

**TRADITION, ADAPTATION, THE 'TIDE OF HISTORY' WORKSHOP:
issues for anthropology in research for native title claims
and their aftermath**

Anthropology, University of Queensland, St Lucia campus

June 23rd and 24th

Convenors: Professor David Trigger and Ms Wendy Asche

Workshop Summary:

While legal decisions, negotiated outcomes and related commentary have indicated that establishing native title rights does not require an unchanging body of traditional law and custom, in practice this remains a difficult and contested area of anthropological research. Further challenges are encountered in the implications of changing law and custom for managing and implementing acknowledged rights arising from claims.

Paper Abstracts (by alphabetical order of participants)

Native Title in urban areas - You win: You lose

Robert Graham (Consultant Anthropologist) and Wendy Asche (University of Queensland)

Urban native title claims are complex, due to the intensive nature of the contact history and the number of contested interests and political stakeholders, compared to sparsely settled areas. Although this makes successful litigation less likely, if managed well, the same environment provides greater opportunities for substantial agreements between claimants and governments or developers.

The Larrakia claims in the Darwin region have had mixed success over the last 30 years under the framework of the Aboriginal Land Rights Act (NT) 1976 (ALRA) and the Native Title Act 1993 (NTA). The Kenbi ALRA claims over the Cox Peninsula were highly divisive for the Larrakia people as four different claimant groups were presented. It was ultimately successful for a very small group of Larrakia. The Larrakia NTA application over Darwin city was presented as an all inclusive Larrakia group but was highly contested by the respondent parties. It was the first of the native title claims by the Northern Land Council (NLC) in the more hostile environment after the NTA amendments. The claim was unsuccessful.

There have been eight native title applications in the Darwin region lodged by the NLC on behalf of the Larrakia people. The anthropological description of the claimant group has been consistent in all applications. One of the native title agreements was settled on

the basis of an anthropological report by the same author who produced an updated version of the report for that submitted in the litigated claim. During the period since the lodging of the first native title application two strong political and economic organisations were established (the Larrakia Nation and the Larrakia Development Corporation). These organisations were an essential element in the successful negotiation of four significant Indigenous Land Use Agreements for the Larrakia people over native title applications separate to the litigated application. In the long term, the failure of the native title claim in litigation has been mitigated by the success of these agreements, which allow Larrakia people an increasing economic and political involvement in Darwin.

Historicising Tradition: Anthropology's Challenges in Native Title

Gaynor Macdonald (University of Sydney)

I will examine three native title cases (Peak Hill, Yorta Yorta and Noongar) and the anthropology that was brought to them (as far as I have access to it) to explore the understandings anthropologists have used to address change and continuity in the context of native title claims in settled Australia. My own conversations with colleagues suggest that anthropologists themselves share no consensus on whether claims in 'settled Australia' are winnable. This warrants a hard look at how we are approaching such cases and whether our own practices need to change to tackle them. I will attempt to address these questions - no doubt controversially!

Looking back, looking forward: challenges for native title anthropology in an era of agreement making

David Martin (Anthropos Consulting)

A decade of statutory amendments and court decisions since the original High Court Mabo decision has resulted in native title becoming an increasingly restricted legal construct. At best, native title only contingently reflects the nature of Aboriginal people's connections to country, and indeed their aspirations for transformation in the circumstances of their lives. In this context, and given the significant human and other resources needed to achieve successful determinations, agreement making is becoming an increasingly important aspect of native title practice both as an adjunct to determinations of native title, and as an alternative to them. However, this move from a primary focus on proving native title to assisting in the development of ILUAs and other agreements, poses major challenges to much established practice in native title anthropology.

In order to prove native title, claimants are obliged to construct an account of their present in terms of essentially unbroken connections to a traditional past - a form of legally sanctioned and indeed mandated traditionalism. Agreements on the other hand offer a range of

possibilities for them to construct their futures through transformative processes involving engagement with the institutions of the dominant society. Such processes can enable claimants to negotiate ways to have their interests and certain of their rights recognised and aspirations met (including for development), without these having to be refracted through the distorting lens of traditionalism. This will require anthropology to move intellectually and politically out of the enclave of native title and its traditional focus on Aboriginal traditions, and to place research and practice against such broader contexts as those of Indigenous policy and sustainable development frameworks.

This paper will argue that what is entailed is a transformed and explicitly transformative anthropology which while being vigilant about its ethical and political implications nonetheless is fully engaged in both the debates around and the practice of development for Aboriginal people.

Keeping the audience in mind when discussing the tide of history

Kim McCaul (Attorney General's Department, South Australia) and Peter Tonkin (Attorney General's Department, South Australia)

The High Court determination in *Yorta Yorta* still provides the benchmark for the kind of ethnographic evidence needed to establish that "the tide of history has not washed away the observance and acknowledgement of laws and customs". While it determined legal criteria, the High Court did not give any particular guidance as to how anthropologists might best present their information to satisfy them. Interim judgements in *Harrington-Smith* and *Jango* both highlighted that anthropologists are still struggling to write for the law.

This paper will provide a reader's and assessor's perspective on what does and what does not work when anthropologists try and navigate the complex interface of Aboriginal law and custom in an environment of social change and the focus of the common law.

Piety, fact and the oral account in native title claims

Kingsley Palmer (Appleby Consulting)

Oral accounts provided by claimants in native title claims have played a key role in determining outcomes. Claimants provide the principal data upon which an expert bases his or her view, set out in an expert or connection report. Typically, claimant affidavits are filed in support of a claim and if the matter goes to trial, claimant testimony has been considered by the courts to be the principal component of the evidence considered.

Professor Sansom (2006) has questioned the validity of the claimant testimony when applied to a process that seeks to prove native title

before a court. He does this on anthropological grounds, arguing that such testimony is unreliable as a result of 'trends of cultural practice'. He suggests that reliance should only be placed on archival records and expert opinion.

I examine some of the arguments of Sansom's paper provided in support of these conclusions. I then seek to evaluate the role of an Aboriginal oral tradition in a native title matter. In this I suggest how some of the difficulties identified in the paper may be better understood and how others can be mitigated by processes that do not require that we throw the baby out with the bath water.

Turning back the tide of history: anthropology, adaptation and the reasonable case model

Ian Parry (Department of Justice, Victoria)

This Paper argues that Victoria represents a particular field, anthropologically and historically, for native title, because of the scale and speed of the dispossession and dispersal of the original indigenous inhabitants. Perhaps as a result, the experience of resolving native title claims in Victoria has followed a different path to other Australian jurisdictions.

At the end of the 1990's Olney J. in the Federal Court could conclude that Yorta-Yorta native Title claim must fail because "The tide of history has undoubtedly washed away any traditional rights..."[Yorta-Yorta, 1998 para 126]. A corresponding conclusion concerning the rest of Victoria might have been inferred.

Notwithstanding this pivotal judgement, the Federal Court has approved increasingly comprehensive Consent Determinations of native title in Victoria [Wimmera 2005 and Gunditjmara 2006].

It is suggested the changes in administration of the Native Title Act in Victoria, between 1998 and 2008, rest on a particular intersection of anthropological understandings, the law and State policy. Shifts in any single feature of the triumvirate, alone, would have been insufficient to account for the movement in claim outcomes.

The situation in Victoria implies that anthropological and historical understandings can evolve to enhance technical insight into the available evidence, even where data is scarce or contested. The evidence thus formulated may provide confidence to the State it deals with the right people for country, a reasonable case exists for connection and rights and interests claimed are appropriate. However, it is insufficient for the sources of anthropological advice to satisfy themselves alternative formulations of the evidence are valid. This understanding and confidence need to be extended to the State bureaucracy and the Federal Court.

Of equal importance, the State must have the political will to respond to the evidence, and in part this rests with the confidence it has in its technical advisors.

The Victorian government has chosen to support native title determinations, where sufficient evidence exists, as part of its

overall indigenous policy framework; the Federal Court has shown a willingness to agree to consent determinations where the process is demonstrably comprehensive.

The paper concludes there is room for further evolution of the role and influence of anthropology in supporting and shaping State policy, with a corresponding improvement in satisfactory outcomes for indigenous interests and the Victorian community as a whole.

History, tradition and cultural revival in southeast Australia

Nicolas Peterson (Australian National University)

Throughout southeast Australia, State and Federal legislation requires information on past social and cultural arrangements and practices. This has done much to stimulate an interest in local and family history among both Aboriginal people and academics. While in most areas the ethnographic record is thin, the historical record is often richer than expected, although still patchy, and it is often historians who are writing about Aboriginal life in the past. How they write about the past is, in part, influenced by their understanding of Aboriginal ethnography and anthropology, particularly as it relates to people and place. Sometimes their grasp of the anthropological concepts is weak and their analysis is flawed. However Aboriginal people often come to be strongly attached to these analyses which appear to be evidentially based. This makes anthropological questioning of them problematic in their eyes. This paper will explore some situations where this has been the case.

Structural Event Indexing and Social Network Analysis in the Development of Native Title Evidence

James Rose (Native Title Services Corporation, New South Wales)

The metaphor conjured up by Olney J in 1998, of a tide 'washing away' the traditional law and custom of Indigenous communities on the NSW/VIC border, is a powerful one and has provoked strong reactions from various quarters of the native title industry and elsewhere. Since this judgement the federal court and National native Title Tribunal have continued to refine and intensify their assessments of evidence tendered in support of native title claims, often with negative consequence for claimants. This trend has placed great pressure on the effective formulation of evidence by expert witnesses - particularly social anthropologists.

At the Native Title Services Corporation (NTSCorp), researchers have struck upon a suite of novel techniques for analysing the large volumes of data collected in support of claims in NSW. These techniques draw on computational approaches to spatial, geographic and genealogical modelling that allow us to test for the temporal and spatial integrity of native title rights asserted by filial-matrimonial communities. The techniques of structural event analysis (SEA) and social network analysis (SNA) are not widely used by social anthropologists in

Australia yet they show an encouraging potential for addressing the probative demands of native title. In combination they generate a framework for demonstrating the relative continuity of practices such as habitation, resource-use and the transmission of knowledge through descent- and marriage-based communities in both space and time. Because the techniques derive from complex mathematics and relational database design they are also ideally suited not only to statistical and graphic representation but also to independent testing by well-organised respondents to native title claims such as crown solicitors. The clarity and objectivity of the methods of SEA and SNA and test results they yield also have the potential to quickly relieve the need for heavy-handed and unproductive metaphors in assessing the credibility of evidence.

Inherited Models and Recent Trends: Their accommodation to Native Title
Basil Sansom (University of Tasmania)

This essay has been re-cast in response to the decision of the appeal court in the Bennell case. The judges have put a new construction on the way in which continuity and change is to be addressed. What is to be understood is their conception of the relationship between continuity of a 'society' on the one hand and the survival native title rights and interests on the other. More particularly, after Bennell, I believe that the shift to cognation can never again be used by respondents as a 'special defense'. In the light of the new case law, I examine each of a series of inherited anthropological models for and of change. These models are historically part of the whitefella documentation of the Aboriginal past; they informed perception and so shaped the record. The set of inherited models I consider are those that seem still worthy of attention now that the Bennell ruling is there with its presentation of new principles and criteria.

Negotiating 'tradition' in the Pilbara
Nicholas Smith (University of Western Australia)

If the number of higher degrees based on research in the Pilbara is any indication, there exists a disjunction between this 'unfamiliar' ethnographic domain and its relative anthropological 'familiarity' through the published work of Radcliffe-Brown. This poses a whole range of issues when researching for native title purposes in the region. I will explore some aspects of the accommodation, adaptation and contestation arising from Radcliffe-Brown's legacy by representatives of various parties in the pre- and post determination native title process.

Christianity, cultural change and the negotiation of native title rights

David Trigger (University of Queensland) and Wendy Asche (University of Queensland)

Various aspects of Christian belief and practice have been documented as significant across a range of Australian Aboriginal communities. In recent years, many of these communities have been involved in seeking to achieve native title rights as recognised in Australian law. Asserting and proving native title entails demonstrating continuity of traditional law and custom since the establishment of British sovereignty. While legal discourse indicates this does not exclude cultural change, law and custom must continue to derive from pre-sovereignty traditions.

This paper addresses the extent to which Christian belief and practice have been articulated by Aboriginal people in native title claims; and why Christianity has been generally downplayed (if not excluded) from research on traditional native title rights and interests. If a sophisticated theory of cultural change and continuity is germane to researching native title, what of the significance of processes of Christian syncretism in Aboriginal relations with place and the inheritance of ancestral connections to 'country'? A number of case studies will be examined.

Conflict in the Statutory Elicitation of Aboriginal Culture in Australia

James Weiner (Australian National University/University of St. Andrews)

Since the High Court *Yorta Yorta* decision in 2002, it has been accepted that the *Native Title Act (1993)* stipulates that in order for Aboriginal rights and interests to be recognized, such rights and interests must arise from laws and customs that can be shown to have continuity with the particular set of laws and customs that existed at the time of Sovereignty, or at best, at the time of first contact.

Yet today's Aboriginal native title claim groups are also required to participate in other statutory ventures outside of the native title domain—for example, "tribal" representatives in north Queensland are obliged to represent their interests on the Wet Tropics Management Authority, and the Great Barrier Reef Marine Park Authority. The activity and time spent participating in these ventures, as commendable as they may be, do not "count" as instantiations of traditionally-based rights and interests. Furthermore, the powers and rights granted to Aboriginal groups under these statutory ventures are often in conflict with the strictures of current native title interpretations of "traditional law and custom and rights and interests". The effect is to elicit versions of Aboriginal action that contradict each other legally.

In this paper I discuss some examples of these institutional conflicts engendered by the statutory actions of State and Federal government and

comment on the implications for the contemporary Aboriginal articulations of identity and tradition.

Research issues in the Githabul case

Ray Wood (Consultant Anthropologist)

I have been asked to outline some of the research and presentation issues involved in preparing the anthropology for the Githabul case, which was recently settled with NSW. This case benefited from a large body of early ethnography and linguistic data that was mostly unanalyzed with respect to customary tenure history. It was of critical importance, especially as it included Malcolm Calley's and Russell Hausfeld's mid-20th century slice of dense reportage at the very point of change from 'classical' to 'post-classical' tenurial organization. Once compared with my 2003 fieldwork, it proved revealing of how continuity in indigenous tenure group formation has ordered this change far more than could have been understood by reliance on the 2003 data alone. I will outline some of the principles I think need to be followed to sift early ethnography in a disciplined way in southeast Australia, and why the data-rich Githabul material contributes toward modeling change and continuities in other cases where the early ethnography is much sparser. I will also try to show why underscores how closure (via legal privilege) of the dense anthropology prepared and/or under preparation in native title cases has created some of the problems we now have in Australia. Making the research a more open process as in North America and New Zealand has allowed it to feed back into practice in those countries, admitted the social science community to more participation in setting standards as to what is a reasonable case, and improved the quality of the research material coming before the Courts.