

Re-evaluating the role of expert reports in native title proceedings

Debbie Mortimer¹

4 February 2021

1. I am speaking to you today from the lands of the Kulin nation. I acknowledge and pay my respects to their Elders past and present, and all those Aboriginal and Torres Strait Islander people who are custodians of this land.
2. I want to thank the organisers, and Julie Finlayson in particular, for their invitation to speak, and for their support as we navigated the changing course of COVID-19 and its impact on this conference. I regret not being with you in person, as I was very much looking forward to all the conversations to be had outside the official presentations, and also to learning a great deal through those presentations. Another time I hope.

Topic

3. The topic of my presentation today fits reasonably well into that part of the conference theme dealing with “collaboration”, because what I am inviting you to consider as potential and actual expert witnesses, and to raise with those who may instruct you in native title or compensation claims, certainly involves an invitation for greater and more substantive collaboration on the use and presentation of anthropological expert evidence.
4. What I say is derived only from experiences as a judge in the Federal Court’s native title jurisdiction, and is only intended to apply to proceedings which arise in that jurisdiction – I recognise anthropologists perform many other roles in working with First Nations people, both within the native title sphere and outside it. Some of what I say may be applicable to other areas, but that is not my primary focus.
5. I want to start with an observation. Despite the legal and social revolution which was *Mabo v Queensland (No 2)* (1992) 175 CLR 1, First Nations people themselves tend to have been treated as the **objects** of the native title system rather than as equal participants in it – more as bystanders, and sometimes it seems like powerless bystanders at that. When we describe the history of native title claims and decisions, their legal and evidentiary framework, and the course of judicial and parliamentary decision-making, we are describing events and processes undertaken largely if not exclusively by non-Aboriginal people. It is non-Aboriginal people who have controlled these matters.

¹ Judge, Federal Court of Australia. This presentation was given to the CNTA annual conference by Zoom. The oral version of the presentation differed in some language and commentary from this written version, but not in substance.

6. This situation may be changing, albeit very slowly. There are steps that the courts, judges, legal practitioners, experts, representative bodies and their staff, and government can take in the way they conduct native title proceedings, and native title negotiations, to move towards redressing and changing that dynamic. Today, my focus is on one aspect that may contribute to such a shift – namely, the potential for changes in the preparation of anthropological opinions. Some of those changes may give First Nations people more prominence in the course to be taken by the determination and compensation process; some changes may empower people more simply by speeding up the time it takes for them to secure a resolution to their applications.
7. What I say may be provocative. Indeed I hope it is. None of what I say is directed at particular individuals, or institutions or agencies. My thoughts are offered with the premise that everyone here, and everyone who may come to know about what I have said, works in good faith and with positive intentions to assist First Nations people to regain and exercise custodianship over, and responsibility for, their country, which has been disrupted since European settlement.

Features of this Court's native title jurisdiction

8. There are objective features of the jurisdiction which are important to what I say:
 - a. It is still a new and developing area of law, not yet 30 years old – in a common law system that is babyhood;
 - b. That said, much of the legal groundwork has now been laid. Not to say some of it may not change, and might be better if it did change, but judges, practitioners and experts who are working on proceedings in 2021 have the benefit of the hard work of those who did many of the early cases and established some working principles and practices;
 - c. The previous feature has led to a less adversarial approach being taken by respondents, especially government respondents. The days of hundreds of objections, of fights over admissibility in which only lawyers (and judges) are interested, of the taking of technical legal points for the purpose of obstructing claims because the party had an interest in such obstruction succeeding, have largely gone. The change in attitude towards native title claims has been tremendous, and a sign of a less fearful, more mature and fairer approach to the recognition of the rights of First Nations people in their country.
 - d. Native title is one of the few areas of the Court's work which can – in principle and in many cases now in practice – be a constructive and positive exercise which need not be intensely adversarial. That is the tremendous advantage of the consent determination process – it is intended to be a cooperative process towards a positive outcome for all parties. Rarely can that be said of litigation in this Court. But – and it is an important “but” – it is still **litigation**, conducted under the auspices of an adversarial system. The

role of experts in this system is well defined, but as you all know well, the legal view of that role encounters some difficulties in its application to native title work.

- e. That said, the objects of the *Native Title Act 1993* (Cth), and the powers given to judges and registrars under it, combined with the powers in the *Federal Court Act 1976* (Cth), mean there is tremendous flexibility available to re-think how best to assist First Nations people, and others affected by claims, to resolve them.
- f. Finally, and perhaps most crucially for my topic today, the native title jurisdiction is notorious for consuming huge amounts of public rather than private resources – on the sides of claimants, government respondents and the Court. It is also notorious for having cases which take much longer to resolve than cases in other areas of this Court’s jurisdiction. I invite you to put to one side the fiction that native title cases are so special and complex that this inordinate length of time is justifiable. It is not. This Court deals with highly complex litigation in many areas – class actions are a good example. But the throughput is universally faster than in this jurisdiction. As many of you may know, there are native title claims in this Court which were lodged in the 1990s. Not as many as there used to be, but still some. And plenty which were lodged in the 2000s. It has been one of my personal missions since commencing work in this area to get old claims resolved. I am like a stuck record about the tragedy of those Elders whose knowledge is critical to a claim passing away before it is resolved. My topic today is very much driven by the unacceptable delays which have been a feature of this jurisdiction since its commencement. The gathering of expert anthropological evidence is a contributor to those delays, by no means the only one, but it is one.

Why a re-evaluation of the approach to anthropological expert evidence is necessary

9. The three driving forces in my opinion that some re-evaluation is necessary are:
 - a. The nature of the work which is ahead for this Court, including compensation claims where we have a chance to do things differently in a new aspect of the Court’s work;
 - b. The costs of native title proceedings and the ever-present problem of funding difficulties; and
 - c. The tragic impacts of delay on claim group members, their communities and First Nations people in a wider sense, and the impediment this provides to greater self-determination and better overall life outcomes for those communities.

Some challenges for judges with the current approach to expert reports

10. Here I intend to pick up some of the observations made by Justice Rangiah at this conference last year, with which I agree, and add some thoughts of my own.
11. As his Honour noted in his paper, and I am summarising here, judges sometimes find anthropological reports challenging to navigate, find the conflicts between anthropologists in a given case difficult to unpick, and they experience frustration with court timetables not being met. Sometimes, identifying the “real issues” in dispute from the reports is challenging. That last observation is equally true sometimes of the presentations of lawyers, I might add.
12. My own thoughts include the following:
 - a. One feature of anthropological reports which is difficult for judges, and for legal representatives in a contested hearing, is a feature identified by Justice Sackville in *Jango v Northern Territory (No 2)* [2004] FCA 1004 at [15]. I hesitate to mention that judgment in present company, but this particular observation by Justice Sackville, in my respectful opinion, has some force. It is the duplication of factual material sourced from claimants with what appears in witness statements. I have read Dr Kingsley Palmer’s analysis of this criticism by Justice Sackville and I can understand that perspective. But I can tell you from experience, even if you put aside Justice Sackville’s valid observations about the admissibility issues to which this practice gives rise (and which in many cases we **do** put to one side), the duplication of what should be primary evidence is a significant problem in sorting out what is reliable claimant evidence and what is not. It also leads to difficulties, regularly encountered, in putting previous statements to First Nations witnesses.
 - b. One of the key areas of value to judges from anthropological reports is an analysis of the “at sovereignty” position, being the issue about which direct evidence from claimants is unlikely to be comprehensive. However, the working out of legal principles in detail about what needs to be established “at sovereignty”, and the examples of the application of those principles to a now wide and plentiful body of claims, should mean that there is increasing common ground on many “at sovereignty” factual issues, and the areas of dispute on which opinion evidence is required should be more focused, and smaller in number. We do not see that in the instructions given to anthropologists, and in the reports which are the products of those instructions. We seldom see any building off findings in other cases, although that approach is readily available. Again, that requires better and earlier collaboration between lawyers and their experts.
 - c. Whether in the form of a report, or as part of an iterative process before and in the preparation of an application, there can be a tendency for expert anthropological opinion to drive the framing of claims. There are a number of

things that might be said about this tendency, whether conscious or unconscious. Two which I consider important are:

- i. It tends to diminish the position of the accounts of First Nations people themselves and to contribute to an impression that they are being led through a process which is **about** them, but not coming **from** them. It leads to this sense – which I hear and see a lot – that unless you have an anthropologist a claim group cannot succeed. I do not agree. But that impression is what spirals into funding dramas that take years to resolve.
- ii. Looking too readily to an anthropologist to frame a case tends to relieve legal representatives of the task of applying the instructions and evidence they gather from their First Nations clients to the law as it presently exists. Lawyers can tend to rely on anthropologists to do this work for them. This is the feature which in my respectful opinion leads to obvious problems about independence, about which much has been written, not I hasten to add necessarily of the anthropologists' making, although they can be the ones who can bear the consequences.

What might be done differently?

13. The purpose of thinking differently about expert anthropologists in both determination and compensation applications is to address the features I have spoken of – especially delays, cost, lack of clarity of claimant accounts, passing of responsibility away from lawyers, failure to make appropriate use of existing findings and accepted positions in preparing new claims, and lack of centrality given to claimants in the judicial process.
14. I want to divide up what I say here into two parts – first, suggestions which may be more relevant to negotiated outcomes through consent determinations; second, contested situations. But the basic theme is the same in each part.

Consent determinations and negotiated processes

15. Those involved in determination applications should now have a reasonable idea of when a claim is likely to successfully follow a consent determination path, and when it may not. It is more difficult at the moment to determine that in relation to compensation applications, as the details of legal principle remain to be worked out, as they have been for determination applications over the last 30 years.
16. If I take the Western Australian government's guidelines for consent determinations as an example,² they expressly state (at [3.5]) that a single connection "book" or the like need not be presented. They expressly state connection material should be "practical, straightforward and clear", and that connection material should be accompanied by a

² <https://www.wa.gov.au/government/publications/guidelines-the-provision-of-connection-material-native-title>

“brief legal submission setting out how that material satisfies the relevant criteria”. That is, the anthropological opinion does not have to join all the dots. And indeed, should not. The guidelines expressly state (at [3.7]) that the “most important information in support of claimed native title rights and interests is primary evidence provided by Aboriginal people”. They set out in detail, under a heading of “essential requirements”, what factual matters have to be addressed.

17. Most of these are primary factual matters for claimants. Some of them may benefit no doubt by being supported by an anthropological opinion to contextualise the primary evidence. As I have said, the “at sovereignty” factual issues may often be developed by anthropologists from secondary sources rather than from claimant accounts, but much of this position is now well established across most of Australia by decided cases. My point is that these guidelines, being clear and targeted, lend themselves to quite summary documents.
18. In my experience over the last six years government is generally ready to engage with claimants and their representatives to explain what aspects of the s 223 definition they are satisfied with, and where more material or detail is required. If there were any doubt about the matter, last year the Full Court emphasised, in a New South Wales decision called *Widjabul Wia-Bal v Attorney General (NSW)* [2020] FCAFC 34; 274 FCR 577, that States must act in good faith in negotiating native title outcomes, objecting only where there is a real and substantive matter which stands in the way of its agreement to native title being determined, and that all that is required for a consent determination is satisfaction by the State of a “credible basis” for the existence of native title rights. “Credible” does not mean unassailable. It does not mean “perfect and complete”. It means capable of being believed and accepted. It is a relatively low threshold.
19. An iterative and consultative process is always going to be more efficient and cost effective. As experts, you can encourage this – question your brief if seems to ask you to reinvent the wheel. Insist on more targeted instructions. Draw on your knowledge from other cases if the breadth of your task seems unnecessary. Ask whether discussions have been had to narrow the issues and make suggestions. Propose early, informal expert conferences drawing on other work you may have done. In some cases you may well have more experience than the lawyers instructing you. Use it to think about and suggest more efficient ways the claim could proceed. That is not framing a case; rather, it is simply acting in an efficient and cost-effective manner, which the Federal Court Act requires of all parties and their representatives.

Contested litigation

20. The theme is the same here. It is almost never the case in contemporary contested litigation – whether intra-Indigenous disputes or disputes with non-Indigenous respondents – that all aspects of s 223 are in issue. Again, the refinement and development of legal principle and its application means parties and their lawyers can

be more focused. The issues tend to be matters such as boundaries and overlapping claims, correct apical ancestors, correct composition of groups, continuity.

21. So, there are no blank slates any more. Preparation of claims and evidence should reflect this more than they currently do. Sometimes decided cases will affect the likely resolution of existing claims. More facts should be able to be agreed between the parties, and agreed early. Most claimant groups understand more about the native title process, for better or for worse. Most will have seen wins and losses by other groups, in relation to other country. Many will have been through the process for some of their country. There is a significant and important burden on legal representatives and representative bodies to ensure their clients are informed, have realistic expectations and understand the Court's contemporary emphasis on negotiated outcomes, and on matters being resolved in reasonable periods of time. I am not convinced these matters are as prominent as they should be in the conduct of native title applications. It is also important to build on clients' own experiences and assist them to take a more leading role in the processes.
22. All these factors should mean we can do anthropological expert evidence more efficiently and effectively, with less expenditure of time and resources.
23. Amongst my suggestions, in no particular order, are:
 - a. Lay evidence ahead of the preparation and filing of any expert evidence at all. This might mean not only preparing and filing the evidence, but the Court actually **taking** the evidence. That does not mean anthropologists working with groups cannot assist lawyers in this process, although as you are all too aware there are dangers in this occurring. Fundamentally however there is a logic to this order of evidence – so far as the law is concerned, opinions are based on primary facts which are proved in the usual way, accepting there may need to be considerable flexibility in admissibility in the native title context. Here, aside from historical and ethnographic sources, the primary facts are the accounts of First Nations people – living or recorded. So one option, which may help avoid the duplication I referred to earlier, is to have the lay evidence prepared, tendered and heard ahead of any expert opinions.
 - b. The use of summary expert reports, which are produced only to focus on the matters actually in dispute. I say “summary” because they may take as agreed or accepted a number of matters – including for example what system of law and custom is applicable and the “at sovereignty” situation in a region – and because they may be able to cross-reference other decisions or opinions rather than repeating material which exists elsewhere.
 - c. There is great potential for oral expert presentations at registrar-led conferences (after parties and their lawyers have provided input on topics). Such registrar-led conferences can facilitate exchanges of views, and need result in the production of only **one** written document which reflects joint views– as to what is agreed and what is not, and why. That is, no advance

written reports at all – a great saving in time and money, and a potentially useful discipline for all in focusing on what is in dispute. To be clear, this is a different suggestion from the usual practice of lengthy and detailed individual expert reports and then a joint conference and production of a conference report. I am suggesting the first step could be removed.

- d. There is also great potential for anthropologists to assist in registrar-led **mediations**. That is, confidential discussions. Of course that may affect whether the same expert could give expert evidence if there was a trial. But – and I emphasise the “but” – the point here is that early, anthropologist-assisted mediation should **resolve** disputes, perhaps especially intra-Indigenous disputes, and so the question of whether the expert can give independent opinion evidence at trial may never arise.
- e. Expert conferences very early in a proceeding, perhaps in a mediation context, perhaps in an open context. Again this may **not** require each expert to have prepared a written report. As experts, you can all be assumed to be able to do your research and express an opinion, with notes, especially in an early negotiation context. Many of you will have worked in the regions concerned before, with the people concerned, or may have considerable familiarity with the system of traditional law and custom which is involved. Free and frank exchange of views between experts at a very early stage may narrow issues, make parties more realistic, and suggest potential resolutions. I emphasise, without the need for the production of a full written report. The assistance you can provide in encouraging parties to be realistic is an important aspect, but the advantages of this are greatest when these processes occur early in a proceeding’s life.
- f. Appointment of a single, agreed, court expert. Again, it is important to recall that seldom are any current or future native title applications beginning with a blank slate – often a lot of work has already been done in the same region, sometimes with the same claim group. It is depressing and frustrating to see the duplication of expert work in some cases – numerous reports by various people over a number of years, and a case still not resolved. Court experts are used in other areas of the Court’s jurisdiction; the parties generally fund the single expert. The Court is likely to accept the opinion of a court-appointed expert unless good reason is shown that it should not.

Conclusion

24. These are not “one size fits all” suggestions. In some cases, they may not be appropriate. However I tend to think that one or more of them will be appropriate in most cases. I am not suggesting that anthropologists can implement the changes alone. Of course not. It must be the legal representatives, and representative bodies, together with government, which lead the change.

25. However I am encouraging you all to participate in bringing about such change, in looking at ways to reduce the detail or content of reports to make them more targeted, or to think of creative and more cost-effective ways to present your opinions and the material relied upon. To avoid duplication. I accept that what judges or courts (or lawyers sometimes) insist upon, or ask for, may feel like an unreasonable or inappropriate compromise of professional methods in anthropological research. But I say respectfully, this is a discomfort which anthropologists should be invited to overcome, if they choose to participate as experts in contemporary native title litigation. I invite you to be prepared to accommodate the demands of adversarial litigation and legal method in the pressed, modern litigation environment.
26. People's rights are at stake. Every month we delay is another month that First Nations people are not in control of their land and waters, or another month where their aspirations and expectations are not addressed as either realistic or unrealistic. It is another month where third parties with interests in land and waters under a claim face uncertainty. In native title of course, unlike other jurisdictions in this Court, we don't speak in months, we speak in years, and sometimes decades. That is unacceptable and it has to change.
27. A response which pleads funding difficulties is no longer a sufficient answer. Yes, the representative bodies which fund this work sometimes do need to be reminded about their responsibilities, especially in relation to existing proceedings and the capacity of funding to frustrate the administration of justice. But there is a real role for an approach that thinks about cutting one's cloth to what is available. We may well find that more cost-effective approaches encourage the funders to be more forthcoming with at least modest amounts. If there isn't \$100k or \$200k for a full report, then all those working for First Nations people need to find a way to get outcomes with the funds that do exist, or with more modest funds. The answer is **not** to say – "oh well, we can't progress this application". That attitude has to change.
28. Cost, delay, efficiency, effectiveness – these are neither buzzwords nor irrelevancies. They are central to the functioning of a modern court. They have been neglected and downgraded in native title work and that has to stop. We all have to get better at being more efficient and effective, more targeted. Do not think you are alone in doing this. Lawyers experience similar challenges. Sometimes they wish to write a treatise in their submissions about a particular legal question. That is almost universally unhelpful to the judge and to the Court, and not a proper discharge of the lawyer's function.
29. Especially at trial level (which is what we are discussing) judicial power is exercised in the real world, in relation to problems of individuals and groups, to solve disputes, to clarify what the law is, and enable people to move on with some certainty and finality. That is our collective function, no more sophisticated than that. We are not writing for posterity, or debating intellectual points. We are playing our role in resolving disputes for people whose lives are affected by the existence of a dispute. We should be encouraging realism, pragmatism, and outcomes. Outcomes are something First Nations people haven't had enough of, and that has to change.