Abstract

Native title is one of those arenas where scholarly research and legal practice coincide, and sometimes collide. The Court and the expert can often be working from rather different scripts when it comes to the way they each construct and interpret a body of evidence. Although it is repeatedly said that the most important evidence in such cases is that of the Indigenous lay witnesses, the outcomes of cases are likely to rest on a pretty equal representation of both lay and expert evidence, and at times may hinge heavily on the Court picking winners and losers among the experts. Disaster strikes when Courts try to be anthropologists.

In almost every native title case extensive scholarly research is undertaken, at least in the disciplines of history and anthropology, and sometimes also in linguistics and archaeology. Unfortunately this usually takes place after a claim has been lodged through solicitors, sometimes clumsily. Whether claimants are successful or not, the native title research done on family trees, group histories, the traditional laws and customs of the claimants’ ancestors, and contemporary claimant relations with the claimed land and waters, remains as a major corrective to the lack of access to details of the past for each group. They are no longer ‘a people without history’.
Thanks
John Lochowiak for his gracious welcome to his people’s country.
UniSA Law School for hosting this sparkling event.
Maggie Ball for organising so much and putting up with my tardiness.

Preamble
I first met John Mansfield when I was introduced to him in an Adelaide restaurant by my colleague and old friend, anthropologist Geoff Bagshaw, some years ago. Geoff had acted as an expert before Justice Mansfield and they read each other well. Knowing Geoff’s tough rules about the admissibility of lawyers, this was a sign of great respect. The respect was mutual. This is how it should be, but it not always is. John’s genuine interest in and empathy for the First People of this country are part of his trademark approach to the intersection of Indigenous property rights, the law, and scholarship.

Introduction
The central players in Indigenous legal claims to land and waters in Australia are the claimants themselves. It is they who bring the claims, and whose evidence plays a key role in the fortunes of each case, especially if the case goes to litigation or is heard in a tribunal hearing. Where a claim is settled by consent, they may be relieved of the often very demanding role of giving evidence in person, and the evidence of the expert reports may carry the main burden, as happened in the Wik case. In any case, an expert report always includes a distillation of what claimants have told the researcher, along with archival and published sources, so their words are not replaced but channelled.

My aim in this presentation is to look at some of the players other than claimants in these often long and complex processes. In particular I want to mix history and a certain amount of personal memoir and reflection in sharing with you a story about the strangely chummy but also sometimes extremely rocky marriages that have been contracted between experts and lawyers over the last forty years in the land rights arena. I have had to be selective with time, so if your story is not here that’s no reflection on your contribution.

First, some history, mixing memory with what is left to us on paper and in pictures.

Milirrpum: the Gove case
Anthropologists and other specialists in Aboriginal culture were involved with Australian legal proceedings well before the land rights era. Notable examples include the case of Yokununna who was shot dead by Constable MacKinnon in 1935 at Ayers Rock. Linguistic anthropologist Theodore Strehlow and ethnologist Charles Mountford assisted in the coronial inquest that followed. Another example was the role of an expert affidavit by Ted Strehlow, again, in the Rupert Maxwell Stuart case that led to a Royal Commission in South Australia in 1959.

But the first time experts were involved in a land rights legal case was the one informally known as the Gove case, about a substantial part of north-east Arnhem Land. The evidence was heard in Darwin in 1970. More technically the case is known as *Milirrpum vs Nabalco and the Commonwealth of Australia*. This is the first applicant, Yolngu man Milirrpum.

Justice Blackburn

heard the case and found against the applicants, reinforcing a view that customary Aboriginal country relationships could not constitute property rights in Australian law. He also found that the expert evidence was at times inconsistent with the evidence of the Yolngu witnesses.

Two experts were called, Professors Ronald Murray Berndt

and William Edward Hanley Stanner.

Ron Berndt had extensive field experience in the Yolngu region, Bill Stanner did not but was very experienced elsewhere in the Top End of the Northern Territory.

They would have presented the best available modelling of Aboriginal land tenure of that time. But the anthropology of Aboriginal land tenure has moved on and developed much further since that time, and the Yolngu system, as the result of efforts by Bernhard Schebeck, Nancy Williams and Ian Keen, in particular is now better understood by scholars. Since *Milirrpum*, the deepening of understandings of Aboriginal relationships to country has been
stimulated, more than by any other factor, by the various land claims processes and the often stringent demands they make on reports prepared for the Court, and the often stringent way in which expert witnesses are tested during cross-examination. Ron Berndt clearly didn’t enjoy being a witness in *Milirrpum*. He once wrote:

[quote from Anth Forum re raw and cooked]

[in effect: *It was a case of the raw and the cooked. The anthropologists were the raw material there to be cooked by the lawyers.*]

In fact neither Ron Berndt nor Bill Stanner ever appeared again as an expert witness in any tribunal or court case to do with land rights, even though dozens were proceeding in the years following 1976 up until their deaths. Ron occasionally helped out with information for another expert, and Bill Stanner worked closely with me on his unpublished field records for the Daly River when I was preparing a report for the Malak Malak land claim in the late 1970s. This is Bill and myself in his office in Canberra at that time.

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And here is Bill Stanner in academia, with other members of the ANU Anthropology Department in 1955. Not far away sits Marie Reay, an anthropologist who did much field work in Australia and Papua New Guinea

[slide, as I knew her later].

Like Stanner she also was involved in a land claim – the very first claim heard under the first land rights legislation, that of the Northern Territory, under the act passed in 1976. So like Bill Stanner and Ron Berndt she briefly made a transition out of academia and into the applied world of the law.

Remember that this was not under a native title act. Dozens of cases were heard under the NT Land Rights act before the Native Title Act of 1993 was passed. The rules of the two were very different.

**The NT ALRA 1976**

In that first claim under the 1976 legislation, the one called Borroloola, Marie Reay was the anthropological consultant to the first Aboriginal Land Commissioner, Justice John Toohey

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who was later to serve brilliantly on the High Court of Australia.

Marie had worked at Borroloola decades before. I believe in all the cases he heard as Aboriginal Land Commissioner, John Toohey was assisted by an anthropologist, another of the early ones being my long-term colleague Diane Bell.

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Similarly, Nancy Williams was Justice Bill Kearney’s anthropological consultant in the Murranji case.

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John also had a research assistant who was an anthropologist, Anita Campbell, who for a time was based at AIAS in Canberra, where I met her in about 1979.

The anthropologist working on the Borroloola claim for the NLC was a very young and scruffy John Avery

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now the grey-haired and respectable Dr Avery of Canberra

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. Working with him was Dehne McLaughlin. Dehne was a geologist who was drawn to the Aboriginal world but was not trained in anthropology. At that time several of those working on claims had no professional training. One was an ex-crocodile shooter, another a former art student and museum employee.

John Toohey

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had a genuine interest in the Aboriginal people with whom he came into contact during a series of extensive hearings. This interest never waned. John wrote to me from London in 2003 to arrange a social evening at Jermyn Street. He was at that time sitting on the Bloody Sunday Inquiry (1998-2010) after serving on the High Court of Australia. He said::

I gather from the Ucko grapevine [I’ll possibly come back to Ucko later] that you are coming to the U.K. for a year or so in July.

I hope that we can meet up. ...
Perhaps we could have a meal together. **My interest in things aboriginal still continues.** [emphasis added]

And indeed as late as 2010 he attended my public lecture in Perth on my book *The Politics of Suffering*, and there we spoke together for the last time before he passed away in 2015.

While hearing on-site evidence in the NT, John would camp in the bush not far from everyone else. He would also dress informally, wearing his trademark orange giggle hat in the cases where I saw him, beginning at Old Top Springs on the Murrangi Track in 1979.

[slide of Toohey in bush]

Even counsel could appear at bush hearings informally clad, so much so that at times it seemed like a short shorts competition, one always won by barrister Vance Hughston.

[slide of Vance]

But he had some competition. My almost exact contemporary Kingsley Palmer, now one of the most senior anthropologists with many native title cases under his jodhpurs, probably takes the cake.

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Although when I look back to the Aurukun outstation of Watha-nhiin in 1976 where my then wife Annie and baby son Tom – now a 42 year old heavy metal musician in Sweden - were putting up with tough conditions, I was actually snapped by Annie in a state that puts me right up there with Vance and Kingsley.

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On-site hearings often produce clumpings together of people in odd assortments, often due to the scarcity of shade on a viciously hot day.

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two veterans of native title anthropology, Geoff Bagshaw and then Jimmy Weiner, now Jamie Bloom, are enduring shade temperatures in the mid 40s
plus a humidity around 99 per cent, on the Dampier Peninsula during site
evidence before Justice North a few years ago. The smiles are those of irony
not of tourism.

And here is Justice North

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taking evidence in that case, which involved a legal cast of well polished
veterans including counsel

[slide]Andrew Collett of Adelaide,

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Robert Blowes of Canberra, and Tom Keely of Melbourne, all of whom I have
known for decades, and one of the best new talents among the native title
lawyers, from an anthropologist’s point of view at least

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Cobey Taggart, here with the rest of the WA State team Caitlin Pilot and Peter
Quinlan.

Back to John Toohey: he had just the right touch when himself asking
questions of witnesses, to whom he spoke in clear pidgin-free basic English and
was always understood. He had a gently firm and wise approach to dealing
with counsel. A phrase he used more than once was: ‘That may be so Mr or Ms
So-and So [pause]; however…’ – and he would then go on to affirm the sacred
role of common sense.

**From academia to land claims or both**

Back to the topic of those who made the transition from academic
anthropology to the new world of land claims and expert witnesses. Most
prominent among these has been Professor Nicolas Peterson, here in the bush
in 1966 at Mirrngadja in Arnhem Land

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Nic was the Research Officer for Justice Woodward, who had been involved as
counsel in the Miliirrump case, and after the election of the Whitlam
government in 1972 became the Royal Commissioner inquiring into land rights
for the Northern Territory.
Nic has taken part in many land claims including under the native title regime, as have many of his numerous ex-students who have benefited from his long-standing anthropological specialisation in Aboriginal relationships with country.

A sign of the times has been Nic’s work particularly with Dr Julie Finlayson at the ANU,

where they have now for some years been running the Centre for Native Title Anthropology. One of the briefs of this organisation has been to improve anthropological practice and another has been to encourage senior anthropologists to retain a role in native title cases and to share their accumulated wisdom with newer generations of anthropologists. This work has been funded by the Federal Government partly as a result of a serious shortage of senior anthropologists who are both competent and available to work in the native title arena.

Not only university academics but also museum curators have played roles in native title and other land claims. In this photo

of my Anthropology staff at the SA Museum in 1985 are several. In the centre is Norman Tindale, whose published and manuscript work has played a significant role probably in the majority of native title cases, although he died just before the NTA was passed. Philip Jones, Steve hemming, Philip Clark and myself have all played roles as experts.
More transitions

When the native title regime arrived as Australian law in 1993 it was fortunate that quite a number of lawyers and anthropologists and linguists who had cut their teeth on the Northern territory legislation were able to bring that experience to the new domain. For several of us also there was engagement in multiple cases under the Queensland Aboriginal Land Act of 1991.

One of those who made this transition has been the key player Graeme Neate, who was John Toohey’s associate and then counsel assisting (1980-1982) in early cases in the Northern Territory, which is where I first met him. Later he drafted the Queensland Act of 1991 and then took up the job of chairing the Queensland land tribunal for many years before becoming a member and then President of the National Native Tribunal where he served for fourteen years. It has always been a pleasure to work on cases where Graeme has been involved. Graeme was I think the first to write extensively on, among other things, the evidence of anthropologists in land claims, in his book of 1989: *Aboriginal Land Rights Law in the Northern Territory*:

Graeme and his panel heard the first claim under the Queensland legislation and it was the Cape Melville and Flinders Island claim. There is a very fine film of this event and its people by the late Lew Griffiths which tells the story and includes some of the live action of witnesses responding to examination in Hope Vale.

Given the flexible evidentiary rules of the Queensland Act, Noel Pearson and I examined the witnesses, but I also wrote the anthropological report and gave evidence as an expert witness. Aboriginal anthropologist Marcia Langton also took part in this first hearing as the member of the team who keyboarded a simultaneous record of the hearing, among other roles. Marcia’s own transitions had been, among others, from radical activism in Joh time
via a university degree in anthropology to a bureaucratic position in the Goss state government, to a PhD in anthropology and more recently a professorial position at the University of Melbourne.

Marcia and I also did joint field work with inland Wik people in 1991.

Here Marcia is seen being given a traditional entrée into new country by Dougie Ahlers, who has placed his underarm sweat in the lagoon water nearby and is anointing Marcia’s head with it to protect her from the spirits of the Old People. In the background is Lurlene Koowarta, daughter of legally famous John Koowarta.

Here is John Koowarta and other family at a helicopter crash site on the Archer River when we were mapping his country in 1990, just before he passed away in 1991.

John won the first action under the *Racial Discrimination Act* of 1975 when he took on Jo Bjelke-Peterson’s government. It was no longer a case of ‘Don’t you worry about that!’

In the foreground of the baptism photo is Marcia’s daughter Ruby. During this trip, one day we ended up piling out of the back of open utes into the dusk on a track far from anywhere with a building or an airstrip, in the messmate forest country of the inland Wik people. Ruby hopped out and asked in a loud voice: ‘Mum, where’s the hotel?’

The Cape Melville case was chosen by Noel and the Cape York Land Council partly because the relevant country had already been culturally mapped back in 1974 by myself and Athol Chase, with traditional owners Johnny and Bob Flinders. It was important that a strong case get up first, one where much of the needed research was already available.

The same applied to the first native title case of the Queensland mainland, the Wik case. This began before the Native Title Act as a common law case in 1992. A team of anthropologists and others including David Martin, John von Sturmer, Athol Chase, Roger Cribb, John Adams and myself had carried out many months of bush-bashing field work over decades in the Wik region to
record the intricate details of the ancient classical cultural landscape of 125 clans and the many hundreds of on-the-ground sites in their countries. This work was done by off-road vehicles (for most of those years they were un-air-conditioned rolling ovens), and at times by dinghy, aircraft, on foot and by horseback. It was often a long time between showers.

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By 1991 this work had resulted in a 1,000 page report for the Australian Heritage Commission detailing this incredibly richly remembered cultural landscape. The existence of this report and the availability of most of its authors were at the heart of the decision by Noel Pearson and the Cape York Land Council to begin with Wik. The Wik people, including Stanley Ngakyunkwokka, leapt at the chance. You can see the cast of characters and a history of the Wik drama in a wonderful recent documentary called *Wik versus Queensland*, available from SBS.

The Wik case was of course the second common law native title case in Queensland, the first being the one usually known as Mabo 1, after the first named applicant of three, who were, in alphabetical order: Eddie Mabo, James Passi and Dave Rice. They had been in the struggle since 1982. The role of their anthropologist, Jeremy Beckett, in their case, was crucial. He had done field work on Meriam 1959-1961.

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He had no involvement in the formulation of the statement of claim nor with the obtaining of witness statements. There is a whole chapter and a very interesting one on Jeremy’s role in Mabo I in Paul Burke’s book *Law’s Anthropology* of 2011.

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Much of the literature on anthropology in native title consists of individual papers or conference proceedings but Paul’s is one of several book-length sole-authored contributions. Two others are Kingsley Palmer’s 2018 volume *Australian Native Title Anthropology*

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which adds further insights to my own now ageing *Native Title in Australia: an Ethnographic Perspective* of 2003.
In short, there is no shortage of analysis of the role and nature of expert evidence in the now very large domain of Australian native title, which has turned into an industry.

**Evidentiary matters**

I’m going to move on now to make a few observations about how expert evidence is received in land claims, particularly native title hearings.

First, the question of bias. It was in his report on Borroloola that Justice Toohey made a comment on the objectivity of the witnesses Avery and McLaughlin, saying:

52. Some criticism was made of both Mr Avery and Mr McLaughlin on the grounds of lack of experience, the way they went about their work and particularly in the case of Mr McLaughlin what was said to be bias towards Aboriginals. No doubt both men were sympathetic to the interests of Aboriginal people and Mr McLaughlin was inclined to wear his heart on his sleeve. Nevertheless on matters going to traditional ownership I have no reason to doubt the truth of what they told me and it is important to keep in mind a comment made by Dr Reay when she said: 'I hope that the great difficulty and complexity of the work undertaken by Mr Avery and also by Mr McLaughlin can be taken into account when evaluating the claim' (Exhibit 80, p. 1). Their work was difficult and it was complex and in my view it was done painstakingly and well.

53. At the same time it is true that too close an involvement of an expert witness with the party calling him is likely to lead to misunderstanding. Perhaps this would have been avoided had Mr Avery and Mr McLaughlin each confined his role to that of witness and not been responsible for the compilation of the claim book (Exhibit 1) which was in essence the applicants' written case.

That this set of comments appeared in the first ALC report probably had a sobering effect on expert witnesses in that jurisdiction for a long time afterwards. The fact that anthropologists often develop strong relationships to at least some of the people from whom they learn is an inevitable part of the discipline and is merely human.
At times anthropologists actually belong to one of the families in the claimant
group by incorporation or adoption, as was the situation of myself and David
Martin in the Wik case. People like Bob Ellis

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who has worked with the people of the Flinders Ranges, especially, for around
50 years, are so integrated into the world of their teachers that they can act, as
Bob has done, not only as an expert but also as a witness of remembered fact.

Judges, wisely, have tended to take all this into consideration but not to use it
as a reason for excluding the evidence of the experts.

Objectivity and independence were possible under the Land Rights Act, and the
Queensland Land Act, but perhaps not obligatory in a legal sense. This was to
change with the arrival of the native title regime, under which experts in land
claims have to sign a statement that goes something like this:

I, So-and-So, declare that I have made all the inquiries which I believe
are desirable and appropriate and that no matters of significance that I
regard as relevant have, to my knowledge, been withheld from the
court. I have read the Federal Court’s Expert Evidence Practice Note of
25 October 2016, and in the present report have complied with and
agree to be bound by it.

Among other things, that practice note requires that an expert’s first duty is to
the Court, not to the claimants or a party opposed to them or simply to the
client who is paying the bills. This has made cases of expert witness bias less
noticeable, even though it still occurs and is sometimes noticed and
commented on by the presiding judge. In some cases in which I was a witness
in recent years, one judge considered an expert to have exhibited bias when it
was patently clear that this was untrue, another judge noted that an expert
was incline to barrack for his client’s claimant group but in the end it didn’t
matter too much, and in another case a judge considered an expert to have
been unbiased when it was as patent as the proverbial that this also was not
true. No names no pack drill.
The structure of hearings

Native title hearings are a great deal more formal than the NT or Queensland ones, and this can be seen in the way people with different roles are spread around in the courtroom. Of course the bush site hearing phase remains necessarily less formal. Here is John Mansfield out in the desert of South Australia a short time ago hearing on-site evidence during the Lake Torrens case.

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In the bush the anthropologist can end up close enough to counsel to be useful in the case of counsel needing advice on facts or pronunciations, and no one would object to this closeness.

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But inside the courtroom the differences between NT land rights hearings and those under native title are quite pronounced. Counsel sit in the front row, instructing solicitors sit behind them, and experts are just part of the audience.

In the NT cases a judge often had counsel assisting present. This may not have been critical but especially in an adversarial context it can balance out aggressive pursuit of the interests of their clients by counsel acting for opposed parties, and unrepresented applicants may approach counsel assisting. I am not aware of counsel assisting being appointed in a native title case.

Closer to my subject here is the fact that it was routine, not universal, for NT Aboriginal Land Commissioners to have a consultant anthropologist in tow, to help with technical questions in the evidence, to perhaps suggest questions to counsel assisting so they could be asked in order to get more relevant evidence from witnesses, and to check draft reports for anthropological and linguistic accuracy. Where a federal court judge has some knowledge of the Aboriginal or TSI domain, has taken the trouble to actually learn something cross-cultural before sitting in judgement on people who come from what is quite often a radically different cultural and linguistic background, this kind of assistance is not so necessary. Where a judge takes the view that they don’t need to learn anything new before leaping into native title, then a consulting anthropologist would not only be greatly beneficial but would also probably be regarded as an unnecessary imposition.
There are judges, not many, who have taken the view that experts generally are a waste of time and that the Court itself is the only real expert in the room. I have had the unfortunate experience of giving evidence before a judge of this persuasion.

The way expert evidence is structured matters a great deal. In the NT cases and quite a few native title hearings, the old practice of each witness sitting alone in the witness stand has been perpetuated. This lends itself to the witness being exposed to Dorothy-dixers from the side that likes them and some torrid, at times ugly and despicable cross-examination from the side that doesn’t like them.

There has been a shift to what is called concurrent evidence. That is, all the experts sit in a row on the bar table before the judge - a spot usually occupied by much better paid and much better dressed people - and counsel examine and cross-examine the experts from, say, the witness stand. There is a valuable version of this and also one that is simply a return to the one-witness-at-a-time practice of yore. The second of these allows counsel to cherry pick the witnesses they want answers from and concentrate on them the way they used to do.

The far better practice, one I first experienced when Justice Jayne Jagot heard the Brown River case in Queensland, is for the Court to treat all of the witnesses as the Court’s experts, from who the Court would like to hear individually and severally, with none being cherry-picked or omitted. That is, the same question is put to all of the experts and one after the other they offer an opinion, usually from left to right and back again. Otherwise the Court is not in a good position in which to get the benefit of the true sweep of opinions held across the various experts on each issue of substance. After all, the experts’ first duty is to the Court, under the rules of the Evidence Act and the Federal Court Practice Note. There can be quite a few witnesses. In Lake Torrens we were seven, and in the Dampier Cluster case we were six.

Justice Jagot also set out the questions she wanted her experts to address in their pre-trial conference, and, for the first time in my experience, asked us to help her learn about the relevant social and cultural complexities, admitting that it was her first native title case. If only all judges had that approach on arrival from somewhere else.
The worst case I have had to endure in this regard was *Jango*, a compensation claim for lost native title over the Yulara resort block close to Ayers Rock. There was no concurrent evidence, the experts for the Commonwealth and the NT – Sansom and Morton - were never called to give evidence at all, the judge, Ronald Sackville,

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had huge difficulties understanding the lay evidence even with the aid of a translator (his dealing with the evidence of elder Reggie Uluru

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exemplifies this), he seemed uninterested in learning anything from the experts who did give evidence (principally Petronella Vaarzon-Morel

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and myself), and knew nothing about anthropological method or the history of anthropological understandings of Aboriginal land tenure. Sackville proceeded to act as if he was the only expert who counted, and, in an astonishing, unjustified and quite appalling decision, concluded that some of the most traditional people in the Australian outback had somehow lost their laws and customs to do with land ownership. The outcome was both unjustifiable and unjust. The best analysis of Sackville’s execrable performance is John Morton’s paper, ‘Sansom, Sutton and Sackville: Three Expert Anthropologists?’

The claimants’ legal team eliciting witness evidence in this case were Annie Keely, here seen roughing it in the hills of Kata Tjurta

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and David Parsons, here also roughing it, but in respectable shorts

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and here doing it even rougher holding up the bar at the Yulara Resort.

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**A clash of principles**

There are many other ways in which the culture of the law and the culture of a social science and its practitioners come into more or less collision. An early one was the admissibility of hearsay, but it was quickly disposed of by John
Toohey in favour of the anthropologists. Given we are dealing with what was in classical times and for many still mostly is an oral tradition, the objection to hearsay was ridiculous.

Another cultural clash has to do with the way legal narratives and scientific narratives differ. Under the strict rules anthropologists have to operate with in native title, cases, we have to set out the empirical facts we rely on including those that may be in contradiction with each other, we then have to set out separately our opinions deriving from those observations and show the chain of reasoning by which we have reached our opinions. We also ought to adhere to some kind of scientific methodology in which doubt plays a key role.

The better native title decisions are rather like that too, but there are others in which the power of the Court to disregard inconvenient evidence and to leap to conclusions without feeling any obligation to go through the necessary ground steps of sifting the empirical evidence leads to decisions that make some of us very worried about the process. The power of the Court to create its own internally consistent, if mistaken, narrative using its powers arbitrarily is scary.

**Lake Torrens**

And I will close these remarks on evidence on the subject of a truly bizarre cultural punching match between expert evidence, and its obligations to include everything relevant to the inquiry, and the overriding power of a legal fact, that may well be fiction, but which holds sway because a Court has said so. This has resulted in the removal from the Court’s consideration of the most relevant and substantial body of ethnographic and historical fact pertaining to the case in hand. This case was Lake Torrens.

Here I will draw on some text from my essay called ‘Remembering Roxby Downs’, published in the Griffith Review in 2016

The Kokathas’ barrister Vance Hughston sought early on to have all expert evidence relating to the area from the western shores of the lake and 140 kilometres further west to Wirraminna, the country in the Kokatha consent determination, excluded from any part in the trial. More precisely, what was to be expunged was any expert evidence that might call the Kokatha determination into question. Because the lake was girt by consent determinations, the same would have to apply to the entire encompassing historical and anthropological context of the lake.
The problem for the anthropologists, who were bound to affirm that they had not omitted anything of substantial relevance to the case in their examination of evidence, was that Lake Torrens was to be surrounded by a legal vacuum that erased most of the evidence central to the question at issue. Only evidence about the lake itself was to be given weight.

The Kokathas’ counsel argued that the Kokatha consent determination of 2014 had found the Kokatha were the native title holders of the described lands since British sovereignty and this was now a fact in law. The Kuyani/Adnyamathanha had failed to press a case for the country west of Lake Torrens, and because the determination was negotiated, no thorough connection report on the country had been carried out. He complained vigorously that myself and others were trying to subvert the legal fact of the determination and go behind it. He claimed the experts should be prevented by the court from making scholarly use of any evidence that went against the consent determination:

MR HUGHSTON: … they must assume that the only people who have traditional rights and interests, and have always had traditional rights and interests in the areas of the two consent determinations, are the Adnyamathanha people on the east, and the Kokatha people on the west. They have to accept that. That assumption must be factored in to any report that they do. And for them to look beneath the determination and look at the early ethnography and come up with their views as to whether yes, well, Kuyani people had rights over there in the west and therefore, you can assume that – you can infer that they had the rights in the lake because they’ve got it on the west side and they’ve got it on the east side. That’s simply impermissible...

No scholar of any conscience could quietly go along with this absurdity. The power of the legal arm of the state to guarantee that the moon is made of green cheese is scary sometimes. Perhaps just as scary for Mr Hughston’s clients was the possibility that, in the course of the Lake Torrens Overlap Proceeding, the Kokatha consent determination would be revealed as the grave error and injustice that (in my assessment and that of others) it was, and the revocation process available under Section 13 of the Native Title Act might be invoked.
When this evidentiary issue came up in the Port Augusta courthouse during the lay evidence, I was astonished to hear Justice Mansfield say that any anthropological or historical evidence relating to the Kokatha determination and the other surrounding determinations that might call into question the findings of the determinations would be given no weight in his reasoning. Most of the evidence that was relevant to an anthropological and historical account of Lake Torrens itself as a land unit and cultural entity lay in its relationship with its surrounds. The lake itself was largely uninhabitable and devoid of anything except salt, save for a few islands and a few mainly saline springs. Lake Torrens itself was a brick in the wall of the Stuart Shelf and the Flinders Ranges. To understand the brick, as I put it, you needed a view of the wall. We were being told that the wall was out of bounds – the purpose of the brick had to be understood in legal isolation of it. Dr Johnson was right: anthropology and history were gagged, while the law brayed.

At that moment, I couldn’t see any point in staying in the game. I left the Port Augusta courthouse quickly. I didn’t slam the courtroom door, no – it banged shut all by itself, although John, with his good nature, has smiled as he’s said that he saw my hand on the door.

I went straight back to the motel and started packing to go home. The South Australian state team, my client, came around one by one, and eventually persuaded me to stay. They had up their sleeves some peachy keen argument that would mean the contextual evidence could maintain a ghostly presence in the proceedings. At least, I conceded to myself, we could leave behind a credible and quite detailed record for the future, especially the future of the Aboriginal families who came from the region and for whom a lean historical past would now be richer, if they wanted it.

A legacy for the families

I will finish with some observations on the legacy value of the long term archival record that is left behind by the various land claims processes, especially native title.

During research with claimants, experts typically make extensive records of remembered family trees, of family histories, and of the places of significance in the claim area. In native title cases this research is extended back as far as older records will allow, given the requirement to show that the claimant
group has had a continuing connection with the claim area since the effective imposition of British sovereignty, a date that varies with local history.

For this reason historians play a special role in unearthing archival sources and published ones as well, so the role of people like South Australia’s own Tom Gara,

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legendary sleuth of the filing cabinet, ace navigator of Trove, and lover of detail, is always important.

The amount of recalled, observed and practiced relevant detail about land ownership and group norms increases with the recency of sovereignty and this offsets the sometimes scanty archival record available for more remote places. Conversely, the earlier and more devastating the impact of European conquest, the more attenuated are the older traditions but the greater the possibility that early written records and photographs might exist.

In either case, the archival records and the unpublished field records of anthropologists and linguists have usually been sleeping a long time in public vaults and private studies, until suddenly they are given new life and importance by being brought into play as evidence in native title research and evidence taking. In south-east Australia two key players here have been Luise Hercus and Gavan Breen. Luise

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passed away this year at 92 having worked heroically up to a week beforehand on her field records that began in Victoria in the early 1960s and covered much of SA and nearby regions. Over and again since the 1980s she worked up her notes and audio transcripts of work with usually elderly Aboriginal people across a vast landscape, in order to respond to calls for assistance from native title claimants or others for reports. Gavan Breen

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began field work in the 1960s in a crossover area in western NSW and worked his way north to the Gulf Country over many years and has likewise provided multiple reports for native title cases.

The late Ken Hale provided a powerful linguistic report that was instrumental in the Wik case being resolved by consent rather than by litigation.
It is not surprising that in many land claim cases there are stand-alone expert reports by linguists, or there are linguistic commentaries in anthropological reports where the expert is qualified in both disciplines, scholars such as Patrick McConvell, Francesca Merlan and Alan Rumsey.

A final word about this huge legacy of record that land claims research and the evidentiary process is leaving behind. A struggle is now in play between two opposed views of what should happen to this legacy. One view is that all this recorded fact should be as accessible as is compatible with the usual norms of privacy, so that anthropological and historical understandings can benefit from its contributions, and improve their own in the future, and Indigenous people from the regional families concerned can learn of their region’s history.

The opposing view is that considerations of political morality, of fear of identity criticism, and of appeasing demands for the privatisation and suppression of knowledge, must lead to these collections being hoarded, and kept from access as much as possible, except for a small elite who can jump the increasingly high bar for permission to study them. If the second view is to prevail, the collecting institutions will find themselves increasingly abandoned to sit alone with their treasures. And who will fund them to do that?

References