

Land, Rights, Laws: Issues of Native Title

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The common law recognition of native title in the High Court's Mabo decision in 1992 and the Commonwealth Native Title Act have transformed the ways in which Indigenous peoples' rights over land may be formally recognised and incorporated within Australian legal and property regimes. The process of implementation has raised a number of crucial issues of concern to native title claimants and other interested parties. This series of papers is designed to contribute to the information and discussion.

This paper describes the adaptation of the methods of oral historians to the purposes of native title claims both in field methods and in the presentation of findings and their analysis in legal proceedings. Further comment is made on the reliability of evidence in court of expert witnesses hired by representative bodies. The paper was given at the Australian Anthropological Society Conference 27-29 September 2001 at La Trobe University.

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EXPERT WITNESS OR ADVOCATE? THE PRINCIPLE OF IGNORANCE IN EXPERT WITNESSING

Bruce Shaw

An emphasis on quick, short-term research versus the more sustained and detailed work that two or more years allow is one of the practical difficulties besetting the field anthropologist, whether he/she is a consultant or in-house with a land council or legal service. I am fortunate to have been an in-house anthropologist for four years, focussed exclusively on native title for a particular land claim. But the nature of the work was so different from what I had done in the past that my oral history methodology needed to be re-appraised and adapted considerably. The quality and quantity of research material that can be worked through in straightened circumstances is a related issue. In this paper I will discuss the following: (1) two different applications of anthropological-cum-oral history research from my experience as compiler of life histories and writer of native title reports, and (2) the issue of expert witnessing and the principle of ignorance.

Two applications of oral history

There are two very different research applications of oral history in my experience. The first is to present oral narratives in their own right by means of compiling life histories. These are exemplified in the series of five volumes of Aboriginal lives told by Miriuwung and Gajerrong people, and a handful of persons belonging to other language groups, living in the Kununurra district of the east Kimberley, Western Australia.¹ The motive was to record stories of the early days of the twentieth century from elders before their time ran out.

The acid test of the reliability of this approach came when the Miriuwung Gajerrong land claim went to trial and I testified as an expert witness. Those compilations were regarded as a set of valuable historical documents because the memoirs extended back to the turn of the nineteenth-

twentieth century. They were elicited in the early 1970s before native title became a political issue in this country – and the concept of ‘land rights’ was only beginning to surface to the national consciousness – and so could not be represented easily as special pleading after the fact. This presentation of the life tales as they were recounted was the strength of the books. But it can also be perceived as not going far enough in that interpretative analysis is held over for the volume’s introduction and some of the endnotes. Nonetheless, it proved an effective means of publishing oral histories.

There are other purposes to which oral histories can be put that require different approaches. One of these is the gathering of evidence for native title. In such a case, questions not only of methodology but also of interpretation become more important.

From late 1997 to the present, I have been an in-house anthropologist with the Noongar Land Council, Perth. My responsibility is to carry out research on one of the six land claim regions into which the south-west of Western Australia had been somewhat arbitrarily divided. The south-west is the country of an Indigenous language family whose descendants identify themselves today by the generic term Noongar, that is, ‘people.’ The object of the research was to determine whether there was a case for native title in the claim region. Oral history methodology was applied to what was for me a new form of research, leading me to sharply modify strategies which had served me well in the 1970s and 1980s.

One part of method that changed was to allow the act of transcribing to pass from my hands to those of an outside specialist offering a transcription service. This set aside more time to carry out the interviews, field trips and writing-up without becoming preoccupied with transcribing the tapes. It remained necessary, however, to play back the tapes, proof read the transcriber’s work and do additional editing.

Another factor necessitating resiliency was the time limit. Whereas the east Kimberley life stories were compiled and written up over a span of twenty years, the native title work had to be done within a matter of three years, the first two for the preparation of a preliminary report. In fact, this generous endowment of time was a policy of the land council, far-sighted by comparison with the conditions offered by other land councils, which often hire anthropologists as consultants for comparatively short periods of contract. Nicolas Peterson remarks that in-house anthropologists normally have additional duties that make it difficult for them to focus on a single land claim.² However, where I worked the policy was to free the in-house anthropologists to research exclusively one land claim each, although less enviable management roles fell to the senior anthropologist. Elsewhere, the period of contract for anthropologists and other consultants, such as historians and archaeologists, can be as short as thirty days or less. Such restrictions create an almost intolerable research burden and raise obvious questions about the effectiveness of short-term research, considering that the anthropological method often (but not always) rests upon some degree of participant observation and the building up of rapport with the people with whom one consults, which are vitally important ingredients in the conduct of oral history work too. Colleagues in such circumstances often say they are burdened by job insecurity, nudging the boundaries of exhaustion and cynicism.

All the same, there is a case for the approach. The practice of sending consultant anthropologists into the field on short term bases happens frequently in future act research and heritage surveys, as well as in native title work for a large claim. Perhaps it has helped to create an expectation among some administrators and lawyers that this is how anthropology or oral history is done, in the short term. But it is not that simple. The common complaint is that one simply cannot do satisfactory research under those conditions because time has to be allowed for writing up and analysing the data after the fieldwork. I have done occasional future act surveys, but with the difference that some of the custodians were already known to me because I had worked with them for native title research. That is a clear advantage and is how the short term research report can be balanced against the longer-term project.

The end product of native title research is very different from that of life story writing. What is expected is a research report analysing the different factors that go into native title. These have to address the criteria of the amended *Native Title Act 1993: Reprinted as at 27 July 1998*. This has a history, touched on in a footnote of Howitt's.³ In 1997, in response to a High Court decision that pastoral leases could coexist with native title, which was not necessarily extinguished by them, the Howard government introduced a Ten Point Plan with the intention of bringing about 'bucketloads of extinguishment.' One of the outcomes of the debate that followed was the failure of the Howard government to enshrine two of the most crucial (to them) points in the Ten Point Plan. These were the extinguishment of native title and removal of the right of negotiation for Indigenous communities. That was tacitly left to the states or territories, two of which (the Northern Territory and Western Australia) pursued those goals vigorously. All the same, the remaining eight points were duly built into the Native Title Act, for instance in Section 190B.

The result of the amendments was to make the Act, which was already stringent, even more rigorous,⁴ as Fred Chaney observed at the time⁵. The effects are best appreciated by those at the rock face of native title, the researchers in the field and the lawyers preparing their briefs. The wider Australian community, while expressing goodwill towards the idea of Reconciliation - as demonstrated by the bridge walk across Sydney Harbour and in other capitals - can have little conception of the restrictions in the Act's provisions. Those restrictions remain at work in the background in contradiction to the Federal Government's public rhetoric about Reconciliation. This is not an isolated view. As early as December 1995, Paul Burke observed that, 'we cannot forget the intrinsic affront and injustice of making the original inhabitants of Australia prove themselves to the satisfaction of the settler legal system.'⁶ We in the field are continually reminded of this invasiveness.

Those amendments to the Native Title Act were introduced six months after the commencement of research for the land claim that was allotted to me. The claim covered a very large region. All of the claim areas are big. I began with the list of 'particulars' learnt from the Miriwung Gajerrong experience and made the transition to the newly phrased criteria of the Act's amendments as time went by. Nicolas Peterson touches on one of the research assumptions with which I began when he says that, 'a researcher's job [is] to come up with and address all interests people claim in an area of land, no matter how problematic, contested or weak they may be,' saying a few pages later that, 'a warts-and-all assessment' is important in the earliest stage (the first field trip).⁷ I would add that the warts and all approach should be followed throughout the research. I think it is important not to sanitise one's report but on the contrary to identify as far as possible those areas of conflict that might very well be used by opposing lawyers during cross-examination. This strategy looks to future litigation in the courts, but it may also be applicable in cases of mediation or negotiation.

In practical terms this meant the structuring of interviews and field trips using check lists that did not elicit wide ranging life reminiscences. There were across-the-table interviews with respondents, usually at their homes, followed in selected cases by field trips out to the country. The anthropological prerequisite of establishing good rapport with respondents can and does happen in the short term. Eliciting life stories in brief or starting to record a genealogy are two well-known means of breaking the ice at first meetings. Field trips cement the rapport further. But it takes time for good rapport to be realised, even in the short term, and the better interviews and most valuable data were had when more than one meeting took place, and especially when the anthropologist is conducted over the family run. In the latter circumstance, there is under the surface a strong emotional weighting when one ventures into the claimant's estate country. The spiritual content becomes heightened, although this does not result in a greater number of filled audio tapes than during a recording session at home. These transactions cannot be hurried, and that is one point where the expectations of a lawyer might not always coincide with those of a social scientist.

Detailed life stories were deemed less important than the criteria for native title that had to be addressed. Hence the focus was on native title issues during the transition from narrative to

analytical report. Work histories in brief and synopses of the interviewee's life story were elicited before moving on quickly to questions of genealogical descent (in order to establish the respondent's apical ancestors), family and kinship practices that might throw light on the inheritance of rights of custodianship, and descriptions of important sites that included what one respondent called 'cultural history,' that is, 'Dreaming' stories about sites. [The term 'Dreaming' or 'Dreamtime,' however, is not a useful one when conversing with Noongar people]. In very broad terms I looked for information under six key subject headings: family history and life stories, language and boundaries, use and care of the land, family organisation, transmission, the spiritual life, and a grab-bag called claim criteria. The last-named included people's hopes and aspirations for a successful native title trial, stories of local town racism and encounters with various government departments and welfare agencies over the years, including experiences of being taken from their families and placed in institutions such as the New Norcia Mission or the Carrolup Settlement. All of this is wonderful material, fit for an oral history volume on 'Noongar Lives.' But such a production, with the approval of interviewees and/or their families, is many years away because the research is under professional legal privilege.

One of my policies is to return to interviewees copies of tapes, transcripts and drafts of genealogies in order to keep faith with them by giving something back immediately. This is important because the progress of a native title claim can take many years with no immediate outcome. One of the most frequent complaints Noongar people voice is that, after giving several hours of their time recording their reminiscences, they never see the researcher(s) again. Their stories disappear into a university department or a researcher's files and there is no follow-up or feedback. My reasoning is that an interviewee at the very least should have documentation of their tape recorded conversations 'returned' to them so that they can store it with other personal papers, to be passed down to descendants. This is informed by the principle that Noongar people place great importance on the transmission of cultural knowledge down through the family and goes hand in hand with a clear explanation of one's research role, which includes making no false promises.

Time present: Expert witness or advocate? The principle of ignorance in expert witnessing

Having recently advocated a felicitous union between the legal system and the disciplines of social science,⁸ I have also to admit to some misgivings. But native title changes with the passage of time, and something new comes from each Federal Court and/or High Court decision that affects the research and legal strategies of the land councils. One strategy I thought unusual is that of 'quarantining' potential expert witnesses from direct 'office politics,' a form of compartmentalisation that could extend to the research process itself by placing an interdiction on field work in the claim area for that researcher. The point was that too frequent an involvement in the day to day operations of a land council compromised the researcher's role of impartial observer. In order to preserve this state of integrity, one legal argument holds that members of a research unit should be quarantined from the rest of the organisation. This is difficult, though not impossible, when all sections of the land council are under one roof, which for financial reasons is often the case. Quarantining has other practical difficulties, for there have to be workable organisational relationships between researchers and other land council staff such as field officers, native title officers, archivists, and lawyers.

Another idea behind this might be that the expert witness should have no direct interactions with claimants but should, on the contrary, assess the report(s) of another researcher in a more general way. However, common sense suggests that the most expert witness is one who has worked closely with claimants and so gained an intimate knowledge of the claimant group and the area. This was one of many issues discussed at the ARCHSS conference held in Adelaide in July this year. If a potential expert witness is hired for native title research, or research related to native title, it is obviously an advantage for that researcher to have a good knowledge of the culture area under review. But this is not always the case.

See for example Justice Von Doussa's comments in the Hindmarsh judgement on some expert witnesses who were testifying about the presence or not of 'secret women's business.' Kenneth Maddock, who was not called in as an expert witness on Ngarrindjeri culture but 'to give a qualitative assessment in anthropological terms of the Fergie Report,' observed that if Deane Fergie was right in her assessment, 'she had made ... a significant anthropological discovery.'⁹ A qualitative assessment indeed and one that, as I see it, flies in the face of anthropological common sense. A good knowledge of Aboriginal culture in areas outside the one in question could easily have supported an inference that secret women's business, even in an urban milieu, was entirely possible. Experienced researchers can assess another's work by drawing on knowledge from a different area well known to them, but it can be clearly more difficult for such a person than for a researcher who had already worked in the field under consideration. It could be argued that Maddock and the others on both sides of the 'divide,' as Von Doussa called it, were only doing what was asked of them. Von Doussa notes earlier in his summary that professionals are expected, 'in accordance with community expectations and standards,' to work in their client's best interests.¹⁰ But one must add that this should be done with care. Falling back on cynicism, for example, is not good social science; to admit having insufficient knowledge about an issue should not be perceived as endangering one's professionalism.

When researchers are conceivably not experts in a cultural bloc outside the one(s) they know, we have the seeming paradox of a level of ignorance being required of them as expert witnesses. This policy is no doubt for reasons of objectivity, including the appearance of a lack of partisanship in the courtroom. But objectivity in this situation is an illusion. First, at a more general level, there is no such thing as a value-free social science. The specific examples from the Hindmarsh Island trial amply illustrate that. Secondly, whether the researcher is an advocate or not seems hardly relevant where in a trial two opposing sides are clearly drawn, though who is the prosecutor and who the defendant as in criminal trials may be harder to define.

A safeguard against the feared 'contamination' of potential expert witnesses when they are perceived also as advocates – which is another aspect of this issue – is the application of reliable methodologies: anthropological method (for instance participant observation), oral history method (for instance recording narratives), legal method (syllogistic chain of reasoning with a hermeneutic emphasis), historical method (accessing archives but also doing oral history); better yet a mix of these according to the preferences and skills of the investigator. A reliable report is one that is measurable by others replicating the research, if need be. The thoughtful use of methodologies such as these serves to help reduce biases both conscious and subconscious on the researcher's part.

Such a difficulty might be one reason why many land councils hire consultants from outside the organisation. Indeed, where I work researchers are hired not only for short term future act and heritage surveys but most recently for the researching and writing up of experts' reports as well. This also reflects under-funding and a resultant stretching of human resources. In the Noongar Land Council, there are four anthropologists who have just begun writing experts' reports: myself (in-house), two others (outside consultants) who in the past wrote Ph.D. theses on aspects of Noongar culture and society, a third (also an outside consultant) with anthropological training and close ties to a claim group through living in the same area, and a younger in-house staff member acting as research assistant to one of the Ph.D-qualified experts. So events have overtaken the misgivings I held when I began drafting this paper early in the year. We seem to be establishing a workable union between the applied research for a specific native title claim and the writing of an experts' report on a different (but neighbouring) claim.

Summary observations

At conferences this year, I have drawn attention to a number of issues, all of which apply to native title, from field work to the courtroom presentation.

Subjective aspects of life such as emotional loading and spiritual experiences cannot be ruled out in native title cases in court. In fact, they have an important and perhaps slightly subversive place in such proceedings.¹¹ It is good for us to recognise this and to accept it in the spirit of hermeneutic analysis as in Litchfield's terms.¹²

Lawyers and judges employ a clean-cut methodology that follows an inferential and syllogistic model in order to establish, ideally, the higher probability or reliability of one argument over another. This resonates with inductive (grounded, phenomenological) method used in the social sciences. A lawyer's description of this can often be in terms of hermeneutics and 'conversation,' as discussed in John Litchfield's lucid paper.¹³ Words such as inference, conversation and hermeneutics elicit favourable reactions from lawyers. It would not be a bad thing for social scientists to occasionally make use of the syllogistic procedure themselves and so make it part of their methodological tool kit. That was one of the points I was driving at, at the ARCHSS conference.

Using oral history methodology in native title research takes place in a moderately structured bureaucratic environment wherein such prerequisites as the signing of release forms or the gaining of an interview can be streamlined because claimants (a) had already signed-on as claimants, and (b) often actively sought out the researcher for interview, or did not demur when they were approached. It is a good example of 'applied' research where both interviewer and interviewee are in close collaboration.¹⁴

An anthropologist or historian working in the field on native title claims – or indeed on other projects – can often find relatively new (to them) social phenomena. One example is that of Indigenous people recording their own family and personal histories through not only their traditional oral history sources but also by drawing upon documentary evidence recorded and written by non-Aboriginal people. The Indigenous books and papers that result have an evidentiary value for native title.¹⁵

Doing native title research in the more settled urban-rural regions of Australia's south gives the lie to that persistent stereotype of the 'real' Aboriginal. Paradigms for Indigenous culture in those regions can be established comparatively easily through inductive research. Accordingly, it is my opinion that native title exists for the south-west of Western Australia (territories of the Noongar language family), and I suspect the same applies to most if not all other parts of 'urban' Australia, regardless of Justice Olney's judgement in the Yorta Yorta trial or what spokespersons for ATSIC might say.¹⁶

Conclusion

There are two points that I am making in this paper. First, oral history is a methodology that can be put to a variety of uses. Its application with east Kimberley elders (emphasising the life story) was substantially different from that of current native title research (emphasising the NTA's requirements). The technique or method in the methodology is the same, that is, tape-recording, transcription, and so on, but the cultural foci are different. Secondly, we have safeguards against the 'contamination' of potential expert witnesses in the reliable methodologies that are at our disposal, which we all apply to the best of our abilities. A text book definition is that a reliable report is one that can be replicated by others in all major essentials. This harks back to the point made also in the ARCHSS conference, that social scientists and lawyers can learn from one another because their methodologies have a lot in common. The judicious use of our different approaches to evidence serves to counteract biases both conscious and subconscious on the researcher's part. Of course, this is an ideal.

¹ Bruce Shaw, *When the Dust Come in Between: Aboriginal Viewpoints in the East Kimberley Prior to 1982 as Told to Bruce Shaw*, Aboriginal Studies Press, Canberra, 1992; Bruce Shaw, *Bush Time, Station Time: Waddi Boyoi and Johnny Walker, Reminiscences of Eighty Years as Told to Bruce Shaw*. University of South Australia, Underdale, 1991; Bruce Shaw, *Countrymen: The Life Histories of Four Aboriginal Men as Told to Bruce Shaw*, Australian Institute of Aboriginal Studies, Canberra, 1986; Bruce Shaw, *Banggaiyerri: The Story of Jack Sullivan as Told to Bruce Shaw*, Australian Institute of Aboriginal Studies, Canberra, 1983; Bruce Shaw, *My Country of the Pelican Dreaming: The Life of an Australian Aborigine of the Gadjerong, Grant Ngabidj, c.1904-1977 as Told to Bruce Shaw*, Australian Institute of Aboriginal Studies, Canberra, 1981.

² Nicolas Peterson, 'Organising the Anthropological Research for a Native Title Claim,' in Paul Burke (ed.) *The Skills of Native Title Practice: Proceedings of a Workshop*, Canberra, 1995, p. 9.

³ R. Howitt, 'Frontiers, Borders, Edges: Liminal Challenges to the Hegemony of Exclusion,' *Australian Geographical Studies*, Vol. 39, No. 2, July, 2001: 233-245.

⁴ For example, of the following rights and interests, which of them are practised in accordance with laws and customs:

- rights and interests to possess, occupy, use and enjoy the area;
- the right to make decisions about the use and enjoyment of the area;
- the right of access to the area;
- the right to control the access of others to the area;
- the right to use and enjoy resources of the area;
- the right to control the use and enjoyment of others of resources of the area;
- the right to maintain and protect places of importance under traditional laws, customs and practices in the area;
- the right to maintain, protect and prevent the misuse of cultural knowledge of the common law native title holders associated with the area;
- the right to rear and teach children in their country;
- the right to live on and erect residences and other infrastructure on the land;
- the right to trade in resources of the area;
- the right to receive a portion of any resources taken by others from the area.

The origins of such lists are lost in the mists of time, passed down to us by lawyers, but they are responses to the NT Act's requirements.

⁵ Fred Chaney, 'Native Title : Challenges for the Third Millennium', in Gary Meyers, *In the Wake of Wik : Bold Dilemmas, New Directions in Native Title Law*. National Native Title Tribunal, Perth, 1999, p. 92-99.

⁶ Paul Burke (ed.) *The Skills of Native Title Practice : Proceedings of a Workshop*. Native Titles Research Unit AIATSIS., Canberra, 1995, p. x.

⁷ Op. cit., Peterson, pp. 9,12.

⁸ Bruce Shaw Bringing the Numinous into the Witness Stand, Adelaide Research Centre for Humanities and Social Sciences, Australian Anthropological Society, ARCHSS & the AIATSIS Native Title Research Unit, Expert Evidence in Native Title Court Cases: Issues of truth, objectivity and expertise, Adelaide University 6-7 July. Conference Papers Published on the Internet, 2001.

⁹ *Chapman v Luminis Pty Ltd (No 5)* [2001] FCA 1106 (21 August 2001) Von Doussa, , pp. 140-141.

¹⁰ Ibid., pp. 113-114.

¹¹ Op. cit., Shaw, 2001a.

¹² John Litchfield, John 2001 *Mabo and Yorta Yorta: Two Approaches to History and some Implications for the Mediation of Native Title Issues*, National Native Title Tribunal Occasional Papers Series, No. 3, March, p. 10.

¹³ Op. cit..

¹⁴ Bruce Shaw, Panel Discussion. Oral history Association of Australia Western Australian Branch, Annual Conference 2001, Margaret River, Saturday 4 August.

¹⁵ Bruce Shaw, Oral history research for native title: Intensity, sympathy, disorder and tradition, Australian Institute of Aboriginal and Torres Strait Islander Studies, The Power of Knowledge, the Resonance of Tradition - Indigenous Studies: Conference 2001, 18-20 September, Symposium C: 'The Resonance of Tradition,' Researching and Writing Regional Family Histories, Convenor Kath Schilling, Canberra.

¹⁶ Op. cit..

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