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Abstract

This article describes the taking of two days of traditional evidence in the Federal Court trial of Ben Ward and Ors on behalf of the Miriuwung and Gajerrong peoples vs. the State of WA and Ors. The applicants filed for the determination of native title in the National Native Title Tribunal in April 1994. After mediation in the Tribunal failed, the application was referred to the Federal Court in January 1995. Initial directions were given by Judge Lee in March 1995, and the taking of traditional evidence occurred between July and October, 1997. The trial at first instance is expected to run until early 1998. It is the first native title hearing to proceed in the Federal Court in Western Australia, and one of the first anywhere on the mainland.

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Entering a Dream: Two Days of a Native Title Trial in the North-East Kimberley

Alex Reilly

Introduction

This article[1] describes the taking of two days of traditional evidence in the Federal Court trial of *Ben Ward and Ors on behalf of the Miriuwung and Gajerrong peoples vs. the State of WA and Ors*. The applicants filed for the determination of native title in the National Native Title Tribunal in April 1994. After mediation in the Tribunal failed, the application was referred to the Federal Court in January 1995. Initial directions were given by Judge Lee in March 1995, and the taking of traditional evidence occurred between July and October, 1997. The trial at first instance is expected to run until early 1998. It is the first native title hearing to proceed in the Federal Court in Western Australia, and one of the first anywhere on the mainland.

The application and subsequent proceedings have been the subject of a number of legal challenges by the WA, NT and Commonwealth governments. Before the Federal Court, the NT and WA governments unsuccessfully sought judicial review of the decision of the Registrar to accept the application. (*Northern Territory v Lane* 1995). The Commonwealth, Western Australian and Northern Territory Governments applied unsuccessfully to the trial judge to have the effect of pastoral leases on native title tried as a preliminary point of law (*Ben Ward and Others on behalf of the Miriuwung Gajerrong peoples v.*

the State of Western Australia and Others 1995).[2] A subsequent appeal to the Full Court of the Federal Court was also unsuccessful. Finally, there was a dispute between the parties in relation to the reception and publication of gender restricted evidence. The judge ordered that men and women's restricted evidence could be taken in the absence of male and female counsel respectively, and dissemination of the transcript could be similarly restricted. The State of WA appealed unsuccessfully to the Full Court of the Federal Court against the orders of the trial judge establishing this protocol, and a subsequent application for special leave to appeal to the High Court was rejected in October 1997 (*State of WA v Ben Ward and Ors*).

Day One

> The marines made their initial contact with the Aborigines during the week spent at Botany Bay. There, though intrigued by the Europeans, the Aborigines had urged them to leave and consequently had rejoiced when they saw the British Fleet depart on 26 January. But Sydney Cove was only a long afternoon's sail away, and consequently the Aborigines' problem had been merely relocated (Moore 1987).

In a cloud of dust a convoy of six four-wheel drive vehicles leaves the bitumen road a few kilometres south of Kununurra. After snaking its way along a powdery red path next to a river, the convoy reaches a clearing on which are built two cement and ply-board houses. Children emerge from within and about the houses, and four generations of women sit closely together on the verandah observing the convoy pass slowly by. The vehicles stop at a river bank 200 metres beyond. This is where the Federal Court of Australia is to convene for the day in the matter of *Ben Ward & Ors. v. the State of WA.*

Many symbols are familiar. Exhibits, witnesses and counsel for applicants and respondents are present. The judge sits at a picnic table draped with a red cloth. To his right and left sit his associate and tipstaff. There are two technicians recording proceedings (the public can tune-in live on FM radio). Maps, books of photographs and large briefs fill empty spaces.

Other symbols are new. As all approach the riverside where the court is to be convened, they are 'watered' by a member of the community - a reminder of the significance of the land. It has its own symbols and rituals. Its own law. Instead of wigs and gowns, judge and counsel wear akubras and flannel shirts. Counsel nestle uncomfortably in deck chairs with their briefs on their laps. Witnesses are not separated from others in the community for examination. They remain in the body of the courtroom flanked by close relatives. The courtroom ceiling is a canopy of leaves. A noticeable breeze blows through the assembly, rustling well-guarded papers.

The applicants are making a native title claim over land which includes the Brolga, Dingo, Bull Ant and Barramundi Dreamings, or in whitefella's language, an area situated around Kununurra in the north-east Kimberley region of Western Australia and the Northern Territory. For the part of the trial I witnessed, the applicants are represented by the Aboriginal Legal Service, though at other points in the proceedings they have also been represented by the Northern and Kimberley Land Councils. There are several respondents - the State of Western Australia, the Shire of Wyndham East Kimberley (concerned citizens, business and property owners in the region), and the Commonwealth and Northern Territory governments.

This is the first day of evidence for a week. The applicants requested an adjournment during the previous week because of a death in the community. During the two hour afternoon session on this day, the applicants call one witness, a woman of the community who is an important guardian of

Miriuwung language and law. The witness sits hunched forward in a deck-chair at the edge of a blue tarpaulin. Six women including her aunt, her sister and several nieces sit on the ground behind her. Their support is palpable. Children come and go.

The witness is asked questions about her gardia (whitefella) and Aboriginal names, about her relatives, her history, her connection to others in the community, where she has lived over the past forty years, where she went on holidays as a child, and where she goes now. She points out places of significance on maps of the area, and people she knows in photographs. When she sees a photograph of herself, she giggles with embarrassment - a brief respite from the solemn proceedings. The witness is asked about dreaming stories, about collecting bush-tucker and about corroborees. Sometimes she says she cannot answer the questions. 'Why?' 'Women's business.' After an hour and a half, the witness is tired and agitated. She displays discomfort at sitting slouched in the deck-chair, and is more reluctant to answer questions. She sighs and picks leaves from the ground to twirl in her fingers. The afternoon session ends. Court, counsel, interested members of the public (one local resident, one historian and one legal academic) and some members of the Miriuwung and Gajerrong communities pack up and return to Kununurra, unsettling the dry earth once again.

Defining Space

> One might have thought that any attempt to define concepts like 'territory' would have involved some prior reflection on the nature of boundaries. Clearly, if the idea of the boundary as a barrier is one peculiar to our culture, it is of little use in describing aboriginal concepts of social and spatial organisation (Carter 1987: 162).

In evidence on the first day, the witness explained the significance of the place where the court had been convened - why it was necessary for all to be 'watered' before entering the place, how the river was a place for fishing, how leaves of some of the trees overhanging the court could be used to stun the fish if thrown in the water. Immediately following this explanation, counsel for the applicants provided cartographical coordinates for the place - latitude so many degrees South, longitude so many degrees East. By providing these coordinates, the place was defined in terms of its relationship to other places. The place is East of *somewhere*. That somewhere is the prime meridian - a specially designated imaginary North-South line which passes through both geographic poles and Greenwich, London. The story of the river and the need for watering, which liberated the space from its colonial past, is immediately juxtaposed to an interpretation of the land which has the centre of the colonial empire as its reference point. By providing coordinates for the location of the story of the river, the story loses its independent existence. The law reappropriates both the story and the land in which it is narrated. The establishment of the court at this place becomes a symbol of the reappropriation. The river is no longer where the community goes fishing, but where the Federal Court convened on 25th August 1997.

The alacrity with which counsel for the applicants provided coordinates for the land is not unprecedented. The opening paragraph of the leading judgment in *Mabo* gives a detailed description of the location of the Murray Islands.[3] Maps are a form of knowledge. They have an abstract relationship with the land they represent. In cartographical maps, the abstract relationship is analytical - maps provide detailed corresponding reference points to represent the lie of the land. In maps of dreaming stories, the abstract relationship is metaphorical - dreaming stories describe connections to land through imaginative descriptions which belie literal interpretation. In the trial process, an attempt is made to plot this metaphorical relationship analytically. Important symbols in dreaming stories are lost or reduced in translation. Aboriginal people are asked to explain their dreaming stories within a foreign epistemology and not according to their sense of being in space and time. Conversely, cartographical map-maker's are asked to represent dreaming stories or sacred sites as locations on a map, when sacred sites are not location specific, and are not reducible to uniform symbols.

Although an understanding of the land in terms of cartography was not known prior to European settlement, maps are of particular importance to establishing native title claims. On the first day of evidence described above, the witness was asked to point out places of significance on a specially prepared map of the area. The witness did this without too much trouble. She was one of the few members of the community comfortable with the use of maps. This was an important moment in the trial. It was a point at which interpretations were intersecting. A journey which she and many of the members of the community had taken was plotted coordinate by coordinate. Places were given names familiar to the white occupiers, and the journey given a new interpretation. There were times of confusion. On a cartographer's map, north is up and south is down. In descriptions used by Aboriginal people, up and down are used less systematically and sometimes interchangeably. 'Up that country' or 'down that

country' bear no resemblance to directions north or south. The different use of language and spatial concepts meant that counsel for the first respondent had not entirely understood the journey that the witness had indicated on the map. Subsequent questions in cross-examination highlighted the confusion.

Maps distort the physical landscape. The undulating landscape is projected onto a flat area which adopts a particular scale and represents the landscape using symbols. The parties to the litigation reduce (distort) their relationship to the land to correspond with the map in order to establish orientation. The struggle of all parties to construct and read a single representative map of the land claimed by the Miriuwung-Gajerrong people is indicative of a broader struggle to frame the claim in legal terms. Where 'maps distort reality in order to establish orientation, laws distort reality in order to establish exclusivity' (Sousa Santos 1995: 458). The law is one of certainty of land tenure. The claim is about exclusive possession to this tenure. The many sites of struggle - of conflicting uses of land, of cultural and religious understanding, of employment conditions, of trade and commerce, of aggression and tolerance, that form the social relations between the parties constellate around the single site of the court, and the single language of examination and cross-examination. The law relocates the form and place of struggle. It sets new boundaries, and locates those boundaries on its own map - and so a river bank becomes a court.

The Second Day

> Here there are no scenes . . . of desolating war and bloodshed to contemplate, no peaceable inhabitants driven from their smiling dwellings, and deprived of the comforts of life, by means of the destroying invader. Our settlers have not established themselves by the sword, nor willingly done injury to the naked miserable stragglers, who were found on these barren shores (*History of New South Wales, 1816* as reproduced in Reynolds 1987: 3).

On the second day the court space is moved to a temporary shelter erected between the community houses. More of the community, including elder men, are present. The men sit in chairs a little back from the blue tarpaulin, on the margins of the court space. Women assemble close behind the witness. The same witness as the previous day is seated between her sister and niece. Today they are also seated.

Examination continues from the previous day. The questioning reveals significant personal details. To whom was the witness promised in marriage? Who made the promise? How long did the resulting marriage last? How much of the Miriuwung language does she know? Does she teach the language? Is she involved in artwork? Where does she collect white ochre for painting? Can she please give 'gardia' and Aboriginal names for all people and places.

Cross-examination by the State of WA begins after morning tea and continues for two and a half hours. It requires more detail of the witness' bloodlines, dreaming and law. All is put to proof. When cross-examination ends the court adjourns for a late lunch. During the lunch break, the litigants retreat to their vehicles. Alliances are clear and boundaries of contact demarcated. The judge and staff retreat to their vehicle parked under a tree furthest from the court

canopy. Lawyers for the respondents retreat to their four-wheel drives parked in a line about 300 metres from the community houses. The witness struggles from her seat, clutching her back, and walks slowly to the community housing.

After lunch, counsel for the second respondent begins cross-examination. Questions are repeated numerous times. Further clarification is called for in relation to much of the evidence already before the court. Questions and answers are often at cross-purposes. At one point, counsel suggests to the witness that when she and others left the station on holiday to make the journey across their traditional lands which were identified on the map the previous day, they were provided with rations for the journey. The witness agrees. Counsel puts to the witness that since they had these rations, *they did not need to collect bush tucker*. The witness confirms that they collected bush tucker. Counsel reiterates that they did not *need* to collect bush tucker because the rations were sufficient for the journey. The witness confirms that they received rations *and* collected bush tucker. Counsel states emphatically that though they collected bush tucker, *they only did so for fun*. Counsel draws an analogy between the witness collecting bush tucker and his son going shooting for sport. The witness is confused.

(Dis)connections

> We could know but little of their customs as we never were able to form any connections with them (Cook 1955)

The trial is about proving an ancient spiritual connection to land. The clouds of dust scattered by the four-wheel drives of the court and counsel disturbed the land, creating a temporary chaos which, once settled, existed in a new order. The trial process has the same effect. It requires people to explain the history

of their connection to the land in a mode and a language which is foreign to them. To do so, they must unsettle their own connections to the land and to each other. They must share parts of their Law, customs and traditional identity which they would not otherwise freely share, and risk having it placed under the scrutiny of cross-examination, apparent inconsistencies discovered, and the authenticity or continued existence of their Law and customs ultimately deemed inconclusive or inadequate to sustain their claim to the land. Although it is the Miriuwung and Gajerrong communities making the claim, it is they who have most to lose.

The trial process is an attempt to understand the Miriuwung-Gajerrong spiritual connection to the land. Many efforts have been made to enhance this understanding. The whole court has left the four walls of the Federal Court building in Perth to a place where Aboriginal people are more comfortable giving evidence. Under the trees the flow and temperature of the air is not conditioned, there is no artificial light and no regulation of noise. A breeze blows through proceedings, sunlight is dappled through the leaves of an overhanging tree, and there is a background cacophony of playing children, and barking dogs. Casual clothes replace traditional court regalia, and the rules of evidence are relaxed to hear better the stories of Aboriginal connections to the land.

There was evidence that the court was not comfortable in its new setting. The court retreated from the riverbed on the first day to the temporary shading between the community houses on the second day. This was a retreat from a significant Miriuwung site (as evidenced by the watering ceremony performed on all who came to the place) to a symbol of western civilisation (the cement houses). It was a retreat from a natural setting to a custom built structure which more clearly demarcated the space of the court and provided the appearance of order, flimsy and flapping though it was.

The location of the court in the middle of the community on the second day symbolised the impact that the proceedings were having on the lives of the people. The trial is central to their continued existence. Its outcome will impact on their right to occupy the space on which the court convened that day. Leaning against a pillar on the edge of the blue tarpaulin, I wondered whether the space of the temporary court had known other rituals under other laws. Had there been corroborees where now there was a common law court? Had there been songs and dances where now there were questions in cross-examination?

The applicants chose to give group evidence as has occurred in Northern Territory and Queensland Land Rights claims. Although softened by the presence of her niece and sister beside her, the focus on the individual witness was still intense. Questions were addressed specifically to the witness and there was pressure on her to answer questions without assistance. On occasions when names escaped her and she was prompted by others, counsel for the respondents were quick to point this out. Ostensibly this was to acknowledge on record which member of the community had interjected. However, it also suggested that there was significance in the failure of the memory of the witness. Her isolation was exacerbated by the formality of examination and cross-examination. There was no time for silence. No opportunity for a story to emerge spontaneously or unsolicited.

Within the new setting a clear hierarchy remains. At the top is the judge, before whom all events in the court are performed. The judge and the lawyers are raised on chairs, adopting the appearance of objectivity. Members of the community sit on the ground, close to the land. The witness, a member of the community, is raised from the ground to the level of the court (despite evident discomfort) to explain her connection to the land. There is a powerful symbolism here. The court only hears those who occupy designated positions

in the court space. The only Miriuwung person in the court who is heard is the one raised from the ground and seated. The other applicants sitting on the blue tarpaulin are invisible. Though they speak to the witness, their voices are unheard by the court. Unlike the lawyers for the applicants and the respondents, they have not been provided with microphones and headsets to speak and listen to proceedings. Their voices sound as whispers and muted murmurs, a poor token to the ideal of group evidence.

Faced with this model for telling their stories, people who are to give evidence to the court for the first time are deeply affected. Some are so frightened of the process that they do not give evidence in the formal proceedings at all. In addition to fear of the process, people fear exposing their Law and customs to criticism through the giving of oral evidence. In giving evidence, witnesses are not just relaying events that they have observed from a distance. They relate stories of who they are. Stories are not just a description of evidence, they are the evidence itself. The Native Title trial looks for evidence of continued practice of Aboriginal Laws and customs. This is equivalent to testing the genuineness of the faith of a Christian by testing their knowledge of the details of Bible stories, the frequency of their pilgrimages to sacred sites and so on. The court need not investigate the truth of such beliefs. However, the more unbelievable the Laws and customs might seem to the interrogator, the more cynical does the process of interrogation become.

A line of cross-examination on the second day was particularly cynical. It is against the Law of the Miriuwung community to state the name of a deceased relative for a period of time after his or her death, and it is insensitive for others to mention the name of a deceased person in front of his or her relatives. During examination-in-chief, counsel for the applicants and the witness herself made this clear to the court. Comprehensive genealogies of the Miriuwung and Gajerrong communities were before the court, and copies were before all

parties to the litigation. The genealogies detailed the names of all the relatives of the witness, and specified which names ought not to be spoken aloud. During cross-examination, counsel for the respondents made the astonishing mistake of confusing the name of the witness's deceased sister with that of her cousin. After an uncomfortable silence, the witness corrected the apparent misconception by providing the name of her deceased sister. Cross-examining counsel proceeded to use the name of the deceased sister repeatedly in subsequent questions. When asked to refrain from doing so out of respect for the witness, counsel righteously observed that the witness had provided the name of her deceased sister herself. The suggestion was that since the witness had broken her own Law under the pressure of cross-examination, the Law was completely discredited and the name of the deceased sister could be used in the presence of the witness without sensitivity.

This line of cross-examination is one of many examples of the impossibility of pluralism in the Native Title trial process. The Aboriginal applicants bring to the court beliefs and values that characterise their life ways. In the trial process they are asked to enunciate these beliefs and values in a cultural discourse which is assumed to be static and determinate. Cross-examination is directed at finding inconsistencies in this discourse to discredit the witness' testimony. But culture is a process, not a state of being (Bhaba 1994). It is not limited by its enunciation, and thus, it cannot be discredited by inconsistencies. When the witness proffered the name of her sister in cross-examination, the most that can be said is that in a new context, unlike any she had previously encountered, she answered a stranger's misconception. Her answer, as it appears in the trial transcript, says nothing of the pain associated with the speaking of the name, or of the difficult compromise she made to accommodate a foreign legal process.

Throughout proceedings, the attention of all is occasionally turned to gusts of wind violently rattling the temporary court canopy. The judge notices out of the corner of his eye barefoot kids kicking a football near an ancient boab tree. Members of the community move in and out of the canopy to tend to small children or return to the community houses. An 80 year old matriarch struggles painfully from her place on the tarpaulin, and enters one of the houses. Voices pass through the makeshift court from one house to the other - as if it were a dream.

Conclusion

Witnessing two days of a native title trial emphasised for me the clash of symbols, the inflexibility of process, and the reappropriation of space. When white law first reached the shores of Australia, there was no recognition of Aboriginal custom and Law. The land was colonised as if its people and their Law did not exist. This assumption was dispelled in *Mabo*, but the colonial implications which were the roots of the doctrine of terra nullius are still present in the determination of native title claims. The common law moves in with its language, symbols and procedures. Aboriginal people must make out their claims within a foreign framework, sometimes breaking their own Law to do so. This new meeting of black and white Law has a surreal quality, and disturbing similarities with early colonial practices.

In a cloud of dust a convoy of six four-wheel drive vehicles leaves the bitumen . . .

[1] I wish to thank Harriet Ketley for sharing with me her experience of the claim and for her extensive help on earlier drafts of this paper. All errors are my own.

[2] Note that this application predated the High Court decision of *The Wik Peoples of Queensland and Ors; the Thayorre People v the State of Queensland and Ors* (1996).

[3] "The Murray Islands lie in the Torres Strait, at about 10 degrees S. Latitude and 144 degrees E. Longitude. They are the easternmost of the Eastern Islands of the Strait. Their total land area is of the order of 9 square kilometres. The biggest is Mer (known also as Murray Island), oval in shape about 2.79 kms long and about 1.65 kms across. A channel about 900 m. wide separates Mer from the other two islands, Dauar and Waier, which lie closely adjacent to each other to the south of Mer." *Mabo (No. 2)*: 16 per Brennan CJ.

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