culture.

They’re still here [traditional people in Dubbo]. But because they didn't have the ... the experience with politics ... that I had ... I started thinking 'well, no wonder they don't want to be involved, because of all the fighting and that, you know' ... every time I'd come back to Dubbo there was the Lands Council ... there was somebody else trying to take over something and ... whereas it was unity once ... [But] then you had the resettlement scheme in the early seventies ... and that brought a lot of people in from remote areas. So that caused a lot of confusion. And then they started getting into the Lands Council and setting up other little organisations. Well, they moved here for a better life, you know, better education, housing and health reasons, and it wasn't their fault. So they moved here for a better life. And gradually took over a community and pushed the traditional people into the background.

And the Government ... first of all they started giving Aboriginal people ... money to set up business and set up that. And that's when the argument started, you know. And then you had little family groups, that weren't originally from Dubbo, fighting over ... you know, a certain organisation or whatever ... So the traditional people were pushed into the background. Because they were a proud lot of people, you know. Not only in Dubbo. Traditional people of their own communities were proud people. And respected. So, they'd seen all this going on and, ah, so they more or less just sat back and watched all this fighting going on amongst Aboriginal people, you know. And we're *ashamed* to be in the same community (Int.#12, 17.09.1998).

According to Alice, there is a ‘traditional’ population in Dubbo, a population which consists of the descendants of the Aboriginal people of the area at the time of white settlement. However, by the time Alice moved back to Dubbo, the traditional population had become indiscernible in an ever-growing Aboriginal community augmented by people from various parts of the state. Alice observed that most of the obvious distinctive features of the local Aboriginal culture, frequently displayed through attachments to the various Aboriginal sites and the

Talbragar Reserve, had become almost invisible in the everyday struggle for economic resources and political power. It was this invisibility, as well as her own ambitions to preserve the knowledge held by the Elders of her family for future generations, which made Alice put to use the learning and experience she had accumulated while working with various Aboriginal groups and organisations.

So, while I was doing the research everywhere else, I was picking up bits and pieces on where I came from. And then I started talking to different people about what we want to do ... ah, talking to different groups, and even though I was on ATSIC I was still picking up different areas where we could, maybe *one day*, I didn't know what, but, maybe one day document everything from our area. And do a family-tree. So [cousin] and I started doing the family-tree, and he was gathering some stuff and I was gathering some stuff. And in between work, well we didn't have much time to, doing it full-time, you know, got together every now and again. But it was just the urge was there to do something all the time ... My brothers always did the artefacts, kept that side of it alive, you know. And we'd ring up and we talked ... it was always there, the connection ... to wanna do something and then after we brought our eldest brother home, it's, just things have ... it's happening, it's just happening ... you know. And that's *it* ... (Int.#12, 17.09.1998).

Alice and her cousin were not the only Aboriginal people of Dubbo compiling their family-trees. In fact, there are several people who have consciously been collecting photos, birth, death and marriage certificates, and other documentation depicting the life of their ancestors over the last few decades. However, until very recently, this compilation was usually conducted at leisure, out of personal interest and focused on the immediate family.

It was not until the late 1990s that it became apparent to the members of "Wirrimbah" that a full genealogical record of the direct descendants of the residents of the Talbragar Reserve was urgently needed. Apart from the general interest in drawing up the genealogy of one's own family, there were two practical purposes for compiling these genealogies. One was to identify the exact nature of relations between people within the extended families. This aspect of being able to clarify consanguineous relations between people became increasingly important as people studied the first drafts of the genealogy. Their concern was based on the

fact that due to dispersal within the family during the latter part of the twentieth century, there had been instances where people of close kin had produced children together. This bears witness to the fact that although people are aware that the residents of the Talbragar Reserve shared a common ancestry, they are not always aware of the exact nature of their relations to other direct descendants. Furthermore, the fact that this knowledge is frequently lacking contributes to the enormity of the task of compiling a genealogy of all the descendants of the Talbragar Reserve. This can be demonstrated by taking a quick look at Alice's side of the family. Alice is the youngest of five children born to one of Sarah Taylor's ten children. Sarah was herself one of five siblings, of whom all but one had five or more children. Alice herself has four children, all of whom are now parents themselves. Today, Sarah and her siblings' descendants number in the hundreds (discussed in Chapter Five (5.3.)). The descendants of the Taylor siblings, however, are not the only people who can claim direct descent from the original Aboriginal population of Dubbo. There were other families (of Dubbo) who moved onto the reserve in the early 1900s; similarly, there are people who are direct descendants of Aboriginal people who were attached to various sheep stations in the area. The compilation of these genealogies is still in progress. The second purpose for compiling a genealogy of all direct descendants has already been discussed, i.e. the necessity to establish a legitimate record which links today's 'traditional' Aboriginal people of Dubbo with the original population at the time of white settlement. And while it serves the role of defining direct descendants, it also serves the role of differentiating them from the individuals and families who have historical ties with Dubbo. This brings the discussion to the second issue raised in the beginning of this section, i.e. previous and current relationships with traditional neighbours, especially in the contemporary context of native title.

In order to establish both the extent and nature of relationships between Aboriginal groups in the era of native title there are two essential issues that must be addressed. The first is to establish a clear definition of the groups (e.g. Merlan 1996, Sutton 1995). The complex nature of the relationship that exists between 'traditional' and 'historical' people in Dubbo has already been discussed in Chapter Six (6.2.). Following the establishment of "Wirrimbah", there is now a

legal definition for a native title claimant group within the Dubbo area. However, the relationship with neighbouring Aboriginal groups and communities needs some further discussion. Since at least the early 1900s, there has been interaction and intermarriage between peoples from the various Aboriginal communities in north-western New South Wales. And while the term 'Wiradjuri' might have been substituted by the term 'Dubbo-Gah' following the establishment of "Wirrimbah", the fact remains that most members of "Wirrimbah" have an extended network of relatives and affiliations, through marriage, throughout Wiradjuri country, as well as with people in other traditional tribal territories to the north. And, since the implementation of the *NTA 1993* (Cth), many of these groups and communities have been going through processes similar to those of the members of "Wirrimbah". The relationships, between traditional people of Dubbo and their neighbours, have been marked by negotiation and cooperation during these processes. What has transpired is an evident recognition by the members of "Wirrimbah" of neighbouring 'tribal' groups, which are frequently faced by obstacles similar to those encountered by the native title claimants in Dubbo.

One of the major tasks for both "Wirrimbah" and their neighbouring groups, when claiming recognition as the traditional owners of their land, has been to establish the geographical boundaries of their traditional lands. By becoming a representative body of native title claimants in Dubbo, "Wirrimbah" has had to define the boundaries of their traditional land. However, one problem that "Wirrimbah" has had to contend with is the fact that there are contradictory maps and documentation describing the boundaries of the tribal land of the Dubbo-Gah and other mobs in the area (see Chapters Three and Five (3.4. & 5.2.)). Apart from the debatable *Garnsey Report*, there are no existing documents detailing the relationships - and the exact boundaries - between mobs and tribes in the area at the time of white settlement. The first task for "Wirrimbah" was to collect the existing knowledge that the Elders in the community possessed about traditional boundaries. Although the people had extensive knowledge of their traditional sites, burial places, and other places of importance, there was no exact agreement on where to draw the boundary lines on the map. Eventually, in order to meet the conditions of the *NTA (1993)*, "Wirrimbah" adopted the definition of boundaries as laid down in the constitution of the Local Aboriginal Land Council in 1983 by the

Ministry of Aboriginal Affairs. Members of “Wirrimbah” defined thereafter themselves as:

[B]eing the peoples within the Wiradjuri nation who are indigenous to an area which includes, but is not necessarily limited to, the Dubbo Local Aboriginal Land Council Area determined pursuant to the provisions of the *Aboriginal Land Rights Act 1983* (NSW) (“Wirrimbah” Constitution 1998: 1).

The decision to adopt this definition is partly due to the contradictory opinions aired by the direct descendants about the exact location of traditional boundaries, along with the fact that neighbouring Aboriginal groups are faced with the same problems as “Wirrimbah. Section 6 (c), of “Wirrimbah” rules states as one of its objectives the need “to liaise with neighbouring groups of Aboriginal people in relation to native title claims” (“Wirrimbah” Constitution 1998: 2). Today, “Wirrimbah” has contacted all of the neighbouring Aboriginal communities and negotiated the geographical location of boundaries of their traditional lands in order to meet the conditions of the *NTA 1993* (Cth). These negotiations have taken place without any major problems arising, evidently portraying a mutual recognition of exactly where the ‘approximate’ boundaries of tribal lands lie, and frequently resulting in the adoption of the Local Aboriginal Land Council’s definition of boundaries. The fundamental reasons for the unproblematic process of these negotiations are inevitably found in mutual agreements vis-a-vis traditional sacred sites, and founded on knowledge which has been maintained throughout the generations.

Alice remembers her grandmother recounting various myths associated with places on the Macquarie River. Her brother recalls how the children went with their mother to the ochre sites west of Dubbo, and were told about the importance of the long depleted red ochre to their ancestors. Alice clearly recalls ‘going bush’ with her stepfather and other members of her family, where she was taught about both her ancestors and the land itself. However, it was not until her eldest brother died and was brought back to Dubbo for his final rest that Alice was finally hit with the realisation that her generation’s knowledge and, by extension that of her ancestors, was fast disappearing. Consequently, one of Alice’s aims is to see her people

record the number and the nature of various sites within her traditional area. This task of recording is extensive and ongoing, but Alice has seen great progress being made over the last few years. In the course of establishing “Wirrimbah” and negotiating with neighbouring Aboriginal communities, the overall knowledge of the number and nature of Aboriginal sites in the wider area has increased. It should be pointed out that much research and recording is possible today because of available funding for native title claimants to record traditional sites, and, more importantly the legal obligations of property and project developers to conduct surveys of significant Aboriginal sites in areas of proposed developments. The direct descendants frequently remark on how these processes have intensified recognition, among both Aboriginal and non-Aboriginal people, of Aboriginal people’s attachment to the land, and their historical and cultural connection to various sites (discussed further in Chapter Nine).

Alice’s collection and recording of her family’s history, as well as her work for “Wirrimbah”, has turned her small house into a miniature office (and a museum). Her quest for collecting the history of her own immediate family has extended to collecting and recording the history of the Aboriginal people of Dubbo. Today, Alice has an impressive filing cabinet filled with documents, maps and drawings relating to the local Aboriginal culture. These include records of oral histories, myths and language: maps; the identifying and describing of sacred sites; newspaper clippings relating to the achievement of individuals and groups of local Aboriginal people, and various material objects created and used by her ancestors. Alice has compiled some of these records and drawings into a teaching kit, which she uses when she is invited to address pupils in local schools and other educational institutions around the area. At the same time she is also gaining both education and training in relation to Aboriginal heritage. Alice was one of the consultation team who advised and negotiated with AGL on behalf of “Wirrimbah”, and subsequently formulated the *AGL Cultural Heritage Management Plan*. She has also participated in an introductory cultural heritage course conducted by the National Parks and Wildlife Services, and has carried out training in the field at the Goonoo State Forest, aimed at furthering her skills in identifying, recording and protecting Aboriginal sites in the Dubbo region. In addition, Alice has been working on the local Aboriginal heritage with government

departments such as the Rural Lands Protection Board and the Dubbo City Council. Currently, she is involved in preliminary discussions with the Dubbo Museum Committee about opening an Aboriginal Museum/Heritage Centre. The aim is to establish a museum dedicated to preserving the historical and cultural lives of their ancestors, a place where artefacts and documents which are currently spread all over the area, can be brought together, preserved and exhibited. Her next project is acquiring a tertiary diploma in archaeology.

Today, Alice has successfully combined the extensive knowledge which she inherited from her ancestors, the knowledge which she has obtained from Elders within the community, her experience and learning gained within other Aboriginal communities, and the formal training she has already acquired from various official institutions. However, all of these achievements and projects are infinitely time consuming. Although a significant amount of work on family histories has been spread among the members of “Wirrimbah”, it is, nevertheless, a fact that it is a small core of people who take on most of the work of running the operation of “Wirrimbah”. These people have suffered both the financial and the emotional cost of extensive participation in grass-roots politics. They have had to learn how to deal with enormous amounts of new information and knowledge in a very short time. They are learning at a very fast pace, constantly aware of the possible consequences of sudden, rapid government action, legislative change, and/or unpredictable judicial findings.

While the members of “Wirrimbah” are adamant about running their corporation according to the openness and egalitarian ways of their ancestors, the structure of their corporation is, to a large extent, a reflection of Australia’s legal and political systems. One of the best examples is the four-member native title sub-committee of “Wirrimbah”. This committee was established for several reasons. Firstly, it was founded in order to avoid any possible internal conflict among the direct descendants in the handling of an existing native title claim over Terramungamine: both women and men, younger people and older are represented in this committee. Next, it was set in place in order to respond swiftly to the possible implementation of (internal and external) projects likely to endanger Aboriginal heritage sites within the Dubbo area. Thirdly, it was established to authorise its four members to

act immediately on the behalf of all members of “Wirrimbah” in the case of political or legislative change. The last aspect draws directly on the experience of a few members of “Wirrimbah” who, in July 1998, witnessed Senator Brian Harradine’s change of mind regarding the Government’s proposal to implement amendments to the *NTA 1993* (Cth) (*Wik* amendments/10 point plan, discussed in Chapter 2.1.) (e.g. Harradine 1998).¹¹¹ The day after Senator Harradine unexpectedly cast his vote in favour of amendments to the legislation, the board of “Wirrimbah” experienced a minor crisis. Media reports fueled local rumour mills about how this new legislation was going to both reassess and/or wipe out existing native title claims, and block opportunities for the lodging of new native title claims. As a result, a small group of people took action. During the course of a few hours, this group drove all over town collecting documents and signatures in order to lodge a native title claim before the Government implemented the amendments. Needless to say, the task proved too arduous and “Wirrimbah” was unable to lodge a claim that day. This exercise is just one of many experienced by the members of “Wirrimbah” who are coming to terms with living in a ‘post-Mabo’ Australia where issues of Aboriginal land rights remain both complex and controversial. Due to various legislative changes, as well as to changes in general discourse on Australian Aborigines, local authority, national institutions and corporations, members of “Wirrimbah” are for the first time recognising their role and authority as prior owners of the land. Similarly, they are recognising the importance of local Aboriginal sites, heritage and culture. So there are new expectations of - and demands on - the members of “Wirrimbah”, especially those at the forefront of operations.

The role of “Wirrimbah”, as the representative body for native title claimants in Dubbo, is steadily growing. Its involvement in the complex enterprise and in the intensive research needed for native title claims constantly brings to light new and complex issues that need immediate attention. Apart from having to identify and establish the membership of ‘rightful’ native title holders, the claimants have to familiarise themselves with new concepts like ‘native title’ and ‘heritage rights’.

¹¹¹ Brian Harradine is an independent Senator from Tasmania and, during the parliament debate and voting on the *Native Title Amendment Bill*, he held the balance of power in the Senate.

For the first time they are participating realistically in the Australian politico-legal system. Members of "Wirrimbah" are also starting to appreciate the complexities and implications involved in the process of lodging native title claims. Last but not least, they are starting to grasp what constitutes native title, i.e. the meaning and nature of traditional ownership of land in relation to traditional law and customs. Issues like displaying and defining the existence and nature of traditional local customs and law are complicated by an apparent incompatibility between Aboriginal customary law and Australian Commonwealth law. Local recognition of 'traditional' authority, combined with political and legal empowerment through the *NTA 1993* (Cth), means that members of "Wirrimbah" have been thrown into a whirlpool of expectations and promises where, on the surface, the rules are supposedly based on legal and political equality and fairness. And while the members of "Wirrimbah" have to meet the same conditions as all other native title claimants in Australia, the fact remains that their capability to do so is to a large extent determined by the historical, social and political processes of the past which have constructed today's socio-political context. By simply looking at some aspects of Alice's story it is evident that the various government policies and legislation, as well as the dominant discourse on 'Aboriginality', at various times in her life have had significant impact on her self-identification, her own notions of 'Aboriginality' and, to some extent, her understanding and appropriation of traditional knowledge. It is thus essential for people like Alice (i.e. the Aboriginal people of Dubbo) to establish some form of an organised body, with the assistance of government agencies (i.e. NSWALC) and/or 'experts' on both Australian law and Aboriginal affairs (e.g. lawyers, historians and anthropologists), in order to 'negotiate' and ascertain their present activities and connection to land as grounded in their ancestral past.

Aboriginal corporations like "Wirrimbah" are described by Mantziaris and Martin (2000) as:

[Having a] 'fundamentally ambiguous' character, operating in the intermediate domain between indigenous and non-indigenous systems of meaning and practice ... [where a]ctors in the non-indigenous domain will look to the corporation as a source of

authority and legitimacy on indigenous matters (p. 274; see also Sullivan, Patrick 1996).

While members of "Wirrimbah" might be considered, and may often be recognised as, experts on local tradition and culture, they are nevertheless working within a legal system that defines and grants authority and power according to non-Aboriginal politics, law and traditions. It is thus essential to examine the (in-) compatibility of Aboriginal customary law and Australian Commonwealth law before turning to the experiences of "Wirrimbah" members of claiming native title in Dubbo.

Chapter Eight

Contradictions in Practices - The Law of the State and the Law of Customs

The law is alive in the land and [in] the song and while the song since the time of colonisation has not always been 'allowed' to be sung, the song and its law survives as it sings from within (Watson 2000: 4).

This chapter considers the notions of 'law' and 'custom', as they have variously been interpreted by early settlers, Federal and state government legislation, anthropologists and Aboriginal people. What constitutes 'law' in Aboriginal eyes, particularly Dubbo Aboriginal eyes, is one consideration; the assumptions about 'custom' embedded in the native title legislation, is another. Emerging from a generally agreed upon - by governments, anthropologists and some Aboriginal people - loss of culture, Aboriginal people have, spurred by the *NTA 1993 (Cth)*, begun to assert a 'cultural continuity' (of 'law' and 'custom'). Ironically, in so far as the *NTA 1993 (Cth)* was a catalyst, the sort of claim to 'culture', 'law' and 'custom' made by the Aboriginal people of Dubbo goes largely unrecognised by the *NTA 1993 (Cth)*, which utilises a much narrower definition of traditional 'law' and 'custom'. This chapter examines the development at law, the assumption about 'custom' made in this law, and compares it to contemporary Aboriginal life, primarily in Dubbo.

8.1. The Misadventures of Mr. Hay

The discussion in this chapter has been partly structured around one of the earliest documented accounts of interaction between white settlers and the Aboriginal population in the Dubbo area around the early 1800s. The discussion addresses the incompatibility of Aboriginal customary law and Australian Commonwealth law regarding rights to, and ownership of, land. In addition, I make brief reference to some aspects of anthropological research into Aboriginal law. My aim is not only to address the incompatibility that exists between the two systems of law, but, more

importantly, to (a) explore the connection of current notions and practices and how they derive from the past, and (b) to search, not only for the discord between the two systems but also possibly some areas of corresponding concepts and practices.

Admittedly, this is a rather unusual manner of formulating an argument in a thesis of this nature but the aim of the exercise is to draw on the actual experiences of many Aboriginal people of Dubbo (Australia) faced with the task of providing evidence to support their claims for the recognition of native title. This chapter addresses the fact that many Aboriginal people of Dubbo still maintain both traditional knowledge and practices. This knowledge and these practices have not necessarily been identified or recognised as deriving variously from the tradition and customs of their ancestors: they might be different from those of non-Aboriginal people and they might differ from those of other Aboriginal people; but they were still customary ('normal') for the Aboriginal people of Dubbo. However, in the context of native title, this knowledge and these practices have taken on a different meaning, a meaning which is very important vis-s-vis native title and local cultural heritage.

In one of a series of articles on the "Western Pioneers of Early Days" appearing in the 'Science of Man and Journal of the Royal Anthropological Society of Australasia' (previously called 'Australasian Anthropological Journal' (1896 - 1897), there is an account of some interaction between the first white settlers in the Dubbo area and the local Aboriginal population.¹¹² One of the more fascinating parts of this account describes the unnerving experience of a white pioneer squatter named Hay. Mr. Hay was a newcomer in the area, but for some unexplained reason, he managed to enrage the local Aborigines in a relatively short period of time. The following account took place in 1844, when the Macquarie River had overflowed its banks, trapping Hay on an 'island' surrounded by water. What made matters even worse for Hay, was the fact that he was also surrounded by an encampment of Aborigines who took advantage of the situation to seek retribution while Hay awaited rescue.

¹¹² There was a series of articles on the "Western Pioneers of Early Days", based on the lived experiences of the authors and/or contemporary recordings. The following quote is from an account published in vol. 1. no. 4 in 1898 (Microfilm C4 969 A1755, Mitchell State Library, Sydney) under

It would appear as if the warriors were not devoid of a grim sense of humour, and were enacting a drama in which a sheet of bark cut out so as to represent the figure of a man, brought before a tribunal for trial, to answer some crime which he was supposed to have committed, was the central figure. After due inquiry the unfortunate "Bark Man" was evidently found guilty. The crime of which he was found guilty must certainly have been a very grievous one. For the sentence which, I take it, was commensurate with the heinousness of the crime was a severe one. The bark man, representing Mr. Hay, was stretched out on a hard portion of "marble ground", and then one of the most ancient warriors, after consulting with three or four others, picked up a tomahawk and with a solemnity worthy of the occasion, but with a pleasure depicted upon his hideous countenance, proceeded in a most methodological fashion to cut off first the hands, then the feet, next the ears, and next after going through the farce by gouging out the eyes, threw the remains of what was supposed to represent "Little Hay" on the blazing myall fires. Hay was a witness to all this by-play, and only too truly construed its meaning.

Needless to say, Mr. Hay lived to tell the tale, but left the Dubbo area shortly after his rescue. The tale of Mr. Hay, as indeed the whole series of these articles, is characteristic of its time in the sense that the 'natives' are referred to as a 'blood-thirsty horde of savages', obstructing the harmony of the settlers' lives. The purpose of citing this account here is not to analyse white settlers' portrayal of Australian Aborigines in the mid-1800s, but to discuss some essential aspects of the Aboriginal fight for recognition of rights to land, i.e. questions about the existence and nature of Aboriginal systems of law and the extent of recognition of Aboriginal customary law and rights to land since the time of white settlement.

A quick look at the brief account of Hay's misadventure suggests that, intentionally or not, the narrator recognised some aspects of contemporaneous Western social and cultural practices: the natives displayed a 'grim sense of humour'; the natives had an identifiable sense of staging a 'drama'; the natives were obviously aware of the seriousness of the situation as was displayed by their 'solemnity'; the setting is compared to 'a tribunal for trial, to answer some crime'; there is 'due inquiry' before the accused is found 'guilty'; there are recognisable features of hierarchical, but

the name of Pinxit and draws on both the written and the verbal accounts of white settlers in Dubbo of the time (some from the *Dulhunty Papers*).

nevertheless democratic decision-making procedures evinced by the warriors; and, the 'executioner' was observed to take some pleasure in punishing the 'guilty'. There are evident similarities between the procedures of the native court, as it was conducted on the banks of the Macquarie River, and its contemporaneous English court, notorious for disposing of its undesirable subjects half way across the world.

The authenticity of the cultural and legal traditions of the 'Macquarie River court' can be questioned; indeed, the whole farce can be described as a mock version of the English legal system; an enactment of white rituals. It can be assumed that after nearly two decades of contact with white settlers, the natives of the time would have gained some knowledge of the settlers' way of life (law), especially when considering that quite a few local Aborigines were to some extent attached to the various sheep stations in the area. However, it must also be recognised that up until the 1860s, reports of violent conflict between the natives and settlers were still fairly frequent. Such conflicts are inevitable when first generations of Aboriginal and non-Aboriginal people come into close contact, but the point is that many local Aborigines had neither adapted to nor taken up the white settlers' way of life. Furthermore, Dubbo did not become a law administration area in its own right until 1846, at which time the local whites built the first court house, police station and lock-up in the area (Hornadge 1993 (1974)).¹¹³ Due to lack of documentation in this era, the 'traditional' aspects (Aboriginal) of the 'modus operandi' of the 'Macquarie River court' are questionable. It remains unverifiable as to whether, on the one hand, the judge, jury and executioners of the bark representation of Mr. Hay had been exposed to the colonial judicial system, or if, on the other hand, the process drew on some traditional customs of the local Aboriginal people. However, as there is no supporting evidence for such practices among Aboriginal people found in any other part of Australia at the time of white settlement, it appears that this performance was staged as a mimetic display for Hay's benefit. The narrator of Hay's experiences did not speculate on whether the performance of the 'Macquarie River court' had any relevance to what might possibly be called a 'native system of law', neither did he attempt to place any meaning behind the performance except that Mr. Hay was 'unpopular'. This lack of recognition of an Aboriginal system of

¹¹³ Prior to that, law in the Dubbo area had been administered from Wellington.

law, or, more precisely, lack of any attempt to recognise meanings and importance behind some 'obscure' behaviour of Aboriginal people is characteristic of this time. No wonder it is so easy to distinguish various contemporaneous Western practices in the story of Mr. Hay. But the intriguing fact is that it took another century and a half before there was official recognition of the existence of Aboriginal customary law in Australia at the time of white settlement, i.e. recognition of native title.

The discussion in Chapter Two outlines the nature of native title in Australia and the definition of native title holders. The Aboriginal descendants of Dubbo have to meet these criteria in order to claim native title where it has survived on their ancestral land. In order to prove their eligibility as native title holders in the Dubbo area, the claimants have firstly to face the arduous task of proving that they are the direct descendants of the people who held the land at the time of white settlement; secondly, they have to demonstrate the continuity of a set of practices which represent their customary law; and, finally, they have to define and differentiate their rights and interests from those of other Aboriginal people in the area today. In the course of the recognition of native title, these issues become of primary importance as, once established, they effectively manifest the claimant group's connection to land held by the original population at the time of white settlement. Native title claimants in Dubbo, as elsewhere in Australia, have to demonstrate that not only did their ancestors have a recognised system of law and customs, but that their direct descendants today have conducted their lives, traditions, culture (customs) and connection to land in accordance with this system of law and customs (e.g. Keen 1999; Pearson 2000; Sutton 1996). In short, the native title claimants in Dubbo have to prove the continuous existence of traditional customary law by displaying how their rights, obligations and interests are still embedded in the legal and cultural practices of their ancestors. Before discussing further the various challenges faced by the Aboriginal descendants of Dubbo today, it seems appropriate to take a very brief look at past and present debates surrounding the existence of Aboriginal systems of law and custom.

8.2. Aboriginal System(s) of 'Law' and 'Customs'

Although the terms 'law' and 'custom' are very important in native title legislation, they have perhaps not been given the specific definition needed in judicial rulings and legislation (Rigsby 1996). However, it is not easy to define 'law'.¹¹⁴ There are various forms of laws, i.e.; the unwritten law; the law of Nature; the laws of the various religious texts; the law of gravity; the law of supply and demand; the law of the land. Furthermore, there are various ways of imposing and experiencing these laws; for example, taking the law into one's own hands; to be either selectively protected or struck by the Divine maker of the law; to be (supposedly) equal before the law; and, to be the maker and/or the enforcer of the law. Some writers addressing conflict and disputes have completely omitted a definition of 'law', while others have discussed presence or absences of law. Still others have looked at functional and/or structural aspects of law (Williams N. 1988). The *Columbia Encyclopedia* (1969 (1935)) defines 'common law' as a:

System of law which obtains in England and in countries colonized by England ... The distinctive feature of common law is that it represents the law of the courts as expressed in judicial decisions. The grounds for deciding cases is found in precedents provided by past decisions, as contrasted to the CIVIL LAW system, based on statutes and prescribed texts.

'common law' is strictly based on Western notions and discourses on law (customs), while Aboriginal customary law is based on social values, rules and beliefs, which might be (appear) fundamentally different to Western notions of what constitutes law and customs. Notwithstanding, the fact remains that Australian common law is the dominant law in Australia, and subsequently the basis for native title legislation and rulings.

The existence of a recognisable system of law among Aboriginal people in Australia was first considered in a little known case brought before the New South Wales Supreme Court in 1829, *R v Ballard or Barrett* (Kercher 1998: 7). In the course of

¹¹⁴ Derivation: ME law, *lagh*, OE *lagu*, from Scand. ; cf. Icel. *Lag* layer, pl. *log* law, Lit., that which is laid down; akin to LAY, LIE. (Macquarie Dictionary 1991 (1990)).

considering the jurisdiction of English law over Ballard - an Aboriginal man who had been taken into custody for allegedly killing another Aboriginal man - Chief Justice Forbes found as follows:

The court would not have had jurisdiction if it had been a conflict between Aborigines in accordance with their own customs [and that] ... [s]avage *people ... make laws for themselves, which are preserved inviolate, & are rigidly acted upon*, and English law had no right to intervene even if its judges found the native laws to be abhorrent (Kercher 1998: 8, *italics* from original text from Forbes).

Forbes' findings were supported by Justice Dowling who stated:

Until the aboriginal native of this Country shall consent, either actually or by implication, to the interposition of our laws in the administration of justice for acts committed by themselves upon themselves, I know of no reason human, or divine, which ought to justify us in interfering with their institutions even if such an interference were practicable (cited in Kercher 1998: 8).

While Chief Justice Forbes and Justice Dowling stated that internal disputes should be dealt with by Aboriginal people themselves, according to their own systems of law, they nevertheless found that disputes between the natives and the settlers should be subject to the English law. Both the native Australians and the new settlers could seek personal protection under English law in case of interracial conflict. Dowling also declared:

[The] same principle of protection applie[s] to the preservation of property, although notions of property may be very imperfect in the native. The Englishman has no right wantonly to deprive the savage of any property he possesses or assumes a domination over (cited in Kercher 1998: 9).

This recognition of Aboriginal systems of law, and, by extension, property rights, was challenged seven years later in *R v Murrell*. Justice Burton found "(with the concurrence of Forbes ... and Dowling) ... [that] Aborigines had no law but only lewd practices and irrational superstition contrary to Divine law and consistent only with the grossest darkness" (cited in Kercher 1998: 7). This ruling proved detrimental to the debate about Aboriginal land rights. Since Justice Burton's ruling

in 1836, there have been various judicial rulings and legislative Acts determining the status of Aboriginal people as subjects of the British Empire/Australian State. But despite indigenous legal concepts of native title being discussed and defined before both the American Supreme Court between 1810 – 1835 and the New Zealand Supreme Court in 1847 (Bartlett 2000: 73 - 81; Reynolds 1992: 46 – 47, 126 – 127), the *R v Murrell* ruling, denying recognition of Aboriginal customary law(s), was not successfully challenged before an Australian court until 1992 (*Mabo (No. 2)*).

During the 156 years of non-recognition of Aboriginal customary law, there have been quite a few challenges to the notion that Aboriginal people have no legal rights to land under Australian Commonwealth law (e.g. Goodall 1996; Reynolds 1999, 1992). One of the most significant challenges was made by the Yolngu people of Gove in the Northern Territory in 1970 (*Milirrpum and Others v. Nabalco Pty Ltd. and the Commonwealth of Australia*).¹¹⁵ In 1971, Justice Blackburn determined that the Yolngu relationship to land, past and present, was neither of a social nor of an economic nature: it was simply spiritual, based on religious connection (see Chapter Four (4.3.)). Justice Blackburn ruled that the Yolngu could not display an historical continuity of a developed system of property rights to their land, as recognised by the Commonwealth law of Australia (Williams N. 1986). Furthermore, with his ruling, Blackburn confirmed the concept of *terra nullius* and the fact that the Commonwealth law did not recognise notions of communal ownership according to Aboriginal customary law. Further, he stated, private property or freehold title ownership of land is defined in the Commonwealth law of England as "the right to use and enjoy, the right to exclude others, and the right to alienate" (Parliament of New South Wales 1980: 33). In 1973, Mr. Justice Woodward was appointed to carry out a Commission of Inquiry into how Aboriginal land rights might be recognised by Australian law. A few years later, the *ALRA (NT) 1976* was passed, primarily based on the precedence of the Blackburn ruling, informed by anthropological research and representation of Aboriginal relationships to land, and following the recommendations of the Woodward Commission (Williams N. 1988).

¹¹⁵ Discussed in Chapter Two.

The *ALRA (NT) 1976* arose out of the failure of the Yolngu people to have their rights legally recognised at common law in 1971. This *Act* was a federal legislation and has been described as a moral response on behalf of Parliament to create some rights to land for a people who had been denied any inherent rights to land at law (Pearson 1997b). The *Act* employs the term ‘traditional owners’, in referring to land claimants who, in order to meet the criteria of ‘traditional owners’, must be found to be

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 (*ALRA (NT) 1976, section 3(1)*).

The concept of a “traditional owner” has already been discussed in Chapter Two, but it is important here to emphasise the fact that following the passing of the *ALRA (NT) 1976*, the definition of Aboriginal ties to land, which was to become the focal point of debates about Aboriginal customary law, became its sacred and/or secret nature, i.e. traditional owners have to be able to actively demonstrate rights/obligations - sacred and/or secret - to a site on the land (Williams, N. 1988).

Apart from the Australian Law Reform Commission’s investigation into Aboriginal customary law, there was little general debate about the existence and the nature of Aboriginal customary law during the 1980s. This fact has been commented on recently by some Aboriginal leaders who claim that while Aboriginal people, especially in the Northern Territory, were gaining some rights to land under the Commonwealth law, the claims for Aboriginal land rights, grounded in existing customary law, were weakened. Aboriginal leader Galarrwuy Yunupingu claims that before 1993, Aboriginal land rights could merely be considered as a “gift of government ... which could be reduced or taken away depending on the political climate” (1997: 13). Patrick Dodson agrees with Yunupingu, describing the passage of the *NTA 1993 (Cth)* as an event where the rights to negotiate about land and legal rights were “not ... given out of kindness or goodness of the hearts of the politicians,

but because it was part of the law” (Dodson, P. 2000: 5).¹¹⁶ To a certain extent the general attitudes towards Aboriginal customary law can be traced back to 1836, to the case of *R v Murrell* discussed earlier. But the determination in *R v Murrell* sealed the fate of Aboriginal customary law. This seal was so strong that despite waves of Aboriginal demands for rights since the 1960s, including demands for rights to land (access to), there has been very limited consideration of the survival of Aboriginal customary law. Until the *NTA 1993* (Cth), Aboriginal rights to land were thus bestowed by the 'Law of the State', not 'by law of custom'.

In retrospect, it may be suggested that the increased discussion surrounding Aboriginal rights and legislative changes from the 1960s up to the early 1980s was a positive process. This period saw an increase in Aboriginal activism (Chapter Five (5.2.)), an increase in public dissemination of Aboriginal rights around the time of the 1967 Referendum (Chapter Three (3.1.)), and the enactment of land rights legislation.¹¹⁷ These constitutional, legal and discursive changes towards Aboriginal land rights became the focus of much academic research (e.g. Langton 2000). The early 1960s saw Australian anthropologists demonstrate an increased interest and investigation into the possible existence of Aboriginal customary law (Williams, N. 1988). However, the fact remains that it was not until the mid-1960s that Australian scholars set out to systematically study the nature and the content - and to analyse the process of - Aboriginal systems of law.

Kenneth Maddock (1984) discusses this elongated period of minimal interest, claiming that anthropologists

need not look long for an explanation [for the meagreness of studies into Aboriginal law]. Local law and customs were officially ignored by the British colonisers of Australian. This neglect continued after the colonies became self-governing. Some anthropologists took a deep interest in the indigenous culture, but those who studied it at first hand made little use of the discipline of law (p. 211).

¹¹⁶ As discussed in Chapter Nine (9.1.), the rights obtained under the *ALRA (NT) 1976* are much greater than the rights obtained under the *NTA 1993* (Cth).

¹¹⁷ See footnote no. 56.

Another explanation for this paucity of specially focused studies into Aboriginal customary law is the lack of a collective cross-disciplinary definition of the term 'law', which, as a consequence, has affected the determination of presence or absence of a system of law (Williams N. 1988). In other words, while there was anthropological research taking place in Aboriginal customary law, it was just not identified as such. While earlier anthropological debate on Aboriginal authority structure and Aboriginal kinship-based hierarchy - generally among men - did not take place under the label of 'Aboriginal customary law', it remains a fact that many anthropologists did focus on practices which today belong under such a label. These studies mostly focused on functional aspects that could be identified through comparison to other societies (mostly European). They centred on various aspects of governance (~1960s) (e.g. Barnes 1963; Meggitt 1962; Strehlow 1963): the exercise of authority and dispute settlement (~1970s) (e.g. Berndt R. M. 1965; Elkin 1964 (1938)); and, the relationship between Aboriginal customary law, local organisation and Aboriginal religion (~1960s – 1970s) (e.g. Hiatt 1962; Strehlow 1970). In the course of the emergence of Aboriginal land rights demands, the issues of anthropological studies vis-a-vis Aboriginal communities altered. The objective of these studies became increasingly the interpretation and explanation of Aboriginal customary law, before members of the various Australian legislative bodies. By the early 1980s, a number of Australian anthropologists were, to some extent, involved in research pertinent to Aboriginal law (e.g. Gumbert 1981; Keen 1984; Maddock 1984; Peterson. & Langton (eds.) 1983). From the mid-1970s onwards, there was an increase in contextualising 'law', i.e. relations of legal forms to political, historical, cultural and economic forms, with specific focus on social control and social organisation (e.g. Maddock 1983a; Morphy, F. & Morphy, H. 1984; Myers 1998 (1987)). There had also been innovative challenges to the studies of customs and norms in Aboriginal societies in the mid-1960s, focusing on conflict, kinship and individual autonomy (Hiatt 1965; Meggitt 1962). The early 1980s saw the rise of feminist theory, and a concomitant increase in research into hierarchy, gender, autonomy, control and power (e.g. Bell, D. 1983; Gale 1983 (ed.), 1989; Hamilton 1981). During this time, anthropologists became increasingly seen as 'experts' on Aboriginal law. In 1971, anthropologists were, for the first time, called as expert witnesses on Aboriginal law (*Milirrpum and Others v Nabalco Pty Ltd. and the Commonwealth of Australia*) (Williams, N. 1988: 213). The combination of this

new role of anthropologists, the shifting focus (paradigm shift) within anthropological research in Aboriginal Australia (ca. 1960), and legislative changes and challenges regarding Aboriginal human and land rights, began to reveal multiple and often varying relations and connections to land within Aboriginal societies. There was a growing emphasis placed on researching the meaning of Aboriginal relationship to, and ownership of, land (e.g. Berndt, R. M. 1982; Berndt, R. M. & Berndt, C. H. 1988 (1964); Hiatt 1984 (ed.); Maddock 1983a; Sutton 1996), with concepts like 'Aboriginal land tenure systems', 'traditional land law' and 'customary land law' appearing more frequently in the literature (e.g. Peterson and Langton (eds.) 1983, Hiatt 1984, Williams, N. 1986, 1988; Rigsby 1996).¹¹⁸

Just as the role of anthropology and anthropologists within Aboriginal Australia was changing, so was the role of Aboriginal people themselves. Following the introduction of Aboriginal land rights legislation, there was a growing importance placed on Aboriginal people taking part in the running of institutions, including missions, reserves, stations and Aboriginal councils (Williams N. 1988). Today, anthropologists are still appearing as expert witnesses before courts in land rights and native title cases, but Aboriginal people are increasingly taking matters into their own hands, assuming the roles of 'experts', advisors, lawyers, anthropologists, politicians (from grass-roots to Federal Government) and activists. However, while it would appear to be a rightful and natural process for Aboriginal Australians to assume such roles as experts and specialists in matters concerning their own cultures and histories, the overwhelming complexities of legislation, amendments to legislation, judicial processes and State and Federal politics still require co-operation from non-Aboriginal professionals. There are still private and public challenges to native title from both Aboriginal and non-Aboriginal people. These challenges appear in the form of demands for legal definitions for the sources of native title, the meaning and content of native title, and requests for financial, moral and legal advice in fighting for or against native title claims.

¹¹⁸ It should be pointed out here that most of these studies took place in rural Australia, anthropological studies pertinent to New South Wales (Dubbo) are discussed in Chapter Three.

There is one matter that remains a certainty today. The *Mabo (No. 2)* ruling did not deny the sovereignty of the British Crown, but it did make it clear, for the first time, that at the time of annexation there were pre-existing systems of Aboriginal law in Australia. Furthermore, while the *Mabo (No. 2)* ruling recognised native title as part of the common law of Australia, it did not result in a statutory definition of native title; for this reason, incidents of native title are dependent on local Aboriginal law (Dodson, M. 1998; Gray 1996). This fact is very important when one considers that the *Mabo (No. 2)* ruling was based on historical context and processes affecting the lives of the Aboriginal people of the Murray Islands in Queensland. In other words, the *Mabo (No. 2)* ruling can not be used as a text book example for native title for the whole of Australia. New South Wales Aborigines, like Aborigines in other parts of Australia, are unlikely to receive the same verdict because their past colonial histories and cultural backgrounds are not exactly the same.

One of the most obvious examples is the difference between land rights legislation in the Northern Territory and in New South Wales. In the *ALRA (NSW) 1983*, spiritual ties to ancestral land are not recognised. The *ALRA (NSW) 1983* is purely a compensation legislation, based on the assumption that due to dispossession all New South Wales Aborigines have lost traditional attachment to land (Ridgeway 1997). Again, unlike the *ALRA (NT) 1976*, the *ALRA (NSW) 1983* does not require proof of traditional attachment to claimed lands.¹¹⁹ There is thus a clear assumption in the *ALRA (NSW) 1983* that New South Wales Aborigines have failed to protect their cultures and traditions, which would automatically include the loss of the customary law of their ancestors. This assumption becomes a fundamental problem for native title claimants in Dubbo when they are faced with the statement that “... [n]ative title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory” (Brennan J., quoted in Sutton 1996: 8).

However, there are a few ethnographical examples found in earlier anthropological literature which oppose this assumption of total loss of tradition and customs. In 1963, Barnes claims that for urban and rural Aborigines

¹¹⁹ Except in Section 37(4) relating to travelling stock reserves.

a sense of continuity in tradition was as important as change. The continuities in law and customs became socially and politically significant even among those who had ostensibly become 'like their white neighbours' (p. 198).

Barnes bases his claim on increased recognition among Aboriginal people in the early 1960s of the necessity to draw on (pre-) existing customs and laws while fighting for Aboriginal rights. Almost twenty years earlier, A. P. Elkin drew a similar conclusion from his experience of the Aboriginal community in Walgett. Elkin found that despite the breakdown of social organisations and traditional rites, "Aboriginal lore, rules, attitudes and beliefs [were still handed down and] ... tribal 'law' and attitudes [were] still operating quite potently ... " (1945: 208). The challenge facing native title claimants in Dubbo today is asserting if and how traditional law and customs have been handed down. Native title claimants in Dubbo today have both to pose and answer the question: Are our 'tribal laws' still operating 175 years after white settlement in [our] lands?

8.3. The 'Law' and 'Customs' of the Aboriginal People of Dubbo

As discussed before, it was the introduction of the *NTA 1993* (Cth), not the *ALRA (NSW) 1983*, which obviously pressed traditional owners in Dubbo to lay claims to the recognition of their historical and cultural rights as the direct descendants of the original Aboriginal population (see Chapters Six and Seven).¹²⁰ During that process (1990s), very distinctive evidence of surviving traditional customs and land-related knowledge became evident. This does not mean that the direct descendants in Dubbo did not display traditional customs and show evidence of still possessing traditional knowledge before the 1990s. While various aspects of their traditional customs had been lost due to dispossession and the implementation of various government policies, many in fact survived. Up until recently, the various customs and practices, which are distinctly different from those of other Aboriginal people in the area, as well as from those of non-Aboriginal people in Dubbo, have not been

given particular attention. Admittedly, it can be argued that there is no proof that these customs and practices derive from the original Aboriginal people of Dubbo, that is, from the ancestors. But at the same time, there is no other convincing explanation of the source of some of the knowledge, customs and practices of the Aboriginal people of Dubbo today, which can be demonstrated as having been transmitted to them from their parents and grandparents, most of whom lived on the reserve and had minimal social contact with both white people and Aboriginal people from other areas.

Before addressing some surviving elements of 'traditional' customs, it is necessary to address the fact that various aspects of traditional knowledge and customs have been lost, or appear to be 'lost'. Much was truly lost through forced restrictions, while some might have become 'hidden' through suppression. Restrictions in the use of the local language proved a serious blow to the transmission of much traditional knowledge. These restrictions are spoken about among the Elders of the community today, quite frequently in reference to the local Aboriginal language and its importance in transmitting traditional knowledge, customs and law. The consequences of these restrictions can be summarised in this statement: "Our grandparents were told not to speak the language" (Int.#12, 17.09.1998). Most Aboriginal descendants of Dubbo agree on the fact that the older generation did not speak their language in town: they did not speak it in front of the welfare officers, and they more or less avoided speaking it in front of the children. One woman in her late fifties recalls that:

The women would sit around and the men would go off and the kids would be playing on the flat. And my grandmother, she wouldn't talk in the lingo to *us* [kids], but she would talk it to the women ... to her daughters, she was talking in the lingo, but I can't ever remember her talking to strangers in the lingo. And that's just my memory. But then my uncle ... said that he could remember granny talking in the lingo all the time as he was growing up (Int.#12, 17.09.1998).

¹²⁰ Some of the legal differences between the *NTA 1993* (Cth) and the *ALRA (NSW) 1983* and the *ALRA (NT) 1976* will be discussed in Chapter Nine.

However, until the 1940s and 1950s, when the assimilation policy came into operation, it is evident that the older generation spoke the 'lingo' and that the 'lingo' was also a very strong aspect of the 'traditional' way of life before the institutionalising aspects of the various policies to manage Aboriginal people were implemented. A woman in her sixties claims that her parents and grandparents

weren't allowed to speak the lingo. Maybe there was a law that say "well, you can't do that". Yeah, that would have been, yeah. Because ... dad has broke out [in the lingo] ... before he got really sick ... he'd break out in his lingo, you know, he's just up and walk away and start talking ... It's just something that would fall out of him, and I don't doubt that it would again, that it would just come out of him if he was inclined to be like that. I mean if we were to take him for a little walk, outside into the sun, and it was totally different from what he is used to, he'd just burst out with all this ... it would just fall out of him, I'm sure it would ... because it's there and it's always been there. I think it's more a part of him than the English speaking language (Int.#10, 30.03.1998).

The Elders in Dubbo today all refer to parents or grandparents who spoke the 'lingo'. However, the important point I want to make here is the fact that people were forbidden to speak their language. The potential punishment that could be meted out for disobeying these bans placed severe constraints on the generational flow of traditional knowledge and law. However, as discussed in Chapter Seven, the fear of retribution for displaying one's difference (cultural identity and traditions) does not necessarily result in total loss of one's traditional inheritance. It might simply go underground.

On the surface, it might appear that traditional components, like language and law, have vanished, but, as discussed in Chapter Three, these assumptions are increasingly being challenged by anthropologists, historians and Aboriginal people themselves. Hidden knowledge, unrecognised customs and veiled laws are re-surfacing as the Aboriginal people of Dubbo realise that after the passing of the *NTA 1993* (Cth), and having fulfilled the statutory requirements of native title holder, they are entitled to equal seating at the negotiation table. Their claims must at least be heard. The following discussion explores the opinions and the experiences of

some of the Aboriginal descendants of Dubbo vis-a-vis the nature and the survival of local ancestral customs, knowledge and traditional law.

When asked about Aboriginal law in general, Robert, one of the leaders of the Aboriginal community in Dubbo today, had this to say:

Everyone in this country who walks this land is affected by Aboriginal culture and Aboriginal law, whether they realise it or not. And I know personally of people who have sinned on the law, done the wrong thing and they've been punished. And the punishment fits the crime. It's depended on how you erred, what you have done wrong ... I've seen people suffer and I've seen people die, because they didn't take precaution, they did the wrong thing, and they disregarded the law, and they went where they shouldn't have or they did what they shouldn't have, or said or done or did something, you know ... and, ah, you can't do that. Aboriginal law is the law of the land. It's not man-made. It's there. It's been there since time began. It's still there now. And we're just a part of it. We have no influence on it (Int.#04, 13.12.1997).

It is interesting to read Robert's words, then deliberate on earlier anthropological debate on the existence and nature of Aboriginal law. Robert does not consider the question of the presence or absence of Aboriginal law in Dubbo/Australia: the law is there as a fact. According to Robert, Aboriginal law is spiritual and omnipotent in nature, and breaking the law invites near certain punishment befitting the crime. The law is not 'man-made', it is the 'law of the land' and human beings are of its making, not the reverse. The origin of the law lies in time immemorial, and apparently neither Aboriginal nor non-Aboriginal people can influence its eternal essence and existence. People like Robert perceive the law as an everlasting reality which is beyond human and individual command. According to Robert, the spiritual essence of Aboriginal law, which is recognised under the *ALRA (NT) 1976*, should also be recognised under the *ALRA (NSW) 1983* as - according to him - it is still evident among Aboriginal people of Dubbo through their ties to their ancestral lands. This belief supports earlier recommendations by the Woodward Commission, that definition of 'traditional owners' and 'common spiritual ties to land' should be applied throughout Australia. These recommendations were not taken up in the writing of the *ALRA (NSW) 1983* (Aboriginal Land Rights Commission 1974). However, Robert's portrayal of Aboriginal law is prevalent among most Aboriginal

people in the whole of Australia. And, while the nature of Aboriginal customary law is important under the *NTA 1993* (Cth), the existence of local, ancestral law must be proven beyond doubt. In places like Dubbo, the existence of Aboriginal customary law is best analysed through social interaction and the transmission of the law.

When deliberating the effects of the intrusion of European law and culture into the lives of the Aboriginal people of the Dubbo area, Robert had this to say about the transmission of local traditional customs and law:

We had sort of grown up in a westernised world and we hadn't had the contact with our old people, probably as we should have, if we could have. You're sort of basically taught how to think, and you dismiss things like that [traditional beliefs] very easily. It's much easier to prop yourself down in front of the television and talk about football, fast cars and things like that, you know, that type of attitude. But that's what I mean, even though all of that is there to distract us from what's all around us ... the Aboriginal law that's all around us ... once you get in touch with yourself and your spirituality, you can start to tune in, and you gradually come to the realisation ... It's quite impossible to do that on your own now. And that's why we need, I need teaching, by people who have been taught and by people who have been taught by people who have been taught, and passed it on (Int.#04, 13.12.1997).

Robert's initial venture into the search for traditional knowledge and law was most likely fueled by his personal 'soul-seeking' and longings to learn about his ancestors. However, the important aspect of his account is the fact that there are still people around who do possess this knowledge and who pass it on. Thus it appears that while some aspects of traditional knowledge and customary law have been lost 'forever', some have merely been 'fractured', and some have been suppressed. The harmony of the generational flow of traditional customs and knowledge was interrupted with European settlement, but the Aboriginal people of Dubbo are still passing on traditional knowledge and myths¹²¹, collecting and preserving the

¹²¹ These myths are frequently associated with the Macquarie River, the Talbragar Reserve, Terramungamine and a number of other traditionally significant sites in the Dubbo area. These myths refer to creatures and spirits in the river, warnings about going to certain places (especially for children and those unfamiliar with the history of the place/the myth), and warnings about the existence of graves and burial sites in certain areas, and thus a reminder of showing appropriate

remnants of the local language, and frequently acting and interacting according to traditional law and customs. It is thus important to focus on the human agency which is responsible for upholding, teaching and practicing Aboriginal law and customs.

In long settled areas like Dubbo, the starting point will always be to identify, display and prove that there are surviving aspects of Aboriginal law and customs being upheld and practiced by direct descendants today. Kinship-instructed behaviour, and an understanding of one's place within the community (family), is very important as can be detected in the following account, given by a woman in her early forties:

I might not have my full language, but I've got a lot of words and I've phrases that I use. And concepts ... there are two children from [my husband's] first marriage, and he was married to a white woman ... and I actually looked after them until they reached high-school. The girl...we picked her up at the weekend, to go to the funeral ... but she hadn't had contact with her Aboriginal side for awhile ... anyway we were talking about something or another and she said, oh, mentioned somebody's name. And her father said to her 'that's auntie to you, you know, you don't call them [X] or [Y] ... you call them auntie [X] and Uncle [Y]'. 'Oh', she says, 'well I don't call any of my other aunts and uncles that'. And then she mentioned their names. And this is her mother's brothers and sisters. And I said to her 'that's you white side, we're talking about you Aboriginal side now, and you show *respect*, and you call them *aunt* and *uncle*'. And she went 'oh, okay' (Int.#11, 10.09.1998).

This account highlights the importance of the Elders within the community, and brings into focus the importance of kinship. The woman giving the account makes a clear distinction between Aboriginal and non-Aboriginal customs by using kinship terms, and, more importantly, she stresses the grounds for the use of kinship terms. Through the use of kinship terms, the younger people are taught about their kin relations and, at the same time, they are instructed about their role and their place within the family/community. Another example of the importance of kinship terms can be found in the denying of its usage. One female informant in Dubbo told me

respect. I make no attempt in this thesis to evaluate the nature and authenticity of these 'myths', I merely like to refer to Levi-Strauss (1966) and how possibly these myths might serve the role of constructing or explaining the historical context of the Aboriginal people of Dubbo today; they might establish some form of link between the past and the present.

how she had ceased to refer to an Elder in the community as 'uncle', since she had found some of his behaviour to be against, and to be disrespectful of, Aboriginal tradition. Consequently, when discussing and addressing him she referred to him by name only. This denying of the usage of kinship terms is - in itself - not likely to be evidence of traditional usage. The reason for giving this example here is to emphasise the fact that (individual) recognition of kinship is very important among Aboriginal people of Dubbo - especially when discussing and determining authority, kinship ties, resolving disputes, and ascertaining rights to land, history and culture - issues that are more likely to draw on tradition. The deliberate lack of using kinship terms is more likely to be evidence of general societal change, i.e. challenges to gerontocracy and patriarchal structures of previous times; but, notwithstanding, it demonstrates ongoing importance of the usage of kinship terms.

Another, example of how current day social interaction can reveal the existence of traditional customs (and law) can be examined through how the Aboriginal descendants of Dubbo determine rights and obligations to their sites and grounds. In his criticism of section 225 of the *NTA* (1994), Peter Sutton (1996) claims that in "normal Aboriginal terms, the possessory relationship, or occupation as of right, is the state from which specific rights, interests and responsibility flow", not the reverse as assumed in the *NTA 1993* (Cth) (p. 9). This claim can be substantiated - and further examined by how these rights, interests and responsibility are mediated - by using an example from a direct descendants' meeting in early 1998. One of the Elders of the community had, with the help of his sons and without consulting other Elders within the family, moved a large rock from the Talbragar Reserve. This rock has significant cultural value for the descendants of the reserve. The importance of 'the rock' was evident in that the debate about its fate overshadowed other matters of such importance as the proposal for the incorporation rules of "Wirrimbah". After some two hours of discussions among the direct descendants, the facts of the removal were revealed. The meeting had both heard the story and had come to a decision. The reason behind the removal: the rock had been removed because, due to erosion, it was in great danger of falling into the Macquarie River, and eventually becoming lost in the riverbed. The problems caused by the lack of consultation with other direct descendants included a) lack of agreement for the removal; b) determination of who could and should take care of the removal if approved; c) the

choice of a relocation spot for the rock should removal be approved. The result: the rock would be moved back to its original spot until its fate was dealt with by (all) the people whose possessory relationship gave them the rights, interests and responsibility to do so. What is interesting about this tale is the matter of authority. The important issue was that no single person has the authority to make such decisions, and the certitude was that all direct descendants have the right to be consulted on communal, cultural and legal issues. It was assumed that while the Elders do carry a certain degree of authority within the community, based on respect and knowledge, decisions regarding land and heritage are reached communally by the direct descendants. However, this does not mean that authority on all traditional issues is held equally among all descendants. Gender, age, presence, absence, participation, birthplace, family history and kinship, all place certain restrictions, as well as obligations, on the rights, interests and responsibilities of individuals.

The final example I offer in this section is also relevant to Sutton's previous statement, and deals with presence (place), participation, age and kinship. A young woman who had not grown up in Dubbo, but who is a direct descendant of the Talbragar Reserve, moved back to Dubbo when she was in her late twenties. This woman had been raised and educated in a white community, so when she began to show interest in recording some of the local culture and history, most people applauded her efforts: it was assumed to be her right and even responsibility as a direct descendant. However, as she proceeded with her task, it soon became apparent that her ways, her methods and her attitudes were not always in accordance with the expectations of many members of the direct descendant group. It is not necessary to go into detail here, but suffice to say that accusations of arrogance, disrespect and ignorance were used to describe her conduct. This demeaning behaviour was explained as being the product of too much influence by white society and thus lack of recognition of Aboriginal customs and conduct. Consequently, this woman was seen as 'handicapped' when it came to 'possessory relationship' with her traditional land. This, in turn, affected her authority and rights to knowledge, culture, law and land. Both previous accounts raise the question of wrong-doing and subsequent punishment. However, it appears that claiming interest or assuming rights, which reduce or in other ways affect the rights and interest of other people who have possessory relationship to the same land and heritage, does

not call for harsh punishment (according to the white system). Indeed, it appears that possessory relationship can neither be easily effected nor removed, but public humiliation, loss of face, loss of respect, and loss of authority based on prestige are frequently used as deterrents.

These few examples do not prove that the customary law of the original inhabitants of Dubbo are alive and well nearly two centuries after white settlement. What these examples do suggest is that there are traditions and rules which differ from non-Aboriginal notions of social interaction, social organisation and social control. There is a general acceptance of certain conditions, which for so many Aboriginal people of Dubbo have until recently been a fact of life, not always identified as specifically Aboriginal, and more importantly not necessarily defined as customary law. However, as discussed before, the recognition of native title has changed all of that. Today, proof of the survival and the continuity of traditional practices, with foundation in local customary law, are one of the major conditions for recognition of native title. The concept of Aboriginal customary law has become very important for the direct descendants in Dubbo: there is an ever-growing realisation of the need to be able to identify, define and prove that certain obligations, rights and interests derive directly from the cultural and legal practices of their ancestors. This is not an easy task, a fact that might best be outlined by stepping into the shoes of native title claimant(s) in Dubbo and revisiting the story of Mr. Hay recounted earlier in this section.

There is certainly one aspect of the account of Mr. Hay which is totally different today, that is, recognition of the existence of Aboriginal customary law. But this recognition is, in case of native title, eventually dependent on the interpretation of the members of the Australian Federal Court. This being established, there are two essential issues which need to be established by the native title claimant; firstly, the nature of these traditional laws; and, secondly, that their "rights and interests are possessed under [these] traditional laws [and that they] have a connection with the land" (*Native Title Act 1993* (Cth), s 223(1)). Both aspects are problematic for the native title claimant in Dubbo, as in most other places in Australia. The first aspect has been analysed and debated among academics over the last few decades. It is discussed and debated among lawyers, anthropologists, non-claimants and claimants

in native title cases today, and, where negotiation is not reached, the nature of local traditional customs and law are eventually determined by the court. While so many Aboriginal people of Dubbo, like Robert for example, are at ease discussing the spiritual nature of Aboriginal law in general, it still remains a real challenge for many to demonstrate the existence of a continuing body of law, through which their membership of a group entitles them to claim to be native title holders.¹²² The second aspect is even more problematic. Firstly, native title claimants in Dubbo are still facing challenges when they are expected to provide evidence - before non-Aboriginal legislative bodies - which would absolutely demonstrate their descent status. As discussed in Chapter Seven, this problem arises due to gaps in the genealogies, and, while it poses hindrances when facing Australian legislative bodies, it is not an issue regarding recognition of descendent status within the Aboriginal community in general. Furthermore, native title claimants do not have a fully traditional way of proving their ancestry, since they have been deprived of both myths, language and stories (Dreamtime), which would give them rights and obligations to grounds and sites. Native title claimants in Dubbo suffer the same problems as many Aboriginal people in long settled places. What is still recognisably traditional? And, as discussed in Chapter Three (3.3.), the stubborn construction of Aboriginal culture as static, primitive and unchangeable, combined with ideas about homogeneity in Aboriginal Australia, leaves few opportunities for challenges for Aboriginal people in long settled areas like Dubbo. It appears that in future native title claims, Aboriginal people of Dubbo will have difficulty proving their socio-cultural and blood links to the Aboriginal people of Dubbo at the time of white settlement. Similarly, by looking at the native title determination taking place in long settled Australia today (e.g. Yorta Yorta), the authenticity of what today is identified and claimed as local Aboriginal customs and law - by local Aboriginal people - is in danger of being challenged by Australian legislative bodies. Since native title has no statutory definition, both the determination of native title holders and the incidents of native title are dependent on local customary law. One of the most important issues is: can the direct descendants in Dubbo prove that theirs is an

¹²² An exemplar of this challenge, faced by many Aboriginal people in long settled areas, is discussed in detail in the next chapter; i.e. the recent Yorta Yorta native title claim.

Aboriginal law, the law of the original inhabitants of the Dubbo area? Can they demonstrate continuities in their relations to land? Will their evidence be accepted?

The significance of these questions becomes increasingly evident as native title claimants in other long settled areas lose their fight for recognition of native title. The Yorta Yorta (New South Wales and Victoria) lost their case before the Federal Court in 1998 on the grounds that they had lost connection with the traditional law and customs which would have sustained native title (Keen 1999; also NNTT web). The Yorta Yorta, whose appeal was rejected in February 2001 (reported in the *Sydney Morning Herald*, 09.02.2001), will inevitably end up before the High Court when they have acquired sufficient funding and legal support required for such an undertaking. The experience of the Yorta Yorta, and undoubtedly the future experiences of many Aboriginal people in long settled Australia, remains one of frustration, anger, sadness and fight. Court decisions such as these continually bring the focus back to the incompatibility of Aboriginal traditional customs and law and the Australian legal system; and, more importantly, the possible lack of maintaining traditional law and customs, resulting in extinguishment of native title. Frustration and anger arise from the fact that although the existence of Aboriginal law has been recognised, it is always subordinate to the Australian system of law. Consequently, when the two systems clash, Aboriginal law, customs and traditions might either not be recognised or be found extinguished (see Dodson, M. 1998: 7).

There are developments taking place in the first decade of this new millennium, which might challenge this absolute domination of the Australian system of law over native title claims. People fighting for native title are developing new ways of conceptualising and defining native title. Noel Pearson (1997a) defines native title as a 'recognition concept', since according to the High Court, native title "... is not a common law title but instead a title recognised by the common law ... [and moreover] neither is native title an Aboriginal law title [but] Aboriginal law will recognise title where the common law will not" (p. 154). Apparently there is a space in which the two systems of law can come together and recognise concepts which arise in the other; but, at the same time, Pearson's definition seems to assume that native title is neither Aboriginal nor non-Aboriginal. Other writers have taken up this concept of a 'space of recognition', but their analyses do not go as far as

relegating native title to a 'law-less share-space'. Rather, they visualise 'recognition space' as “two circles, one representing the Australian legal system, the other representing the system of relations ordered by traditional law and custom” (Mantziaris & Martin 2000: 9; see also Keen 1999).

To summarise, it has been pointed out that the difficulty vis-a-vis the concept of recognition space is that

non-indigenous parties bring to the recognition space only that part of their culture that relates to property law and the law of corporate dealings. The indigenous side, on the contrary, brings its entire culture (Sullivan 2000: 18; also Mantziaris and Martin 2000).

It appears that the incompatibility that exists between non-Aboriginal and Aboriginal ways of conceptualising and understanding land rights, connection to land, native title and cultural heritage, is still the major obstacle to the determining of claims of native title. Major challenges lie with the conceptualisation of what constitutes Aboriginal law. Can the Australian legal system accept 'law' as being "alive in the land and the song" (see quote at beginning of this chapter), and how will the recognised legislative bodies define the nature of native title in the various parts of Australia? In order to address these questions, it is important to look at Aboriginal people's own notions of connection to land, notions of who 'owns' the land, and how, during dispossession, dispersal and various government policies, some people maintained connection to their ancestral lands.

Chapter Nine

The Question of 'Ownership'

As this thesis has demonstrated, the major issue for Aboriginal people in New South Wales (Australia) today is the legal recognition of the survival of Aboriginal rights to land through the often turbulent period of colonisation. The Aboriginal people of Dubbo are certainly a party to debate and deliberation vis-a-vis these issues. Their participation in such debates is mostly on the local level, but occasionally their actions, opinions and demands reach outside the community (e.g. negotiation of the AGL pipeline through the Western Plains discussed in Chapter Seven). Local politics, internal conflict and the ideas and conceptualisations of an Aboriginal community of Dubbo have already been discussed (Chapter Six) as well as the differentiation within the Dubbo community between 'traditional' and 'historical' people (Chapter Seven). The underlying themes in both of these chapters are questions of sameness, difference, rights and social change (transformation). For native title claimants in Dubbo today, there are two additional aspects: ownership of land and cultural heritage.

This first section in this chapter addresses some of the powerful notions and beliefs of past and/or present 'ownership' of the Talbragar Reserve, as well as the feelings and connection which many of the direct descendants maintain to various sites and grounds in and around Dubbo. These notions and beliefs are found among many Aboriginal communities in long settled Australia, and have proven both beneficial and problematic to native title claims. The second section focuses on how the determination of the existence of continuous links to country - via surviving language, traditional knowledge, customary practices and unbroken links to known genealogical ties to particular ancestor(s) on the land – is contingent upon the interpretation of officers of the Court of Native Title legislation. These matters will be examined through a comparison of the native title claims of the Dunghutti and Yorta Yorta people.

9.1. Queen Victoria and the Taylors' Land

Why should we, as direct descendants, just ask for Terramungamine and Talbragar. Because we're all from Dubbo, within the community, so we should be protecting all our sites within Dubbo. I mean places like the Devil's Hole ... all our sites around the area ... once we're set up we will get records¹²³ of all our sites within the area and maintain and protect those and set up management plans to look after those (Publication Officer speaks at a "Wirrimbah" meeting, 24.08.1998).

I have already alluded to the fact that there is some level of internal grass-roots political conflict within the Aboriginal community in Dubbo. However, it still seems justifiable to claim that most Aboriginal people of Dubbo are aware of, and agree upon, which groups of people hold core rights and which hold contingent rights. The internal conflict within the Aboriginal community in Dubbo tends to take the form of a lack of cooperation, based on poor administrative decisions made by non-Aboriginal people in the past, within an institutional structure which frequently places all Aboriginal people in New South Wales under the same banner. When considering Sutton's list of core and contingent rights (Chapter Two (2.2.)), it tends to be the case that there is a consensus among most Aboriginal people in Dubbo that core rights holders are people who fall exclusively into the category of 'traditional' people. Most¹²⁴ Aboriginal people in Dubbo fall under the contingent rights category. However, there are some limitations to how far these categories reach, based on the following two fundamental aspects: What exactly are these rights in Dubbo today? Where is the land to which people hold these rights?

There are three important aspects of traditional Aboriginal land ownership which need to be examined before addressing these questions: (a) the fact that interests and rights to land are held communally; (b) the recognition that core (primary) rights to land are usually entrenched in various forms of socio-territorial identity(ies) (constituting obligations duties, rights and knowledge); and (c) the fact that the concept of 'alienability' is not a feature of traditional Aboriginal landowning

¹²³ This is a reference to archaeological records of the various 'ancient' Aboriginal sites around Dubbo, adding to the sites which are known today.

¹²⁴ There are people who would be considered to have forfeited their rights for various reasons: usually acts of vandalism and other criminal behaviour.

systems. These three aspects differ greatly between the various parts of Australia. For this reason, and before discussing them in detail within the context of Dubbo today, it might be illuminating to take a brief look at the Talbragar Reserve, and to examine the various differing opinions that have been aired vis-a-vis the 'ownership' of this particular parcel of land during the last 103 years.

The Talbragar Reserve reverted to the LALC in 1984, since when it has been held in trust for the whole of the Aboriginal community of Dubbo. On the surface, this reversion should appear to be a simple and a straight forward legal move applicable to most existing Aboriginal reserves land in New South Wales at the time of the implementation of the *ALRA (NSW) 1983*, and recognised as such by most local Aboriginal people. However, more than fifteen years after this reversion, there remain various, contradictory notions about who owns, or who holds, the lease to the Talbragar Reserve. It is not uncommon to hear some Aboriginal people of Dubbo, especially the older generations, claim that Queen Victoria¹²⁵ granted the Aboriginal people of Dubbo title to the Talbragar Reserve. More specifically, the title was given to the Taylors, although there is no consensus about which one of the Taylors received the title. Consequently, various people have claimed over the last few decades that the reserve has always been known as the 'Taylors' land' (from personal conversations in 1998 and 1999; also see Dormer 1988: 256).

The belief that Aboriginal reserve land in New South Wales was given to the Aboriginal people by Queen Victoria has been recorded in various parts of New South Wales. Marie Reay (1949) claims that most of the mixed-bloods she encountered in the 1940s and the 1950s believed that "Queen Victoria ... [was] personally responsible for granting large tracts of land to the aborigines" (p. 98). C. D. Rowley (1971b) agrees with Reay, claiming that " ... New South Wales Aborigines on stations and other reserves believed that they were living on land which had been given to them (generally by Queen Victoria) in recompense for the loss of everything else in Australia" (p. 135). Heather Goodall (1996) similarly explains these beliefs as responses to earlier establishment of Aboriginal reserves

¹²⁵ Queen Victoria reigned from 1837 - 1901. The earliest record of Queen Victoria being associated with Aboriginal land rights is in 1846 when the Wybalenna (Tasmania) sent the queen a petition, calling for recognition of Aboriginal rights in land (Roughley-Shaw 1999: 10).

and the general assumption that Queen Victoria was the “benefactress who now owned all ‘Crown Land’ and was offering these ‘small tracts’ [the reserves] to Aborigines” (p. 56). Henry Reynolds (1992), who traces these beliefs back to the late 1800s, emphasises the strength of the oral historical accounts of the early 1900s. These accounts claim that Queen Victoria not only gave Aborigines freehold title to their reserves, but, in recognising their prior ownership to the land, felt obliged to guard the welfare of Australian Aborigines who had lost their land to the white settlers (p.153).

Some members of the older generations in Dubbo claim that Queen Victoria gave the local Aboriginal population back some of the land to which King George III laid claim in the late 1700s. But there are other accounts of deeds and titles (holders) to the Talbragar Reserve, the most frequent of which suggests that Sarah (Taylor) Burns, one of the Taylor sisters who originally moved onto the reserve, held the lease on the reserve. The following two paragraphs come from interviews with Sarah's granddaughter and daughter-in-law respectively.

The Mission was actually given to my grandmother [Sarah] ... from what I gathered, it came from her husband's father [a white man]. And apparently he owned all of that land, or leased all of that land out around that area. It was a great deal of land. And they were running, I think, sheep and cattle at that time. But he was given all ... they were given the ninety-nine years perpetual lease on that. So, apparently there were documents to prove that and they'd been handed down through the years. And dad's sister had it at one time, while she was a part of the Land Council, when she was alive. And then his nephew got a hold of it and now no one knows where the papers are (Int.#05, 26.03.1998).

I mean, that his mother [Sarah] had the lease for it [the reserve] ... ninety-nine year lease that I never ever saw, that the land belonged to her, yeah, Sarah Taylor ... Ah, I don't know who gave it to her, it was supposed to be the property people who lived over the river ... and they just gave her the lease for ninety-nine years (Int.#08, 29.07.1998).

There are further claims as follows: some of Sarah's sisters held the lease at some earlier stage in the 1900s (personal communication); Bucky Burns, one of the two last residents on the reserve owns the land (personal communication); and Bucky Burns holds a ninety-nine year lease on the reserve (Dormer 1988: 256). In the late

1960s, C. D. Rowley traveled through Dubbo and was escorted around the reserve and nearby land by an Aboriginal man who was born on the land in question. This local Elder, by then in his late seventies, told Rowley that the reserve land

had been made over to the Dark People by Queen Victoria; and that eighteen acres of it had been specially granted to his grandfather (Rowley 1971b: 196).

Furthermore, Rowley claims that after establishing the fact of his grandfather's ownership of the land, the man went through "the usual details of litigation, leading up to the usual denouement of the story - that someone else unjustly got the land" (1971b: 196).

The most intriguing aspect of these different claims about who held, and subsequently who holds, the lease on, or the title to, the Talbragar Reserve, is that there are very few people who claim to have laid their eyes on the actual document(s). However, despite persistent claims of family and/or ancestral 'ownership' of the reserve, a growing number of people are realising that the title to the reserve did, in fact, revert to the LALC in 1984. This recognition of the fact that the LALC holds the deed for the reserve has created some 'new' uncertainty and problems for the direct descendants. Under the *ALRA (NSW) 1983*, the title to the reserve reverted to the LALC to be held in trust for all Aboriginal people residing in Dubbo. Even more importantly, the *NTA 1993 (Cth)* does not recognise native title on any land held communally by Aboriginal people/organisation, i.e. the LALC. The direct descendants living in Dubbo today acknowledge that any attempts to claim recognition of native title over the Talbragar Reserve are not feasible under current legislation. They frequently speculate why this should be the case. Answers to these speculations vary to a great extent, depending upon who is speaking and from where information is acquired. However, the fact remains that there is a general lack of knowledge about the nature and the processes of the Australian law and Australian courts in relation to matters of land legislation (this lack of knowledge is presumably shared by the majority of the general public in Australia). The Aboriginal people of Dubbo, like other Aboriginal people in Australia, have certainly been the subjects of frequent and numerous legislative changes which have been implemented on both State and Federal levels, inevitably forcing long series of

adjustments on behalf of New South Wales Aboriginal people. The question is thus: Why do the Aboriginal people of Dubbo show limited knowledge of, and often limited longings to, understand the legislature of Australia? A part of the answer might lie with the fact that legislative (and political) changes usually take place at a macro level. And, while it is undoubtedly true that the effects reverberate through the community at a micro level, these legislative changes are written, interpreted and implemented according to the hegemonic value systems of a modernist Australian state. Ideally, the principle behind legislative (political) changes should apply at the micro (local) level, but grass-roots power struggle, claims and counter-claims, and a general struggle for economic and social benefits, often obstruct the expected processes and 'benefits' of legislative changes. Similarly, legislative changes are not always harmonious with the real situation on the micro level, which means that frequently people are not aware of what is taking place at the macro level.

One of the prime examples is the construction of 'Aboriginality', which has already been addressed in Alice's story in Chapter Seven. During the period of 'assimilation', Aboriginal people in New South Wales were persuaded, forced and/or guided into forgetting and/or abandoning their 'Aboriginality'. In the course of the introduction of land rights (from the mid-1970s onward), 'Aboriginality' had to be 're-discovered'. However, the *ALRA (NSW) 1983* treats 'all Aborigines' in an area as equals. In effect, their Aboriginality cancels out their difference. Thus the introduction of a new, national legislation - the *NTA 1993 (Cth)* - which requires demonstrable 'differences' between groups of people in terms of Aboriginal traditional heritage, has only tended to exacerbate the already intricate problems for many New South Wales Aborigines. These problems of differentiation might not have been a real issue before the implementation of the *NTA 1993 (Cth)*, when, in New South Wales, Aboriginal people were all entitled to the same social and financial benefits. However, after the implementation of the *NTA 1993 (Cth)* - and especially before the implementation of the *NTAA 1998* - there were potential financial and political benefits attached to the native title holder status. The recent adoption of the terms 'traditional owners', 'traditional people' and 'historical people' is one of the best indications of how Aboriginal people in New South Wales are reacting to recent legislation (i.e. *NTA 1993 (Cth)* and *NTAA 1998 (Cth)*). These pieces of legislation, introduced with the aim of improving the lives of Aboriginal

people and making amends for past injustices, have resulted in still more socio-political complications and factual, legislative challenges on the local level. There is a constantly developing dynamic tension between, on the one hand, the macro (national) and the micro (local) levels: lack of trust and lack of faith in promises and practices of government is found on the local level, and frequent abuse of political power and funds¹²⁶ is found at government level. On the other hand, between different groups on the micro (local) level there are conflicting claims over land and heritage, all of which hold up and/or invalidate native title claims.

In extending these issues further, it is essential to address the aforementioned characteristics of traditional Aboriginal notions of land ownership: inalienability, communal ownership, and sources of socio-territorial identity(ies). In order to address these three characteristics, it seems appropriate to examine some of the information and expectations of Aboriginal land ownership which form the basis of the *ALRA (NSW) 1983*. The following paragraph presents a condensed selection of writings on the previous legislation on Aboriginal land rights in Australia (Northern Territory), writings which were consulted by the Select Committee of the Legislative Assembly upon Aborigines during the compiling of the *ALRA (NSW) 1983*.

The distinctive characteristic of communal property is that every member of the community is an owner of it as such ... If land were to be granted to Aboriginal people, it should be granted to a community or tribal group as such ... We recommend that the Committee endorse the enactment in New South Wales of legislation to vest full legal title to land in the Aboriginal Communities ... Title to land should be communal and inalienable and in fee simple ... The way with Aborigines holding title is that all of the people in the community will hold title ... It is in perpetuity for the whole of the community (cited in Parliament of New South Wales 1980: 84).

The aim of the Committee was to meet "the expectations, wishes and aspirations of New South Wales Aborigines [by securing] freehold title [which] is the only appropriate estate or interest in land to vest in Aboriginal communities pursuant to a genuine land rights policy" (Parliament of New South Wales 1980: 83). However,

¹²⁶ See allegation about the Victorian Government's dealings in the Yorta Yorta native title claim,

there have been great changes over the last twenty years. The general assumption of the early 1980s that all New South Wales Aborigines lived equally in 'communities' - and that there was no difference between them - has been relegated to the past. Today, these notions have certainly changed within the social sciences, much writing proving to be ahead of policy making.

By merely looking at the previous accounts of the diverse opinions that have been disseminated regarding ownership of the Talbragar Reserve, obvious problems arise. Land, especially reserve land, has been an area of tension for a long time, something which although not widely known, was recognised by anthropologists as persistent among New South Wales Aboriginal communities as far back as the late 1940s (Kelly 1944). This tension inevitably stresses the fact that land, as in property (something valuable), is (was) of more than considerable importance to many New South Wales Aborigines. The indisputable fact that there is tension over land among Aboriginal people in New South Wales needs to be addressed, especially in the context of native title. Each native title claimant group needs to (a) establish individual membership as native title claimants, (b) avoid internal conflict and overlapping claims, and (c) facilitate the registration process of native title claims.

Heather Goodall has raised an important factor essential to analyses of this tension over land among Aboriginal people, when she discusses the white settler's use of land in New South Wales. Prior to the 1860s, a large part of New South Wales was used for sheep grazing, but during that decade, the growing non-aboriginal working class started calling for their own plots of land for agrarian purposes. In 1861, the first land laws came into force in New South Wales, resulting in the intensification of land use and a major change in what Goodall calls the 'social use of space' (1996: 69). With many Aboriginal people attached to sheep and cattle stations at the time, it is not unlikely that this major change in the use of the land - and the importance which the white settler of the time attached to owning demarcated plots of land - influenced Aboriginal notions of ownership of land. It is also not unlikely that in 1898, when the Talbragar Reserve was established, the people/families who moved onto the reserve entwined such notions of ownership of reserve land with more

discussed in the next section.

traditional connections to the land; firstly, notions of traditional, communal ownership of land based on spiritual and material connections; and secondly, notions of communal (family), but restricted (from non-family) ownership of a demarcated plot of land (e.g. a gift from Queen Victoria). An additional factor is the likelihood that traditional connection to the land became focused on reserve land, as most other land had been taken over by white settlers. There are other important grounds and sacred sites, and gradually people's connection to these grounds and sites are emerging. The term 'emerging' does not indicate that this connection is something which is emerging out of a vacuum, but merely implies that this is a process taking place because of the circumstances arising surrounding native title. By 'circumstances', I mainly refer to the on-going process of realising what is involved in claiming native title, and subsequently, what grounds, sites and areas can potentially be claimed. Furthermore, it is important to point out that, firstly, during the time of the protection policy (segregation), the movements of many Aboriginal people were limited and, secondly, Aboriginal people were frequently denied access to their traditional lands by property owners (Beckett 1965). Thus connection to such grounds and sites may often have been conducted in secrecy or, more likely, not at all.

There were a few Aboriginal families/individuals attached to various sheep stations and farms in the Dubbo area in the late 1800s and early 1900s. However, nowadays their descendants do not evince the same attachment to these stations and farms as is evident among the descendants of the residents of the Talbragar Reserve towards the reserve land (most people belong to both groups). This special attachment can be explained, to a certain extent, by the fact that, apart from people marrying both in and out of the reserve, the families (names) who moved initially onto the reserve remained there until the reserve was closed. Furthermore, the reserve was relatively small, both in size and population; and, in addition, the people were to some extent self-sufficient (i.e. they supplemented their diet through hunting, fishing and growing vegetables) and never fully institutionalised (i.e. both men and women sought work outside the reserve and for periods of time children attended school outside the reserve). When these facts are examined in the context of the claims of 'ownership' of the reserve – while admitting the contradictory views of who holds/held title, but emphasising at the same time the fact that it was 'someone' in the

family - it transpires that there is a very strong notion of communal 'ownership' of the reserve within a selected group of people; the (Taylor) direct descendants, for example. However, it must be recognised that this notion is based on varying, sometimes contradictory, accounts of how the reserve became (again) owned by the local Aboriginal people. It would thus not be acceptable as a 'traditional' connection under the *NTA 1993* (Cth). These notions became very apparent in the early days of "Wirrimbah's" venture into the arena of native title claims, when the general assumption was that native title to the reserve should now, more or less automatically, revert to the descendants of the original inhabitants of the reserve (who, according to them, owned it anyway).

The strength of notions of communal ownership and/or rights to the reserve became apparent during the establishment of 'Wirrimbah' (a general recognition among both 'traditional' and 'historical' people) and became even stronger when examined through another aspect of traditional ownership of land, i.e. core rights, entrenched in socio-territorial identity(ies) (Sutton 2001b). This identity is displayed through (a) obligations (moral): there are regular get-togethers organised by members of the family to clean and clear the reserve land, to maintain the structures and facilities on the land, and to repair any damage to these structures, regularly inflicted by vandalism that is endemic in publicly open places; (b) duties (legal): which can be differentiated from obligations in the sense that people feel it their duty to prevent vandalism and illegal conduct on the reserve. This is demonstrated through appeals that appear in the local newspaper, to people in general to respect the reserve land and to report vandalism. Frequent discussions are held, focused on building a caretaker cottage on the reserve land, and, in a desperate attempt to curb vandalism, there are calls for the fencing of the reserve. The last two projects have not taken place yet due to lack of funding; (c) rights ('economic'); a bid for rights to use the land and the Macquarie and Talbragar rivers for recreational activities, fishing, family-gatherings and various social events; (d) knowledge (emotional, spiritual), which is best observed during family gatherings when stories - both factual and mythical - highlight the importance of the reserve in the lives of the direct descendants.

Talbragar Reserve was my place of learning. Because that was where I went to school, first went to school. And that's where I learned things about the river, from my old grandfather Arthur Burns. Him and Johnny, his son, used to take me in the old sulky everywhere. And old grandfather Burns, he was a great fisherman, and always had fish, all year around. Yeah, well he taught me all about the river ... I call this my place of learning, ... for all the family (*The Peckham Recordings* 1997).

These words were spoken at a family reunion of the Peckham family (descendants of Sarah (Taylor) Burns and Arthur Burns' daughter). This reunion brought together Peckham family members from various parts of Australia (the majority from the Dubbo area) over Easter of 1997. During this time, the youngest members of the family were introduced to each other and to the older generation: they heard various stories about life on the reserve and generations long gone; they were 'scared' by myths such as the one about the Devil's Hole in the Macquarie River and the monster which resides therein; they were taken fishing and gathering, and taught how to make 'bush tucker'; they were taught the importance of kinship and their connection to the reserve land. The *Peckham Recordings* (1997) are a fundamental indication of how the Aboriginal system of law and customs instills notions of ownership of, and connection to, land through a combination of reinforcing kinship relations, sharing knowledge (myths, rituals, practices and history), and teachings about obligations to the land. These examples further support the claims discussed at the end of the last chapter of unequal contribution when non-Aboriginal and Aboriginal systems of law come together. Assuming the existence of a 'recognition space', Aboriginal people bring to it their entire culture, while non-Aboriginal people merely bring specific legal acts relating to property (see Mantziaris and Martin 2000).

While quite a few people, when relating their stories in the *Peckham Recordings*, described any possibility of claiming native title over the Talbragar Reserve as a possible 'dream come true', most realised, or were later informed, that under today's legislation, native title cannot be recognised on the reserve. As I have mentioned in Chapter Seven (7.2.), the reserve is not the only place the direct descendants identify with, derive customary rights from, and hold as traditionally important. However, when stories about the various sites and places - handed down from past generations of direct descendants along with historical records of Aboriginal land and sites in the

Dubbo area - are reviewed in the light of current day conditions, uses and ownership of these places and sites, it becomes clear that while Aboriginal customary law does not include the notion of 'alienability', the same is not true of Australian (British) Commonwealth law. This fact is becoming increasingly clear to the Aboriginal people of Dubbo as they venture further into the field of native title. Some of their hopes, objectives and expectations regarding various grounds and sites can be explored through the proceedings of a "Wirrimbah" Direct Descendants Aboriginal Corporation meeting which took place during 19 - 22 August 1999.

The "Wirrimbah" meeting in August 1999 was the largest meeting of its members since its establishment. Interestingly, but not surprisingly, many (most) of "Wirrimbah's members have a very limited grasp of what native title actually means for them. However, they did believe two things: native title was big; and, they thought it was theirs. This belief is something which other members of the family who had been at the forefront since the establishment of "Wirrimbah", had shared with them not so many months before. However, the less seasoned members of the family were soon informed that by venturing into the arena of claiming recognition of native title, they had a lot to learn. In the first instance, they would have to seek an understanding of what native title meant according to the legal requirements through which it would be tested. The people at the forefront of "Wirrimbah" had already done so, through discussions with Native Title Tribunal (NSWALC) lawyers and consultants, through the reading of various pamphlets addressing 'Native Title for Beginners', through exposure to debates and discussions in the media, and through long deliberations among themselves. Even then, the concept of native title remained not only very complex but also very paradoxical. One of the aims of the meeting was to bring together as many members of the family as possible (especially those living outside Dubbo). The plan was to meet with lawyers and consultants from the Native Title Research Unit of the New South Wales Aboriginal Land Council and people from the NSW National Parks and Wildlife Services (NPWS). This was deemed necessary, firstly, to clarify and explain the meaning and processes of native title claims; secondly, to bring people up to date with their only native title claim lodged so far, their claim to Terramungamine. Lastly, it would enable members to discuss any possibility of claiming native title over other traditionally important areas in and around Dubbo. Another important objective of

this meeting was to gather together as wide a section of the direct descendants as possible. The aim, on the one hand, was to set up a network of people, usually the 'heads' of certain section of the family, through whom information regarding the activities of "Wirrimbah" could be channeled, and through whom the opinions and wishes of the family could be communicated (especially family outside the Dubbo area). On the other hand, they could set in place mechanisms/committees authorised to act quickly on behalf of all direct descendants.¹²⁷ A number of direct descendants flew or drove to Dubbo, many with the financial support of the NSWALC, most from the various parts of New South Wales, and some from as far away as Cairns, Queensland.

The first task of the meeting, after the obligatory welcoming routine of family reunions, was to introduce the members of the Native Title Unit of the NSWALC and the direct descendants who were attending their first "Wirrimbah" meeting. Members of the Native Title Unit informed the direct descendants about the role of the Native Title Unit in possible native title claims in and around Dubbo. As discussed before, 'Wirrimbah' has been working with the Native Title Unit of the NSWALC since late 1997. This work has focused primarily on the Terramungamine native title claim, and secondly, on the process of incorporating 'Wirrimbah' as the representative body for all direct descendants of the Aboriginal population of Dubbo at the time of white settlement. Finally, focus centred on prospects and conceivability of lodging native title claims over other traditionally significant sites in the Dubbo area. One of the first, and incidentally on-going, questions, was "what can we claim"? The general answer was simple: apart from the reserve, which is not claimable under the *NTA 1993*, there are a few traditionally important grounds and sites in the Dubbo area that are potentially claimable. There was some State forest land, and a few pockets of vacant Crown land. As in many parts of Australia, the local (New South Wales State) authorities have moved quickly following the introduction of Aboriginal land rights legislation (i.e. *ALRA (NSW) 1983* and *NTA 1993* (Cth)), so what land remains claimable under this legislation is very limited. The places of most concern to people, and which members of the Native Title Unit of the NSWALC consider possible for recognition

¹²⁷ Discussed in Chapter Seven (7.2.)

of native title are: Terramungamine, traditionally/currently used for hunting and gathering, which contains many camp sites and is noted for axe grooves; Troy Crossing, a portion of land adjacent to the Talbragar Reserve, and the Goonoo Forest, traditionally used for hunting and gathering and the only place where scarred trees (burial and initiation sites) have been preserved.

As mentioned before, Terramungamine is already under a native title claim. Two brothers, Malcolm and Bucky Burns, lodged a claim over the Terramungamine Station/reserve, north of the Talbragar Reserve, in 1996. The following paragraph comes from documents collected by Lewis Burns, one of the direct descendants:

The Terramungamine reserve had been occupied by white people since the early 1830s. The first white settler, A. V. Brown took out a license on the 1st of January 1837 to de-pasture stock 'beyond the limits of location'. He held the Station under license until 1852 when he took up 21,000 acres of the Dubbo run. The Dubbo run had previously been occupied by R. V. Dulhunty, and retained the name of Dubbo after the exchange. Terramungamine then passed into the hands of Thomas McPhillamy, who took up 16,000 acres, still retaining the name of Terramungamine for his station. The station later passed into the hands of F. E. Body, who held it for many years.

At first sight, the importance of this information might seem trivial, except maybe for the descendants of these white landholders. But a closer look reveals the potential of having native title recognised over the Terramungamine Reserve. Terramungamine has never been held under freehold title, which means that under the *NTA 1993* (Cth), native title may have survived. At the same time, Terramungamine is of great traditional importance to the members of "Wirrimbah". The previous paragraph, drawn from written sources, signifies the importance of Terramungamine to non-Aboriginal people. But a few minutes with some of the direct descendants (especially of the older generation) discussing Terramungamine will soon ascertain the importance of the Reserve, to them, their parents and grandparents. Due to the nature of the past use of the land on the Terramungamine Reserve, which was basically used as a sheep run, the local Aboriginal people were able to continue traditional use of the land, i.e. hunting and gathering. Furthermore, they could maintain connection and transmit knowledge about sacred sites on Terramungamine (burial sites and large sites of axegrooves). Currently, the claim

over Terramungamine is in mediation at the Federal Native Title Tribunal, a long and tedious process. But, in light of what has taken place when native title claims in New South Wales have come before the court, the native title claimants of Dubbo and their legal advisors are straining to stay out of court.

Also discussed at the August meeting was the Goonoo State Forest, another area where native title might have survived. Apart from being of special importance as a plant and wildflower area (at least 360 species of native plants have been found in the Goonoo Forest (Grounds 1984b), the forest holds the remainder of the scarred and carved trees in the Dubbo area. Interestingly, before the August meeting, the members of "Wirrimbah" had not considered lodging a native title claim over the Goonoo State Forest. Representatives of the NSW National Parks and Wildlife Services (NPWS) who were present at the meeting initiated the idea. The main reason why the representatives of the NPWS attended the meeting was to inform the members of "Wirrimbah" of the role of the NSW NPWS in relation to protection of various nature and wildlife areas, and, by extension, many traditionally important Aboriginal sites and grounds. Having done so, the representatives of the NPWS also hinted at rumours that parts of the Goonoo State Forest were destined to become 'tinder' for a new smelting factory in Lithgow. While the representatives of the NPWS did not mention native title, it only took a few minutes - albeit marked by emotional upheaval - for the members of "Wirrimbah" to come to the conclusion that a native title claim over the Goonoo State Forest would immediately put a halt to any plans for tree-felling in the forests. Needless to say, the representatives of the NPWS were not unhappy with this resolution. Although "Wirrimbah" has not yet lodged a claim over the Goonoo State Forest, there have been no further talks of the Goonoo State Forest in connection with smelting in Lithgow. Another place of importance is Troy Crossing which, due to its location, adjacent to the reserve, has been a place of considerable importance for gathering, social activities, and even residence for some Aboriginal people of Dubbo. Furthermore, due to its past use as a sheep run (pastoral lease), there is a distinct possibility that native title might have survived. The Jinchilla Gardens were also frequently brought to the fore at the August meeting. The Jinchilla Gardens are of great traditional significance for all Aboriginal people of Dubbo, being considered especially sacred due to the number of burials in those grounds. The Jinchilla Gardens represent one of the places where

non-Aboriginal enterprises - the converting of the grounds into a tourist attraction - have failed do away with its meaningful and important connection to the past, so valued by many Aboriginal people of Dubbo. However, because the Jinchilla Gardens are owned (freehold title) by a non-Aboriginal person, native title has been extinguished over that area. Still, as discussed at the August meeting, there is hope of reclaiming the Jinchilla Gardens, and currently the Indigenous Land Corporation¹²⁸ is examining the possibility of buying the land on behalf of the Aboriginal people of Dubbo. And this is where the list of areas, which could possibly be claimed under native title or bought back under ILC scheme, came to an end in August 1999.

The members of "Wirrimbah", who met in August 1999, took another step towards a realisation which is becoming more evident as time passes, that - like other groups of Aboriginal people in long settled areas - the prospects of gaining recognition of native title over areas of Dubbo are rather bleak. There are not many sites in the Dubbo area which have escaped the onslaught of 'progress' and 'civilisation'. The Dulhunty's first homestead was built on a large Aboriginal site, as were most other homesteads around Dubbo, many of which, incidentally, bear the names of local Aboriginal mobs. There are still large numbers of Aboriginal camp and work sites around Dubbo, but the largest sites, situated in locations favourable to human habitation, have all given way to modern constructions. The Dubbo marshes were drained, filled in and paved over to create Victoria Park, and to provide a site for the construction of the Dubbo Railway Yards (Dormer 1981). The large ochre sites west of Dubbo were depleted of their precious red ochre and the greater part of these sites were blasted, tunneled and/or leveled in order to facilitate the construction of the railway line (Personal communication March 1999). The last of the scarred and carved trees have been removed from the Dubbo city area, but there are still a few scarred trees in the Goonoo State Forest. The Macquarie River is controlled via the Burrundong Dam, and, due to great demands for water from cotton farmers in the

¹²⁸ The ILC is an independent statutory authority, which assists a group/community of Aboriginal Australians - especially those who have been dispossessed of traditional land - to buy land that is culturally significant to them (National Native Title Tribunal 25.07.2001).

north-west of the State, its water level is frequently very low.¹²⁹ The river is of great significance to the local Aboriginal population. Apart from being (having been) a source of food and swimming, it includes sacred places like the 'Devil's Hole'. The river runs low for most of the year, and most native fauna and flora has given way to introduced species. Apart from protected forest areas, most native trees have been cleared.

It is this picture, or more correctly, the lack of the hunting and gathering of native species (flora and fauna) in traditional manner (with spears and clubs), which has resulted in the strongly held and frequently expressed belief that Aboriginal people in long settled areas have lost touch with their ancestral tradition, i.e. have lost their culture, have lost their knowledge, have lost their heritage and ultimately their links to the past. It is certainly a fact that the *Native Title Act 1993* (Cth) does not call for traditional methods of hunting and gathering as evidence of continued connection to the past. What is important is that Aboriginal people are still hunting 'traditional' food. And while many native animals, formerly abundant, have become extinct in the areas, there is still a 'traditional', albeit limited, food source available in the form of fish.

Hunting and gathering have certainly survived the effects of white settlement, having been adapted to new technologies and changed social circumstances. Thus it is not true to say that the Aboriginal people of Dubbo have given up the practice of hunting and gathering on their traditional lands. The reality is that they no longer do so naked. They no longer walk around carrying spears, boomerangs and *nulla nullas*,¹³⁰ and they are most likely to drive down to the river, to Talbragar, or over to Terramungamine. When they go fishing, their fishing-rods are most likely bought at the local shopping centre and when they go camping they are very likely to take the flour for the damper with them. However, the fact remains that many Aboriginal people of Dubbo continue to hunt and gather; like their ancestors before them, they

¹²⁹ It should be recognised that global warming and the 'El Nino' have affected rainfall, and by extension, amounts of river water in Australia over the last few years (see Bureau of Meteorology, Australia, <http://www.bom.gov.au>).

¹³⁰ A *nulla nulla* is an Aboriginal club or cudgel used in hunting and war.

'go bush'.¹³¹ And, traditional cooking methods, like 'hangi',¹³² and the use of 'bush food' are of great importance. At the same time, it has to be recognised that a number of non-Aboriginal people in Dubbo also practice fishing, hunting and gathering. But a fundamental difference can be observed between the notions behind, and the feelings towards, both activities and places visited. Most white people¹³³ fish for leisure and/or food, usually for no more than a day at a time. The location of the fishing depends purely on previous experiences and the current 'tips' on availability of fish. Similarly, most Aboriginal people of Dubbo go fishing (camping, hunting and gathering) for leisure and food, but they also go because it is a practice learned when they were young. The location of the activity is of importance (different places for different people): often the activity can stretch over days (not predetermined), and frequently the activity and the location have an exclusive meaning. The following quotes are taken from interviews with two sisters who fondly recall their experiences with their parent and grandparents 'in the bush':

And my father, taking us out in the bush and showing us these trees that had all these different designs in them ... It was just all very natural, you didn't realise that they [the trees] didn't mean anything to anyone else but our people (Int.#07, 24.04.1998).

And then there was another life that we [family] lived in the bush. And just living in tents and around the campfire and listening to the men talk every night and telling yarns. That educated us in a way in hunting and teaching us to hunt ... out there, at the campfire, we were allowed to do whatever. So that got me, it got all of us, you know, and we've got really fond memories of being out in the bush and what we used to do out there [as children]. *More so* then when we were going to school, because there was ... they just didn't want us to be ourselves at school (Int.#12, 17.09.1998).

Aboriginal people in Dubbo, both the 'historical' and the 'traditional' people, still 'go bush'. Non-Aboriginal people in Dubbo also 'go bush'. However, there is one very

¹³¹ The Aboriginal people of Dubbo use the term 'go bush', which essentially has the same meaning as the more widely recognised term 'walkabout'. The latter term has been degraded by popular and often inappropriate use.

¹³² A method of cooking, where the fire and the food (meat or fish) is covered with grass/earth and the food is cooked/smoked for a prolonged period of time.

¹³³ Information mostly gathered from white residents and their friends who lived in the same guesthouse as I did and who, like some of the Aboriginal people I met in Dubbo, shared fishing experiences with me.

important point that must be addressed. While all the people - Aboriginal and non-Aboriginal - who 'go bush' engage in activities which would fall into the category of contingent rights and interests (see last section), the only people who exercise the various core rights are the 'traditional' people (the direct descendants). While people in Dubbo have physical access to, and enjoy, the various open and public areas around Dubbo, the direct descendants are the ones who are gradually gaining recognition among both non-Aboriginal and Aboriginal people in Dubbo. They are the people who may "speak for, on behalf of ... the areas as cultural property ... [and] acquire and transmit the core traditional rights and interest over the area" (Sutton 2001b: 26). Notwithstanding, this recognition, which has arisen in the context of native title, has not been tested in court. There is a significant difference, on the one hand, between being the local recognised authority on ancestral history, dream-time stories, and the various specific Aboriginal aspects of the area (e.g. names, (his-) stories and myths), and, on the other, being the legally recognised native title-holders over specific traditional grounds and sites in the area. The essential difference lies with the important empowerment of being the legally recognised native title-holder(s).

Bringing the discussion back to the Taylor mob, it becomes evident that despite various claims of 'ownership' of the Talbragar Reserve land, there was, and is, no legal recognition supporting such claims. It appears that in the event of securing, or rather maintaining, 'ownership' of land, 'the Taylors' lost out to Queen Victoria and her successors. Under current legislation, 'extinguishment' seems to have been the fate of native title in large parts of the Dubbo area. Moreover, 'extinguishment' seems to be the key word behind much Aboriginal land rights legislation, something which becomes apparent in the following words of the Aboriginal leader, Pat Dodson:

The concept of extinguishment replaced the previous legal lie of *terra nullius* and, when we look at the way legislators are handling the Native Title issues, it's very hard not to become despondent and to think that under the new myth of extinguishment soon there'll be no Aborigines left at all in Australia, let alone the remnants of what might have been our property rights ...

Extinguishment is a terrible word ... for indigenous people ... it's not just about the rights you hold in property. It is, in fact, about the nature of your being, of who you are, and how you relate and derive your meaning from a tract of land from which your spirit has arisen (Dodson, P. 2000: 3, 9).

There is a fundamental lack of recognition within the native title legislation of the fact that varying degrees of social changes and 'surface' changes to cultural expressions, activities and/or practices within Aboriginal communities can take place without dissolving the culture and the identity of the people.¹³⁴ While the whole process of native title claims is essentially drawn from a legislative basis, determinations are established according to past and present management of land laws (who holds what kind of title on the area in question). The end result - recognition or not of surviving native title - is often a matter of interpretation. For Aboriginal people in New South Wales, the matter of being subject to interpretation and evaluation of to what degree traditional aspects of their culture have survived into the third millennium is often daunting. The implementation of the *NTAA 1998* (Cth) has further impeded any prospects of New South Wales Aborigines succeeding in native title claims. The Dunghutti of Crescent Head are the only people in New South Wales who have successfully claimed native title, and, in light of the implementation of the *NTAA 1998* and some recent court findings, it appears that negotiation has given way to court hearings, dramatically impairing the prospects of successful native title claims in New South Wales. What experience is showing as more native title cases are determined, is that the Aboriginal people in long settled areas are finding it very problematic to deliver the evidence needed to meet the conditions of the *NTA 1993* (Cth). Furthermore, they are frequently dependent on the unpredictable legal interpretations of members of the court. The assumption which can be drawn from most native title determinations in long settled Australia is that local Aboriginal people have not only lost their links to their land, they have also lost their links to the past. These assumptions can and have resulted in the loss of cultural heritage for many Aboriginal people, including those of Dubbo who have still not carried a native title claim to its final solution. In the following section, in an

¹³⁴ This lack of recognition is, of course, not universal. The *NTA 1993* (CTH) is open to interpretation and, as will be discussed in the next section, different judges interpret the legislation differently when it comes to the question of tradition, cultural continuity and/or change.

attempt to contextualise their experiences and expectations of recognition of native title on their traditional lands, I compare and review the native title experiences of two groups of people located in long settled Australia; the Dunghutti and the Yorta Yorta.

9.2. Lost Links! Lost Heritage?

It is a moment of which our ancestors would have long hoped, whereby the whole Australian community through its courts has fully recognised the meaning of the land to the Aboriginal people.

These words were spoken by Mary-Lou Buck on 7 April 1997, after the Dunghutti people of New South Wales negotiated the first successful claim on mainland Australia (NC94/5) under the *NTA 1993* (Cth) (quoted in the *Sydney Morning Herald* 08.04.1997: 1, also *Sydney Morning Herald* 10.10.1996: 1). Negotiations between the New South Wales Government and the Dunghutti people resulted in an agreement that formally recognised the existence of native title over 12.4 hectares of vacant Crown land at Crescent Head on the north coast of New South Wales, near Kempsey. This agreement was not only unique as the first recognition of the existence of native title in a long settled area on the mainland of Australia: It was the first time that an Australian government had negotiated an agreement with Aboriginal people in order to acquire their land.¹³⁵ There were various non-claimant and representative bodies involved in this negotiation, among them the State of New South Wales, fourteen non-Aboriginal Crescent Head residents, the Shire of Kempsey and the NSWALC. This historic agreement took place 209 years after white settlement in Australia. It took two years to reach an agreement between all interest parties, and forty minutes of the Federal Court's time to finalise the consent agreement: the Dunghutti held native title rights for six hours (Blackshield 1997; NNTT web 07.04.1997; reported in the *Koori Mail* 23.04.1997).

Like the other eighty-four native title claims, which had been lodged in New South Wales in April 1997, the nature of the settlement of the Dunghutti claim depended

on the historical and legal circumstances leading up to the agreement. Similarly, the victory for the Dunghutti and their future as native titleholders of their land is affected by the historical and economic circumstances of their lives (past and present). The Dunghutti, numbering approximately 5,000 people, will never hold the land as their own (i.e. as native title holders), will not occupy the land as their own (i.e. native title holders), will not be able to use it for traditional activities such as hunting and gathering, and will not be able to conduct spiritual or ritual activities on the land. The same day that native title was recognised on Crescent Head, the State moved to compulsorily acquire the native title rights. This move by the State had been a part of the agreement between the Dunghutti and the non-claimants. The land had been earmarked by the State for residential development prior to the lodging of the native title claim.

The history of the Dunghutti people, after white settlement, does not differ much from that of the people of Dubbo. In 1851, John Henderson described the Dunghutti as "great, strapping, and ferocious-looking fellows", reflecting an environment rich in culture, spirit, history and resources" (The *Encyclopaedia of Aboriginal Australia* 1994: 253). The white settlement on traditional Dunghutti land took place with little bloodshed, but the social, cultural and spiritual life of the Dunghutti was inevitably transformed as a result. These transformations, which took place gradually, were shaped by government policies towards Aborigines in New South Wales at each specific time. Barry Morris, an anthropologist who has worked extensively with the Dunghutti (Dhan-gadi) people, has described how official government intervention in the late 1900s altered social relations, both within the Dunghutti community, as well as between the Dunghutti people and the dominant colonial authorities (1988, 1989). Morris's analytical focus is on the relations between the subjugated group (the Dunghutti) and the dominant group (the colonial authorities) within the historical and social context of colonisation. Based on the hegemonic powers of the colonial authorities, the image of the Dunghutti culture, and by extension the cultural identity of the people, was continually reconstructed, reflecting official government policies towards Aboriginal peoples at each specific time (Morris, B. 1988).

¹³⁵ Still (July 2001) the only successful native title claim in New South Wales.

When discussing the Dunghutti, Morris claims that in order to justify government policies, supposedly focused entirely on the preservation of the Australian culture and giving a guarantee for a righteous and harmonious society, the State turned the Dunghutti into 'objects of knowledge' by attempting to "centralise and manage the production of the representations of identity" (Morris, B. 1988: 64-68). According to Morris, the Dunghutti culture and traditional ways of life were constantly attacked and altered through various government programmes, first under the emblem of the colonial welfare system, and later through policies of assimilation, integration and multiculturalism. Colonisation not only claimed the lives of large numbers of Dunghutti people, as well as resulting in the loss of traditional lands and a change from a self-supporting economy to one of dependence, but it also caused a separation from the past, from the history and culture of their forefathers. Morris argues that by being denied the right to produce and express their cultural knowledge and cultural identity, the Dunghutti people were sentenced to a meaningless existence wherein "their own experience and understanding of the past and the production of the past by the state" were in constant contradiction (Morris, B. 1988: 65). However, while these claims may constitute a somewhat generalised view of the fate of Aboriginal people in New South Wales after white settlement (colonisation), Morris recognises the fact that the geographical and historical context is extremely important when analysing the consequences of colonisation vis-a-vis local Aboriginal culture(s). When discussing the effects of colonisation on the Dunghutti, he emphasises the importance of the creativeness and the complexity of cultural responses to external influences, as exhibited by the Dunghutti (1989). The major purpose of Morris's 1988 article is to address "the controls and the limitations of the policies of 'self-determination'" (p. 63) through an analysis of the political nature of Dunghutti identity, expressed through the recent revival of initiation ceremonies and some other traditional, cultural and social activities.

The Dunghutti maintained and practiced initiation ceremonies longer than most of the other Aboriginal groups in New South Wales. However, by the mid-1930s the Dunghutti had performed their last initiation ceremony and, by the 1980s, there were few surviving Dunghutti men who had been initiated, who spoke the local

language, and who could recite with confidence the stories and myths of the Dunghutti (Creamer 1977; Morris 1988, 1989). Morris claims that this decline in various traditional activities and cultural knowledge was not merely the result of political coercion via government legislation and policies: it was also an

indirect consequence of domination manifested through the Europeanisation of their [Dunghutti] social and material world ... Similarly, the radically-transformed physical and social landscape ensured that such ceremonies lost the context of their meaning. In their perpetuation, the Dhan-gadi [Dunghutti] attempted to sustain themselves as a separate entity in a social world in which Aboriginal identity was problematic (1989: 66).

As I have demonstrated in this thesis, the experiences of the Aboriginal people of Dubbo differ little from those of the Dunghutti. The Aboriginal people of Dubbo have suffered to a similar extent the loss of various aspects of traditional knowledge and practices through both legislative coercion - the prohibiting of various cultural and social practices - and dramatic environmental changes in the physical landscape, which have rendered various cultural and social practices obscure.

The Dunghutti and the Aboriginal people of Dubbo share some past experiences of segregation and life on a reserve. The Nulla Nulla Reserve was created through the initiative of the local Dunghutti people themselves in 1885, and, by 1914, the reserve was officially registered under the name of Bellbrook.¹³⁶ The Bellbrook Reserve was a medium sized reserve (38.85 hectares) and the majority of the population comprised an extended kinship group (five families in 1920). The reserve was located two kilometres out of Bellbrook township (eighty kilometres from Kempsey) and was certainly 'out of sight'. Occupancy of both the Bellbrook Reserve and the Lower Creek camp was geared towards employment on non-Aboriginal stations in the area. Morris claims that this condition imposed new limitations on the social mobility of the Dunghutti, arguing that many aspects of traditional life were not, or at least were minimally, affected by changes in social organisation (lifestyle) (1989). Morris claims that

the creation of a segregated and isolated community at Bellbrook did enable the Dhan-gadi to sustain many of the cultural habits of their everyday existence [and that these] routinised and regular activities ... were neither immune to change, nor were the patterns of change chaotic ... [I]n the pervasive sphere of mundane culture a creative process of bricolage (Levi-Strauss 1966) ... emerged, which reconstituted certain forms of social and material existence (1989: 74 - 75).

According to Morris, the history of the emergence of current day social and material existence, combined with the meanings and values derived from traditional knowledge and lived experiences, make up the Dunghutti people's collective and distinctive cultural identity (1988: 72). This distinctiveness was clearly portrayed in late 1985, when, after a fifty year break, the last of the surviving initiated men performed an initiation ceremony for young Dunghutti men (Morris 1988). Morris explained this revival of initiation ceremonies as being essential to "maintaining a distinctive social identity ... expressed in terms of regaining what has been lost and a need to get back to earlier and superior forms of social life" (1988: 73). At the same time, it can be assumed that the revival of initiation ceremonies bears witness to the Dunghutti's swift responses to current political and legal changes, at a time when Aboriginal identity was gaining something of value (e.g. land rights). The Dunghutti's adaptability to enforced social and cultural change - combined with their success in maintaining identifiably distinctive cultural difference (identity) - is clearly displayed in the relatively easy process, as well as by the concession shown by non-claimant parties that marked the first successful native title claim negotiation on mainland Australia.

The sweetness of the Dunghutti success was somewhat diminished by the fact that they will never exercise their rights as native title holders over the areas which were being developed on Crescent Head and dealt with in the agreement.¹³⁷ As already mentioned, the land had been earmarked for residential development, it had already been subdivided, and parts of the land had been cleared: public facilities

¹³⁶ By the early 1900s, the Dunghutti lived in two main communities - at Bellbrook, the official reserve, and at Lower Creek, a 'fringe camp' organised around the labour requirements of the local pastoralists (Morris, B. 1989: 75).

¹³⁷ The area for which native title claim was negotiated is just a portion of traditional Dunghutti territory.

had been constructed, and many plots of land had been sold. The results of the agreement were threefold: firstly, the new owners (recent buyers of plots of the land) could carry on with their constructions and plan future developments on the land, knowing that their (freehold) title was secure; secondly, the agreement in fact recognised the importance of native title towards legal, cultural and historical aspects of the Dunghutti community; in addition it recognised the significance of traditional ownership for the Dunghutti; finally, under the agreement, the State agreed to the payment of compensation for the parcels of land which were being developed. The sum of \$778,000 was paid to the Dunghutti Elders Council (as the corporate body representing the Dunghutti) and, according to a Dunghutti spokesperson, the compensation will be used to revive the local language, build a cultural centre, and fund adequate housing for the Dunghutti people (NNTT web 09.10.1997; Reconciliation and Social Justice Library website 24.04.1997; Jopson 1996).¹³⁸ The Dunghutti managed successfully to meet the criteria of native titleholders, as set out in the *NTA 1993* (Cth), and to reach an agreement with all non-claimant parties. However, crucial to the success of the Dunghutti claim was the fact that theirs was a negotiated agreement: it was not tested in the courts and it took place before the implementation of both the *NTAA 1998* (Cth) and Registration Tests (June 1997). So, whereas the Dunghutti people's claim was successful, the Yorta Yorta people, on the other hand, have a different story to tell.

Today, in mid-2001, two hundred out of the approximately twelve hundred Yorta Yorta people can claim as theirs just over half of the land that was reserved for them at the turn of the nineteenth century: half of the 2,965 acres of Cummeragunja Reserve land was returned in 1984 under the *ALRA (NSW) 1983* (Atkinson 2001: 19). The Yorta Yorta's original tribal land covered some 20,000 square kilometers in current day northern Victoria and southern New South Wales (Atkinson 2001). In May 1994, the Yorta Yorta lodged a native title claim (VC94/1) over 200 individual areas of public land, including a section of the Murray River located within their ancestral lands. These areas cover approximately 2000 square kilometers of traditional land, which is claimable under the *NTA 1993* (Cth). The Yorta Yorta lost their claim for the recognition of native title before the Court in

¹³⁸ The initial agreement was signed by all parties on 9 October 1996, and was approved by the courts

1998. In February 2001, they lost their appeal against that decision before the Federal Court of Australia.

In 1994, eight applicants, appearing on behalf of the Yorta Yorta Aboriginal Community, lodged the Yorta Yorta native title claim. It was the first contested application for a determination of native title to come to trial after the enactment of the *NTA 1993* (Cth), its hearing being completed before the 1996 amendments of the *Act* came into force.¹³⁹ The case was very complex. It included over 500 non-claimants (initial hearings), hearings that were exceptionally long (114 days). Over 200 witnesses were called (Black CJ 2001). The trial judge, Justice Olney, rejected the application on the basis that the Yorta Yorta had lost their connection with their traditional law and customs that would have sustained native title over their traditional lands. Subsequently, he made the determination that native title did not exist over the land and waters claimed. The Yorta Yorta appealed. On 8 February 2001, in the Federal Court of Australia, Chief Justice Black, Justice Branson and Justice Katz heard the appeal, then dismissed it.¹⁴⁰ The Yorta Yorta are now preparing for a hearing before the High Court of Australia (see Atkinson 2001). The experiences of the Yorta Yorta, which have great significance for all native title claimants in Australia, warrant a closer look at the reasons given by the courts (judges) for their determination.

One of the two main conditions which the *NTA 1993* (Cth) calls for in native title holders is proof of direct descent from the original population of the area at the time of white settlement. The Yorta Yorta satisfied Justice Olney that two people, Edward Walker and Kitty Atkinson/Cooper, were descendants of "persons who were in 1788 indigenous inhabitants of part of the claim area" (Black CJ 2001: 3). The other condition is the need for native title claimants to be able to demonstrate an unbroken connection to the claimed land according to traditional law and custom. According to Justice Olney, the Yorta Yorta failed to do so. The judge found that the claimants

on 7 April 1997).

¹³⁹ Determination made on 18 December 1998.

¹⁴⁰ Justices Branson and Katz found in favour of the respondents, while Chief Justice Black found in favour of the appellants.

were no longer in possession of their tribal lands and had, by force of the circumstances in which they found themselves, ceased to observe those laws and customs based on tradition which might otherwise have provided a basis for the present native title claim (quote in Black CJ 2001: 3)

According to a written principle report, provided by the 'expert' anthropologist who appeared on behalf of the state of New South Wales,¹⁴¹ the claimants had - due to the impact of European settlement in the claim area - lost their traditional connection to the land by the end of the nineteenth century. According to this report, the law and customs of the Yorta Yorta had substantially vanished and that "[a]t most there is a shadowy and vestigial survival" (quoted in Branson J. and Katz J. 2001: 35, italics according to original text). The finding was thus that native title had effectively expired, and could not be revived.¹⁴²

The main argument advanced by the claimants in their appeal was that Justice Olney had applied a 'frozen in time' approach, since he approached the matter from a perceived 'wrong point' in time - the earliest documentation of the traditions and customs of the Aboriginal people of the area. Thus he failed to take into account the capacity of traditional law and customs to adapt to external changes and challenges. One of the appeal judges agreed with this argument, stating that according to the terms of the *NTA 1993* (Cth), "an assessment of the *present* laws and customs of the claimant group [is] the correct starting point" (Black CJ 2001: 4). However, when seeking information about the traditional law and customs of the Yorta Yorta, Justice Olney had considered the writings of a nineteenth century pastoralist named Curr to be more reliable than the evidence of the Yorta Yorta people themselves. According to Olney, this pastoralist had

at least observed an Aboriginal society that had not yet disintegrated and he obviously had established a degree of

¹⁴¹ The appellants called two anthropologists, an archaeologist, and a linguist. The respondents also called on 'experts': the state of Victoria called two historians and a genealogist, the state of New South Wales called an anthropologist and a linguist, and a group of non-claimants called a second anthropologist.

¹⁴² The were, of course, legal advisors and experts who provided documentation and argued for continuous connection of the Yorta Yorta to their traditional lands.

rapport with the Aboriginal people with whom he came into contact (quoted in Black CJ 2001: 7).

When referring to the oral evidence given by members of the claimant group, Justice Olney agreed that they were

a further source of evidence, but being based upon oral tradition passed down through many generations extending over a period of 200 years, less weight should be accorded to it than to the information recorded by Curr (quoted in Black CJ 2001: 7).

Two of the appeal judges, Justices Branson and Katz, agreed with Justice Olney's findings, and the appeal was duly rejected.

These brief accounts of the Dunghutti and the Yorta Yorta native title claims highlight some of the more important points that have been raised and discussed throughout this thesis: the rights to define one's culture, the capacity to construct, determine and recount one's history, and the legal authority to claim and interpret both. At first sight, it might appear that the main reason behind the success of the Dunghutti native title claim was that despite forceful social and material changes to Dunghutti existence in the course of white settlement, the Dunghutti managed to maintain a demonstrable connection to their land according to traditional law and customs. Negotiations between the New South Wales Government and the Dunghutti people may have been portrayed in the media as a preferred way of working through native title claims.¹⁴³ However, it is not unlikely that a cynical mind might conclude that the extent to which the Dunghutti could demonstrate their connection to their traditional land deterred most (all) of the non-claimants from considering it feasible to challenge their claim before a court of law. In the words of a legal adviser to the claimants:

[W]hen further native claims are made over the land within Dunghutti territory, the popular assumption will be that the

¹⁴³ The preference for negotiated settlements arose from the experience in the Northern Territory, where virtually every claim has succeeded. Remarks about the preference of negotiations after the Dunghutti native title case were mostly raised by representatives of the State. There were fewer recognised and disseminated voices raised by developers and other residents in the area about the benefits of the negotiation process (i.e. length of time and the total sum of compensation) and there were challenges by other groups of Aboriginal people regarding native title rights in the area (Snell 1997: 24 - 25).

claimants are people who have managed to maintain the necessary connection to their traditional country -- and non-Indigenous people will have to think twice before dismissing the idea of native title being successfully claimed in settled areas (Blackshield 1997: 11).

The fact remains that when the Dunghutti claim was lodged, and subsequently negotiated successfully, there had been no previous 'testing' of native title claims in an adversarial context in long settled Australia. Now that the Yorta Yorta experience has demonstrated that there is a group of Aboriginal people who, despite their own (and many others) strong expectations, have failed to meet the conditions of the *NTA 1993* (Cth) when tested before the court, it is likely that more claims will end up before the court. Today's experience has shown it to be of essential importance whether a settlement in native title claims cases is reached by negotiations, or by frequently prolonged and antagonistic litigation (e.g. Atkinson 2001, Blackshield 1997). All five New South Wales/Victoria native title claims¹⁴⁴ determined before the courts have received the same determination, i.e. native title does not exist (NNTT web 20.07.2001).

The experience of the Yorta Yorta is quite a sombre reflection of statements like the one above. The Yorta Yorta experience calls into question the meaning and use of terms like 'tradition' when discussing traditional links and/or connection to land. In the Yorta Yorta appeal, Chief Justice Black refused to look at concepts of 'tradition' and 'traditional' as "concept[s] concerned with what is dead, frozen or otherwise incapable of change" (2001: 14). The Chief Justice continued to seek meaning(s) for these terms by referring to definitions in dictionaries; as well, he examined their use in previous native title determinations, stating that:

The meaning of 'traditional' is that which is "handed down by traditions" and 'tradition' is "the handing down of statements, beliefs, legends, customs etc., from generation to generation, especially by word of mouth or by practice"... Far from being concerned with what is static, the very notion of 'tradition' as involving the transmission from generation to generation of

¹⁴⁴ Determinations at the end of June 2001. Duffy Forest (NN97/15) on 31 March 1998, Yorta Yorta (VC94/1) on 18 December 1998, Darkinjung LALC (NN99/10) on 11 October 2000, Metropolitan Local Aboriginal Land Council (NN00/2) on 23 May 2001, and, Deniliquin Local Aboriginal Land Council (NN00/4) on 23 May 2001 (National Native Title Tribunal, 28 June 2001)

statements, beliefs, legends and customs orally or by practice implies recognition of the possibility of change (cited in Black CJ 2001: 14).

Chief Justice Black found that Justice Olney's ruling that traditional connection to land had expired before the end of the nineteenth century, was erroneous and that "[t]he test applied was too restrictive in its approach to what is 'traditional'" (Black CJ 2001: 34). However, Justices Branson and Katz, taking credence in anthropological evidence claiming that the traditional law and customs of the Yorta Yorta had virtually vanished, and that "[a]t most there is a shadowy and vestigial survival" (quoted in Branson J and Katz J 2001: 35), supported Justice Olney's ruling, ultimately overthrowing the appeal. It appears that in 2001, the all important questions about the success of native title claims focus on who interprets the legislation, and how it is interpreted. Some judges appear to consider it immaterial whether laws and customs have undergone change since the Crown acquired sovereignty over Australia. This is evident in the first native title determination, *Mabo (No. 2)* where Justice Brennan found as follows:

Of course in time the laws and customs of any people will change and the rights and interests of the members of the people among themselves will change too. But so long as the people remain as an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, the communal native title survives ... (Justice Brennan in *Mabo (No. 2)*(at 61).

The crucial aspect for Justice Brennan was whether the native title claimants had maintained the general nature of their connection to their ancestral lands

according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs, *as currently acknowledged and observed* (Justice Brennan in *Mabo (No. 2)*(at 61) [emphasis added].

The emerging picture of native title is thus subject to non-Aboriginal interpretation of what constitutes not only 'traditional laws and customs' but also how they are 'currently acknowledged and observed'. And, when there is limited recognition among the members of the court of innovation, flexibility and adaptation among Aboriginal people who have struggled to maintain some form of links to the past –

including connection to land and observation of laws and customs - the legislation does not recognise the survival of native title. It could be suggested that the record of the State and Federal governments in dealing with Aboriginal rights to land, history, heritage and culture, has not improved a great deal since the early days of colonisation. These essential aspects of the lives of most Aboriginal people in Australia today are still open to the interpretation of 'experts' who are either engaged by, or offer their services to, the dominant governmental authorities of the day. Today, while anthropologists, lawyers, and historians continue to be considered expert witnesses on what constitutes Aboriginal tradition, these 'experts' work both for and against the interests of various Aboriginal groups. Apart from the influences of 'expert' interpretation, the frequent challenges to the authenticity of traditional knowledge (oral evidence), along with the privilege given to non-Aboriginal knowledge (documented evidence), remain of major concern to native title claimants (e.g. Keen 1999). It appears that the strong legal barriers, created during the colonial period and maintained under the current politico-legal system (legislation), inevitably maintain the notion that Aboriginal people in long settled Australia have lost their links to their culture(s), traditions, customs and history(ies). When these links have supposedly been extinguished and/or expired, there is a concomitant expiry of people's rights to land. The sombre reflections of a Yorta Yorta native title claimant, using the words of Patrick Wolfe, express the feelings of many native title claimants in New South Wales: "[T]o fall within native title criteria, it is necessary to fall outside history [white history]" (quoted in Atkinson 2001: 21).

In summarising this comparison of the Dunghutti and the Yorta Yorta native title claims, some of the major points brought forth correspond with some of the key issues discussed throughout the thesis, issues that have affected the lives of the Aboriginal people of Dubbo (New South Wales) during the last two centuries. The major issues, which have not altered much over time, include: lack of Aboriginal political authority, lack of Aboriginal input to the interpretation of Aboriginal culture(s), challenges to the authenticity of Aboriginal tradition(s) (law and customs), frequent control by non-Aboriginal people over traditional Aboriginal (native title) rights and obligations (connections to lands); extinguishment of Aboriginal rights in land (property), and general denial of the capability of

Aboriginal people to adapt to external changes while maintaining their difference (identity).

Eight years after the passing of the native title legislation, some Aboriginal leaders are claiming the failure of the whole native title process. Geoff Clark, chairman of ATSIC, calls for the abandonment of the whole native title process, claiming that:

[M]illions upon millions of dollars [are] being wasted on long-running legal battles, with Aborigines trying to prove who they are and where they came from (reported in *Koori Mail*, 08.08.2001: 1,2).

Clark calls for some form of a “‘recognised indigenous authority’ and ‘[s]ome document that delivers to Aboriginal people a capacity to become equals in this country” (*Koori Mail*, 08.08.2001: 2). Essentially, what is emerging alongside native title is the fact some of the most important aspects of the fight for Aboriginal rights during the last century and a half are still valid in 2001. Evidently current legislation does not adhere to the needs of many (most) Aboriginal people when it comes to questions of Aboriginal land and cultural heritage rights. There is still much ‘unfinished business’.

Chapter ten

‘Unfinished Business’ - Conclusion

It is also important to note that for the common law to deny indigenous peoples acknowledgment as owners of their land because of a failure to preserve their societies in their classical form would constitute a massive denial of their right to self-determination, however narrowly that right is conceived under domestic law (Blackshield 1995: 6).

This is the way for us all, every Aboriginal person in NSW to get our own identity back, and make our claims to our own culture by being able to, without a doubt, prove our direct descendancy to the traditional owners of this land ... whose sites belongs to whom, that everyone would know where they came from ... (“Wirrimbah” minutes 23.07.1998).

This study set out to examine the historical, legal, political and social context of native title claims and claims to Aboriginal cultural heritage in New South Wales, with specific focus on the area of Dubbo. Throughout this thesis, whether discussing past or present social organisation within Aboriginal communities, the various government policies and legislation regarding Aboriginal affairs, the apparent incompatibility of Australian Commonwealth law and Aboriginal customary law, the various movements and calls for recognition of a difference (Aboriginality), or the socio-political and legal developments, there have been a number of consistent underlying themes. Included among the most significant themes are the existence, transmission and survival of traditional Aboriginal customs and laws in New South Wales during the period of the colonisation of Australia. The discussion has focused on how the Aboriginal people of New South Wales/Victoria (i.e. the Aboriginal people of Dubbo, the Dunghutti and the Yorta Yorta people) have fared when defining, negotiating and arguing the nature, extent and existence of the various traditional elements, within settings ranging from small, local, grass-roots meetings to the Federal Court of Australia. With the support of a variety of data, including late nineteenth and early twentieth century ethnographical findings, the writings of twentieth century Aboriginal activists, historical analyses of the late twentieth and early twenty-first century, and the very recent findings of the judges of the Australian Federal Court, the discussion in this

thesis has highlighted the ongoing debate surrounding these issues. Throughout this discussion, I have been able to show that there have been changes in the composition of the participants of these debates. Increasingly, Aboriginal people are taking part in these debates themselves: there has been a shift in the application, and, to some extent the distribution, of politico-legal power in legislative and policy-making regarding Aboriginal rights, cultures and histories. The important questions are thus: What is the scope of these changes? What has been the role of the State in determining degrees of Aboriginality? Have the changes in the dominant discourse on Aboriginal people in Australia, reflected in legislative changes over the last four decades, resulted in an increased equity for Aboriginal people when it comes to issues like land, native title and cultural heritage rights? Furthermore, has the implementation of land and native title legislation enabled Aboriginal people in long settled Australia to lay successful claim to some of their ancestral lands?

The overall experience of the Aboriginal people of Dubbo is that while they have been given prospects and hopes through the implementation of the *NTA 1993* (Cth), the actuality of meeting the conditions of the legislation has proved to be more than somewhat complex, if not problematic. Problems lie in part with the notion of what constitutes traditional customs (culture), and if and how they have been maintained. Since the early 1900s, New South Wales Aboriginal people have frequently been described as a people who have lost their culture(s), languages, laws and customs. This supposition has directly influenced and supported claims from various sources that there are not many Aboriginal people in areas of long settled Australia who can lay claim to their cultural heritage, and thus meet the legal test required for claims. Furthermore, it is not only non-Aboriginal politicians, academics and members of the court who debate and doubt the nature and extent of the surviving traditional elements of New South Wales Aboriginal cultures. Some Aboriginal people believe they have suffered some, if not total loss of ancestral traditional knowledge and customs (culture). I referred to this in Chapter One where, citing that in 1997, a group of Aboriginal women had problems identifying surviving 'traditional' elements among the Aboriginal population of Dubbo. Their initial lack of recognition of any distinct Aboriginal cultural trends among the Aboriginal people of Dubbo dwindled and ultimately

disappeared as the differences between the Aboriginal and the non-Aboriginal population were identified. The fact remains that legally acceptable evidence supporting the existence of native title in and around Dubbo is not easily established.

It seems appropriate to point out that in 1967, in the course of a national Referendum, the Australian Constitution was amended in order to bring an end to earlier discrimination towards Aboriginal people in Australia. A presumed notion of loss of culture among New South Wales Aborigines, and, by extension, the desirability of conversion of the Aboriginal people to the ways of the dominant population, was still being voiced by the community at large. In 1967, Professor A. P. Elkin gave evidence before a Committee inquiry into the state of Aboriginal affairs in New South Wales. One of the main issues raised was the closing down of Aboriginal reserves and the assimilation of all the residents - apart from the oldest residents who were assumed to be beyond assimilation - into the white community. Elkin was asked if "[t]he aboriginal culture was more patriarchal than matriarchal". He replied:

It is difficult to say. On the ritual and religious side it was passed on right through the fathers - the men. The interesting thing in this State in various places is that the breakdown of culture has become matriarchal. The woman is the one who holds the line. Who are the fathers of all these mixed bloods? You find the same strong matriarchal conditions in some of our erstwhile old slum areas. Among these people it is remarkable how that develops. I have always told the board that if you want to get new ideas across, it is the grandmothers you have to convert. They are the links with the old times (reported in Parliament of New South Wales, 1967: 693, Part II).

In his reply, Elkin touches on many of the issues raised in this thesis. By querying the whereabouts of 'the fathers' Elkin recognises that dispersal and/or dispossession has taken place among New South Wales Aborigines. However, he fails to outline the reasons or the processes of this dispersal; rather he refers to it by comparison as 'erstwhile old slum areas'. Elkin assumes that due to this 'breakdown', there had been some form of loss, that because 'the fathers of all these mixed-bloods' cannot be found, the transmission of traditional Aboriginal knowledge has undergone change. To a certain extent 'the fathers' have become

the 'missing links'. At the same time, Elkin describes some form of social change, indicating that while one route for the transmission of traditional knowledge has been 'lost', another has opened up through the grandmothers. The assumption one can draw from this quote is that in the course of the colonisation of New South Wales, a severe interruption to the transmission of traditional Aboriginal knowledge occurred. But concurrently New South Wales Aborigines have maintained various elements of traditional life by virtue of their links to the past. Why else would Elkin be calling for the 'conversion' of 'the grandmothers' in order to get 'new ideas across'? Those surviving elements, linking past to present, are of essential importance today for New South Wales Aboriginal people claiming native title. It appears, however, that these notions of loss of 'links' to the past, and loss of traditional customs and ancestral lands among New South Wales Aboriginal people, are gaining strength. The notion of 'loss' is now being confirmed before the Federal Court of Australia, thus decreasing the potential recognition of native title in New South Wales (Victoria) according to the *NTA 1993* (Cth) (see the Yorta Yorta native title claim).

The last few decades have seen frequent claims and debates pertinent to the survival of the cultures and traditions of New South Wales Aborigines, debates that take place among both Aboriginal and non-Aboriginal people. But there are still some 'eminent' public figures who make provocative statements claiming that the 'Aboriginal race' is a 'forgotten race' and that their culture is dead.¹⁴⁵ Arising from these statements is a notion – albeit erroneous – that Aboriginal people in New South Wales lack the moral stamina to maintain continuity of their traditions, i.e. to display a level of recognisable 'difference' and to successfully maintain an 'unbroken' link between the past and the present. Legislation like the *NTA 1993* (Cth) is formulated, amended and interpreted according to non-Aboriginal notions of links between past and present, and thus connection to, and rights in, land. Such interpretation gives rise to varying degrees of dilemmas for many/most Aboriginal people seeking recognition of native title. The Aboriginal people of Dubbo, like so many others, have been denied the right to produce and express their cultural

knowledge in the past. Today, they are facing the challenge of establishing this 'lost' knowledge and these 'lost links' within a system that once did its best to destroy (or change) this knowledge. Furthermore, the system does not always recognise the validity or value of this knowledge. At the same time there may exist questions and/or conflicts on the local level, challenging the validity of claims to traditional, local, Aboriginal knowledge and, as a consequence, rights to claim recognition of native title.

As with so many groups of Aboriginal people in Australia, it is essential that the Aboriginal people of Dubbo be able to demonstrate both cultural identities (knowledge) and social position (e.g. acceptance within the community) in order to draw up as precise a picture of cultural continuity with the past (ancestors) as possible. As opposed to non-Aboriginal Australians, Aboriginal people have to pass a test in order to prove how successfully they have maintained their links to the past. They are required to meet the conditions of a legislation which was set in place to recognise Aboriginal rights, interests in, and former ownership of, the land. The questions that must be addressed are as follows: Has culture, especially in the case of Aboriginal people in long settled areas, been reified in the context of native title claims? Has native title legislation (as well as other forms of land rights legislation) not taken into account the differences, the adaptability and the diversities of Aboriginal people in Australia? Is it simply too open to interpretation by experts (academic and legal) who have been trained within the hegemony of a modernist Australian state? James Weiner has addressed some of these questions claiming that:

By virtue of the practices that have arisen regarding the legal protection and adjudication of Aboriginal land rights and culture in Australia, what in fact is tested judicially is not strictly speaking 'Aboriginal culture' but some relational product of indigenous Aboriginal exegesis and Western notions of tradition (Weiner 1999: 3 – 4).

¹⁴⁵ This claim, which caused quite a media frenzy, was made by former Liberal Party president John Elliott at a meeting of accountants in Melbourne in March 1999 (reported in the *Koori Mail* 24.03.1999: 4).

The concepts of 'culture' and 'traditions', how they are defined, constructed and interpreted, is of fundamental importance to all native title claimants. Furthermore, the concept of 'culture' continues to be of enduring significance among anthropologists (see Sahlins 1999a). The discussion throughout this thesis has emphasised that there are a number of different approaches to defining, discussing and analysing concepts of 'culture', 'tradition' and 'customs' within the discipline of anthropology. The concept of 'culture' varies through time, it varies between places, and it varies depending on study subjects. Today, anthropologists play a variety of roles in the processes of defining Aboriginal cultural survival, cultural revival, and negotiation of difference. They employ various concepts in both the shaping and constraining of what constitutes the culture of a group of people. As the perceived scholarly 'experts' on 'culture', anthropologists influence the understanding of the relationship between a cultural identity and traditional customs. Furthermore, they frequently assess contemporary claims of Aboriginal people to cultural distinctiveness and traditional links to the past.

The role of anthropology and anthropologists in land and native title claims is of both direct and indirect importance. When looking at the historical role of anthropologists in the making of Aboriginal land rights, it becomes evident that there are at least two sides to their influence which, despite the best intentions of the people involved, can produce negative outcomes for Aboriginal claims to land and native title rights. Firstly, the input of many anthropologists has frequently taken the form of building blocks for legislation regarding Aboriginal land rights. When legislation, or more correctly the interpretation of legislation, has been built upon 'outdated' anthropological and historical information, the results have revealed a construct of Aboriginal people as bound and timeless - 'frozen in time'. This seems to have been the fate of the Yorta Yorta. On the other hand, when anthropologists argue for the recognition of the 'fluidity of culture' and adaptability of traditional customs, there is a significant chance of threat to the legal basis on which native title may be recognised. Members of the Australian legal system may interpret this fluidity as 'cultural change', and consequently as evidence of the loss of 'traditional culture' and/or adaptation of 'non-traditional culture'. The role of anthropology may be seen as a discipline that has worked for and with Aboriginal people. Anthropologists have focused on increasing the general understanding

(and often interpretation) of the nature and realities of the lives of Aboriginal people. This has inevitably resulted in anthropologists being considered 'experts' on Aboriginal people/culture(s). But the role of 'expert' can be a very powerful one. The echo of Professor Elkin's claim in the 1940s that New South Wales Aborigines had not only lost their culture(s), but were people without culture, still reverberates from as diverse places as a small local Aboriginal organisation in Dubbo to the Federal Court of Australia. Today anthropologists appear as 'expert witnesses' for both sides in native title claims: bearing evidence not only to the 'expert' status of anthropologists regarding Aboriginal affairs, but, when findings are fundamentally different, also to the potentially diverse interpretation of each distinctive group of Aboriginal people. In the area of native title claims, it appears that the role of 'experts', like that of anthropologists, needs to be carefully examined within the Australian legal system and the voices and authority of the subjects carefully evaluated.

Increasingly, native title claimants pose the following questions: Who can and who should define our culture and history? And, perhaps more importantly: In what form are 'traditional' culture and local history documented? How do the various forms (e.g. oral, written documents and performances) stand before the law (the dominant value system)? In the Yorta Yorta native title claim, the evidence of a handful of 'experts' (anthropologists, a genealogist, a linguist and historians) plus that of a century old document was accepted over the oral evidence of fifty-four Yorta Yorta people, along with documents provided by their own 'experts'. The non-claimants' 'experts' professional evidence was considered the most 'correct' version of the Yorta Yorta traditional customs, and thus accepted as evidence in the determination of the survival of the connection between past and present traditional practices. It appears that there is an increasing need to address the subordinate status which Aboriginal systems of knowledge and law hold within the dominant modernist state of Australia, i.e. there remain inherent obstacles as long as Aboriginal knowledge and cultural heritage is underprivileged. Thus, there is a need to take a much closer look at what is taking place on the local level when addressing documentation, construction and presentation of local Aboriginal traditions.

Many Aboriginal people are increasingly seeking ways (e.g. education, advice, technological knowledge and financial sources) to record the tradition and history of their ancestors - as well as contemporary cultural and social history. This would surely indicate that Aboriginal people recognise that traditions can and do change, and do have a history (i.e. history of people's beliefs and practices). In Dubbo, this desire to record the culture and history of one's ancestors is not just a result of recent legislative changes (e.g. the *ALRA (NSW) 1983* and the *NTA 1993 (Cth)*): it has been taking place since the late 1960s (and might be traced to ideological changes in the course of the 1967 Referendum). However, the implementation of the *NTA 1993 (Cth)* has placed specific emphasis on the importance and nature of this recording. Today, the members of "Wirrimbah" place significant emphasis on the following: The recording of their histories (oral knowledge mainly held by the Elders in the community); the compilation of language (words and phrases) and genealogical knowledge (membership); the recognition, documentation, protection and management of traditional heritage/sites in and around Dubbo (archaeological/legal recognition); recognition of contemporary Aboriginal art and crafts production and its link to local knowledge and myths (links to the past). To a certain extent, this emphasis on recording and gaining recognition of local Aboriginal culture is the result of the *NTA 1993 (Cth)*. Not only is recording essential in order to meet the conditions of the legislation: it is also essential in order to define and differentiate the native title claimants in the 'concoction' of Aboriginal people who live in Dubbo today. It is essential in order to identify social change, cultural continuity and links with the past. At the same time, there are the unexpected effects of the implementation of the *NTA 1993 (Cth)* which contribute to this apparent increase in interest in, and recording of, local culture and history. For the first time, Aboriginal people of Dubbo have access to financial resources, technology and/or expert advice, essential to the compilation of such data. These resources are either available directly from State/Federal institutions (e.g. Native Title Unit of NSWALC) or they may appear in the form of financial and expert assistance - available only because of the recognition of native title in Australia - that facilitates recording traditional Aboriginal sites and grounds in and around Dubbo (e.g. the AGL gas pipeline discussed in Chapter Seven (7.1.)). For the first time, the Aboriginal people of Dubbo are contemplating building a local Aboriginal Cultural Centre, hoping to be able to establish a museum

displaying the history and cultural aspects of the lives of their ancestors. They plan to assemble in one place artefacts, photos and documentation which are currently scattered among the direct descendants, the local historical society, the local library and various other individuals and institutions. The drive behind these plans is the preservation of historical and cultural knowledge for future (Aboriginal) generations. However, while the recognition of native title in Australia has enabled the Aboriginal people of Dubbo to become active participants in defining and displaying their cultural heritage, the important questions remains: What do they define and display as cultural heritage?

It has been pointed out that many Aboriginal communities, especially in long settled areas, are making "conscious efforts ... to re-appropriate the documented forms of their 'traditional' culture within contemporary lived structures" (Weiner 1999: 4). The Aboriginal people of Dubbo are increasingly demanding and gaining the right to self-representation. They are utilising terms like 'culture', 'traditions' and 'heritage' and, in doing so, they are combining local knowledge transmitted down through the generations with the various surviving documents depicting the lives of their ancestors. However, this 're-appropriation' may not always prove beneficial when claiming native title or other cultural heritage rights. The potential pitfalls, encouraged incidentally by the openness of the *NTA 1983* (Cth), and the strength of the notion of what constitutes 'real' Aboriginal culture, might sometime result in 'selective' re-appropriation of the past, reifying the static notions of traditional Aboriginal culture and rejecting social change and cultural continuity. Thus severe obstacles arise from many sources in relation to gaining recognition of native title.

The real significance of the implementation of the *NTA 1993* (Cth) will not be known for some time to come. There is an emerging picture which suggests that there is a general feeling among both Aboriginal and non-Aboriginal people that the 'material and symbolic stakes have been raised' (Edmunds 1994). Until the implementation of the *NTA 1993* (Cth), there was little debate about the traditions and cultures of New South Wales Aborigines. The significance of the extent and nature of surviving traditional elements was hitherto not of marked importance to many (Aboriginal and non-Aboriginal) people, and the general homogenisation of

New South Wales Aborigines was not an obstacle to material resources, legal rights and political endeavours. Today, internal variations and internal conflict have to be analysed in the context of native title. The *NTA 1993* (Cth) has made attainable specific rights and influences by defined groups of people regarding decisions over delineated areas, along with a certain kind of authority which arises from their ability to demonstrate uninterrupted links to particular ancestor(s) on the land. Inevitably, these rights, or more often assumptions of various benefits included in such rights, have transformed various aspects of local Aboriginal politics, causing some conflict and creating new problems in many Aboriginal communities. It is, therefore, essential to pay increasing attention to how the various Aboriginal groups take advantage of, on the one hand, the processes and resources made available through the legislature, and on the other hand, how and if native title claimants seek support from, and make use of, local resources (e.g. local political avenues and use of local knowledge (oral and documented)).

Any possibility of success for the Aboriginal people of Dubbo in gaining recognition of their version of their traditions, and recognition of their cultural identity, cultural heritage and social standing, seems likely not to be dependent upon how culturally similar, and thus continuous, with the past they are found to be. Eight years after the implementation of the *NTA 1993* (Cth) the Aboriginal people of Dubbo have one native title claim in mediation and, considering what is taking place in native title determinations in long settled areas, the probability of a successful outcome of Dubbo claim (Terramungamine), or any future claims for that matter, is not good. While the Aboriginal people of Dubbo (members of "Wirrimbah") have gained considerable recognition on both local and state levels as the authority on local Aboriginal culture and history, there is no guarantee for similar recognition before either a native title tribunal or the Federal Court. The current native title legislation remains open to interpretation. As long as it does not clearly recognise and include the vitality, flexibility and adaptability taking place among New South Wales Aboriginal people in post-European settlement - as inherently culture-specific responses to dispossession and dispersal - it is unlikely that there will be many native title determinations in New South Wales (Australia) which find in favour of

the claimants.¹⁴⁶ When the question of the existence of native title and the nature of cultural heritage are raised, the emerging picture suggests that - at least in long settled Australia - very few can succeed in their claim to be native title holders. The questions have to be posed: After eight years of recognition of native title in Australia, has the legislation failed? Do Aboriginal people in long settled areas need other forms of legislation, procedures, recognition and paths more suited to the present reality of their lives, in order to gain rights to their cultural heritage? As the *NTA 1993* (Cth) is put through more 'tests', what is emerging is the fact that there is much 'unfinished business' to be resolved before a large number of Australian Aboriginal people receive their just rights and recognition.

¹⁴⁶ One cannot anticipate the possible outcome of future appeals in the High Court.

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