

The High Court Kobelt decision and the intersection between law and anthropology: 'culture' and 'agency'

Centre for Native Title Anthropology, ANU

Melbourne, February 6th - 7th 2020

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This presentation

- Unlike much of native title proof, the meanings attached to 'culture' in 'cultural loss' do not have an extensive jurisprudence
- This presentation focuses on an anthropological use of a concept of 'culture' in a non-native title case where I was engaged by ASIC which was ultimately appealed to the High Court
- It sets out a conceptual framework for this concept which was directed to the terms of my Brief and the audience – in essence, a Federal Court Judge
- The ultimate audience however was seven High Court Judges, and there was a mixed reception to my opinions

General background

I was engaged by ASIC to give expert evidence in the 'Kobelt' case, which was ultimately appealed to the High Court.

Mr Kobelt runs a general store and second-hand car dealership adjacent to the APY lands, almost all his customers are Anangu, and he utilises a 'book up' system where he keeps their keycards and PIN numbers.

ASIC's legal arguments alleged *inter alia* 'unconscionable conduct' by Mr Kobelt



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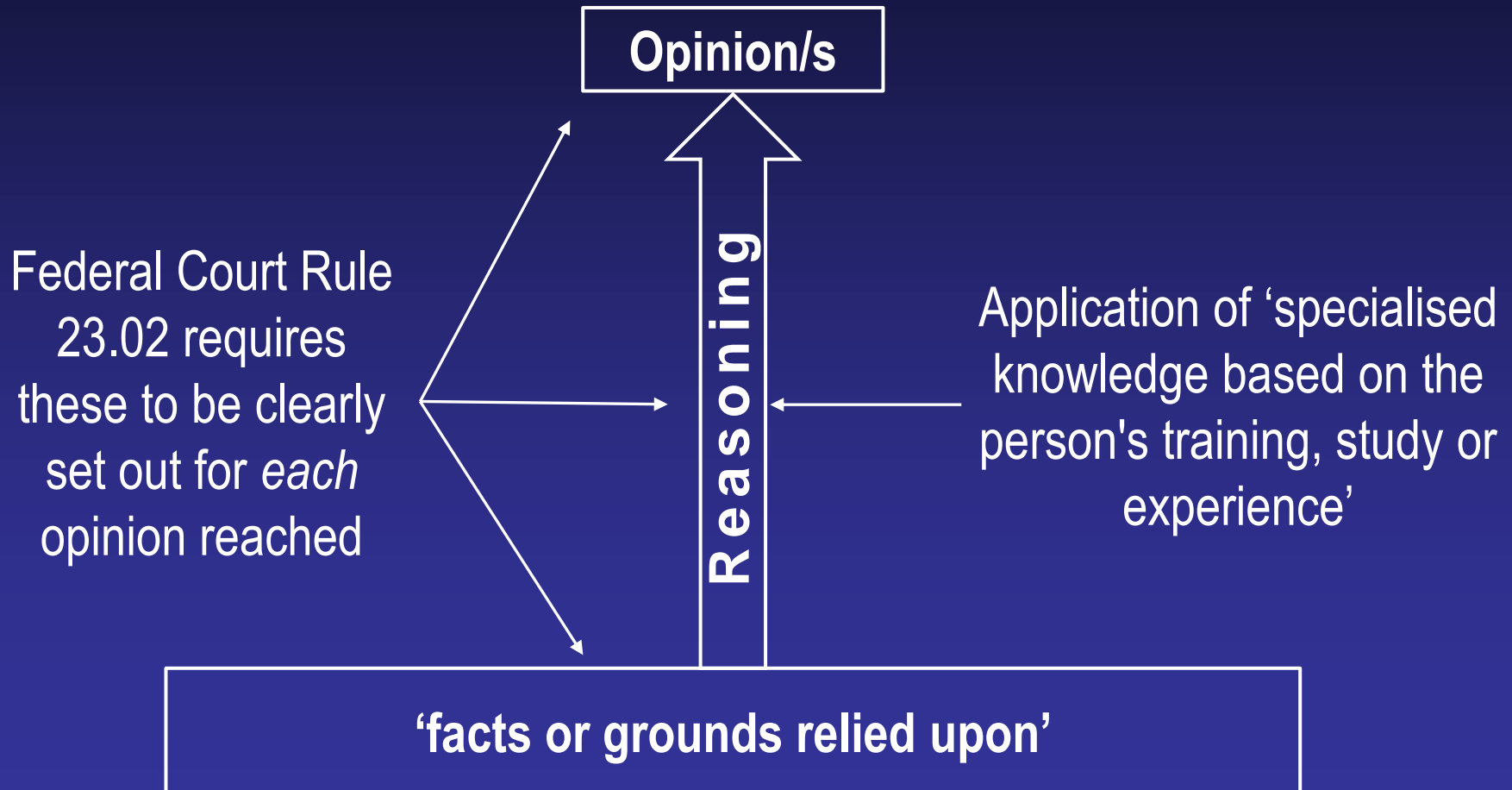
My Brief

My complex brief included identifying factors which could render Anangu vulnerable to exploitative commercial behaviour. In particular, it included the following:

3. What, if any, social or cultural matters affect the ability or willingness of Aboriginal residents of the APY Lands to:
 - 3.1. understand the nature, terms, advantages and disadvantages of credit arrangements generally?
 - 3.2. understand the nature, terms, advantages and disadvantages of the specific credit arrangement provided under Nobby's Credit Facility or similar facilities;
 - 3.3. question or negotiate the terms of transactions (including credit arrangements) with traders;
 - 3.4. complain about the terms of transactions (including credit arrangements) with traders.

Writing an Expert Report

:
The audience is a Judge



My approach – writing for the Judge

For my purposes here, a number of key interlinked concepts:

A concept of 'culture' which does not categorise certain elements of it as authentically Aboriginal or otherwise, but does recognise that the distinctive contemporary values, understandings and practices comprising that culture may have diverse origins and historical trajectories.

These sociocultural features include a set of potentially distinctive values and practices which people may bring to bear in their interactions with commercial entities such as Kobelt's store, and more generally with the market economy.

My approach ...

These values and practices may have their origins both in the precolonial 'classical' Aboriginal society as well as incorporating elements from the general Australian culture and society through ongoing processes of engagement with it.

I also addressed the issue of whether certain of the ways in which Anangu people engage with the market economy and money more generally (and Kobelt's store) might be understood as arising largely out of their socioeconomic status, or whether (in part at least) they may also arise from distinctive aspects of Anangu 'culture'.

In my Report, I separated discussion of the 'sociocultural' and 'socioeconomic' features for analytical convenience, but argued that they were necessarily interlinked

My approach ...

I set out my opinion that the subject matter of my Report could be fruitfully understood as arising through an 'intersection' between the distinctive Anangu society and culture of the APY Lands, and the wider Australian society and its culture and institutions (including the legal and financial systems).

I opined that an intersection of systems necessarily raises the possibility of varying degrees of incommensurability of the values, understandings and practices of those systems in that intersection, as well as varying forms of accommodation and adaptation by the Anangu people concerned.

I opined that these incommensurabilities become most apparent where they intersect (e.g. for my purposes here, in Anangu interactions with Kobelt's establishment, and the market economy and the legal frameworks which regulate it). **I had a particular purpose in opining this**

My approach ...

I focussed on particular aspects of Anangu 'culture' I considered relevant within this intersection space – given that my field interviews demonstrated widespread support for Kobelt's book-up system:

Agency: I discussed as a social scientific term, referring to the capacity and willingness of individuals to take action or to exercise instrumental or strategic choices in accordance with what they perceive to be in their own interests.

I used it in my Report to discuss factors which may lead Anangu people to structure their engagements with establishments like Kobelt's such that (from their own perspectives) they are able to realise their own objectives.

My interviews showed that many Anangu see shopping at Kobelt's store as exercising agency; e.g. as translated to me, being able to decide what to buy and where with their 'own thinking', 'own feeling', or 'own mind'.

My approach ...

I proposed that the ability to exercise choice is an important aspect of agency, but stressed that Anangu choices (and agency) were fettered by structural factors such as poor literacy and numeracy, by the circumstances in which they are exercised, by expectations arising from his or her socialisation and culture, etc.

I also considered a number of other features of Anangu agency in structuring their engagement with the market economy, and Kobelt.

- The personalisation of financial transactions (a key factor):
- Managing 'demand sharing':
- Managing the 'boom and bust' cycle of welfare payments.

The High Court and 'culture'

Kobelt won his case – four of the seven judges ruled that the bases of ASIC's, most particularly 'unconscionable conduct', had not been proved.

My analysis figured in three of the majority decisions, and two of the minority.

The decision was widely seen as a disaster for consumer protection generally, and protection of vulnerable Aboriginal people specifically

The High Court and 'culture'

Of the majority judgements:

Chief Justice Kiefel and Justice Bell in a joint judgement quoted quite extensively from and drew on my evidence regarding e.g.;

- the 'intersection' of systems, and incommensurability
- Anangu adaptation of their values and practices to those of the market economy through the personalisation of financial transactions
- the importance of book-up to Anangu in managing the 'boom and bust' cycle
- widespread support for 'book-up' amongst Anangu; and
- The capacity of Anangu to exercise agency and choice through using Kobelt's services

They did not consider my discussion of the full implications of incommensurability, or of the structural impediments fettering agency and choice

The High Court and 'culture' ...

Justice Gageler stated that to accept ASIC's contention that the 'cultural considerations' which were implicated in Anangu customers' choice to participate in Kobelt's book-up system were amongst the factors which 'made those customers vulnerable' ...

“fails, in [his] opinion, to afford to the Anangu people the respect that is due to them within contemporary Australian society”

Gageler J stated that he adopts the analysis by Kiefel CJ and Bell J of my evidence in relation to the advantages to Anangu of Kobelt's book-up system. He gave no attention to the structural factors I discussed which constrain these advantages, or the oral evidence I gave on this issue.

Justice Keane's judgement ignored my evidence, and focused only on legal issues

The High Court and 'culture' ...

With regard to the three judges who accepted ASIC's appeal (i.e. accepted that Kobelt's conduct was unconscionable):

Justices Nettle and Gordon referred to:

- the power imbalance between Kobelt and his Anangu customers, but without referencing my evidence;
- Commented on the boom and bust cycle, and the practice of 'demand sharing' (without referring to my evidence), but stated that there was little evidence that Kobelt's customers chose to shop there because of the latter
- while the primary judge described my evidence as 'generally helpful and reliable', and referred to my deep understanding of remote Aboriginal people's 'relationship with money and financial transactions', Nettle J and Gordon J criticised ASIC's failure to brief me to consider the matters specifically in relation to the 117 customers in ASIC's case

The High Court and 'culture' ...

- I had adduced very little evidence from customers themselves that they had left their cards with Kobelt *in order* to reduce the pressure of demand sharing.
- Furthermore, the case was concerned with Kobelt's book-up system, not book-up systems in general as described by me.
- The 117 customers the subject of the case had little choice but to engage with Kobelt's system because of their 'special disadvantage' (i.e. socioeconomic disadvantage).
- My consideration of personalising financial transactions was that there was a *tendency* to do so, based on *inferences* that this applied to the 117 customers, which was methodologically problematic.

The High Court and 'culture' ...

Nettle and Gordon's judgement that Kobelt's conduct had indeed been unconscionable was based largely on his customers' 'special [socioeconomic] disadvantage', unequal bargaining power, and the lack of transparency or accountability (the latter matters which I was not briefed to consider).

Justice Edelman's judgement did not refer to my evidence at all.

Summary implications for 'cultural loss'

- It is always essential to have guidance from Counsel / senior lawyers in relation to Federal Court proceedings, and the likely 'flexibility' of concepts such as culture in 'cultural loss'
- However, my experiences outside Native Title in this and another Aboriginal consumer protection case suggest that an interpretation of 'culture' beyond the 'traditional' will be useful, even necessary.
- Standard anthropological methodologies, including 'inductive reasoning' from the more particular to the general, or from the general to the particular, may be challenged in the Court or by judges themselves;
- Courts may pick and choose from elements of an anthropological account – so it is all the more necessary to provide systematic, interlinked evidence.