Observations on Justice Mortimer's paper concerning the role of anthropologists in Native Title matters before the Court

Dr David Martin, Anthropos Consulting, 17th March, 2021

I found Justice Mortimer's presentation to the CNTA's Annual Conference thought-provoking and challenging. It offers a substantive critique of current practice in preparing and utilising anthropological Expert Reports, against factors such as the requirement for Court proceedings in Native Title matters to be conducted in accordance with the principles of efficiency and cost-effectiveness, and the imperative to place claimants as central to proceedings, rather than as a background to them.

I do not disagree with Justice Mortimer on those issues. In my experience, anthropologists are well aware of the all-too-common progressive disengagement and alienation of claimants in many cases through the drawn-out processes of both litigation and gaining consent determinations over their lands. Furthermore, I have assessed and peer reviewed many 'connection' and expert reports for both representative bodies and for States. While many reports have been of a high quality, there have been others which have raised concerns regarding such matters as quality, unnecessary verbosity, failure to write for the legal audience and the requirements of Native Title jurisprudence, and idiosyncratic accounts of the at-sovereignty situation which do not address the full anthropological literature available.

At the same time, as the whole Native Title recognition system progresses through claims, many of those remaining to be dealt with are becoming more fractured and complex. In such circumstances, detailed consideration of such matters as family histories and the trajectory over time of connections to the claimed lands under transforming laws and customs becomes a significantly more complex task, not easily amenable to being addressed through information in affidavits nor solely through interviews with contemporary claimants. This is an issue to which I will return.

I have also been concerned by the failure of some anthropological expert reports to demonstrate the necessary independence and obligation to the Court – it is troubling for example to see how often the thrust of anthropological reports in contested matters aligns with the position of the engaging party, whether it be a government or a representative body. In the latter case, additional complexity can arise because of the expectations of the anthropologist by the claimants themselves, but here he or she can carefully explain their role as an expert in ensuring the Court has all the information necessary to come to a decision, but that he or she is not the decision maker.

I will now address certain of the underlying principles and the proposals put forward by Justice Mortimer.

Firstly, I suggest it is relevant that there is a complex intersection between the law and anthropology in the Native Title arena. For example, terms used in Native Title jurisprudence and legislation such as 'traditional', 'normative', 'laws', 'customs', and 'society' also have a history in anthropology, which typically gives them meanings which can differ in significant ways from those in the legal arena.

However, it is my view that it is important that anthropologists do not provide opinions on legal terms such as those of 'society', 'normativity', and 'tradition' most particularly, and that we are not briefed to do so. In my own view, we should rather set out our specifically anthropological reasoning and opinions in such a way that they are cognisable to legal reasoning and thereby provide assistance to the Court in coming to its decision on the issue at hand. This entails anthropologists 'translating' legal terminology into relevant anthropological concepts, and explaining the reasons why we have done this. There is a consequent professional obligation of anthropologists working in the Native Title arena to gain some appreciation of Native Title law, which would seem to me to not be the case for experts in other disciplines – forensic pathology, for example. It also seems to me to be consistent with Native Title itself lying

in a ‘translation’ space between Australian law and the relevant Indigenous system of law and custom.

Ensuring that anthropologists focus only on their anthropological reasoning and opinions and not on Native Title jurisprudence can only benefit a more expeditious and focussed engagement between anthropologists and Native Title law.

Secondly, I have given careful thought to what I understand to be the relationship between Indigenous lay evidence on the one hand and expert anthropological opinion evidence on the other, as set out by Justice Mortimer in her paper. I would expect that anthropologists preparing expert reports for Native Title proceedings would be well aware of the differences between Indigenous evidence and their own opinion evidence. However, there are complicating factors. These do not just pertain to establishing the nature of the likely situation at sovereignty, but also to both the system of contemporary laws and customs under which the claimants have connections to country, and the historical processes since sovereignty relevant to the requirement under Native Title law to demonstrate the continuity of those laws and customs.

I turn now to another matter. It has often struck me on the basis of my own experience, not only in Native Title matters but also in Indigenous consumer protection proceedings in the Federal Court, that the discipline of social anthropology and the institution of the law share to some extent the view that there is little regarding social practices that lies beyond their purview. Certainly, social anthropology covers an extraordinarily wide field concerning sociocultural, aesthetic, economic and political matters. Nonetheless, while anthropologists recognise and accept the centrality of Indigenous lay evidence in Native Title determination and compensation proceedings, I am also of the view that the interpretation of that lay evidence requires its contextualising, its ‘triangulation’ against not only the evidence of other Indigenous witnesses but also against ethnographic and historical sources, and its evaluation against well-documented features of the responses

of Indigenous people to ‘question and answer’ interviews both in the courtroom and outside it. Such matters generally require attention by those with specialised knowledge and experience, most particularly but not only in the case of assessing evidence from Indigenous people from remote areas.

For these reasons too, as an anthropologist I am cautious about accepting lay Indigenous evidence in the form of an affidavit as necessarily a ‘statement of the facts’ and beyond the need for expert purview. Furthermore, when I read an affidavit with an anthropological eye, I do not just hear in the text the voice of the Indigenous witness concerned, but also the questions of (usually) the lawyer generating the affidavit – and who moreover is an advocate for the case being advanced on behalf of her or his client, and not an independent expert as is an anthropologist.

I will focus now on other matters which bear on Justice Mortimer’s concerns around the role of anthropologists in Native Title proceedings. As I observed above, I too have looked askance at huge Expert Reports (including those prepared for potential consent determinations of Native Title) totalling hundreds of pages, and in some cases exhibiting considerable ‘surplusage’ as observed by Justice Rangiah in his trenchant 2016 paper at a CNTA workshop. As also noted above, I too acknowledge the all-too-common marginality of Indigenous people in their own Native Title claims (which will potentially be even more the case, it seems to me, in highly technical compensation matters). Yet, while the Court and parties to the proceedings are required by law to ensure that Native Title proceedings are both cost-effective and conducted efficiently as stressed by Justice Mortimer, I suggest that the information in Expert Reports will generally also play a significant role for the Native Title holders themselves in the post-determination arena.

Allow me to outline two areas in which I suggest appropriately focused Connection or Expert Reports are of considerable value to the Indigenous people concerned — and thus be part of the necessary process of addressing the concerns raised by Justice

Mortimer about the marginality of the Indigenous claimants themselves in Native Title proceedings.

Firstly, Expert Reports typically include and consolidate important cultural information, such as relevant laws and customs, mythology, site descriptions and maps, and group or family histories. These histories are particularly important; they are not simply summations of information given to the anthropologists concerned, but rather are focussed narrative accounts of those families through time based on interviews with claimants as well as on a wide range of historical and ethnographic records which can sometimes extend beyond the memory of living claimants.

In my experience, this cultural information, including the family histories, can be seen by those Indigenous people as highly valued and meaningful cultural resources, as well as validation of their own and their forebears' presence in particular locales in the claim area, and (critically) key elements in the intergenerational transmission of cultural and historical knowledge.

Secondly, information in a well-researched and appropriately scoped Expert Report would *inter-alia* set out in a systematic fashion the contemporary system of law and custom including (where this is the case) the distribution of local groups (e.g. 'families') across the determined area seen as having connections of a possessory nature in particular sectors of that area. Thus, an Expert Report (as well as the terms of the determination itself) has the potential to be central to the management of the Native Title by the Registered Native Title Body Corporate in accordance with the requirements set out in the Native Title Act and the PBC Regulations. I have in mind in particular information pertaining to decision making in Native Title dealings, and regarding Indigenous Land Use Agreements, which must ensure that the RNTBC consults the <u>relevant</u> Native Title holders.

Such materials would be useful to the Indigenous people concerned in the management of their Native Title precisely because they are not merely an aggregation of assertions and opinions of individual claimants regarding such elements of law and custom as who holds relevant connections over which areas within the broader determined lands and waters, but rather an objective account, based on careful reasoning taking into consideration not just what people said but on the whole gamut of past and more recent ethnographic enquiry, historical and ethnographic records, potentially publicly available information from relevant neighbouring or regional determinations, and so forth.

In summary, I am suggesting, an Expert Report (or appropriately presented information drawn from it) can constitute an important element in the Indigenous governance of their own Native Title.

Of course, Native Title holders should themselves ultimately decide as to whether the information in such an anthropological report will be used in the manner outlined above. However, it is my experience that in the absence of such a document there is a high risk that the all too often endemic disputation within claimant groups as to the legitimacy or otherwise of particular apical ancestors, of claims to membership of the Native Title group, or of claims to speak with authority for particular areas within the broader determination area, will be reflected and reproduced within the corporate governance of the RNTBC and the manner in which it undertakes its prescribed functions under the NTA and the PBC Regulations.

Finally, with reference to Justice Mortimer's suggestions regarding mechanisms utilising anthropological expertise more efficiently and effectively and drawing on my own opinions as outlined above, I will make the following brief observations.

Innovative ways of moving past the 'duelling with Expert Reports at 20 paces' process are to be supported, and Justice Mortimer outlines a range of options through which

this might be realised in varying circumstances, including the use of a single Court-appointed expert agreed by the parties. With regard to the taking of lay evidence ahead of the preparation and filing of any expert evidence, which is already not infrequently undertaken in preservation of evidence hearings, I would refer to my earlier opinions about the differences between lay and expert anthropological evidence, in which the latter draws not only on what claimants say (whether in affidavits, interviews, or indeed evidence before the Court), but also triangulates and contextualises it against a wider body of evidence, including that in ethnographic and historical records.

Regarding the use of summary expert reports focussing only on the matters in dispute, I have been involved in such a process. In that matter, by agreement two relatively succinct reports were produced, each jointly authored by the two anthropologists. The first was a compilation of the materials which we jointly agreed were relevant to forming our opinions, such as historical, anthropological and other ethnographic materials, while the second volume set out our agreements, agreements with caveats, and disagreements regarding our opinions on each of the specific questions agreed by the parties. This proved to be both effective and efficient, in my view.

With regard to Justice Mortimer's suggestions involving utilising oral presentations at Experts' Conferences early in the process, and perhaps delineating matters at issue, my own experience is that these too can be very fruitful. However, I am of the view that ensuring all participant experts are relying on the same body of materials, as discussed immediately above, can assist in their effectiveness.

More broadly though, I myself see a tension arising from the Court's imperative to expedite litigation outcomes so as to maximise effectiveness and the efficient use of resources on the one hand, for example in relying on oral presentations and abbreviated written reports from experts along with lay evidence, and on the other the need for

sustainable management of the determined Native Title for current and succeeding generations of the Indigenous people concerned.

I have addressed some of the matters relevant to this concern above, observing that claims are increasingly beset by conflict amongst the claimants, and that in these circumstances a well-researched and focused Expert Report can constitute an important cultural resource in the management of the Native Title. I suggest that the information in such a Report, incorporated into the operating principles of the RNTBC, into its consultations on native title dealings in accordance with the PBC Regulations, and intra-Indigenous agreements, can thereby also potentially serve to minimise post-determination conflict which otherwise could result in further litigation.

Speaking as an anthropologist, and having regard to both our professional ethical framework and that the NTA constitutes beneficial legislation, I believe there to be a professional imperative to minimise the risk that the post-determination governance of the Native Title, through the RNTBC and its ancillary agreements and procedures, does not inadvertently impair or worse prevent common law holders and their descendants from exercising their Native Title rights – which would be a most egregiously unjust outcome.

Thank you for the opportunity to present this short response to Justice Mortimer's paper.