

## Chapter Two: Aspects of Traditional Aboriginal Australia

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## CHAPTER TWO

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# Aspects of Traditional Aboriginal Australia

### NOTE

(1) This Chapter discusses historical, socio-economic and cultural aspects of traditional Aboriginal life. Of necessity, these matters are discussed in very broad and general terms. No notion of generic “Aboriginality” is intended or implied.

(2) Most of the material in this Chapter relates to the Aboriginal culture groups of mainland Australia. It is noted that the language groups of Tasmania and the Torres Strait Islands have entirely different social histories.

(3) In this Chapter, the present tense is used to describe aspects of traditional Aboriginal life which may continue today, albeit in modified form. The past tense is used to describe matters which are of historical, rather than current, significance.

## 2.1

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### OVERVIEW

Current knowledge and understanding of traditional Aboriginal society and culture derives from Aboriginal oral traditions, the writings of early European voyagers and settlers, and extensive research studies<sup>1</sup>. Most of the recorded information derives from post-nineteenth century studies carried out by non-Aboriginal researchers. The findings of such researchers may properly be considered speculative, since many were observing Aboriginal peoples in times of profound change<sup>2</sup>.

#### 2.1.1 Early Occupation

Carbon-dated human remains provide evidence of at least 45,000 years of Aboriginal occupation of the Australian mainland<sup>3</sup>. There is evidence of more than 10,000 years of indigenous occupation of Australia’s Torres Strait Islands<sup>4</sup>.

Although estimates vary, it is probable that at least 300,000 (and possibly more than one million) Aboriginal people inhabited the Australian continent at the time of first

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<sup>1</sup> CH Berndt and RM Berndt *The Aboriginal Australians: The First Pioneers* Pitman Publishing Pty Ltd, Carlton, 1978, p 6

<sup>2</sup> R Broome *Aboriginal Australians* Second Edition, Allen and Unwin, St Leonards, 1994, p 11.

<sup>3</sup> Broome, n 2, p 9. The human remains in question have been discovered at Lake Mungo in New South Wales and at Keilor in Victoria

<sup>4</sup> ‘Aboriginal Australia’ *New Encyclopaedia Britannica* Vol 14, 1985, p 423.

British colonisation<sup>5</sup>. Aboriginal society was organised into hundreds of language groups of varying sizes, many containing sub-groups. Each language group was characterised by a common language, common territory and common cultural attributes. Most language groups were semi-nomadic, traversing defined areas of territory which varied in size from 500 sq km to 100,000 sq km<sup>6</sup>.

No overarching political system or institutions of government existed in Aboriginal society in 1788: there were “no chiefs or kings”<sup>7</sup>. Further, no direct lines of social communication existed across the continent. There was no machinery which could link the language groups into a continent-wide system to resist colonisation<sup>8</sup>.

### 2.1.2 Semi-Nomadism

The socio-economic life of traditional Aboriginal language groups is semi-nomadism. Vegetables, grain, fruit, small animals and fish (where available) provide the mainstay of the diet. Kangaroos and other native game, often scarce or elusive, are highly valued food sources. Each language group possesses an intimate knowledge of its territory, the local flora and fauna and seasonal cycles<sup>9</sup>.

In mainland Australia, little evidence of Aboriginal farming traditions exists: however, it is evident that very few native seeds are suitable for cultivation. Generally, animal husbandry is not practised but, as has been wryly observed, “hopping marsupials, goannas and emus do not encourage pastoral pursuits”<sup>10</sup>.

In Australia, the semi-nomadic life requires physical and psychological adaptation to an often-harsh environment. In desert and semi-desert areas the capacity to travel long distances on foot, without becoming exhausted or overheated, is essential. In order to survive each person must be able to obtain food and water well before the need becomes acute. In hot or otherwise difficult physical conditions energy must be preserved between periods of hunting and food gathering<sup>11</sup>.

Traditional semi-nomadic life on the Australian mainland requires very little in terms of dwellings or permanent purpose-built structures. Material possessions consist mostly of tools, weapons and implements for hunting and gathering. Within the group, women and men carry out traditional gender-specific roles. These relate to the obtaining and preparation of food, the conducting of ceremonies, child raising, teaching, medicine and the fashioning of ceremonial objects, tools, weapons and implements<sup>12</sup>.

The distinct language groups form broadly mapped cultural blocs which are generally congruent with the natural environment (riverine, woodland, desert or coastal) and with drainage basins created by topography and large river systems<sup>13</sup>.

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<sup>5</sup> E Bourke ‘Australia’s First Peoples: Identity and Population’ in C Bourke et al ( eds) *Aboriginal Australia* Second Edition, University of Queensland Press, St Lucia, Queensland, 1998, 3, p 38.

<sup>6</sup> Broome, n 2, p 11.

<sup>7</sup> Berndt and Berndt, 1978, n 1, p 1.

<sup>8</sup> Berndt and Berndt, 1978, n 1, p 1.

<sup>9</sup> RM Berndt and CH Berndt *The World of the First Australians* Aboriginal Studies Press, Canberra, 1988, p 108

<sup>10</sup> AP Elkin *The Australian Aborigines* Angus and Robertson, Sydney, 1976, p 51.

<sup>11</sup> The practice of conserving energy provoked criticism from early European observers, who interpreted it as indolence: Elkin, n 10, p 46, quoting EJ Eyre *Journals of Expeditions of Discovery 1840-1* London, 1845.

<sup>12</sup> Broome, n 2, p 11.

<sup>13</sup> D Trigger ‘Some Aspects of Cultural Diversity Throughout Indigenous Australia’ in F McKeown (ed) *Native Title: An Opportunity for Understanding* Proceedings of Induction Course conducted by the National Native Title Tribunal at the

### 2.1.3 Languages

Although little is known about the origin of Aboriginal languages, it appears that all mainland Aboriginal languages derive from a common ancestor language which is different from all other languages. It appears that Tasmanian Aboriginal languages possess a distinct, separate ancestry from that of mainland languages<sup>14</sup>.

It appears that it is sometimes difficult to distinguish between separate but related languages, and dialects of a single language. Although estimates vary<sup>15</sup>, possibly 600 dialects of more than 270 Aboriginal languages were spoken at the time of colonisation<sup>16</sup>. The *Pama-Nyungan* family of languages, which is characterised by the use of suffixes only, was spoken throughout three-quarters of the continent. In north and north-western Australia, between 28–70 different families of languages existed, most of which used prefixes and suffixes<sup>17</sup>.

Many Aboriginal languages are similar in the sound and form of words, in sentence structure and in complexity of grammatical patterns. They are characterised by precision, brevity of expression, an emphasis on concreteness, and the endeavour to express in minimal words a complete picture of a situation or desire<sup>18</sup>.

### 2.1.4 Inter-Group Relationships

Traditional language groups often engaged with one another on ceremonial occasions and to trade. Interaction occurred most frequently with the nearest groups: groups beyond one's immediate neighbours might be regarded warily<sup>19</sup>.

However, inter-group relationships were not always peaceful. Disputes in relation to personal matters such as marriage arrangements, or ceremonial arrangements were not uncommon. Land or other property was rarely in dispute. Physical conflict might arise, sometimes initiated by small surprise raiding parties: pitched battles might also take place<sup>20</sup>. Often, inter-group disputes were resolved quickly, because of their (usually) personal nature. However, feuds might last for many years, even though long periods of time might elapse between acts of retaliation. It has been claimed that the *Aranda* and *Kutjatja* peoples of Central Australia fought with each other for extended periods throughout the nineteenth century<sup>21</sup>.

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University of Western Australia, Nedlands, 1 – 3 December 1993, p 29. The language groups of Western Australia are briefly noted in Chapter Four of the Benchbook.

<sup>14</sup> C Yallop *Australian Aboriginal Languages* The Thetford Press Limited, Thetford, Norfolk, 1982, p 3.

<sup>15</sup> Yallop, n 14, p 27.

<sup>16</sup> House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs *Language and Culture – A Matter of Survival* Report of the Inquiry into Aboriginal and Torres Strait Islander Language Maintenance, AGPS, Canberra, 1992, p 1

<sup>17</sup> Characteristics of the Western Australian *Ngaanyatjarra* language are discussed in Chapter Five of the Benchbook.

<sup>18</sup> Elkin, n 10, p 51.

<sup>19</sup> Broome, n 2, p 18.

<sup>20</sup> Broome, n 2, p 18.

<sup>21</sup> Broome, n 2, p 18.

## 2.2

### ABORIGINAL SPIRITUALITY

The central tenet of traditional Aboriginal society is belief in the oneness of the spiritual, human and natural world. This spiritual worldview is known as the Dreaming, and it permeates every aspect of traditional Aboriginal life.

#### 2.2.1 The Dreaming

The expression “The Dreaming” (originally conceptualised as the “dreamtime”<sup>22</sup>) was coined in 1958 by the anthropologist WEH Stanner<sup>23</sup>. The Dreaming exists outside of Western concepts of linear time: it refers to a creation era long ago and to a present, supernatural world, which interacts with the natural world<sup>24</sup>. The Dreaming began at the dawn of time, remains bound up in the present, and will endure forever.

Dreaming stories tell of the creation by supernatural spirits of the world and everything within it. Those spirits, sometimes called Ancestral Beings, emerged at the dawn of creation from the pre-existing formless earth, from spirit homes in the sky or from other far-off places. Some Ancestral Beings assumed forms and identities which combined features of humans with other species. Hence certain Dreaming stories refer to “kangaroo-man”, “serpent-woman”, “brolga-woman”, “shark-man” and so on<sup>25</sup>.

The Dreaming stories describe the movement of the Ancestral Beings over the earth, hunting, gathering food, tool-making, singing, dancing and fighting. (“All the affairs of human life, good and evil, are included in the Dreaming stories”<sup>26</sup>.) As they travelled, the Ancestral Beings created the physical features of the landscape, sea and sky. Their “Dreaming tracks” formed riverbeds and watercourses. The Ancestral Beings named the places to which they journeyed, the flora and fauna, and they created sacred rules of human social life and culture (the Law).

The Ancestral Beings eventually died, or returned to their spirit homes, or merged with the physical features which they had created. They passed onto human beings a system of existence which was complete in every respect. The Ancestral Beings entrusted custodianship of certain areas of land to particular language groups, which custodianship was conditional upon those groups following the Law.

In traditional belief the Ancestral Beings retain the power to intervene in the life of man. Thus, they remain a vital force in ensuring the continuity of human existence and in maintaining the fertility of the land and natural species.

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<sup>22</sup> The “dream time” or *alcheringa* was first described in WB Spencer and FJ Gillen *The Aboriginal Tribes of Central Australia* McMillan, London, 1899.

<sup>23</sup> WEH Stanner ‘The Dreaming’ in *White Man Got No Dreaming: Essays 1938 – 1973* Australian National University, Canberra, 1979, 23. (The original essay was published in WA Lessa and EZ Vogt, eds, *Reader in Comparative Religion: A Comparative Approach* Row, Peterson, Evanston, Illinois, 1958).

<sup>24</sup> The Hon Justice Gray ‘Do the Walls Have Ears? Indigenous Title and Courts in Australia’ (2000) 5 *Australian Indigenous Law Reporter* 1, p 2.

<sup>25</sup> B Edwards ‘Living the Dreaming’ in C Bourke et al (eds) *Aboriginal Australia* Second Edition, University of Queensland Press, St Lucia, Queensland, 1998, 77, p 80.

<sup>26</sup> Edwards, n 25, p 87.

The Dreaming stories are broadly similar throughout Australia, although regional variations reflect local landscape features, flora and fauna. Some “travelling Dreamings” cross the territory of many language groups<sup>27</sup>. Where this occurs, different language groups have affiliations to, and responsibility for, different Dreaming sites located along the Dreaming tracks<sup>28</sup>.

The essence of the Dreaming is that every part of the life force - the Ancestral Beings, the land, the sea, humans, fauna, flora and natural phenomena - is inextricably and eternally connected to every other part. Moreover, through the observance of ritual and ceremony, humans are able to enter into a direct relationship with the Dreaming<sup>29</sup>.

### 2.2.2 Totems

An important aspect of Aboriginal spirituality is the belief that every person has a totem. “Totemism” describes the relationship between an individual with a plant or animal species, or a condition or a situation:

“A totem is in the first place a thing; an entity, an event or a condition....Virtually anything perceivable can serve: plants and animals of all kinds – anything in the entire floral or faunal realms; wind, rains, storms, thunder, lightening, stars, sun, moon and clouds – anything of heaven; tools and weapons, food and cosmetics, fire and smoke, mist and spume, fresh water and salt – anything of earth; the human exuviae and genitals - almost anything of the human body..... Totemic significance goes far beyond utility. Sexual desire, cold weather, sweethearts, vomiting, runaway wives, mother’s milk and innumerable pests have all been recorded as totems.”<sup>30</sup>

In traditional Aboriginal belief each person’s totem originates in the place where that person’s mother was impregnated with a “spirit child”. “Spirit children” are released in particular sacred places by the Ancestral Beings. Thus, for example, should a pregnant woman first become aware of her pregnancy when near the site of a goanna, her unborn child is immediately affiliated with the goanna totem<sup>31</sup>.

Groups may also have a totem: a group totem is ancestral, traceable through a descent line in the language group. A totem serves as the symbol of, and companion or protector to, the relevant person or group. Where the totem has a physical form, harming it or killing it - sometimes even touching it - is prohibited. The totemic affiliation also provides a connection to the spiritual world. The performance of special rituals, often in secret, is essential to the preservation of the spirituality of the totem<sup>32</sup>.

<sup>27</sup> For example, the Dreaming story of the Rainbow Snake, which is associated with rain, spirit children and fertility, appears in many areas of northern Australia.

<sup>28</sup> The Hon Justice Gray, n 24, p 2.

<sup>29</sup> Edwards, n 25, p 79.

<sup>30</sup> WEH Stanner ‘Religion, Totemism and Symbolism’ in Stanner, n 23, 106, pp 129 – 130.

<sup>31</sup> Broome, n 2, p 15.

<sup>32</sup> Edwards, n 25, p 86.

### 2.2.3 Connection With Land

The close bonds between Aboriginal people and the physical and spiritual worlds are especially apparent in relation to land. Land is vested in each member of the language group as a sacred bequest from the Dreaming, and thereby provides the foundation for the group's existence. Each group's territory is physically, spiritually, economically and culturally essential for survival. Accordingly, connection to land is an integral part of the psyche of every person within the language group.

The territorial boundaries of each language group are created and validated through the Dreaming stories. Those boundaries, which are often defined by natural features (but which in some instances may be permeable<sup>33</sup>) indicate primary responsibility for country. Members of the language group are responsible for the spiritual maintenance of the land through ceremonies and rituals.

The relationship of an individual or group with land is sacred and cannot be exchanged or lost. Thus –

“It would be as correct to speak of the land possessing men as of men possessing land.”<sup>34</sup>

Since the Dreaming stories relate only to one's own territory, there is no reason to covet country which belongs to others<sup>35</sup>. Accordingly, in early times, rights to land or custodianship of land was rarely challenged. Indeed, to leave one's own territory meant moving away from its protection: other country might be regarded as being “full of danger and mystery”<sup>36</sup>.

The anthropologist WEH Stanner has famously described the richness of the multi-dimensional relationship of Aboriginal people to land:

“No English words are good enough to give a sense of the links between an Aboriginal group and its homeland. Our word ‘home’, as warm and suggestive though it be, does not match the Aboriginal word that may mean ‘camp’, ‘hearth’, ‘country’, ‘everlasting home’, ‘totem place’, ‘life source’, ‘spirit centre’ and much else all in one. Our word ‘land’ is too spare and meagre. We can now scarcely use it except with economic overtones unless we happen to be poets. The Aboriginal would speak of earth and use it in a rich symbolic way to mean his ‘shoulder’ or his ‘side’. I have seen an Aboriginal embrace the earth he walked on. To put our words ‘home’ and ‘land’ together into ‘homeland’ is a little better but not much. A different tradition leaves us tongueless and earless towards this other world of meaning and significance.”<sup>37</sup>

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<sup>33</sup> Trigger, n 13, p 25.

<sup>34</sup> K Maddock *The Australian Aborigines* Allen Lane, London, 1972, p 27.

<sup>35</sup> Broome, n 2, p 14.

<sup>36</sup> T Jacob *In the Beginning: A Perspective on Traditional Aboriginal Societies* Ministry of Education, Western Australia, 1991, p 58.

<sup>37</sup> WEH Stanner ‘After the Dreaming’ in Stanner, n 23, 198, p 230.

## 2.3

### SOCIAL ORGANISATION

In social and political terms traditional Aboriginal life is remarkably stable. Despite the intimacy occasioned by life-long, relatively small-group living, disruption is rarely caused by struggles for wealth or power. This stability is largely attributable to the social and cultural framework of traditional Aboriginal society. Although any analysis of Aboriginal society is controversial, a general overview is attempted below.

#### 2.3.1 Language Groups

The largest traditional social unit is the language group, which comprises men, women and children who are descendants of the same ancestors. The language group forms the primary basis of individual, as well as group, identity.

Language groups may have many, or relatively few, members: they may or may not contain sub-groups. The language group occupies particular tracts of land and obtains its food and other resources according to its Law. The birthright of each member of the group involves reciprocal rights and obligations. A language group may be loosely organised, but loyalty to it usually remains strong<sup>38</sup>.

Membership of a language group is determined according to principles of patrilineal or matrilineal descent (through the male or female line). Marriage is usually, but not always, exogamous (outside the group). Upon marriage, a woman usually lives with her husband's family. Children retain membership of the language group of their birth throughout their lives<sup>39</sup>.

A language group may be more concerned with matters of internal administration than with external matters<sup>40</sup>. The Australian Law Reform Commission (ALRC) has commented that the language group *per se* possesses no particular political or economic importance<sup>41</sup>. Nor is it stratified by social indicators such as wealth or inherited status. In traditional Aboriginal society, spiritual activity is the only means through which elevated social status may be gained<sup>42</sup>.

#### 2.3.2 Local Descent Groups

Smaller sub-groups of a language group, which have been termed local descent groups, may occupy particular tracts of land within the larger group's territorial boundaries. Usually each such tract centres upon a watering place where the group's ancestors lived and where the spirits of the Ancestral Beings dwell. At intervals, perhaps once a year, local descent groups may gather together for ceremonial, social, and/or trading purposes<sup>43</sup>.

<sup>38</sup> Broome, n 2, pp 13-14.

<sup>39</sup> Jacob, n 36, p 119.

<sup>40</sup> Berndt and Berndt, 1988, n 9, p 366.

<sup>41</sup> ALRC 'Traditional Aboriginal Society and Its Law' in WH Edwards, Ed., *Traditional Aboriginal Society* MacMillan Education Pty Ltd, Australia, 1987, 189, p 191.

<sup>42</sup> 'Aboriginal Australia' *New Encyclopaedia Britannica* Vol 14, 1985, p 424.

<sup>43</sup> Jacob, n 36, p 119.

### 2.3.3 Bands

The term “band” refers to a group of people which lives and moves around territory together, combining efforts to provide for everyday economic needs. Bands are distinguishable from language groups or local descent groups in that they are not vested with custodianship of land<sup>44</sup>. The composition of a band is inherently variable: it may comprise members of different local descent groups and/or language groups. Bands fluctuate greatly in size as well as in composition, and range over large tracts of territory, avoiding ancestral and sacred sites<sup>45</sup>.

### 2.3.4 Families

The smallest distinct social unit is the family group or “hearth group” (i.e. one which sleeps around a common fire). A family group might include secondary wives (or, in some areas, husbands), children, grandparents and other old or close relatives. Where possible, a family lives and moves around its traditional territory together<sup>46</sup>.

### 2.3.5 Social Classification (Skin Groups)

At birth, each member of a traditional Aboriginal language group is classified into a social group dictated by its Law. Many methods of social classification exist, some of which are highly complex. In Western Australia these social divisions are often referred to as “skin groups”. At birth, each child is given a “skin name”, which establishes that child’s place within the language group.

The simplest classification system is that in which members of the language group are divided into alternate generational levels. In this system, a person is on the same generational level as his or her siblings, grandparents and grandchildren: his or her parents and children are on an alternate generational level<sup>47</sup>. These categories are enogamous: that is, each person marries another on the same generational level. An example of this type of system is the *Pitjantjatjara* society of the Western Desert region: its two generational levels are known as *Nganantarka* (‘our bone’) and *Tjanamilytja* (‘their flesh’)<sup>48</sup>.

A common classification system is the moiety system (moiety meaning “divided into half”). In this system, all humans and life forms, and even inanimate natural phenomena, are divided into two groups. Everything in one moiety has its counterpart in the opposite moiety. An example of a traditional moiety system exists in the *Gunditjara* community of Victoria: the two moieties are *Krokitch* (symbolised by the white cockatoo) and *Kaputch* (symbolised by the black cockatoo)<sup>49</sup>.

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<sup>44</sup> FR Myers *Pintupi Country, Pintupi Self* Australian Institute of Aboriginal Studies, Canberra, 1985, pp 72-73.

<sup>45</sup> A Yengoyan ‘Economy, Society and Myth in Aboriginal Australia’ in WH Edwards, Ed., *Traditional Aboriginal Society* MacMillan Education Pty Ltd, Australia, 1987, 203, p 208.

<sup>46</sup> Jacob, n 36, p 61.

<sup>47</sup> Berndt and Berndt, 1978, p 29.

<sup>48</sup> C Bourke and B Edwards ‘Family and Kinship’ in C Bourke et al (eds) *Aboriginal Australia* Second Edition, University of Queensland Press, St Lucia, Queensland, 1998, 100, p 110.

<sup>49</sup> Bourke and Edwards, n 48, p 107.

Moieties are exogamous: each person in the group marries a person from the opposite moiety. Membership of a moiety is significant in ritual and social interaction within the language group, as well as in the making of appropriate marriages.

Where divisions based on moieties and generational systems are combined to make four divisions, a "section" system is created. Sometimes two of those four "sections" are divided, creating six divisions: this system exists in the *Ngaanyatjarra* community of Western Australia.

A "subsection" system is created where four "sections" are further subdivided to form eight divisions: "subsection" systems exist in the *Warlpiri* community in Central Australia and the *Yolgnu* community in Arnhem Land<sup>50</sup>. In other areas, further subdivision into even more categories may occur.

The traditional social classification systems of Western Australia are many, diverse and complex. Both patrilineal and matrilineal descent is common: some groups have local "totemic" affiliations rather than moieties or sections.

The many different systems of social classification in Western Australia are broadly indicated in the map on the following page<sup>51</sup>:

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<sup>50</sup> Bourke and Edwards, n 48, p 109.

<sup>51</sup> The map is taken from Department of Lands and Surveys and Education Department *Western Australia: An Atlas of Human Endeavour* Second Ed, Government Printing Office of Western Australia, 1986, p 32.



The complexity of social classification is apparent from the following brief discussion of the six-section *Ngaanyatjarra* system<sup>52</sup>:

The *Ngaanyatjarra* community is divided, first, into two large sections, known as *Ngumpalurrungkatja* ('shade side') and *Tjirntulukultulpa* ('sun side'). Within *Ngumpalurrungkatja*, there are three sections: *Purungu*, *Yiparrka* and *Panaka*. Within *Tjirntulukultulpa*, there are three sections: *Tjarurru*, *Milangka* and *Karimarra*. At ceremonies the *Ngumpalurrungkatja* people sit toward the west, while the *Tjirntulukultulpa* people sit towards the east.

Marriage partners and descent are dictated in the following way:

- A *Purungu* man will marry a *Milangka* or *Karimarra* woman and have *Tjarurru* children.
- A *Yiparrka* man will marry a *Tjarurru* woman and have *Milangka* children;
- A *Panaka* man will marry a *Tjarurru* woman and have *Karimarra* children;
- A *Tjarurru* man will marry a *Panaka* or *Yiparrka* woman and have *Purungu* children;
- A *Milangka* man will marry a *Purungu* woman and have *Yiparrka* children;
- A *Karimarra* man will marry a *Purungu* woman and have *Panaka* children.

This is shown in diagram form below<sup>53</sup>:

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<sup>52</sup> A Glass *Into Another World: A Glimpse of the Culture of the Ngaanyatjarra People* Institute for Aboriginal Development, Alice Springs, Northern Territory, 1990, pp 27-29.

<sup>53</sup> Glass, n 52, p 27.

## 2.4

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### THE KINSHIP SYSTEM

In traditional Aboriginal society inter-personal relationships are governed by a complex and intricate system of rules, known as the classificatory system of kinship (kinship system). The kinship system is based upon an expanded concept of family, and a concomitant extension of family rights and obligations.

The kinship system enables each person in a language group to ascertain precisely where he or she stands in relation to every other person in that group, and to persons outside that group. By providing a mental map of social relationships, each person knows precisely how to behave in relation to every other person<sup>54</sup>.

#### 2.4.1 Classificatory Kinship

Under the kinship system classificatory terms, which usually apply only to lineal relatives, are extended to apply to collateral relatives. The governing principle is “the equivalence of same-sex siblings”. Under this principle people of the same sex who belong to the same sibling line are considered to be “the same”<sup>55</sup>.

To illustrate: assume that there are two brothers, one of whom has a daughter. The brothers are “equivalent” in that the daughter regards both her biological father and her father’s brother as “father”. Similarly, two sisters are “equivalent”: the sister of a biological mother is classified with the biological mother and called “mother”. In practice, the difference between biological parents and classificatory (or “formal”) parents is always recognised.

It follows that the children of classificatory fathers and mothers are regarded as classificatory brothers and sisters. Thus, one person may have a number of fathers, mothers and many brothers and/or sisters.

Persons on the same sibling line, but of a different sex, are regarded differently. Thus, a father’s sister is “aunt” to the child, and a mother’s brother is “uncle” to the child. The term for the children of “aunt” sometimes differs from the term for the children of “uncle”, but both translate to “cousin”<sup>56</sup>.

The kinship system becomes increasingly complicated with more remote family members. It transcends blood relationship and social groupings to connect even distantly related people within the group. It dictates the names by which each person in the group may be called.

The kinship system also provides a mechanism for interaction with persons outside the language group. Ultimately, even a complete stranger to the group will be accorded “kin” status in order that social interaction may occur<sup>57</sup>. The kinship rules govern economic as well as social matters: food gathering and sharing, betrothal, marriage and the education of children. The rules ensure that no one is isolated.

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<sup>54</sup> Broome, n 2, p 16.

<sup>55</sup> Berndt and Berndt, 1988, n 9, p 85.

<sup>56</sup> Berndt and Berndt, 1978, n 1, pp 36 – 37.

<sup>57</sup> Jacob, n 36, p 125.

Thus, orphans and widows are provided for by those responsible for them within the kinship system. Although some members of a community may neglect duties and responsibilities, kinship factors usually foster conformity to expectations.

In short, the kinship system is essential to physical, psychological and emotional survival in traditional Aboriginal society. It provides a powerful regulatory framework for individual identity, stable relationships and group cohesion<sup>58</sup>.

#### **2.4.2 Kinship Avoidance**

The kinship rules ordain that certain relatives must avoid one another, thereby strictly controlling personal relationships. For example, as children grow to adolescence brothers and sisters (including classificatory brothers and sisters) are expected to behave in a reserved manner towards one another, and perhaps will even avoid calling each other by their personal names. Brothers-in-law are expected to adopt a rather formal attitude to one another and maintain a degree of physical distance from one another<sup>59</sup>.

The strongest kinship avoidance rule is that which exists between a man and his mother-in-law. In its strictest form this rule prohibits a man and his mother-in-law from seeing or speaking to one another, and even from uttering each other's name. The apparent purpose of this rule is to prevent a woman and her mother competing for the affection of the same man: there may be a risk of such competition where a man is approximately the same age as his wife's mother<sup>60</sup>.

The application of the kinship avoidance rules may be evident at traditional meetings and ceremonies. Often, people face in different directions, or sit apart, or communicate only through an intermediary. This practice usually signifies the observance of kinship rules, rather than personal animosity. Sanctions for breach of the kinship rules vary according to the nature of the rule and the relevant kinship relationship<sup>61</sup>.

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<sup>58</sup> Elkin, n 10, pp 84-85.

<sup>59</sup> ALRC, 'Traditional Aboriginal Society and Its Law', n 41, p 194.

<sup>60</sup> Elkin, n 10, p 149.

<sup>61</sup> ALRC, 'Traditional Aboriginal Society and Its Law', n 41, p 193.

## 2.5

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### CULTURE AND CUSTOMS

Strongly-defined cultural roles and mores underpin traditional Aboriginal life. In this way political, economic, cultural and social stability is maintained, and custom and tradition perpetuated.

#### 2.5.1 The Role of Elders

Certain senior male members of traditional language groups may become Elders. Elders are initiated men who are selected to be ritual leaders upon the basis of their personal qualities (such as bravery and compassion) and upon their knowledge of the Law. Elders provide leadership in matters affecting the group, including dispute-resolution, educating the young and advising on marriage partners. In traditional Aboriginal society the advice of the Elders is usually “heeded and unquestioned”<sup>62</sup>.

Elders assume responsibility for sacred objects, spiritual matters and the performance of ritual. The Elders are vested with custodianship of the Law. Their overriding duty is to honour and maintain the Law, and pass it down to the next generation<sup>63</sup>.

#### 2.5.2 Female Authority

Historically, the traditional role and status of women in traditional Aboriginal society has not been easy to ascertain. In earlier times anthropologists concluded that men, rather than women, performed significant roles in the operation of the Law and in ritual life<sup>64</sup>. This was attributed to the fact that usually after marriage women left their own country to live in their husband’s country. Since ritual matters are conducted by the traditional owners of territory, it appeared that men, rather than women, exercised authority in the life of the language group<sup>65</sup>.

More recent research has established that women possess separate sacred knowledge and carry out separate ritual (“women’s business”), which complements that of the men. Women’s business may extend to other rights and duties, including land relationships. It appears that women, like men, gain in power and prestige as they grow older: women with strong spiritual and personal qualities may achieve a status similar to, but separate from, that of Elder<sup>66</sup>. Further, it has been suggested that women with strong personalities were never outmatched by men<sup>67</sup>.

#### 2.5.3 Secular Authority and Decision-Making

Whether enduring secular (non-spiritual) authority vests in any particular leader in traditional Aboriginal society is a contentious point. Elkin observed that one

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<sup>62</sup> Jacob, n 36, p 59.

<sup>63</sup> Jacob, n 36, p 58.

<sup>64</sup> ALRC, ‘Traditional Aboriginal Society and Its Law’, n 41, p 194.

<sup>65</sup> Broome, n 2, p 19.

<sup>66</sup> Jacob, n 36, p 59.

<sup>67</sup> Broome, n 2, p 20.

headman usually presided unofficially at meetings, settling quarrels and making decisions affecting the group<sup>68</sup>. However, Hiatt and Meggitt argued that leadership is confined to the spiritual realm<sup>69</sup>. Another view is that influence is exerted by the senior members of the group in a diffused, egalitarian way<sup>70</sup>. Yet another is that leadership is “situational”, individuals or “bosses” leading the way according to the type of activity being undertaken<sup>71</sup>.

In any event, in traditional Aboriginal society, important decisions must be reached by the social process of consensus<sup>72</sup>. Without consensus, a decision affecting the group is unlikely to be implemented. An integral part of the decision-making process is allowing ample time for deliberation to occur. Stanner emphasised that Aboriginal people -

“...need credible motive for having to choose...They need information...They need time, all the time needed to work out the implications, how this will affect that and how that will affect something else. Time to consider the alternatives, time to take into account new thoughts that did not occur to them earlier. Time to strike balances between winners and gainers, time to make sure of consensus...”<sup>73</sup>

It should be noted that consensus does not mean unanimity: rather, it consists of “the expression of a view to which nobody will make a strong objection”<sup>74</sup>.

Note: the ALRC has commented that the existence or otherwise of Aboriginal authority figures is relevant to a determination of whether, how and in whom, authority to administer law should be vested in any section of modern Aboriginal society<sup>75</sup>.

#### 2.5.4 Reciprocity

In traditional Aboriginal society mutual rights and obligations, deriving principally from kinship obligations are consistently observed. A primary obligation is to make gifts: upon initiation a man is expected to make gifts (such as tools or implements) to those who initiate him; upon betrothal, he makes gifts to his future wife’s family. Usually the economic value of the gift is unimportant: the purpose of giving and receiving is to reinforce social bonds<sup>76</sup>. Reciprocity principles underpin most aspects of community life, including ritual, ceremony and the protection of sacred sites.

Similarly, the cultural practice of sharing food and other valued goods is based upon reciprocity principles. Each person shares with those persons from whom he or she has received benefits in the past, and from who benefits will be received in the future. Reciprocity also governs the cultural norm of avenging wrongdoing: this is the notion of “payback” or “squaring it up”.

<sup>68</sup> Elkin, n 10, p 114; see also Berndt and Berndt, 1988, n 9, p 365.

<sup>69</sup> LR Hiatt *Kinship and Conflict* Canberra, Australian National University Press, 1965, p 147; MJ Meggitt *Desert People: A Study of the Walbiri Aborigines of Central Australia* University of Chicago Press, Chicago, 1965, pp 248 – 250.

<sup>70</sup> Broome, n 2, p 20.

<sup>71</sup> Jacob, n 36, p 59.

<sup>72</sup> N Williams ‘Aboriginal Decision Making and Native Title’ in F McKeown (ed) *Native Title: An Opportunity for Understanding* Proceedings of Induction Course conducted by the National Native Title Tribunal at the University of Western Australia, Nedlands, 1 – 3 December 1993, p 114.

<sup>73</sup> WEH Stanner ‘Aborigines and Australian Society’ *Mankind* 10 (4):201-212, extracted in Williams, n 72, p 110

<sup>74</sup> Williams, n 72, p 110.

<sup>75</sup> ALRC, ‘Traditional Aboriginal Society and Its Law’, n 41, p 191.

<sup>76</sup> Broome, n 2, p 17.

Reciprocity, which operates on an inter-group as well as an intra-group level, strongly reinforces personal and group relationships. It operates as a system of checks and balances to maintain social equilibrium<sup>77</sup>.

### 2.5.5 Medicine Men and Sorcerers

Medicine men (or magic healers) and sorcerers (sometimes known as *kadaitcha* men) exist in traditional language groups. Sometimes a medicine man is also a sorcerer. Particular initiation rites must be undergone before a man obtains the necessary power to be a medicine man or sorcerer<sup>78</sup>. In some language groups certain women also are imbued with magical powers.

Medicine men perform a number of roles including the diagnosis and curing of illnesses (often through magical rituals), the holding of seances (to connect with the spiritual world) and the conducting of “inquests” into unexpected or unexplained deaths. Assistance rendered by a medicine man may take the form of “singing”:

“Many magic men have the power to do magic feats by singing magic songs. They can sing and cause someone to become mad. They can also sing a person’s head and thus make them strong. They can sing over a spear wound, singing as they put their mouth right on the wound, thus causing it to heal up quickly. They can sing a song and thus give themselves the power to travel at great speed (for instance when a car has broken down and they need to fetch help).”<sup>79</sup>

The work of sorcerers is always that of black magic. Sorcery is usually carried out upon people of other tribes, upon unfaithful wives and alleged murderers<sup>80</sup>. The pointing-bone is the most widely known, and widely used, tool of sorcery<sup>81</sup>.

In traditional Aboriginal society people live in fear of sorcery, although the curative powers of the medicine man may be invoked to counteract it. However, a cure may prove difficult especially where the sorcerer has performed a particular ritual operation such as the removal of part of the body or soul<sup>82</sup>.

### 2.5.6 Visual Art, Literature, Songs and Dancing

There are a number of distinct schools of traditional Aboriginal visual art, which may be created on rock facings and in caves, on wood, bark, and even on clay or sand. Broad traditional Aboriginal “art areas” exist across the Australian continent, although each language group has its own distinctive form of artistic expression.

Aboriginal visual art may be broadly described as a stylised form of communication which is inseparable from its cultural and social setting. It must possess cultural and social significance and conform to traditional expectations. Unlike some non-Aboriginal art traditions, Aboriginal visual art does not represent the response of an individual to an aesthetic urge or a means of self-expression. Much Aboriginal visual

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<sup>77</sup> Bourke and Edwards, n 48, p 106.

<sup>78</sup> Berndt and Berndt, 1988, n 9, p 331.

<sup>79</sup> Glass, n 52, p 44.

<sup>80</sup> Elkin, n 10, pp 308 – 310.

<sup>81</sup> Berndt and Berndt, 1988, n 9, 324.

<sup>82</sup> Berndt and Berndt, 1988, n 9, p 330.

art and carving has spiritual or symbolic meaning for the group: what others may care to make of it is immaterial<sup>83</sup>.

Aboriginal literature includes stories, poetry, songs and chants. These may relate to everything connected with the traditional life: the Dreaming stories, magic, totems, hunting, fighting, epics or mourning. In some areas up to five hundred stories are known: in others there may only be a dozen or so<sup>84</sup>. Sacred Dreaming stories are especially prized and the privilege of telling them may be strictly controlled.

Usually traditional songs are simple and short, with much repetition of key phrases. The songs are intended to assist the group in remembering details of the Dreaming stories. Songs are often accompanied by clapping sticks and didgeridus: other musical instruments include hand drums, rattles and gongs<sup>85</sup>.

Dreaming stories are also honoured through the performance art of dancing. Dances may be performed solo or by groups; they may be open or closed to audience participation. Sometimes, but not always, dances relate to sacred matters. Dance steps are often intricate and varied, rich in symbolism and significance<sup>86</sup>.

Note: the word “corroboree” has passed into English as a word for all Aboriginal ceremonies involving singing and dancing<sup>87</sup>. However, the term has been criticised as being too vague, lumping sacred and non-sacred together in an undifferentiated way<sup>88</sup>.

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<sup>83</sup> Berndt and Berndt, 1988 n 9, p 412.

<sup>84</sup> Berndt and Berndt, 1988 n 9, p 389.

<sup>85</sup> Berndt and Berndt, 1988 n 9, p 371.

<sup>86</sup> Berndt and Berndt, 1988 n 9, p 383.

<sup>87</sup> It is believed that the word “corroboree” derives from a New South Wales Aboriginal dialect: Berndt and Berndt, 1988, n 10, p 381.

<sup>88</sup> Berndt and Berndt, 1988, n 9, p 381.

## 2.6

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### CEREMONY AND RITUAL

According to traditional belief, Aboriginal people share the same spiritual essence with everything else in the cosmos. Contact with the Ancestral Spirits, and access to spiritual powers, is sought through the performance of traditional rituals and the perpetuation of traditional customs<sup>89</sup>. Some rituals are designed to ensure the continued supply of species; others mark the passage through significant stages of life, such as puberty and death.

Nearly all the Dreaming stories are connected to specific locations, and sometimes to sacred objects. Each adult must perform increase ceremonies each year at the sacred site of his or her totem to enable the life force to be released. This ensures an ongoing supply of the particular natural species of which that person was a part<sup>90</sup>.

Many sacred ceremonies are open to the whole community and often men and women play complementary roles in them. Some important ceremonies are open only to men in the belief that the spiritual forces which the ceremonies invoke are too dangerous for women. Similarly, men are unable to attend the secret ceremonies of women. All traditional ceremonies are vital to the sacred life<sup>91</sup>: some are described below.

#### 2.6.1 Initiation into Adulthood

In traditional Aboriginal society childhood is short, albeit a time of great freedom. As children approach puberty they are required to undergo ritual initiation processes.

A girl is physically capable of fulfilling her traditional roles of food gatherer, sexual partner, bearer of children and carer of the elderly as soon as she reaches puberty. At that time she will be initiated into womanhood. After a relatively short time of seclusion from the group, during which she may be instructed in women's business, appropriate initiation ceremonies are conducted for her. These include ritual acts of body-cleansing, body-painting and ornamentation, and perhaps body scarification<sup>92</sup>.

A boy approaching puberty is introduced into manhood through a series of initiation processes. First, he is physically removed from his family to live for an extended period away from the group. The Law may forbid that his name be spoken by persons in the group during this period. Under the kinship rule his "uncles" have special obligations in relation to discipline and initiation processes. The boy is taught the rights and obligations of adult males, and some of the secrets of the sacred Law<sup>93</sup>.

Male initiation rites include tests of worthiness and courage. Initiation ordeals may include tooth evulsion, circumcision, nose piercing, sleep deprivation, and/or the cutting of ceremonial markings upon skin. These tests are designed to instil qualities

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<sup>89</sup> Edwards, n 25, p 85.

<sup>90</sup> Broome, n 2, p 15.

<sup>91</sup> Broome, n 2, p 19 – 20.

<sup>92</sup> Berndt and Berndt, 1988, n 9, pp 180-181.

<sup>93</sup> Myers, n 44, p 234.

of obedience, discipline, self-reliance and cooperativeness. Upon satisfactory completion of the tests, complex and elaborate initiation ceremonies are held in the boy's honour<sup>94</sup>.

After the initiation ceremonies, young men are still regarded as novices. They are expected to sit in respectful silence at meetings held by the men. A young man gains in status by participating in further tests and ceremonies during subsequent years. As a man becomes entrusted with more secrets the sacred Law, so he grows in power and influence<sup>95</sup>.

### 2.6.2 Betrothal and Marriage

In traditional Aboriginal society marriages are significant to the forging of alliances, and often betrothal arrangements are made when the prospective bride is very young, or possibly even unborn.

A man may not marry until he has undergone a significant part of the lengthy initiation process: thus, at marriage a man will be in his twenties or even thirties. Often a man's first wife is the widow of an older man, and his subsequent wives may be much younger. A marriage may be signalled by the simple act of a couple living together and being accepted as married by their kin. It has been noted that the mere act of a woman walking through a camp to join a man at his request may constitute a marriage ritual<sup>96</sup>.

### 2.6.3 Death, Mourning and Burial

In traditional Aboriginal society death is not feared: it is the time when a person's spirit is released from the physical body to rejoin the unseen world. Death signifies a return of the spirit to the Dreaming and the eternal life-stream. It is believed that upon death a person's spirit returns to its source - its sacred totem site - to await reincarnation<sup>97</sup>.

Although death is not feared, it is a serious matter which causes immense grief and sorrow to the bereaved relatives. Great care is taken not to increase the hurt by any direct reference to the deceased's death. News of a death is conveyed indirectly by statements such as:

- "X has become one" (Where Y, the husband/wife of X, has died);
- "X has become a bereaved brother/sister" (where Y, the sibling of X, has died);
- "X has become only hands" (where Y, X's young baby, has died). This signifies that X no longer has a baby to carry in her hands.<sup>98</sup>

Traditional mourning and grieving customs vary widely between language groups. However, all customs involve acts of ritual mourning, the singing of sacred dirges, and complex ceremonies. Mourning and burial rituals must be carried out properly, as they assist the spirit to return to its sacred place. Without proper ceremonies, the

<sup>94</sup> Jacob, n 36, pp 98-105.

<sup>95</sup> Jacob, n 36, pp 98-105.

<sup>96</sup> Meggitt, n 69, p 269.

<sup>97</sup> Jacob, n 36, p 108.

<sup>98</sup> Glass, n 52, p 39.

deceased's spirit cannot take its place in the afterlife but will become caught between death and future life<sup>99</sup>.

High levels of agitation and distress often accompany mourning rituals. The bereaved may even carry out ritual acts of self-harm (such as the gashing of foreheads, or inflicting burns with hot coals). If the deceased is of significant status, members of other language groups will attend the mourning ceremonies to pay their respects. The "sorry time" of the funeral and mourning takes precedence over all other matters<sup>100</sup>.

Traditional burial practices vary widely: the deceased's body may be left in a rock fissure, a cave or the hollow of a tree; it may be left exposed on a platform, desiccated with smoke; cremated in a fire; or buried in a woven-branch coffin. Fires may be lit to provide comfort for the deceased's spirit. Traditional burial places are regarded as dangerous places where spirits may gather: accordingly, extreme care is taken in approaching them<sup>101</sup>.

After the funeral, the family or group may move away from the area for a period. In certain communities, a re-burial or second funeral occurs some months after the first funeral. Relatives, particularly widows, may have to commence food taboos and endure periods of silence and/or isolation from the group for up to a year<sup>102</sup>.

After a death, the name of the deceased person becomes taboo. To speak or use the name of a deceased person indicates lack of respect for the deceased and for the bereaved, and inflicts great hurt and sorrow upon the latter. Even words which sound similar to the name of the deceased person may become taboo.

Accordingly, a deceased person may be mentioned only indirectly or by reference: for example, as "X's brother" (X being the surviving person). In the case of the predictable death of a very old person or a baby, the taboo may last for as long as a year. However, if the deceased dies in the prime of life, or if his or her relatives are especially sensitive about the death, the name of the deceased may not be spoken for 15 to 20 years<sup>103</sup>.

After the death of a family member, surviving family members may be called by new names. Each may be known by a special name which means "one whose brother (or sister/father/mother) has died". Thus, in the *Ngaantyatjarra* language, sisters of a sibling who has died may be called *Pirnkunya*; brothers of that sibling may be called *Tjitjurrunya*; the father is called *Purrrkutjarranya* and the mother *Kumpurranynga*. They may be called by these names for the rest of their lives<sup>104</sup>.

Where a name is a "shared one" (that is, where a surviving person has the same name as a deceased person) the surviving person will adopt a new name, as his or her name has been rendered taboo. That person might also be called a special word which means "a person whose name is taboo": in *Ngaantyatjarra*, that word is *Kunmarnarranya*<sup>105</sup>.

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<sup>99</sup> Broome, n 2, p 20.

<sup>100</sup> Jacob, n 36, pp 110, 111.

<sup>101</sup> Jacob, n 36, p 115.

<sup>102</sup> Broome, n 2, p 21.

<sup>103</sup> Glass, n 52, p 39.

<sup>104</sup> Glass, n 52, p 39.

<sup>105</sup> Glass, n 52, p 39.

## 2.7

### LAW

Traditional Aboriginal Law varies in content and application from one language group to another: there are no traditional rules of universal application<sup>106</sup>. However, some general propositions may be propounded and these are discussed briefly below.

#### 2.7.1 Essential Spirituality of the Law

Traditional Aboriginal society does not distinguish between the physical and spiritual universes. Accordingly, there is no distinction between secular and spiritual rules. The Law governs the observance of sacred ritual and economic activity: it maintains social order and dictates the minutiae of everyday life. Notwithstanding its inherent spirituality, the Law is not accompanied by systematic belief in gods, prayer, by sacrificial acts or through institutions such as the priesthood<sup>107</sup>.

In traditional communities children grow up accepting the Law unquestioningly. Undoubtedly the often-harsh sanctions of the Law provide additional reason for obedience (see 2.7.4, below). The dictates of the Law have been described as highly practical, representing the accumulated wisdom of hundreds of generations<sup>108</sup>.

#### 2.7.2 Dispute Resolution

In traditional Aboriginal communities disputes are an expected element of normal social processes. Disputes, which often centre on inter-personal problems, are to be distinguished from ongoing conflict, which indicates that traditional law has broken down<sup>109</sup>. Since disputes are considered disruptive to group harmony, a resolution to them is always sought<sup>110</sup>.

Different procedures may be followed in an attempt to resolve a dispute. Elders may attempt to negotiate a satisfactory outcome; immediate family members usually play an important role. Sometimes disputes may be resolved by open informal discussions, in which everyone participates. However, talk and argument may culminate in violence, which may persist until the matter is resolved<sup>111</sup>.

#### 2.7.3 Customary Offences

In *The Recognition of Aboriginal Customary Law* the ALRC emphasised the difficulty of recording Aboriginal customary offences and of customary responses to those offences. That difficulty arises *inter alia* from differences in customs and

<sup>106</sup> ALRC, 'Traditional Aboriginal Society and Its Law', n 41, p 189.

<sup>107</sup> ALRC, 'Traditional Aboriginal Society and Its Law', n 41, p 190.

<sup>108</sup> Berndt and Berndt, 1988, n 9, pp 337-338.

<sup>109</sup> Williams, n 72, p 112.

<sup>110</sup> Jacob, n 36, p 62.

<sup>111</sup> ALRC, 'Traditional Aboriginal Society and Its Law', n 41, p 200.

practices of Aboriginal communities throughout Australia, and from the fact that concepts of offences and punishment are quite different in traditional Aboriginal and Anglo-Australian culture<sup>112</sup>.

Under Aboriginal customary law, many offences are offences of strict liability. The viewing of sacred objects, places, or ceremonies by those not entitled to view them is a gravely serious offence: an offence is committed even if the viewing was wholly unintended. Similarly, disclosing sacred secrets to a person not entitled to know them is a very serious offence. The commission of such offences may demand the immediate death of the offender<sup>113</sup>.

Traditional inter-personal crimes include murder (including unauthorised “killing” by sorcery), the usurpation of ritual privileges or duties, insulting another person (by swearing and/or exposing of the genitals) and the breach of a taboo such as invoking the name of a dead person<sup>114</sup>.

Domestic crimes include elopement (running away with a person other than one’s betrothed). Adultery with certain kin is viewed very seriously<sup>115</sup>. An extended definition of “incest” prohibits sexual relations between a man and his classificatory mothers, sisters and his mother-in-law. It may be noted that in some groups the practice of wife-lending exists. Where this occurs, any incest taboo which might otherwise be breached in fact is not breached<sup>116</sup>. To marry someone who has the same totemic affiliation or who comes from the same moiety is a serious breach of the Law<sup>117</sup>.

In traditional Aboriginal communities property crimes are rare, since everyday material objects may readily be borrowed pursuant to kinship rights. Sometimes ritual stealing occurs (such as that of twine for ceremonial purposes), but no serious redress is required or taken<sup>118</sup>.

A limited number of offences of omission exist: these include the physical neglect of certain relatives, the refusal to make gifts to certain relatives, and the refusal to educate certain relatives<sup>119</sup>.

#### 2.7.4 Punishment of Offences

The ALRC pointed out that in Anglo-Australian society lawful “punishment” connotes a response to wrongful acts. It is activated by some form of collective decision (i.e. by a person or body authorised to act in the name of the general community) and is closely regulated by rules<sup>120</sup>. However, in traditional Aboriginal society punishment is perceived as a response to a particular act by the injured party or group, rather than as a response to an act which is inherently “unlawful”<sup>121</sup>.

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<sup>112</sup> ALRC, *The Recognition of Aboriginal Customary Law* Vol. 1, Report 31, AGPS, 1986, para 499, p 360.

<sup>113</sup> ALRC, ‘Traditional Aboriginal Society and Its Law’, n 41, p 195.

<sup>114</sup> Meggitt, n 69, pp 256-257.

<sup>115</sup> Meggitt, n 69, p 256.

<sup>116</sup> Elkin, n 10, p 161

<sup>117</sup> Elkin, n 10, p 118.

<sup>118</sup> ALRC, ‘Traditional Aboriginal Society and Its Law’, n 41, p 196.

<sup>119</sup> Meggitt, n 69, p 257.

<sup>120</sup> ALRC, *The Recognition of Aboriginal Customary Law*, n 112, p 360.

<sup>121</sup> ALRC, *The Recognition of Aboriginal Customary Law*, n 112, p 360.

Punishment is usually characterised by “payback” or “square it up” principles, on the basis that -

“Retaliation is the essence of law.”<sup>122</sup>

As indicated earlier, many traditional offences will call for very serious punishment, even death. However, specific penalties are not necessarily prescribed in respect of other, lesser offences. An appropriate punishment may be chosen from a range of punishments following a process of argument or mediation involving the parties injured by the offence and the offender and/or the offender’s supporters<sup>123</sup>. In other cases Elders may meet to decide upon an appropriate punishment, which punishment may be administered by the Elders or their delegate(s)<sup>124</sup>.

Aboriginal customary punishments take a wide variety of forms. The particular punishment to be inflicted is influenced by factors including the particular community in which the offence occurred; the sex, status and previous history of the offender; the sex, status and conduct of the victim; and the community’s perceptions of the seriousness of the offence<sup>125</sup>.

Customary punishments include:

- death (either directly, or by sorcery or incantation);
- spearing (of greater or lesser severity);
- other forms of corporal punishment (such as burning the hairs from the offender’s body);
- individual “duelling” with spears, boomerangs or fighting sticks;
- collective “duelling” involving those injured by the offence, or affected by it, and those associated with the offender;
- shaming or ridicule;
- rigorous forms of initiation or teaching;
- compensation (e.g. through adoption or marriage)
- banishment from the community<sup>126</sup>.

Banishment or exclusion from the group may be invoked as a punishment for continual offending, or for a serious offence in respect of which death is not an appropriate penalty. Banishment is regarded as an extremely harsh punishment: it causes immense grief to the offender, who may literally waste away and die from sorrow<sup>127</sup>. According to one theory banishment is not a traditional Aboriginal punishment, since it is wholly inconsistent with traditional Aboriginal socio-centric culture<sup>128</sup>.

Punishment by sorcery is usually invoked where physical vengeance is appropriate but not practicable. The offender will be identified during a ritual ceremony and a sorcery rite performed, or perhaps only threatened. Should the identified person become ill, insane or die, the sorcery has succeeded<sup>129</sup>.

<sup>122</sup> Berndt and Berndt, 1988, n 9, p 360.

<sup>123</sup> ALRC, *The Recognition of Aboriginal Customary Law*, n 112, p 360.

<sup>124</sup> ALRC, ‘Traditional Aboriginal Society and Its Law’, n 41, p 195.

<sup>125</sup> ALRC, *The Recognition of Aboriginal Customary Law*, n 112, p 361.

<sup>126</sup> ALRC, *The Recognition of Aboriginal Customary Law*, n 112, p 361.

<sup>127</sup> Jacob, n 36, p 55.

<sup>128</sup> Meggitt, n 69, pp 258.

<sup>129</sup> ALRC, ‘Traditional Aboriginal Society and Its Law’, n 41, p 199.

Ideally, once punishment has been exacted, justice is done and things return to normal. However, if the punishment which has been exacted is interpreted as retaliation, it may invite an act of reprisal. Things may escalate to the point that a "blood feud" will erupt: such a feud may continue for many years after the commission of the original offence<sup>130</sup>.

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<sup>130</sup> Berndt and Berndt, 1988, n 10, p 346.

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## 2.8

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### EXTENT OF SURVIVAL OF TRADITIONAL SOCIETY

The devastating effect of British colonisation and the imposition of post-colonial law, policies and practices upon traditional Aboriginal society have been well documented. It is not within the scope of this Benchbook to re-examine those matters.

It is difficult to know the extent to which traditional Aboriginal life survives intact, if at all. The impact of the forces of white colonisation has varied enormously from language group to language group, the variable factors including:

- the extent to which Aboriginal individuals and language groups were dispossessed of their traditional lands;
- the various historical periods during which colonising acts occurred;
- the historical relationship of Aboriginal groups with the local non-Aboriginal community;
- the nature of the different economic industries in which Aborigines have participated (e.g. pearling and pastoral industries);
- the various policies imposed by and the practices carried out by various Australian governments and bureaucracies at different periods since 1788. Historically, these policies and practices centred on forcible removal, segregation and assimilation: today, contemporary policies focus on self-management and self-determination<sup>131</sup>.

Further, traditional territorial boundaries, so fundamental to the identity of language groups, have broken down in many areas. Demographic shifts, or the lack of surviving members of a particular language group, have created a form of territorial succession in some areas. In other words, sometimes traditional country has been “taken over” by another language group. Today, the loss of traditional boundaries impacts seriously upon the establishment of native title rights<sup>132</sup>.

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<sup>131</sup> Trigger, n 13, p 29.

<sup>132</sup> Trigger, n 13, pp 25-27.

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## REFERENCES/FURTHER READING

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