COMMENTS ON JUSTICE MORTIMER'S PRESENTATION/SUGGGESTIONS AT CNTA CONFERENCE 4/5.2.21

Professor David Trigger

1. Below are some notes I made to refer to in my own presentation regarding compensation research on 5th Feb at the conference. The notes were made after listening to Justice Mortimer's presentation via live streaming. I have subsequently revised the notes minimally to be readable by others. PLEASE NOTE THESE THOUGHTS ARE PRELIMINARY AND COMPLETED WITHIN A VERY RESTRICTED TIME FRAME. THEY WILL BENEFIT FROM LISTENING MORE CAREFULLY TO JUSTICE MORTIMER'S PRESENTATION.

2. I note the main point as to the desirability of streamlining anthropological expertise in native title where possible to narrow issues for research and enable cost savings. I also note and agree that lawyers would be critical to discussions of the changes that have been suggested.

3. Lay evidence to be taken formally ahead of expert evidence. I am unsure if this means ahead of detailed research being completed by an expert? It is common for lay evidence to precede expert evidence in litigation but the expert evidence then follows and is based on detailed research that has been undertaken prior to the lay evidence being presented. In consent determination matters it is also common that detailed research informs the expert's opinions.

   The proposition that the expert benefits from hearing &/or reviewing the lay evidence and that this evidence subsequently informs the expert's inquiries: yes to some extent. But a potential problem with this view is the independence of expert opinions from lay evidence. There is a difference between results of anthropological research and subsequent opinions, on the one hand, and lay evidence elicited by lawyers on the other hand.

   There is a different relationship of communication and elicitation, when a researcher is e.g. visiting on country with people, &/or is understood by claimants to know terms and concepts from traditional law and custom, and brings that knowledge to the interpretation of statements made and actions undertaken by research participants, as compared to when individuals give lay evidence in a court setting or to a lawyer for a witness statement. Witness statements will not necessarily coincide with the expert anthropologist's data or opinions partly for that reason. Witness statements are not equivalent to the ethnographic data assembled by an expert anthropologist.

   Whether lay evidence assists to narrow issues for anthropological research would at the least be dependent on the quality of the assembled lay witnesses, and the adequacy of the legal elicitation of their testimony. I can think of a number of cases where this would not have been the outcome.

   Further point: While primary facts come from lay evidence, there have been many cases where the availability of the anthropologist's expert opinions in the context of their written reportage, has assisted greatly the lawyers' and court's understanding of the nature of law and custom and connection to country. Would that occur if an anthropologist's report was not available around the time or just subsequent to the taking of lay evidence?

4. Summary expert reports only. Issues that have been narrowed. Cross referenced to other findings, presumably from previous research for a n.t. claim &/or other available research results. No need to repeat material.

   Yes, all of those suggestions make sense. The short form reports in the Northern Territory might be one example of that approach.

   However, the risk is an insufficient understanding of law & custom, or in the case of compensation, of the range of effects of compensable acts. And of some import, is that there will be a lack of comprehensive data on which post determination matters might rest, for rep bodies and other orgs including PBCs, seeking to manage n.t. rights and compensation monies. The value of anthropological research for the longer term is thus undermined.

   Colleagues from the N.T. may have advice on how the short form approach has worked.

5. Oral expert contribution of opinions. With Registrars. Providing only joint reports with agreements and disagreements of experts articulated and exchange of views. No advance written reports. Just talking led by Registrar.

   Where experts have sufficient data and research material at hand this could work well. But a problem is that not all experts engaged by parties will have that material at hand without an expert's report prepared by an anthropologist engaged by the claimant party. They won't bring expert knowledge of the particular facts of a case without detailed reading and that usually includes reading the results of research investigating explicitly n.t. issues.

   So, e.g., an anthropologist engaged by government to examine the adequacy of work done by an anthropologist engaged by a claimant party, would have limited previous documents to work on prior to oral conferences, apart from published materials & reports available from previous cases and academic research. Oral discussions whereby a claimant-engaged anthropologist informs other colleagues verbally without giving them a written report could potentially require much time with breaks of days for the various participants to check and read materials cited by the anthropologist engaged by the claimant party.

   My thinking is thus that the previously produced materials, made available for expert conferences, can assist oral discussions. However, the process of reaching expert agreement and disagreement without written findings of an anthropologist engaged by the claimant party, will at least in some cases be time consuming and fraught with a lack of sufficient up to date information.

6. Mediations: anthropologists to assist Registrar led mediations, confidential discussions. Early assisted mediation may resolve intra indigenous disputes?

   Only where an anthropologist has done sufficient research can they effectively assist resolution of disputes particularly regarding intra indigenous disputes.

7. Early expert conferences. Not necessarily based on written reports. Assume opinions can be given early. Anthropologists 'know their stuff'. Non-writing based contributions would be sufficient.

Similar to point 2, only if sufficiently detailed work on those issues has been completed. Agreed we don't always need a written report to articulate opinions. But an expert may be held to account and cross examined potentially and needs to have assembled supportive data for opinions. The basis for authority of the expert has to be maintained and that is normally that substantive investigations have been carried out.

As an aside, the anthropology discipline and profession has some difficulty attracting younger colleagues to work on native title. Partly due to Indigenous politics and partly reticence to be subject to the rigours of the legal process. If the opportunity to first conduct detailed investigations through considered examination of available research materials, plus where needed the opportunity to carry out first hand fieldwork, is not to be part of the brief, I think this may further lead to disincentives for less experienced anthropologists to work in this area.

8. An agreed expert anthropologist appointed to assist the court. Jointly funded. Opinions to assist the judge.

   Yes, I agree this is a good way forward. I have been surprised it has not occurred more in n.t. cases.

   That was part of the system for ALRA Northern Territory claims which worked well from the mid 1970s over some decades.

   However, the court expert would need reports, or a body of expert data, to work on. Simply by being present at expert conferrals the court expert could direct questions and arrive at conclusions. If a court expert takes that role & assists the court having reviewed a joint report from experts engaged by different parties, it may be feasible.

   Unless the court anthropologist replaces the need for anthropologists engaged by the parties the costs would not reduce.