

With language can severely restrict a defendant's right to be heard and understood in a court of law.

ELEVEN EXPERTS, including a lawyer, a law lecturer and linguistic expert contribute their expertise to the book. There is a strong emphasis placed on the obstacles faced by people of Aboriginal and non-English speaking backgrounds. Many chapters take a case study approach, using court and police transcripts to illustrate the ways in which language can affect the outcome of a legal case. The Stuart Royal Commission in 1959 and the Kelvin Condren case are among those analysed, along with the Elcho Island coronial inquest and the Kenbi Land Claim.

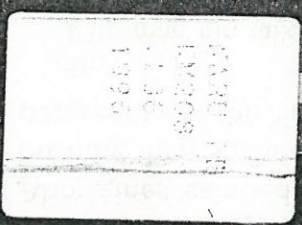
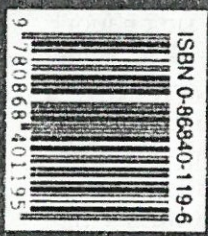
TWO CHAPTERS on offensive language explore the legal and linguistic definitions of this offence. They show how the charge of 'offensive language' is weighted against the poor and uneducated generally, and especially against Aboriginal people.

EASY TO READ and full of fascinating detail, this is a book not only for people working in linguistics and law, but for anyone interested in the application of justice in Australia.

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# LANGUAGE IN EVIDENCE

Edited by DIANA EADYS



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of these). However, there are a number of educational institutions in the Northern Territory which cater for significant numbers of Aboriginal students. They include Batchelor College, the Institute for Aboriginal Development, NT Open College, Nungalinga College and the Centre for Aboriginal and Islander Studies (within the NT University). They are well placed to offer specific courses (or components of courses) which could focus on Western culture learning.

Aboriginal people who speak English as a second language need access to courses in Western culture learning. Given the disproportionate number of Aboriginal people who have dealings with the police and judicial systems, courses about police, courts, gaols and laws are especially warranted.

#### **5. Skills in Cross-cultural Communication for NT Lawyers**

Effective and productive courtroom dialogue between counsel and witness, where the witness is an Aboriginal person speaking English as a second language, calls for highly developed skills in cross-cultural communication, not generally evident among courtroom lawyers. Yet lawyers working in the Northern Territory come into professional contact with significant numbers of Aboriginal people.

Lawyers need training in cross-cultural communication skills and an understanding of relevant aspects of Aboriginal law and culture.

## **4**

### **'TAINTED EVIDENCE': LITERACY AND TRADITIONAL KNOWLEDGE IN AN ABORIGINAL LAND CLAIM'**

**MICHAEL WALSH**

Your Honour would no doubt take judicial notice of the fact that Aboriginal tradition is an oral tradition. The language has gone and in our submission, so too has the tradition (Northern Territory Government 1990:61).

The evidence of the 'urban' Larrakia such as ... etc., can only be considered as being highly derivative from the claim materials. Their evidence is tainted, it is not original. It does not derive from any, or any substantial, independent knowledge of the matters dealt with in the claim materials and does not provide any independent corroboration of the contents of the claim materials (NT Government 1990:58).

#### **INTRODUCTION**

One of the Northern Territory land claims highlights differing perspectives on tradition, Aboriginal identity and cultural transmission. This is the long-running Kenbi Claim which involves land close to the built-up area of Darwin and has claimants from diverse backgrounds. Some claimants readily satisfy stereotypes about 'traditional' Aboriginal life: both parents Aboriginal, living in the bush and gaining much of one's subsistence from the land; a deep knowledge of Aboriginal place-names and their spiritual associations; participation in ceremonies. But some claimants



come from families that have intermarried with the newcomers over seven generations so that in appearance they may be virtually indistinguishable from other inhabitants of Darwin. Such claimants have lived most of their lives in towns and have drifted away from the very close associations to the land that are evident among their more bush-oriented relatives. They have been to school and some have gone on to further education. For these Aborigines the land claim has brought on questions of identity which are not confined to their own community.

An examination of transcripts and other claim documents reveals that the views expressed by the Northern Territory Government lawyers cannot simply be dismissed as part of the cut-and-thrust of cross-examination and legal disputation. Rather, they reflect differing perspectives on the status of a literacy that is fairly recent, and introduced from outside. For some lawyers Aboriginal tradition is essentially static, so that literacy can have no role to play; knowledge derived from literate skills must be treated as suspect and not 'authentic'. For some Aborigines these new literate skills can be seen as one way of regaining their Aboriginal heritage.

Not surprisingly the Kenbi Claim has become a test case of what it means to be a 'traditional' Aborigine. But it also raises questions about the role of literacy and the status of traditional knowledge. 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.

## LAND CLAIMS IN THE NORTHERN TERRITORY

A series of hearings have been held since 1976 to determine which Aboriginal people should be found to be 'traditional Aboriginal owners' of certain areas of land in the Northern Territory. Aboriginal groups may put forward a claim under the terms of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) to areas of unalienated Crown land. This is a federal Act relating specifically to land in the Territory and specifically to 'traditional Aboriginal owners'. In other parts of Australia there are other land rights models in place and other legal avenues

along which Aboriginal people with aspirations to gaining land can proceed. But the Northern Territory Act is unique in its requirement that a judge find 'traditional Aboriginal owners' within the meaning of the Act (see Neare 1989 for background from a legal perspective).

Land claims are prepared on behalf of the Aboriginal claimants by Land Councils<sup>2</sup> set up under the Act. Anthropologists prepare extensive documentation on such matters as: how the claimant group relates to the land in question; the extent and composition of the group; the nature of their rights to the land; their knowledge of the land in terms of named locales and their spiritual significance; and the history of contact between Aborigines and newcomers in the area. In the northern part of the Territory nearly all Aboriginal land interests are handled by the Northern Land Council.

The case for the claimants is then presented in a hearing before the Aboriginal Land Commissioner, a judge appointed to find 'traditional Aboriginal owners' within the meaning of the Act. Preparation for the claimants' case is a co-operative venture by anthropologists, lawyers and knowledgeable Aborigines, many of whom will give evidence before the hearing. While the lawyers for the claimants take evidence from the Aboriginal witnesses and argue points of law, the anthropologists<sup>3</sup> must often act as a bridge between the Aborigines who have little knowledge of Western law and the lawyers who may have difficulties in understanding what Aborigines are telling them. There are other parties who have interests in the land under claim and they are usually represented by lawyers, one of the chief protagonists being the Northern Territory Government (hereafter also referred to as the 'opposition'). Evidence is taken from these other parties and from the claim researchers.

The hearing creates a sizeable influx of new people into the Aboriginal local community. The Aboriginal Land Commissioner comes with a Counsel Assisting, a consultant anthropologist, an Associate and a sound recordist (since the proceedings are taped and later a transcript is made available). The Northern Territory Government party comprises a number of lawyers (a solicitor and at least one barrister), anthropologists and observers. The Northern Land Council team is often the largest single grouping. It includes a number of lawyers and anthropologists who come from main centres like Canberra, Melbourne or



Sydney and who have been retained for the claim. There are also many of the staff from the Northern Land Council to handle the considerable logistical problems of mounting a claim. The community is likely to be small, perhaps a couple of hundred people, and quite isolated so that ordinary necessities of life like food and shelter must be brought along. People are needed to drive and maintain vehicles, to provide tables, chairs and other office equipment, to maintain communication with the main office in Darwin, to organise a bush kitchen and to see that people have somewhere to sleep and wash.

The hearing is more informal than one might expect in legal proceedings. It is part of the hearing process that all interested parties should go to places in the claim area and take evidence *in situ*. These site trips involve many vehicles going along rough bush tracks with the chance of flat tyres, the occasional breakdown and getting lost. In some land claims it is necessary to travel by boat to islands that form part of the claim area. As one moves from place to place the hearing is briefly reconvened, evidence is taken and then the whole party will rendezvous at the next place at which evidence is to be taken. Some parts of the hearing are held in a 'bush courthouse' consisting of an open roughcut timber frame over which boughs have been placed to provide shade. More formal parts of the proceedings (involving legal argument, for example) may be heard in a major Northern Territory centre like Darwin or Alice Springs or even more distantly in Melbourne.

The informality of parts of the hearing is a mixed blessing. It is clearly an advantage to take evidence about a particular place at that place and the setting is more congenial to most Aborigines. On the other hand, it can be less comfortable for lawyers and other non-Aborigines who have particular expectations about the orderly unfolding of legal proceedings. For Aborigines who have spent much of their lives in the bush, site trips are easy enough to accommodate: one talks about one's country and it is recorded by a tape recorder for the transcript. For the non-Aboriginal people one of many difficulties is that they come from a culture in which literacy is prominent and in legal proceedings is central. For lawyers especially it is unthinkable to go through a court case without recourse to written materials: their own notes, written submissions, legal texts. The two groups have fundamentally different orientations to literacy.

Among land claims in the Northern Territory the Kenbi Claim poses special problems. This is not just because of differing orientations to literacy by the two groups. In the Kenbi Claim the division into two discrete groups (Aborigines and non-Aborigines) becomes blurred when there are so many Aborigines involved as claimants who not only have a high level of literacy but have also gained some familiarity with legal and anthropological material. Because of this crossing over the traditional divide there is ambivalence within both groups about the interrelations between literacy and traditional knowledge.

## BACKGROUND TO THE KENBI CLAIM

The Kenbi Claim involves land of some 900 sq km immediately to the west of Darwin. There have been over 1200 claimants, the majority being the Larrakia whose traditional territory included the present (built-up) town of Darwin, the Cox Peninsula and nearby islands. The claim documents indicate that there are now over 700 people of Larrakia descent. Currently the bulk of the Larrakia live outside the claim area. However many live within the Larrakia estate (the land the Larrakia people believe they own) in Darwin, Palmerston, Humpty Doo and Howard River.

More than 100 years ago the Larrakia population was estimated as 500 (Foelsche 1886 I:250). During that time Darwin was a magnet, drawing Aboriginal people in from the surrounding countryside for the dubious attractions of tobacco, alcohol and opium. The non-Aboriginal population was tiny and predominantly male. Shortly after the township of Darwin was started in 1869 liaisons took place between non-Aboriginal men and Aboriginal women. Today some residents of Darwin can trace such unions in their family tree back to the 1870s. Such people often identify as Larrakia although their appearance might suggest otherwise. After so many generations of intermarriage some people who identify as Larrakia are blond-haired, blue-eyed and fair-skinned.

Meanwhile, Larrakia country across the harbour was being lived on and used less by the Larrakia because the majority of them had moved to Darwin. The vacuum was filled by other Aboriginal groups whose traditional territories were further to the south. These 'migrants' began moving about 100 years ago into what became the land claim area. The 'migrant' groups who have the longest association with the Larrakia are the Wadjiginy and



the Kiyuk whose traditional territories abutted that of the Larrakia. Gradually other groups moved in, so that in all some six Aboriginal groups now have close links with the Kenbi Claim area. The six groups have territorial affiliations along the coast heading south from the claim area in this order: Wadjiginy; Kiyuk; Ami; Manda; Marriamu; Marrijabin. Collectively these coastal groups can be referred to as the Wagaitj (beach or sand [people]) after a word in Wadjiginy.<sup>5</sup>

By now it is mostly the Wagaitj who live on and use the Kenbi Claim area while many Larrakia live in the built-up township of Darwin. The process was gradual, with European settlement growing up around the Larrakia who were living on the eastern side of the harbour. The settlement grew from a village to a town to a city of some 80,000 people. Along the way Larrakia people were attracted to the growing township and were pressed into employment. Some were locally employed as gardeners, housekeepers, nannies, cooks and labourers while others were dispersed on to cattle stations, in some cases never to return. Gradually the Larrakia became accustomed to living in or at the fringes of the Darwin township, but still travelled back and forth to the Cox Peninsula. The Wagaitj made occasional visits to Darwin but remained more oriented towards a bush lifestyle, getting most of their sustenance from fishing, hunting and gathering. As the town expanded the Larrakia became increasingly reliant on an urban lifestyle so that their links with the claim area became more spiritual than economic. When the land claim process emerged in the 1970s the Larrakia had experienced 100 years of close contact with non-Aborigines and their connections with what was to become a land claim area had been significantly changed. The claim area was now occupied and used by their territorial neighbours, the Wagaitj, who had maintained a lifestyle more in keeping with some views of what it means to be an Aborigine, particularly a 'traditional' Aborigine.

### THE PROGRESS OF THE KENBI CLAIM

Kenbi is the longest running land claim in the Northern Territory. Aboriginal people had already expressed interest in gaining this land in 1973 during the Woodward inquiry (the precursor to the Land Rights Act of 1976). During the late 1970s the claim was lodged with the Aboriginal Land Commissioner and basic anthropological work was completed by the end of 1979 and

written up as the Kenbi Claimbook (Brandl, Harrios and Walsh 1979). While carrying out the research we were keenly aware of much uninformed hostility towards the claim, from non-Aboriginal residents of the Cox Peninsula, from non-Aboriginal people in the greater Darwin area and even from some Aborigines. Some felt that their homes would be taken over if the claim were successful; some felt that the people interested in this claim were not 'real Aborigines'.

For these kinds of reasons we attempted to publicise the claim in whatever way we could. Early in 1980 a short pamphlet was widely distributed into mailboxes around Darwin. The pamphlet laid out some very basic points about the claim and invited people to contact the Northern Land Council if they wanted to know more. In February 1980 Maria Brandl and I wrote a 30-page piece, 'Kenbi Land Claim: notes for those interested', providing a summary of the claimbook. This was distributed to journalists, politicians and those interested in Aboriginal affairs. Again there was an open offer to provide further information to anyone interested. We approached journalists directly to encourage more coverage by the media. As a result the claim received some exposure on TV and radio and was reported in print media like *The Bulletin* and *The Australian*. The claimbook itself was widely distributed, especially to Aboriginal people whom we knew might have interests in the claim.

The widespread distribution of information on this scale was unprecedented. We wanted non-Aboriginal people to be reassured that the claim was not going to interfere with their own homes in Darwin. In this way they might no longer be opposed to the land claim for essentially spurious reasons. We also expected that there were many other Aboriginal people with potential interest in the claim whom we had not been able to contact in the short time we had had available. And time seemed short: we expected the claim to be brought on early in 1980.

However, lengthy litigation (briefly set out in Blowes 1991) delayed the onset of the land claim hearing for many years. In January 1988 Maria Brandl and I, two co-authors of the 1979 claimbook, arrived in Darwin to reassess the situation after nearly ten years of legal battles over Kenbi. In 1983 some of the urban (and literate) Larrakia had written to the Northern Land Council indicating that they wanted to play a role in the claim and to be kept informed of its progress. As Maria Brandl and I interviewed



some of these people in and around Darwin we saw copies of the 1979 claimbook and often heard people referring to it. Some people we knew of in 1979 but had not been able to contact had come to know of the claim and their potential role in it through reading this book.

The claim was eventually heard during 1989 and 1990. On 26 February 1991 the judge found that 'there are no traditional Aboriginal owners within the meaning of the *Aboriginal Land Rights (Northern Territory) Act 1976* of the claim area or any part of it' (Aboriginal Land Commissioner 1991:1). This decision has been appealed before a Full Court of the Federal Court in 1992 and those judges unanimously ruled that the finding of the Aboriginal Land Commissioner should be set aside and that there be a rehearing. This rehearing is set to commence in October 1995.

### THE ROLE OF LITERACY IN THE KENBI CLAIM

There are three major reasons why literacy came to take on such a prominent role in the Kenbi Claim:

- a substantial number of claimants were literate
- a major source of documentation for the land claim had been available for ten years before evidence was taken
- literacy and traditional knowledge have been implicitly regarded as being in opposition

It is rather uncommon to find Aborigines now who are non-literate but it is quite usual to encounter Aboriginal people, particularly in northern Australia, who participate in varying ways in the 'culture of literacy' (Willmot 1981). As Willmot points out, people for whom literacy is part of their culture use literacy as part of their everyday life: they would, in some sense, feel deprived if removed from a literate environment. By contrast, there are people for whom literacy is at best a marginal part of life. Such observations are not confined to Aboriginal Australia. The classic study of Shirley Brice Heath (1983) on literacy in three rural Appalachian communities in America has shown that groups of people will differ in their approach to literacy along class and ethnic lines.

In recent years much attention has been focused on literacy and the effects it may have on a culture. Two major approaches to literacy can be identified. There is the autonomous model in

which literacy, because of inherent properties, creates fundamental and irreversible changes to the society and to the individual. It is therefore sometimes referred to as the 'great divide' or 'great leap' theory. In this view literacy can be seen as one part of the 'fatal impact' that Western civilisation has on 'tribal' peoples.

The alternative, ideological, model sees literacy as a more heterogeneous phenomenon, parts of which different societies adopt according to their own social practices. This view proposes that within one society different groups will embrace literacy selectively according to their requirements. The autonomous perspective would view the same situation in terms of deficit: the contrast is between individuals or groups who are 'fully' literate and those who are less than fully literate. This debate is sometimes stormy and is conducted in far more detail than can be gone into here (see for example Olson and Torrance 1991; Street 1984; Street and Besnier 1992), but it provides a conceptual backdrop to the differing stances on literacy embraced in the Kenbi Claim.

Among the Aborigines associated with the claim literacy plays markedly different roles. As a very crude first approximation we could say that there are (at least) three categories:

- Aborigines<sub>1</sub> — oral and nonliterate
- Aborigines<sub>2</sub> — oral and semiliterate
- Aborigines<sub>3</sub> — oral and literate

In the first category are some of the older Wagaitj people who have lived most of their lives away from towns and who grew up at a time when formal education was quite limited. From the transcript (Aboriginal Land Commissioner 1990a:2317, hereafter referred to as Kenbi Transcript) we can provide an example of the first category:

Land Council barrister: Yes. *What reason are you passing on the knowledge you have got?*

Aboriginal witness: *My mother die.*

Land Council barrister: Yes.

Aboriginal witness: *You got to tell them kids.*

Land Council barrister: Yes.

Aboriginal witness: *Culture.*