

1. Why won't we tell them what they want to hear? Native title, politics, and the intransigence of ethnography

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Introduction

The definition of 'native title' in the *Native Title Act 1993* (NTA) privileges a particular set of notions about indigenous relations to land and waters that nevertheless remains subject in everyday life to a variety of interpretations. The extent of such possible interpretations is limited, however, by their positioning in relation to two of the main processes associated with native title claims: the legal and statutory processes on the one hand and 'the facts, Mrs Gradgrind, the facts', on the other. While 'the facts' are assumed to be a firm point of reference for the issues examined by the legal system, these two arenas may or may not be in contradiction with each other. So, too, may there be (and clearly often are) different anthropological interpretations of the facts, as well as those of different groups of indigenous people involved. The native title claim process, even more than the land claim process, does not allow the luxury of multiple interpretations, but confronts both claimants and anthropologists with urgent questions of 'fact'; that is, of commitment to a particular, consistent and clear set of interpretations. Sometimes this is not necessarily a surrender to positivism, but an acknowledgment of the boundaries to interpretation established through a developing ethnography. It may or may not be in the interests of particular anthropologists involved in, but not the arbiter of, a claim. The issue is not principally of a privileging of 'fact' over interpretation, but of what is possible within the limits of ethnographic documenting and of how this relates, or does not relate, to the requirements of the native title claim process.

Facts and contested representations

Although the definition of 'native title' in s.223(1) of the NTA, the information required by the National Native Title Tribunal (NNTT) Regulations, and the practice directions now required by the Federal Court, appear to privilege a particular set of notions about indigenous relations to land and waters, these notions nevertheless remain subject in both everyday life and in the practices emerging from the claims process to a variety of

interpretations. The framework within which such differing interpretations are contained is established by the claims process, and by their positioning in relation to two of the main arenas within which native title claims are asserted. These are:

- the statutory and legal processes set up under the NTA, but now modified in a number of different ways as a result of decisions by Federal Court judges; and, as Thomas Gradgrind insists in Dickens' *Hard Times*,
- 'the facts, Mrs Gradgrind, the facts' (Dickens 1972).

What constitutes the facts, and which facts we are talking about – legal facts, historical facts, ethnographic facts – remains problematic. As does what we mean by these anyway. To look at the matter of legal facts, it is clear that many are themselves not initially facts, but interpretations that become facts as a result of authoritative decisions. For example, do pastoral leases extinguish or not extinguish native title, and to what extent? Inevitably, this question will be decided as a matter of interpretation by the courts, and will become a fact only when it is ultimately decided by the High Court. When it does become a fact, we will all have to live with it. In the meantime, the fact that it is not yet a fact is a major issue in NNTT mediations and has led to the positioning of the parties in relation to the mediation process such as that taken by the Pastoralists and Graziers' Association in Western Australia. One of their recent memoranda sets out the following position (July 1995):

Currently Aborigines have no rights over that land other than those stipulated in s.106 of the *Land Act 1933*. So the mediation process presumably means negotiation to see what rights the land holder is prepared to negotiate away to satisfy the demands of the claimant ...

Justice French has proposed that native title claims, after acceptance should go straight to court but that mediation by the NNTT should continue in parallel. The inference must be that any gains made in mediation would be presented in court ... It would appear desirable that pastoralists' aim should be to have claims proceed in court without any concessions made in mediation ...

You will see that the case will proceed in court whether you mediate or not and the court may not take into account any concessions made. It is likely that the first case to be heard to determine whether or not native title can survive the grant of a pastoral lease will set the precedent for all other cases ...

In the meantime, if you are persuaded to attend a pre-mediation or mediation meeting, I suggest that you should be extremely wary of making any concession at all no matter how convincing Justice French makes it all appear. Perhaps a better tactic would be to write to the Tribunal saying that there is nothing to be gained through mediation so there is little point in attending.

The existence or otherwise of this particular legal fact, clearly is an issue that affects the possible achievement of other parties to a claim being

willing to engage in discussion, let alone negotiation with the claimants. This is so in a number of claims, particularly in relation to pastoralists. In one Western Australia claim, for example, the only significant group to refuse to engage in any discussion with the claimants at all, leaving aside the Western Australian Government, were the local pastoralists. Almost all the mining companies involved in the claim area, as well as representatives of fishing and other marine resource interests, agreed to enter into negotiations, and these meetings will go ahead. Those with the fishing and marine resource interests will be given priority, since there is no question in this case of extinguishing acts over waters.

The pastoralists, however, clearly held a position that they have nothing to gain and only things to lose, although there are indications that pastoralists in other areas may be beginning to change their position. The Northern Territory Cattlemen's Union, for example, was reported this week (23 September 1995) as recognising the importance of Aboriginal pastoralists in the beef industry and indicating their willingness to enter into discussions.

When we come into this arena of legal facts – which as used here in a non-technical sense, are not really facts but authoritative interpretations – we are constrained by the requirements set down by the courts. What happens, then, to historical and ethnographic facts, including those of the kind presented by Merlan's paper (1995), in which the locus of construction of new sites is apparent. The question arises as to how this would stand up in a land claim or a native title claim. Also, even if it can be ascertained what constitutes those facts, what is the relationship between the two which, at one level at least, is a relationship of written to oral histories; that is, of written records to individual and collective memory?

This seems to me to be one of the central questions emerging from the native title and other land-related cases, like *Wagait* and *Hindmarsh Island*, and to raise other questions about the character of indigenous 'tradition' that are not easily accommodated by the definitions in the NTA. Nor are they readily addressed within a theory of representations, in which 'virtually any observation about the present can be mobilised in the very search for the present itself' (Jameson 1991: xii). A theory of representations, one which is essentially situational and contextual, allows little room for an assessment of the groundedness of any one set of representations in an external reality, other than that constituted by relations of power. The status of facts in this approach, though relevant, is also obviously problematic. If we look at the issues raised in the *Finniss River Land Claim* and readdressed in the recent *Wagait* hearings in the Northern Territory, it is possible to identify these areas of concern.

The Wagait dispute

The Finnis River Land Claim (Northern Land Council 1981) had to take account of a discrepancy between, on the one hand, the observed and unchallenged fact that one group of claimants, the Marranunggu (who at that time, though not later, encompassed the Werat), lived on the Wagait Reserve and had done so within living memory and, on the other, that the other group of claimants, the Kungarakan and Warai, asserted a superior historical right. The Aboriginal Land Commissioner also had to take account of two other sets of facts: that neighbouring groups all placed the Marranunggu 'south of the Daly', and that the consensus of neighbouring opinion was that the traditional owners of the land under claim (adjacent to the Reserve) were the Kungarakan, with the Warai, with whom they claimed a 'company' relationship.

Written historical records, in the form mainly of maps, including Tindale's, favoured the Kungarakan claim. One interpretation of the oral record by Ivory and Tapsall (1978) also asserted that the traditional owner of the country was a Kungarakan man living at Adelaide River – Edwin Mundang McGregor – and that they (Ivory and Tapsall) had their first indication of this ownership from Marranunggu people actually living on the reserve. Ivory and Tapsell also stated that Mundang indicated that he had no knowledge of this country, and almost all their information about the reserve came from their Marranunggu informants. The Land Commissioner dealt with these difficult discrepancies by accepting a theory of succession, in this case, interrupted succession, which allowed him to explain these facts. It also allowed him to make a recommendation that addressed the claims of both the Kungarakan/Warai and the Marranunggu/Werat. In this instance, a particular theory was used to interpret a set of conflicting claims, each basing itself on a particular set of facts which, in turn, was based by the claimants on a range of differing authoritative sources such as written records and maps, oral histories, and the opinions of neighbouring groups.

In re-presenting their claim to the Reserve to the Northern Land Council in 1993 and 1994, the Marranunggu completely rejected this theory of succession and asserted their claim to have always lived on the eastern Wagait and to trace their ownership of the country back in entirely orthodox fashion to the ancestor of their father's father's father, a man called Djakeboi. In unexpected support of this claim was the statement by a witness brought to the hearing by an opposing group, a senior man from south of the Daly River who agreed that he had always been told that the disputed country belonged to 'Djakeboi's father'. At the same time, both the Marranunggu and the Werat posited descent from a group agreed to have become extinct, the Djerait or Dekdjerait – claiming, that is, not so

much succession as descent. Interestingly, in these hearings, the Kungarakan also posited a prior group, the Parlymarinyan or 'coastal Kungarakan', who they suggested had become extinct and to whose country they had succeeded.

In other words, all three of the major disputing groups conceded the possibility of at least two other now extinct groups, the Djerait and the Parlymarinyan, as having had rights in the country to which the present groups had succeeded in a number of different ways. In other words, despite the categorical assertions by all three groups to full, exclusive ownership of the eastern part of the Reserve, all three also accommodated the possibility of descent from, or succession to, another related but linguistically distinct group which had since become extinct.

As well, each of these groups, while citing the oral authority of remembered and named people, also referred extensively to written records and to maps. Indeed, one of the more striking bits of new material was discovered just a week before the site visits began. This related to a core boundary issue, in which the Marranunggu claimed that a particular hill, *Ngalgal*, had always formed their western boundary. *Ngalgal* was called in English Hatter's Hill. In contemporary maps, the point referred to as *Ngalgal* by the Marranunggu is marked as Peak Hill. Hatter's Hill as marked refers to a tiny rise significantly to the east of Peak Hill. The last minute discovery was a 1917 surveyor's map that clearly named the present Peak Hill as Hatter's Hill. This strongly reinforced the Marranunggu claim to a boundary site that they contest with the Wadjigan/Kiuk.

At issue in this dispute, therefore, as it appears to the outsider to be in the Hindmarsh Island dispute, is a series of mutually incompatible representations of the facts, relating to group definition and self-representation. None of the disputing groups in the eastern Wagait was prepared to accommodate any of the claims of the other groups, with the exception of the Kungarakan reaffirming their willingness to retain the 'company' relationship with the Warai, a willingness which was entirely rejected by the Warai. One of the other many interesting moments in the hearings, and one which illustrates the problematic relationship in these situations between written records and memory, was when one of the lawyers quoted to a senior Warai man his own words from the Finnis River Land Claim transcript in which he asserted the existence of a 'company' relationship between the Warai and the Kungarakan. Thirteen years later, and in the face of the written record, this same Warai man had no trouble in denying that he had ever said any such thing, or that such a relationship had ever existed. The Wagait lawyer was as clearly confounded by this response as a certain journalist in the Hindmarsh Island saga has been by a similar rejection of a previous recorded statement by a key player.

Whither ethnography?

In the face of clearly incompatible or contested representations by disputing Aboriginal groups where, and under what circumstances, do we locate anything that might be called ethnographic facts? If the Aboriginal participants to such disputes are as intransigent as their particular ethnographies may be, how can the determination of any native title claims be achieved? What if the recognition of particular native title claims founders not on the difficulties in the NNTT and court processes, or even on the intransigence of oppositional State and Territory governments, but on the failure of disputing claimant groups to reach any agreement in relation to particular areas of land?

A less fraught example than Wagait, but one that raises similar issues in a much lower key and less contested way, is a native title claim in Western Australia. The claim is to land and waters, and covers country belonging to a number of different named language groups, all of whom, except for those which appear to have died out, are now resident in the area. The claim has been submitted in the name of two of those language groups. A third group, whose country borders the claimed land, has been named as a party to the claim but, apart from a small but important border area that includes a creation site, is generally supportive of the claim. The disagreement over this border area is being addressed between them and the claimants and is likely to be settled.

Of the two main claimant groups, only one is actually a coastal group. The other's country belongs in the adjacent tablelands. Everyone, including the claimants, is quite clear about these distinctions. An issue has arisen, however, about who has the right to speak for which country, not just between the tableland and coastal areas, but for particular parts of the coastal country as well, where some of the claimants are being seen to speak inappropriately for country more properly spoken for by other families. There are two other areas of concern. One acknowledges that there are families connected to the groups said to have become extinct and queries what rights to country they may have. The other relates to the outcome of the claim if there is a determination of native title, in terms both of access to resources and of the distribution of potential income. At this stage, none of these concerns is looming so large as to seriously undermine the claim, but they are ones that are unlikely to go away, and may escalate unless addressed.

Undoubtedly, many of the disputes emerging, or becoming more formally articulated in the native title and related processes, are the product of a variety of causes, including indigenous political dynamics as well as histories of displacement and resettlement. Nevertheless, the disputes are real, and oppose groups not just on the basis of differing access

to power and resources, but also of deeply held convictions about the rightness of their interpretations. If the Dieri and Arabanna peoples in South Australia define themselves as separate, and both claim exclusive rights of traditional ownership to Finnis Springs, where does ethnography take us? Is there a place for an appeal to historical facts, if they should be found to have been documented? In a sense, ethnography, like the theory of representations, emerges essentially from the present, with history as largely unreflected. In some sense, then, the disputes over ownership of land demonstrate a rupture between ethnography and history, but in ways that reflect the unresolved relations between written and oral history, or between records and memory. And somewhere amidst these shards of a sense of objective reality lurks the notion of a positioning of groups or individuals asserting authority and rights to recognition, and a related notion of ideology.

Fredric Jameson (1991: 51) refers to the 'great Althusserian (and Lacanian) redefinition of ideology as 'the representation of the subject's imaginary relationship to his or her real conditions of existence'. This, he suggests, constitutes a 'cognitive map', which enables 'a situational representation on the part of the individual subject to that vaster and properly unrepresentable totality which is the ensemble of society's structures as a whole'.

What native title claimants are presenting, often in conflict with each other, are their particular cognitive maps of their present relationship with the land or waters under claim. In a sense, such maps represent particular interpretations arising out of, but not necessarily acknowledging, the particular historical circumstances of the claimants and their neighbours. The native title claims process, however, does not allow the luxury of multiple interpretations, but confronts both claimants and anthropologists with urgent questions of consistency and accord in presenting the claim. The situation of the claimants within 'that vaster and properly unrepresentable totality ... of society's structures as a whole' demands compromises that claimants may or may not be willing to make, or be properly consistent with their own cognitive maps and with the processes appropriate under 'the traditional laws acknowledged and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders' (s.223(1) of the NTA).

There is, as we all know, a serious challenge for anthropologists in this process. Both the Finnis River Land Claim and the Wagait dispute have demonstrated that there is no necessarily clear ethnography in relation to particular areas of land where different claimant groups hold conflicting cognitive maps of those areas. The solution does not lie in one anthropologist accusing another of bad ethnography or of bad theory. As the native title claims process continues, anthropologists have also to face

situations where the issue is not differing cognitive maps among claimants, but the demands on a carefully worked ethnography that does not satisfy the requirements of lawyers or indigenous organisations running native title cases. The solution in this instance cannot, for the sake of advancing the claim, lie with distorting the ethnographic facts as they have emerged from generally undisputed representations about ownership and use by the indigenous groups concerned.

Nor does the solution lie in denying the reality of conflict between disputing groups. To date, a number of ways of dealing with such conflict in order to achieve outcomes for the native title process have been put forward; for example by the Kimberley Land Council in a situation around Broome that has led to the establishment of the Rubibi Working Group.

One of the questions that must confront anyone involved in attempting to achieve such outcomes, however, is: How far is it possible to go without distorting the ethnographic representations that constitute the cognitive maps and the very identity of the groups concerned? And at what point, if at all, does an anthropological interpretation of these differing representations – for example, that the declared separateness of groups reflects a particular family-type dispute within a more broadly defined category of relatedness – have any role in presenting the claims of groups to an external body such as an Aboriginal Land Commissioner, the NNTT, or the Federal Court? In the end, the most crucial question may well be: As anthropologists, are we going to be able to tell anyone what they want to hear?