

The truth in painting: cultural artefacts as proof of native title

Kirsten Anker¹

1 Introduction — 'walking all over their painting'

On the front cover of the *Oxford Companion to Aboriginal Art and Culture* an Aboriginal man in a red loin cloth appears dancing on a brightly coloured canvas. He is dwarfed by the size of the painting, and is doubly lost amid the 'riotous colour', the lines, circles and swirls of his platform, the Ngurrara Canvas II. This is Nyilpirr Spider Snell, an artist from the Kimberley/Great Sandy Desert region of North Western Australia, performing the *Kurtal* — or snake dreaming dance — in Canberra to 'remind those sitting on the High Court of the depth of [his peoples'] claim' (*Native Title Newsletter* 2002: 4).

The painting is a collaboration of around 50 artists, produced when the Walmajarri, Wangkajunga, Mangala and Juwaliny peoples were asked to prepare a map of their traditional area for a Native title claim. They decided to do it this way, each person painting a section which represents their own areas of responsibility on the land and in lore. The result, although not employing cartographic conventions, is described as a map and shows the freshwater holes (*jila*) and other sites in the desert in spiritual and physical relation to each other, as well as representing the relationships between the painters themselves (Chance 2001: 28–40). In giving evidence about the connection of the claimants

Anker

to the land during a plenary session² before the National Native Title Tribunal in 1997, each witness stood on their respective portion of the canvas and recounted the stories associated with it.

But what exactly does a painting prove? One painter described the importance of the Ngurrara Canvas:

I believe that [native title] is about blackfella law. The painting is only for proof. When I go to court to tell my story, I must listen very carefully before I open my mouth. Maybe the *kartiya*³ will say, “We don’t believe you” ... That’s why we made this painting, for evidence. We have painted our story for native title people, as proof. We want them to understand, so that they know about our painting, our country, our *ngurrara*. They are all the same thing (Ngarralja Tommy May, in *Chance* 2001: 38).

In one respect, the painting is seen as a way to communicate knowledge to non-Aboriginal people and to the courts. Proof of knowledge about country and traditional law is the measure of entitlement under the *Native Title Act* 1993 (Cth). But the knowledge of which Ngarralja Tommy May speaks is not something which the painting ‘points to’. This would be the conventional understanding that evidence is something that testifies to the external real world of facts. The painting *is* the country, we are told. ‘They are all the same thing.’ This statement suggests that evidence about traditional knowledge is itself evidence of a different way of knowing. The painting is powerful because in proving a different kind of title to that familiar to the common law, it engages in the very question of what entitlement is. The painting is not just a fact about law, it is law.

Second, the painting is seen to address the need for credibility in making a claim, the need to appear truthful. The relation of truth to evidence in Western law is complicated. While the function of evidence is to elicit the facts, where facts are taken to correspond directly to an external reality, the court usually has before it only some form of statement that the facts claimed are true. Evidence is then what allows the court to increase or decrease the weight of probability in assessing that a claim is true. This might include evidence about the character of a witness in order to infer the likelihood that they are making truthful statements.

The truth in painting

Assessments of credibility are also likely to be influenced by more subtle cultural indicators such as dress and manner (Timony 2000). So what is it about a painting that could show the credibility of a witness? Do paintings have their own truth?

Third, the painting is described as representing a map of the claimants' country.⁴ Maps of the more conventional variety have been central to native title claims, as they have been central to the development of Anglo-Australian land law and to the project of colonisation in general. Boaventura de Sousa Santos has written that both maps and law make claims to authoritatively represent reality (1987). The use of such a painting in evidence may undermine the exclusivity of both western cartography and western law because it suggests that in order to recognise a different kind of title, the common law might also have to consider a different way of conceiving of entitlement and representing the land. The painting may well act as a kind of map in the claimants' case, but it does more than just indicate the geographic parameters of the claim. It makes a normative claim about the basis for entitlement and the manner in which it can be proved that resists reduction to a set of rights and interests over a bounded territory.

Thus I will disassemble the painting's function along three axes, all of which see it targeting a particular orthodoxy in the common law and pushing towards a realisation of the transformative and plural character of evidentiary practices in native title. Part 2 takes up the claim that the Nurrara Canvas is law. Although subordinated to the category of 'fact', the painting must be taken on its own terms in order for it to be meaningful as proof, including a very different person-place relation as the basis for entitlement and the point that, for the claimants, the painting embodies the law. The most obvious challenge here is to the idea of the state as the sole source of law, but other assumed attributes of law — that it consists of public, verifiable and positive statements of principle, for example — are also resisted. In Part 3, I will argue that the painting makes a claim to credibility that confronts conventional legal understandings of truth because it operates aesthetically, rhetorically and therefore a-rationally. Lastly, to read the painting as a map entails a challenge to the European valuation of land, the way it is thought and

Anker

depicted. Where maps have historically colluded with property law in order to communicate a particular mode of entitlement, the canvas insists on disrupting the universality of this vision. In all three instances, there is a strong normative aspect to the canvas which is missed in a conventional reading of it as something purely factual, purely aesthetic or purely cartographic. I will show that it is this much larger challenge which must be met if Australia is, as was claimed for the recognition of native title in *Mabo* (1992), to have rejected *terra nullius*.

The Ngurrara Canvas operates in a number of frames.⁵ It contains designs that originate in body and ground painting associated with traditional ceremonies and law, but it is transposed onto the western format of a flat canvas and in acrylic paint of a much wider palette than was earlier available. It is not a map of the claim area in the conventional sense anticipated by the National Native Title Tribunal personnel, and yet it is comprehensible as such in the context of a growing public awareness of the way Indigenous art can represent traditional relationships to ‘country’. It articulates a claim in a language alien to the rational legal discourse of the court, and yet it can still have rhetorical power — ‘It was, one tribunal member said, the most eloquent and overwhelming evidence that had ever been produced [in the tribunal]. The Aborigines could proceed to court’ (Brooks 2003).

2 Ngurrara as law

A Indigenous law as ‘fact’ in native title

Among other things, the Walmajarri, Wangkajunga, Mangala and Juwaliny groups had to prove they have a connection to the area claimed under traditional laws acknowledged and traditional customs observed by them (*Native Title Act* section 223(1)). In *Mabo v Queensland (No 2)* (hereinafter *Mabo*), Brennan J had said that the content of ‘native title must be ascertained as a matter of fact by reference to those laws and customs’ (*Mabo*: 58). The existence of Indigenous law is a necessary, although insufficient, condition for the recognition of native title (*Fejo v Northern Territory* (hereinafter *Fejo*): [46]). In *Members of the Yorta*

The truth in painting

Yorta Aboriginal Community v Victoria, (hereinafter *Yorta Yorta*) the High Court stressed that claimants would have to demonstrate that they continue to practice traditional laws *as laws* and not, for example, as a mere community narrative of what used to happen (*Yorta Yorta*: 554). Evidence for native title thus consists of claimants' knowledge about traditional laws as well as proof that these laws are still followed.

And yet, the status of the state as the sole source of law in Australia is consistently affirmed in native title jurisprudence. In *Fejo*, the court adhered to a strict positivism in holding that although a grant of freehold title could be subject to pre-existing English customary rights (or the regulatory rules of the jurisdiction), the same would not apply to rights deriving from outside the sovereign system of law, regardless of the continuation of Indigenous connection and law, and even once the land returns to the Crown (*Fejo*: [53]). *Commonwealth v Yarmirr*: Kirby J (at [257]) and *Yorta Yorta* (553) confirmed that in Australia, there is only 'one law.' The puzzle in which legal pluralism is at once required and denied is solved, in the court's logic, by relegating Indigenous law to the domain of fact.

The reference to laws and customs is indicative of the court's *sui generis* characterisation of native title: it is not to be bound to European conceptions of property, it has its own character (*Mabo*: Brennan J at 49–50, Deane and Gaudron JJ at 63, 84). The character able to be determined by laws and customs is limited, though, because native title is strictly a right 'over land and waters', and is always subject to the overriding authority of the common law. Thus in *Western Australia v Ward* (hereinafter *Ward*), recognising native title is thus said to involve the translation of a broad Indigenous spiritual relationship to land into proprietary rights and interests (*Ward*: [14]). Some translations, however, would not be apt. The ambit 'right to speak for country' that often expresses one of the strongest identifications between a person and a place was held not to be equivalent to the strongest right under common law, the right to possession, occupation, use and enjoyment (*Ward*: [88]–[90]). If anything, such a right would have been extinguished when the Crown 'spoke for' the land in issuing mining licenses (*Ward*: [91]).

Anker

An example from *The Lardil Peoples v State of Queensland* (hereinafter *Lardil Peoples*) shows how ‘the facts of Indigenous law’ might be ascertained. Counsel for the claimants, seeking to establish a right of exclusive possession, questions a witness about how a particular ‘rule’ concerning permission to enter certain sea territory has been passed on between generations and if there are any sanctions for breaching it. To a European observer, the qualities of longevity, widespread acceptance and obligation give the practice the ‘necessary’ normative or rule-like character (*Lardil Peoples*: para 76). To identify the law, the practice must be indexed to a rational principle rather than the irrationality of compulsion, the ‘modal must’ of the Dreaming⁶ as Elizabeth Povinelli puts it (2002: 260).

Although many judges have commented on the difficulties in ascertaining ‘the nature and incidents of native title’, the treatment of Indigenous law as fact in native title doctrine supposes that it has an objective existence and is able to be communicated more or less accurately through English. It reproduces the familiar positivist notion of law as a concrete presence, consisting of propositional rules, and independent from all that is not law, but it guards the authority of ‘real law’ for the law of the court. A property right is then a triangulation of a rule, a person, and an area of land. Not only does Indigenous law as fact not threaten the state’s monopoly over sovereignty, but neither does it challenge the *idea* of law as a discrete body of rules or the idea of entitlement as arising from rules regulating the use of land.

B Different evidence and evidence of difference

In contrast, the procedures for proving native title, as they have evolved under the *Native Title Act* and in Federal Court practice, seem to augur transformation — a ‘profound shift’, in the words of Court Registrar Louise Anderson — in the common law. Native title is said to challenge ‘the Court, the parties, and the broader Australian communities to reconsider fundamental questions such as Australia’s history, concepts of ownership, time, spirituality, and even the content of truth itself’ (2003: 124) Through section 82 of the *Native Title Act* and changes to the Federal Court Rules, court procedures have been adapted to take

The truth in painting

account of cultural concerns of Indigenous claimants that differ somewhat from the preoccupations and standard practices of the common law. For instance, Order 78(ii) of the Federal Court Rules suggests that evidence about customary law may be given ‘by way of singing, dancing, story telling or in any other way than in the normal course of giving evidence’. It is often through the difficulties encountered in the process of obtaining, and seeking to understand, evidence that primary judges encounter unavoidable differences in ‘fundamental questions’ that a fuller treatment of native title as the recognition of difference would have them consider.

Four areas of perceived difference tend to arise in native title cases.

- Propositional logic. While the examination of witnesses often uses propositional logic to produce contradictions in witness statements and thereby conclude that only X or Y can be true, anthropologists have reported a lack of concern in some Aboriginal communities with apparent contradictions (see *Lardil Peoples*: [71]). The relative context-dependent nature of statements seems to be the point of contrast here. Other differences between Aboriginal and standard English, speech styles, and modes of questioning are commented on (Neate 2003, Eades 1988).
- Written as opposed to oral knowledge. Although section 82 of the *Native Title Act* permits the court to waive rules of evidence, such as hearsay, so that the oral nature of Indigenous tradition can be accommodated, some argue that there is an inherent bias towards the credibility of the written word (Kerruish & Perrin 1999, Reilly 2000).
- Open as opposed to closed information values. The trial process is premised on the optimum availability of facts and Western cultures value information as a public good. Commonly, the accessibility of knowledge in Aboriginal cultures is highly selective and dependent on age, sex and spiritual affiliation. Details of peoples’ connections to places — the focus of proof in native title — are the very ones most likely to be highly secret. Court practices have adapted to some degree in trying to respect (particularly the gender aspects of) restricted knowledge or ‘secret business’.

Anker

- Abstract or universal knowledge as opposed to highly particularised knowledge grounded in places and rituals. Aboriginal ‘country’ is literally the basis of knowledge and authority and the uneven distribution of access to knowledge corresponds directly to differentiated rights in country. There is a metonymic association between following the law, walking the country, and doing ceremony such as singing, dancing or painting the country. Evidence in native title is often given in ‘on country’ hearings in recognition of the inability of some claimants to speak about country without it being beneath their feet.

These differences (crudely drawn) in thinking and being problematise the project of translation that evidence purports to be. Although the common law has carefully restricted native title to property, once traditional laws and customs become a reference point, the practice of claiming native title soon makes the identification of proprietary rights and interests bring with it the tangled cosmos of ideas of which property is a part. Ways of knowing are directly implicated in what something (a painting, an account of hunting and fishing, a Dreaming story) is evidence of and why.

We can examine more closely how the Ngurrara works as fact in the Walmajarri and Wangkajunga peoples’ claim. Up close the painting is made up of abstract components — concentric circles, dots, arcs and lines — which the claimants identify with physical locations, as well as the occasional figure — a tree or a *kurtal* dancer. That the painters talk about ‘getting the boundaries right’ between sections of the painting, that the other side ‘is not my place’ (Ngarralja Tommy May, in Chance 2001: 35, 38) shows that the claimants have differentiated rights of ‘access’ and ‘ownership’ across those physical locations, matters fairly readily translatable as proprietary rights. And yet, ‘[t]here is no grid-like effect to demarcate separation of territories but a blending of adjacent areas, the flow of the painting imitating the flow of peoples’ movement through the country and of family connections over space’ (Pat Lowe, in Chance 2001: 30).

The truth in painting

Throughout Australia, designs were and are used in a number of situations — on rock walls, on bodies during ceremonies, etched or painted onto stone or wooden *tjurunga*,⁷ on the ground for ceremonial or simply illustratory purposes. To the south east of Ngurrara country, the Walpiri of the Western Desert use sand designs to accompany stories and gossip, so that children learn these markings as an integral part of speech (Munn 1973: 63). Their word *guruwari*⁸ expresses the conflation between places, the Dreaming creation stories and visual representation: it means both the design and the marks left by ancestors on the ground (Munn 1973: 119). The iconography of *guruwari* also embodies the realm of law, providing a lexicon for the creation of obligations and kinship by the ancestor Beings.

For the Yolngu in the north, Howard Morphy describes a conflation between bark designs, Dreaming stories and topographical features — bark paintings recount the journeys of the ancestors, shaping the land as they went. Both designs and landform are ‘continuing manifestations’ of the activities of the ancestors (1991: 218). Consequently, narratives, paintings and related ceremonies about ancestor Beings can be thought to provide a sort of alphabet that allows people to get to know their country, and conversely, to construct and reconstruct the story by reading the country (Schreiner 2001).

Ngurrara painter Pijaju Peter Skipper talks about the painting as being both *wangarr* (shadow or image) and *mangi* (essence, spirit or presence) of the land, both a representation of the absent land and an embodiment of it. The land in turn contains ‘the stories and the bodies of the old people’ (Chance 2001: 33). Each section of the painting simultaneously renders the stories associated with each place. It is these stories to which the entitlement implied by boundaries can be traced, and this demonstration of knowledge about places that, locally, can be taken as proof of rights of ownership (Rose 1994: 2). Once the identification of individuals with particular totem ancestors is added, however, the web between individual people and specific places, designs, songs and stories binds them in a relationship of ‘ownership’ quite unlike the possession of an object held by a subject person, familiar in the West.

Anker

Within Indigenous law, various ceremonies of design creation are often part of a ritual obligation, and even transferring those designs to canvas has been seen as a continuity in that obligation, especially where it has been impossible to visit and physically maintain sites (*Neowarra v State of Western Australia*: [340]–[341], Myers 2002: 284, 289). The development of painting for a Western art market has meant that many communities are used to employing art to communicate with a non-Indigenous public and in relation to the goals of recognition, land rights and economic independence (Myers 2002: 5–6, Morphy 1991: 16–20), as will be discussed below. Using painting in an unconventional manner as proof, in order to gain control over traditional country, can be recuperated within the common duty under Indigenous law to ‘care for country’ as this latter notion shifts to accommodate new circumstances, and so the execution of the painting itself is also a manifestation of people continuing to follow the law.

In the logic of native title, the ‘tradition’ of designs, boundaries and Dreaming stories is the frame of reference which gives a painting value as evidence. Designs originating in sand, rock, bark and body painting embody relationships between ancestors and law, living people and places in the land, which makes them crucially relevant to what is being translated in native title as property rights. In evidence, the painting illustrates the rights (such as those indicated by boundaries), the origin of those rights in a system of law (such as Dreaming stories) and facilitates the oral evidence of the witnesses. The very production of the painting tends to the proof, following *Yorta Yorta*, that these people not only hold the requisite knowledge about their country, but continue to practice it *as* law. The painting succeeds in proving this in large part because, according to the painters’ ways of seeing things, the designs are so intricately bound up in the land that ‘they are the same thing’, that walking on the painting ‘brings [the] country up closer’ (Jukuna, in Chance 2001: 40).

But the significance of the painting relating to proof of title has to be decoded. It is, aside from general characteristics of Aboriginal acrylic painting already familiar in contemporary Australia, opaque to uninitiated non-Indigenous peoples. As for any other translation, the grammar and

The truth in painting

idiom of this code have to be respected, followed, in order to render it legible. Its norms have to be taken seriously. How else does a dot establish a title, than if the law binding that dot to a whole conceptual universe is followed as a principle of interpretation, as a law?

In native title doctrine, Indigenous law is not 'law' in any normatively significant way for the court. But because of the need to translate, to take seriously what Indigenous law 'is', the 'fact' box, like the 'property' box, is a leaky one. For one moment, non-Indigenous triers of fact have to suspend their disbelief and put to one side their knowledge of how the world works and interpret it through other principles. There is one further hurdle of disbelief for the claimants, however: not the difference of the evidence in itself, but its authenticity.

3 Ngurrara as truth

Like Ngarralja Tommy May, other painters are confident of the ability of the Ngurrara Canvas to convince others of the truth of their claim (see also ABC Radio National 1997). For the court or the tribunal, the truth of the claim will come down to the authenticity of what is presented as traditional laws and customs connecting the claimants to the land. How is it possible for the canvas to do this work?

A *The normal course of evidence in the common law*

In the conventional positivist view of law, evidence is the process by which the facts of the case are brought before the judge or jury so that they may establish what happened. Once facts are characterised, the relevant legal principle will then be applied so as to produce the decision of the case. The assumptions of what William Twining calls the 'Rationalist Tradition' of evidence scholarship, implicit in most contemporary work on evidence, are that events and facts have an existence independent of human observation, that true statements correspond with facts, and that present knowledge about past events is theoretically possible, if typically incomplete (Twining 1985: 12–4).

Anker

Although in practice we can never perfectly establish the truth of a statement of fact, we can filter the process — through the rules of admissibility — so that only evidence that tends to increase or decrease the *probability* that a statement of fact is true is allowed to be introduced. This includes details suggestive of whether the witness is being truthful or otherwise, that is, their credibility.

The ‘normal course of evidence’ is taken as a reasoned process of revealing the world through the senses of the witness or the court itself, via eyewitness or expert testimony, documentation or exhibited objects. These either constitute the ‘fact’ in question itself (the witness saw the accused stab the victim) or by inference attest to the occurrence of the fact in question (the witness saw the accused running away from the victim with a bloodied knife in hand). A brief survey of contemporary texts indicates that there are few challenges to this paradigm (Cross & Tapper 1985: 16–37, Ligertwood 1993: 4, Howard 2000: 2). Murphy, for instance, admits that ‘facts’ in court are a matter of what the court can be persuaded to believe rather than what is true, but proceeds as if this process of persuasion is uncontentious or uninteresting (1995: 1–16).

And yet, as evidence is a matter of persuasion, it is never a purely ‘rational’ exercise. Whether facts are true or relevant to the question on trial, or can be inferred from other facts, depends on the experience or intuition of the trier of fact. Persuasion takes place by rhetorical and emotional means as well as by ‘logic’, as practitioners are well aware. But the challenge that these points pose for the Rationalist Tradition is more than just an admission of some extra factors added to a core of facts, or a suspicion that the work of most litigators is in manipulating the trier of fact into arriving at the judgment that will suit their client. None of this challenges the proposition that the truth is ‘out there’. The relevance of outlook and experience, however, goes also to the heart of the concepts of logic, rationality and knowledge itself, as feminist and critical race scholars have argued: our background, values and experience affect not only what we know, but how we know (Alcoff & Potter 1993, Delgado 1995, Harmon 1999, Nicholson 2000).

The truth in painting

Critical legal scholars have likewise argued that the process of judgment is neither rational nor determinate, and that both facts and law are highly constructed, dependent on language, reasoning and discourse for their representation (Hutchinson & Monahan 1984). Consequently, ‘the legal representation of fact is normative from the start’ and is telling of a particular way of imagining the world (Geertz 1983: 174). The fallacy of the correspondence theory of facts (where statements are considered to correspond directly to aspects of or events in the real world that exist apart from human discourse) is hinted at by the vernacular of practitioners who often speak of the ‘coherence’ of evidence as a narrative as a test for the plausibility of that evidence (Twining 1985: 183, Jackson 1988). How we assess the truthfulness of a story depends on how well it ‘hangs together’, and this relies in turn on cultural experience with styles of narrative. Playing on standard stories also has the effect of pre-empting judgment — if a woman can be cast successfully as a damsel in distress, or a wicked stepmother, we can guess whether the decision will be in her favour or not (see Sarmas 1994).

Other scholars point to the integral role that our senses play in the way we respond to law to the fact, that it is sometimes the aesthetics of legal drama and discourse that makes certain decisions possible. For example, Desmond Manderson argues that it was the visual impact of the scarred body of the plaintiff in *Natanson v Kline*, her heart beating visibly through ribs damaged by radiation in a mastectomy procedure, that led to a new legal principle of informed consent, when those before her had failed in similar claims (2000: 41). The aesthetics of a body, or a painting, or a judicial decision, imply a moral standard. Likewise, they demand a moral judgment.

Perceiving evidence as rhetorical, narrative, aesthetic and normative puts paid to the premises of the Rationalist Tradition. Instead, the hearing of evidence produces a sort of translation of what is taken to be the ‘real world’ — other places and other times — into the terms of law; it renders a world in which law’s principles make sense. In the process it establishes both the separation of law from society and its mastery

Anker

over society (Mohr 1999). The translation and the constitution of the law/world hierarchy is a play which is dramatised in various ways — the architecture and dress of the court, the presentation of witnesses, exhibits, experts, documents.

Conventionally, however, for all the symbolic significance of wigs and gowns in evoking the majesty of the law, and the historical origins of the forms of order, these aspects of law are mostly considered to be little more than window dressing, peripheral to the substance of either law or fact (Haldar 1994: 188). But the window's frame, like the frame on a painting, plays a role that is not merely extraneous. It constitutes the object, says what is inside and out, is at once a part of the scene while seeming external to it. It tells us, in both legal and aesthetic terms, what is available for judgment (Derrida 1987: 57).

The frame here is more than just the interpretive context of a 'frame of reference'; it has the sense of selection, delimitation, constitution. The frame as an analytic device is bound up in the philosophical question of 'the limit'. In distinguishing between a thing and what it is not — a painting from the wall, an object of beauty as opposed to its ornamentation, fact from law, law from everything else — there is a question of what happens at the border (the limit) between the thing and the not-thing. A frame (*parergon*) does the job of maintaining this limit, it 'delimits' the subject (work, *ergon*) captured within it. But the status of the *parergon* as neither inside nor outside, and yet maintaining the inside from the outside, makes it a paradox. In order to imagine how the *parergon* operates, Derrida, in *The Truth in Painting*, denotes the frame structurally with the figure of a laced boot (from Van Gogh's painting): it laces the edges together by passing through them in a repeated and reversible movement, from outside to inside, from under to over. A frame thus 'cuts out but also sews back together. By an invisible lace which pierces the canvas ... passes into it then out of it in order to sew it back onto its milieu, its internal and external worlds' (1987: 304).

Consequently, when the courtroom, the gavel, the leatherbound law report say 'what passes by me is the law' they are neither superfluous, nor quarantining the law off from the world, but are rather performing

The truth in painting

this lacing role. It is by virtue of the law's frame that the outside becomes represented in the *ergon*, that scraps of the world, 'footprints, fingerprints, chance memories captured by a witness' come to correspond to 'the "whole truth and nothing but the truth" of an event' once brought within the walls of the court (Haldar 1994: 192). In native title cases, some of these frames help constitute the world for the court: a microphone in a bush hearing gives a witness voice, a piece of canvas makes *ngurrara* into a map, a loincloth signifies Aboriginality. The means by which things become what they are. The two senses of frame — *ergon* and frame of reference — are related, for something does not become a 'thing' to be interpreted until it has been framed 'off' from everything else. Each framing then also implies a frame of reference, a weaving between the thing and its context.

B The painting as supplementary evidence

The positivist paradigm for evidence would allow that paintings, dances, songs, and pitching the court in a desert river bed to visit country, are merely novel ways to introduce facts about Indigenous rights and interests in land into evidence. But how are these 'facts' communicated? Without further explanation, a man dancing on a canvas does not immediately say much to a court. An explanation can indicate the significance of the dance, the song, the iconography to the facts at issue—how the claimants are connected to the land and what their rights are over it. But then, as far as the court is concerned, what does the painting add to the explanation?⁹ The presentation of cultural evidence communicates in ways supplementary to the facts proper: by appeal to the senses through colour and rhythm, a sense of space and a smell of dust; and by referents in intercultural knowledge between Indigenous and colonial cultures. Does it *look* like an authentic demonstration of Aboriginal law and culture? Does this man seem to know how to move about the canvas in an Aboriginal way? (Does it tell the story that the court needs to hear?)

For the court, evidence will be judged credible if it gels with expectations of authentic culture (the 'feel' and the 'look') and if the

Anker

witnesses display ‘genuine’ knowledge in their testimony. For this, any observer will rely on a repertoire of cultural precedents, among them a likely awareness of paintings as a particularly high-profile site for debates about authenticity and Indigenous culture in recent decades.

The use of acrylic colours to paint Dreaming designs on boards for sale emerged in Pupunya (in the Central Desert) in the 1970s. With support from the government under the new policy of self-determination, and interest from painters for whom commercial values complimented their own views of the paintings as culturally ‘dear’, a modest market developed in ‘Aboriginal acrylic paintings’. While Indigenous artefacts had earlier held only ethnographic interest for Western audiences (Short 1991: 218, Morphy 1991: 22), they now represent a category of ‘fine art’ in galleries the world over (Myers 2002: 64).

The appeal of these paintings to a Western public has been multi-faceted. In Australia, a new ‘national consciousness’ led people to formulate Aboriginal culture as distinctive of a uniquely Australian identity which was, significantly, linked to its land. Internationally, responses to Aboriginal art were themed around an interest in ‘the Other’ and a nostalgia for place and spirituality, a ‘conceptual return to our lost (“primitive”) selves’ (Myers 2002: 201, 283–6). While acrylic paintings represented an idea of Aboriginal authenticity, however, debates raged around the negative effects of commercialisation and industry on the ‘traditional’ nature, and therefore the value, of such art. On the other hand, it seems that despite the use of new materials and the influence of advisors in tailoring work for a market with particular visual expectations (Myers 2002: 284, 289), the paintings continue to hold the layered significance of designs that were previously painted on bodies, objects and in the sand, to enact stories from the Dreaming and the geographical places belonging to the painter.

This is what interests the court — that something traditional ‘is there’ in the painting. But like most work in galleries, acrylic paintings are intercultural objects, produced in a complex world of government policy, the consumer market, art criticism and land claims as well as distinctly Indigenous purposes. Non-Indigenous ideas of ‘pure tradition’

The truth in painting

are in themselves hybrid events, products of the colonial encounter and textually mediated efforts to explain the inexplicable.¹⁰ The Ngurrara Canvas has a specifically contemporary purpose, but is also continuous with an inherited mandate to look after country; it is not a ‘title deed’ and represents something quite different to ‘property’, and yet, if reiterated over time, it can come to be understood in those terms because property and title deed will *themselves* undergo a semiotic shift (Mohr 2002).

So the world of facts in native title does not exist ‘out there’; it is created for the court by the supplementary evidence in the physical and aesthetic being of the painting or other evidence. In the *Lardil Peoples* example, a principle of exclusive possession comes into being when, through the event of oral questioning, someone articulates what they do when asking permission. The manifestation of Ngurrara/country in the canvas brings the claimants’ law into the terms of the law of the court at the same time as it marks a distinction between the two. More than pointing out that the painting convinces of the truth of its object because it matches stereotypes of cultural authenticity, I am arguing that the excluded supplement of the common law ‘proper’, whether a-rationality and aesthetics in the question of proof, or Indigenous law in the question of sovereignty, always makes a return and so effects a transformation on what *is* proper to the law. The general point here is that the recognition of native title is not the application of a label (property) to an external phenomenon (Indigenous law) by an unassailable common law. What is there in evidence is mixed up in the exigencies of proof — all law becomes articulated and made present in certain ways in response to a challenge or a need to explain and justify and so is intrinsically hybrid.

In stating that the ‘facts’ of Indigenous culture and law do not exist in any objective way for the court, I do not mean that giving evidence is a chimera. It is a practice itself, meaningful, for example, in terms of obligations to care for country or to represent Dreaming relations in pictorial form. It is also a practice for *kartiya*, one that constitutes spaces and relationships in particular ways and one that is required to

Anker

transform law ‘into a living reality, a concrete experience’ (Tait 1999). If, in the usual environment of the court room, symbols and practices work to consolidate the power and authority of western law, then being a visitor on, for example, Walmajarri homeland potentially destabilises that frame of reference by immersing the court in another world. If evidence is the law’s way of framing the world to make it available for judgment, then the intercultural frames of a native title hearing push towards the possibility of other views on the world and other sorts of judgments. A closer reading of the Ngurrara Canvas as a map of country will provide one example.

4 Ngurrara as Map

Through the approximations I ascribed to Indigenous visual culture above — iconography, representation of topography, lexicon — the common reference to paintings as maps is understandable; they both encode the land. Within the native title frame, paintings can thus be accepted in the role of marking out an area of claim, in the way that a cartographic map would. And yet, unlike a topographical map, it would be useless to an uninitiated person trying to find their way, for the map and the canvas are premised on incongruent ways of reading the land. The question I wish to address here is what this habit of reading has to do with entitlement to property.

A Cartography and the common law

In addition to the principles of proof discussed above, property has its own requirements. In the Torrens system of land titles now operating in Australia, proof of title depends on establishing that the person claiming title is the person who is registered as the proprietor of an interest on the register of the state or territory-wide Land Titles Office (or equivalent).¹¹ This system is the apotheosis of a long process of the ‘dephysicalisation’ (Vandavelde 1980: 329) of real property in the common law, where title to land was gradually, and now almost completely, removed from material events on the land.¹²

The truth in painting

In spite of this development, the common law presupposes a resource of memory. In medieval and preliterate times, where the performance of rituals such as turning turf or exchanging objects marked the conveyance of land to a new owner, the objects worked as a guarantee of title 'only because they were fixed as reference points within a medieval art of recollection, which recorded cultural events by associating them metaphorically or metonymically with things and their images' (Pottage 1994: 361). So the functional locus of title was in the local knowledge about boundaries and transfers; the ritual of transfer merely underlined the accumulated practice of neighbours and past owners as to who held what rights and where.

The advent of cartography eventually facilitated the removal of property from local knowledge onto a more abstract domain, first of the paper title, and more recently, of the register. In a more rapidly changing social, political and economic context, individual memories could no longer give certainty. Increased communication led to a perception of local spaces as parts of a whole, matched by the increased availability of maps which placed land onto a homogenising, linear grid. Industrialisation led to a growth in urban areas and rapid changes in topography that confused and outstripped local memory, at the same time as creating the need for, and perception of, land as a commodity. Proof of title in the common law context is thus dominated by a logic of exchange and abstraction. Every time we use the title system, we bring that logic into being as a (naturalised) way of perceiving land.

Native title evidence is introduced into this frame of reference. Memory and practice as a resource in proving title is at once deeply familiar and pointedly forgotten in modern property. It is easy to accept that a painting stands in for memory in the same way as a title deed (or the register) does for common law property, while overlooking the performative, constitutive role that earlier rituals actually played and that the technology of title continues to play, and so missing the subtleties of what native title is performing and bringing into being.

The critical context for this performance, in Australia, is the way the same disciplines of cartography and property that in England facilitated

Anker

industrialisation worked in concert to offer up a vision of a land available for acquisition. Since its inception in the European imagination,¹³ *Terra Australis* was represented cartographically as a blank space within the initially vague outlines of its coast (Ryan 1996: 115–7). The impression of collusion between this and the legal doctrine of *terra nullius* — a legal blank space — is hard to avoid. Once physical colonisation of Australia began, representations of its landscape in the sketches and journals of early explorers followed a similar trope. The monotonous, undifferentiated mass of land in the interior resisted being read, for example for signs of water, in the way that ‘normal’ landscape could be read.¹⁴ Landscape also *became* monotonous because of the imperative to move through space in exploration—the apparent absence of geographical ‘milestones’ frustrated an explorer’s desire to sense progress and direction (Carter 1988: 247).

New maps inscribed colonial qualities over Indigenous (unreadable) ones: the blankness was marked by features of European creation — fences, houses, roads. Locations are specified through coordinates of latitude and longitude that take Greenwich, London — the heart of the British Empire — as their point of reference (Reilly 2003: 3). Indigenous placenames were laid over with names bestowed by explorers who created a landscape in the act of naming. Names reference the imperial act of possession or the experience of exploration itself — Victoria, Queensland, Cape Tribulation, Lake Disappointment.

In an attempt to manage the vastness and unfamiliarity of the land, both written accounts and early landscape painting made use of the comforting European ideals of the ‘picturesque,’ an aesthetic in which the land appears as a scene arranged for the viewer — vivid green foliage, ornamental avenues of trees and the like — and, moreover, as naturally awaiting the arrival of sheep and cattle (Appleton 1975: 25–39, Sturt & Mitchell in Ryan 1996: 74–6). It is a short step from rightfully enjoying the view to rightfully enjoying ownership. Kooris,¹⁵ when present, were corralled by the ‘picturesque’ as part of the scenery — they belonged to the known rather than existing as knowers (or owners) themselves and so did not disturb the fantasy of *terra nullius*.

The truth in painting

Although native title is a form of land ownership that in some sense operates outside the grid of registration, it is in other ways incorporated into the same non-Indigenous view of land through the processes of representation used in native title claims. Maps, as Alexander Reilly explains, are everywhere in native title, and ‘[t]he ability to represent relationships to land and waters cartographically is central to the process’ (2003: 3). Maps are used to specify the external boundaries of the claim area and the extent of other land tenures,¹⁶ and to indicate the various aspects of the claimants’ connection to the country through symbols that represent Dreaming tracks, and other sites of significance to them, alongside the symbols of European settlement — roads, fences and homesteads. Such maps embody both the possibility of co-existence, and the limitations of the recognition of Indigenous relationships to country because in being reduced to a singular, unambiguous discourse, Indigenous spaces are subjected to a deeper process of colonisation (Reilly 2003).

The significance of maps as representations to questions of proof is that they belong to an aesthetic that semiotically communicates entitlement. The act of representing space positions people with respect to the world. Perspectivalism ‘helps constitute an apparent divide between the “sovereign eye” of the observer and the space of the “external world”’ (Blomley 1998: 575) that makes domination and surveillance possible and natural (Cosgrove 1984: 25). In cartography, even the implicit sense of observation is erased. The flatness of projection is a view from no-where and the naturalness of this particular vision is perfected. The cartographic aesthetic thus achieves the necessary conditions for ownership: a subject ‘eye/I’ that can only relate to the objectified land through possession, and a grid of infinitely exchangeable portions. It also excludes other perspectives by creating the illusion that these qualities inhere in the land rather than existing as properties of vision (Bender 1999: 32).

The Ngurrara Canvas, on the other hand, has a spatial organisation in which there are no portions, only places known and named. If dot paintings can sometimes resemble aerial photographs, they are far more

Anker

significant for positioning people in, in relation to, and because of, the landscape. Such land could never be a possession; it is more like family. The relationship is one of care and stewardship.

The Ngurrara Canvas is coined as a map because that is the term to which the claimants responded. The analogy also permits the uninitiated to understand the painting as a representation of the relative position of places in the land. But the painting embodies an alternative aesthetic that contests all three aspects of the legality of entitlement: objectification, commodification and exclusion. As a map, the painting is not simply assimilated to the Cartesian worldview, but participates in shifting the terms in which maps are understood. It introduces a multiplicity to the monopoly over vision, a perspective in which people are in not absent from the map, and a relationship with land that forms an alternative mode of entitlement.

To the court, the Ngurrara Canvas both represents and demonstrates, through performance, the existence of property rights via matters of entitlement under traditional law. But what the painting represents and performs is something larger than what is forensically captured as the frame of traditional law: western titles are also performative, and in this intercultural arena, the evidentiary process hosts a shifting conversation about what land (and with it identity and entitlement) can possibly mean, and performs the fact of that plurality. Although not superseding the technical requirement in section 62(2)(b) of the *Native Title Act* that a cadastral map of the claim area be provided—and so never ‘officially’ a map — Ngurrara as map nonetheless puts into relief the fact that land titles are a complex of habits of vision, practices with respect to the world and the methods of representation that link the two.

B Physical Country

If *Ngurrara* is a map, this map *is* also the country, filled with significant places, connected by stories. Giving evidence on the painting is the next best thing to standing on the land (Chance 2001: 40). Where physical country is understood to be fully integrated both into an Indigenous notion of law and one of identity, it makes sense that, as Kathryn Trees

The truth in painting

has explained in relation to the hearings for the Miriuwung–Gajerrong claim, witnesses do not merely feel more comfortable giving evidence on their home country than in the foreign territory of a courtroom (although that is one way of expressing it); their ability and authority to speak about certain places may literally depend on their being physical present (2002).

The practice of permitting hearings ‘on country’ would seem to go further than merely increasing ‘access to the facts’ because it contemplates the normative impact of being on country to the witnesses. Chief Justice Black of the Federal Court writes that:

The new practice is a recognition that, for many claimants, their relationship to country is not able to be explained in the abstract, and that it is necessary to be on country to gain a true appreciation and understanding of that relationship and the claimants’ evidence about it. It is also an acknowledgment that, under traditional law, some evidence can only be given on country, and that there will be many cases in which it would be quite wrong to expect claimants to talk about their relationship to country by reference to maps prepared by non-indigenous people (Black 2002: 18).

Under the *Native Title Act*, taking account of the cultural concerns of claimants and witnesses is part of the balancing process of procedural fairness (*Native Title Act* section 82). But is there more at stake? If giving evidence on country is a source of authority for Aboriginal people, is there a conversely unsettling process going on here for the court? How does it affect the processes of law ‘for judges to sit in the desert under trees or in tents for 4–6 weeks at a time to hear evidence, with limited facilities and very few formalities’ (Black 2002: 18)?

The physical site of the court and its surroundings are conventionally seen as extraneous to the operation of law. As we saw, however, this window dressing communicates a great deal about the law, and even makes judgment itself possible. Even in a desert setting the idiom of order familiar in courtroom architecture (Haldar 1994) is apparent: during the Miriuwung–Gajerrong hearing, a picnic table was transformed into a judges’ bench with a red cloth; maps and stacks of legal papers reinforced the value of the written word; the judge and the lawyers sat

Anker

on raised chairs and heard from witnesses while they, too were sitting in chairs rather than on the ground; microphones designated who the court would listen to; the whole arrangement enhanced the position of the judge—the performance was for him, who sat in objective distance from it all (Reilly 1996: 203–5). Sometimes such degrees of formality are even requested — as when the Karajarri community invited the court to robe — to reflect the significance of the proceedings for the claimants (Anderson 2003: 135).

There are clues as to how an experience of physical country might affect judgment. Reilly writes that the court looked uncomfortable in its new setting on the riverbed of Miriuwung–Gajerrong country (1996: 205). In *De Rose v State of South Australia* (hereinafter *De Rose Hill*), O’Loughlin J mentions six of the 13 sites visited during the hearing. Unusually for a native title judgment, he gives some brief descriptions of physical aspects of the sites. For instance, the site at Intalka was said to be ‘a rocky gorge of spectacular beauty, spoilt by the presence of three large rusted water tanks’ (*De Rose Hill*: [384]). Some of the significance of the places to the claimants was described — where the ancestor Beings had traveled through, places of danger and death — and the association of ancestor Beings with physical features of the land was a recurring part of the hearing (*De Rose Hill*: [387]).

We can only speculate as to the effect on the trial judge of travelling round to these various sites with elderly Yankunytjatjara and Pitjantjatjara people, at times obviously impressed by the landscape and the stories associated with it (for example *De Rose Hill*: [410]). Perhaps there are some clues to his surprising findings that the claimants had lost their spiritual connection to the place (*De Rose Hill*: [910]–[915]), however, from the fact that the claim area comprised a cattle station. Alongside emu eggs transposed into boulders and *Tjukurpa*¹⁷ tracks there were fences, water bores and cattle. This is contested land, and the presence of European artefacts in the landscape represents a *fait accompli* in the competition between two groups of people.

Just as the legal doctrine of *terra nullius* was accompanied by cartographic and artistic representations that all spoke to a particular way of seeing the land and the Kooris, Murris, Wiradjuris and others

The truth in painting

who lived there, a reversal of the doctrine relies on an ability to see the land as peopled, as belonging to someone, as known to someone. It is possible to consider that hearings ‘on country’ merely enable a more comprehensive presentation of the facts required to prove native title. This is a perspective that poses few challenges to the positivist conception of law and evidence. However, I would argue that a hearing on country enables the change of view required to fully reverse *terra nullius* in all its constituent parts by physically locating the court in what was previously a blank space, and populating it — with ancestors, stories, law and people themselves. In contrast to the positivist conception, this argument proposes a law which, like the specific instance of *terra nullius*, is part of a larger complex of seeing, representing and being in the world.

5 Conclusion

When the High Court spoke of native title as an ‘intersection between two normative systems’ (*Yorta Yorta*: 550) it was as a device to explain the recognition by the common law of rights arising in traditional Indigenous law: the intersection happened once, at the time sovereignty was claimed. Because there can only be one law and one sovereign, recognition relates to property rights alone. But the reference in the definition of native title to the internal perspective of claimant groups — what does Walmajarri law say — means that in the process of proof, what Walmajarri law says about property rights soon unravels into larger and more fundamental questions. Partly because of the inherent requirements of proving customary entitlement as a fact in court, and partly because the Federal Court has been directed to take Aboriginal and Torres Strait Islander cultural concerns into account, some kind of ‘profound shift’ is visible in the necessity to take seriously the daily realities of the claimants’ lives and the way they think: there are unfamiliar rules about who can speak about what and where they can speak; some people aren’t supposed to look at other people; this rock is an emu egg; strangers have to be ‘watered’ before they enter this place; this painting is the country.

Anker

The need for elements of Indigenous law to be taken as principles of interpretation in proof means that the intersection of the ‘two normative systems’ is not a dead letter, but a live quotidian interaction. The dynamics of this can be understood in part by considering how forms of evidence particular to native title, and especially paintings such as the Ngurrara Canvas, communicate their significance by operating within different cultural frameworks. A painting that draws on traditional designs from the Kimberleys works on levels pertinent to the painters in terms of embodying Dreaming stories and their connections to places and ancestral Beings. It is one way of fulfilling a traditional obligation to ‘care for country’ and it in fact performs that relationship to country. For the court, this manner of proof is inevitably read against common law notions of proof, title and the modes of imagination and representation, such as cartography, that support them. Reiteration over time of Indigenous modes of expressing connection to country through Dreaming stories and designs can begin to stand in for these western phenomena — maps, title deeds — within both contexts. In response, the phenomena themselves begin to undergo shifts.

But the intersection is more than simply the traditional law and custom frame caught within the common law frame. Such a painting is not a ‘purely’ Indigenous object, produced for internal purposes. Already there is a recent and high-profile history of Aboriginal painting for a Western market that involves desires for cultural pride and economic independence on behalf of the painters, as well as changing Western aesthetic criteria, ideas of landscape and, for non-Indigenous Australians in particular, a search for a distinctive national identity. The Ngurrara Canvas was painted for an additional specific purpose, the native title claim, but its power as a communicative tool relies on this history of Aboriginal mainstream art and the ability of a non-Indigenous audience to perceive the painting as meaningful. Through its address to the senses, the Ngurrara Canvas may also compel others — without further rational explanation — to recognise in the common law what is a compulsion under law for the claimants.

Lastly, the use of the painting as a physical platform for delivering evidence on country introduces a final frame that draws all the others

The truth in painting

together. To stand on a painting that represents parts of the country in order to talk about those places and its laws embodies the connection in Walmajarri and Wangkajunga ontology between land, people, stories and designs and so brings home a radically different knowledge about land to that of the court. But its spatiality allows it to invoke the concept of maps, while challenging the way of seeing and understanding land that western cartography represents. Standing on a painting that is a map of country from another way of seeing thus confronts the physical and the representational aspects of *terra nullius* — we are here on this country and this is the way it looks to us.

This intersection through the processes of giving evidence is not, despite my emphasis on dialogue, a fluid semiotic free-for-all. Meaning (or knowledge) and power are bound together, and in native title, it is the *kartiya* who have the power to disseminate some interpretations, to quash others, and to back those interpretations with the force of the state. After all, the Ngurrara Canvas does not fulfil the requirements of s62 for a map of the claim area. Others before me have despaired that what is proper to Indigenous peoples, whether in art or in native title, is inevitably erased by the colonial leviathan which at best holds an inventive monologue with itself. Such a view would mean that even when, like the Ngurrara claimants, agency is asserted through cultural means, the terms on which they are received are not of their making — if not property, title, or proof, then dance, painting and ‘Aboriginal or Torres Straight Islander’ trap them in a diorama from which there is no escape. While it may return land to their control or engender pride in aspects of culture, the native title process is stressful, often requires the breach of secrecy laws, and always demands that claimants represent themselves through foreign languages, ideas and technologies.

I do not claim that in using the Ngurrara Canvas as evidence some kind of ‘true’ recognition of the painting’s meaning has taken place, but rather that the processes of interpretation and meaning making are more complex, plural and shifting than the conventional model of proof would allow. In a ‘clash’ of laws, judges may wield the force of law, but the source of law as legal meaning remains a deeply social, and inescapably

Anker

plural, process (see Cover 1983). For law more generally the implications are that some of its neat divisions have to be rethought, in particular, the singular location of law in the state, the separation of fact and law, the rationality of proof, and the idea of property as distinct from a broad ontology of place.

As Fred Myers argues in relation to Aboriginal art, by the very fact that it provokes exposure to a paradox, Aboriginal art has influenced the parameters of art criticism and discourse. The same prospect exists in native title: the involvement of Indigenous claimants in native title processes is not only supplying answers to the questions posed by the common law, but changing the nature — the how and the what — of the questions, themselves.

Notes

- 1 Research Fellow, McGill University and PhD candidate, University of Sydney. I am indebted to several colleagues at McGill — particularly Rod Macdonald, Mark Antaki and Desmond Manderson — whose input helped refine my ideas in this piece; to discussions following presentations at the University of Sydney, as part of the International Roundtable for the Semiotics of Law held at McGill University, and at the forum *Gouvernance et Diversité* in Montreal; and to the LTC anonymous reviewers whose comments were astute, detailed and generous.
- 2 Claimants have to pass an initial registration test with the Tribunal, demonstrating that there is sufficient factual basis for their claim: *Native Title Act 1993 (Cth) s190B(5)*. As of 1 July 2005 the claim is still in mediation: National Native Title Tribunal File No WC96/32.
- 3 White people.
- 4 Aboriginal painting from other regions have also been described as geographic maps: for example Pintupi Western Desert acrylic dot paintings (Myers 2002: 34) and Yolngu bark painting in Arnhem Land (Morphy 1998: 24)
- 5 My intellectual debt here is to Howard Morphy's image of the frame in relation to Yolngu art (1991: 21–32), and Richard Mohr's analysis of change and continuity in law with frames as a semiotic device (2002).

The truth in painting

- 6 An Aboriginal English term for a central conception in some Aboriginal cultures which is sometimes described as the source of law or custom, the time when the land, animals, people, stories and law were created by spiritual ancestor Beings, but also a continuing web connecting all these things. See W E H Stanner's classic essay (1998).
- 7 Sacred object, in Aranda language around Alice Springs (Pannel 1994).
- 8 A type of men's ceremony and corresponding designs.
- 9 I am questioning the position of Western evidence here, not the position of the Ngurrara claimants, who have clearly expressed the view that this was their preferred method of giving testimony, and the way they feel best able to express themselves.
- 10 A sobering analysis of one of the earliest ethnographic studies by Spencer and Gillen is given by Elizabeth Povinelli (2002: 71–109).
- 11 As long as no exceptions to the indefeasibility of title apply, for example, *Real Property Act 1900* (NSW) s42.
- 12 Some rare exceptions include the doctrine of adverse possession, and the provision of easements by prescription.
- 13 Pythagoras devised a concept of a southern landmass counterbalancing the northern one in the 5th century BC, and a *Terra Australis* appeared on the medieval *mappae mundi* (Eisler 1995: 8–11).
- 14 A similar experience was had by European settlers of the Canadian prairies, who were at a loss to know how to paint in the 'absence' of scenery (Rees 1982).
- 15 As early landscape painting was mainly from areas in the South East, the people depicted were Kooris.
- 16 Required by *Native Title Act 1993* s62.
- 17 Dreaming, or ancestral Beings.

References

- ABC Radio National 1997 'Art Work as Evidence in Native Title Claim' *Law Report* July 15 available at <http://www.abc.net.au/rn/talks/8.30/lawrpt/lstories/lr970715.htm>
- Alcoff L and Potter E 1993 *Feminist Epistemologies* Routledge New York

Anker

- Anderson L 2003 'The Law and the Desert: Alternative Methods of Delivering Justice' *Journal of Law and Society* 30/1: 120–36
- Appleton J 1975 *The Experience of Landscape* John Wiley & Sons London
- Attwood B 2003 *Rights for Aborigines* Allen & Unwin Crows Nest
- Bender B 1999 'Subverting the Western Gaze: Mapping Alternative Worlds' in Ucko and Layton 1999: 31–45
- Bennet L and Feldman M 1981 *Reconstructing Reality in the Courtroom* Rutgers University Press New Brunswick
- Black M 2002 'Developments in Practice and Procedure in Native Title Cases' *Public Law Review* 13/March: 16–25
- Blomley N 1998 'Landscapes of Property' *Law and Society Review* 32/3: 567–612
- Carter P 1988 *The Road to Botany Bay: An Exploration of Landscape and History* Knopf New York
- Brooks G 2003 'The Painted Desert' *New Yorker* July 28: 60–7
- Chance I ed 2001 *Kaltja Now* Wakefield Press Adelaide
- Childs M and Ellison L eds 2000 *Feminist Perspectives on Evidence* Cavendish Publishing London
- Cosgrove D 1984 *Social Formation and Symbolic Landscape* Croom Helm London
- Cover R 1983 'The Supreme Court, 1982 Term: Forward: Nomos and Narrative' *Harvard Law Review* 97: 4–68
- Cross R and Tapper C 1985 *Cross on Evidence* Butterworths London (6th edn)
- Delgado R ed 1995 *Critical Race Theory: The Cutting Edge* Temple University Press Philadelphia
- Derrida J 1987 *The Truth in Painting* Trans G Bennington and McLeod I University of Chicago Press Chicago
- Eades D 1988 'They Don't Speak an Aboriginal Language, or Do They?' in Keen 1988: 87–115
- Edmonds M 1994 *Claims to Knowledge, Claims to Country: Native Title, Native Title Claims and the Role of the Anthropologist* Aboriginal Studies Press Canberra

The truth in painting

- Edwards W H 1998 *Traditional Aboriginal Society* Macmillan Education Australia South Yarra (2nd edn)
- Eisler W 1995 *The Furthest Shore: Images of Terra Australis from the Middle Ages to Captain Cook* Cambridge University Press Cambridge
- Geertz C 1983 *Local Knowledge: Further Essays in Interpretive Anthropology* Basic Books New York
- Haldar P 1994 'In and Out of Court: On Topographies of Law and the Architecture of Court Buildings (A Study of the Supreme Court of the State of Israel)' *International Journal for the Semiotics of Law* 7/20: 185–200
- Harley B 1992 'Rereading the Maps of the Columbian Encounter' *Annals of the Association of American Geographers* 82/3: 522–42
- Harmon L 1999 'Etchings on Glass: Reflections on the Science of Proof' *South Texas Law Review* 40/2: 483–508
- Howard M 2000 *Phipson on Evidence* Sweet & Maxwell London (15th edn)
- Hutchinson A and Monahan P 1984 'Law, Politics and Critical Legal Scholars: The Unfolding Drama of American Legal Thought' *Stanford Law Review* 36: 199–245
- Jackson B 1988 *Law, Fact and Narrative Coherence* Deborah Charles Publications Merseyside
- Keen I ed 1988 *Being Black: Aboriginal Cultures in 'Settled' Australia* Aboriginal Studies Press Canberra
- Kerruish V and Perrin C 1999 'Awash in Colonialism: A Critical Analysis of the Federal Court Decision in the matter of *The Members of the Yorta Yorta Aboriginal Community v Victoria*' *Alternative Law Journal* 24/1: 3
- Kleinart S and Neale M eds 2000 *Oxford Companion to Aboriginal Art and Culture* Oxford University Press London and Canberra
- Ligertwood L 1993 *Australian Evidence* Butterworths Sydney
- Manderson D 2000 *Songs Without Music: Aesthetic Dimensions of Law and Justice* University of California Press Berkeley
- Mohr R 1999 'In Between Power and Procedure: Where the Court Meets the Public Sphere' *Journal of Social Change and Critical Inquiry* 1: <<http://www.uow.edu.au/arts/joscci/joscci1/index.html>>
- 2002 'Shifting Ground: Context and Change in Two Australian Legal Systems' *International Journal for the Semiotics of Law* 15/1: 1–24

Anker

- Morphy H 1983 "'Now You Understand": An Analysis of the Way Yolngu Have Used Sacred Knowledge to Retain Their Autonomy' in Peterson et al 1983: 110–45
- 1991 *Ancestral Connections: Art and an Aboriginal System of Knowledge* University of Chicago Press Chicago
- 1998 'The Art of Northern Australia' in Edwards 1998: 6–29
- Munn N 1973 *Walpiri Iconography: Graphic Representation and Cultural Symbolism in a Central Australian Society* University Press Ithaca Cornell
- Murphy P 1995 *Murphy on Evidence* Blackstone Press Ltd London (5th edn)
- Myers F 2002 *Painting Culture: The Making of an Aboriginal High Art* Duke University Press Durham
- Native Title News Letter* 2002 3/May-June
- Neate G 2003 'Land, Law and Language: Some Issues in the Resolution of Aboriginal Land Claims in Australia' International Association of Forensic Linguists 11 July 2003 Sydney: available at http://www.nntt.gov.au/metacard/files/iafl/eates_IAFL_speech_July_2003.pdf
- Nicholson D 2000 'Gender, Epistemology and Ethics: Feminist Perspectives on Evidence Theory' in Childs and Ellison 2000: 13–37
- Pannel S 1994 'Mabo and Museums: "The Indigenous (Re)Appropriation of Indigenous Things"' *Oceania* 65/ 1: 18–39
- Peterson N and Langton M eds 1983 *Aborigines, Land and Land Rights* Australian Institute of Aboriginal Studies Canberra
- Pottage A 1994 'The Measure of Land' *Modern Law Review* 57/3: 361–84
- Povinelli E 2002 *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* Duke University Press Durham
- Rees R 1982 'Painting, Place and Identity: A Prairie View' in Sadler and Carson 1982: 117–41
- Reilly A 1996 'Entering a Dream: Two Days of a Native Title Trial in the North-East Kimberley' *Law/Text/Culture* 4: 196–211
- 2000 'The Ghost of Truganini: Use of Historical Evidence as Proof of Native Title' *Federal Law Review* 28/3: 453–75
- 2003 'Cartography and Native Title' *Journal of Australian Studies* 79: 3–14
- Rose D B 1994 'Whose Confidentiality? Whose Intellectual Property?' in Edmonds 1994: 1–11

The truth in painting

- Roskill M and Carrier D 1983 *Truth and Falsehood in Visual Images* University of Massachusetts Press Amherst
- Ryan S 1996 *The Cartographic Eye: How Explorers Saw Australia* Cambridge University Press Cambridge
- Sadler B and Carson A eds 1982 *Environmental Aesthetics: Essays in Interpretation* University of Victoria Victoria
- Santos B 1987 'Law: A Map of Misreadings — Toward a Postmodern Conception of Law' *Journal of Law and Society* 14/3: 279–302
- Sarmas L 1994 'Story Telling and the Law: A Case Study of *Louth v Diprose*' *Melbourne University Law Review* 19/3: 701–28
- Schreiner A 2001 'Landmarks for Aboriginal Law in Australia' Law Society Association Conference 4–7 July 2001 Budapest
- Short J 1991 *Imagined Country: Environment, Culture and Society* Routledge London
- Smith B 2001 *Australian Painting 1788–2000* Oxford University Press South Melbourne
- Smith T 2001 'From the Desert: Aboriginal Painting 1970–90' in Smith B 2001: 496–517
- Stanner W E H 'The Dreaming' in Edwards 1998: 227–51
- Tait D 1999 'Boundaries and Barriers: The Social Production of Space in Magistrates' Courts and Guardianship Tribunals' *Journal of Social Change and Critical Inquiry* 1: available at <http://www.uow.edu.au/arts/joscci/joscci1/index.html>
- Timony J 2000 'Demeanor Credibility' *Catholic University Law Review* 49/4: 903–44
- Trees K 2002 'Respecting Difference: For Indigenous People Law and Cultural Memory is in the Land not Legislation' *Mediating Law: Theory, Production, Culture* 11th International Conference of the Law and Literature Association of Australia 29 November–1 December 2002 Melbourne
- Twining W 1985 *Theories of Evidence: Bentham and Wigmore* Weidenfelt & Nicolson London
- Ucko P and Layton R eds 1999 *The Archaeology and Anthropology of Landscape* Routledge London

Anker

Vandavelde K 1980 'The New Property of the Nineteenth Century: The Development of the Modern Concept of Property' *Buffalo Law Review* 29/2: 325–67

Walton W 2002 *Legal Argumentation and Evidence* Pennsylvania State University Press University Park

Cases

Commonwealth v Yarmirr (2001) 208 CLR 1

De Rose v State of South Australia (unreported O'Loughlin J 1 November 2002)

Fejo v Northern Territory (1988) 156 ALR 721

Mabo v Queensland (No 2) (1992) 175 CLR 1

Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 194 ALR 538

Milirrpum v Nabalco (1971) 17 FLR 141

Neowarra v State of Western Australia (unreported Sundberg J 8 December 2003)

The Lardil Peoples v State of Queensland (unreported Cooper J 23 March 2004)

Western Australia v Ward [2002] HCA 28

Statutes

Land Rights Act 1976 (NT)

Native Title Act 1993 (Cth)

Real Property Act 1900 (NSW)



Photograph of Ngurrara Canvas II. Andrew Meares/Fairfaxphotos.com



Detroit Industry, North Wall, 1932-1933, Diego M Rivera. Gift of Edsel B Ford. Photograph © 2001 The Detroit Institute of Arts



Detroit Industry, South Wall, 1932-1933, Diego M Rivera. Gift of Edsel B Ford. Photograph © 2001 The Detroit Institute of Arts



Detroit Industry, West Wall, 1932-1933, Diego M Rivera. Gift of Edsel B Ford.
Photograph © 2001 The Detroit Institute of Arts



Detail from West Wall, above.



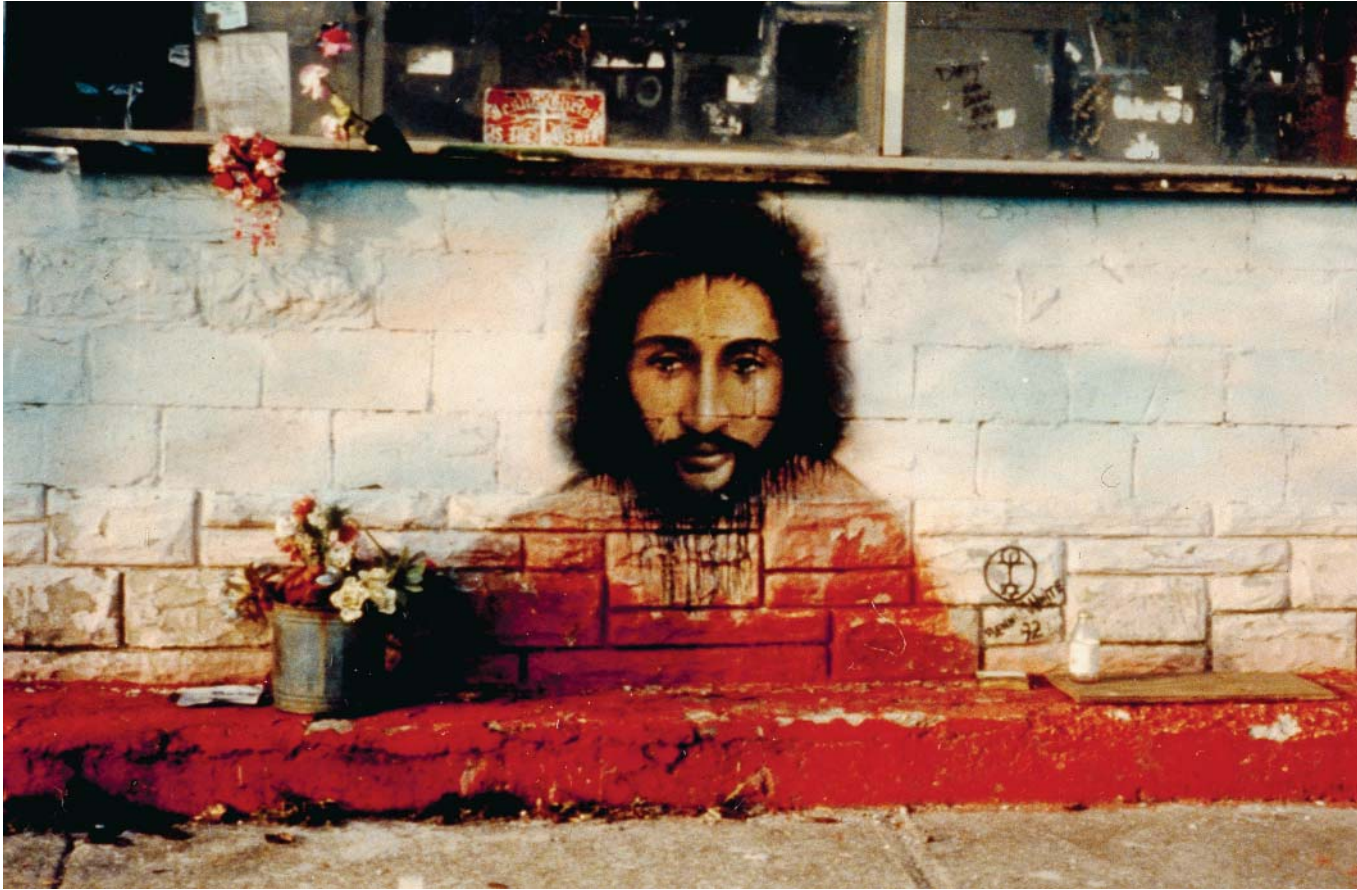
Detroit Industry, East Wall, 1932-1933, Diego M Rivera. Gift of Edsel B Ford. Photograph © 2001 The Detroit Institute of Arts



Predella panel from North Wall.



Predella panel from South Wall.



Malice Green. Photograph by John McKay.