

Global experience in tribal land issues: Customary land rights and Indigenous peoples in Australia and the Philippines

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1. Introduction

This report has been written as a ‘Briefing Note on “Global Experience in Tribal Land Issues”’, to be appended to a Background Paper on “Emerging Issues on Tribal Land in the Central Belt of India”.¹ Its purpose is to ‘inform the policy dialogue on issues related to access to land and land tenure security’ including both ‘land policy and administration issues’.² This report has been prepared over a total of 10 working days by the authors (each taking 5 days to research and draft their sections and compile them into a single report), with the authors each taking individual responsibility for drafting sections on their principal geographical areas of expertise (McKay on the Philippines, Smith on Indigenous Australia). Given the limited time, and areas of expertise of the authors, we have focused primarily on the social and cultural impacts of state recognition of customary land interests in both countries. In both cases we have drawn both on our own primary research (primarily ethnographic research with Indigenous groups involved in customary land claims in the northern Philippines and north-eastern Australia), as well as a range of published and unpublished government and NGO documents and secondary accounts of the processes and effects of recognition and codification of Indigenous/’tribal’ land interests.

It is useful, at the outset, to voice some caution about the applicability of the notion of ‘Indigenous people(s)’ across geographic, historical and social contexts. The notion (and label) ‘Indigenous people(s)’ has gained rapid acceptance across a range of global contexts in recent years, not least due to its recognition in a number of international arenas, and an increasing focus on ‘Indigenous people(s)’ in development contexts.³ The

[Cover image: Kuuku Ya’u people discuss their customary ownership of land with Fr. David Thompson during a site visit to a sacred site on Bromley station, Cape York Peninsula, Australia]

¹ This report was drafted following initial discussions with Barbara Verado (Social Development Specialist, Agriculture and Rural Development Unit, South Asia Region) as to the broad content and direction of this report. The Background Paper was not sighted by the authors during preparation of this report.

² World Bank (n.d.) “India Land Policy for Growth ESW: Terms of Reference: ‘Briefing Note on “Global Experience in Tribal Land Issues” for a Background Paper on “Emerging Issues on Tribal Land in the Central Belt of India””.

³ See, for example, Beteille, A. 1998. “The idea of Indigenous people.” *Current Anthropology* 39:187-91; Bowen, J. R. 2000 “Should we have a universal concept of ‘indigenous peoples’ rights? Ethnicity and essentialism in the twenty-first century.” *Anthropology Today* 16(4): 12-16; Colchester, M. 2002 “Indigenous rights and the collective conscious.” *Anthropology Today* 18(1): 1-3; Friedman, J. 1999 “Indigenous struggles and the discreet charm of the bourgeoisie”. *The Australian Journal of Anthropology* 10(1); Karlsson, B. G. 2003 “Anthropology and the ‘Indigenous Slot’: Claims to and debates about Indigenous peoples’ status in India.” *Critique of Anthropology* 23(4): 403-423; Kenrick, J. and J. Lewis 2004 “Indigenous peoples’ rights and the politics of the term ‘indigenous’”. *Anthropology Today* 20(2): 4-9; Kuper, A. 2003 “The Return

result of such attention to Indigeneity has been a proliferation of identification by various peoples and groups as ‘Indigenous’ across the globe. (Similarly, national and regional policies aimed at ‘Indigenous’, ‘tribal’, or ‘Aboriginal’ groups has served to proliferate such identities within nation-states, an issue discussed elsewhere in this report.)

The authors of this report – whilst recognizing the usefulness of comparative work with regard to the effects and outcomes of codification or recognition of Indigenous customary land tenure in the context of different nation states – feel some caution is required in approaching such experiences, and the ‘lessons learnt’ as *transferable*, at least without further consideration of the particular historical, legal, economic, social, cultural and political factors which have led to particular situations with regard to such recognition or codification. For this reason we suggest that, in any such comparative exercise, considerable attention be brought to the particular grounds for comparison between different situations with regard to ‘Indigenous peoples’ and their customary connections to land, beyond a simple presumption of ‘Indigeneity’ being sufficient grounds for comparison.

2. Conceptual Framework (Western vs. Indigenous/Tribal conceptions of land/territory)

Both Indigenous Australians and Indigenous Filipinos continue to conceptualize their lands and territories in ways often profoundly distinct from conceptualizations of land ownership common in ‘Western’ contexts. Nonetheless, in both Australia and the Philippines, there has been a long interplay between local and introduced, and informal and formal conceptualizations of land and territory. In both countries, this interplay has been intensified by the formal recognition of local customary tenure systems.

In the Philippines, community belonging (i.e. being recognized as a member of an Indigenous group holding customary land) is based on relationships of blood, marriage and the exercise of rights and obligations in relation to shared common resources within a defined physical and cultural territory.⁴ Community belonging incorporates rules of non-alienation of land to “outsiders” – people who cannot claim membership in the community through descent or marriage. Access to communal land is intended to share scarce resources with land-poor or landless community members.

Land rights in the Philippines (in the sense of intra-community rights) are founded on conceptions of care and stewardship for future generations, supported by evidence of use and improvement. Land belongs to the first person to occupy it, as shown by their

of the Native”. *Current Anthropology* 44(3): 389-402; Sylvain, R. 2002 “ ‘Land, water, and truth:’ San identity and global indigenism.” *American Anthropologist* 104(4): 1074-1085.

⁴ ‘Changes in Indigenous Common Property Regimes and Development Policies in the Northern Philippines,’ June Prill-Brett, 2003. A paper presented at *Politics of the Commons: Articulating Development and Strengthening Local Practices*, Chiang Mai, Thailand.

investment of labor to improve it. Records of ownership are transmitted as oral history, often as part of religious rituals. Land use systems and accompanying rules and obligations cover all the potential relationships arising in the community, encompassing a variety of land uses, both traditional and new. This means that customary forms of ownership vary across indigenous groups and evolve according to land and resource types.

Broadly, there are **two kinds of property regimes evident amongst Indigenous groups in the Philippines**⁵:

1. *Common property regimes* – Based on the ethic that no person in the community should be deprived of his or her right to have access to productive land in the communal domain. This form of property traditionally acts as a socio-economic safety net. Property is not heritable, but reverts to the community or clan after individual use or access:

- a) *Communal property* - unrestricted use rights to water from springs, rivers, and brooks, grazing land, forest products, timber and fuel, and the right to hunt wild animals or fish the seas within the communal domain. Inalienable rights of access vested in each community member (past, present and future) with no requirement to ask permission from elders. Non-members are excluded without the consent of the community.
- b) *Corporate property* – descendants of a founding ancestor who first improved a portion of communal land can activate use rights to corporate land, owned in common by the descent group, typically swidden land, fruit trees, riverine fishing sites, common graveyards, grazing land and irrigation canals. Members of a “clan” (cognatic descent group⁶) who are land-poor gain permission from clan leaders to use clan land for cultivation

2. *Notions of individual property* – lands that have been invested with permanent material improvements - rice paddies, residential lots, permanent gardens, agroforests – are owned by individuals. These properties are inherited, typically on marriage, usually under bilateral primogeniture⁷ and are managed by the family of the inheritor. Sale or alienation is the decision of the owner, but plots

⁵ Prill-Brett 2003.

⁶ i.e., a local corporate group, whose membership is determined by a principle of following either one’s mother or father’s group membership (and thus, potentially, the groups associated with any of a person’s grandparents); such groups typically hold at least some property rights or interests in common as property of the group.

⁷ i.e., succession or inheritance of the best of such individual property rights is by the oldest child (regardless of gender) of either the man or woman originally holding the individual rights.

are customarily offered first to immediate family, then further relations, before being sold out of a kinship group.

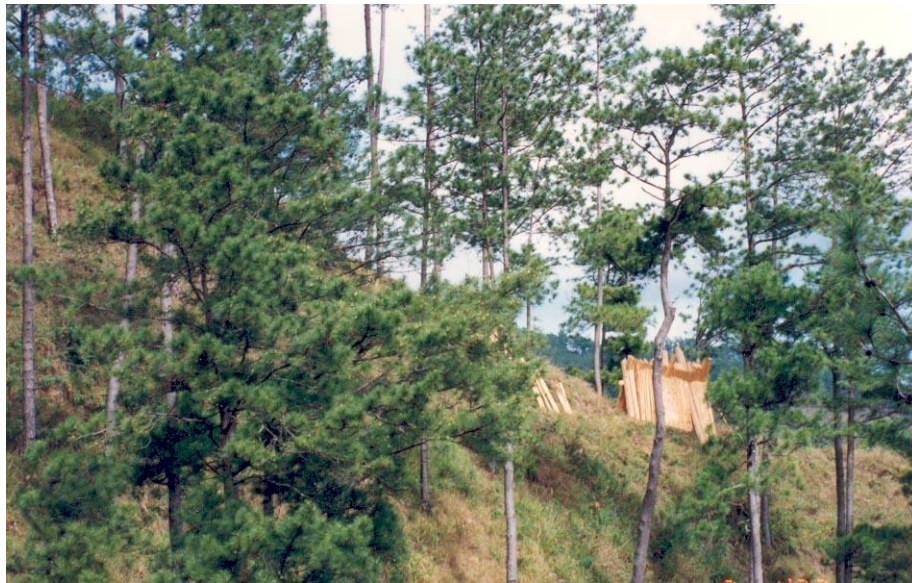


Figure One: Corporate Property - This stand of tropical or Benguet pine trees (*Pinus keyisia*) is corporate property for the Applai Igorot groups of Northern Luzon. In Sagada, where this photograph was taken, clan groups manage the ‘plantation’ (*tayan*) surrounding their and cut lumber for house-building. Despite Sagada’s CADC, in 1997 the Philippine army seized a load of cut lumber on the basis that felling trees violated the Forestry Code. The next day, a sign reading ‘For Sale: Pine Furnitures’ (sic) appeared on the gate of the army camp.

State/governmental conceptions of land in the Philippines are Western in character, and rely on the state's right to resources with the national legal system (founded on the Regalian Doctrine.)⁸ This means that indigenous people living on lands to which they do not have title are effectively squatters on 'public lands.'⁹ Regardless of their forms of title, occupants may be evicted from public lands should the government have a need for the land in question.¹⁰ Government conservation laws have posed particular problems for indigenous lands and livelihoods. In the 1970s and 1980s, laws against shifting cultivation, logging, and farming on areas over 18 degrees of slope meant that many indigenous communities were pursuing illegal livelihood strategies.

Philippines national laws, in contrast to indigenous concepts:

- 1) approach the idea of private property as vested in the individual (indigenous tenure may be based in corporate or kin groups)
- 2) anticipate the bundling of rights of use and disposal together, (in indigenous systems, use and disposal may be separate rights)
- 3) rely on the notion that individual land rights will be bounded by a single contiguous non-overlapping territorial delineation – a 'parcel' (indigenous land rights often spread over multiple areas of land in different forms and do not 'parcel' easily)

Aboriginal Australian customary ownership of land

Whilst Aboriginal Australian customary connections to land or 'country'¹¹ are recognizable in part as forms of ownership,¹² these relations are understood somewhat

⁸ Article XII, Sec. 2 of 1987 Philippine Constitution states: "All lands of the public domain, waters, mineral, coal, petroleum and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the state."

⁹ See R. Rovillos and D. Morales 2002 'Indigenous Peoples/Ethnic Minorities and Poverty Reduction – Philippines' a report prepared for the Environment and Social Safeguard Division, Regional and Sustainable Development Department, Asian Development Bank, Manila.

¹⁰ Moreover, Art XII, Sec. 5 of 1987 the 1987 Philippine Constitution states "the congress may provide for the applicability of customary laws governing property rights or relations determining the ownership and the extent of ancestral domain."

¹¹ A common English term used by many Aboriginal Australians to refer to land with which particular Indigenous communities assert customary attachment/ownership.

¹² See Rigsby, B. 1998 A survey of property and tenure types. In Nicolas Peterson and Bruce Rigsby (eds) *Customary Marine Tenure in Australia*, pp. 22-46. Oceania Monograph No. 48. Sydney: University of Sydney.

differently to most Western property relationships. At the heart of this difference is the notion that there is a ‘substantial’, ‘spiritual’ or ‘essential’ tie between people and land, arising from the activities of the mythological ancestors. In contradistinction to predominant Western understandings of property (particularly in relation to land), this ‘substantial’ tie between people and ‘country’ underpins of the construction of land ownership as fundamentally *inalienable*.

For Aboriginal Australians – and for Torres Strait Islanders (Melanesian people [and Australian citizens] who come from a series of Islands between the Australian mainland and Papua New Guinea) – conceptions of land or territory remain inseparable from the activities of mythological ancestors, ‘heroes’, and other legendary figures held to have shaped land, and left language, culture and customary law for those humans who followed them in occupying land across Australia.¹³ These ancestral figures are known (in English) as ‘Dreamings’, ‘Stories’ or ‘Histories’. The time of their foundational activities is often referred to as the ‘Dreamtime’, a term that is now familiar to many outside as well as within Australia.

In broad terms, the activities of these mythological figures – recorded in oral history and local ceremonial song/dance traditions (and associated forms of material culture, e.g. ‘Aboriginal art’) – has (prior to European settlement) been the principal means of transmitting and reiterating the connections of particular indigenous groups to tracts of land, and areas of the sea, across Australia.

The primary groups associated with these tracts – commonly referred to as ‘country’ or ‘estates’ (the most common anthropological term used for these tracts) – have been particular descent groups, typically recruited by principles of patrilineal descent.¹⁴ Men and women across Australia, would, in the majority of cases, have gained their primary territorial rights through automatic membership in the corporate group of their father and their father’s siblings (anthropologists refer to such groups as ‘clans’).

Similar principles continue to operate across much of the continent, although there has been a common shift towards the recognition of cognatic ties (i.e. ties traced through both paternal and maternal grandparents). Land-owning groups are now most commonly those ‘families’¹⁵ that coalesce around shared ancestral connections to particular areas, and

¹³ There were, however, often substantial regional differences, even before the historical effects of non-Indigenous settlement, in the nature and operation of these ancestrally-chartered territorial systems. See Keen, I. 2004 *Aboriginal Economy and Society: Australia at the Threshold of Colonization*. South Melbourne: Oxford University Press.

¹⁴ i.e., membership of land-owning groups through affiliation to the group identified with a child (of either sex)’s father.

¹⁵ Such ‘families’ (again a common English term used by many Aboriginal people) are cognatic descent groups, markedly different in composition to Anglo-Australian ‘families’. See Sutton 2004 *Native Title in Australia: An Ethnographic Perspective*. Cambridge: Cambridge University Press.

larger ‘tribal’ groups or ‘nations’, conglomerations of ‘family’ groups associated with one or more Indigenous language varieties (despite the common loss of speakers of these language varieties across much of Australia).

There are exceptions and qualifications to be made with regard to this systemic principle. In arid and semi-arid areas in the centre of the continent (the ‘Central Desert’), membership of a land-owning group draws on a series of principles, including links through ritual initiation, places associated with a child’s conception, birthplace, places of parents’ death or burial, long-term residence, and holding of ‘traditional knowledge’ with regard to a particular place or area.¹⁶ Elsewhere across the continent, similar principles often inflect descent-rules in determining particular individuals’ connection to and ownership of ‘country’. Moreover, most individuals will have not only a primary attachment to (and conjoint ownership of) one area or ‘country’, but will also have *a series of attachments to (and customary rights in) other areas* – for example, the ‘country’ of their mother’s ‘clan’, or the place of their birth.

Across Australia, these complex and cross-cutting principles of customary connection to/ownership of land – combined with *strongly process-oriented expressions of ownership and connection*, give an indeterminate character to Indigenous Australian customary ownership of lands, and land-owning ‘groups’. This indeterminate character leads to a number of problems in the articulation of state programs of codification of customary lands and local Indigenous systems.

Communities of ownership in Indigenous Australia

Communities of those holding interests in land under local customary tenure systems are thus based on a series of forms of connection, which will be both regionally specific, and which will be further subject to ongoing local negotiation. Outside of those figured as land-owners, there is typically some form of recognition, in the forms of ‘standing licenses’ or agreements for occasional use, for others to use areas of land or associated resources, including spouses of members of the land-owning group.

Within broader communities of connection and ownership, interests may or may not be differentiated (and such differentiations may or may not be agreed upon by community members). The figuring of such communities, outside of state attempts at inducing formalization through codification, remains indeterminate in character. Local notions of ownership – based on a fundamental notion or spiritual or substantial connection to land – strongly emphasize inalienability of connection. This notion of inalienability has (at least until recently) been reflected in government schemes to transfer land by grant (‘land rights’) or through recognizing customary tenure systems (‘native title’). Nonetheless,

¹⁶ Sutton (2004: 141), after Keen, I. 1997 “The Western Desert vs. The Rest.” In F. Merlan, J. Morton and A. Rumsey (eds) *Scholar and Sceptic: Australian Aboriginal Studies in Honour of L. R. Hiatt*, pp. 65-93. Canberra: Aboriginal Studies Press.

Indigenous systems' provisions for the grant of 'standing licenses' to others to use land and resources allows for the extension of rights and interests to others.



Figure Two: Robert Nelson (Kaanju language-group, Cape York Peninsula, Australia) burning off undergrowth on his traditional homelands.

Indigenous groups in Australia demonstrate a range of what might be glossed as 'rights and interests'¹⁷ in their attachments to particular areas of land and sea:

1. *Common property regimes* – As in the Philippines, there is a common local/regional ethic that no person in the community should be deprived of his or her right to access to (or ownership of) land in the communal domain. Similarly, all adult members of the indigenous 'community of connection' would expect to be consulted about any significant use of the land or its resources, and permission should be sought for any use of or visit to land by other Indigenous (and, ideally, non-Indigenous) persons from a senior member of this community. The predominant economic use of land, traditionally, was through hunting, fishing,

¹⁷ As Martin (2004:68) rightly suggests, the language of 'rights and interests' is originally a Western one, and might involve a translation that misrepresents notions of ownership or connection to land in indigenous contexts. [Martin, D. 2004 'Designing institutions in the 'recognition space' of native title'. In Sandy Toussaint (ed.) *Crossing Boundaries: Cultural, Legal, Historical and Practice Issues in Native Title*, pp. 67-76. Melbourne: Melbourne University Press.]

and gathering. Norms of consultation regarding use of land and resources have now been extended beyond such activities to other uses of the land (e.g. consultations with mining companies about access and use of land and the distribution of royalties, Aboriginal involvement in pastoral enterprises, etc.). Membership of the community of connection is activated at birth, although a ‘cognatic shift’¹⁸ in the figuring of such communities means that any person is likely, through their lifetime, to activate some connections to land, and leave others dormant, a process that will likely shape the future connections of their children.

Those who see themselves as members of a ‘community of connection’ regard themselves as having a right to waters, land and resources in the ‘country’ with which they hold ties through descent, shared ‘spiritual’ essence, as well as their own personal involvement with land and the similar involvement of others holding joint connection to it. Inalienable rights of access and use are vested in each community member (past, present and future) with no requirement to ask permission from elders. Non-members are excluded without the consent of the community or particular members of that community. It is typically the case that members of such communities regard themselves as rightfully having greater control over their lands than the state and other outsiders would legally recognize as the case. This is further complicated by the unwillingness of many Aboriginal people – particularly in northern and central Australia, in areas with colonial histories of domination by non-indigenes – to assert the norms and rules dictated by local customary systems in the case of non-Indigenous use of land and resources, even where these rights might be legally recognized (such reticence being the result of long histories of domination and marginalization of Aboriginal people by non-indigenes).

As noted above, it is now commonly the case for common connection to lands to be asserted and recognized at a series of scales, ranging from ‘families’ (often large common descent groups) to ‘tribes’ and ‘nations’. There is commonly at least some internal differentiation of interests within these larger groups or communities of connection, which also tend to be associated with far larger areas of ‘country’. Such differentiations are also commonly a source of contestation between group members and their constituent sub-groups.

2. *Notions of individual property.* Despite a relative lack of emphasis on traditional improvement of lands akin to that in the Philippines, Aboriginal Australians have long employed various means of husbandry, and have also asserted individual ownership of particular resources, e.g. valued tree species or native bee nests. Even today – in northern Australia at least – norms of sharing

¹⁸ i.e., a shift from a general patrilineal emphasis in connection to ‘country’, to a broader range of connections (potentially) through all four grandparents. Such shifts, across Australia have been partly impelled or further sedimented by the general state-led trend to codification of customary ties to land on a ‘cognatic’, rather than more limited (e.g., patrilineal) basis.

and transmission tend to exclude market-style transfers in return for cash payments. Rather, cash tends (in these areas) to be reconfigured in local circuits of gifting and sharing of resources between close kin.¹⁹

State/governmental conceptions of land in Australia are Western in character, although they are marked by attempts to reflect Indigenous conceptualizations of customary ownership and use of lands and waters. In most cases, they coexist both with State and Federal government interests in land, and are often also coexistent with other non-state interests. In many cases, Aboriginal people reside on or visit and use lands to which they do not have title, and Aboriginal people tend to have little or no control over a range of governmental and non-governmental interventions in their lands, e.g. exploration for and extraction of minerals by mining companies. In Australia, as in the Philippines – and particularly in ‘remote’ and ‘rural’ areas – government conservation laws have posed problems for indigenous lands and livelihoods, in particular through the creation and management of national parks, which severely restrict Aboriginal use and control of traditional homelands.²⁰ In more settled parts of the country, the governmental tenure system – in particular, the grant of freehold titles – presents a considerable barrier to even the partial recognition of Indigenous rights in land.

Australian national laws, in contrast to indigenous concepts:

Despite attempts to provide at least partial recognition of Aboriginal customary interests in land through state and federal legislation, formal governmental regimes for the codification of indigenous land interests tend to fail to recognize both the complexity *and* fluidity of local Indigenous tenure systems. Such failure that often profoundly affects those indigenous groups whose land has been subject to codification. A major problem here has been the governmental desire, as in the Philippines, to determine single, contiguous, non-overlapping territorial delineations with regard to Aboriginal land interests, despite the fact that indigenous interests in land are complex and overlapping.

Although the past thirty years has seen governmental attempts to recognize – as far as possible – indigenous customary tenure, prior to this period there was a widespread refusal of the notion of Indigenous land ownership in Australia. Current government policy is tending towards a reactionary approach to the previous recognition of ‘communal’ land ownership (i.e., the transfer or recognition of *group* title), and the recognition of inalienable forms of title, and there is a current drive to promote both individuation of land tenure and the commercial leasing of areas of Aboriginal-controlled customary lands to outside agencies.

¹⁹ See D. Martin 1995 ‘Money, business and culture: Issues for Aboriginal economic policy.’ *CAEPR Discussion Paper No. 101*. Canberra: CAEPR, ANU. Available at www.anu.edu.au/caepr

²⁰ See Smith, B. R. 2003a Whither ‘certainty’? Coexistence, change and some repercussions of native title in Northern Queensland. *Anthropological Forum* 13(1): 27-48.

3. Global Patterns of Land Alienation (Common land alienation practices and efforts to justify them legally/legal and institutional frameworks)

Colonization and history of land uptake – The Philippines

Defining indigeneity. Diverse ethnic, religious and cultural groups compose Philippine society. The Philippine Islands were not heavily settled by colonial powers, so almost all Filipinos can claim ancestors who inhabited the archipelago since ‘time immemorial.’ Filipino indigeneity does not follow clear cut distinction between ‘indigenous peoples’ and ‘national or ethnic minorities’ proposed by the United Nations.²¹ The UN defines indigenous groups as only arising from organized colonization by European powers, while ethnic minorities arise from territorial expansion by indigenous nations into adjacent areas. Filipinos, however, generally consider all indigenous Filipino groups as ethnic groups, but not all ethnic groups are indigenous.

Of more than 200 Filipino ethnolinguistic groups, only 110 are considered ‘tribal’ or indigenous. Roughly 17% of the Philippine population or 12 million people are thought to qualify as indigenous, but no formal census has been conducted.²² People currently called Indigenous Peoples (IPs) have previously been known as non-Christian tribes, national minorities, and cultural communities.²³ They now have special rights under Philippine law. The 1987 Philippine Constitution acknowledges the rights of ‘indigenous cultural communities’ (Art II, Sec. 5), stressing the need to preserve and develop cultural heritage. In 1997, the government promulgated the Indigenous Peoples’ Rights Act (IRPA), specifying these rights.

The current government definition asserts that ‘indigenous cultural communities/indigenous peoples’ refers to:

a group of people or homogenous societies identified by self-ascription and ascription by other, who have continuously lived as an organized community on communally bounded and defined territory, and who have, under claims of ownership since time immemorial, occupied, possessed customs traditions and other distinctive cultural traits, or who have, through resistance to political, social, and cultural inroads of colonialism, non-indigenous religions and culture, become historically differentiated from the majority of Filipinos. ICCs/IPs shall likewise include peoples who are regarded as indigenous on account of their descent from

²¹ See Martinez, M.A. 1999 ‘Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigneous Populations’ Final Report. New York: United Nations Economic and Social Council, UN Document E/CN.4/ Sub.2/1999/20.

²² The National Commission on Indigenous People’s website (www.ncip.gov.ph) currently The NCIP lists indigenous population at 11,778, 190 persons but the NCIP admits there is no formal census.

²³ See Rovillos and Morales 2002.

the populations who inhabited the country, at the time of conquest or colonization, or at the time of inroads of non-indigenous religions and cultures, or the establishment of present state boundaries, who retain some or all of their own social, economic, cultural and political institutions, but who may have been displaced from their traditional domains or who may have resettled outside their ancestral domains. (RA 8371, 1997, IPRA, Sec 3 (h))

NGOs and academics take this further, claiming that legitimate IPs²⁴:

- 1) claim or are recognized to be among the first, if not the first, to inhabit a given area;
- 2) have maintained their culture/lifeways as a response against colonization; and
- 3) are marginalized and therefore generally in a state of opposition against the present state where in their ancestral domain is located.

Communities who meet criteria 2 should be considered to be ethnic groups, but cannot be considered IPs without meeting 1 and 3.

Both these definitions anticipate land-based, sedentary agricultural ways of living. This is an artifact of the colonial history of the Philippines. The Americans applied the category 'tribe' to indigenous groups and this classification has been retained, leading both lawmakers and NGOs to recognize the claims of 'settled, wet-rice farming groups' – who farm more or less distinct parcels as individuals - as more appropriate than those made by groups with more mobile livelihood strategies such as shifting cultivators, migrant fishers, sea-going traders etc.

Both these definitions emphasize resource conflicts that derive from colonial histories, so it is worth examining these in depth.

Spanish colonialism (1521 – 1898) – Magellan claimed the Philippine archipelago for the Spanish Crown in 1521. Under the *Regalian Doctrine*, the Crown owned all natural resources. For almost four centuries, the Spanish attempted to produce a uniformly Catholic and Hispanicized population from the diverse Malay societies of the lowland Philippines. People who inhabited the uplands of Luzon and Mindanao and the Muslim populations of the southern Philippines largely resisted Spanish subjugation. The lowland plains were governed under a feudal system which reassigned indigenous lands and resources to Spanish *conquistadores* and local elites as a reward for loyalty. Outside the Spanish colonial domain, Muslims and mountain peoples continued to govern their lands under their own diverse tenurial systems.

²⁴ Boquieren, R. 2002. 'Historical Perspectives on Sources of Ethnicity in the Philippines.' Paper presented to the Roundtable Discussion on Ethnicity, Center for Integrated Development Studies, University of the Philippines College Baguio, Baguio City.
Available at: www.geocities.com/rowenareyesboquiern/ethnos.htm?200515

American colonial administration (1898 – 1946) – Spain ceded the Philippines to the United States in 1898. The Philippine Bill of 1902 transferred all Spanish Crown lands to the new colonial government, transferring ownership of natural resources to the state. The Americans introduced new laws requiring registration and titling of land. American cadastral surveys classified lands as private, public, and government reservations. The American regime also introduced the idea of land reservations – national parks and forest reservations – as conservation spaces, empty of human habitation. Public lands not yet covered by land registration or paper title were open for titling by any qualified applicant on the payment of land taxes. Most indigenous communal lands fell in this category and, while the Americans encouraged private land registration among indigenous groups, the new concept of private ownership did not fit with the diversity of indigenous tenurial relations. Only elites and educated indigenes registered their lands, and then only those lands for which they could afford to pay tax.

Postcolonial Philippines - After independence (1946), the new republic retained colonial laws for resource management. The *Regalian Doctrine* continued to be the basis for state ownership and control of all natural resources in the archipelago. The resources of greatest interest to the postcolonial government were forests and minerals found in the traditional lands of indigenous groups. Upland resources were seen as essential to Philippine attempts to cope with indebtedness, reliance on imports, unemployment and the inequitable distribution of opportunities and resources in the lowlands. Following American-style conservation practices, upland areas that were not ‘resource-rich’ were to be set aside for ecological conservation and watershed protection.

The Ancestral Domain Era - Concerns over resource management led the government, through the Department of Environment and Natural Resources (DENR) to recognize that the state was not the sole source of legitimacy for land occupation. In 1993, DENR set up processes to legitimate two forms of land claim, ancestral land and ancestral domain, arising from ‘time immemorial possession.’²⁵ DENR awarded Certificates of Ancestral Domain Claims (CADCs) at the community level and Certificates of Ancestral Land Claims (CALCs) to individual claimants. A CADC required each community to develop a natural resource management plan. By 1997, about 30 million ha of land was covered by these CALC and CADC claims.

²⁵ DAO 02 recognized as:

1 - Ancestral Domain: all lands and natural resources occupied or possessed by indigenous cultural communities, by themselves or through their ancestors, communally or individually, in accordance with their customs or traditions since time immemorial, continuously to the present except when interrupted by war, force majeure, or displacement by force, deceit or stealth. It includes all adjacent areas generally belonging to them and which are necessary to ensure their economic, social and cultural welfare.

2 - Ancestral Land – refers to land occupied, possessed and used by individuals, families or clans who are members of indigenous cultural communities, since time immemorial by themselves or through their predecessors-in-interest, continuously to the present except when interrupted by war, force majeure or displacement by force, deceit or stealth

These early efforts to recognize Ancestral Domain were not without problems. Pressure to ‘fast-track’ the process led DENR to give CADCs to municipalities – government-defined units usually much larger than the traditional communities where land-management practices are shared. Likewise, the DENR process allowed claims to be initiated by sub-units of such communities, led by a PO (people’s organization) or LGU (local government unit) that might represent only a small sub-section of community interests and practices. Neither the large-scale municipal CADCs nor the initiation by sub-units was equivalent to the socio-cultural scale at which a domain is managed – the territory of one distinct community. CADC awards tended to presume sustainable management systems were already in place. CADC management plans often did not assess whether community-based procedures existed to determine whether jural rights, duties or obligations in these resources existed. These omissions left some traditional management groups – councils of elders, heads of clans - out of the formal CADC management process.²⁶ Where POs and LGU leadership did not incorporate the elders and others who held the traditional knowledge of territorial boundaries and resource management practices, traditional resource management was undermined. The result of Ancestral Domain has often been intensified conflicts in use, increasing resource competition and weakened ecological considerations.

IPRA – The Indigenous Peoples’ Rights Act - In 1997, the *Indigenous Peoples’ Rights Act* (IPRA) transferred the AD process to a new government department with a new legal framework to support Ancestral Domain. Under this Act, responsibility for native title passed to the National Commission on Indigenous Peoples (NCIP), as an independent agency under the Office of the President. IPRA made some very significant changes to the legal status of indigenous land claims. Most importantly, IPRA overturned the 18% slope rule, thus circumventing the Revised Forestry Code (1975) and allowing the titling of indigenous agricultural lands and.²⁷ This was a highly controversial move: a legal case questioning the basis for IPRA via Regalian Doctrine was filed in 1998 and eventually dismissed by Supreme Court in 2000.

In the first few years, IPRA was toothless and the NCIP under funded. Between 1998 and 2001 no titles (Certificates of Ancestral Domain Title) were issued. From July 2002 to December 2004, 29 CADTs have been approved by the NCIP and 21 have been sent to the Registry of Deeds for registration.²⁸ In late 2004, the NCIP was transferred to a new Department of Land Reform, but this is still ‘under implementation.’

²⁶ See Prill-Brett 2003.

²⁷ IPRA states that “individually-owned lands which are used for agriculture, residential, pasture, and tree farming purposes, including those with slopes of 18% or more, are hereby classified as alienable and disposable agricultural lands” (IPRA, Alienable and Disposable Lands, Sec 12).

²⁸ See www.ncip.gov.ph/resources

IPRA was intended to improve the quality of life and promote unity among indigenous communities. However, conflicts over boundaries between adjacent community-level stakeholders, and between individuals and groups within the same community are increasing. Beyond IPRA, new technologies, commercial crops replacing subsistence crops, new infrastructure such as roads, and different rules or/and policies of conservation introduced by national and international conservation agencies are all, of course, contributing to these conflicts.

Colonization and history of land uptake – Australia

Defining indigeneity. Indigenous Australians include a large, indeterminate series of diverse social and cultural groups. Firstly, both Aboriginal Australians and Torres Strait Islanders (a set of Melanesian peoples who originate from the Straits between mainland Australia and Papua New Guinea) are Indigenous Australians, by virtue of their mutual encapsulation within the Australian nation-state.²⁹ Both Aboriginal Australians and Torres Strait Islanders claim occupation of, and connection to, their homelands within Australia since ‘time immemorial’ as a result of their connections, through their ancestors and ties to ‘country’, to the spiritual essence which they understand to be imbued in their customary lands.³⁰ Amongst Aboriginal Australians, a series of distinctions are made which class people into more or less defined and often cross-cutting groups or identities. Many of these distinctions are directly relevant to questions of customary tenure (others less so, e.g. ‘saltwater’ versus ‘freshwater’ peoples, or not at all, e.g. household compositions.) The more relevant distinctions – many of which have both long-standing importance, and which have also been profoundly affected by the historical and cultural impacts of encapsulation by the Australian ‘mainstream’ – include shared language-identity (often referred to as ‘tribal’ identity), involvement in ritual complexes, clan or family identity, and long-term residence in or association with particular places or areas.

State encapsulation of Australia’s Indigenous peoples – along with the profound demographic, economic, environmental, political, social, *and* cultural impacts of a numerically dominant settler population across most of Australia – has profoundly influenced the ways in which Indigenous Australians are identified and identify themselves. International definitions of Indigeneity are of little direct relevance to most Indigenous Australians, save for the ways in which the international political sphere has

²⁹ There are also a number of ‘Indigenous people’ also living in Australia – many of them citizens – whose homelands lie elsewhere, including New Zealand Maori and other Pacific Islanders, and emigrants from elsewhere. These peoples are not discussed in this report.

³⁰ Throughout most of this report I refer interchangeably to ‘Aboriginal people’ and ‘Indigenous Australians’. Although I do not explicitly mention Torres Strait Islanders in most cases, much if not all of the discussion here also applies to these Islanders, who now live both in their ancestral homelands and on the Australian mainland.

influenced Australian Federal and State policies. Rather, the most influential definitions of Indigenous people are two-fold (although these are often profoundly inter-related³¹):

1. Self-definition (among individuals, groups, and communities) of Indigeneity *per se*, and various forms of Indigenous identity.
2. Various definitions in the policies and programs of a range of state and non-state organizations, ranging from State and Federal government land rights legislation, to the policies of local Indigenous housing and health organizations.

One of the key ways in which these two forms of definition are inter-related is self-identification as being of Aboriginal descent, Torres Strait Islander descent, or both in the national census.

All of those ethno-linguistic (or ‘tribal’) groups identified by reference to an Indigenous language-variety, and its association with particular areas of the Australian mainland or Torres Strait Islands. At the last census, approximately 1.5% of the general Australian population of around 19 million people identified themselves as Indigenous (i.e., as of Aboriginal or Torres Strait Islander descent). There is general recognition by Federal and State governments that Indigenous Australians continue to face pronounced socio-economic disadvantages in comparison to the general Australian population. A range of policy initiatives have been developed to attempt to address this disadvantage. These initiatives include programs aimed at improving Indigenous health, outcomes from primary, secondary and tertiary education, increasing the amount and quality of housing available to Indigenous Australians, and providing increased employment. These programs are typically inflected by governmental ideologies in the ways in which they seek to address Indigenous disadvantage, and such ‘special treatment’ is the subject of considerable ambivalence amongst the majority non-indigenous population. A proposed amendment to the Australian constitution to acknowledge prior Indigenous ownership of Australia was defeated in a national referendum, indicating the level of popular resistance to recognition of the ‘special status’ or interests of indigenous Australians.

Of principal concern for the purposes of this report is the definition of Indigenous people in Federal and State legislation intended to either transfer areas of land to Indigenous people (‘land rights’ legislation), or to recognize *existing* Indigenous rights in land in accordance with Australian common law (‘native title’). As in the case of the Philippines, the passing of these forms of legislation is best understood in the context of Australia’s colonial history.

³¹ See Smith, B. R. forthcoming (a) “We got our own management”: Local knowledge, government and development in central Cape York Peninsula. *Australian Aboriginal Studies* (2005/2), forthcoming, December 2005.

Australian colonial history and Indigenous customary tenure

Australian colonization proceeded through the establishment of six distinct colonies (which remained separate until the federation of the Australian Commonwealth in 1900, when they became Australia's constitutive States). The first of these colonies was founded in New South Wales in 1788, and operated initially as a penal colony. Australia's six colonies were unique in the history of British colonialism in that they were founded 'without any recognition of the rights of the indigenous peoples to their lands and without any treaties'.³² Rather, the British colonizers presumed a state of *terra nullius* – the Aboriginal occupants were understood (legally, at least) to have no form of ownership recognizable under British or international law, and thus the Australian continent was open for full possession by the British sovereign. Until 1900, Australia remained a British colony, and operated according to British law. Following Australia's independence and federation, a bi-partite system developed, combining a Commonwealth government with State and Territory³³ legislatures.

Across its history as a British colony and as an independent nation, Australia sought to retain strong ties to Britain and a predominantly Anglo-Celtic social and cultural composition. This history was most clearly expressed in the 'White Australia' policy, which sought to limit non-White immigration into Australia in the mid-20th Century. The predominance of a 'White Australian' identity, and associated social and cultural norms further served to marginalize Australia's Indigenous population, who were subject to policies aimed at their racial and socio-cultural assimilation, and were not generally recognized as Australian citizens until 1967, following a national referendum.

Australian history has predominantly been a history of 'the progressive mastery of the land', although colonial settlement has never been complete in the sense of 'thoroughgoing productive domestication' of the whole of the Australian continent.³⁴ Rather, population and settlement of the Australian continent has focused on a number of seaboard areas – and large metropolitan centers – with smaller rural population centers spread around most of the southern coastal fringe. Australia's northern and inland areas are far less densely populated, and across much of the latter areas Indigenous peoples often form the majority or a large minority of the local population. Although much of the

³² Brennan, F. 1998 *The Wik Debate: Its Impact on Aborigines, Pastoralists and Miners*. Sydney: UNSW Press, p.5.

³³ As well as the six Australian States (New South Wales, Victoria, Tasmania, Queensland, south Australia and Western Australia), Australia has two Federal Territories. One, the Australian Capital Territory (ACT), is a small area encapsulated within New South Wales. The ACT is predominantly composed of the city of Canberra, the Federal Capital, which also has its own legislature. The second, the Northern Territory, covers a vast area of central and northern Australia. Initially governed by the South Australian government, it has been a Federal Territory since 1911 and has its own legislature, although it remains dependent on Commonwealth funding.

³⁴ See Merlan, F. 1998 *Caging the Rainbow: Places, Politics, and Aborigines in a North Australian Town*. Hawaii: University of Hawaii, p.158-159.

south was settled rapidly, following agricultural expansion from the main colonial settlements in the 18th and early 19th Century, much of the rest of the country resisted settlement, and white settlers only occupied some areas of the centre and north of the country in the late 19th and early 20th Century. It is in these areas that State and Federal legislation has most consistently sought to recognize Indigenous customary tenure, and it is also in these areas that Indigenous socio-economic disadvantage is most pronounced.

Although Indigenous ownership of land was formally denied, Australia's colonial settlement depended on Aboriginal knowledge of country. Across much of the continent, the development and running of agricultural enterprises depended on an indentured Indigenous labor force. This was particularly the case with the pastoral enterprises which took up vast areas of inland Australia to run sheep and cattle herds. In far north Queensland, for instance, pastoralists who moved into the region took up large cattle stations (ranches) in the late 19th Century, with local Aboriginal groups supplying up to 95% of the labor from the early 20th Century onwards. In addition to their skilled labor (for which Aboriginal people received far less than the standard award rates for non-Indigenous workers), these stations relied on the huge body of traditional knowledge about the land possessed by local Aboriginal people. In turn, local Aboriginal knowledge systems became profoundly syncretized through pastoral employment, with transformations of local knowledge about tracking, burning regimes, and animal behavior occurring in the shift from a hunting-gathering economy to a pastoral one.³⁵ Pastoralists also benefited indirectly from Aboriginal hunting and gathering abilities, sending their workforce on unpaid 'holidays' during the off-season, when they lived from locally available bush resources, decreasing the station owners' need to provide for them.

The advent of land rights commenced with two key events in the late 1960s. The first of these was the 'walk-off' by Gurindji stockmen from Wave Hill station in the 1960s, originally a demand for equal pay, but which rapidly grew to encompass (eventually successful) demands for the return of a parcel of Gurindji land. The second of these events was the (unsuccessful) court case brought by Yolngu people in response to the proposed development of a Bauxite mine at Yirrkala on the Gove Peninsula in north-east Arnhem Land in Australia's Northern Territory. The Yolngu plaintiffs brought a case to the Northern Territory's Supreme Court in 1968 alleging their ownership of the area. In 1971, Justice Blackburn determined that despite evidence of systematic local forms of land tenure, the plaintiffs could not be said to legally 'own' the land in the Western sense. In particular, the plaintiff's customary connections to land 'did not demonstrate the characteristics of proprietary relationship – the right to exclude others, the right to alienate – as he alleged this was understood at common law'.³⁶

In combination with widespread national and international pressure on the Australian government to act on the question of Aboriginal land rights, the failure of the Gove case led to the establishment of a Royal Commission in 1972 to make recommendations about

³⁵ See Smith 2003a; Sutton (2004:32-37).

³⁶ Merlan (1998:165).

the means by which some recognition of Indigenous customary claims to land could be provided across Australia. The Woodward Commission's recommendations led to the passing of the Aboriginal Land Rights (Northern Territory) Act (ALRA) of 1976. This legislation sought to transfer areas of 'Crown land' (that is, land in which only the Crown is held to have a legal interest) to Aboriginal people, following hearings by a land commissioner, to those Aboriginal groups (aided by lawyers, anthropologists and other professionals) able to prove that they are:

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.³⁷

Although it was initially presumed that such a definition would prove clear-cut and unproblematic, reflecting local Indigenous customary connection to land, a number of problematic cases saw the contestation and gradual transformation of the ways in which this definition was understood to apply. In particular, presumptions about patrilineally-or-patrilineally recruited 'clans' as the basis of local customary tenure have been repeatedly challenged, and the constraints of the legislative approach taken in the ALRA's structure for the recognition of Aboriginal customary tenure have become all too evident. Despite these complications, however, the ALRA has proved to have a huge impact, transferring large areas of the Northern Territory (the least 'settled' of Australia's States and Territories, and the one with the proportionally largest Indigenous population) to formal, codified Indigenous ownership.

Similar legislation followed – often far later – in Australia's States. In Queensland, a deeply reactionary State government resisted pressure for the passing of land rights legislation until 1991, which saw the passage of both the *Aboriginal Land Act* and the *Torres Strait Islander Land Act*.

Queensland's *Aboriginal Land Act* 1991 allows for the transfer or grant of areas of land to Aboriginal people who are "particularly concerned with the land." This definition includes people who "are connected to the land by Aboriginal tradition", who "live on or use the land", or who "live on or use neighboring land." Any Aboriginal person or group with "traditional connection" to the land, with "historical connection" to the land, or who asserts "economic or cultural viability" in relation to their involvement with the land can make such a claim for grant or transfer.³⁸ Any land transferred is transferred as freehold land, but its grant is inalienable – that is, it cannot be sold by the grantees to others. Land available for grant or transfer includes Aboriginal reserve land (reserve areas created to house Aboriginal communities, mostly in remote areas in the State's north) and designated Aboriginal community land, and "available state land declared by regulation

³⁷ Merlan (1998:166).

³⁸ Queensland Government 2001 *The Aboriginal Land Act 1991: An Act Providing for the Transfer, Claim and Granting of Land as Aboriginal Land*. Brisbane: Government Printers.

to be transferable land.” The latter category is predominantly composed of large national park areas in the State’s north, which (following a successful claim for transfer) are immediately leased back (rent-free) to the Queensland Parks and Wildlife Service in perpetuity, but which must then move towards a regime of joint management with Aboriginal grantees.³⁹



Figure Three: Victor Lawrence (Mungkanhu language-group) and family sign memorandum of understanding with Queensland Parks and Wildlife Service to allow limited development of their ‘homelands camp’ in the Mungkan-Kaanju National Park, Cape York Peninsula, Australia.

Although a number of transfers of reserve areas (as well as some small blocks of Unallocated State land) have been made through this legislation, the claims for transfer of unallocated State land and national parks have proved frustrating for a number of claimant groups. Although the legislation and process were designed to be beneficial (only parks and State land gazetted for claim by the Queensland Government can be claimed), the process has sometimes taken on an adversarial dimension, and has often been seen as insulting by Aboriginal groups who assert that they should not need to ‘prove’ anything to the State government that has previously dispossessed them of their traditional land by force. Further, despite a number of recommended transfers of national park areas to Aboriginal claimant groups, a lack of political will has seen no real progress towards the joint-management regimes intended under the Act. Lastly, as with native title claims (see below), the forms of codification involved in the process, even when

³⁹ See Smith, B. R. 2003b ‘All been washed away now’: Tradition, change and Indigenous knowledge in a Queensland Aboriginal land claim’. In *Negotiating local knowledge: power and identity in development*, (eds) J. Pottier, A. Bicker, and P. Sillitoe. London: Pluto Press, pp. 121-154.

anthropologists with some experience working with the claimant groups have been involved, have not proved unproblematic. This has been particularly the case when transfer processes – which occur through government consultation, rather than a tribunal hearing – have not drawn on anthropological expertise, often resulting in the generation and codification of locally contentious groups of grantees.

The other major form under which customary land tenure is recognized by the state is under the Commonwealth's *Native Title Act 1993* and its later amendments. This Federal legislation was passed following the Mabo No.2 case in Australia's High Court, in which a group of Torres Strait Islanders successfully asserted that (contrary to Justice Blackburn's findings in the Gove case and the colonial doctrine of *terra nullius*) Indigenous systems of land tenure could be recognized as systems of land ownership under the common law. As a result, where non-Indigenous settlement or changes in Indigenous law and custom had not led to its extinction, 'native title' is now recognized as still existing in areas of land across Australia. This legal recognition of customary tenure means that any Indigenous group can litigate for the recognition of potentially extant rights and interests in land across Australia, although such interests would, in most cases, prove to be co-existent with other interests (including the Crown, but also those of State governments, government agencies and private interests).

The High Court's findings in Mabo No.2 led not only to the *Native Title Act 1993*, legislation designed to facilitate the pursuit of 'native title claims' by Indigenous groups (or by other parties who sought to ascertain the degree, if any, to which Indigenous interests co-existed in the land in which they hold property rights). To do this, the *Native Title Act* put in place

a statutory scheme for the recognition and protection of native title and, among other things, provided (i) a [legal] mechanism for determining claims to native title (ii) ways of dealing with future acts [i.e., further actions by other parties, including acts that might partly or wholly extinguish native title, e.g. the allocation of new freehold blocks] affecting native title and (iii) in certain circumstances, compensation for its extinguishment.⁴⁰

As it seeks to legally 'recognize' an extant system of customary land tenure, the *Native Title Act* (unlike State 'land rights' legislation) does not itself provide any explicit determination of how native title should be recognized in terms of the composition of the claimant group or the content of their rights and interests, other than through its basic definition of 'native title' or 'native title rights and interests':

The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

⁴⁰ Sutton (2004: xiv).

- (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 and waters; and
- (c) the rights and interests are recognized by the common law of Australia.⁴¹

An increasing body of case law, and the requirements of the various States regarding ‘connection reports’ written by experts (usually anthropologists, archaeologists and historians) to present the claimants’ connections have, however, increasingly acted to delimit the ways in which native title is presented, recognized and codified. This is particularly the case where such recognition occurs through a ‘consent determination’ as opposed to litigation. As discussed below, this process of recognition and codification is not without considerable problems, particularly from the perspective of many Indigenous people.

The passing of the *Native Title Act* led to the establishment or inclusion of a number of organizations and structures to support the processing of such claims. Among these organizations are:

- a National Native Title Tribunal (NNTT), which plays a number of roles in processing and supporting the claims process;
- Native Title Representative Bodies (NTRBs), a role often taken up by previously extant ‘Land Councils’ (Aboriginal-directed NGOs incorporated for the pursuit of Indigenous peoples’ interests in land), which represent the claimants in their litigation of Native title claims (and other matters) and act to commission expert ‘connection reports’ to support the claimants’ pursuit of their claims;
- the Federal Court, which oversees claim processes, whether these are litigated in the court, or determined by way of a ‘negotiated determination’ produced through agreement as to the nature of extant Indigenous rights and interests in a given area by the claimants (and their representatives) and other parties (with the State government typically acting as the primary party in such negotiations);
- Native Title offices within State and Federal Governments which act to negotiate or oppose Indigenous claims, typically conducting or commissioning their own research.

In addition to these organizations, it was the Federal government’s intention, at the time of the formulation of the original *Native Title Act 1993*, to provide a measure of social justice and access to land for those groups whose Native Title rights and interests were found to have been extinguished by colonial occupation and history (a particular problem

⁴¹ *Native Title Act 1993* (Cth), cited from Sutton (2004:xv).

in more settled areas, and in particular in the south of Australia). One result of this intention was the establishment and funding of an Indigenous Land Corporation,⁴² whose roles include the purchase of land for Indigenous groups, and the provision of support (financial and otherwise) for the use and development of Indigenous-held land.

As noted above, anthropologists play a key role in the codification of native title holding groups and the rights and interests they claim in the Native Title claim process. In so doing, anthropologists

record claimants' and other informants' statements about how one may rightfully belong to a place, what rights flow from one's traditional connection to a place, how one should behave according to customary rules to do with interests in sites and areas of country, and so on. These statements are highly important guides as to how people consciously formulate relevant principles. These statements, however, do not alone account for or predict how people relate systematically to places or how they in practice allocate rights and interests in them.⁴³

Indeed, as noted above, the nature of customary connections to land in Indigenous Australia is marked by a strongly indeterminate and processual character. This character is deeply at odds with the forms of codification required to 'make legible' Indigenous customary rights and interests by state mechanisms, and with the aspirations of other parties who seek to identify the exact terms of their coexistence with Indigenous interests. (Such parties include miners and pastoralists, who have widespread interests across the inland and remote areas where Aboriginal people have maintained the strongest legal claims for recognition under the *Native Title Act 1993*, and who have strongly contested a large number of claims, and placed pressure on State and Federal governments to similarly oppose claims.)⁴⁴ As a result (particularly given the limited resources and short time-frames involved in much native title research), the determination of native title rights and interests with regard to particular groups often produces a considerable transformative effect on local customary systems, creating rigid groups and structures where fluid and intensely negotiable forms of social organization previously existed.

One unfortunate result, even before determination of Indigenous peoples' interests, is that the native title claim process tends to amplify ongoing local competition or disagreements over customary land tenure. For this reason, many Indigenous Australians complain that 'native title only causes arguments between our families' and that the resulting groups profoundly misrepresent the 'proper' customary groups who hold interests in land under Aboriginal law and custom. Conflicts are a particular problem where native title claimants live alongside groups whose connection to the areas in which they now reside are only 'historical', arising from colonial re-settlement of Aboriginal families. In such

⁴² See www.ilc.gov.au

⁴³ Sutton (2004: xv-xvi).

⁴⁴ See Smith 2003a.

cases, local communities are often divided by claims, with ‘historical’ people fearing that ‘traditional owners’ will use the leverage of the Act to secure a privileged social or economic position, or seek to expel ‘historical’ people from the local area. A second problem is that the *Native Title Act* (in most, though not all cases) has increasingly produced little in the way of meaningful rights and interests in land for claimants, falling far short of expectations of ‘getting the land back’, and leading to widespread Indigenous disenchantment with the native title process. Nonetheless, the importance of recognition of their status as ‘traditional owners’, the leverage afforded by native title claims with other parties (in particular, mining companies and other developers), and the potential recognition in some cases of substantial interests in land, mean that a number of Indigenous Australians continue to press ahead with claims of this kind.



Figure Four: Juna Coleman (Olkola and Mungkanhu language-groups) dances *malkiri* to celebrate her family’s signing of a memorandum of understanding for her mother’s customary land with Queensland Parks and Wildlife Service, Coen, Cape York Peninsula, Australia

4. Indigenous/tribal reactions (strategies used to defend their lands) and alliances/partnerships they make in the process

Indigenous reactions and alliances in the Philippines

For many years, Indigenous peoples in the Philippines lived in a situation of confusion to which they reacted with both apathy and opportunism. Applying the ‘Western concept’ of tribe to diverse populations meant that current government support for claims to ancestral lands has, to a large extent, influenced the indigenous concepts of land ownership and the access and management of common property resources.⁴⁵ Under the Department of Environment and Natural Resources’ Ancestral Domain regulations and then IPRA, communities have found a new regulatory and legal environment in which to express their interests in land. As groups have developed new strategies in response to these opportunities, there have been some unintended consequences.

1. Proliferation. Ancestral Domain has seen a proliferation of ‘tribes’ at the level of the municipal and *barangay* (village) unit amongst many ethnolinguistic groups. The tendency to proliferation has been reinforced by resource control issues arising from the Internal Revenue Allotment negotiations under the 1991 Local Government Code where tax funds go to local government units. Resource tenure is, of course, most meaningful when the resources to administer and develop territory will come packaged with it. Thus the identification of one ‘tribe’ per municipality or per *barangay* (village) has often been a convenient fiction developed to settle boundaries and resource access. The resulting ‘tribal barangay’ will be supported with government funds. However, this convenience has presented considerable problems for groups whose identities are have been obscured or transformed by the formal processes of codification – particularly those groups who have not had representatives in elected office at the village and municipality level in during the Ancestral Domain determination phase.

2. Bureaucratic Opportunism. Recognition of Ancestral Domain does not necessarily bring with it legal acceptance of indigenous resource-management practices by other government agencies. Different agencies present indigenous groups with different and often conflicting perspectives, objectives, and agendas. The Department of Environment and Natural Resources’ (DENR) mandate is to protect and conserve the forest and other natural resources and the department has its own management directed towards these objectives. The Department of Land Reform’s (previously Department of Agrarian Reform) goal is to distribute land to the landless, so encourages privatization of common property and corporate property resources. NGOs working with indigenous groups also have people their own preconceived ideas and agendas for resource management.

These conflicting and often contradictory perspectives set up competition among indigenous stakeholders, with groups asserting their rights to resources through both customary and state laws.

⁴⁵ See Prill-Brett 2003.

Often, the objectives of these different actors conflict with the indigenous communities' own resource management practices, especially for common property resources. Out of this conflict comes opportunity for some indigenous claimants who invoke both customary and national laws to allow them new access to natural resources that were not previously open for private access. Not only has this intensified inequalities within indigenous communities, it has also undermined the sustainable management objectives of the Ancestral Domain process.⁴⁶

At the Municipal level - where most Ancestral Domain claims appear to operate - the full participation of community members is often ignored or overlooked. Municipal governments are often dominated by elites who have 'forgotten' traditional rules and practices because of their long history of familial activity in the market economy. In fact, in some communities, the indigenous rules and practices have been abandoned and must be reinvigorated or recreated to take advantage of Ancestral Domain. The National Commission on Indigenous Peoples has recently been accused of creating 'fake' councils of tribal elders to facilitate Ancestral Domain delineations.⁴⁷

3. Alliance-building. To counter the threats posed by the various arms of the state, state concessionaires and migrants, indigenous communities have forged alliances with various parties. These include alliances with:

- Guerilla forces⁴⁸ – indigenous struggles against militarization deployed by the government to resettle them or to allow corporate access to their resources have led to support for communist and Muslim insurgencies;
- Non-Government Organizations, including both religious and lay organizations;
- Other indigenous groups at the regional and national levels.

⁴⁶ See Prill-Brett 2003.

⁴⁷ June Prill-Brett, personal communication, July 2005

⁴⁸ In the south, Muslim indigenous groups may support Islamist guerillas; in the north, indigenous groups have aided communist insurgents and, in the 1980s, initiated their own insurgent militia – the Cordillera People's Liberation Army – later absorbed into the Armed Forces through a peace accord.



Figure Five: A view of Sagada, Mountain Province. The national government gave a concessionaire, Cellophil Resources, rights to timber – corporate group property under their Applai customary laws - on community lands in the 1980s. In response, Sagadans became involved in NGO networking at an international level while local support for the New Peoples’ Army (communist) insurgency grew.

Indigenous reactions and alliances in Australia

In Australia, the long history of political and social marginalization of Indigenous people (and the limited literacy and exposure to ‘mainstream’ education of many Aborigines), as well as the poor transfer of information about claims processes, has left many Indigenous Australians in a poor position to understand or respond to the recent proliferation of land rights and native title legislation and their effects. As in the Philippines, both apathy and opportunism are readily apparent across the continent, but many people – both in remote areas and in the settled south – remain intensely passionate or concerned about the pursuit of recognition for their customary land tenure.

Both the ways in which the legislation for State and Commonwealth recognition of land rights codifies customary interests in land, and the application of introduced concepts about land-owning groups (in particular, the notion of ‘tribe’) – concepts that have often become deeply embedded in local social imaginaries – have already exercised a hugely

transformative influence on local systems of customary land tenure. Such influence is also apparent with regard to associated forms of management of natural resources and other common property resources (for example, royalties from mining on Indigenous lands).

1. Proliferation. The *Native Title Act 1993* in particular (as well as earlier land rights legislation) has led to a proliferation of ‘tribes’ (and, in settled/southern Australia, larger ‘nations’) amongst Indigenous people across Australia. This proliferation of the privileging of ethno-linguistic identities that were typically far more marginal in the ‘classical’ social organization of Indigenous Australians presents considerable challenges in areas where the principles of these classical systems continue to operate amongst some (if not all) of the members of a particular ‘tribal’ groups. In northern Queensland, for instance, there is considerable disagreement amongst the members of a number of native title claimant groups as to whether all the members of a particular ‘tribe’ should be representing themselves as ‘traditional owners’ of tracts of land associated with members of one or more smaller ‘clan’ or ‘family’ groups.⁴⁹

Nonetheless, the influence of Western notions – in particular that of the ‘tribe’ – has been such that many Indigenous Australians, as well as non-indigenous people, continue to privilege these notions in figuring Indigenous customary tenure in land claims and related dealings, leading to the ongoing proliferation and sedimentation of such notions amongst Indigenous people. Such proliferation has been hastened by the convenience and recognizability of the notion of ‘tribe’ amongst non-indigenes, in part because it is easily codified by non-indigenous organizations, but also because, as a concept, it is readily recognized by those whose understanding of Indigenous social organization is developed from a Western/Anglo-Australian cultural background.⁵⁰

2. Bureaucratic Opportunism. There is a clear desire by a range of state agencies – and, increasingly, by non-state organizations and the private sector (in particular, mining companies and other enterprise developers) – to clarify questions of customary tenure, and to codify Indigenous land-owning groups.⁵¹ Clarification and codification are (in part) driven by the need to facilitate negotiations, consultation and agreement making, as well as the implementation of government and non-government projects across Australia. Such attempts at clarification and codification have become closely tied to the development of the native title process, and its impacts on the relationship between the state and Indigenous Australians.

In part, codification of Indigenous tenure holders through native title and land claims provides a potent mechanism for the inclusion of Aboriginal people in government and

⁴⁹ See Smith, forthcoming (b) “‘Still under the Act?’” Forthcoming in *Oceania*, 2006.

⁵⁰ See Smith, forthcoming (b).

⁵¹ See Smith 2003a.

non-governmental projects, and thus allows for the extension of the state into what anthropologists in Australia have referred to as the ‘Aboriginal domain’, those spaces in which

the dominant social life and culture are Aboriginal, where the major language or languages are Aboriginal, where the system of knowledge is Aboriginal; in short where the resident Aboriginal population constitutes the public.⁵²

As noted above, despite governmental claims about ‘recognition’ of Indigenous tenure systems, Aboriginal incorporation through codification of customary systems of land tenure exerts a strongly transformative effect on both the complex forms and the underlying principles that constitute these local systems.⁵³ The anthropologist James Scott⁵⁴ uses the phrase ‘thin simplifications’ to identify the ways in which the state’s attempts to make sense of the complexities of local systems reifies and delimits these complexities. But such attempts at producing clarity and certainty are themselves often the source of further complexities. In Aboriginal Australia, as elsewhere, the opportunity that codification provides bureaucrats and others to ‘make legible’⁵⁵ local tenure systems and Indigenous land-owning groups tends to feed back into these systems, creating new difficulties and complexities through local articulation with state codification regimes.

This is the case even where Indigenous people, either actively or through the continuation of local land-related practices, attempt to resist government-linked programs of codification. A range of factors – not least, the opportunity that codification offers competing groups or individuals to extend their land claims into contested areas – tends to impel Aboriginal people to enter into native title or land claims regardless of their acceptance of the principles upon which codification operates. The ‘overlapping claims’ which result from the transfer of local competition over customary tenure into the formal domain of state codification add to the stresses and conflicts between Aboriginal groups. Such conflicts have become a major aspect of contemporary Indigenous politics, and demand huge amounts of institutional time and resources to resolve (in particular, the

⁵² Von Sturmer, J. R. 1984 The different domains. In *Aborigines and Uranium*, pp. 218-237. Canberra: Australian Institute of Aboriginal Studies, p. 219.

⁵³ See B. R. Smith and F. Morphy (eds), forthcoming, *The Effects of Native Title*. CAEPR Monograph Series. Canberra: CAEPR, The Australian National University.

⁵⁴ Scott, J. C. 1998 *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed*. New Haven: Yale University Press.

⁵⁵ Trouillot refers to states’ operations through a ‘legibility effect’, which produces ‘both a language and a knowledge for governance, of theoretical and empirical tools that classify, serialize, and regulate collectivities, and...the collectivities so engendered. Trouillot, M.-R. 2003 *Global Transformations: Anthropology and the Modern World*. New York: Palgrave MacMillan, p.81. Such ‘collectivities’ include the ‘tribes’ codified through native title processes - see Smith, forthcoming (b).

resources of NTRBs and the NNTT), as well as adding additional burdens to local Indigenous lives.

The opportunities offered to individuals through the increasing articulation of the 'Aboriginal domain' and the state and private sector have also led to the development of an associated Indigenous elite, linked to a range of new 'Indigenous organizations', whose agendas and projects are often deeply antagonistic to those of the (other) members of local Indigenous polities.

Like Indigenous peoples in the Philippines, state recognition and codification of Aboriginal customary tenure does not necessarily bring with it legal or practical acceptance of indigenous resource-management practices by government agencies. As discussed above, a number of successful claims under the Queensland *Aboriginal Land Act 1991* have not led to the promised development of joint-management over national parks in northern Queensland. And the increasingly limited outcomes from even 'successful' native title claims leave little foundation, in most cases, for Aboriginal people to pursue or develop what they regard as appropriate or legitimate land management based on Indigenous tenure systems, customary management principles, and Indigenous environmental knowledge.⁵⁶ In many areas of the country, Indigenous people remain extremely suspicious of, or deeply opposed to, the development and management of protected areas, which are often regarded as a means of dispossessing Aboriginal land owners.⁵⁷ However, recent programs developed both by the Australian government, and by environmental NGOs have led to partnerships developing between Aboriginal groups and non-Indigenous organizations in an attempt to reconcile Indigenous and non-Indigenous interests in natural resource management.⁵⁸

In addition to the problematic articulation between state codification of land rights and native title, and the complexities of local customary land tenure, the difficulties of dealing with the contemporary governmental and non-governmental apparatus brings further complexities to bear in state engagements with Aboriginal land owners. The contemporary articulations between Indigenous people and a range of state and extra-state organizations and interests mean that Aboriginal people have to navigate a complex set of personalities, groups, and agendas within their dealings with 'government' (not to mention the proliferating range of NGO and private organizations increasingly inter-linked with government programs and local Indigenous communities.)

3. Alliance-building. In response to the increasingly complex nature of their articulations with the Australian 'mainstream' (including state agencies, local government, the private sector, NGOs, and other local and regional interests), Aboriginal people across Australia

⁵⁶ See Smith, forthcoming (c) "Managing in a new environment: Ecologies and Resources in Post-Colonial North Queensland." *Cultural Studies Review* 12(1), forthcoming, May 2006.

⁵⁷ See Smith 2003a.

⁵⁸ See below for a discussion of the Indigenous Protected Area program.

have, in many cases, developed a series of alliances with various parties to ensure greater control over their lives and interests – in particular, with regard to their traditional homelands – and to develop access to new resources. These include alliances with:

- Other Aboriginal people and groups, both through formal structures such as local Aboriginal organizations, councils and corporations, and through extensions of traditional alliances within the ‘Aboriginal domain’;
- Local non-Indigenous people, including the pastoralists whose stations (ranches) cover large areas of remote and rural Australia;
- Regional Aboriginal organizations. Although often presumed, from the outside, to be simply ‘representative’, a number of Aboriginal organizations who represent the interests of regional conglomerations of Aboriginal people tend to operate through either patron-client relationships, or relationships of mutual benefit in the pursuit of discrete aspirations and projects;
- Government agencies and their local and regional representatives – although these relationships are most typically brokered through local or regional Aboriginal organizations;
- Researchers – in particular anthropologists and others conducting long-term research with particular Aboriginal communities. Such individuals (and the organizations that employ them) provide access to resources and services otherwise inaccessible to many of the more socially marginalized Aboriginal people living in remote Australian contexts.



Figure Six: Fr. David Thompson (anthropologist) and David Claudie (Chairman, Chuulangun Aboriginal Corporation, Kaanju language group) discuss native title matters, Cape York Peninsula, Australia.

For many Aboriginal people (particularly those living in northern and central Australia) a cultural emphasis on face-to-face and personalized relationships skews engagement with non-Indigenous. As a result, the most successful and sustainable relationships in Aboriginal contexts (both from Indigenous and non-Indigenous perspectives) are those based on long-term familiarity between particular individuals (rather than, say, a government organization or NGO and the roles of offices that exist within it) and particular Aboriginal people and the wider groups in which they are situated.

Current situation with regard to land rights: The Philippines

The IPRA aims to recognize, promote and protect the rights of Indigenous Peoples (IPs): Right to Ancestral Domain and Lands; Right to Self-government and Empowerment; Social Justice and Human rights; and Right to cultural integrity. IPRA provides for the creation of the *National Commission on Indigenous Peoples (NCIP)* as “the primary government agency responsible for the formulation and implementation of the policies” for IPs. The current budget of the NCIP is Php 400 million or USD 7.5 million per annum. It has approximately 1522 permanent staff and is led by 7 indigenous

commissioners appointed directly by the President.⁵⁹ The primary activities of the NCIP are as follows:

NCIP assesses claims to indigeneity - 161 'indigenous' groups sought representation on the NCIP's consultative body, and 14 needed further investigation on the merits of their claim to representation.⁶⁰ Groups were excluded as 1) being subgroups of a major IP group (24 groups) 2) being not indigenous to province (15 groups) and 3) not being an ethno-linguistic group (11 groups).

NCIP issues native title – NCIP issues Certificates of Ancestral Land Title (CALTs)⁶¹ (individual private title) and Certificates of Ancestral Domain Title (CADTs) (community title.) These titles have been issued for areas previously awarded CADCs and CALCs by the Department of Natural Resources (DENR) and areas claimed through direct applications to the NCIP.

Based on combined applications for direct CADTs and conversion of CADCs into CADTs, NCIP estimates that 5 million ha of Ancestral Domain lands. Only about 1.4% of this area - 70,000 ha - is already covered by CADTs. Thus, at the current rate it will take decades to get through the determination process. The idea underpinning these efforts is that once ownership of the land is determined, the other steps leading to sustainable development and livelihood security will somehow fall into place.⁶²

All AD certified lands are exempt from taxes, unless used for large-scale agriculture, commercial forest plantation and residential purposes and upon titling by other private persons. Under the IPRA and NCIP regulations, all taxes exacted from a CADT area should go towards the sustainable development of the Ancestral Domain.

NCIP conducts Free and Informed Prior Consent (FPIC) procedures – The NCIP ensures that indigenous groups can give informed consent to or reject development proposals involving any indigenous lands by holding community consultations and then providing proponents with a formal certificate of consent. In the first years of NCIP operation, this became a time-consuming activity, involving multiple visits and meetings with indigenous leadership. Pressure from the mining industry, in particular, has led the NCIP to reduce the time for these consultations from 185 days to 107 days, and to streamline and decentralize the certification process for areas without Indigenous Peoples living in them. Exploration projects now only require a certification of consultation from

⁵⁹ See www.ncip.gov.ph for details

⁶⁰ See Boquieren 2002.

⁶¹ IPRA also allows the titling of individually owned ancestral lands under the provisions of the Land Registration Act 496 of 1902.

⁶² See Prill-Brett 2003.

a designated official, instead of the resolution of the whole municipal or provincial council.

NCIP mediates conflict between IPRA and other laws/agencies – There are significant conflicts between IPRA and other laws regulating environment and natural resources, particularly Philippine Forestry Reform Code 1982, Philippine Mining Act 1995, or laws pertaining to issues of governance. These conflicts have led to contradictory interpretations that have required the involvement of the legal system to settle.⁶³ NCIP is currently establishing a new consultative mechanism between itself, DENR, DLR, Department of Agriculture and Department of Interior and Local Government.

NCIP has a SWAT team – NCIP has established a fast-response for crises, particularly those arising from threats of immediate dispossession of indigenous groups or entry of ‘developers’ without indigenous peoples’ consent.

Current situation with regard to land rights: Australia

The current situation with regard to land rights and native title in Australia is discussed in section 3 above. This section provides further details with regard to the ways in which the *Native Title Act*, and its associated organizations and processes, deals with Indigenous land rights and interests in Australia, and some current changes in Federal government policy concerning native title.

As of 31 August 2005, there were 71 determinations of native title in Australia, of which 44 were by consent. This included 52 determinations that native title exists in the whole or part of the determination area. There were also 187 registered Indigenous Land Use Agreements (ILUAs) (see below).⁶⁴ These determinations and registered ILUAs represent only a tiny proportion of the 478 (as yet undetermined) native title claims registered as of 30 September 2005.⁶⁵ While all of these claims are currently ‘active’, the lack of resources and the huge number of extant claims facing the native title system (in particular, Native Title Representative Bodies), combined with the often lengthy and difficult process of pursuing determination either through litigation or negotiation, mean that a number of these claims are ‘in limbo’ at any time. Nonetheless, a number of determinations and parallel agreements have been reached and, despite current claims by the Federal Government, there is clear evidence, in at least some areas, of native title significantly changing the ways in which customary tenure is dealt with by non-Indigenous interests across Australia.

⁶³ See Babilonia Wilner Foundation website (<http://www.bknet.org/lawindex.html>).

⁶⁴ Attorney-General’s Department (Cth) 2005 *Native Title reform: Practical reforms to deliver better outcomes in native title*. www.ag.gov.au/nativetitlesystemreform.

⁶⁵ National Native Title Tribunal 2005 *Geographic extent of claimant applications as per the register of Native Title claims*: www.nntt.gov.au/publications/data/files/Register_NTC_A4.jpg

A key way in which the native title process is able to transform land-based relationships with other parties, and gain meaningful recognition of customary interests by non-Indigenous parties, is through the development of Indigenous Land Use Agreements (ILUAs). An ILUA is a voluntary agreement about the use and management of land, made between a native title group and other parties, including local government, miners, and pastoralists. ILUAs provide a means to resolve the native title interests of Aboriginal groups with the interests of these other parties, allowing them to make binding agreements about how land is used alongside, or as an alternative to, the process of seeking a determination of native title. In some parts of Australia, ILUAs are negotiated as part of reaching a consent determination of native title.⁶⁶

The flexibility of ILUAs (the terms of agreement are determined solely through negotiations between the parties and their representatives and advisers) allows them to be tailored to suit the needs of the people involved and their particular land use issues. By making agreements, Indigenous Australians may gain benefits such as employment, compensation and recognition of their native title. Other parties to the agreement may obtain the use of land for development or other purposes.⁶⁷

Another key aspect of the machinery established through the native title process is the incorporation of Prescribed Bodies Corporate (PBCs).⁶⁸ These organizations are incorporated bodies established to represent a group of successful claimants following a claim under the *Native Title Act 1993*. Following a Federal Court determination that native title exists, the court codifies the native title holding group and the rights and interests of which their native title consists. This group is then impelled to form a PBC – a body to represent them as a group and manage their native title rights and interests. As one anthropologist with extensive experience in the design and implementation of PBCs puts it:

The role of prescribed bodies corporate is to protect and manage the native title, in accordance with the wishes of the relevant indigenous people, and with the requirements of the legislation.⁶⁹

⁶⁶ See Parliament of the Commonwealth of Australia 2001. Nineteenth report of the parliamentary joint committee on native title and the Aboriginal and Torres Strait Islander Land Fund. Second interim report for the s.206(d) inquiry: Indigenous Land Use Agreements. September 2001. Canberra: Commonwealth of Australia.

⁶⁷ www.nntt.gov.au.

⁶⁸ See Mantziaris, C. and Martin, D. F. 2000 *Native Title Corporations: A Legal and Anthropological Analysis*. Sydney: Federation Press.

⁶⁹ David Martin, cited from www.nntt.gov.au.

Under Australian law, the PBC is the legal body that conducts business between the native title holders and other parties with interests in the area over which native title is held. The PBC is thus intended to manage the holding and implementation of native title, as codified following a native title claim, with regard to other parties. PBCs are diverse in nature, reflecting the differences in native title across various Indigenous groups.⁷⁰

In recent years, the Australian government has become increasingly frustrated with the manner in which native title claims are resolved, and the time and resources expended in reaching such resolution. This frustration mirrors earlier governmental dissatisfaction with the outcomes of Native Title court cases, which led to 1998 amendments which profoundly affected the process and outcomes of claims in an attempt to provide greater ‘certainty’ for non-Indigenous landowners and other interested parties (e.g. mining companies and holders of leases for the use of lands in rural and remote areas). As a result, the government has recently announced a review of the processes for resolving native title claims; this review forms part of a suite of reforms to the native title system intended to lead to native title claims being resolved more quickly and cheaply. These reforms are intended to ensure better co-operation of the Federal Court and the National Native Title Tribunal allowing for more effective management of claims. The six main aspects of the proposed reforms are:

- measures to improve the effectiveness of Native Title Representative Bodies (NTRBs);
- reform of the native title non-claimants (respondents) financial assistance program to encourage agreement making rather than litigation;
- the preparation of exposure draft legislation for consultation on possible technical amendments to the *Native Title Act* designed to improve existing processes for native title litigation and negotiations;
- an independent review of native title claims resolution processes to consider how the National Native Title Tribunal and the Federal Court may work more effectively in managing and resolving native title claims;
- consultation with relevant stakeholders on measures to encourage the effective functioning of Prescribed Bodies Corporate (PBCs), the bodies established to manage native title once it is recognized; and
- increased dialogue and consultation with the State and Territory Governments to promote and encourage more transparent practices in the resolution of native title issues.⁷¹

The Commonwealth government is also in the process of implementing changes to the land rights regime in the Northern Territory. These changes are primarily aimed at ‘freeing up’ land that the Commonwealth government regards as useless for economic development given the current legislative nature of land granted under the Territory’s land rights regime. The reforms aim to allow new local councils (either newly created or

⁷⁰ www.nntt.gov.au.

⁷¹ Attorney-General’s Department 2005.

formed from existing land management bodies) to sell 99-year leases in Aboriginal-owned land to individuals and businesses, subject to traditional owners' approval. The new local bodies will also engage in long-term town planning in a bid to establish self-sufficient Aboriginal communities in some of Australia's most remote areas. As part of the reforms, it is intended to promote individual home ownership amongst Aborigines living in remote Australia.⁷²

Despite some support, a number of academics and Indigenous commentators have been critical of aspects of these proposed reforms. These criticisms suggest that, despite a rhetoric of 'choice,' these reforms will see many Aboriginal people losing control of land gained or returned as a result of the past three decades of land rights in the Northern Territory and elsewhere in Australia, and embed many in ongoing and unnecessary mortgage debts, rather than acting as a catalyst for investment and regional economic development, suggesting that

more significant structural issues inhibited development, including remoteness from mainstream markets, low populations, the need for greater investment in education and vocational skills, poor infrastructure and the generally economically marginal nature of most lands held under Aboriginal title.⁷³

The planned reforms have also been seen, in part, as an attempt to wind back the power of Land Councils (large Indigenous organizations that have developed as a result of land rights legislation.) Concerns have also been raised by some commentators with lengthy experience working on grassroots development projects in Indigenous Australia, who assert that the reforms are likely to result in further intensification of conflict and legal action within Indigenous communities, and between Aboriginal people and outsiders who enter into leasing agreements under the new measures.

5. Surveying, mapping and demarcating indigenous and tribal lands

Demarcating Ancestral Domains in the Philippines

In 1998, NCIP lacked funds for land delineation, equipment and staff capability and was limited by quality of documents turned over by DENR. NCIP signed a Memorandum of Agreement with PAFID (Philippine Association for Intercultural Development) and

⁷² Karvelas, P. and Lewis, S. 2005 Canberra to allow black land sale. *The Australian*, 4 October. See also Altman, J. C., Linkhorn, C., Clarke, J., Fogarty, B. and Napier, K. 2005 *Land Rights and Development Reform in Remote Australia*. Melbourne: Oxfam Australia. [see www.oxfam.org.au]

⁷³ Rintoul, S. 2005 A lease on Aboriginal livelihood. *The Australian*, 8 October. See also Altman et. al. 2005.

Anthrowatch, two NGOs, to deal with mapping and delineation.⁷⁴ While the approaches to cultural mapping and delineation of domain are still being formulated, initial efforts have been critiqued as⁷⁵:

- having poor definition of ‘community’ which results in difficulty identifying groups responsible for oral tradition, customary law and particular resources and thus offering no substantial basis for collective action;
- ignoring the complexity of resource management practices for common property, thus producing conflict;
- employing implementers who were not adequately qualified or prepared for carrying out tasks required and thus made unrealistic promises to indigenous participants; and
- ignoring potential and existing intra-community and inter-community/inter-ethnic conflicts, especially in resource competition issues.

Problems with mapping:

- Recognition and codification of Ancestral Domain happens at multiple of scales, usually set by national administrative divisions and which do not necessarily correspond to indigenous resource-management units.
- There is a lack of objective ethnographic information on indigenous land tenure systems and existing property regimes. Communal rights pose the biggest problems: what are the common property resources of a particular community? What kinds of rights to what kinds of resources do community members have access to? Who are the responsible resource managers to what kinds of resources? What are the social arrangements (rules of custom) pertaining to these resources?
- The NCIP process uses weak definitions of domain – Ancestral Domain requires the group to demonstrate ‘effective control’ over territory – a characteristic not necessarily found in all communities applying for a CADT or CALT.⁷⁶ While the IPRA prescribes possession or occupation as the primary requisite for a claim of AD, this does not distinguish communities as to their level of integration with the national titling system. This is especially important for communities who still possess concepts of territory and territorial control – the indicators that correlate

⁷⁴ PAFID has worked on 85 CADCs and CADTs and with over 600 indigenous communities. Anthrowatch is building equipment for mapping and delineation, conducts community organization and capacity building.

⁷⁵ See Prill-Brett 2003.

⁷⁶ See Prill-Brett 2003.

with sustainable resource management. Maintenance of the rule of exclusion and biodiversity within the area are evidence of territorial and cultural integrity, but are not assessed by the CADT process. A sustainable indigenous resource management system indicates an integrated sociocultural system that has been able to adapt to change.



Figure Seven: A view of Haliap, a barangay (village) of Asipulo Municipality in Ifugao Province, Philippines. The municipality has just applied to the NCIP for a CADT and is undergoing a highly conflictual demarcation of boundaries process. Much of the previously ‘communal’ forest land was ‘privatized’ in the 1980s and 1990s by individuals. These people ‘claimed’ the land by underplanting the trees with coffee to mark the boundaries of their plots, then declared the land area as taxable private property. Today, there are many overlapping claims between indigenous villagers, between villages and across now highly contested municipal borders.

***Recognition of Ancestral Domain should require*⁷⁷:**

- 1) Effective control and management (as against mere possession and occupation)
- 2) Operational concepts of territory and resource control (including a principle of exclusion)

Special assistance is needed for communities without traditional resource management practices extant; simply giving them title will not be sufficient to ensure sustainable development of resources. Where absence or lack of an Ancestral Domain concept and resource management practice exists, the state should enter into a co-management agreement with local Indigenous groups. In cases where communities' land tenure rights are secure, support services for sustainability need to be enhanced and developed.

Demarcating Indigenous lands in Australia

The process of demarcating Indigenous lands in Australia has taken a complex historical route. Its greatest impetus – at least in the wider public domain – has, historically, been in the work of anthropologists. From early in the history of European settlement, a number of amateur and professional ethnologists (often working in collaboration) produced accounts of 'tribal organization' across different parts of the Australian continent. These mapping efforts continued as anthropology emerged and consolidated as a discipline in the 1930s and 1940s. Most notable for the purposes of a discussion for contemporary attempts to codify Indigenous customary territories is the work of the anthropologist N. B. Tindale, who produced the first comprehensive 'tribal' map (based on the putative territories of ethno-linguistic, or 'tribal' groups) originally published in 1940, and revised and published in Tindale's hugely influential map and monograph discussion of Aboriginal Tribal Boundaries in Australia in 1974.⁷⁸

Tindale's map is widely circulated not only amongst anthropologists and other experts (who have subjected the map to a sustained series of critiques), but also amongst Aboriginal people themselves. In areas where traditional knowledge of territorial systems has been profoundly affected by colonization, Tindale's map is often drawn upon as a resource in rejuvenating systematic knowledge of 'tribal areas', rejuvenation closely tied to the increasing prominence of the idea of 'tribe' as indigenous form of social imaginary discussed above. For this reason, Tindale's map often becomes the focus of claims and conflicts in the context of Native Title claims, particularly where it is both drawn upon and contested by competing Indigenous factions laying claim to interests in the same region.

⁷⁷ see Prill-Brett 2003.

⁷⁸ Tindale, N. B. 1974 *Aboriginal Tribes of Australia: Their Terrain, Environmental Controls, Distribution, Limits, and Proper Names*. Berkeley: University of California Press.

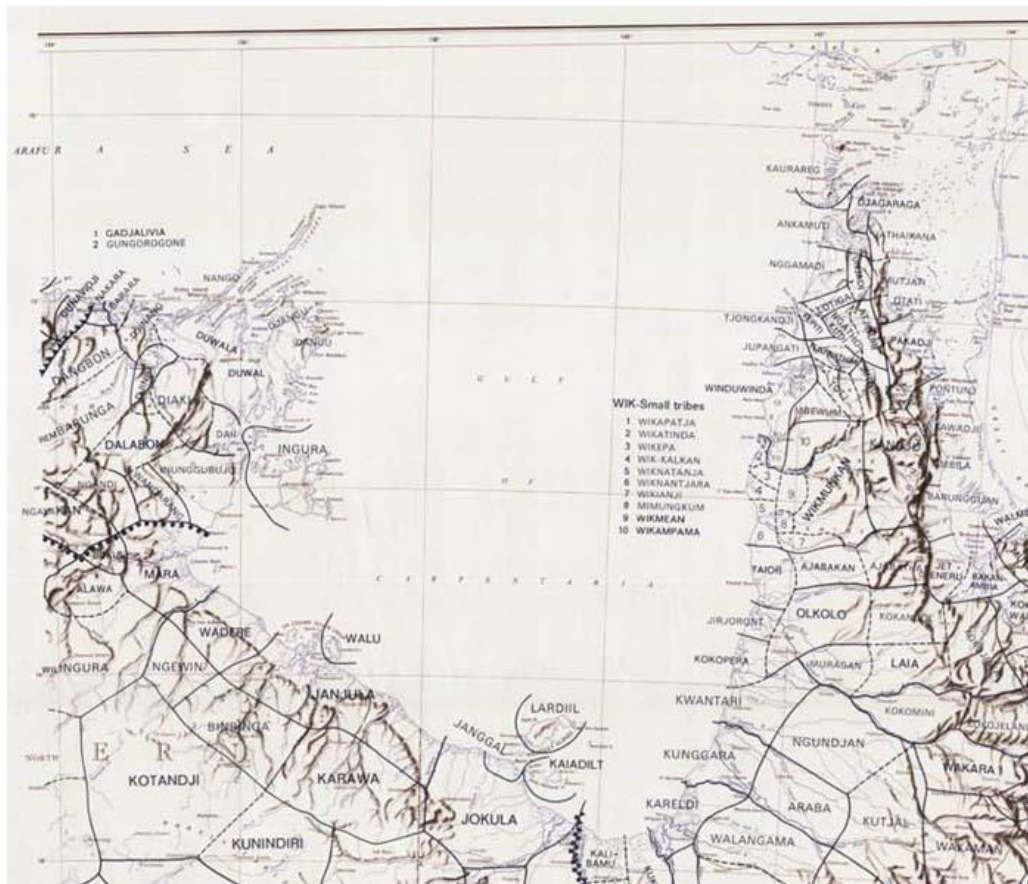


Figure Eight: A portion of Tindale’s 1974 ‘tribal’ map showing ‘tribal’ boundaries in northern Queensland and the north-east of the Northern Territory

There is little room here for a discussion of the history of the more recent development of mapping of Indigenous territorial interests in Australia.⁷⁹ Across the 20th Century the primarily academic drivers for such projects amongst non-Indigenous people were rapidly overcome by anthropological involvement in the preparation of court cases for land rights, particularly following the introduction of the Northern Territory’s Aboriginal Land Rights Act in 1976 and subsequent land rights legislation in other states. Legislation and authorities created with the purpose of protecting Aboriginal cultural heritage and sacred sites similarly impelled large amounts of ‘mapping’ activity. The introduction of the *Native Title Act* has hugely intensified such work, resulting (albeit in a piecemeal and unorganized manner) in vast mapping project to determine Indigenous territorial interests across most, if not all of the Australian continent and its surrounding waters.

⁷⁹ See Sutton, P. 1995 *Country: Aboriginal Boundaries and Land Ownership in Australia*. Canberra: Aboriginal History, and Sutton 2004 for a more detailed discussion.

By the time of the introduction of land claims and site protection legislation, anthropologists and other academics in Australia had already developed complex methodological tools and approaches for mapping Indigenous interests in land across a range of scales and contexts, ranging from individual sites, to the extent or 'boundaries' of 'clan' or 'tribal' areas.⁸⁰ Such methodologies range from simply recording, in notebooks or through audio or video recordings, one or more Aboriginal people describing the extent of particular areas, or the nature of particular sites, to the (increasingly more common) approach of visiting a number of significant 'sites' or places (often involving vehicle or helicopter visits to remote areas), recording information (both from Aboriginal respondents, and with regard to the environment and physical geography of the site itself) about the place in question, and using GIS and GPS mapping technology in combination with paper or electronic maps.⁸¹ Such 'mapping' trips are typically expensive, and whilst some are undertaken under the aegis of research grants, the majority are now organized and paid for by various organizations as part of Aboriginal land claims or native title claims and associated processes (e.g. the purchase and transfer of land to traditional owners by the Indigenous Land Corporation).

These site visits are particularly important as, despite an increasing trend in more urbanized and 'settled' areas towards talk of 'boundaries' as map-lines encompassing particular areas, in more remote parts of Australia in particular (although not exclusively), Aboriginal interests in country tend to be constituted around a number of particular named sites, rather than as a simple contiguous, bounded block.⁸² 'Mapping' exercises thus provide the best way of determining both the extent and complexities of Aboriginal ownership/interest in land discussed earlier in this paper. Again, however, the under-resourcing of organizations working on land claims and native title issues, and underestimation by a number of agencies and individuals of the complexities and timeframes involved in such processes, often means that the extent of mapping that can be supported in any given instance typically falls far short of the level that is desirable. Further, the infirmity of many of the most knowledgeable older people from a particular area, combined with the typically long absences of Aboriginal people from much of their country across the majority of the continent (and a result of government programs and other pressures to centralization and sedenterization) mean that 'mapping' expeditions can be further limited in the results they yield.

Aboriginal people, of course, have long practiced their own forms of 'mapping', not least in the performance and reiteration of ritual song, dance and painting and sculpture which represent particular groups' connections to particular areas and transmit this knowledge to younger generations. These ritual traditions, or the knowledge originally carried in them, remain extant in many parts of Australia, although they have been supplemented

⁸⁰ See Sutton 1995.

⁸¹ See the cover of this report for a photograph taken during one such 'mapping' visit.

⁸² Indeed, in some areas, the areas in which any given group (e.g., a 'clan') holds interests often prove to consist of a number of discontinuous tracts or sites.

(and in some cases replaced) by various syncretic engagements with Western forms of mapping – not least, two-dimensional representations of Aboriginal sites and boundaries on Western style maps.

Despite (and indeed because of) the interplay between them, it is useful to identify two distinct styles of mapping that now interact in the codification and demarcation of Indigenous territorial interests. The first of these, which we might refer to as ‘closed’ (or ‘determinate’) mapping again calls to mind James Scott’s notion of ‘thin simplifications’.⁸³ These ‘closed’ mappings involve abstract, standardized portrayals of Indigenous territorial systems that allow the codification of ‘a vastly simplified and uniform property regime that is legible and hence manipulable’ by a state’s administrative apparatus.⁸⁴ This style of mapping, of course, is now practised by Indigenous as well as non-Indigenous people. It contrasts – though also now commonly co-exists with what we might call ‘open’ or ‘indeterminate’ mapping, which is the style of the longer-running forms of mapping at the heart of Indigenous cultural traditions.

Recognizing such ‘open’ mappings on their own terms would necessarily ‘dislodge our [Western/state] commitments to solid and fixed identities’, and involve accepting ‘flows, [and] relations of difference, and change’⁸⁵ in codifications of Indigenous customary tenure systems. Mappings of this ‘open’ kind remain common amongst many Indigenous Australians, both reflecting the indeterminate and processual character of Aboriginal Australian land tenure systems, and continuing to reproduce these processual, indeterminate aspects of customary tenure in the interactions between members of local indigenous polities.

But fully recognizing the principles through which such systems operate apparently presents insurmountable difficulties for the projects of codification undertaken by state agencies. Western legal recognition of the ‘open’ nature of Indigenous mappings would necessitate ‘at least as many legal codes as there were communities’⁸⁶. Although the specific determinations of the recognition of particular bodies of law and custom in native title cases arguably goes some way towards this, it is impossible for any modern state to fully recognise and incorporate the complexities of the customary law that inheres in the ‘Aboriginal domain’. Modern states require both ‘uniformity of enunciation, [and] unification of the substance of expression,’⁸⁷ which provide the possibility of uniformity of comparison, use and engagement by state agencies in relation to land tenure and

⁸³ See Scott 1998.

⁸⁴ Scott (1998:35). See also Trouillot 2003.

⁸⁵ Pickles, J. 2004 *A History of Spaces: Cartographic Reason, Mapping and the Geo-Coded World*. London: Routledge, p. 184.

⁸⁶ Scott (1998:35).

⁸⁷ Scott (1988:135).

interests held in land. Similar ‘certainty’ is also required by others engaging with Aboriginal ‘traditional owners’, further preventing the state from codifying Indigenous interests in too ‘open’ a manner.

In classically-oriented Aboriginal communities then, territoriality, the reproduction of ‘group’ identities, and the connections between these groups and particular ‘countries’, continue to be of an often ‘indeterminate’ (or ‘open’) character, producing *particular* mappings of interests in land *specific to particular contexts and events*.

The state’s ‘mappings’ of Indigenous territorial interests necessarily involve a shift from one kind of mapping to another. Across Australia, this process of translation is ongoing in the state’s codification of customary tenure systems. One of the key contemporary aspects of this process occurs in the determination of ‘native title’. In the context of native title, the codification of ‘traditional law and custom’, and the determination of Indigenous interest-holding groups in relation to particular areas of land, aims to produce a uniform reckoning of Aboriginal land holding groups that persists across time and context. Unfortunately, not only does such ‘recognition of native title’ tend to be transformative, reductive and reifying in its engagement with local Aboriginal communities, but the always partially unsuccessful attempt to install codified forms of tenure within the activities of Aboriginal people themselves – for example, through the incorporation of Prescribed Bodies Corporate – can often intensify forms of land-based conflict between local Aboriginal groups and individuals.

In summary, approaches to cultural mapping and delineation of Australian Aboriginal customary tenure systems tend to:

- involve poor or problematic definitions of the ‘communities’ of customary land-owners or interest holders;
- ignore the complexity of resource management practices for common property;
- employ implementers not adequately qualified or prepared for carrying out tasks required;
- involve unrealistic promises or estimates of the outcomes and timeframes presented to Indigenous participants;
- ignore potential and existing intra-community, inter-community, and inter-ethnic conflicts, and even exaggerate or create such conflicts through the interventions associated with land codification through claim or transfer processes; and
- fail to grapple both with the scalar and processual complexities of Indigenous land interests in the interests of providing suitable forms of mapping for the state and other parties.

Potential answers to these problems are, unfortunately, at loggerheads both with existing government policies and with the ways in which the state, more generally, needs to operate. At the very least, there is a need to recognize that, in order to proceed in a manner that will achieve the best fit between local systems of Indigenous customary tenure and the state's requirements for codification, in many cases an *increase* rather than reduction in the resources and timeframes of claim processes is required.

Secondly, mechanisms such as Prescribed Bodies Corporate (PBCs) need careful anthropological and other professional involvement – and the close involvement of Indigenous claimants – in their design, implementation and management, to involve the best 'fit' with the processual and indeterminate character of Indigenous land interests⁸⁸. As far as is possible, the codification of Indigenous customary systems should be managed in such a manner as to serve as a 'convenient fiction' for articulation with outsiders, rather than an attempt to determine and 'fix' local systems in the state domain. At their best, organizations such as Prescribed Bodies Corporate can successfully broker the articulations required by both parties between the certainties required by the state, and the indeterminacies of local Aboriginal involvement with country.

Beyond such local organizations, regional bodies resourced and staffed sufficiently to support (but not dominate) local organizations, particularly in their interactions with other interest-holders, will be required in many cases in an ongoing support role. Organizations such as Land Councils or Native Title Representative Bodies, which employ both anthropologists and lawyers, are best placed to provide such support services.

6. Patterns of land devolution/recognition of indigenous/tribal peoples' rights to land (Common legal/institutional measures to restore land to its original owners/occupiers)

[6a] Philippine Ancestral Domain and Australian Aboriginal Land Claims – an analysis of characteristics of effective legal and policy frameworks in both countries

In the Philippines, Filipino scholars observe that the most successful community resource management systems are those that are⁸⁹:

- under the control and management of indigenous communities; and
- practice common property regimes (as detailed above)

⁸⁸ See Mantziaris and Martin (2000), which provides the most comprehensive and informed discussion of the design of PBCs.

⁸⁹ June Prill-Brett, 1997. 'Resource Tenure and Ancestral Domain Considerations: Their Importance to a CBNRM Agenda': www.idrc.ca/cbnrm/documents/prillbrett.cfm

In Australia, characteristics of effective legal and policy frameworks with regard to the recognition of Indigenous systems of land tenure and land use include:

- frameworks which are not overly constraining in their definitions of how to recognize either forms of customary tenure or groups of interest holders/‘traditional owners’;
- frameworks which, rather than seeking to replace local systems (and their indeterminacies and complexities), instead seek to create mechanisms that facilitate articulation *between* local systems and other interest holders, government agencies etc.;
- frameworks that are sufficiently resourced to allow negotiation or determination of Indigenous interests with regard to a particular area, rather than allowing time or resource constraints to lead to ‘short-cutting’ in codification processes;
- frameworks which include not only full and ongoing consultation with a wide number of local Indigenous stakeholders (as well as non-Indigenous stakeholders whose interests may co-exist with Indigenous interests), but also incorporate the ongoing involvement of (properly resourced) professionals, both before and after codification, able to provide advice both to relevant agencies *and* the Indigenous stakeholders;
- frameworks designed to support the resolution of conflicts between Indigenous interest-holders, and between Indigenous and non-Indigenous parties, and which are designed and implemented in such a way as to mitigate the conflict-generating or intensifying effects of codification;
- frameworks that continue to support and validate not only local *systems* of customary tenure, but also aspects of local social, cultural and political relationships linked to land tenure. In particular, frameworks which mitigate the potential for codification processes, and the mechanisms and agencies associated with codification and land management, to support the development of local or regional Indigenous elites;
- frameworks which provide for meaningful recognition and incorporation of Aboriginal customary tenure systems, and associated aspects of local knowledge systems, into land and natural resource management;
- frameworks that do not retard (and which actively support) the social and economic development of Indigenous peoples, and which simultaneously resist the commoditization of land (e.g. through codification resulting in Individual ownership) in ways contrary to the foundational principles of local tenure systems (e.g., in Australia, inalienability of customary land, complex and indeterminate *group* ownership of land).

[6b] local and regional success stories using management of resources and economic development built around indigenous customary law – best practice examples

1 - Success story 1 - sourcing outside support (Bukidnon, Mindanao, Philippines)

In Bukidnon, on the southern island of Mindanao, 4 NGOs, including PAFID and Anthrowatch assisted the Higaonon ethnic group to obtain a CADT and formulate an Ancestral Domain Sustainable Development and Protection Plan. This was a case where indigenous interests conflicted with existing municipal and provincial management plans for the land area occupied by the Higaonon group.

PAFID organized community mapping training for the CADT, returned to construct a 3D map of sacred ground, burial places, farm plots etc. and placed the map in a specially constructed house. They conducted a census within the AD to obtain CADT and to provide accurate demographic data in the ADSPP. An ADSPP workshop focuses on customary principles and policies, allowing the community to develop *sitio* (neighbourhood)-level plans. Higaonon people presented their traditional concepts of land ownership and control, and outlined levels of authority over land disputes and the processes by which to solve disputes. They described their rules for managing natural resources. An AD committee was formed for each *sitio* and this committed coordinated census-taking, mapping and boundary delineation, and undertook the dissemination of information. The process successfully combined Higaonon customary laws with national legislation (CADT) and modern techniques (census, 3D mapping.)

2 - Success story 2 - a new agreement (Imugan, Nueva Viscaya, Philippines)

The Kallahan Educational Foundation (KEF) in Imugan, Nueva Viscaya (on the northern island of Luzon), manages the Kallahan reserve – 14,370 ha of forest, with 1,400 large plants of different species, 150 bird species (35 on the United Nations Environment Program endangered list). In 1998, KEF was awarded a communal lease agreement and a CADC for 40,069 ha of land. 4,000 ha of this is set aside as a sanctuary for biodiversity conservation. Led by a board dominated by tribal elders, KEF has signed a new form of agreement – an Ancestral Domain Management Agreement - with DENR. The ADMA allows the community to harvest and manage the forest reserve for next 5 years, serving as a license to harvest and sell forest resources. KEF runs a Community-based Enterprise that makes jams, marmalades, jellies and preserves as well as paper, brooms, furniture and other products from the forest resources. UMFI (Upland Marketing Foundation, Inc) has a contract with KEF to market the jams and jellies in Manila. KEF products are now found in more than 100 supermarkets in Metro Manila. The area does not yet appear to have applied to the NCIP for a CADT.

3. Success story 3 - Kaanju Homelands Indigenous Protected Area (IPA), North Queensland (Australia)

In response to the perceived failings of 'mainstream' customary tenure recognition (in particular, the native title process) and formal Indigenous governance (regional Aboriginal councils and corporations), Aboriginal people from the Wenlock and Claudie River systems in central Cape York Peninsula, north Queensland, have registered their own Aboriginal Corporation (Chuulangun), based at a small settlement on their traditional homelands.

Chuulangun's most successful project to date has been based around the development of an 'Indigenous Protected Area' (IPA) project in collaboration with the Federal Government's key environmental body, Environment Australia. The purpose of IPAs, from the government's perspective, has been to establish partnerships between government and Indigenous land managers to extend the system of national protected areas to include involvement in lands in which an indigenous interest has been recognized or codified, as well as to promote Indigenous involvement in protected area management, and to integrate traditional environmental knowledge into management regimes.

From the perspective of Chuulangun, the IPA scheme has allowed them to move away from a regional approach to representing Aboriginal interests in land and natural resource management, to one in which what they members of Chuulangun regard as 'proper' customary interests are placed at the forefront of 'management' and 'governance' of traditional homelands.

The development of the Kaanju IPA has centered, to date, on the production of a comprehensive *Kaanju Homelands Land and Resource Management Framework* for the indigenous management of Kaanju homelands.⁹⁰ This framework sets out the goals for the management of Kaanju homelands, outlines management issues, objectives, strategies and projects, as well as outcomes and possible sources of funding, collaboration and support, and proposed timeframes for the implementation of strategies and projects. The main goals set out in the framework, are:

- To conserve, protect and enhance the natural and cultural values of Kaanju homelands for the benefit of current and future generations of Kaanju people;
- To manage Kaanju homelands in accordance with Kaanju laws and customs.
- To reaffirm traditional Kaanju governance structures in relation to land and resource management issues on Kaanju homelands;
- To promote the recognition, locally, regionally and nationally, of the Kaanju people as primary managers and decision makers for our homelands; and
- To incorporate, where appropriate, traditional knowledge with western scientific processes providing beneficial outcomes for natural and cultural resource management policy and practice.

⁹⁰ See www.kaanjungaachi.com.au.

The Kaanju IPA is not set to be declared and registered by Environment Australia, in collaboration with Chuulangun Corporation, in early 2006. It will be the first such IPA in north Queensland, and one of the few such frameworks whose development has been led by a local Aboriginal group.⁹¹

[6c] Approaches to resolving cases of conflict:

i. intra-indigenous conflicts and manipulations of 'indigenous' identities;

In the Philippines, many conflicts arise from long history of indigenous lands being in the 'public domain':

internal conflicts – In some communities, IP individuals have used state legal instruments to privatize communal property. While IPRA offers re-conveyancing options, these only apply if the privatizer is a non-IP. If such cases are not resolved through customary law, the NCIP will hear cases of conflict between IPs at the Regional Hearing Office (RHO) level.

Another form of conflict forwarded to NCIP is that produced by false claims to community membership or IP status. NCIP has introduced a formal process for certification of IP status where local elders and elected leaders recognize individuals as 'tribal' members and forward documents to the regional NCIP office for recording and approval.

inter-group boundary conflicts - Resources which may have originally been managed as the common property of a certain community became perceived as "open access" under pre-Ancestral Domain national laws. Some IP groups have encroached into the traditional territory or domain of another in order to exploit their resources. Here, NCIP must settle conflicts over resources and boundary disputes through their legal functions as a dispute resolution body. Both parties must plead their respective cases in front of NCIP's Regional Hearing office (RHO) in the first instance.

The NCIP's RHO hears cases of: disputes over domains; violation of consent requirements; violation of customary laws; actions for redemption or reconveyancing; and other 'analogous cases.' Cases of disputes between and among IP communities and actions for damages arising from violations of IPRA are heard first at the RHO, and then sent to the NCIP. The NCIP itself has exclusive jurisdiction over any petitions to cancel CADTs/CALTs. Where criminal proceedings are required, cases are heard in the regular

⁹¹ For further details, see Smith, B. R. and Claudie, D. 2003 "Developing a land and resource management framework for Kaanju Homelands, central Cape York: Opportunities and challenges." *CAEPR Discussion Paper* No. 258. Canberra: Centre for Aboriginal Economic Policy Research, Australian National University. www.anu.edu.au/caepr

court system, but NCIP retains jurisdiction over the civil and administrative aspects of the case.

As discussed earlier, NCIP also adjudicates on group claims to IP status through recognition by its regulatory body and offices.

In Australia, resolution of such conflicts typically occurs at two levels. The first of these is within the ‘Aboriginal domain’, and includes the working-out of contested issues between the groups and individuals involved. As has always been the case, such conflicts often involve episodes of physical violence (fighting remains endemic in many Indigenous communities), and this will often attract the intervention of the police and other authorities.

The second level of resolution – particularly where such conflicts involve land claims or native title matters currently being progressed towards determination by representative organizations and other agencies – involves mediation by a range of bodies, most typically including land councils/NTRBs and perhaps the National Native Title Tribunal, who retain a set of trained mediators on their staff. Anthropologists – particularly where they have long histories of working with the groups involved – may be retained to provide advice on such conflicts, and provide expert opinions on evidence of connection such that an agreement or resolution may more easily be brokered. In the case of native title, it remains possible for the Federal Court to make a determination of the coexistence or otherwise of Indigenous interests in such cases of conflict where they relate to a native title claim.

The question of manipulations of Indigenous identities is a problematic one – particularly given the complex, indeterminate/shifting and potentially inventive nature of groups and individual identification that lies at the heart of customary tenure in the Aboriginal domain. Nonetheless, particularly with regard to native title matters, it is generally agreed that vexatious, false, or poorly-supported claims (or aspects of claims) are relatively common (although these more often than not are based on some form of interest or association with the land in question). Resolutions of the problems of manipulations of identity are typically a key matter with regard to conflicts over native title claims, and are dealt with as part of the processes outlined above.

ii. interests of non-indigenous peoples in resources – what forms of conflict arise;

external competition conflicts - Open competition for resources between the community and government-favored individuals or corporations has arisen, with some IP individuals have converted more than their fair share of common property resources into capital. These instances give rise to RHO cases, as above.

More often than not, these cases of conflict with non-indigenes are with concessionaires who have legal rights to land and resources delineated by other government departments.

In these instances, the NCIP attempts to negotiate with the Department in question to revoke the rights issued before taking the case to the courts.

In Australia, ongoing conflicts arise with regard to non-indigenous peoples' interests in resources. However (not least because of the unequal power relationships that have long-characterized Australian colonialism) these conflicts are typically driven by non-Indigenes responding to Aboriginal claims of interests with regard to particular areas of land. In north Queensland, for example, power lobby groups representing both pastoralists and miners have successfully lobbied against the 'uncertainties' produced for their industries as a result of native title, leading to a '10-point plan' of amendments to the *Native title Act 1993* by the Federal government to ensure a 'necessary degree of certainty' for these industries, and further limiting the outcomes of most native title cases for Indigenous claimants. At a smaller scale, pastoralists and miners will often be respondents to individual claims, and their publicly-funded legal representatives endeavor to produce the most restrictive recognition of Indigenous interests possible, often seeking determinations of the 'extinguishment' (non-existence) of native title under Australian common law.

Locally, such contestation may result in frayed relations between local non-indigenes and Indigenous claimants. Again, it is possible for organizations such as the National Native Title Tribunal to play a mediatory role in such conflicts, and the NNTT now often provide information sessions to the wider local community preceding or following registration of a native title claim. Such sessions tend to emphasize the likely limited effects of co-existence of native title with other interests (particularly in the case of pastoralists' interests, which legally supersede indigenous interests.) These negotiations may result in the negotiation of one or more Indigenous Land Use Agreements (ILUAs – see above) between the parties.

iii. *policies and programs designed to prevent or resolve such conflicts*

The Regional Hearing Office and the NCIP's juridical powers are set up to hear and resolve conflicts. However, the IPRA and responsibilities of the NCIP are designed to prevent conflict through the Free and Informed Prior Consent requirements. By arranging for consultative discussions and informed consent in advance, the NCIP's goal is to see resource conflict between IPs and non-indigenes minimized. However, an efficient way of coordinating with other government agencies has yet to be formulated, so much conflict still exists at the regulatory level.

Unfortunately, many of these conflicts do not arise singly, but in complex entanglements. And it is difficult to envision the necessary policies and programs NCIP will require to effectively implement IPRA until a test case arises. What follows is a sketch of one such case.

Court Challenges? – There is currently a Congressional Inquiry into implementation of IPRA and the activities of the NCIP. This inquiry was prompted by reports to Congress of alleged misrepresentation by groups in Palawan claiming indigenous status to the prejudice of genuine IPs in the area. This has led to a review of criteria used by NCIP to determine the validity of claims over ancestral territories and a re-assessment of the approach it takes to resolving conflicting claims. As indicated above, the NCIP has been recognizing claims of collectives of indigenous groups, organized by administrative unit (barangay and municipality). However, in Palawan, it is alleged that some AD claimants awarded title by the NCIP are not actually legitimately indigenous. The allegation is that they are transient fishermen and settlers and have not resided on or inhabited the land since ‘time immemorial’ and their claim is dispossessing other, more ‘legitimate’ IPs. The counterclaim is that these migrant people were IPs but were evicted from their previous territory by a corporate concessionaire – a pearl-farm – that received a government license to exclude local inhabitants from its area of operations. One key question for NCIP is: was the pearl-farm license granted while the CADT was pending with the NCIP? If this is the case, the concession may violate IPRA and thus be revoked by the courts. The second question is a much more difficult one: should a displaced group of IPs enjoy preferred rights to a territory shared with a group of longstanding indigenous inhabitants? Resolving this may well require the NCIP to rethink the applied definitions of indigenous under the IPRA (see above.)

In Australia, As discussed above, there are an increasing number of organizations and individuals who offer mediatory services in relation to intra-Indigenous and inter-ethnic conflicts in relation to customary land claims.⁹² Further details of such mediation and agreement-making processes can be found at the following web-site:

- Native Title Research Unit **Indigenous Facilitation and Mediation Project.** This project aims at ‘developing appropriate approaches to Indigenous decision-making and dispute management in native title’: <http://www.aiatsis.gov.au/rsrch/ntru/ifamp/index.html>

7. Conclusions

In his important review of ‘best practice’ options for the legal recognition of customary tenure, Daniel Fitzpatrick concludes – rightly, in our opinion – that ‘there is no single “best practice” model for recognizing customary tenure’.⁹³ Rather, a range of

⁹² For a discussion of mediation in the native title context, see also Neate, G., Jones, C., Clarke, G. 2003 ‘Against all odds: The mediation of native title agreements in Australia’. Paper available at: www.nmtt.gov.au/metacard/files/Against_all_odds/Against%20all%20odds.rtf

⁹³ Fitzpatrick, D. 2005 “‘Best Practice’ Options for the Legal Recognition of Customary Tenure.’ *Development and Change* 36(3): 449-475, p. 471.

circumstances related to what Fitzpatrick calls ‘the causes and nature of tenure insecurity’ demand different policy responses.

These responses may vary between minimalist, transformative, or incorporative approaches in the ‘recognition’ of customary land tenure groups, the relative security and equitability of access of customary group members to land, current and potential economic benefits, level of conflict over customary land, availability of natural resources, and the effects of outside encroachment on both ‘cultural survival’ and ‘livelihood security’. The three principle concerns in such matters, Fitzpatrick suggests, are ‘social justice, economic security, [and] environmental conservation’.⁹⁴

Rather than replicate Fitzpatrick’s review in its entirety,⁹⁵ we conclude with some brief observations or ‘lessons learnt’ from the experience of the legal recognition of customary tenure in Australia and the Philippines.

With regard to the Philippines, the principal concern is that, in the process of the legal recognition of customary tenure, common property regimes, the safety net that allowed equity in the access to scarce resources for all community members (and especially the poor and marginalized) are being undermined. The legislative environment has produced new conditions where some members of the community able to control access to resources once shared by all members. The *Indigenous Peoples Rights Act 1997* does not provide the necessary measures to prevent or reverse this, and will not necessarily prevent outsiders from buying land from members of the community in return for cash.

More generally, the Philippines experience suggests that recognition of customary tenure should:

- employ a robust definition of Indigenous People and Ancestral Domain, one constructed specifically for the local groups it will represent;
- as far as possible, avoid involving a large number of government agencies and NGOs in the ‘recognition’ and codification process; perhaps, instead, have specialized multi-agency teams
- involve the recognition that a large amount of money and other resources will be required – in particular, money to train implementers and employ expert researchers for grassroots work with local communities;
- avoid the assumption that traditional systems are still fully in place, everywhere.

⁹⁴ Fitzpatrick (2005: 471).

⁹⁵ A review which we commend, save for its problematic commitment to an ‘evolutionary theory of property rights’, which, amongst other problems, understates the transformative effects of particular national and international engagements with customary tenure systems.

To return to the suggestions made above regarding the Australian example, these suggestions made with regard to the Philippines mostly hold for Australia, save that – in the Australian experience – whilst more robust forms of *recognition* of Indigenous customary tenure would (at least from Indigenous perspectives) be desirable, an overly robust *definition* of Aboriginal customary tenure would risk both failing to engage with local and regional differences in customary tenure systems, and further ‘writing over’ of local customary tenure systems by the ways in which these are codified by the state.

More generally, the Australian experience suggests that recognition of customary tenure should:

- not seek to be overly constraining in definitions of the ‘content’ of customary tenure or of groups of interest holders;
- avoid replacing local systems with introduced systems ‘based on’ local systems, and instead employ mechanisms that facilitate articulation *between* extant local systems and the state and other parties;
- contrary to current Federal government policy, recognize that considerable resources and time are required to produce sufficient and sustainable recognition and representation of customary tenure systems;
- be based on widespread and ongoing consultation and negotiation with a wide number of local Indigenous stakeholders;
- ensure sufficient support (financial and otherwise) for the organizations established to represent customary stakeholders following codification of their interests;
- be mindful of the propensity for conflict endemic in many situations of customary land tenure, and the propensity of state recognition/codification processes to exacerbate such conflicts;
- be mindful of the need to support ‘cultural survival’ during, and following, the process of codification;
- ensure that codification processes do not allow the inequitable division of rights, interests and resources in a manner alien to existing systems of customary tenure and interests;
- provide for meaningful recognition and incorporation of local knowledge systems into land and natural resource management following codification;

- actively support the social and economic development of Indigenous peoples, but not (at least in the absence of widespread Indigenous support) seek to commodify land, particularly through the generation of individual ownership, in a manner contrary to the foundational principles of local tenure systems.

Finally, despite the critical direction taken in this report with regard to both the Australian and Philippine system, it should be noted that land claims and native title, in some cases at least, have delivered meaningful outcomes for Indigenous Australians and appear to have the potential to do so for many indigenous Filipinos. In Australia, substantial areas of land have been returned to Indigenous ownership, or meaningful rights and interests recognized in coexistence with the interests of other parties. For others, even limited recognition of rights and interests has delivered both a sense of satisfaction from a long-deferred recognition of Indigenous connections to land by government, and, in some cases, such recognition has provided the springboard for negotiation of involvement in various land management projects, royalties from enterprise development and the like. Despite a series of problems with the process of recognition of customary land tenure, it remains a process of immeasurable importance for Indigenous Australians. And, while the process in the Philippines is less advanced, it holds similar potentials and pitfalls for assuring indigenous groups of secure tenure and thus, their livelihoods.

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