

# Native Title News

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## Article

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### ANTHROPOLOGY AND NATIVE TITLE

By David Trigger, Professor of Anthropology, University of Queensland

This article responds to the following issues proposed for discussion by the convenors of the Queensland Native Title Forum held at the Commonwealth Law Courts in Brisbane on 21 August 2009.

- The methodology and timelines for preparing anthropological material to support applications, for resolving disputes as to membership of claim groups, boundary descriptions and overlaps, and for consent determinations and use at trial.
- The training of anthropologists in connection with native title and their recruitment and retention for native title purposes.

#### Methodology and timelines

- It should be clear that the anthropologist is free to consider all available published and unpublished documents. These will include those authored by other anthropologists and, at times, the work of historians, linguists and archaeologists as well as archival resources relevant to the history and culture of the native title group's region. If there are documents such as previous commissioned reports from other researchers which are to remain unavailable (perhaps because a form of privilege is not to be waived), this should be made clear in the brief received from the relevant legal representatives. Otherwise, unless the anthropologist is genuinely ignorant of the existence of previous reports, there may be difficulty with a researcher confirming that all

relevant materials have been examined. It can be stated that all available materials have been consulted; but this is a somewhat different outcome from one based on the most thorough examination of all relevant materials.

- Previous legal decisions clearly have relevance to the research task. Anthropologists should be trained to understand that native title work is directed to legal inquiry. However, in my view, research anthropologists should avoid too much speculation about legal reasoning and instead focus squarely on addressing the core issues from the perspective of social science.
- Legal practitioners should, similarly, avoid attempting to carry out anthropological or social science inquiry. There is a strong case for the two types of professional working with a good understanding of the quite separate roles of each.
- The research task ideally involves substantial discussions, interviews and participant observation with living claimants, as well as other Aboriginal people of the region (and sometimes knowledgeable non-Aboriginal people).
- Though it is not usual for anthropologists to include quantitative research, my own view is that this can be useful where relevant. For example, if reliable information about the regularity of use of and visitation to the claim area is available, this may assist to build the broad picture of the nature of ongoing traditional connections to the lands and

waters. This is not to say findings about the regularity of expression of laws and customs can displace inquiry as to their normative content.

- Information obtained should be checked across members of the claim group. Reliance on information received from a single individual is not the best option. While it is possible that some groups will direct the researcher to a particular senior person, information from that person should be discussed with others (ideally on more than one occasion). While the information may be confirmed by others, and ultimately the researcher may form a view different from some claimants, the most reliable conclusions will emerge from a research process that entails discussions across the group's membership. Informal discussions are likely to be particularly productive. Formal meetings alone, with groups of more than a few people, are not the most effective setting in which to record relevant information.
- Internal politics among Aboriginal people can put considerable pressure on a researcher if there are substantial disagreements either within a claim group or between that group and an adjacent group. In some cases both these conditions exist. In my experience, this is one of the most difficult matters for native title organisations to address, yet leaving the matter to the researcher's domain of work is no solution. Absolute clarity about the negative consequences of internal divisions, established by the NTRB or land council from early on, would assist researchers in this matter.
- It is reasonably expected that the research will involve mapping of culturally significant areas of land and waters (though visiting locations will not likely be feasible in all cases), documenting relevant laws and customs, preparation of genealogies and consideration of relevant historical materials. A register of significant sites, a list of (adult) claimants and their biographies, and reportage on the expression of laws and customs form part of the anthropologist's research. It is necessary to recognise that researchers can rarely, if ever, have conversations with all adult members of a claim group, so that a flexible approach to claimant lists is desirable. A researcher can never guarantee that there may not be further potential claimants who come to assert their traditional connections, after the research and the claim determination is completed. Nor can a researcher know for certain exactly how such assertions may be handled at future times.
- The necessary time period for an anthropologist to arrive at reliable conclusions will vary with the size of the claim and, most importantly, with the size of the claimant group and the geographical distribution of its members. Where a researcher does not have prior familiarity with the claimant group and/or the cultural region of the claim, a period of six months (approximately 120 working days) is required for a medium-size claim area and group. Larger areas will require further time (up to

12 months, or 240 working days); reduced periods may be feasible when the researcher is familiar with the issues (or where a team of senior and junior work together).

- Given the difficulties in ensuring a sufficient number of highly skilled anthropologists nationally, more energy should be put into finding ways to combine their efforts with those of supervised junior colleagues. In my view, as long as the senior anthropologist clearly records the nature of supervision of juniors, provides written advice when needed, and discusses results at regular intervals, such partnerships may help resolve the issue of insufficient senior anthropologists available for native title research. It also could lead to researchers progressing to the role of senior anthropologist.

#### Native title claim group membership disputes

- Difficulties arise where claim group membership is defined prior to substantial involvement from research anthropologists. If expectations have been raised as to who will be included, the anthropologist can be in a contentious role when finding that a different definition arises from research.
- This is also the case in regard to claim boundaries.
- The point is also relevant to choices made as to who among claimants will be named applicants.
- This raises the issue of legal practitioners receiving instructions from their clients in regard to group membership and claim boundaries without the benefit of advice based on relevant anthropological research. From the perspective of a research anthropologist, this can mean entering a research field where the claimant's expectations or views can differ from the anthropologist's findings. Less experienced researchers need support from senior colleagues and officers in relevant organisations (and ideally from influential senior people among claimants) in handling what can be resultant vigorous politicking from among claimant subgroups and individuals. Where possible, initial group and area boundaries should be prepared after at least some research has been carried out.
- On the matter of claim group membership, where more than one avenue for claiming native title rights exists in the traditional system of laws and customs, it is often only when legal processes begin that the need for a final resolution of this matter is prompted among claimants. For example, where individuals might trace native title rights to different claim groups through each of their parents (or grandparents), the researcher should clarify whether law and custom expects one of the claims to be the primary assertion from that individual.
- If traditional law and custom entails an expectation that persons will assert only one primary claim group membership, or even if law and custom is less than definite on this point, it may be useful for the legal process to require clarification of that matter early in the claimants' discussions with researchers and lawyers. In my experience, there are many regions where exercising of potential

(perhaps best understood as “secondary”) native title rights would exist in traditional law and custom. However, there is not enough clarity about what is expected in the legal recognition process regarding binding decisions among claimants on the matter of choosing primary and secondary connections to traditional countries.

- Care should be taken to ensure named apical genealogical referents are known to living claimants, at least among senior persons. Earlier generations of deceased persons may be known from documentary and/or ethnographic research. However, it is counter-productive for apicals to be names unfamiliar to the broad native title group membership, even if these names are known by a select number of senior claimants, and consequently presented by the researcher as the earliest known deceased forebears. It is possible to describe an apical, who might be several generations prior to the most senior living generation, as Bob (father of Sally, mother’s father of Bill), for example, if it is important to include the earliest names known from the historical and ethnographic records. Given the well-known genealogical shallowness of oral tradition in Aboriginal cultures, the important issue is that listed apicals be recognisable across the broad claim group membership. We might note that the further back a genealogy is traced, the more branches and descendants emerge as possible native title holders. Yet more distant lineages of descendants may have long chosen a different pathway to asserting traditional rights and so are not holders of rights for the claim under review.
- On the matter of claim boundaries, there should be an assumption that “zones of transition” between adjacent claims will commonly emerge from the research process. An area of shared country at boundaries could become a default expectation other than where research finds claimants in agreement about more precise boundaries. There should be no expectation that current traditional boundaries are easily represented by a single cartographic line on a map. This despite the obvious general value (though not necessarily in all cases) of “tribal” or language maps such as that prepared by Norman Tindale for the whole continent.

#### Differences between anthropological reports for consent determinations and use at trial

- If legal advice is that there is a substantial difference between the kind of reports needed for mediation and litigation, some clear communication to the anthropologist of the differences would be useful. The prospect of being engaged potentially for a trial, involving cross-examination, is one of the disincentives for less experienced anthropologists to work in native title.
- Assisting less experienced anthropologists to become familiar with expert witness requirements in litigation should supplement training for report production. A greater understanding among less experienced anthropologists of legal expectations

about the articulation of expert opinions to be used in mediation and litigation should be developed. Greater confidence among anthropologists on this matter may result in more junior professionals taking up work in native title.

- The extent of anthropological research required for mediation or “connection” reports is clearly related to the level of detail and depth of argument required by respondents in mediation (principally the states).

#### Training, recruitment and retention of anthropologists

- The findings of Dr David Martin’s April 2004 report prepared for the National Native Title Tribunal, *Capacity of anthropologists in native title practice*, provides a useful summary of the situation some years ago. Many of the findings remain relevant to the present time. (See [www.nntt.gov.au/Publications-And-Research/Tribunal-Research/Pages/Commissioned-Reports.aspx](http://www.nntt.gov.au/Publications-And-Research/Tribunal-Research/Pages/Commissioned-Reports.aspx))
- Debates within the profession of anthropology which position native title work as only ambiguously relevant to the lives of Aboriginal people continue to be relevant. Young graduates are often keen to take up employment in an area they feel is useful and productive, but the complexities of native title processes and the ambiguities of beneficial outcomes for claimant groups appear to be of concern to a proportion of graduates considering working in the area.
- A clear public statement from a relevant group made up of senior Aboriginal people about the need for anthropologists to work in native title would be useful in influencing young graduates to take up such work. The Commonwealth Government, through FaHCSIA, may be able to facilitate such a statement, which could be referred to by academics in teaching students. The statement could appear on relevant websites used by students. Senior Aboriginal people working in native title may be prepared to field queries from young anthropologists deciding whether to specialise in training and employment in the area. A possibility is that one or more of the CEOs of NTRBs take on this role. Another possibility is that FaHCSIA commission a senior anthropologist to be available for this work.
- Students are aware of the difficulty of the intellectual tasks in researching native title, particularly the risk of an enforced “traditionalism” arising out of the process of seeking to record continuities in traditional law and custom. There are also often onerous practical difficulties in fieldwork settings. The work requires both intellectual and personal robustness. Younger researchers clearly need ongoing mentoring.
- There is little clarity about career path futures in native title anthropology. If the jobs were managed on a statewide (or even nationwide) basis, perhaps through establishing a pool of young professionals, this may go some way to countering the impression that volatile and unstable employment situations in particular organisations could well lead to the disappearance of one’s job.

- There remains a fundamental problem in regard to the results of native title anthropology research being available for study and general circulation. Consideration should be given to enabling an assumption that research reports will be available for study in order to use them in training anthropologists for work in native title. A special case should have to be made if reports and the results of anthropological work are to remain unavailable for such purposes. In my view, it is possible for confidentiality to be maintained without restricting the availability of reports essential for the training of researchers to work in this area.
- A system of “apprenticeships” (perhaps better termed cadetships) in native title anthropology might be considered. One or more university departments could be funded to mentor and train

honours anthropology graduates over a period of 12 months through performing work on actual cases. Professional services from the university anthropology department could be used by organisations representing claimants and other parties, as part of apprentices’ developing research competence in the area. It may also be possible for independent consultants in private practice to be funded to take on one or more apprentices or cadets. In my experience, the greatest barrier to more young anthropologists developing strong skills in native title anthropology is that there is little opportunity for them to be leveraged gradually into the work, with the mentoring support of senior experienced researchers.

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