

Social scientists and native title cases in Australia

Peter Sutton

ABSTRACT

Recent legal developments in Australia have led the courts to reject the doctrine of *terra nullius*, which denied pre-existing Aboriginal rights to land ownership, and Aboriginal prior occupation and ownership of land are now acknowledged. However, in the absence of consent determinations the courts have to evaluate the justification for legally recognizing native title based on specific local evidence for continuities in the traditional customs and laws of Aboriginal claimants since British sovereignty. Much of the evidence for such continuities can come from the Aboriginal claimants themselves. However, proving the time, depth and relevance of these continuities and presenting them in a form that is considered acceptable by the courts has drawn upon the ‘expertise’ of academics. This paper considers the types of evidence that anthropologists, linguists, historians and archaeologists are able to present and makes some suggestions as to how this could be improved in the future.

THE LEGISLATIVE BACKGROUND

In 1969 and 1970 members of land-holding groups in northeast Arnhem Land, in the Northern Territory of Australia, brought action against the mining company Nabalco and the Commonwealth of Australia in an attempt to gain recognition of their own traditional rights over the land of the Gove Peninsula. This led to the famous ‘Gove case’ of 1971, which resulted in a reaffirmation of the doctrine of *terra nullius* that had long been the basis for official non-recognition of customary and pre-existing indigenous rights in land and waters in Australia.

However, a form of statutory Aboriginal titles was introduced by the Commonwealth government for the Northern Territory in the *Aboriginal Land Rights (Northern Territory) Act* (Commonwealth) (1976), section 3(1) of which reads:

‘traditional Aboriginal owners’, in relation to land, means a local descent group of Aboriginals who

- (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and
- (b) are entitled by Aboriginal tradition to forage as of right over that land;

This definition, which rested on anthropological ideas and advice of the time, inevitably drew many anthropologists into researching and providing evidence in the many claims heard under this Act, claims that by the end of the 1990s were coming to a close. The State land rights scheme created for Queensland in 1991 has similarly drawn many anthropologists into the application of the legislation to the claims process, which recognizes three bases of claim: traditional affiliation, historical association and economic viability. Other state legislative schemes that deal with Aboriginal land interests (other than native title, see below) have not required the same kind of anthropological involvement.

In 1982 three Murray Islanders, Eddie Mabo, David Passi and James Rice, on their own behalf and on behalf of their families, commenced proceedings in the High Court of Australia seeking, *inter alia*, a declaration that they were the holders of traditional native title and that the Crown's sovereignty over the Murray Islands was subject to their rights according to local custom and traditional native title. In 1992 the High Court delivered its historic *Mabo* judgement, in which a majority (6:1) held that native title could be recognized by the common law of Australia. By the end of 1993 the Australian government had passed the *Native Title Act*, which created a statutory scheme for the recognition and protection of native title and, among other things, provided (i) a mechanism for determining claims to native title, (ii) ways of dealing with future acts affecting native title and (iii) in certain circumstances, compensation for its extinguishment. Although the Act was subject to far-reaching amendments in 1998, attaining a complexity found daunting even by lawyers, it retained its essential definition of what constitutes 'native title' or 'native title rights and interests'. Section 223(1), reads in part:

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

- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognized by the common law of Australia.

A series of High Court decisions have gradually refined the construction and meaning of these words, although there will undoubtedly be more decisions to come. It is now clear that claimants need to establish that the traditional laws they acknowledge, and the traditional customs they observe and on which their rights in land and waters are based, are substantially the same as those of their predecessors

in the same area prior to the acquisition of British sovereignty. Those laws and customs must have normative content. The chain of transmission of these traditions also must be shown to be substantially unbroken, and traditions reconstituted in recent times will be of no avail. Many are of the view that this decision effectively removes the possibility of succeeding in achieving recognition of native title, except in remote regions where classical traditions have persisted most appreciably. It is also clear now that the High Court has rejected broad traditional claims of an essentially proprietary kind, preferring instead the 'bundle of rights' approach. These decisions have pushed the emphasis of social science research on native title cases into greater historical depth of detail and into a greater focus on particular rights or traditional 'activities'.

ANTHROPOLOGISTS

It is conceivable that a native title scheme that did not encourage or require work to be done by anthropologists might have been created, and it is notable that the definition of native title rights and interests in the *Native Title Act* (1993), unlike the Northern Territory Land Rights Act and similar legislation, owes little of a direct nature to anthropological models. There is variable opinion on the extent to which anthropologists are necessary even in the evidentiary testing process, given that claimants are typically called, in contested cases, to give evidence about themselves. But, there are good reasons why expert evidence is normally called as well, and may be relied upon by a court (see Fingleton and Finlayson, 1995; Finlayson and Jackson-Nakano, 1996; Peterson and Rigsby, 1998; Finlayson *et al.*, 1999).

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

They are ‘folk models’ – and usually only fragments of them – that contribute important subjective knowledge to the record. An anthropological model, on the other hand, has to take into account what we can learn from people’s actual behaviours, including other statements, as well. A senior man may say, for example, that strong interests in a country can only come from having a birthplace there or a father from that place, but it may become fully apparent that there are many cases that do not conform to this ‘rule’, yet which are so patterned as to clearly be manifestations of a regular customary system. Bagshaw (2003) presents an excellent example of the kind of ethnography that is submitted for legal purposes in such cases. Furthermore, a scholar who has good archival or other older historical records of the relevant ethnographic area can reach longer-term conclusions spanning as much as a couple of centuries, well beyond living memory or even oral history. Do patterns that people do not recognize, or do not wish to recognize, fall outside the normative?

In non-legal and anthropological terms the ‘normative’ covers not only explicit rules but may also include the behavioural reflection of the *assumption* of a norm, and *average* or *typical behaviour* as well as ideal norms. In classical Aboriginal cultural traditions it would be abnormal, perhaps even inconceivable, that people would produce explicit, full and objective articulations of how their social order works, comparing ideals with action, and extracting underlying patterns of typical behaviour. Anthropologists rely on combined informant verbal and behavioural evidence, together with documentary evidence, in order to gradually form a systematic picture of topics such as customary ways of recognizing rights in country and how they might have changed over time. For these reasons it would be both unsophisticated and counterproductive to reduce the category of evidence for traditional ‘laws and customs’, for example, entirely to verbal formulations that might be elicited from particular Aboriginal informants or witnesses, although this position is argued by some lawyers. One cannot put the weight of responsibility for such central probative matters on brief statements given in what is often a culturally alien context, and sometimes in a person’s third or fourth language. Furthermore, some Aboriginal people objectify and intellectualize their customary behaviours more than others. There is a

significant contrast – and one that has classical, pre-colonial roots – between the people of northeast Arnhem Land, for example, who can articulate their culture to a high degree, and those of the Western Desert who largely do not. An insistence that courts rely solely on indigenous witness evidence for adequate explication of their normative systems would thus disadvantage those from the Western Desert compared with those from the more complex society of northeast Arnhem Land, for example.

If one takes a narrow view of how traditional rights are ‘acknowledged’ by claimants, restricting it merely to their verbalizations and omitting what may be abundant other evidence for their possession of a complexly patterned cultural logic, an ingrained system, of recognizing rights, one may miss important evidence. Patterned behaviour is not merely a statistical norm when it comes to human social behaviour. Such behaviour is informed by often deeply submerged cultural presuppositions, of which the people concerned may be only partly aware. There may also be presuppositions and rules of which people are aware but which they may be constrained, by customary law, sometimes by political self-interest, from articulating, especially in public. Without the analysis of an external observer they may not be able to do justice to their cases, in a context where a negotiation or court hearing simply can never offer claimants and their assessors the kind of direct exposure to significant periods of everyday life and to multiple sources of evidence that an anthropologist necessarily engages with during field work. Further, contemporary statements by claimants may be of little assistance in articulating the normative content of relevant laws and customs that applied before sovereignty was established, or in articulating transformative and other relationships between past and present.

For further information: Mantziaris and Martin (2000) provide an anthropologically and legally informed approach to native title corporations, and Sutton (2003) discusses the main ethnographic issues concerned with proof of native title under the Australian legal regime.

LINGUISTS

Linguistic evidence has played a role in Australian indigenous land claims for some decades, but in

native title cases this type of evidence seems to be assuming a more prominent role than ever, and it may be destined to play an even greater part in the future (Henderson and Nash, 2002; also McKeown, 1996). It has now become quite common for there to be a separate linguistic report alongside the main anthropological, archaeological and historical reports lodged on behalf of claimant groups prior to determinations of native title. This is partly a reflection of the raised standard of evidence that flows from the possibility of native title litigation, by contrast with the more limited degree of detail required of administrative inquiries such as those of the Aboriginal Land Commissioner (Northern Territory) or the Land Tribunal (Queensland). It is also a consequence of the peculiar demands of native title law itself, especially its emphasis on evidence for continuity of native titles since the establishment of British sovereignty.

Linguists and others have for some decades provided expert evidence or have published writings that deal with the problems of cultural difference, communicative style, translation and transcription that may arise where indigenous witnesses give evidence in English-dominated and culturally very European legal hearings. Such issues were first given an airing in the early 19th century when colonists debated among themselves the question of whether or not native witnesses should be able to give evidence in criminal trials. Later the anthropologists T.G.H. Strehlow and A.P. Elkin published on the linguistic and other cultural problems of indigenous court evidence, and Strehlow played a significant, if thwarted, historic role when providing expert linguistic evidence to the Stuart Royal Commission in 1959.

In the native title field, one particular contribution of linguistics remains rather under-utilized, and that is the field of the contemporary semantics of indigenous languages and of indigenous varieties of English. Of course, in any kind of land claim it is to be expected that words and phrases that carry key meanings relevant to understanding the principles of land tenure, kinship and genealogical relationships, the character of country groups, and forms of spiritual and other connections between people and country will at least be mentioned in passing and may be explored in some depth.

Land claims have also long required skilful interpretation of earlier literature sources, with their often bewildering array of spellings and their frequent lack of clarity as to what the recorded names of various kinds of groupings or speech varieties referred to. In the earlier colonized areas of the east and southwest of Australia the problems of establishing exactly what classical group nomenclatures referred to can be very great.

Native title as a special jurisdiction can place heavy evidentiary weight on at least two other main areas with which linguists are concerned. These are:

- 1 the nature of contemporary relationships between linguistic varieties, indigenous groups that identify with those linguistic varieties, and the rights such groups assert over countries held to be intrinsically connected with those varieties, and
- 2 the reconstructible or documented history of those relationships in the past, including prehistory.

It has been the first of these that has had the greater exposure in land claims since the early 1980s but, even so, much localized and detailed case work still needs to be done on topics such as how and why it is that language groupings have risen to such prominence as marking the territorial identity of groups in the post-colonial era in certain regions.

Importantly, a linguist can tell a court hearing what relationship exists between, for example, fragmentary but localized colonial-era linguistic records and those varieties that have been better recorded and mapped by linguists more recently. Even where the record contains no name for the variety represented in a colonial police sergeant's wordlist, for example, its degree of closeness to known and usually named and locatable varieties can establish which one it is likely to have been drawn from. At a deeper level, linguists can often provide expert evidence as to the nature of the relationship between language and country as understood by the native title applicant groups themselves.

HISTORIANS

Historians are quite often engaged to provide a social history of the region in which a claim is

located (Choo and Hollbach, 2003). They typically recount a document-based history of colonial exploration, conquest and non-indigenous settlement, provide a sketch of the changes in the legislative contexts through which indigenous people have lived and look at specific themes such as the trend of race relations and the redistribution of power, or employment and economic patterns, over time.

In many cases, though not all, these reports tend to take a broad brush to the subject. They sometimes privilege broad processes, principles and trends, using local specifics only by way of exemplification. They also tend to concentrate on non-indigenous people and leave many references to indigenous characters to broad descriptions such as 'local Aborigines' or 'several families', for example. As evidence for relevant occupation by knowable forebears of claimants this is not particularly useful or highly relevant. It also puts the cart before the horse, in a litigation context. The court is not there to understand history, but to know whether there is reliable and probative evidence as to the history of *these* particular people in relation to *these* specific forms of occupation over *these* particular lands and waters.

For historical reports to be much more frequently useful in litigation contexts would require them to contain far more local detail. For example, one essential would be a detailed chronology of which relevant non-indigenous settlements were created and by whom and where and when, and which indigenous settlements came into existence, when, where and under whose control. This requires the careful assembly of lists of, for example, all relevant pastoral (ranch) holdings, their starting and finishing lease dates, and the names of their lessees and managers; and all mission settlements, dates when they were founded or closed, who were their superintendents and responsible churches, and so on. The keyboarding of employee lists, blanket distributions and registers of births, baptisms, deaths and marriages, for example, is very labour-intensive, but to have a searchable database of such material can be vital to tracing efficiently the whereabouts of pertinent individuals over time. Cross-referenced to genealogies and ethnographic maps, such lists also can be powerful research engines about long-term trends and processes. For example, they would

enable us to answer questions such as to what degree the present claimants in a case are the descendants of immigrants, versus descendants of those who were in occupation at sovereignty in 1788 or 1825 or whenever (depending on the region), or at least from the earliest records following the relevant sovereignty date?

Unglamorous as detailed lists may be, they are very important to understanding claimants' oral evidence and the historical strands of the ethnographic evidence assembled by anthropologists. Aboriginal people in remote areas, especially, may sometimes have little or no skill in the use of calendar years when discussing the past, but can often recall the names of key people and past settlements when recalling events. Knowing when these historical figures were on the scene enables the Court to ascertain roughly during what years the events took place. Knowing the names and locations of the many, often ephemeral, non-indigenous settlements of the past is also important to knowing if evidence about events occurring there falls within the geographical purview of the case or not.

Like some anthropologists, some historians have been criticized in court, from time to time, for wearing their hearts on their sleeves. Even where this counterproductive tendency is not evident, courts and native title parties often show some reluctance to consider historical reports in any detail. This may be principally because it is the lawyers' chronologies of official tenure changes, and the anthropologists' diachronic accounts of indigenous laws and customs giving rise to customary rights and interests in land and waters, that form the crucial historical evidence. Were the historical reports more consistently localized, detailed and personalized, they would more often yield a better return on the investment of effort involved. They would also, for the same reason, be more likely to attract the attention of judges and non-party lawyers, because they would contain more material that went to the specific evidentiary issues of the cases.

ARCHAEOLOGISTS

Archaeologists have provided research reports for a number of native title cases (Lilley, 2000). It is often said that such field surveys and reports can

do nothing more than establish that some unidentified indigenous people physically occupied the relevant area for varying lengths of time in the past. This is usually the case, but there are some exceptions in the sense that archaeological trait distribution can be tested against the recent material culture of a regional population to see how far they constitute a match (Veth and McDonald, 2002).

Archaeology can also provide past occupational evidence regarding sites said to be of cultural or economic significance to claimants. It may be that a ritual site is, or is not, found to have flat rocks on which red ochre has been ground in the past. A place said to have been a camping area for members of a seed-grinding culture may be checked for evidence of millstones, nether stones or grinding platforms on rocky outcrops. If this kind of use of archaeology is to have weight in Court, the field surveys should be conducted after the ethnographic ones, not before.

As far as I am aware there has been no use of physical anthropology in native title claims. In particular, use of DNA testing has not become an issue. It would not be surprising if it entered the picture in the future, especially where indigenous people are contesting assertions of shared descent and relatedness among themselves. At least one Native American internecine contest of this kind, where handsome casino profits are at stake, has led to DNA testing (Tanner, 2005). It is less likely, perhaps, that DNA testing could also be used to establish a connection of biological descent between living claimants and the remains of the deceased found in archaeological sites on or near the claimed land, although one cannot rule out this possibility.

Peter Sutton is a linguist and an anthropologist, and is currently ARC Professorial Fellow at the University of Adelaide and the South Australian Museum, and Honorary Research Fellow at the Institute of Archaeology, UCL. He was Senior Anthropologist at the Northern Land Council of the Northern Territory 1979–1981 and Head of the Division of Anthropology, South Australian Museum 1984–1990. Professor Sutton has assisted in various capacities with over fifty indigenous land claim cases in the Northern Territory,

Queensland, New south Wales, Western Australia and South Australia since 1979. He has published a wide range of books and academic papers including *Native Title in Australia: an Ethnographic Perspective* (2003).

Contact address: School of Social Sciences, University of Adelaide, North Terrace, Adelaide SA 5000, Australia. Email: sutton.peter@saugov.sa.gov.au

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