REVIEW

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Henderson, J. and D. Nash (eds). 2002. *Language in Native Title*. Canberra: Aboriginal Studies Press

This is a book about the role of linguistic evidence in demonstrating claims to native title by aboriginal groups in Australia. It is essentially a collection of case studies pitched at the professional linguist who is familiar with the somewhat esoteric methodologies of linguistics and has an interest in their application in particular circumstances. With the exception of an introductory chapter by John Henderson and David Nash and a more general chapter by a lawyer (Greg McIntyre) and an anthropologist (Kim Doohan) it is very much a book by linguists and for linguists. The context is that of establishing native title claims and the role that language plays in locating claimants both in time and place. A noticeable and recurring theme is a certain skepticism, seemingly borne of bitter experience, toward the law and its practitioners, though there is little here on the actual legal content of native title.

I came to this book in almost complete ignorance of the discipline of linguistics and its role in native title claims. I came away with some appreciation, though very little understanding, of the technical complexities of the study of language – the average layperson or lawyer may not fall upon a concept like the 'lexical archaism in ethonyms' with the thrill of instant recognition! But I did come to an appreciation of the recurrent theme of just how important is the association of language with place, in showing both an

historical connection to place but also of continuity of connection to place. Both are of course critical to demonstrating a claim to native title.

The introductory chapter by Henderson usefully demonstrates the importance of language itself in articulating the historical scope and content of claims and, just as important, the continuity of a claimant group's association with particular tracts of land. Most of the remaining chapters go into considerable technical detail as to how indigenous language practices can do this, though there is little straightforward explanation of the methodological tools employed. The medium mostly used is that of the case study – how the author applied those tools to a particular language context. It is essentially a book by linguists and for fellow linguists. Perhaps inevitably there is a certain amount of bewailing the difficulty of the task, made doubly so by the arguably unreasonable evidentiary burdens required by law. As Evans puts it in chapter four, the ambition is to reduce the 'penumbra of imprecision' which surrounds a judge's understanding and articulation of the evidence before her. Much can turn on a single piece of linguistic evidence and how it is articulated – for example, in the use of the modal 'can't'. As a lawyer it is difficult not to despair at the difficulty of anyone but a professional linguist mastering such complexities and contextualising them appropriately.

In Chapter seven the sole lawyer among the authors (Greg McIntyre) presents a more accessible (to non-linguists) piece on such notions as the overlapping legal concepts of 'people' versus 'nation' versus 'society' versus 'community'. The difficulty lies in reconciling claimants' perceptions of the connections of individuals and families to particular geographic areas through *inter alia* kinship and those of settler law, wherein aspects of 'title' are fairly straightforwardly granted by the sovereign state to individual citizens. Similarly Michael Walsh's chapter is pitched in relatively non-technical language – for example, in showing how a language may be 'owned' on the basis of birthright and linked inextricably to territory yet without the ability of the claimant to actually use or speak the language. Such ownership is largely permanent and non-voluntary, and most aborigines can be said to 'own' a language though few can claim full knowledge or use of it. Thus the unfairness of the requirement of the New South Wales government, for which the author blames lawyers, that language proficiency be one of the criteria for a group seeking native title rights even though less than one percent of aborigines in New South Wales can still claim proficiency in an aboriginal language. Presumably that is in significant part due to the assimilationist policies of settlers and the physical disconnection of aborigines from that to which they

were culturally connected. Again, what kind of legal system requires them to demonstrate that which the authors of the system have made impossible to demonstrate through their own policies, and in whose interests it is to make it so impossible? Walsh's ill-disguised disdain for lawyers is understandable. But his useful substantive point is that declining language fluency need not be grounds for denying a flourishing culture, including relationships to the subject matter of aboriginal claims.

Other chapters tended to be well beyond this reviewer's technical competence. The esoteric methodologies they describe are not very accessible to those of us who are linguistically-challenged. Nor are the very specific case studies they invoke. They will doubtless be illuminating to the professional linguist but only to the highly motivated and diligent lawyer – not a common species in the skeptical minds of these authors – or layperson.

Less difficult to read than the substantive linguistic content was a recurring hostility among various authors to the legal profession. In the first two chapters (by John Henderson and Peter Sutton respectively) there was skepticism of lawyers' willingness to familiarize themselves with even basic linguistic frameworks and theories. There was real sarcasm and hostility bordering on paranoia – Sutton, for example, fears that '[h]ighly paid counsel may decide it is their job to break you, not only intellectually but emotionally, and in public' (at 33). Those kinds of sentiments are echoed later, for example in the chapter by Heather Bowe and her concern at damage to professional credibility when her evidence is challenged under cross-examination. Again Michael Walsh shows an ill-disguised disdain for lawyers, blaming them, for example, for the requirement of the New South Wales government that language proficiency be one of the criteria for a group seeking native title rights even though less than one per cent of aborigines in New South Wales can still claim proficiency in an aboriginal language. Nicholas Evans demonstrates the often critical importance of a single piece of linguistic evidence and how it is articulated but complains that 'misunderstandings are not properly appreciated by the legal profession', and worse that the profession is resistant to the 'need for consciousness raising'.

No doubt much of the criticism is well-founded. Lawyers are commonly faced with the intellectual difficulty of mastering enough of various esoteric disciplines to make credible arguments in litigation or before tribunals, and just as important, to test the veracity and credibility of opposing witnesses. For claims to reach courts there are usually sound and persuasive arguments to both sides – that is why they get as far as litigation – and will routinely go to

contested and often controversial readings of 'facts'. Cross-examination may be an often clumsy and manipulable means for testing opposing claims but it is a well-tried tool and some kind of testing is surely necessary to reach at least a preferred or more credible version of 'the truth'.

But lawyers are not the decision makers, and the more important task is of course to inform (but not mislead) the decision-makers – judges and tribunal members – who most likely lack the resources (and perhaps the authority) to mount an independent enquiry or even to fully educate themselves on the arcane matter before them. They must be educated through the advocacy of both sides, and linguists are clearly critical in that process. But that puts it too simply. The judge / adjudicator can't be 'educated' to reach a legally (or even linguistically?) inevitable 'correct' answer for there rarely is one – rather she or he will be persuaded to a particular point of view by lawyers and witnesses. It behoves linguists themselves to reach some kind of understanding and, hopefully, tolerance of law's own provenance and discourses, to appreciate the difficulties of reconciling the subjectivities of all its actors and somehow reaching a resolution that is 'just' in both its outcomes and its processes. As Michael Walsh puts it in Chapter nine, '[o]f paramount importance is getting the message across to the judge'. But there is rarely 'the' message but rather various and often conflicting 'messages' each with their own spin. Hence the importance of advocacy notwithstanding that it may appear unsavoury and manipulative to the virgin linguist. One hopes that the cynicism of these linguists is balanced by their enthusiasm to understand and adapt to legal process and the imperatives that drive it.

In terms of substantive law there is another serious complication in the case of native title. It is a creature of Anglo-American common law rather than of legislatures. It sits rather uncomfortably with our legal systems as it represents the interface between two or more legal systems, most particularly in the area of property law. Thus is native title said to 'hover over' the 'underlying radical title' of the Crown. Amongst its many complications is the difficulty of reconciling collectively held 'native title' which represents a kind of organic relationship with land and nature generally, often characterized in terms of 'stewardship', with our individualist notions of fee simple 'ownership' of land and resources. As well this collective native title will vary among claimants according to their historical relationship with the rights claimed, that is to say with the historical occupancy and use. It is in legal terms *sui generis* – to be determined uniquely in each particular case and varying in content accordingly. Thus the content of native title arises from practices which by

definition pre-date the arrival of settlers, but it is recognized by settler law and so must somehow be reconciled with it. So if indigenous peoples come to our legal system as bewildered strangers, so too does our legal system contort to accommodate indigenous perspectives that are at best analogous and often simply alien.

This makes for messy law and messy processes – what Sutton calls '…an appallingly complex and, many would argue, fundamentally mean-spirited system'. Its complexity goes to the issue of the importance of evidence brought to demonstrate those historical practices which will determine the substantive content of any claim. Linguistics is a critical ingredient in linking those practices to present claimants, and this book makes that connection for non-specialists like myself – certainly in a good deal more detail than the casual reader would have cared to know, but the sheer weight of scholarship makes the point effectively. I know better now what I don't know.

The more serious charge of native title law being 'mean-spirited' is I think demonstrable – as my remarks below suggest – but non-lawyers might pause for thought at the dilemma of judges who, like legislators, must strike some kind of stable balance between principle and *realpolitik*. Arguably judges are better placed to follow principle and indeed that has been the experience of native title law in Canada, Australia and (recently at least) New Zealand. But common law is susceptible to legislative override and that is precisely what has happened in, for example, New Zealand in the case of a recent court finding on native title in the foreshore and seabed. Both Australia and New Zealand lack constitutional protection of minority rights, rendering them vulnerable to the tyranny of settler majorities. If the law is mean-spirited it is because we are the law.

Law is all about language. Its conceptual frameworks, its rules and principles, are all fraught with indeterminacy not only in content but also expression. They are also of course steeped in particular histories, contexts and ideologies and reflect all sorts of underlying metanarratives – of liberalism, patriarchy, Christianity, colonialism, capitalism, whatever. These kinds of layers are similarly embedded within legal conceptions of native title – it is not a pure and remote concept handed down by a deity but a flesh and blood thing whose shape and texture is still significantly under-theorised and under-determined, even in cutting edge jurisdictions like Canada.

So into this substantive and procedural mess step various 'experts', among them the authors of these chapters. They don't explicitly rail at the absurdity of their task, but their frustrations suggest it. The whole exercise of claiming

native title has an Alice-in-Wonderlaw air to it. The colonial settlers were able to lay absolute claim, or sovereignty, to all of Australia more or less by placing a foot on the shore and asserting it, utterly ignorant of that which they were claiming. They essentially claimed everything (an 'underlying radical title' as we lawyers like to put it) more or less by just turning up. The indigenous peoples who were already there and occupying the land are, however, now required to jump through an extraordinary array of legal and evidentiary hoops to demonstrate that which is obvious – that they were here and settled on the land – yet which is very difficult to 'prove' after centuries of alienation from their lands and cultures at the hands of the very people who are demanding proof. They must show practices and associations which settlers never could and largely still could not. They are required to do so under rules set by settlers themselves with powerful interests in denying such claims. Even in the more obscure chapters such as McConvell's ('Linguistic Stratigraphy and Native Title: The Case of Ethonyms'!) one gets a sense of how nonsensical it is to obsess about aboriginal culture and history of the last two to three hundred years given the mind-boggling sweep of tens of thousands of years of aboriginal occupation of Australia. Into that bizarre scenario come 'experts' such as linguists who are enlisted to prove the unprovable in order to show that which is blindingly obvious. Their frustration is understandable, but for better or worse they must work within the rules of settler law no matter how blunt and self-serving those rules may be in determining something as subtle and complex as the historical association of an aboriginal culture with land which sustained it.

But on a more optimistic note I would like to suggest that there is an aspect of language and native title claims which might give some comfort to linguists although it is not strictly speaking a 'linguistic' story.

The power of language in the claims of indigenous peoples was once made very plain to me in the articling year of my legal education in Canada. I had just graduated from the University of British Columbia law school and was articled to one of the leading civil litigation lawyers in Vancouver. We were acting for a First Nation in a claim against an industrial concern which had been polluting the waters of the local river from which our indigenous clients had fished for many centuries before the appearance of white settlers. The litigator wanted some powerful and 'authentic' language which reflected our client's relation to the river and to the fish. He got me to sit down with an anthropologist who had been working with our client.

Together we stitched together some language that we thought captured

something of the centrality of the river and its fish to the animist culture from which the relationship of our clients to the river drew – how they must treat delicately with the fish (known as 'kwexstwajaxwin' or 'touchy oolichan) both out of respect and of fear that they would not return if offended, as indeed they did not after being tainted by industrial pollution. We described the rituals involved – the singing of a particular song, the carved fish hooks which symbolized the human relationship to the fish, the ostracism of individuals who sullied the river (a powerful sanction in such a communal society). Our clients were said to 'glory and revel' in the river before their covenant with it was broken by the defendant's pollution. The indigenous stance was one of courtesy and proper behaviour toward the natural world and the hazard of disastrous consequences for breach. This was not just fishing but an elaborate and complex social and economic system incorporating a sophisticated and interactive world view.

We incorporated these 'indigenous' characterizations of the cause of action into the legal documents in conscious counterpoint to the dry legal language of Negligence, Riparian Rights, Private Nuisance and so on. The somewhat novel language immediately drew the attention of opposing counsel – they claimed to recognize the voice of one of the village elders in our words and were suitably touched and a little intimidated. They seemed moved to respond rather than simply deny. I recount the story simply as a reminder of the power of language and its ability to capture and communicate something important about indigenous cultures and their claims to be heard. But as well to note that notwithstanding the understandable skepticism of the authors in this book the law can still sometimes hear and be moved by the voice of the 'other'.

One is reminded of the judicial apology offered in *Mabo*, and further of the *Mabo* court's willingness to give voice to legal claims never before recognized in Australia. Majoritarian legislatures have been notoriously unwilling to do so and it has fallen to Anglo-American common law judges to acknowledge that voice. They may have done so clumsily and incompletely, and their education in the complexities and nuances of aboriginal cultures may be cursory at best, but, notwithstanding their scepticism, linguists can take some satisfaction in their part in what is, for all its faults, an emancipatory project.