Saying It Like It Is: Oral Traditions, Legal Systems and Records

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The High Court of Australia in Mabo *not only recognised native title, it made Australia officially a legally pluralist nation. Indigenous people have to prove the content of their legal systems to succeed in native title cases. Aboriginal legal systems differ from the Anglo-Australian legal system in that they depend on oral accounts and are characterised by restrictions on the possession of knowledge. The need to make information public, to prove the existence and content of an indigenous legal system, may involve breaches of that very system. Indigenous legal systems value the spoken word, which is regarded as less authoritative than the written word in the non-indigenous legal system. In native title cases, problems will arise with respect to the hearsay rule, written records that are inconsistent with oral evidence, and cross-cultural communication. Transformation of oral accounts into written records, in the form of transcript, judgments and reports, can also have profound effects on Aboriginal legal systems themselves.*

This is a refereed article.

Introduction

Australia has always been a place of legal pluralism. Before the British colonists brought the common law and the statute law of England, there were indigenous systems of law. Indeed, there were very many of them. They did not cease to exist just because English law was imported; for many years, their existence was not recognised by the Anglo-Australian system. In 1992, in *Mabo v State of Queensland [no.2]*[2], the High Court of Australia did more than 'invent' native title. It made this nation officially a legally pluralist one. The common law now recognises and gives effect to indigenous law with respect to land tenure and, possibly, with respect to other aspects of life and death as well. Native title is what indigenous law says it is, no more and no less, except to the extent that non-indigenous law operates to 'extinguish' or 'impair' native title. (A more accurate description of what occurs is that the non-indigenous legal system withdraws recognition, wholly or in part, of indigenous entitlements, which continue to exist under indigenous law).

The problem is that those versed in the Anglo-Australian legal system do not know the content of indigenous legal systems. We have therefore cast upon indigenous people the burden of proving the continuing existence and the content of the relevant indigenous legal system in relation to each application for specific recognition of entitlements to land. Further, we have required that, to a high degree, the exercise of proving be carried out in accordance with our system of law, except to the extent that our system of law can accommodate the modes of proof known to indigenous legal systems. The purpose of this paper is to explore issues created by the inevitable clash between indigenous and non-indigenous modes of proof, the possible effects of insisting on the latter, and the likely impact of the results of the process on the indigenous legal systems themselves.

The strength of most indigenous claims to country lies in the oral record, yet the Anglo-Australian legal system is a 'most prohibitively literate of institutions'.[3] The blanket stereotype of Aboriginal[4] cultures as 'oral' and non-Aboriginal culture in Australia as 'literate' may give rise to a false image. There can be no doubt that, within Aboriginal societies, people vary greatly in their literacy. Many Aboriginal people have taken on much of what might

be described as 'literate'. It is still possible to generalise that Aboriginal people think differently, and express different ideas, from non-Aboriginal people.

Statutory land rights systems have existed in the Northern Territory, and a number of States, for some years. The land rights process has developed in the Northern Territory over the last twenty-two years, since the passing of the *Aboriginal Land Rights (Northern Territory) Act 1976* (the Land Rights Act). While the land claims process is fundamentally different from that of native title,[5] and one should not simply be equated with the other, they both grapple with the same difficulties in dealing with Aboriginal oral tradition. In native title cases, it is possible to take advantage of the experience gained in land rights claims of the manner in which indigenous legal systems have been dealt with by the Anglo-Australian legal system. In part, this paper seeks to do that.

The dreaming

Perhaps the best known oral traditions of Aboriginal people relate to what has been popularised among non-Aboriginal people as the 'dreaming'. The expression 'dreaming' was coined by an anthropologist, W.E.H. Stanner, to refer both to a creation era long ago and a present, supernatural world, which interacts with the natural world.[6] Dreaming stories typically include creation narratives that describe the dreaming beings participating in the formation of the landscape, the naming of its features and the imparting to humans of language, culture, song and ceremony. The dreaming beings may once have been human in form, but have assumed the identities of animals, plants, or other phenomena. The dreaming ancestors who made the landscape may now be seen in features such as rocks, waterholes, sandhills and mountains.

Dreaming tracks sometimes travel across vast stretches of land, often crossing the country of different groups of Aboriginal people. Some travelling dreamings cross the continent; others are limited to particular regions. Different groups will have affiliation to, and responsibility for, sites along sections of such dreaming tracks. Other dreamings fall wholly within

the country of a single Aboriginal group. Some dreamings are local in the sense that they are associated with a particular site only.

It is the dreamings, knowledge of which is held in stories, songs and ceremonies, which connect people with land. The dreamings are integral to the land tenure system of Aboriginal people. They attach people to land in a way that results in the identification of the two; people are land and land is people. A person's rights to land are not capable of being bought and sold, because the self cannot be traded. Knowledge of dreamings has been used in many land claims in the Northern Territory to demonstrate spiritual affiliations and responsibility to sites and land, as required by the Land Rights Act. By Aboriginal legal systems, it is this knowledge that constitutes proof of entitlement to land; stories, songs, dances and sacred objects relating to the dreamings are the very title deeds. Aboriginal people may wish to advance similar types of evidence in the proof of native title applications. As well as the dreamings, other forms of Aboriginal oral traditions and oral history are of major importance to land claims and native title applications. For example, genealogies, general historical stories and land use information will be transmitted orally in most Aboriginal communities.

One of the features of the Aboriginal system of knowledge and of law is that, like any other system, it is not static, but changes over time. Aboriginal people often say that they have difficulty with the non-indigenous legal system, because the law changes. They assert that their law does not change. In reality, the significance of stories and sites changes with time and context. Different versions of the same story can develop. Knowledge can never really be complete, in the sense that there is a given quantity of information that can be gathered. It is more important to consider the extent to which those who have the rights to conceal or reveal knowledge have authorised its dissemination.

Aboriginal oral traditions are known to include stories, including dreaming stories, featuring figures such as Captain Cook and Ned Kelly.[7] It is widely acknowledged that change is an essential part of any living knowledge system and is as much a part of literate knowledge systems as oral ones.

Rights to information

In non-indigenous Australian culture, information, like land, is a commodity. We regard it as proper to disseminate information, to the extent that we accept readily that information can be traded for profit. The Anglo-Australian legal system operates on the principle that it is of value to make the maximum possible amount of information publicly and freely available; indeed, the notion of an open and impartial inquiry, on which that system is based, must be compromised were this assumption not made. The principles of natural justice demand that opposing parties be treated equally, and that each party know the basis of the other party's claims and have an opportunity to answer them.

In Aboriginal cultures, knowledge is rarely open or freely available. It tends to be highly regulated and controlled according to factors such as age, kinship, descent categories, locality or gender. Eric Michaels posits that, because information is inseparable from its author in oral cultures, authorship takes on a privileged status, and a complex system of information constraints operates.[8] Indeed it is often said of Aboriginal communities that intellectual property is emphasised over material property and that knowledge is the 'currency of Aboriginal life'.[9]

In addition to the well known distinction between information that is 'secret' and information that is 'public', Aboriginal people understand a complex system of different 'rights' to information that is also highly regulated. In face-to-face transmission, there are differences among rights to know something, to hear something, and to speak of it. These regulations apply not only to oral information, but also to such things as design and dance. Violations of these rules amount to theft.[10]

The ownership of the right to speak is essential to communicate business, particularly to an outsider:

> Polite conduct in all Aboriginal discourse is consistent with the laws governing sacred knowledge. Even in mundane matters, it is wrong to speak of (or for) somebody else's country, dreaming, or personal business unless given explicit licence to do so.[11]

This complex system of information control commonly results in the fragmentation of knowledge across a community. It is certainly by no means usual that vast repositories of community knowledge may be held by a small number of senior people. Jim Wafer explained this fragmentation of knowledge in the context of the North-West Simpson Desert Land Claim as follows:

> A major characteristic of oral cultures is that different parts of their traditions are preserved in the memories of different people, with the inevitable overlaps and gaps. It is not usually the case that any one individual has an overview of the whole tradition. In the case of overlap, it is quite common for different individuals to know different versions of the same part of the tradition, because of the way variations occur as the traditions are transmitted over time and across geographical distance.[12]

The existence of sites on or near the land which is the subject of a claim, and the relationship of claimants to those sites, is at the heart of the process of dealing with claims under the Land Rights Act. To write a report without revealing such information would be to fail to perform the duty required under this legislation of the Aboriginal Land Commissioner. Sometimes this has meant that as Aboriginal Land Commissioner I have revealed, or referred to, restricted evidence when I was presenting a report. I have always taken care to ensure that references to such evidence are minimal, and locations and descriptions of sites given are not precise. Yet I am aware that this leaves Aboriginal people in a double bind; they are placed in the position 'of opening their knowledge up for invasive scrutiny as a necessary precursor to protecting their knowledge'.[13]

Anthropologist Deborah Rose thus describes the difference between the Aboriginal and Anglo-Australian approaches as 'a fundamental disjunction between different systems of law'.[14] In the non-indigenous system, everyone expects to be told everything. In the Aboriginal systems, the higher levels of knowledge will be the most secret. When involved in the non-indigenous legal system, Aboriginal people will be most reluctant to reveal these higher levels. If they are then forced to reveal them, this gives rise to suspicion on the part of non-Aboriginal participants that what is being revealed is recent invention.[15]

Status of the spoken word

In contrast to Aboriginal views, in 'Western' thought the written word is primary and is often assumed to have more value than the spoken word. Oral traditions are often aligned with 'myth' and 'folklore' and are immediately associated with subjectivity, whereas written 'history' often carries the connotation of being objectively verifiable, factual accounts of events. For example, fifteen or more years ago, Patrick O'Farrell expressed the extreme view that, as a historian, to rely on oral accounts is to 'retreat from analysis, discipline, depth and precision – perhaps a history of the heart not the head'.[16] He regarded the spoken word as 'consistently the looser, the less pondered variety of verbal expression' and compared the written word 'which is likely to be more considered and precise.[17] Oral accounts have been regarded with disfavour by some anthropologists and social scientists, as well as some historians.[18] They were often assumed to lack empirical status, and concern was expressed about the selectivity and colouring of memory as a limitation on the 'truthfulness' of oral accounts. As well as the issue of reliability, historians, anthropologists and other social scientists have debated the problems of representativeness and generalisation associated with the use of oral accounts within the social sciences.[19] The theoretical debate in the social sciences is reflected in the practicality of the approach of courts to indigenous oral accounts. Both theory and practice seem to indicate that there is a 'Western' way of thinking, in which written records are preferred to oral accounts.

In *Delgamuukw v British Columbia*, the Canadian courts considered the law's approach on these very issues of reliability and representativeness of oral accounts.[20] There was discussion as to the admissibility and weight of the *adaawk* and *kungax* of the Gitksan and Wet'suwet'en peoples. The *adaawk* and *kungax*, which are somewhat analogous to the Aboriginal dreamings, were described as oral histories of a special kind in that they contained a 'sacred "official" litany, or history, or recital of the most important laws, history, traditions and traditional territory of a House'.[21] The importance of the *adaawk* and *kungax* is said to be underlined by the fact that they are repeated, performed and authenticated at important feasts. These oral histories were offered as proof of a system of land tenure. The trial judge found that they could not serve as evidence of detailed history, or land

ownership, use or occupation. He discounted the *adaawk* and *kungax* because they were not 'literally true', confounded 'what is fact and what is belief', 'included some material that might be classified as mythology' and projected a 'romantic view' of the history of the Gitksan and Wet'suwet'en.[22] The trial judge also cast doubt on their authenticity because the verifying group was so small that they could not safely be regarded as being representative of a larger community. No weight was given to these oral histories by the trial judge, because they did not convey the 'historical truth', because knowledge about those oral histories was confined to the communities whose histories they were, and because those oral histories were insufficiently detailed.[23] The Canadian Supreme Court, however, rejected this reasoning of the trial judge. Lamer CJ said:

> The implication of the trial judge's reasoning is that oral histories should never be given any independent weight and are only useful as confirmatory evidence in aboriginal rights litigation. I fear that if this reasoning were followed, the oral histories of aboriginal peoples would be consistently and systematically undervalued by the Canadian legal system.[24]

The spoken word is valued in the Aboriginal system of law in a way different from the Anglo-Australian legal system. What is likely to constitute the 'truth' in each system is determined in a different manner. This is reflected in the stark contrast between the distrust of information received second-hand by the Anglo-Australian legal system, as opposed to the status and authority accorded to information received through other people in Aboriginal law. Oral records are passed in a chain across the generations of a particular Aboriginal community to the present day. By their very nature, they constitute what is described as 'out of court statements', which conflict with the general rule against the admissibility of hearsay in the Anglo-Australian system of law. The rule against hearsay is one of the oldest (and most complex) rules of evidence. The rule can be explained simply:

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is

> admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.[25]

In *R v Hennessey*, Lawton LJ said, 'Witnesses, whether for the prosecution or the defence, are required to testify what they saw, heard, smelt or felt and not to what they know because of what they have been told'.[26] While the rule excluding hearsay applies to all kinds of assertions, whether made orally, in writing or by conduct, it represents a different approach to determining the truth from that of Aboriginal law. The Aboriginal notion is that words can constitute the truth if they can be backed by the appropriate claim to authority, such as 'this is what my father told me' or 'this is what my old people told me'. These lines of authority, extending back through the generations, are precisely what give information its value and its reliability in Aboriginal systems. This is similar to the familiar attitude to the authority of texts, in which the appeal is to knowledgeable sources. The difference lies in the container of the information; in one case, it is a book or other document, while in the indigenous case, it is a person.

Common law courts have had to wrestle with the interaction between the rule excluding hearsay and the proof of indigenous oral tradition. In the Gove case in 1971,[27] Blackburn J was asked by some Aboriginal people who claimed title to land by their legal system, to restrain mining operations on that land which were in contravention of the relevant indigenous law. One issue was whether the Aboriginal people would be allowed to give evidence of the indigenous legal system at all. On this issue, his Honour said:

> No difficulty arose in the reception of the oral testimony of the aboriginals *[sic]* as to their religious beliefs, their manner of life, their relationship to other aboriginals *[sic]*, their clan organisation and so forth, provided, first, that the witness spoke from his own recollection and experience, and secondly, that he did not touch on the question of the clan relationship to particular land or the rules relating thereto. No question of hearsay is at this stage involved; what is in question is only the personal experience and recollection of individuals. The substance of this evidence had to be proved, in some manner, as an indispensable preliminary to the exposition and understanding of the system of 'native title' asserted by the plaintiffs.[28]

His Honour did admit as evidence certain statements, made by Aboriginal witnesses, as to what their deceased ancestors had said about the rights of various clans to particular pieces of land and the system of which those rights form part, under an exception to the rule against hearsay that applies to the declarations of deceased persons as to matters of public and general rights.[29] He also permitted evidence of anthropological opinion, stating, 'In my opinion such evidence is not rendered inadmissible by the fact that it is based partly on statements made to the expert by the aboriginals *[sic]*'.[30]

Questions of admissibility of knowledge handed down orally across generations were argued in *Mabo* before the Supreme Court of Queensland.[31] Once again oral evidence included what had been told to the Torres Strait Islander witnesses by their old people and this evidence gave rise to hundreds of objections. Moynihan J admitted much of this evidence, such as statements made by Eddie Mabo's grandfather relating to boundaries of land, but stated that further evidence would be needed for it to be accepted as truth. His Honour said:

> I have little difficulty in accepting that the fact of assertions being made by persons other than a witness may be relevant and hence admissible. The evidence is not, without more, however necessarily admissible as to the truth of the matters asserted.[32]

In a community where truth is asserted through demonstrating one's line of authority back through the generations, an approach like this may require Aboriginal people to rely on documentary evidence, or expert evidence, to add weight to their oral statements.[33] Diane Bell argues that this was the case in the approach of the royal commission in South Australia in 1995, which inquired into the Hindmarsh Island bridge proposal and attempts by Aboriginal people to prevent the building of the bridge.[34]

The decision of the Supreme Court of Canada in *Delgamuukw* may have opened a new chapter in the attitude of common law courts to the use of indigenous oral accounts and the operation of the hearsay rule. The recognition of the intrinsic value of oral traditions, and of oral evidence of them, might even mark the beginning of the creation of a special exception to the hearsay rule, relating to evidence of land tenure systems, and

entitlements under them, in oral cultures.[35] The resolution of the issue will be particularly important now that amendments to the *Native Title Act 1994* have come into operation, which make the rules of evidence applicable to the hearing of applications for determination of native title, unless the Court otherwise orders.

Inconsistent written records

Another difficulty for the courts with the oral history of Aboriginal peoples lies in assessing them against inconsistent written records. In the recent case of *Shaw v Wolf*,[36] Merkel J had the difficult task of weighing up competing oral and written accounts in determining whether certain candidates for election to regional councils of the Aboriginal and Torres Strait Islander Commission were Aboriginal. Extensive evidence was given about genealogical records in Tasmania. Historical accounts and archival records formed an important source of information about genealogy, but had to be assessed alongside oral accounts which differed from them in some respects. One such written record, created by George Augustus Robinson, the Protector of Aborigines in Tasmania for some years, was assessed thus:

> In view of Robinson's very keen scientific and missionary interest in the Aboriginal Tasmanians, the amount of time spent with them and his particular concern for the morality of Aboriginal women living with sealers and the children of these women, these journals constitute an important source of genealogical information for the 1820s to 1840s.[37]

There have been expressions of concern that genealogical records kept by some missionaries are unreliable simply because of their missionary interest in Aboriginal people and their concern for the morality of Aboriginal women. Some missionaries could not accept Aboriginal polygamy, or the reality of what might have been regarded as adultery, and attributed fatherhood of children to men who were not their biological fathers. Some were concerned, for good social reasons, to attribute to Aboriginal men fatherhood of children whose fathers were really non

Aboriginal men. Some lacked understanding of complex kinship systems, which often include designations of people as 'mother' and 'father', who are not biological parents of the person concerned. Courts must be wary of 'text positivism', the notion that, if a written record is constructed as accurately as possible, the author's role dissolves into that of an honest broker, passing on the substance of things with only the most trivial of transaction costs. Indeed it is only relatively recently that anthropology as a discipline has begun to struggle with the false notion of 'objective' ethnographic accounts and that biases inherent in many of the classic ethnographies have been analysed.[38]

Merkel J in *Shaw v Wolf* concluded that oral accounts should not be discarded simply because there is a conflicting historical account. He stated:

> It was evident from much of the evidence of the respondents that oral histories and informal documentation were often not entirely consistent with the formal histories which had been widely accepted. Dr Pybus gave evidence that oral histories would certainly not be discounted by professional historians or historical researchers but that oral evidence will be more significant when it is a contemporaneous record rather than a retrospective, albeit first person, recollection, and that the historical value of such evidence may be limited if no corroboration exists.
>
> The conflicting accounts and hypotheses raised by the different historical records demonstrate that the general historical record, particularly when relied upon to discount descent in a particular case, is not complete or reliable in all instances. Consequently, the Court is to exercise caution in acting on any general historical record or account as evidence disproving a version of history or ancestry of a particular respondent based on oral history, particularly if it has some contemporaneous corroboration.[39]

Again, the approach of the Supreme Court of Canada in *Delgamuukw*, recognising the nature of oral cultures, may provide us with a guide to a new approach.

Communication

There are practical communication difficulties between Aboriginal people and non-Aboriginal people in the Anglo-Australian legal system. There were some hundreds of Aboriginal languages in Australia. Many of them have been lost, many have only small numbers of speakers, but others are used for daily communication among significant numbers of people. Across the north of Australia, there is a widely-spoken dialect, designated by linguists as Aboriginal English. This dialect really represents a spectrum; at one end it shades into Kriol, a heavy form of Pidgin English and classified as a language in its own right, which is understood by very few speakers of 'standard' English. At the other end, in conformity with the definition of a dialect, speakers of Aboriginal English and 'standard' English understand each other reasonably well, although there are differences in both vocabulary and grammar, which can create communication difficulties between Aboriginal witnesses and counsel.[40] There are cases in which interpreters will be needed. Usually, the only speakers of an Aboriginal language will be people who have an interest in the outcome of the proceeding, or people who have worked so closely with them as to be outside the class of independent experts.

Even when interpreters are not required, there are marked differences between Aboriginal and non-Aboriginal people in communication techniques. The eliciting of information by direct questions is generally foreign to Aboriginal people; indirect discourse is preferred.[41] Looking a person in the eye and making strong assertions are considered as confrontational, and therefore as outside the bounds of proper behaviour. The propensity of Aboriginal people to answer 'yes' to questions put strongly has been recognised in the Northern Territory by the *Anunga* rules[42] which govern the interrogation of Aboriginal suspects by police. The Aboriginal preference for giving evidence in groups, rather than as individuals, has been accommodated in land rights hearings in the Northern Territory.[43] This practice is likely to disconcert some judges if used in court proceedings, because it often involves interjection, correction, or consultation as to the answer to a question. The preference for giving evidence about a particular place at that place has also influenced the conduct of land rights claims in a substantial way.

The ability of the courts to give effect to appropriate Aboriginal methods of imparting knowledge may be affected by the recent amendments to the *Native Title Act 1994* which reintroduce the rules of evidence in the hearing of applications for determination of native title, unless the court otherwise orders, and remove the requirement that the court take account of indigenous cultural and customary concerns. The position will be that account can only be taken of such concerns to the extent that no other party will be prejudiced unduly. Non-indigenous procedural considerations have thus been given dominant effect in proceedings in which the central issue will always be the existence and content of indigenous legal systems.

Transformation of Aboriginal oral history into a written product

During a land claim hearing or native title application, Aboriginal oral accounts are transformed into written documents, first in a transcript of proceedings, then in a report (in land claim matters) or a judgment (in native title applications). The underlying concern is one of control of Aboriginal knowledge. The transformation of an oral product into a written one can separate information from its authors and have enormous ramifications for Aboriginal people, because the information can be distributed more generally and will remain in a more permanent form.[44]

A transcript is compiled using tape recordings of the evidence. Other than a videotape of the entire hearing, the production of a transcript is considered to provide the best record of the evidence available for lawyers involved in the case and the decision-maker. It is well known that any transcript can never be so detailed and precise as to convey the full context of spoken interaction. It is not possible to record on paper pitch, timing and gesture. The particular difficulties of obtaining transcript that reflects accurately evidence given in Aboriginal English, Kriol, or an Aboriginal language, have been highlighted by two Australian anthropologists and linguists: Professor Bruce Rigsby (during the hearings of Lakefield and Cliff Island National Park land claims in Queensland in 1995)[45] and Dr Michael Walsh (regarding the Kenbi (Cox Peninsula) land claim hearing in the Northern Territory).[46] The process of transcribing evidence is particularly unsuited to the

performance of songs and dances as evidence, which is at the very heart of proof of title according to Aboriginal legal systems.

The production of a transcript inevitably involves some element of selection by the transcriber, due to factors such as a number of people speaking at once, and the making of asides. Without any intention of distorting the record, for the sake of comprehensibility, what is said is often 'normalised' in a written form.[47] Even those decisions regarding punctuation that must be made by the transcriber can affect the style, flow and meaning of a person's words. The transcript is then regarded as containing the 'true' version of the evidence of each of the persons. If witnesses give subsequent evidence different from the transcribed version of what they have said earlier, the later evidence is likely to be characterised as recent invention.

What becomes of the tapes recorded in the process of producing a transcript has also created a complex issue. The Aboriginal Land Commissioner engages transcript providers on a 'contract' basis. It is undesirable that the commissioner, or a court, should have direct control over the production of transcript, lest there should be allegations of tampering. Once the tapes are more than one year old, the transcript provider has authority to destroy or erase them under the *Archives Act 1983*. During my term as Aboriginal Land Commissioner I received a proposal from a transcript provider that some tapes might instead be placed in the custody of the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), for the purpose of preserving the audible version of the evidence for future researchers. I sought and received submissions from both the Northern Land Council and the Central Land Council, both of which favoured the preservation of the tapes in the custody of AIATSIS, on condition that access to them be subject to the approval of the Aboriginal Land Commissioner. AIATSIS accepted custody of the tapes on this condition. Part of the process of the production of transcript involves filtering out matters that are audible on the tape, but are not part of the evidence. Many of these are asides by counsel to solicitors or others instructing counsel. These communications are the subject of legal professional privilege, which means that they cannot be revealed to anybody without the waiver of the privilege by the client. In a land rights claim, the client might be a large group of people, the precise content of which is not

easily ascertainable. Waiver of privilege is unlikely to be practicable. On the other hand, the client might be the Attorney-General for the Northern Territory, who might be reluctant to waive privilege without knowing the content of the privileged communications. No-one could listen to the tapes for the purpose of hearing the privileged communications which he or she is entitled to hear, without hearing those which he or she is not entitled to hear. It is not possible for any researcher to listen to the tapes without hearing the privileged communications. The practical use of the audible record for future research seems unlikely.

The transcript itself will be likely to be in demand in relation to other proceedings with respect to the same, or neighbouring, areas of land. In most land claims in the Northern Territory, parts of the transcript have been the subject of directions by commissioners that they not be used or revealed for purposes other than the particular land claim, or that they not be revealed other than to adult males, or adult females. These directions are made in an attempt to respect the requirements of Aboriginal legal systems as to the persons entitled to knowledge. It is a criminal offence knowingly to disobey a direction of an Aboriginal Land Commissioner. In one land claim which I heard, I was invited to sign a notice equivalent to a subpoena, directed to the Queensland Land Tribunal, requesting production of all of the transcript of, and documents tendered as exhibits in, a proceeding relating to land adjacent to that claimed. I made it clear that I would not sign such a notice with respect to any document the subject of restrictions imposed by the Land Tribunal. Courts and tribunals dealing with native title issues will have to deal with requests to compel the production of evidence made subject to restrictions in other proceedings. There will be tension between the considerations that led to the restrictions being imposed in the earlier proceeding and considerations of natural justice in the later proceeding.

The publication of the reports of Aboriginal Land Commissioners has also presented some difficult issues. These reports are directed to the Minister for Aboriginal and Torres Strait Islander Affairs. They are tabled in parliament and published as public documents. They contain findings as to the identity of those found to be traditional Aboriginal owners of the land claimed, according to a statutory definition of that term, and

recommendations that the claimed land be granted to an Aboriginal Land Trust. They contain genealogical information and information regarding spiritual affiliations of the claimants to sites on and near the land claimed, including information regarding dreamings.

There can be no doubt that, after publication, these reports do have a life of their own. They may be accorded value and significance beyond their intent and purpose. For example, findings as to those who are (and perhaps those who are not) 'traditional Aboriginal owners' become highly public and certainly have an impact within Aboriginal communities. They may add to the political clout that certain individuals wield within the community, and diminish that of others. In this way, and perhaps other ways, the oral tradition is transformed by the written one it first created. Aboriginal people, as well as Anglo-Australians, may come to indulge in text positivism, and might treat the written version as orthodox.

The transformation of an oral history into a text impacts on the usual processes of change and continuity evident in oral cultures. Wafer discussing 'traditions' in Arrente culture states:

> Aboriginal traditions in general have not been systematised by the kinds of processes that written records make possible, through the juxtaposition and comparison of different versions of the tradition. There is no canonical version of Arrente traditions, comparable to the canonical books of western theology. The creation of a canon requires written records, so that different versions of the traditions can be compared, a single version elevated to the status of orthodoxy, and other variants declared secondary or heterodox.[48]

The processes of colonisation have already impacted on Aboriginal systems of knowledge in many ways, often adding greatly to the fragmentation of knowledge through the massive disruption to the social system, decimation of community populations, and dislocation of peoples from their land and kin. Today there remains a possibility that creating a fixed record of Aboriginal traditions at a single point in time, in a land claim hearing or in a native title application, may well disrupt the Aboriginal knowledge system even further. Walsh has a more optimistic view. He argues that the substantial

written record created from Aboriginal oral evidence in the land claims process is already being incorporated within Aboriginal knowledge systems:

> Traditional knowledge had a degree of flexibility over the generations. Literacy and the land claim process have a tendency to fix traditional Aboriginal knowledge in a way that breaks with tradition; or, rather, the widespread use of literacy may be contributing to a new kind of traditional knowledge in which the words remain fixed but the interpretation of those words gradually shifts.[49]

In the process of a land claim or a native title application knowledge may in fact be consolidated and the value of this knowledge asserted and recognised. Whether the result be positive or negative, it is clear that there will be some effect on the content of indigenous legal systems from the publication of findings as to the content of those systems.

Conclusion

Despite the pioneering work done in Northern Territory land rights claims, the Australian non-indigenous legal system is only at a very primitive stage in its approach to indigenous legal systems. Working out a satisfactory approach to ascertaining the content of an oral tradition will not be easy. Doing so without having significant effects on indigenous legal systems themselves will be even more difficult. Only by recognising differences and determining to accommodate them to the greatest possible extent can we hope to succeed.

Endnotes

[1] I am indebted to my associate, Ms Zoe Ellerman, for her careful research, ideas, and considerable work on drafts of this paper. Responsibility for any errors is mine alone.

[2] (1992) 175 CLR 1.

[3] Tim Rowse, *After Mabo: Interpreting Indigenous Traditions*, Melbourne University Press, Carlton, 1993, p. 5.

[4] My switch from the use of the term 'indigenous' to 'Aboriginal' at this point is not a lapse.

Unfortunately, my knowledge of the cultures of Torres Strait Island peoples is almost non-existent. What follows is based to a considerable extent on my six years of experience as Aboriginal Land Commissioner, dealing with land claims under the *Aboriginal Land Rights (Northern Territory) Act 1976.* I have also relied on the writings of others, which deal mainly with the indigenous peoples of the mainland, appropriately described as 'Aboriginal' peoples.

5 Native title is a matter of recognition by the law of indigenous ownership of land in priority to ownership by the Crown. Land rights involves the granting to indigenous people of rights in land that the law holds to be owned by the Crown.

6 W.E.H. Stanner, *White Man Got No Dreaming,* Australian National University Press, Canberra, 1979, pp. 23-40.

7 Deborah Bird Rose, 'Cross-Cultural Management of Knowledge in Proof of Native Title', unpublished paper delivered at the 1995 Supreme and Federal Court Judges' Conference, Adelaide; id. *Dingo Makes us Human: Life and Land in an Australian Aboriginal Culture,* Cambridge University Press, Cambridge and Melbourne, 1992.

8 Eric Michaels, 'Constraints on Knowledge in an Economy of Oral Information', *Current Anthropology,* Vol. 26, No. 4, 1985, pp. 505-510.

9 Id. *Aboriginal Invention of Television in Central Australia 1982-1986,* Australian Institute of Aboriginal Studies, Canberra, 1986, p. 2. (See also Basil Sansom, *The Camp at Wallaby Cross: Aboriginal Fringe Dwellers in Darwin,* Australian Institute of Aboriginal Studies, Canberra, 1980, p. 20.)

10 *Ibid.*, p. 4.

11 *Ibid.*, p. 4. (See also Sansom, *op.cit.*, p. 26; P. Brock, 'A History of the Andyamathanha of the North Flinders Ranges: Methodological Considerations', *Oral History Association of Australia Journal,* Vol. 7, 1985, pp. 68-77 at p. 71).

12 J. Wafer and A. Green, *The Simpson Desert Land Claim; Area 1: the North-West Simpson Desert,* Central Land Council, Alice Springs, 1989, pp. 44-45.

13 Deborah Bird Rose, 'The Public, the Private and the Secret Across Cultural Difference', in *Heritage and Native Title: Anthropology and Legal Perspectives, Proceedings of a Workshop conducted by the Australian Anthropological Society and Australian Institute of Aboriginal and Torres Strait Islander Studies, the Australian National University Canberra 14-15 February 1996,* edited by Julie Finlayson and Ann Jackson-Nakano, Native Title Research Institute, Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), Canberra, 1996, pp. 113-128, at p. 113.

14 Id. 'Whose Confidentiality? Whose Intellectual Property?' in *Claims to Knowledge, Claims to Country: Native Title, Native Title Claims and the Role of the Anthropologist,* edited by Mary Edmunds, Native Titles Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), Canberra, 1994, pp. 1-11 at p. 1.

[15] It is possible that this is the very issue which gave rise to the Hindmarsh Island bridge controversy. See D. Bell, *Ngarrindjeri Wuwurrwarrin: A World That Is, Was and Will Be*, Spinifex Press Pty Ltd, Melbourne, 1998.

[16] Patrick O'Farrell, 'The "Great Oral History Debate" Revisited', *Oral History Association of Australia Journal*, Vol. 5, 1982-3, pp. 3-9 at p. 8.

[17] *Ibid.*, p. 5

[18] See for example F. Boas, 'Recent Anthropology', *Science*, Vol. 98, 1943, pp. 311-314 & 334-337; D. G. Mandelbaum, 'The Study of Life History: Gandhi', *Current Anthropology*, Vol. 14, No. 3, 1973, pp. 177-206.

[19] See for example L. Langness, *The Life History in Anthropological Science*, Holt, Rinehart and Winston, New York, 1965, pp. 9-10.

[20] *Delgamuukw v British Columbia*, began in the Supreme Court of British Columbia before McEachern CJ: (1991) 3 WWR 97. The plaintiffs appealed the decision of the trial judge to the full court of the Court of Appeal of British Columbia: (1993) 5 WWR 97. This appeal was dismissed and the plaintiffs then appealed to the highest court in Canada, the Supreme Court of Canada: unreported decision, Supreme Court of Canada, No. 23799, 11 December 1997.

[21] (1991) 3 WWR 97 per McEachern CJ at p. 164.

[22] *Ibid.*, p. 180.

[23] *Ibid.*, p. 181.

[24] *Delgamuukw v British Columbia*, unreported decision, Supreme Court of Canada, No. 23799, 11 December 1997, at paragraph 98.

[25] Cited in D. Byrne and J.D. Heydon, *Cross on Evidence* (4th Australian edition), Butterworths, Sydney, 1991, p. 800.

[26] (1978) 68 Cr App R 419 at p. 425.

[27] *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141

[28] *Ibid.*, p. 153.

[29] *Ibid.*, p. 158.

[30] *Ibid.*, p. 161.

[31] 1 Qd. R. 78.

[32] *Ibid.*, p. 87.

[33] Various solutions are often proposed to deal with this problem of the truth or falsity of oral accounts. General tests of credibility, honesty, and internal consistency, are favoured along with the search for corroboration from a written source. These solutions all focus on ensuring that oral sources conform to some standard of 'objectivity', that is, that they can be substantiated by another source. Interestingly, after examining these issues, one author concluded that an oral narrative's 'reliability' may be better understood if 'the scholar invests in some fair knowledge of the informant's cultural milieu, which includes

the political system in which he lives [because] the factor which most imparts bias and imposes limitations is the political system' (V. Cowden, 'Historiography and Oral History: A Plea for Reconciliation', *Oral History Association Journal*, Vol. 5, 1982/3, pp. 35-40). That is, you need knowledge of the system that produced them properly to assess and understand an oral account.

34 'The Royal Commission found fabrication in the oral accounts of the proponent women. In so doing it tapped into modes of contesting Aboriginal oral claims about sacred sites that have been well honed over the past few decades. Firstly, without any independently generated written documentation, a claim is open to the challenge that "it is all made up to frustrate development". "No texts; no sites" was the mantra of the Royal Commission.' Bell, *op. cit.*, p. 34.

35 Such a rule has operated in other jurisdictions, particularly relating to some African jurisdictions. See *Stool of Abinabina v Chief Kojo Enyimadu* [1953] AC 207, in which the Privy Council considered a line of African cases and held that courts can act on 'traditional evidence', that is evidence as to rights alleged to have existed beyond the time of living memory; see also *Administration of Papua and New Guinea v Daera Guba* (1972) 130 CLR 353 per Barwick CJ at pp. 373-374; cf. *Milirrpum v Nabalco Pty Ltd, op. cit*,. per Blackburn J p. 159.

36 Unreported, Federal Court of Australia, 20 April 1998.

37 *Ibid.*, p. 18.

38 In fact, anthropology has begun only recently to struggle with the criticism that it is based on the false notion of 'objective' ethnographic accounts. The publication of Malinowski's Mailu and Trobriand dairies in 1967 is widely credited as the major catalyst for the reassessment of the 'objective' and 'scientific' nature of ethnography. The fieldwork practice recorded in Malinowski's diaries simply did not fit with the methodological exhortations outlined in his 1922 publication, *Argonauts of the Western Pacific.* (See for example James Clifford and George E. Marcus, *Writing Culture: the Poetics and Politics of Ethnography*, University of California Press, Berkeley, 1986, p. 14, and Clifford Geertz, *Works and Lives: the Anthropologist as Author*, Stanford University Press, Stanford, 1988, pp. 22-23).

39 *Shaw v Wolf, op. cit.*, p. 21.

40 See for example Diana Eades, 'They don't speak an Aboriginal Language, or do they? Language use in Aboriginal Identity and Cross-Cultural Communication', in *Being Black: Aboriginal Cultures in "Settled" Australia*, edited by Ian Keen, Aboriginal Studies Press for Australian Institute of Aboriginal Studies, Canberra, 1988, pp. 97-116; Diana Eades, *Aboriginal English and the Law: Communicating with Aboriginal English Speaking Clients, A Handbook for Legal Practitioners*, Continuing Legal Education Dept. of the Queensland Law Society, Brisbane, 1992; id., 'Aboriginal English in Court', *Judicial Review*, Vol. 1, No. 4, 1994, pp. 368-378; id., 'Cross Examination of Aboriginal Children: the Pinkenba Case',

Aboriginal Law Bulletin, Vol. 3, No. 75, August 1995, pp. 10-11.

[41] *Ibid.*

[42] *R v Anunga* (1976) 11 ALR 412.

[43] See T. Neal, 'The Forensic Challenge of Native Title', *Law Institute Journal*, September 1995, pp. 880-883; G. Neate, 'Determining Native Title Claims – Learning from Experience in Queensland and the Northern Territory', *The Australian Law Journal*, Vol. 69, July 1995, pp. 510-539.

[44] In 1996 I received a proposal from a legal adviser of the Northern Land Council that these reports should be made available on the Internet. This was a proposal about which I had reservations and I sought confirmation from both the Northern Land Council and the Central Land Council. While I received no reply from the Northern Land Council, the Central Land Council was opposed to their publication on the Internet.

[45] B. Rigsby, 'Aboriginal Evidence and the Transcript in Two Queensland Land Claims', unpublished paper presented at the Forensic Linguistics Conference, University of New England, August, 1997.

[46] M. Walsh, ' "Tainted Evidence": Literacy and Traditional Knowledge in an Aboriginal Land Claim', in *Language in Evidence: Issues Confronting Multicultural Australia*, edited by Diana Eades, University of New South Wales Press, Sydney, 1995, pp. 97- 124 at p. 98.

[47] *Ibid.*, pp. 121-122.

[48] Wafer and Green, *op. cit.*, p. 44.

[49] Walsh, *op. cit.*, p. 98.