

Introduction to CNTA's annual conference 2020, 'Culture, development and Native Title: making the most of it' held at Queen's College, Melbourne, on 6th and 7th February

Culture and native title

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We have chosen 'Culture' as our theme for this year's conference for several reasons.

As anthropologists the concept of culture is, of course, ever with us and as native title anthropologists it has had a very practical relevance to us in recent years particularly in relation to PBCs. How far should the constitution, governance and management of PBCs take cultural factors into consideration. However, the relevance of the concept now in the native title field is very much wider than that for, as they say, the concept of culture has gone viral even drawing in the High Court. There are three recent examples.

The most obvious is the High Court's move away from the concept of 'solatium' when considering issues of compensation in native title to the undefined concept of 'cultural loss'. A range of motives are read into this move but the most likely one is that the Court sees the loss to be compensated as something quite distinctive in nature and content from the precedents set by the body of previous compensatory claims. The term 'cultural loss' marks it out as being *sui generis*: of its own kind.

A second example which most of you may not be familiar with is another decision from the High Court in the case of the *Australian Securities and*

Investments Commission v Kobelt in a decision handed down on 12th June 2019 in which culture and anthropology are involved but not native title. David Martin will be talking about this. Apart from the intrinsic interest of the case it underlines the profile being given to 'culture' in the highest of legal circles and raises questions as to what we are to make of how they deal with it.

The third example is much the most complex in its implications, should it be taken up. This is the Proposition 4 sent out by the High Court for consideration by parties to the case of Love and Thoms in which the issue is whether their Aboriginal connection to Australia trumps the two men's legal citizenship of PNG and New Zealand respectively, derived from their fathers.

Proposition 4 reads: (see Gans, 2019 post at <https://blogs.unimelb.edu.au/opinionsonhigh/2019/11/10/news-the-court-proposes-new-rules-about-aboriginal-societies/#more-8590>)

The common law's recognition of customary native title logically entails the recognition of an Aboriginal society's laws and customs and in particular that society's authority to determine its own membership

Jeremy Gans, a professor of law at the University of Melbourne makes the following comment on this proposition:

Proposition 4 appears to be an extension of the Court's recognition of customary land laws in 1992's Mabo No.2 to every law and custom of every Aboriginal society, and in particular recognising those rules as (seemingly alone) determining the membership of every Aboriginal society¹

Two major questions are raised by this invoking of the 'cultural'. The first is what is meant or understood by 'culture/cultural'. Second, and more problematically what is to be made of the legal profession so blithely using core anthropological concepts such as culture, society, laws and customs: in particular at what point does the unreality of their usage become problematic.

Raymond William in his famous book, *Key Words*, comments that 'culture' is one of the two or three most complicated words in the English language, something that is suggested by Kroeber and Kluckhohn's 1952 survey of the term in which they list 164 definitions.

Cutting through this complexity it is common to distinguish high culture, which references the disciplined exercise of skills in music, dance, singing, acting, art and creative writing, from culture in its anthropological sense of beliefs and practices that go to make up a way of life.

In the 1970s and 1980s I rarely if ever heard any Aboriginal people using the term in either sense whether in settled or remote Australia but today it is quite another matter. Just as the concept of 'traditional owner' was rapidly taken up in remote Australia with the passing of the Aboriginal Land Rights (Northern Territory) Act 1976, so referencing culture has become common across the Aboriginal and non-Aboriginal world.

However, what any person means or understands when they use the term and what work it is doing has completely escaped the binary simplifications referred to above and in doing so deeply complexified knowing what is meant.

One thing does seem clear, however, and that is that culture refers to an unquestioned good or treasure, most of the time. It is something that must be maintained, strengthened and reproduced and it has become a central trope of policy speak and political discourse in Indigenous affairs, taking on the status of ideology.

The difficulty from our perspective as applied anthropologists is to understand how what we understand about culture relates to the usages of non-anthropologists and to be sure that we do not misunderstand or miscommunicate when we hear or use the term. It is also important to ask how useful a referent it is in the context of native title and policy.

I have found it useful as a starting point when talking about culture to use the metaphor of a high-rise building. These are built by erecting a concrete core that houses the lifts and essential service for people who will live in the building. This is surrounded by a steel and concrete frame that forms the internal structure of floors and walls and the on the outside is the cladding that gives the building the appearance it is known by.

The outside cladding relates to all the obvious elements of cultural difference: language, song, dances, art, ceremonies, dress, housing, food and the like. This I think is mainly what is being referred to in most popular usages. The steel and internal framing equates to the social organisation which relates to the social institutions of marriage arrangements, land tenure, kinship, gender relations, family structure and the like. Hidden by both the cladding and the framework is the central core. It equates to the sedimented dispositions which are taken for granted, implicit, tacit, and unconscious ways of being in the world that are deeply instilled in everybody's life during their first decade and

are fundamental to how people are in the world. This core sense is a really important one for us as anthropologists in many contexts of social change and transformation. It is all the things we include in diffuse umbrella terms such as egalitarian ideology, relational ontology and the significance of intimacy, immediacy and mobility in people's lives, that have their origins in the nurturing and everyday family life in the early years. The move from the outside to the inside is a move from those aspects most vulnerable to disenchantment and the impact of encapsulation to those that are the most enduring.

While most people are probably thinking of obvious difference when they invoke culture it is the less obvious that are the more significant as far as policy goes. But it seems clear that the basic rule of statutory interpretation, the literal rule, in which words are to be interpreted according to their literal or everyday meaning, unless there are legal reasons and precedents not to, is less and less helpful as we move away from claims.

In the context of native title claims a number of simplifying assumptions have been and are made in relation to defining the nature of the laws, customs and society at sovereignty. The assumptions are helpful and possible because the principal objective has been to return rights and land to people, underlining the beneficial intention of the native title legislation. It is in the post-determination context in particular that we come face to face with the unreality of some of the assumptions and simplifications that have got us to this point. It now needs to be asked: 'Is there a point when these assumptions no longer work, create new problems or are simply misleading?'

Take the issue of society. Given that there were no societies in any clearly defined and bounded sense in the past, anthropologists and lawyers have had to do a lot of work to produce 'societies' in the claims context. Significantly there is less concern about defining societies in claims now than in the 1990s. It is clear that it is no easier to define them today. Yet Proposition 4, and the legal commentary on it, give Aboriginal society a key place in their interpretation of what native title means in practice once granted, for clear logical reasons. To make things more complicated there are plenty of Aboriginal people, and others, who loosely equate tribes with nations and link that to some sort of sovereignty and so may have no difficulty with society if it is equated with tribe. But neither tribe in the past nor tribe today was or is an analytically meaningful social unit with a society like nature.

And then there is the even more difficult political issue of what can this unit mean when there is such a large migration of people into the census category 'Aboriginal' at each census and some of whom are seen as 'wannabes' by other Aboriginal people, let alone what implications this has for the nature and significance of traditional laws and customs and claims about culture in their lives.

Clearly, we are deep in the world of identity politics here, in which culture is identity. As a political arena the politics of identity brings with it enormous depths of feeling, pressures for conformity and over claiming, creating disputes and difficulties that policy makers will have to face in an increasingly complex social and political environment. On the one hand there is the enormous unfocussed good will towards indigenous people in large sections of the population who have little knowledge or understanding of either the many different Aboriginal Australias or ideas about what should be done with the

consequences that these people are almost entirely uncritical and often unrealistic in their assessment of almost everything to do with Aboriginal affairs. On the other a tightening economy will make personal identity, which is normally a private matter but becomes of public significance when it is being used to seek distinctive treatment, will make the politics more complex than even.

Culture is vital to us all as human beings, but as social scientists we know we can only take culture so far in trying to understand and explain any situation. It can only ever be a partial understanding for there are historical, psychological, biological, economic, political and institutional forces also at work.

The key take home message for us, then, as native title anthropologists is that it is important not to over-do the work of culture in its broadest sense as used here, in explaining things. We all value our own culture, understood as a way of life we are familiar with and embedded in, but when culture is used to explain actions or predispositions, or invoked as a basis of policy or anything else, we need to be in deconstructive and analytical mode, alert to how it is actually being used before we make any judgement as to whether it helps clarify the understanding of a situation or not.

¹ The judgement was handed down on 11th February 2020.