First Nations Legal & Research Services

Workshop on Lawyers and Anthropologists working together in Native Title

Tuesday 10 June 2025. 9:30AM to 5:00 PM

with Rob Blowes SC

SOME RESOURCE MATERIALS

In the Dry of 1982, I met an anthropologist

Rob Blowes

I intend this to be a tribute rather than a lecture, but I will endeavour to leave both anthropologists and lawyers with a take to work point along the way.

That first anthropologist I met in the dry of 1982 was Professor Robert Layton.

It was full decade before Mabo and a dozen years before the *Native Title Act*. Much history of interaction between lawyers and anthropologists predates the *Native Title Act*.

The slide show running in the background is intended to distract as well as to entertain.

There may be the occasional embarrassment but the intention is to pay tribute to all of the professional, intelligent, dedicated expert anthropologists I have worked with over what is now exactly 35 years since I met Professor Layton. Today, I can say I have met a few anthropologists and that some of my friends are anthropologists.

I apologise in advance for not having photographs of all of you with whom I have worked over the years, but you have all made important contributions to the understanding and thinking about respecting and recognising the relationships of the Aboriginal and Torres Strait Islander peoples to their land and water, each other and their languages.

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The photos are no representative but rather reflect the cases I have been involved in during the early years of my career. Much of my later work has not been photographed as well or as often. My apologies to those I have missed and to those I don't mention. However, I trust you will find it at least as interesting as my very short story and even shorter lecture here today.

I had arrived in Darwin in February 1982 to take up a position as a senior legal officer at the Northern Land Council.

The then Principle Legal Officer, Grant Nieman informed a few weeks later that the *Cox River (Alawa Ngandji) Land Clai*m would be one of my first responsibilities and my first task was to spend two weeks on the road and in the field including visiting the claim area with the anthropologist.

So, I bought and packed my swag into the back of an open backed very early series single cab Toyota Hilux and made my first trip down the Track, through Pine Cr, Katherine; turned left somewhere near Daly Waters and headed for the Gulf country and the outstation at *Dumnyun-ngatanyana* on the claim area, where the hearing was held later – all the while talking anthropology the discipline and the anthropology of the people of the region with Professor Layton. Professor Diane Bell and Toni Bauman also worked on that claim.

That was my anthropology 101. I will be forever grateful for that early and intensive opportunity to learn and to appreciate the skills and methodology that an anthropologist can bring to bear on a proper understanding of the traditional laws and customs of the Aboriginal or Torres Strait peoples of a claim area.

My next close encounters with anthropologists followed in quick succession throughout 1982.

I stated work with Professor David Trigger and Dr Myrna Tonkinson on the Nicholson Nicholson River (*Waanyi/Garawa*) Land claim -10890 sq. km on the Northern Territory side of the Queensland border (although the claim included some debate about the surveying and location of that border).

The claim area was inaccessible to the point that Dr Trigger (as he then was) and I had to spend a week or so being ferried with claimants by helicopter to

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record video evidence at sites on the claim area. Many claimants lived in Doomadgee, which would have been a suitable location for the hearing but the then Premier of Queensland wouldn't allow the Aboriginal Land Commissioner to sit in Queensland. So, we had to move a large number of people, including elderly claimants, across the border to a very remote hearing location at *Nadjabarra* on the banks of the Nicholson River. Professor Trigger was indefatigable in his efforts in support of that claim.

Greg McIntyre came to the claim hearing to observe and perhaps acquired ideas he was able to apply in the claim for common law recognition of native for Mr Mabo and the Torres Strait Islanders of *Mer*, Murray Island.

My working relationship with Professor Trigger continued from there to the Robinson River claim (which Dr Jeannie Devitt was also involved in) and the Century Zinc Mine negotiations, one of the first major future act tests of the *Native Title Act*.

1982 was when I also met my now good friends Professor Francesca Merlan and Professor Alan Rumsey and started working on the (*Jawoyn – Nitmiluk*, Katherine Gorge and Katherine area land claim). In the course of that claim quite a heated issue arose among anthropologists about the ethics of using material from claimants acquired in the course of PhD research in a manner not contemplated by the informants at that time and ostensibly against their interests and contrary to cultural restrictions. The question did not arise from Professor Merlan or Professor Rumsey's work I hasten to say. However, it resulted in all the anthropologists who happened to be in the hearing room at the time, being hastily called to give evidence about the ethics of anthropology: Professor Sutton, Dr Athol Chase, Dr Ian Keen and perhaps others. Dr Ken Maddock also gave evidence in that case and Dr John Bern was assisting the Aboriginal Land Commissioner. That claim saw, I think, the only ever formal cross examination of an anthropologist by another anthropologist; when Jeff Sher QC asked Profess Rumsey to cross examine Dr Maddock on some particular points.

I worked with Alan and Francesca again on the Gimbat (Kakadu Stage 3) land claim.

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I had the great pleasure of working with Professor Merlan again on the claim to Elsey Station and also of later with Alan again on the 60,150 square kilometres native title claim led by the late *Mr Neowarra* for the *Ngarinyin*, *Worrora* and *Wunambal* people for their *Wanjina* and *Ungurr* country in the northern Kimberley.

Athol Chase and Betty Meehan were the next I met and worked – also 1982, in the context of preparation for and hearing of the Upper Daly claim for the *Wagiman*, *Wardaman*, and *Nanggumerri* peoples. Again, it was my absolute privilege to spend many days learning from such highly professional and generous researchers.

Also in another lifetime, Professor Sutton and Dr Michael Walsh were colleagues and consultants in the second hearing of the epic Kenbi Land Claim. Others in this room were also involved.

I'm running out of time to mention others, to whom tribute should be paid on such an occasion as this. So, I will skip to the transition to native title anthropology.

The role of anthropologist in the presentation of statutory claims under the *Aboriginal Land Rights (Northern Territory) Act 1976* was not what it is now under the *Native Title Act*. Land Claims were an administrative process where the rules of evidence did not apply and where the "Claim book" was part pleading, part expert report and part hearsay evidence of what the anthropologist was told by informants. Generally they were written by the anthropologists. For anthropologists, moving from claim book writer for an administrative inquiry to report writing and being expert witness in a judicial process has been a radical and difficult transition.

In the context of land claims, the independence of the anthropologists was much less an issue as was the form of their reports and their role in the process generally. I will say more about that along the way.

Following the High Court decision in *Mabo*, in 1992, Professor Peter Sutton, Dr David Martin, and Dr John von Sturmer introduced me to their turf on western Cape York when the Cape York Land Council was started work on a common

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law native title claim in the *Wik* and Wikway region. That claim became a native title claim after the passage of the *Native Title Act*. Their familiarity with the region from their PhD research made possible a broad regional claim based on estates and estate groups as well as a language-owning group system of socio-territorial organisation under traditional laws and customs.

Professor Rumsey and Dr Tony Redmond and Professor Valda Blundell and also Diana McCarthy were all anthropologists I worked with on the *Wanjina-Ungurr* claims. The development of that case was also assisted Dr Daniel Vachon and Dr Kim Doohan. Those claims were made on the basis of a broad society, only made possible by the careful work and thinking, particular of Professor Rumsey and Dr Redmond. In that case I discovered some of the difficulties of a joint expert report and the joys of leading all of the evidence of claimants orally in a native title hearing; after the respondents and the Court decided against written evidence, which is now the norm rather the exception.

By now I fully appreciate not only the incredible and professional skills involved in divining and articulating unwritten rules about relationships between people, between people and country and between people and language; and to be able to identify associated social and territorial structures. Without the professional application of those skills, the native title system, the Native Title Act, simply would not work. That is clear enough from the early rush by lawyers to lodge native title claims without anthropological research and consideration of their analysis of the traditional laws and customs of the people of the intended claim area. The legacy of that still haunts the system.

The cameo role I had in the *Yulara* compensation claim required working closely with that irreplaceable font of wisdom and ideas, Professor Peter Sutton in relation to questions about the form of his report which had been subjected to a barrage of legal objection to admissibility and ultimately to extensive cross-examination. Ultimately a finding against native title. Notwithstanding what has been written since, none of that should be laid at Professor Sutton's feet.

From that and other experiences it was made increasingly clear to me that anthropologists and lawyers need the considerable support of each other from

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the moment the idea of a native title claim arises. Native title claimants are now well served without it.

In suggesting the anthropologists need the support of the lawyers in a case, I do not suggest any failing or inadequacy on the part of the anthropologist. Rather, I merely point out that the requirements of being a significant and expert witness in a legal process is uniquely mystifying and complex – more so that lawyers might appreciate.

Everything about the legal process is foreign to a researcher who has experienced the relative freedoms of academic research. A clinical test of relevance is just the start of the difficulties. Legal logic and reasoning is highly constrained and in some respects more demanding of rigour than social research in other contexts. The rules of evidence, the potential for disclosure of all communications between a researcher and his or her informants, field notes, other anthropological reports and so on, all add to the mysteries and complexities of getting involved in a legal process. Lawyers need to patiently attempt to explain such things to anthropologists.

On the other hand, the lawyer is dependent upon quality anthropological input before a sustainable native claim can be properly designed and pleaded, initially in a Form 1, then in Points of Claim or similar. Sufficient broad ranging conversation at that point is a necessity. The anthropologist from that point on is entitled to clear and realistic terms of reference to guide the further necessary research and report writing.

At all times though, the conversations should be limited to information exchange and the mutual development of understanding of the factual circumstances and the legal process. It is improper for a lawyer to tell an anthropologist what opinion they should reach or express and the expert should not be comprised by overly involving him or her in ongoing strategic deliberations about a claim.

In the Torres Strait Sea Claim, known by the name of the first named Applicant, Mr Akiba – Emeritus Professor Jeremy Becket, Dr Kevin murphy and Professor Collin Scott, supported by Dr Garrick Hitchcock. They were each given separate roles as researchers and witnesses. Professor Scott generally

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focussed on the east, Dr Murphy on the west. An elder statesman of native title anthropology Professor Beckett requires special mention in any tribute to native title anthropologists. Professor Beckett provides a link between what is sometimes call the "early ethnography" and current claim research. He conducted research for and appeared as a witness in the Mabo claim and in the *Akiba* claim provided an overview report which commented on the reports of the other anthropologists on the basis of his work going back to the 1950s.

The experts in that case were assisted with discussion and customising of their terms of reference, anonymous comments on form, relevance, additional hypotheses and other matters to consider. Before they gave their evidence a lengthy conference was held with each to discuss the processes of examination-in-chief, cross-examination, re-examination, likely topics they would be asked about and so on. All anthropologists as expert witnesses should be provided such assistance, not least for the efficient conduct of the proceedings.

While on the subject of longevity and elder statespersons; anthropologists and lawyers had been working towards land rights and native title recognition for Aboriginal people and Torres Strait islanders since at least the late 1960s, more than a decade before I first met an anthropologist. The Gove Land Rights Case of *Milirrpum v. Nabalco Pty. Ltd*. (1971) 17 F.L.R. 141, is probably the beginning, followed closely by the Woodward commission and the drafting of the *Aboriginal Land Rights (Northern Territory) Act*. Professor Nic Peterson may be the only person here, or at all, who was a participant in those early processes and has had an ongoing role sincd. He has had involvement with lawyers and questions of land rights since those days. His report with Dr Jeannie Devitt, in the Croker Island seas native title claim case of *Yarmirr v Northern Territory* (1998) 156 ALR 370 was among the first to cause lawyers and anthropologists to review questions about the status, content and form of reports of anthropologists as evidence in native title proceedings.

In the *Gunditjmara* native title claim eventually determined by Justice North, by consent - *Dr Ray Madden, Mr Geoffrey Bagshaw, Professor Basil Sansom and Dr John Morton* were involved a significant conference of experts which was influential in the result over a large area in south western Victoria. Such conferences are a topic unto themselves and I don't have time to go there.

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Working with Mr Geoff Bagshaw resumed in the context of preparation for the Full Court appeal on the *Bardi* and *Jawi* claim. That preparation was much assisted also by the meticulous work of Associate Professor Katie Glaskin.

In the recent *Yilka* case concerning the Cosmo Newberry Reserves Dr Lee Sackett's role was indispensable, as is Dr Sackett generally when it comes to Western Desert matters. Because of his involvement in the previous claim over the same area (as part of the Wongatha claim area), particular consideration of his role was required, leading to the involvement also of Dr Scott Cane in that case.

I had the great pleasure of working with Dr Sackett and Dr Cane again and *Birrilburu* and *Pilki* claims, about the inclusion of commercial activities in broadly framed native title rights.

It is always a pleasure to work with Dr Kingsley Palmer, as I did briefly and most recently in *Bularnu*, *Waluwarra* and *Wangkayujuru* Peoples' claim in the channel country of north west Queensland, ultimately determined by Justice Mortimer. Kingsley is one of the "I've been everywhere" native title anthropologists. His experience as an expert report writer and expert witness is up there with few others. He has contributed to many significant litigated cases, including the *Ngoongar*, *Rubibi*, and *Mirriuwung* and *Gajerrong* claims, to name only a few.

Kingsley is consequently very experienced in dealing with lawyers and could no doubt tell a tale or two if today's tables were turned and the very unlikely event occurred, of an anthropologists' tribute to native title lawyers. A word or advice to other lawyers though, do not give Kingsley Palmer any material you don't want him to refer to.

I worked with Kingsley when we occupied positions of manager of the Anthropology and Legal branches respectively at the Northern Land Council in the mid-1980s and until recently we were members for some time of an advisory committee for the Native Title Research Unit of AIATSIS.

My most recent work with anthropologists has been with Mr Geoffrey Bagshaw, Dr James Weiner, Dr Janelle White in a matter that also involves Dr Scott Cane and Professor Sutton. I can't tell stories about that case as it is ongoing.

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I have run out of time to provide a complete catalogue of the tributes I owe, and the claimants I have represented owe, to the many other anthropologists I have worked with over the years.

Lawyers and anthropologists play very different but equally important and complementary roles in native title claims and it is fundamentally important that each understand and respect the role of the other. However, the anthropologists need to remember that ultimately they are engaged in a legal process in which ultimately, if the case does not succeed, it is highly likely that the responsibility will rest with the lawyers rather than the anthropologists. On the other hand however, the lawyers need to appreciate that it is the anthropologist who will be in the witness box vulnerable to comments by judges.

Of course, there are some cases that are destined to be unsuccessful through no fault of anyone except our collective national history of disregard for and disrespect of the relationship of the original people of this country and their lands and waters.

Thank you.

30 June 2023

Robert Blowes SC

Barrister & Mediator

Contacts

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Qualifications to practice law

High Court of Australia	
Enrolled as a legal practitioner	24 February 1977
Australian Capital Territory	
Admitted as a Barrister & Solicitor	8 February 1977
Commenced practice as a Barrister	25 September 1987
Appointed Senior Counsel	26 July 2004
New South Wales	
Admitted as a Solicitor	11 February 1977
Admitted as a Barrister	2 November 1990
Northern Territory	
Admitted as a Legal Practitioner	4 March 1982
Queensland	
Admitted as a Barrister	17 December 1992

Qualifications as a mediator

Bond University training course	November 2009
Bond University process and skills assessment	February 2010
National Mediator Accreditation	26 March 2010
Federal Court Native Title List of Mediators	July 2010

Education

Australian National University, Canberra	Bachelor of Arts, 1974 Bachelor of Laws (2A Honours), 1976
Legal Workshop, ANU (1976)	
Orange High School, Orange, NSW	Higher School Certificate, 1970
Glens Falls High School, Glens Falls, New York	Graduated with Honours, 1970

Memberships

ACT Bar Association – membership not renewed after 30 June 2023

Principal Area of Legal Practice – Indigenous Property and Cultural Heritage law

39 years full time experience as instructing solicitor, counsel and, since 2004, as senior counsel in:

- Conduct of matters arising under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)(***Land Rights Act***) and under the *Native Title Act 1993* Cth (***Native Title Act***) including land claims and native title proceedings and appeals, and provision of related advice; participation in and conduct of mediation, arbitration, negotiation, legal drafting, opinion writing

- Negotiation (sometimes in mediation) of indigenous land use agreements including for major mining projects, national parks and other proposals. Drafting and settling of related agreements over Aboriginal lands and native title claim and determination areas
- Cross cultural communications and understanding indigenous perspectives and anthropological concepts
- Legislative and indigenous policy advice, formulation and writing

ACT Bar, (1987 to 30 June 2023)

I have had an extensive native title and Land Rights Act claims, appellate, negotiation and mediation practice since joining the bar in 1987. Some of those matters which I have been involved in as junior or senior counsel include those listed as after 1987 in the lists matters that appear below

University of Western Australia, Perth, WA (May to June 1997)

Visiting appointment at the Anthropology Department of the University of Western Australia to write a joint paper with Professor David Trigger on Indigenous Regional Land Use Agreements in Australia

Freehill Hollingdale & Page, Solicitors, Canberra, ACT (1987)

Solicitor. Six months commercial conveyancing, advice and litigation. Advice on NT Aboriginal land rights legislation and mineral exploration negotiations

Northern Land Council, Darwin, NT (1982-1987)

Solicitor. The Northern Land Council is an Aboriginal Land Council incorporated under the *Aboriginal Land Rights (Northern Territory) Act 1976.* Engaged as Senior Legal Advisor until March 1984 then as Principal Legal Advisor. Major responsibilities included:

- Preparation of and appearances in Aboriginal land claims
- Instructing solicitor in numerous Federal and High Court appeals and in other litigation arising from land claims and the *Land Rights Act*
- Negotiation for legislation, lease and management arrangements for Kakadu National Park, and other parks in the Northern Territory, Mudginberri abattoir lease arrangements, Northern Territory legislation affecting Aboriginal land rights in the Northern Territory, a number of mineral exploration licences on Aboriginal land and the renegotiation of arrangements for the Ranger Uranium Project.
- Provision of day to day advice to Northern Land Council, its Executive, Chairman, Director and senior staff
- Management of legal branch of 5 professional staff and other support staff

Mallesons, Solicitors, Canberra, ACT (1977-1982)

Solicitor: 6 *months* conveyancing and commercial law, 4.5 years general litigation

Some Court proceedings instructed or appeared in

Kearney [R v]; Ex parte Northern Land Council (1984) 158 CLR 365 HC (Full court)
Attorney-General (NT) v Kearney (1984) 55 ALR 545 FC (Full court)
Peko Wallsend Ltd v Minister for Aboriginal Affairs (1985) 5 FCR 532 [FC (Full court)]
Attorney-General (NT) v Kearney (1985) 61 ALR 55 [HC (Full court)]
Northern Land Council v Commonwealth (1986) 64 ALR 222 [HC (Gibbs CJ)]
Northern Land Council v Commonwealth (1986) 161 CLR 1 [HC (Full court)]
Minister for Aboriginal Affairs v Peko Wallsend Ltd (1986) 162 CLR 24 [FC (Full court)]
Northern Land Council (No.2) v Commonwealth (1987) 61 ALJR 616 [HC (Full court)]
Queensland Mines Ltd v Northern Land Council (1070) 68 NTR 1 [NTSC (Angel J)]
Northern Land Council v Commonwealth (1990) 24 FCR 576 [FC (Jenkinson J)]
Northern Land Council v Queensland Mines Ltd Unreported NTCA

Northern Land Council v Commonwealth (1991) 30 FCR 1 [FC (Full court)]
Northern Territory v Northern Land Council (1992) 81 NTR 1 [NTSC (Kearney J)]
Commonwealth v Northern Land Council (1993) 176 CLR 604 [HC (Full court)]
Wik Peoples v Queensland & others (1994) 49 FCR 1 [FC (Drummond)]
Wik Peoples v Queensland & others Unreported 26/05/94 [FC (Drummond)]
Wik Peoples v Queensland & others Unreported 06/09/94 [FC (Full court)]
Waanyi Peoples Application [No.1] (1994) 129 ALR 100 [NNTT (French J)]
Waanyi Peoples Application [No.2] (1995) 124 FLR 1 [NNTT (French J)]
North Ganalanja, Waanyi People v Queensland & CRA (1995) 61 FCR 1 [FFC (Jenkinson, Hill & Lee JJ)]
North Ganalanja, Waanyi People v Queensland & CRA (1996) 185 CLR 595 [HC (Full court)]
Wik Peoples v Queensland & others (1996) 63 FCR 450 [FC (Drummond)]
Queensland v Wik Peoples (Removal application) Unreported 15/04/96 [HC (Full court)]
Wik Peoples v Queensland & Others (1996) 187 CLR 1 [HC (Full court)]
Savage Togarah Coal v Gurang Land Council & Others Unreported 05/06/98 [SC (Qld)]
Fejo v Northern Territory (1998) 195 CLR 96 [HC (Full court)]
Yorta Yorta v Victoria (2001) 110 FCR 244 [FFC (Black CJ, Branson & Katz JJ)]
Anderson v Wilson (2000) 97 FCR 453 [FC (Black CJ, Beaumont and Sackville JJ)]
Larrakia Native Title Claims (East Arm) Settled 2001 [FC (O'Loughlin J)]
Wilson v Anderson (2002) 213 CLR 401 [HC (Full court)]
Yorta Yorta v Victoria (2002) 214 CLR 422 [HC (Full court)]
Risk v Northern Territory [2006] FCA 404 [FC (Mansfield J)]
Attorney-General, Northern Territory v Ward [2003] FCAFC 283 [FC (Wilcox, North & Weinberg JJ)]
Neowarra v Western Australia [2003] FCA 1402 [FC (Sundberg J)]
Harrington Smith v Western Australia (No 9) [2007] FCA 31 [FC (Lindgren J)]
Jango v Northern Territory (2006) 152 FCR 150 [FC (Sackville J)]
Stanley Mervyn, Peoples of the Ngaanyatjarra Lands v Western Australia [2005] FCA 831 [FC (Black CJ)]
Lovett on behalf of the Gunditjmara People v Victoria [2007] FCA 474 (FC (North J)]
Western Australia v Sebastian [2008] FCAFC 65 [FFC (North and Mansfield JJ)]
Sampi, Bardi and Jawi People v Western Australia [2010] FCAFC 26 [FFC (North and Mansfield JJ)]
James, Martu People v Western Australia [2010] FCAFC 77 [FFC (Sundberg, Stone and Barker JJ)]
Akiba v Queensland (No 3) (2010) 204 FCR 1 [FC (Finn J)]
Commonwealth v Akiba (2012) 204 FCR 260 (FFC (Keane CJ, Mansfield, Dowsett JJ)]
Akiba v Commonwealth (2013) 250 CLR 209 [HC (Full Court)]
Dempsey, BWW v QLD (No 2) [2014] FCA 528 [FC (Mortimer J)]
Billy Patch, Birriliburu People v Western Australia [2014] FCA 715 [FC (North J)]
Willis, Pilki People v Western Australia [2014] FCA 714 [FC (North J)]
Western Australia v Brown (2014) 253 CLR 507 [(HC (Full Court)]
Western Australia v Willis, Pilki People [2015] FCAFC 186 [FFC (Dowsett, Jagot & Barker JJ)]
Murray v Western Australia (No 5) (Yilka Claim) [2016] FCA 752 [FC (McKerracher J)]
Manado, Bindunbur Native Claim Group v Western Australia
[2017] FCA 1367; [2018] FCA 275; [2018] FCA 854 [FC (North J)]
Manado v Western Australia [2018] FCAFC 238 [FFC (Barker, Perry & Charlesworth JJ)]
Drury on behalf of the Nanda People v Western Australia
[2020] FCAFC 69 [FFC (Mortimer, White & Colvin JJ)]
Commonwealth of Australia v Manado [2020] HCA 9 [HC (Full Court)]
Nona, Badulgal, Mualgal and Kaurareg Peoples (Warral & Ului) v Queensland (No.4)
[2022] FCA 566 [(FC Mortimer J)]

Some Northern Territory Aboriginal land claims instructed or appeared in

Yutpundji-Djindiwirritj (Roper Bar) Land Claim, Toohey J, 1982
Kenbi (Cox Peninsula) Land Claim, Toohey J, 1982
Nicholson River (Waanyi/Garawa) Land Claim, Kearney J, 1984
Cox River (Alawa/Ngandji) Land Claim, Kearney J, 1984

Murranji Land Claim, Kearney J, 1986
Jawoyn (Katherine Area) Land Claim, Kearney J, 1987
Garawa/Mugularrangu (Robinson River) Land Claim, Olney J, 1990
Upper Daly Land Claim, Kearney J, 1990
Jawoyn (Gimbat Area) Land Claim, Gray J, 1995
Elsey Land Claim, Gray J, 1997
Upper Daly (Repeat) Claim (Settled), Olney, 1999
Kenbi (Cox Peninsula) Land Claim Gray J, 2000

Some negotiations and mediations acted in

Nitmiluk (Katherine Gorge) National Park - legislation and management and lease back arrangements
Kakadu National Park – renegotiation of lease back arrangements
Ranger Uranium Project - renegotiation of agreements under *Land Rights Act* – at one stage with Sir Ninian Stephen (former High Court judge and Governor-General) as mediator
Century Zinc Project - negotiation of agreement under *Native Title Ac*t – including stages with National Native Title Tribunal members as mediators and Bill Haydon as negotiator for Queensland
Wik Native Title Claim – various negotiations with Queensland and other interested parties – including stages with National Native Title Tribunal members as mediators
Goldfields area WA – negotiation and drafting proposal for standard form access arrangements for exploration and mining on native title claim areas
Miriuwung & Gajerrong Native Title Claim – settlement of appeals remitted from High Court in *Western Australia v Ward* – including extensive overseen by Federal Court Deputy Registrar Efthim as mediator [see *Attorney-General of the Northern Territory v Ward* [2003] FCAFC 283]
Ngaanyatjara Lands Native Title Claim – settlement of a native title claim in the Western Desert region in Western Australia resulting in a consent determination of native title [see *Stanley Mervyn, Peoples of the Ngaanyatjarra Lands v Western Australia and Ors* [2005] FCA 831]
Gunditjmara Native Title Claim – settlement of a native title claim in south western Victoria – including extensive negotiations with Federal Court Registrars Anderson and Edwards and Professor Mick Dodson as mediators [see *Lovett on behalf of the Gunditjmara People v Victoria* [2007] FCA 474]; also, see *Lovett on behalf of the Gunditjmara People v Victoria* (No 5) [2011] FCA 932
Djakunde & Jangeri Jangeri, Wulli Wulli and proposed Wakka Wakka claims mediation – January 2011. Engaged as mediator by Queensland South Native Title Services.
Cobourg Peninsula Land Claim No 6 – Land Right Act claim – engaged as mediator by indigenous parties

Negotiation, Legal Drafting, Submission & Opinion Writing

Experience in these areas has been extensive and varied; has mostly been in context involving Aboriginal land rights and native title issues; and has ranged across a number of legal, social, cultural and geographical contexts

Computer Skills

Extensive experience in use of computers in legal practice, in negotiating and drafting of agreements, in litigation and in writing generally. Competent in use of Microsoft Office applications and Adobe

Age

Born 1951

LAWYERS AND ANTHROPOLOGISTS:

WORKING TOGETHER EFFECTIVELY IN NATIVE TITLE / LAND RIGHTS CASES

1. In this paper, I argue that an effective working relationship between a lawyer and an anthropologist requires each to have a good understanding, not only of his or her own role and obligations, but also of the role and obligations of the other.

2. No doubt other factors are also needed for an effective working relationship, including mutual professional courtesy and respect.

3. On occasions, I have sensed that some anthropologists, particularly those who are inexperienced as expert witnesses, have approached interactions with lawyers with a degree of wariness or even defensiveness. A proper understanding of the respective roles and obligations should help to allay any concerns on the part of the anthropologist.

4. I have also sensed over the years that at least some anthropologists feel undervalued in native title proceedings. One small example of that is that I once heard a capable and respected anthropologist describe the case on which we were both working as "an anthropology free-zone", a statement that wasn't literally true, but which caused me to stop and think. That case was in the post-*Jango* environment, which probably had something to do with the degree of separation from the expert witnesses that I and the other lawyers were trying to implement. I say something further about *Jango* below.

5. For my part, I have found anthropologists to be generally very helpful in gaining a proper understanding of the case at hand. There are many things that lawyers will not understand from merely having read the papers. For example: Why is a prospective witness saying what he or she is saying when it cannot obviously be reconciled with the case that is being put? Why is a witness reluctant to talk to the lawyers? What are the background politics that may be influencing what people are saying and what positions they are adopting?

Roles and obligations of lawyers and anthropologists in native title proceedings

Lawyers' obligations

6. Unlike an expert witness, a lawyer is an advocate. That of course does not mean that anything goes. Focussing on barristers, their conduct is governed by the *Legal Profession Uniform Conduct (Barristers) Rules 2015* which are enforced by the Legal Services Board and Commissioner.[1]

7. Among other things, these rules identify as principles that barristers owe their paramount duty to the administration of justice (Rule 4(a)) and should exercise their forensic judgments and give their advice independently and for the proper administration of justice, notwithstanding any contrary desires of their clients (Rule 4(e)). See also Rule 23.

8. These rules further provide, among other things, that:

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[1] A copy of these rules may be accessed at: Legal Profession Uniform Conduct (Barristers) Rules 2015 - NSW Legislation. The current version of these rules is dated 4 March 2022.

(a) a barrister must not engage in conduct which is: dishonest or otherwise discreditable to a barrister; prejudicial to the administration of justice; or likely to diminish public confidence in the legal profession or the administration of justice (Rule 8);

(b) a barrister must not deceive or knowingly or recklessly mislead the court (Rule 24) and must take all necessary steps to correct any misleading statement made as soon as possible after the barrister becomes aware that the statement was misleading (Rule 25);

(c) "[a] barrister must promote and protect fearlessly and by all proper and lawful means the client's best interests to the best of the barrister's skill and diligence, and do so without regard to his or her own interest or to any consequences to the barrister or to any other person" (Rule 35);

(d) "[a] barrister must not act as the mere mouthpiece of the client or of the instructing solicitor and must exercise the forensic judgments called for during the case independently, after the appropriate consideration of the client's and the instructing solicitor's wishes where practicable" (Rule 42);

(e) a barrister must not allege any matter of fact … unless the barrister believes on reasonable grounds that the factual material already available provides a proper basis to do so (Rule 64); and

(f) a barrister must not "advise or suggest to a witness that false or misleading evidence should be given nor condone another person doing so", nor must he or she "coach a witness by advising what answers the witness should give to questions which might be asked" (Rule 69).

9. Lawyers also have obligations under ss 37M and 37N of the *Federal Court of Australia Act 1976* (Cth). In short, they are obliged to take into account the duty imposed on their client by s 37N(1) of the Act and to assist the client to comply with that duty. Subsection 37N(1) of the Act requires the parties to litigation to "conduct the proceeding … in a way that is consistent with the overarching purpose". The "overarching purpose" is defined in s 37M(1) of the Act to mean "to facilitate the just resolution of disputes … according to law … and … as quickly, inexpensively and efficiently as possible". This definition is expanded in s 37M(2) of the Act.

Anthropologists' obligations

10. In native title proceedings, the anthropologist's role is as an independent expert witness and, as such, he or she is bound by the Court's Harmonised Expert Witness Code of Conduct.

11. Everyone here will be familiar with the Federal Court's Expert Evidence Practice Notes (GNP-EXPT), which includes the annexed Harmonised Expert Witness Code of Conduct. This document is almost invariably attached to terms of reference directed to anthropologists.

12. Without canvassing the Code in detail, for present purposes attention is drawn to the following important provisions:

(a) "[a]n expert witness is not an advocate for a party and has a paramount duty, overriding any duty to the party to the proceedings or other person retaining the expert witness, to assist the Court impartially on matters relevant to the area of expertise of the witness" (Clause 2);

(b) every report prepared by an expert witness for use in Court shall clearly state the opinion or opinions of the expert and shall "the assumptions and material facts on which each opinion expressed in the report is based" and "the reasons for and any literature or other materials utilised in support of such opinion" (Clauses 3(d), (e)); and

(c) '[w]here an expert witness has provided to a party (or that party's legal representative) a report for use in Court, and the expert thereafter changes his or her opinion on a material matter, the expert shall forthwith provide to the party (or that party's legal representative) a supplementary report …"; (Clause 4).

13. There is also the Australian Anthropological Society's Code of Ethics, the latest iteration of which appears to have been produced in 2012.[2] The Society's members agree to abide by the Code upon their application and acceptance as members. Further consideration of this Code is beyond the scope of this paper.

Key points of interaction between lawyers and anthropologists as expert witnesses

14. Expert anthropological evidence in a native title case is different from expert evidence given in a range of other contexts. For example, in a personal injuries case, a doctor might be provided with a few papers, spend 20 minutes or half an hour with the injured person, then write a report about the nature and extent of the injuries and their cause.

15. In contrast, in native title cases, anthropologists will ordinarily have a mountain of evidence to sift through and be required to undertake fieldwork, before preparing what are sometimes voluminous reports. Further, it is not uncommon for the facts to raise issues that have not been considered or not been much considered before.

16. There are in my view three key points at which lawyers and expert anthropologists interact:

(a) the initial engagement of the anthropologist;

(b) the finalisation (or "settling") of the expert report(s); and

(c) prior to the expert participating in a conference of experts or giving evidence at trial.

Careful consideration by both the lawyer and the anthropologist at each of these points should promote more effective working relationships between them.

Initial engagement

17. The initial engagement is obviously important, not only in terms of the choice of the anthropologist for the particular case, but also for identifying exactly what the anthropologist is to be asked to do. Terms of reference should not be formulaic but should be carefully tailored to the particular issues likely to arise in the case. They therefore need to be based on a proper understanding of those issues.

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[2] See Code of Ethics - Australian Anthropological Society, accessed 11 May 2025.

18. In relation to matters of law, it is common for terms of reference to include some instruction about concepts that are legal in nature, not anthropological, for example, what, for native title purposes, is meant by "society", "traditional laws and customs", "permissible adaptation", "overlapping native titles" and "cultural loss". The native title legal landscape is one that is still relatively new and one that continues to evolve.

19. I generally ask that draft terms of reference be provided to the anthropologist for consideration and comment. The lawyer is responsible for the ultimate form of the terms of reference, but that task can be assisted by feedback from the anthropologist. The objective of doing this is to ensure that there is engagement with the real issues.

20. Sometimes new issues can arise or an issue can be missed or not fully appreciated at the time the terms of reference are drawn. Where this occurs, supplementary terms of reference should be prepared.

"Settling" expert report(s)

21. In *Harrington-Smith v Western Australia (No 7)*, Lindgren J said:[3]

> Lawyers *should* be involved in the writing of reports by experts: not, of course, in relation to the substance of the reports (in particular, in arriving at the opinions to be expressed); but in relation to their form, in order to ensure that the legal tests of admissibility are addressed.
>
> [original emphasis]

This passage has been cited with approval in various subsequent cases.[4] It does not, however, in my opinion, reflect the limits of a lawyer's proper role in relation to an anthropologist's report.

22. I doubt that anyone would argue against the proposition that the lawyer is entitled to draw the expert's attention to:

(a) mistakes of fact or law in a draft report;

(b) a failure on the part of the expert to address all the terms of reference; or

(c) a failure on the part of the expert to address evidence that the author has been asked to consider.

In my view, a lawyer is not only entitled to raise such matters but is duty-bound to do so.

23. It is also my view that a lawyer is entitled to draw attention to any internal inconsistency within the report and to ask questions such as: "At paragraph X you express opinion Y but do not mention matter Z. Have you considered matter Z in forming that opinion?"

24. Various things that a lawyer is not permitted to do are clear. For example, as noted already and as with all witnesses a lawyer comes into contact with, he or she is prohibited from coaching a witness, subtly or otherwise, by advising what answers the witness should give to questions which might be asked.

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3 [2003] FCA 893; 130 FCR 424 at [19].

4 See, for example: *Jango v Northern Territory (No 2)* [2004] FCA 1004, [9]-[10] (Sackville J); *Risk v Northern Territory* [2006] FCA 404, [456] (Mansfield J); *Miller v South Australia (No 3)* [2022] FCA 466, [24] (Charlesworth J).

25. The authors of a recent article published in the Australian Law Journal proffer some helpful guidance in this area, including that legal practitioners should:

    (a) "be careful to avoid communications that might, or might be seen to, distort the witness's independence";[5] and

    (b) "not influence the content of the report to the extent that the report does not accurately reflect the expert's honest and independent opinion".[6]

    The authors acknowledge, however, that there are "few bright-line rules"[7] and they add:

    > The appropriate level of lawyer involvement in preparing an expert report depends on the circumstances of the case: "there is not one rule or practice which covers all experts or all situations".[8]

26. Lawyers must therefore be vigilant not to coach witnesses, including expert witnesses, and not to compromise the independence of anthropologists or other expert witnesses.

27. For the anthropologist's part, he or she must be vigilant to see that their independence is not compromised and must keep firmly in mind that:

    (a) their report and oral evidence must be true to their own opinions and their own understanding of the underlying facts; and

    (b) they, not anybody else, will be tested in cross-examination about their opinions, understanding of the facts, manner of preparing their report and so forth.

    If an anthropologist considers that a particular lawyer is conducting himself or herself in a way that might compromise their independence, they can and should say something about it.

28. I return to the question of independence below in discussing the decision of *Jango*.

Conference of experts and giving evidence at trial

29. The lawyer should in my view help to prepare the anthropologist for the processes of participating in an experts' conference and giving evidence at trial, particularly if he or she is inexperienced in such things. That preparation is directed towards two main matters.

30. The first is to ensure that the anthropologist has a good appreciation of the process. For example, if you are at trial, is the process individual evidence-in-chief, cross-examination and re-examination or concurrent evidence and how does the relevant process work? What should you do if a question is unclear? What happens if you need to look at your report or notes in order to answer a question? How confined should your answer to a question be and is there any difference between evidence-in-chief and cross examination in that regard? What happens if you wish to qualify or add to an answer that you have

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5 Oakeshott C and Smart C, "Walking the Tightrope: Communications with Expert Witnesses Following New Aim v Leung" (2024) 98 ALJ 596, 596. The case referred to in the title is *New Aim Ptu Ltd v Leung* [2023] FCAFC 67; 410 ALR 190 (Kenny, Moshinsky, Banks-Smith, Thawley and Cheeseman JJ).

6 Ibid., 597.

7 Ibid., 596.

8 Ibid., 598, citing a passage from the *Phosphate Co-operative of Australia Ltd v Shears (No 3)* [1989] VR 665, 683 (Brooking J).

previously given in evidence? Another matter that can be touched upon is whether the relevant judge has known likes or dislikes that may be relevant to the expert's evidence.

31. The second matter relates to the substantive issues. By this time, there will ordinarily be one or more expert reports of the anthropologist before the Court, so his or her opinions will already have been laid out. There may or may not have been a responsive expert report in which the anthropologist has responded to the opinions of the opposing expert(s). If that is not the case, the lawyer will obviously want the anthropologist to have considered those opinions carefully.

32. Even where there has been a responsive report, the lawyer may well want to discuss substantive and other matters with the expert in conference. For example, the lawyer might say, "you might be asked about X, so think about how you would answer that question". X might be a substantive anthropological issue, a matter that goes to the qualifications and experience of the expert or what the expert has said on previous occasions. The lawyer should never say to a witness: "You should answer question X by saying Y". The lawyer can and, in my view, should get the expert thinking about what might be thrown at them and invite them to think about how they would respond. If a particular aspect of the evidence has not been thought about in advance, the answer given may well not do justice to the expert's view.

33. In relation to concurrent expert evidence, the attention of both lawyers and experts is drawn to Annexure B to the Expert Evidence Practice Notes.

Some potential pitfalls for anthropologists as expert witnesses

Expert anthropologist performing other roles in the case?

34. In *Jango v Northern Territory* [2006] FCA 318; 152 FCR 150 Sackville J was critical of the ways in which the applicant's primary expert anthropologist, Professor Peter Sutton, had been utilised in the course of the claim preparation and hearing. His Honour acknowledged what I expect we all know to be the case, namely that Professor Sutton is "very well qualified" and has "extensive experience as a social anthropologist and linguistic anthropologist" and that his publications "are highly regarded".[9]

35. However, his Honour drew attention to Professor Sutton's involvement in the case preparation and hearing in a number of ways that were beyond his brief to prepare and expert report and to give expert evidence. Sackville J said:[10]

> I formed the view that Professor Sutton played an active part in formulating and preparing the applicants' case and that this participation influenced both the way in which their case was presented and Professor Sutton's approach in giving evidence.

His Honour then identified various matters in which Professor Sutton had played a role:

(a) he had spent considerable time commenting on draft witness statements and his Honour inferred that he had "clearly played a significant part in shaping witness statements";[11]

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9 [2006] FCA 318; 152 FCR 150, [315].

10 Ibid., [322].

11 Ibid., [323].

(b) he rejected the original version of the Points of Claim;[12]

(c) he gave some advice concerning informants whom he considered would be good witnesses, he sat in close proximity to counsel for the applicants and he suggested questions to counsel from time to time.[13]

36. Sackville J relied on these matters and some other matters (including what was found to be a tone of defensiveness during Professor Sutton's cross-examination[14]) in finding that his role "had not been limited to that of a wholly objective expert observer and commentator".[15] The consequence of this was that his Honour was more prepared to accept Professor Sutton's opinions that were supported by other evidence and it seems that, where that was not the case, careful scrutiny was applied to the reasoning underlying the opinions.[16]

37. A number of points may be made about this. First, Professor Sutton no doubt undertook these tasks because he was asked to do so by the lawyers. To the extent that it is profitable to apportion blame, the lawyers should in my view bear the lion's share of it.

38. Secondly, *Jango* was mainly heard in 2003 and 2004 and was therefore one of the earlier native title claims. The ground rules had not been fully worked out at that point. Professor Sutton had given evidence in numerous statutory land claims in the Northern Territory which proceeded in a very different legal context. The Territory land rights experience was undoubtedly influential in how claimant lawyers approached the earlier native title cases.

39. Thirdly, the year before *Jango* was decided, *Gumana v Northern Territory* (**Blue Mud Bay**) was decided. In this case, Selway J found:[17]

> It is clear that Professor Morphy was actively involved in the preparation of the applicants' case, including preparing witness statements, taking and giving instructions and so on.

This fact did not, however, lead his Honour to discount Professor Morphy's evidence; indeed, he did not have any concern about accepting his evidence. This was because Professor Morphy's evidence was entirely supported by the Aboriginal evidence and was generally supported by the literature.[18] A significant difference between the evidence in Blue Mud Bay and the evidence in *Jango* is that in the latter case the evidence was much more contested. Questions about an expert's independence therefore come into sharper focus in heavily contested cases. With respect, Selway J stated the correct position as follows:[19]

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12 Ibid., [324].

13 Ibid., [325].

14 Ibid., [326].

15 Ibid.

16 Ibid., [338].

17 [2005] FCA 50, 141 FCR 457, [169].

18 Ibid., [171]-[172].

19 Ibid., [163].

> There is an obvious risk that the involvement of the "expert" in the preparation of a case will at least affect the weight to be accorded by the court to the evidence given: see, eg the submissions referred to in *Lardil* at [89]-[90].

In light of these matters, I consider that the approach that should be taken in native title cases is to manage that risk by eliminating or at least minimizing the other roles that are to be played by the expert anthropologist in the case.

40. Fourthly, the *Jango* decision in 2006 sent shockwaves through the group of native title lawyers who typically appeared for claimants. In some later cases, external "consulting" experts (sometimes called "dirty" experts) were engaged to give advice to lawyers appearing for claimants, so as to insulate the expert anthropologist from possible criticism for being involved in such matters. The consulting experts did not give evidence in the relevant cases.

41. In 2016, however, the Expert Evidence Practice Notes were issued. The practice of engaging "consulting" experts was discouraged. Paragraph [3.2] provides:

> ... it is important to note that there is no principle of law or practice and there is nothing in this practice note that obliges a party to embark on the costly task of engaging a "consulting expert" in order to avoid "contamination" of the expert who will give evidence. Indeed the Court would generally discourage such costly duplication.

42. To the best of my knowledge the practice of engaging external "consulting" experts in native title cases has since faded away. That said, the role of a "consulting" expert is sometimes performed by a staff anthropologist of the NTRB or NTSP, but that is not always possible. Staff anthropologists can be of great assistance to lawyers briefed in native title cases.

43. Of the tasks that Sackville J mentioned in connection with Professor Sutton:

(a) I agree with respect that the expert anthropologist should not be commenting on or "shaping" draft witness statements, nor should he or she be reviewing the Points of Claim or other pleading. That said, it is undoubtedly permissible for lawyers to confer with an expert to make sure that they understand and are therefore able to articulate complicated and nuanced sets of facts and concepts that may need to appear in the pleading.

(b) I agree that that the expert anthropologist should not be sitting in close proximity to counsel, passing notes, suggesting questions or the like. Doing such things, creates the impression that the anthropologist is part of the "team" – something that undermines, or at least appears to undermine, his or her independence.

(c) Although Sackville J may not have gone this far, I would not agree that the expert anthropologist should never tell the lawyers acting for claimants who they think might be good witnesses. My preference would be not to ask who the anthropologist thinks is a good witness, but to ask who he or she thinks the lawyers should speak to. In any event, in my view there is nothing wrong with doing this, particularly where the alternative is for the lawyers to proceed in relative ignorance and potentially to damage the case by not calling people who would be good

witnesses. I do not see how the anthropologist's independence is compromised by this in any significant way.

Findings that an expert anthropologist has been an advocate or had a tendency towards advocacy

44. A not uncommon submission that is made about expert anthropologists who have been called to give evidence by the lawyers acting for the native title applicant that they have crossed the line from expert witness to advocate; or that they have been predisposed in their opinions towards the claimants; or that they not been dispassionate or have lost objectivity.

45. In some cases, submissions of this kind have been rejected.[20]

46. In other cases, however, the Court has found that the anthropologist (or other expert such as a linguist, historian or archaeologist) has assumed the role of an advocate or at least has had a tendency towards advocacy on behalf of the claimant group.[21]

47. A finding that an anthropologist or other expert has assumed the role of an advocate or has a tendency towards advocacy is generally not a finding about the person's honesty. By way of example, in one fairly recent native title case, the judge made a finding that a particular expert had "departed from his independent position as an expert" and had become an advocate, but accepted that this "stems from his genuine beliefs, based on his experience and expertise".[22]

48. Equally, the mere making of the submission that an expert witness has crossed the line and become partisan can be perceived by the expert as an attack on his or her integrity and therefore deeply upsetting. A submission about partisanship should of course only be made by a lawyer where there is a proper basis for it.

49. In my view, lawyers have a role in educating experts, particularly less experienced ones, about the dangers of slippage into advocacy. Occasionally, one comes across an expert who is simply too keen to help. If this occurs, it is necessary for the lawyer to try to curb that enthusiasm. It needs to be understood by the expert that, if that kind of finding is made, his or her evidence is likely to be discounted, which obviously does not help the case.

50. A range of matters may be relied upon to support a submission about advocacy, including that the witness has:

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20 See, for example: *Chapman v Luminis (No 4)* (2001) 123 FCR 62, 296 (von Doussa J); *Drill v Western Australia* [2020] FCA 1510, [954] (Mortimer J); *Gumana v Northern Territory* [2005] FCA 50, 141 FCR 457, [171]-[172] (Selway J); *Harrington-Smith v Western Australia (No 9)* [2007] FCA 31, 238 ALR 1, [416], [427]; *Neowarra v Western Australia* [2003] FCA 1402, [112]-[119] (Sundberg J).

21 See, for example: *Briggs v Victoria (No 2)* [2025] FCA 279, [130] (Murphy J); *De Rose v South Australia* [2002] FCA 1342, [352] (O'Loughlin J); *Gordon v Western Australia* [2018] FCA 430, [118] (North J); *Malone v Queensland (No 5)* [2021] FCA 1639; 397 ALR 397, [870]-[871], [886], [888] (Reeves J); *Munkara v Santos NA Barossa Pty Ltd (No 3)* [2024] FCA 9, [1139] (Charlesworth J); *Nona v Queensland (No 5)* [2023] FCA 135, [546], [688] (Mortimer J); *Risk v Northern Territory* [2006] FCA 404, [124], [132] (Mansfield J); *Ross v Queensland (No 5)* [2022] FCA 763, [30] (Mortimer J); *Rubibi Community v Western Australia (No 5)* [2005] FCA 1025, [255] (Merkel J); *Strickland v Western Australia* [2023] FCA 270, [145]-[146] (Jackson J).

22 *Ross v Queensland (No 5)* [2022] FCA 763, [30] (Mortimer J).

(a) accepted statements by informants at face value, when the circumstances required interrogation of those statements;

(b) failed to address, or skated over, adverse evidence;

(c) failed to make appropriate concessions or had to have appropriate concessions dragged out of him or her;

(d) failed to answer questions in cross-examination, or has given long, discursive and largely non-responsive answers;

(e) been prone to the use of hyperbole and of strong language where the facts do not warrant it, or has failed to qualify statements of opinion that required qualification;

(f) gratuitously offered criticisms of the opposing expert, intended to discredit him or her; and

(g) been unduly defensive in cross-examination.

To the maximum extent possible, these things are therefore to be avoided.

***Munkara v Santos NA Barossa Pty Ltd (No 3)* [2024] FCA 9**

51. There are no doubt many lessons to be learned from Charlesworth J's very lengthy decision in this case, both for lawyers and for experts.

52. For present purposes, I draw attention only to the following findings of her Honour:

(a) that a lawyer and an anthropologist had engaged in "a form of subtle coaching" of Indigenous people to tell their cultural stories in a particular way; this undermined her Honour's confidence in the reliability of that evidence (at [994], [1133], [1135], [1152]);

(b) that concerns were raised about the independence of an anthropologist who had participated in discussions about "strategies" that could be adopted by the Indigenous people at a point in time when legal proceedings were in contemplation and had gone "about his task by eliciting information that would stop the pipeline, rather than as an anthropological enquiry carried out with a neutral attitude in the ultimate outcome" (at [1133]-[1134]); and

(c) that an anthropologist had assumed the role of advocating an arguable or defensible answer to a particular question (at [1139]).

Charlesworth J was also very critical of an expert witness whose field is marine science (at [1150]-[1151]).

53. In passing, I observe that this case highlights the kind of difficulties that can arise where environmental groups enlist Indigenous people to help them pursue environmental objectives, such as stopping a particular development.

The changing role of the anthropologist over time

54. Finally, it may be of interest to draw attention to the changing roles that anthropologists have played since the beginning of the land rights era and in different statutory settings.

55. Under the Commonwealth's Territory land rights legislation of 1976, the claim hearings proceeded by way of administrative inquiry at the end of which the Aboriginal Land

Commissioner reported to the Commonwealth Minister and the Administrator of the Northern Territory, making (or not making) recommendations for the grant of land.[23] The rules of evidence did not apply at the hearings.

56. Particularly in the early years, anthropologists played a bigger role in proceedings before the Commissioner than they do in native title proceedings. For example, in the first land claim hearing, the Borroloola land claim heard by Justice Toohey in 1977, the first witness at the inquiry was Dr John Avery, the expert anthropologist engaged on behalf of the claimants. His evidence occupied many pages of transcript and was given before any Aboriginal evidence had been given. In addition, in the 1970s, 1980s and 1990s, the Commissioner was not uncommonly assisted by a Consultant Anthropologist, as well as by Counsel Assisting.

57. Under the Queensland land rights legislation of 1991, the claim hearings also proceeded by way of administrative inquiry at the end of which the Land Tribunal made recommendations to the Minister for Lands.[24] The Tribunal's procedure was generally within its own discretion and proceedings were required to be conducted with as little formality and technicality as the Act and the proper consideration of matters permitted. It was not bound by the rules of evidence and could inform itself "in any way it considers appropriate".[25]

58. Anthropologists sometimes played a bigger role in proceedings before the Land Tribunal than they do in native title proceedings. For example, at the hearing of the claims to the Lakefield and Cliff Islands National Parks in 1994, a large amount of the questioning of Aboriginal witnesses was undertaken by Professor Bruce Rigsby who was the senior author of the claim materials.

59. Since it has been enacted, the *Native Title Act 1993* (Cth) (**NTA**) has provided for claims to be heard and determined by the Federal Court; this is clearly a big change from the Land Commissioner or Land Tribunal models. The NTA, as originally enacted, had some of the features of the statutory land rights models. In particular, the Court:

    (a) was required to pursue the objective of providing a mechanism of determination that is fair, just, economical, informal and prompt (s 82(1));

    (b) was required to take into account the cultural and customary concerns of Indigenous people (s 82(2)); and

    (c) was not bound by technicalities, legal forms or the rules of evidence.

60. This regime was, however, very significantly amended in 1998. By the amended s 82 of the NTA:

    (a) the requirement for a "fair, just, economical, informal and prompt" mechanism for determining claims was omitted;

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23 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 50.

24 *Aboriginal Land Act 1991* (Qld), ss 4.02, 4.03, 4.16.

25 Ibid., s 8.20(1).

(b) instead of being required to take into account the cultural and customary concerns of Indigenous people, the Court now has a discretion to do so, provided that doing so does not unduly prejudice the rights of any other party to the proceedings; and

(c) the direction that the Court was not bound by technicalities, legal forms or the rules of evidence was omitted and was replaced by a requirement, which still applies today, that the Court is bound by the rules of evidence, "except to the extent that the Court otherwise orders".

It has been held that, for the Court to "otherwise order", some factor must be pointed to that justifies the Court in taking that course.[26] Since 1998, the practice has been that the rules of evidence are simply applied. Although there have been some judicial pleas for native title proceedings to be less adversarial, it is the NTA itself that provides, with some variation, that native title proceedings are to be conducted as ordinary adversarial litigation.

Tom Keely

15 May 2025

[26] *Daniel v Western Australia* (2000) 178 ALR 542, [39].

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ANTHROPOLOGIST AS EXPERT IN NATIVE TITLE CASES IN AUSTRALIA

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Abstract

Anthropologists play an important role in native title cases in Australia, providing expert evidence in the form of reports and sometimes testimony to the court for both applicant and respondent parties. I outline some of the difficulties faced by anthropologists as well as those who commission them for this role. I set out some of the fundamental requirements that develop from the Native Title Act and subsequent court decisions and how this should determine the questions an anthropologist should be asked to consider. Since anthropologists often base their expert views on field data, the nature of field work and the relationships and their implications developed during its conduct are discussed. The role of expert also evokes ethical issues on occasion while the use of early texts and their application to native title questions raises further practical matters. As evidentiary material, the writing of an expert report requires consideration of issues relevant to its admissibility and thus its ultimate usefulness to the court. Finally, I examine how anthropologists may be involved and contribute to non-litigated native title outcomes.

Introduction

Anthropologists play an important role in relation to applications made under the federal *Native Title Act*. At the time of writing (2011) a substantial portion of applied anthropology in Australia related to native title inquiry. Freckelton comments in this regard that, 'in Australia, anthropologists' evidence figures most prominently in native title hearings where it has become a mainstay' (Freckelton 2009, 1099). This engagement has brought to the fore a number of theoretical, procedural, methodological and ethical issues which should inform practice. The successful use of anthropological experts in native title cases continues to demand that attention be paid to the particular nature of anthropological inquiry.

The basis of the anthropologist's expert view is field data gained usually (though not invariably) over a period of fieldwork with those making application for the recognition of native title. This necessarily involves developing close working relationships with those studied, being a key feature of the anthropological method[1]. This raises questions relating to the admissibility of the evidence when opinion is based on field data, particularly with respect to the hearsay rule[2]. It also may incline experts to adopt (even unwittingly) an advocacy role[3]. The nature of the 'facts' upon which anthropological evidence is provided are sometimes subjective and indefinite in the sense that they deal not with quantifiable phenomena like measurements of distance or head counts, but rather with interpretations of cultural phenomenon[4]. Moreover, as an emerging jurisprudence native title is subject to progressive change as legislation and case law modifies aspects of the proofs required by the court or respondents. Such considerations provide a challenging context within which to utilise the services of an anthropologists, particularly in native title cases.

1 See Palmer 2007, 6-7.
2 *Milirrpum v Nabalco Pty Ltd* (1970) 17 FLR 141 (at 161).
3 *De Rose v South Australia* [2002] FCA 1342 at [352]; *Daniel v Western Australia* [2003] FCA 666 at [233].
4 Mansfield J in *Risk v Northern Territory of Australia* [2006] FCA 404 at [468] – [470]. See Freckelton 2009, 1105-7.

Anthropologists have in the past been critical of some aspects of the relationship between their profession and native title law and its practitioners[5]. Those seeking the services of anthropological experts should seek an understanding of the special and sometimes complex issues that surround the use of expert anthropologists as well as sound understanding of the role of anthropology, particularly in native title cases. This may go some way towards avoiding pitfalls which may render such expert evidence either irrelevant or inadmissible.

There are comparatively few senior anthropologists available for native title work which is, in part as a consequence of the issues set out above, both physically and mentally demanding. Thus, at present at least, demand far exceeds supply. Since many native title anthropologists are committed a year or more ahead

The law and the expert

The principal section of the *Native Title Act 1993* (Cth) relevant to the expert opinion of an anthropologist is 223(1). This defines the expression 'native title' and 'native title rights and interests'.

The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

a. the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

b. the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

c. the rights and interests are recognised by the common law of Australia.

Under Section 225 the Act requires the Federal Court to determine whether or not native title exists in relation to the area over which the application is made and, if it does exist, to determine who holds those rights and their extent.

The words, 'the traditional laws acknowledged, and the traditional customs observed', extracted as they are from legislation, refer to matters of law rather than anthropology. However, since they provide a likely basis for framing a case (What were the laws? How do these relate to land and water? What common law rights develop from them?) they are also terms that will be relevant to the manner whereby an anthropologist situates his or her expert views. Like the term 'society' which I discuss below, this has the potential to yield confusion since the terms 'custom', 'tradition', 'traditional' and 'law' are also terms of anthropology which may not have the same meaning as that implied or defined in law.

The High Court stated[6] that a custom was 'traditional' if it had been passed on from generation to generation, usually by word of mouth and common practice. Further, the origins of its content are required to be evident in the normative rules of the indigenous peoples that existed before sovereignty so that it is a part of the normative system (a body of law and custom) that has had a continuous existence and vitality since sovereignty.

Gleeson CJ, Gummow and Hayne JJ wrote that as a consequence in a native title proceeding,

5 Palmer 2007; Trigger 2004; Morton 2001; Chalk 2001; Sansom 2007; Glaskin 2007; Morton 2007; Sutton 2007.

6 *Yorta Yorta v Victoria* (2002) 214 CLR 422 at 444-5 [46]-[48], 456 [86]-[87].

> it will be necessary to inquire about the relationship between the laws and customs now acknowledged and observed, and those that were acknowledged and observed before sovereignty, and to do so by considering whether the laws and customs can be said to be the laws and customs of the society whose laws and customs are properly described as traditional laws and customs[7].

The use of the term 'society' serves to emphasise the relationship between the people and the laws and customs[8] of that group. There is then a nexus between the 'society' and the laws and customs of that society.

> Law and custom arise out of and, in important respects, go to define a particular society. In this context, 'society' is to be understood as a body of persons united in and by its acknowledgment and observance of a body of law and customs[9].

Gleeson CJ, Gummow and Hayne JJ go on to state that there is a relationship between rights, customary laws and a society.

> To speak of rights and interests possessed under an identified body of laws and customs is, therefore, to speak of rights and interests that are the creatures of the laws and customs of a particular society that exists as a group which acknowledges and observes those laws and customs. And if the society out of which the body of laws and customs arises ceases to exist as a group which acknowledges and observes those laws and customs, those laws and customs cease to have continued existence and vitality. Their content may be known but if there is no society which acknowledges and observes them, it ceases to be useful, even meaningful, to speak of them as a body of laws and customs acknowledged and observed, or productive of existing rights or interests, whether in relation to land or waters or otherwise[10].

The nature and extent of a 'particular society' whose members acknowledge and observe laws and custom is a matter that requires consideration in the context of an application made for the recognition of native title. Legal commentator Lisa Strelein has noted that the need to establish the existence of a 'coherent and continuous society' has 'emerged as a fundamental threshold question for native title claimants (Strelein 2009, 80, 98).

The relationship between anthropological concepts of 'society' or 'community' and the legal requirements of the native title legislation is complex since these terms may not command the same meaning in anthropology as they do in law (see Palmer 2009, 3-5 for a discussion). Nevertheless the requirements of the *Native Title Act* and decisions that have developed from it set definite areas that are likely to benefit from anthropological expertise. These include a consideration of the nature of the society at the time of the assertion of sovereignty by the British and the content of the laws and customs of that society at or about that time. Anthropologists of course do field work and collect data as contemporary activity: they cannot record laws and customs of the past except in so far as they are recalled by those with whom they work. While such necessary reconstruction is based to some extent on oral tradition it is more substantially derived from the accounts of early ethnographers, diarists, commentators and other archival materials. This brings with it its own problems which I discuss below.

7 214 CLR 447 [56].
8 214 CLR 445 fn (94).
9 214 CLR 445 [49].
10 214 CLR 422 [50].

Mansfield J wrote[11] that the High Court's decision in *Yorta Yorta* required continuity for the Aboriginal society as well as the continued observance of its traditional laws and customs. Thus if the society ceased to exist,

> [T]he rights and interests in land to which these laws and customs gave rise, cease to exist. If the content of the former laws and customs is later adopted by some new society, those laws and customs will then owe their new life to that other, later, society and they are the laws acknowledged by, and customs observed by, that later society, they are not laws and customs which can now properly be described as being the existing laws and customs of the earlier society. The rights and interests in land to which the re-adopted laws and customs give rise are rights and interests which are not rooted in pre-sovereignty traditional law and custom but in the laws and customs of the new society[12].

The degree to which laws and customs may change or have suffered some interruption is also pertinent. Some degree of change, adaptation or interruption, 'will not necessarily be fatal to a native title claim'. However, it is also a question of how much is too much.

> The key question is whether the law and custom can still be seen to be traditional law and traditional custom. Is the change or adaptation of such a kind that it can no longer be said that the rights or interests asserted are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant peoples when that expression is understood in the sense earlier identified?[13]

What is required then is evidence of the perdurance over time and up to the present of those customs as well as the society wherein they were enmeshed. Here the anthropologist as student of the society making application can assist the court by providing his or her views, based on data collected in the field, of the laws and customs of that society. So too can the expert provide a view of the continuity of the laws and customs based on a comparison between the reconstructed or orally recalled past and the present. The assessment of the degree of change and at what point it might prove fatal has been subject to appeal[14] .

This comparative approach would appear to lie at the heart of the anthropologist's involvement as an expert in applications for the recognition of native title. Expert evidence that advances no view as to the customary system and how the contemporary laws and customs can be understood to be substantially rooted in and derived from them will be of very limited assistance to the court[15].

The usefulness of anthropologists to the native title process has been recognised by the court.

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11 *Risk v Northern Territory of Australia* [2006] FCA 404 at [56].

12 214 CLR 422 at [53].

13 214 CLR 422 [83].

14 *Bodney v Bennell* (2008) 167 FCR 84 [74]. See Strelein 2009, 100-105 for a discussion.

15 'However, in the present case, no attempt has been made to identify a pre-sovereignty society, the laws and customs which such a society may have acknowledged and observed in connection with rights and interests in land and waters, any connection between the apical ancestors and such society, or any connection between pre-sovereignty and current laws and customs of the relevant kind. The question is whether the applicant has stated the factual basis of its claim to the extent required by the Act. If it offers no explanation as to how the claim group's laws and customs can be sourced to those of a society existing prior to first European contact, then that obligation has not been discharged. In the present context, I cannot see that Mr Hagen [anthropologist], any more than the applicant or its deponents, can simply re-state the claim so that such restatement becomes the factual basis of the claim.' Dowsett J. *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 at [77].

Mansfield J[16] was of the view that anthropological evidence could provide a framework for understanding Aboriginal evidence[17]. He considered that anthropologists also had a contribution to make with respect to the issue of continuity.

> Not only may anthropological evidence observe and record matters relevant to informing the Court as to the social organisation of an applicant claim group, and as to the nature and content of their traditional laws and traditional customs, but by reference to other material including historical literature and anthropological material, the anthropologists may compare that social organisation with the nature and content of the traditional laws and traditional customs of their ancestors and to interpret the similarities or differences[18].

The focus of the anthropological research and the substance of the expert's views need to be directed towards these native title questions. In particular, the anthropologist should be competent to provide to the court an account of the claimants' laws and customs that characterise the claimant society and attest to a normative system that codifies rights to country. It is, however, the customary bases of these laws, customs and normative referents that provide the essential forensic component. Oral testimony may assert that current laws are formed from time beyond reckoning but recollections may be shallow, conspire to endorse the normative system and lack independent corroboration. The weight that may be afforded to such evidence is likely to be limited. The court may then benefit from an expert view as to how a society and its laws and customs may have looked at the time of sovereignty and how the continuity of these laws and customs may be best understood.

Native title research

Fieldwork and familiarity[19]

Anthropologists expect to do fieldwork to gain their raw data. The body of theory used by anthropologists then provides a basis for the analysis of culture, based on a consideration of the primary field data. Researchers may anticipate committing time to the field work endeavour. This is because a fundamental tenet of the anthropological method is some degree of immersion in the society being studied. This provides for an appreciation and comprehension of the nature of the social relationships and structures of the society that is unavailable to those whose experience of it is cursory and consequently superficial. This manner of undertaking anthropological research, known as 'participant observation' was pioneered by the anthropologist B. Malinowski (1922, 18). The application of a body of theory-like knowledge to primary field data meant that 'ethnography' was no longer simply recording and categorisation, with doubtful speculation, but comprised a more rigorous intellectual process.

> For native title research the question frequently asked is, 'how long does the researcher need to spend in the field?' A separate but related question has to do with the degree of familiarity the researcher may have with those studied as a result of past work in the

16 *Alywarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group v Northern Territory* (2004) 207 ALR 539 at [88].

17 In relation to communication difficulties see *Jango v Northern Territory* (No. 4) [2004] FCA 1539 at [40]. See also *Ward v Western Australia* (1998) 159 ALR 483 at 531 per Lee J; *Risk v Northern Territory of Australia* [2006] FCA 404 at [465] per Mansfield J.

18 *Alywarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group v Northern Territory* (2004) 207 ALR 539 at [88].

19 An examination of the methods of anthropology and how they are clearly differentiated from other forms of evidence adduced in the native title process is provided in Palmer 2007, 4-6. I also there discuss issues relevant to the time needed in the field and the relationship between time in the field, prior familiarity and experience (ibid., 6-7). This paper should be read in conjunction with the account provided there.

> region or with the claimant community. While there are no simple or single answers to these questions, they are relevant to the anthropologist working on a native title inquiry. This is because they raise issues that potentially affect the admissibility of the expert evidence and certainly the weight that may be given to it by the court.

Classic anthropological field work of the sort undertaken for a doctorate would most probably extend over a period of nine to twelve months. Over this period the anthropologist would learn the language (if different to his or her own), develop relationships of trust with those studied, participate in the quotidian events of the community and come to an appreciation of specific aspects of the culture, depending on the subject of his or her study. Such extended periods of field work are unlikely to be practical in the context of a native title inquiry. Not only are applications increasingly subject to court orders seeking to expedite matters that, in some cases, have been a decade or more in the preparation, but funding constraints are unlikely to support such a relatively expensive process. That said, proper anthropological research cannot be done without at least some primary fieldwork allowing for targeted data to be collected and this cannot be done quickly. One anthropologist has recently suggested that a minimum of six months (120 working days) is an appropriate figure for field work in an area in which the anthropologist has not previously worked, but that in some cases twice that would be required (Trigger 2009, 2). My own view is that an experienced anthropologist may acquire the primary data required in a shorter time than this, but much depends upon the facility with which the researcher conducts his or her research as well as practical issues that can prove significant to the management of the research process.

The degree to which the researcher is already familiar with the community may be relevant as a researcher who is well-known to those with whom he or she works will already have a working relationship (presumably based on mutual trust) as well as an understanding of the culture. However, prior knowledge of the community which is the subject of the inquiry is not necessary, particularly when the practitioner is highly experienced. From a practical point of view finding a suitably qualified anthropologist who is already familiar with the study area is often impossible. In cases where there is internal dispute, overlapping claims and sectarian interests inform the ethnography, using a person who has not worked in the area before could provide substantial advantage. Such a person has no history of working with one group over another, and is thus seen to be independent of various competing groups. Moreover, those familiar with a community and having developed close personal relationships with those whom they may have known for years (sometimes decades) may have allowed these relationships to colour their views which might compromise their objectivity.

Some of these matters have been considered at various times by the court with no clear conclusions as cases are different. For example, Olney J stated of one anthropologist that the evidence suffered,

from a combination of factors, notably that she has no prior anthropological experience in the area under consideration, she had not read the ethnographic literature of the region and has relied upon the written witness statements, not all of which were in evidence and some of which were shown to be inaccurate[20].

In another case Olney J found that anthropologists involved in the matter had extensive qualifications and experience in anthropology and land tenure and had undertaken substantial field work which supported their evidence[21]. In contrast, Sackville J was critical of the anthropologist Peter Sutton who

20 *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 at [55].

21 *Yarmirr v Northern Territory* (1998) 82 FCR 533 at [562]-[563]. See also *Ward v Western Australia* (1998) 159 ALR 483 at [531].

had clocked up 400 research days[22] which the Judge considered to be too long and unnecessarily duplicated other evidence. However, Professor Sutton expressed the view that a longer period would have been beneficial[23].

The dangers of partiality developing as a result of a long-term association with a community were noted in *Neowarra v State of Western Australia*[24] where the anthropologist acknowledged his close association with the claimant group over a period of years. However, the Court accepted that the evidence and opinions were at all times professional, despite the inherent 'closeness' to the claimants[25].

Not all expert anthropologists will undertake field work. Those called by respondent parties (usually the states or territories) are unlikely to undertake field work. Instead they need to rely on their anthropological training and experience and prior field work in similar areas – unless they had also worked in the application area in times past. One view is that those who have not undertaken field work would carry less weight than those who have[26]. Reliance upon an ethnography drawn from another area with which the expert is familiar must be shown to be pertinent. However, the courts have shown that respondent experts may be influential in the court, despite a lack of field work in the region[27].

Anthropologists called by respondent parties to an application for the recognition of native title would generally be expected to provide opinion on the methods, propositions, procedures and views of the applicant's expert. Such a process should be based upon accepted academic and scholarly practice. An expert who provides such evidence to the court is not then relying on field data but provides a scholarly critique of the work of another with a view to assisting the court in its consideration of that evidence.

The conclusion to be drawn from these examples is that no single arrangement suits all cases. Given that the expert meets the minimum qualifications that will yield requisite recognition by the court there would appear to be some variation in what is regarded as an acceptable standard of familiarity with the culture under study. In addition 'more' is not always understood by the court to be 'better' while there are dangers in a expert being seen to be too 'close' to those he or she studies for fear that it might colour their objectivity. Nor is it necessarily desirable to use the services of an anthropologist already familiar with the area of study – even if this were to be practical which in most cases it is not. These are matters that need to be carefully weighed when commissioning an expert to ensure the balance between expediency and familiarity, experience and application are finely tuned.

Ethical issues

The relationship that develops between an anthropologist and those studied, founded as it is upon trust, raises ethical issues which require consideration and accommodation. Australian anthropologists share a code of ethics[28]. Some of the matters likely to be of concern in this regard relate to conflicts within claimant groups[29], communicating the anticipated consequences of research and confidentiality[30],

22 *Jango v Northern Territory of Australia* (2006) 152 FCR 150 (Jango) at [313, 320].
23 *Jango*, [316]. See Palmer 2007, 4-5 for further discussion.
24 [2003] FCA 1402 at [71; 112-119].
25 *Neowarra v State of Western Australia* [2003] FCA 1402 at [113]. For other examples of comment in this regard see *Gumana v. Northern Territory of Australia* [2005] FCA 50 at [152-172]. *De Rose v. South Australia* [2002] FCA 1342 at [352] and *De Rose v. South Australia* [2003] FCAFC 286 at [263].
26 *Neowarra v State of Western Australia* [2003] FCA 1402 at [120].
27 Rubibi Community v State of Western Australia (No 5) [2005] FCA 1025, [34], [45], [249] [252]. Bodney v Bennell [2008] FCAFC 63 [86-95].
28 See www.aas.asn.au/docs/AAS_Code_of_Ethics
29 See Australian Anthropological Society Code of Ethics 3.1.
30 *Ibid*., 3.4.

communicating the results of research[31] and the purposes to which the research will be put[32]. There is an expectation that anthropologists should not knowingly or avoidably allow information gained on a basis of trust to be used against the legitimate interests of those studied by hostile third parties[33]. This provides for an indicative list of some of the relevant issues. There are many more and their full consideration would require separate treatment.

While it could be argued that these are matters for the anthropologist, those seeking to commission researchers to undertake inquiry for a native title claim must be aware of the potential difficulties that may arise if anthropologists are placed in situations that have the potential to create ethical difficulties. To this end, it is essential that all lawyers who seek the services of an expert anthropologist first read their Code of Ethics. The matter is touched on by Freckelton (2009, 1109) who is of the view that 'many difficult ethical questions beset anthropologists' methodologies and opinions within the context of land clam hearings'[34]. He provides some additional references to ethical codes. Elsewhere I have discussed the matter briefly (Palmer 2007, 2) and provided some further references.

Early ethnography and archival materials

Following field work, the second task for the anthropologist in the preparation of expert views relates to a consideration of relevant early ethnography and archival materials. The continuity of laws and customs required by the *Native Title Act* suggests application of the 'before and after' test. Consequently, the expert must provide a view as to the nature of the relevant society at or about the time of sovereignty. The primary source for this is the ethnographic accounts of those who lived in times past, and who recorded laws and customs which might be considered to reflect the laws and customs of the pre-sovereignty society. This is a complex area and is by its very nature speculative.

Reconstructive anthropology must be treated with caution, depending as it does on interpretations of interpretations. The observations of many of the early writers present difficulties. Accounts were generally made by untrained observers, since they pre-dated the development of professional anthropology in Australia. Many brought with them preconceptions, value-laden prejudices and assumptions about the nature and structure of 'primitive' societies. Most were interested in the categorisation of certain social types of phenomena rather than providing a distinct ethnographic account of a single society. Most had little interest and consequently no understanding of how rights to the country of the people they identified were exercised or perpetuated. Much early data, either published or in manuscript form are scattered, incomplete and not easy of access.

The relationship between the oral accounts of the claimants and these oral sources has been the subject of a critical account by B. Sansom (2006). Sansom has been critical of any reliance on the oral account which he characterises as typically 'shallow'. My own view in this regard is that the oral evidence of claimants should be considered in the context of the archival accounts and those contained in the earlier ethnography. I consider that practitioners of an oral tradition may utilize devices to limit arbitrary change to the form and content of customary lore (Palmer 20011). This does however raise some methodological issues which are relevant to the development of an expert view (Palmer 2011).

31 *Ibid*., 3.5.
32 *Ibid*., 3.7.
33 *Ibid*., 3.10.
34 Anthropology is no more 'beset' by ethical issues than any other professional practice (including law) that is governed by ethical principles.

The reliability of early sources and the date beyond which they should be regarded as being 'too modern' to be of assistance is also matter for debate (Sansom 2007; Burke 2007; Glaskin 2007; Sackett 2007). Obviously one consideration must be the date of the frontier in the area where the ethnographic material was recorded, as this varied across the continent depending on the history of settlement. Thus while dates of sovereignty vary across Australia depending for the most part on the state or territory, the date of what I call 'effective sovereignty' moved with the frontier. On the assumption that prior to European settlement and alienation of a region laws and customs would have remained more or less unaltered, the date of effective sovereignty can provide a useful reference point for reconstruction that is not beyond the reach of the earlier ethnographies[35].

The expert report

The results of the expert's research should be set out in an expert report. Here adherence to the Practice Note of the Federal Court is essential[36]. This has caused some difficulties in the past. For example, Olney J wrote[37] of the experts' report in the Yarmirr case that it served 'the very useful purpose of providing the contextual background'. However, he went on, 'Whether or not a particular statement in the report is to be classified as mere pleading, as expert opinion or as hearsay is not always readily apparent'. He found the report to be both 'reliable and informative' and while it contained some speculation ('but not much') his Honour had 'not found it necessary to refer to it'. Not all judges have been so forgiving. Gleeson CJ, Gaudron, Gummow and Hayne JJ stated[38] that the report had been received in to evidence without objection, 'despite it being a document which was in part intended as evidence of historical and other facts, in part intended as evidence of expert opinions the authors held on certain subjects, and in part a document advocating the claimants' case'.

I have explored elsewhere some of the significant issues that develop from the presentation of the expert's evidence, the requirements of the court and what might be understood to represent best practice in this regard (Palmer 2007, 7-11). Issues considered include the relationship between the expert's evidence and that of the claimants (*ibid*., 8-9), the basis upon which the expert provides his or her view (*ibid*., 9-10), the Points of Claim (*ibid*., 10) and the brief provided to the expert (*ibid*., 11-12). Olney J (above) identified some parts of the expert report he considered as 'mere pleading'[39] which has been an issue for expert evidence brought to a head in the *Jango* case.

Mere pleading

The history of anthropologists' involvement in land claims in Australia develops in large part from the *Aboriginal Land Rights Act (NT).* Under this legislation anthropologists were not subject to the operation of the *Evidence Act* as is now the case in hearings held in relation to the *Native Title Act*. Perhaps too as a consequence of the anthropologist's frequent close connection with those studied (discussed above) there was a potential for anthropologists to assume advocacy roles. Sackville J reported in this regard in relation to the *Jango* case that counsel had,

35 Such a proposition is accepted by the State of Queensland (State of Queensland 2003, 5). The States and Territories are joined as respondents to any application for recognition of native title by virtue of a provision of the Act.

36 http://www.fedcourt.gov.au/how/practice_notes.html#cm7 The Practice Direction was replaced on 25th September 2009 with Practice Note CM7.

37 *Yarmirr v Northern Territory* (1998) 82 FCR 533 at [563].

38 *Commonwealth v Yarmirr* (2001) 208 CLR 1 at [84].

39 Trigger 2004.

> Attributed this deficiency [to pay sufficient regard to the requirements of the *Evidence Act*] to practices that have grown up in claims made under the *Aboriginal Land Rights Act 1976* (Cth) (‘*Land Rights Act*’) and have persisted in the preparation of expert evidence for claims made under the *NTA*. According to Mr Parsons, it has been common for parties to rely upon discursive expert reports that have been prepared without assistance from lawyers and therefore with little regard to the requirements of the *Evidence Act*.[40]

It was clearly an error to rely on past practice, as had already been flagged in the Yarmirr case noted above. Sackville J was particularly critical of the part played by the anthropologists in the formulation of the case. He expressed doubt as to their independence.

> I formed the view that Professor Sutton played an active part in formulating and preparing the applicants’ case and that this participation influenced both the way in which their case was presented and Professor Sutton’s approach in giving evidence. I understand and accept that in the peculiar circumstances of a native title claim (including a compensation claim) it may be difficult for an anthropologist to remain as aloof from the parties as might be the case with, say, an expert economist or accountant in other kinds of litigation[41].

His Honour continued that while he did not doubt that Professor Sutton was at pains to maintain his independence:

> The fact remains that the applicants’ case, as Professor Sutton was aware, closely follows the framework he created. Of course, the circumstance that a pleaded case closely corresponds with the evidence of an expert witness may simply reflect the expert’s independent analysis of the objective facts. In this case, however, my strong impression was that the presentation of evidence by the applicants was heavily influenced by the approach taken by the two anthropologists[42].

Of particular concern to the Judge was the anthropologists’ involvement in the preparation of the witness statements. He was of the view that, ‘It would have been very difficult for them to comment on witness statements without taking into account their understanding of the applicants’ case and the approach taken in their own reports’[43].

These are practical and organisational matters that are the responsibility of those lawyers who prepare the case for trial. This is not to say that lawyers may not seek the help and advice of anthropologists in the work they undertake in preparing witnesses and taking statements for submission as evidence. Such assistance may be of substantial benefit since an anthropologist may have understandings and knowledge not available to others lacking his or her experience and expertise. However, the anthropologist so employed is best not then used as an expert in a native title claim because their independence may be open to question.

The bases of the expert view

Anthropologists generally base their interpretations of culture upon field data. However, the discipline does not generally require rigour in this regard since such interpretations may be asserted progressively from sometimes disparate ethnography so that final understandings are not interpreted with respect

40 *Jango v Northern Territory* (No 2) [2004] FCA 1004 ‘Ruling on Evidence’ at [6].
41 *Jango v Northern Territory* (No 2) [2004] FCA 1004 at [322].
42 *Jango v Northern Territory* (No 2) [2004] FCA 1004 at [322].
43 *Jango v Northern Territory* (No 2) [2004] FCA 1004 at [323].

to a single ethnographic note[44]. The presentation of an expert view to the court requires a rather different procedure and one not altogether familiar to anthropology. Opinion must be based 'wholly or substantially' on specialist knowledge. Consequently, the opinion must be presented in a manner that allows evaluation of this requirement. This means that an expert view must be shown to be based on data that are identifiable and can themselves be evaluated. The anthropologist must therefore provide a clear indication of the basis for his or her view. This may be by a direct reference to the field note or field notes that are relevant, or to some other scholarly work which is regarded as having some authority, or perhaps more generally to the expert's professional training and experience. These bases are then able to be interrogated, should this be considered necessary and the bases of the reasoning made clear.

A related consideration is the need to differentiate between facts and opinions. Sackville J noted in this regard that this was not apparent in the Yulara anthropology report,

> Like some of the reports discussed by Lindgren J in Harrington-Smith (No.7), the Yulara Anthropology Report often does not clearly expose the reasoning leading to the opinions arrived at by the authors. Nor does it distinguish between the facts upon which opinions are presumably based and the opinions themselves. Indeed, it is often difficult to discern whether the authors are advancing factual propositions, assuming the existence of particular facts, or expressing their own opinions. Certainly the basis on which the authors have reached particular conclusions is often either unstated or unclear[45].

The anthropology then needs to set down the 'facts' as field data, referenced to a relevant field note or other source. The inferences drawn from the facts can then be flagged by an introductory phrase such as, 'in my view' or 'in my opinion'. Care needs to be taken that the citation provided truly supports the inferences drawn. Sackville J was critical of Professor Sutton's footnoting commenting that,

> [s]crutiny of the notes cited in the relevant footnote provides scant support for the conclusions … many of the notes (as one might expect) are cryptic and therefore difficult to interpret. But on their face the words recorded do not appear to justify the proposition.[46]

Care needs to be exercised then that there is a direct correlation between the facts as referenced and the inferences drawn from them.

While anthropologists have been identified as providing a means whereby 'evidentiary gaps' can be filled in a native title case, the status of the expert's evidence is particular. He or she is not able to provide the court with second-hand evidence of the sort, 'Johnny told me that he had rights to this country'. Such evidence, to have any weight, must come from the claimant himself, in one admissible form or another. This much is evident. There is an important implication of this fact for the expert and his or her report: opinions that rely on field data require that the data upon which the expert relies be admitted in evidence so its veracity can be judged. At a practical level this might require the barrister making a list of those 'facts' derived from the field data upon which the expert relies and ensuring that these are explored in the presentation of evidence. Ensuring the congruence of the evidence and

44 For a relevant discussion of this see *Jango v Northern Territory* (No 2) [2004] FCA 1004 at [336].

45 *Jango v Northern Territory* (No 2) [2004] FCA 1004 at [11]. See also *Harrington-Smith on behalf of the Wongatha People v Western Australia (No. 7)* (2003) 130 FCR 424 at [31] per Lingren J.

46 Jango v Northern Territory (No 2) [2004] FCA 1004 at [336].

the field data is an intelligent way to manage the claim. From the anthropologist's point of view this also ensures that there is some rigour in the nature of their data which should in any event always be replicable.

An anthropologist, like any other expert, cannot be expected to know the requirements of the law, although those with some experience in these matters should command some knowledge in this regard. Ultimately it is the responsibility of those who frame the case (for applicants or respondents) to ensure that the expert evidence, like any other form of evidence, is relevant, admissible and ultimately helpful to the court. In this regard Lingren J made comment on the the lawyer's role in settling the final form of the expert's report.

> Lawyers *should* be involved in the writing of reports by experts: not, of course, in relation to the substance of the reports (in particular, in arriving at the opinions to be expressed); but in relation to their form, in order to ensure that the legal tests of admissibility are addressed. In the same vein, it is *not* that the legal test of admissibility is attracted by nothing more than the writing of a report in accordance with the conventions of an expert's particular field of scholarship[47].

Rather his Honour continued, the legislation required that relevant aspects of the *Evidence Act* apply. Consequently the question of admissibility was of fundamental importance.

Alternative settlements

The *Native Title Act* provides for settlements reached without the need to go to trial. The Act contemplates that the first port of call is mediation through the National Native Title Tribunal which could result in a 'consent determination', given final legal effect by order of the Federal Court (Ritter 2009, 6-7). However, there are numerous other 'alternative settlements' that have been reached (Strelein 2009, 149). According to one legal academic there is an 'overwhelming view that native title issues are best resolved through reaching agreements' (Ritter 2009, 174). While it seems unlikely that litigation will cease, particularly as the Federal Court increasingly is pressing for cases to be finalised or brought to trial, it is relevant to consider the role of the expert anthropologist in applications that are subject to alternative settlement procedures.

Claims for the recognition of native title must be made by application lodged with the Tribunal. Registration of the claim, to secure the right to negotiate over what are called 'future acts' on the application area (e.g. creation of exploration or mining rights), requires submission of materials relevant to the Tribunal's 'registration test' (Ritter 2009, 7-8). Materials submitted are evaluated against this test and the claim either registered or not depending on the assessment. Once an application is lodged and perhaps registered the State as respondent may assess the claim usually upon the basis of an assessment made against its own assessment guidelines, being different for each state and territory. There are then, quite apart from the expert report produced for a trial, potentially three other circumstances that might require expert anthropological opinion: application, registration and assessment for a consent determination.

The nature of the materials required and relevant procedures in relation to these three processes are not my concern here beyond noting that anthropological materials may be of assistance. In particular the state or territory, in its assessment of the claim for a potential consent determination, requires

47 *Harrington-Smith v Western Australia (No.7)* (2003) 130 FCR 424 at [19]. This passage was quoted with approval by Sackville J in *Jango v Northern Territory (No.2)* [2004] FCA 1004 at [9].

'connection material' which commonly includes a report written by an anthropologist. Preparation of such a report (a 'connection report') may raise issues relevant to the expert's evidence in relation to the preparation of a expert report for a trial, should it eventuate, which, of course, can never be ruled out.

The first point to make in relation to these processes is that they need to be differentiated in terms of what is asked of the expert anthropologist. Consideration also needs to be given as to whether it is prudent to involve the expert in what might be understood as the preparation of the claim (application, registration) and so call into question the independence of the expert[48]. On the other hand, a claim prepared without proper anthropological advice might run the risk of being inadequately described or founded upon principles that would subsequently prove to be not supported by the evidence. Applications and subsequent registration almost certainly do need the involvement of an expert. However, consistent with their role as an expert, he or she should be relied upon to provide an independent expert view. The view is then extrapolated by those with carriage of the case for the preparation of application or registration materials, which are likely to include other evidentiary items as well. This properly ensures that the expert does what the expert does best: provides independent expert advice. He or she is not understood in any way to be involved in the strategic management of the claim.

So called 'connection reports' are written to address specific criteria set down by the states in documents setting out their own understanding of what is required for a consent determination[49]. Such reports are sometimes distinguished from expert reports (that is a report produced specifically for a trial). They may be considered to be less stringent or rigorous or perhaps provide a more superficial coverage of the relevant issues. However, in my experience there is a good deal of confusion in this regard and the terms 'connection report' and 'expert report' (sometimes 'anthropologist's report') are often used interchangeably or without clear differentiation.

While the 'connection report' and the 'expert report' may be understood to serve different purposes they must both cover the same native title issues. Should mediation fail and the matter go to trial, the connection report may suffer deficiencies of admissibility, detail and stringency of process (of the sort discussed in this paper) and probably will have to be re-written to comply with the Practice Direction.

This emphatically counsels against preparation of 'connection reports' *per se* and instructs that anthropologists should be asked to write a single expert report which is used first in mediation and then, should the negotiation process fail, may be used as the primary means of presenting his or her expert views. Not only is this a wise way to proceed in relation to limiting the opportunities for inconsistencies and divergence of views between one report and another, but it makes sound economic sense. Most Native Title Representative Bodies (those that manage the native title process on behalf of claimants) cannot afford to have two substantial reports written - given the extensive time and resource requirements for field work and other research. Dowsett J has been critical of the role of anthropologists, their lack of availability and the time taken to obtain their reports (Dowsett, 2009, 15-16). Limiting the number of reports that have to be written would go some way to addressing these problems. Clear direction and management as well as the wise selection of capable and well qualified experts are additional if unrelated factors.

48 *Cf Jango v Northern Territory* (No 2) [2004] FCA 1004 at [322].

49 Known as 'Guidelines' neither the Northern Territory nor the ACT have such a document.

The expert report may serve as a 'connection report' and yield benefit in terms of both resourcing and locating the expert as independent of the process of claim preparation and management. Consequently, it would be feasible and desirable to use the one single expert report in support of both initial application and registration. As with the connection assessment process, the use of the expert report (or such parts of it as were regarded as being relevant) would be supplemented by additional materials, prepared by those managing the claim, including affidavits and other evidentiary or supportive materials.

Conclusion

I have set out some of the issues that an anthropologist might be asked to consider in providing an expert view to the court regarding native title questions. In this I have provided an outline methodology as to how this might be best accomplished, having regard to the questions likely to be asked. I have noted some of the more obvious pitfalls for an anthropologist and the commissioning lawyer. These pitfalls have become apparent over the last ten years or so as native title litigation has become increasingly contested. The application of the *Evidence Act* in 1998[50] mandated vigour to evidence and process which had not been required before. These changes have challenged the approach of both anthropologists and lawyers who had been in the habit perhaps of adopting a much less structured and legally rigorous approach. Key issues like admissibility, demonstration of the bases of the expert's views, differentiation between fact and opinion, the importance of an expert's view being independent and non-partisan, the maintenance of distance between the expert and case formation and the relationship between the points of claim and the expert' views are all critical issues which I have discussed here and elsewhere (Palmer 2007).

Fundamental to getting these matters right are relationships. In practical terms, for example, the involvement of the lawyer in the final form of the expert report will require considerable tact, inter-personal skills and flexibility on both sides. One of Sutton's complaints regarding the final form of his expert report was that his original report had been emasculated by the application of what he called the 'lawyer's Occam's Razor'[51]. The report in question was not written consistent with anthropological orthodoxy and was of limited assistance to the court. It attracted critical comment from the judge who expressed disapproval of the expert[52]. Yet the incident should rightly be seen as a failure of those who prepared the evidence rather than of the expert witness called (Palmer 2007, 13-15).

Unlike experts in other fields, anthropologists base their expertise upon a detailed knowledge of specific human relationships and cultural exchanges relevant to those they study – in native title inquiries those who comprise the applicant community. Anthropologists write of these relationships according to the principles of their discipline and by reference to an epistemology that may not readily separate 'fact' from 'opinion' or 'interpretation' from field data. Anthropologists understand that at least some facts are subjective and lack absolute value.

This is not inimical to native title process or the application of law. This particular aspect of the anthropological process has been recognised by Mansfield J[53] who understood that so called 'facts', 'have varying degrees of primacy or subjectiveness'[54]. This accepted, the important thing from his Honour's perspective was to ensure,

50 As a consequence of amendments to the *Native Title Act*. Strelein 2009, 192.
51 *Jango v Northern Territory (no 2)* FCA 1004 at [314].
52 *Jango v Northern Territory (no 2)* FCA 1004 at [314].
53 *Risk v Northern Territory* [2006] FCA 404 at [468] to [470].
54 Cf Palmer 1992, 36.310.

> [T]hat the intellectual processes of the expert can be readily exposed. That involves identifying in a transparent way what are the primary facts assumed or understood. It also involves making the process of reasoning transparent, and where there are premises upon which the reasoning depends, identifying them[55].

This provides for a positive practical way forward. However, what is required is more than the application of a methodology that describes an intellectual process of the inter-relationship of cognitive sets. Anthropologists understand societies as sets of relationships and the meanings that hang off them. This is the basis of cultural interpretations and a key factor in the anthropology as explanatory text. Getting a fit between an approach that posits societies in terms of sets of relationships rather than as a thing characterised by the presence of nominated facts requires skill and tact. It also requires the initial development of common understandings along with an appreciation of what is required in the legal process and what the anthropologist as an expert may be able to provide which will be of assistance. This is a two way street. The effecting of successful outcomes requires far more than the application of stated principles and practice. It demands mutual appreciation, comprehension and recognition. It demands insightful planning particularly by those lawyers who seek to apply anthropological expert evidence to a native title matter.

55 *Risk v Northern Territory* [2006] FCA 404 at [470].

References

Burke, P. 2007. 'The problem when flexibility *is* the system'. *Anthropological Forum* 17.2, pp 163-165.

Chalk, A. 2001. 'Ansthropologists and Violins – A lawyer's view of expert evidence in naive title cases'. Paper presented to conference, 'Expert evidence in Native Title court cases: issues of truth, objectivity and expertise'. 6-7 July, 2001, Adelaide University.

Dowsett, J.A. 2009. 'Beyond Mabo: Understanding native title litigation through the decisions of the Federal Court'. Available at http://www.fedcourt.gov.au/aboutct/judges_papers/speeches_dowsettj2.html

Freckelton, I. 2009. 'Anthropologists' Evidence'. In, *Expert Evidence. Law, Practice, Procedure and Advocacy* (I. Freckelton and H. Selby eds.). Law Book Co, Thomson Reuters, Sydney, pp 1098-1113.

Glaskin, K. 2007. 'Manifesting the latent in native title litigation'. *Anthropological Forum* 17.2 pp 165-168.

Malinowski, B. 1922. *Argonauts of the Western Pacific*, Routledge and Kegan Paul, London.

Morton, J. 2001. 'I-witnessing I the witness: courtly truth and native title anthropology.' Paper presented to conference, 'Expert evidence in Native Title court cases: issues of truth, objectivity and expertise'. 6-7 July, 2001, Adelaide University.

Morton, J. 2007. 'Sansom, Sutton and Sackville: three expert anthropologists? *Anthropological Forum* 17.2 pp 170-173.

Palmer, K. 1992. 'Forensic Anthropology'. In, *Expert Evidence*, Law Book Co., (subscription service), chapter 36.

Palmer, K. 2007. 'Anthropology and applications for the recognition of native title' *Land, Rights, Laws: Issues of Native Title*, vol.3, no.7.

Palmer, K. 2009. 'Societies, communities and native title'. Land, Rights, Laws, Issues in Native Title 4.1. Native Title Research Unit, AIATSIS, Canberra.

Palmer, K. 2011. 'Piety, fact and the oral account in native title claims' in *Anthropological Forum,* 21.3 pp. 269-286.

Queensland Government 2003. 'Guide to Compiling a Connection Report for Native Title Claims in Queensland'. Native Title and Indigenous Land Services, Department of Natural Resources and Mines, Brisbane.

Ritter, D. 2009. *Contesting Native Title*. Allen and Unwin, Sydney.

Sackett, L. 2007. 'A potential pathway'. *Anthropological Forum* 17.2, pp 173- 175.

Sansom, B. 2006. 'The brief reach of history and the limitation of recall in traditional Aboriginal societies and cultures'. *Oceania* 76 pp 150-172.

Sansom, B. 2007. '*Yulara* and future expert reports in native title cases'. *Anthropological Forum* 17.1 pp 71-92.

Strelein, L. 2009 (second edition). *Compromised Jurisprudence. Native Title Cases since Mabo*. AIATSIS, Canberra.

Sutton, P. 2007. 'Norms, statistics and the Jango case at Yulara'. *Anthropological Forum* 17.2 pp 175-192.

Trigger, D. 2004. 'Anthropology in native title court cases: mere pleading, expert opinion, or hearsay?' In, *Crossing Boundaries. Cultural, legal, historical and practice issues in native title*, S Toussaint (ed.). Melbourne University Press, Melbourne, pp 24-33.

Trigger, D. 2009. 'Anthropology and Native Title'. *Native Title News*, 7.4. pp. 1-4.

EXPERT ANTHROPOLOGICAL EVIDENCE – A JUDGE'S PERSPECTIVE

(Speech by Justice Rangiah to the Future of Native Title Anthropology Conference at Brisbane on 4 February 2016)

Many anthropologists might be surprised to know that 350 years before Captain Cook reached Botany Bay, the Chinese had not only reached and explored the continent but had also settled here and lived in harmony with the Aboriginal people.

We know this because in 2003, President Hu Jintao of the People's Republic of China addressed a joint sitting of the Australian Parliament and opened by saying:

> Back in the 1420s, the expeditionary fleets of China's Ming Dynasty reached Australian shores. For centuries, the Chinese sailed across vast seas and settled in what they called 'the Southern Land', or today's Australia. They brought Chinese culture here and lived harmoniously with the local people, contributing their proud share to Australia's economy, society and thriving pluralistic culture.

According to David Hunt in his book *Girt*, President Hu's words were inspired by Gavin Menzies' book *1421: The Year China Discovered the World*, which sold over a million copies.

Not everyone shares Menzies' perception of ancient Sino-Aboriginal relations. Professor Felipe Fernández-Armesto of the University of Notre Dame offered this scathing review of Menzies' book:

> It is almost without exception wrong, factually wrong, and the conclusions drawn from it are logically fallacious, I mean, they are the drivel of a two-year-old...To say that it is devoid of evidence, logic, scholarship and sense was just about the nicest thing one could say about it.

The point I make is that history and anthropology often involve matters of perception; and often perception depends on the particular agenda of the person doing the perceiving. That is a great commonality of anthropology and law: the role of perception and agenda.

I would like to share some observations from my perspective as a judge that anthropologists may find useful when presenting expert evidence to the Federal Court in native title cases.

The evidence of an anthropologist takes two forms, written and oral. I would like to discuss both forms: the writing of reports, and the giving of oral evidence in the Court.

I come back to the theme of perspective. The perspective of an anthropologist will be influenced by his or her background. It is often an academic background where the anthropologist is used to writing papers that will only be read by other academics. A report for a legal proceeding is quite different: it is intensely practical.

At the risk of being too simplistic, my advice is that when you write a report in a legal setting, you must first consider who you are writing for, and then write taking into account the perspective of that target audience.

So, who are you writing the report for? Well, you are not writing it for yourself; and you are not writing it for other anthropologists. You are writing it for the lawyers who have engaged you. You are writing it for the members of the native title claim group (your report will provide a valuable record of the history, laws and customs of the claim group). Ultimately, however, you are engaged to write the report for the purpose of a native title proceeding, and your audience is the judge who will decide the case.

Everyone in a courtroom has an agenda. For a barrister, it will be winning the case and impressing the instructing solicitor and everyone else with his or her brilliant oratory. For a solicitor it will be winning the case and trying to keep the client happy. The judge has an agenda too. When everyone else has gone home, the judge is left with a morass of papers, inconsistent evidence and conflicting opinions which he or she has to sort out. The judge's agenda is to decide the case as quickly, efficiently and simply as possible.

The judge is vitally interested in what anthropological reports say that will assist in deciding whether the requirements of ss 223 and 225 of the *Native Title Act 1993* (Cth) are met. No more and no less. A judge will appreciate and respect an expert who can write reports in a style and a manner which is direct, relevant, succinct and without surplusage.

Surprisingly, too few reports have the qualities I have described. I think that is because many anthropologists have not shifted their perspective to consider the audience, and are still writing scholarly articles that read as if they are directed towards other anthropologists. Some reports are dense and use language and references penetrable only by other anthropologists. Others are discursive and disorganised.

The target is ultimately a judge; and judges are not anthropologists. Judges do not have the years of study, experience and expertise in the anthropology of indigenous communities anthropologists have. The judge's task is a practical one. The pages and pages concerning anthropological methodology that we often see are not usually of much relevance. I can appreciate that such discussion may have been relevant when the question of whether anthropology was an appropriate discipline for expert evidence was very much in issue in native title proceedings. However, that time seems to have passed. The report must be practical rather than scholarly.

What judges want are simple reports using simple language and containing simple concepts that are as succinct as possible. I fully understand that this is not always possible to achieve, but my advice is to try to achieve it as far as possible. Why produce a 200 page report, if you can do it in 50 pages using less florid language and fewer diversions into interesting but irrelevant topics?

In the course of the case, a judge will want to be able to quickly and easily find the passages dealing with, for example, the existence of a particular right or interest. Judges, and the lawyers who engage anthropologists, want well-structured, well-ordered reports containing headings and sub-headings, so that the reports are easy to follow.

Judges decide things. So a judge is vitally concerned to know what is in dispute and what is not. When I come to read the report of an anthropologist responding to the report of another anthropologist, I want to be able to find out very quickly what is in dispute, and what is agreed. Very often, there is no place to easily find out. It would be very useful if, for example, the second anthropologist were to say in the introduction "I agree with Dr X's report except in relation to the following issues…".

One of the problems the Court has with anthropological reports is they are often delayed. We all have pressures. Judges are under pressure to deal with their caseloads. In turn, judges place pressure on lawyers by imposing timetables. We can understand that it takes substantial time to prepare a well-researched, well-written anthropological report. We are prepared to give that time. But once a judge is told it will take six months for a report to be prepared and makes an order to that effect, the Court expects that the timetable will be adhered to.

Sometimes we get the impression, rightly or wrongly, that expert anthropologists see themselves as being beyond the processes of the Court; that they can dictate the pace at which they work. If there are anthropologists with that attitude charging significant fees for their work, then it might be time to slip back into academia where they can proceed at a more leisurely and unstructured pace. Anthropologists have contractual obligations to their clients, and as expert witnesses they have obligations to the Court. The Courts do not seem to have problems with other expert witnesses providing their reports within the time they have committed to. The position tends to be different with anthropologists; by no means all, but too many. I think that requirements of professionalism, if nothing else, mean that if you make a commitment you have to stick to it.

I suspect that the problems I have discussed are often due to a lack of communication between lawyers and anthropologists. An expert anthropologist cannot stay aloof from the legal issues involved in the case, nor can lawyers be divorced from the anthropological issues. The instructions given to anthropologists by lawyers are vitally important. Sometimes instructions seem to have a generic quality rather than being specifically tailored to the particular nuances of the case. Sometimes reports dwell at great length on issues that are not seriously in dispute between the parties. A lack of communication with the lawyers may result in an anthropologist wasting time when the report could have otherwise been completed much earlier.

One way of improving the quality and timeliness of reports would be for the anthropologist and the lawyers to meet and discuss in detail the scope of the report and the issues likely to be in dispute before the final instructions for the report are given. This should occur after the anthropologist has had some chance to reach an informed preliminary view as to the scope of the work required. That way, the instructions can be designed to meet the specific requirements of the case, and both the lawyers and anthropologists know exactly what is required. As an expert engaged to perform a very important function, an anthropologist should not be hesitant about making his or her specific requirements known to the lawyers, and seeking clarification of what is required of him or her. The sheer volume of work required to be done by the anthropologist and the length of time it takes to complete makes open and frank communication vital. I would also suggest regular ongoing meetings, rather than the “See you in a year” approach.

I had always thought of anthropologists as mild-mannered and temperate people. That image is belied by the vitriolic exchanges that we sometimes see in anthropologists' reports. When writing reports, be polite and professional in your disagreement with colleagues. Judges expect courtesy between professionals. A lack of courtesy is an indication of a lack of professionalism. We notice when reports use intemperate language and attack the man or woman, and not the issue.

I will move to the topic of oral evidence. In many, if not most, cases these days, where more than one expert gives oral evidence, the evidence will be given concurrently. The experts will be sworn in at the same time and sit together in a witness box or area. Different judges have different styles of taking concurrent evidence, but the method I prefer is to ask the parties to prepare a list of questions they want the experts to answer and then conduct the questioning of the experts myself. I will usually ask the applicant's expert to speak first and then the respondent's expert. I allow the experts to comment on each others' answers. I allow experts to ask each other questions. There are no fixed rules other than that the experts must not interrupt each other's answers. When I have finished questioning the experts, I allow the parties' lawyers to cross-examine. Often there is little left to cross-examine about.

I find concurrent evidence a very useful way to proceed for a number of reasons. Among those reasons is that when one expert puts forward a proposition, we get the other expert's immediate response to that proposition, and then the response to the response. Under the traditional system where witnesses give evidence consecutively, it may be days before an expert gets a chance to respond to a proposition put by another expert. I find that concurrent evidence allows me to get a better and more immediate understanding of the competing evidence.

One of the criticisms made of concurrent evidence is that an expert with a more dominant or forceful personality can overbear the others and dominate the evidence. I have not seen that happen yet.

Getting back to the theme of agendas, like everyone else in a courtroom, expert anthropologists have an agenda. Anthropologists have egos. Egos, like reputations, are fragile, and dictate that part of the expert's agenda will be to have his or her opinion accepted by the Court. It is natural to feel defensive when your opinions are disputed by your fellow anthropologists and you are under heavy attack from a cross-examining barrister.

When a judge is faced with conflicting opinions, the judge is looking for a way to decide which opinion should be accepted. We look to the evidence that supports an opinion and the logic with which the opinion is constructed. The judge may also be influenced, whether at a conscious or subconscious level, by the demeanor of the witness. I have seen experts called to regularly give expert evidence, not because they are particularly well regarded by their peers, but because they look and sound so impressive when they give evidence. On the other hand, the defensiveness of a witness may show through aggression, sniping comments, evasiveness and belligerence. I caution against slipping into that behavior in the witness box. Demeanor does play a role.

Occasionally, an expert giving evidence can be seen as having a different agenda. That agenda can be taking up the cause of a client and becoming an advocate for them. The job of an expert witness is to remain objective. When an expert is no longer objective and has become an advocate, it quickly becomes apparent to the judge. There is nothing that more readily undermines a judge's confidence in the expert. Again, I think this is a matter of having to adopt a different mindset as an expert witness. It is one thing to passionately argue a cause in academic publications, but that is not what you are engaged to do as an expert witness.

My advice is to remember that the barrister has his or her own agenda, which is to win the case, and that may involve trying to discredit you. Your best response if you do not want to be discredited is to be dispassionate, remain calm, remain courteous and not be so defensive that you refuse to make concessions even where it is clearly appropriate to do so. The judge sees all of these things, and this does influence whether your opinion is ultimately accepted or rejected.

I have never seen it, but I have heard plenty of stories about court-ordered conferences between expert anthropologists characterized by aggression, rudeness and an unwillingness to listen to an opposing view. I recall being told by one anthropologist about how another anthropologist threw a pencil at him in a heated moment. It might be entertaining, but it is important to remember that judges expect more moderate behavior.

I have not intended to be too negative. We see many excellent, well-researched and well-written anthropological reports. I count several anthropologists amongst the most brilliant and

interesting people I have ever met. My purpose has not been to be critical for the sake of it, but to make some suggestions which I hope will be of assistance to you when presenting evidence.

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

Debbie Mortimer[1]

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.

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 relevant 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.

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.

This edited collection brings together some of Australia's foremost experts in native title to provide a realistic assessment of the achievements, frustrations and possibilities of native title, two decades since the enactment of the *Native Title Act 1993* (Cth), and after the most significant High Court decision on native title in more than ten years, *Akiba v Commonwealth*, which confirmed the existence of commercial native title fishing rights. The Indigenous and non-Indigenous authors come from a variety of disciplines and perspectives and include academics and practitioners from the fields of law, economics, anthropology, politics, history and community development. Uniting the book is a concern that native title make a real impact on the economic and social circumstances of Australia's Indigenous communities.

The book consists of two parts.

Part One is entitled *Legal Dynamics in the Development of Native Title*. It examines the way in which Australian law has defined and often constrained the scope of this newly recognised property right. There is a particular focus on legal issues with a direct bearing on the economic potential of native title, such as alienability and the right to trade resources and the challenges posed for anti-discrimination law.

Part Two is entitled *Native Title as a Vehicle for Indigenous Empowerment*. Authors provide an overview of the contribution made so far by native title and the prospects for future empowerment. Detailed mapping and analysis provides readers with a geographic orientation and a sense of realism about the economic potential of the native title estate, in comparison with achievements under a parallel statutory land rights regime. This part also explains some of the challenges Indigenous groups face in areas such as governance, land reform and internal politicking, as they operate in the shadow of the law, seeking to utilise native title for greater empowerment.

image taken at Mangkuna (Corkbark) on Karajarri country in the Kimberley, n Australia - November 2014.
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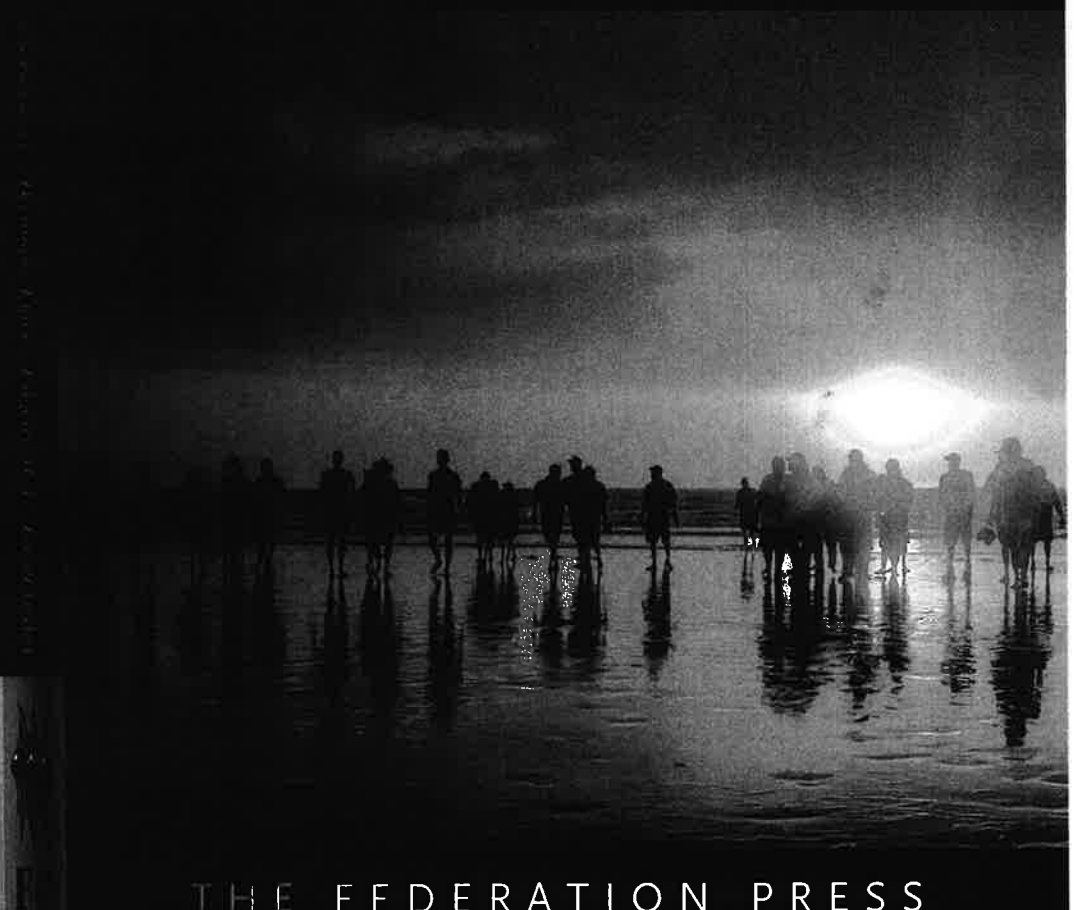
ative Title from abo to Akiba: A Vehicle for Change and Empowerment?

Editors
Sean Brennan, Megan Davis, Brendan Edgeworth and Leon Terrill



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boast of being the rationale and splendour of the common law, that it may change, and the definitional characteristic of legislation which is that it can be repealed, amended, substituted and fiddled with from here to kingdom come.

3

A Judge's Reflections on Native Title

Paul Finn

Shortly after I gave judgment in the *Torres Strait Sea Claim*[1] (the *Sea Claim*) I took a year's leave to take up a Chair at Cambridge University. Quite unexpectedly, Torres Strait and native title became a significant part of that year.

I was familiar with Cambridge's place in the anthropological narrative of the Strait. In 1898 – only 26 years after sovereignty was first asserted over Torres Strait Islands – a Cambridge don, AC Haddon, persuaded six others to accompany him there. From a previous visit, Haddon had appreciated there was little European knowledge of the Islanders' customs and beliefs. He apprehended that, with the changes wrought both by the dramatic growth of marine industries from the 1820s and by the advent of the London Missionary Society in 1871, the memory of what he even then considered to be a 'vanished past' needed to be recorded. The six months they spent in the Strait – which itself is seen as the modern progenitor of fieldwork-based anthropology – resulted in six volumes of Reports published between 1904 and 1935. These have very recently been republished. They understandably provided a significant part of the anthropological material used in the *Sea Claim*.

I was aware that the members of the expedition had cameras as part of their equipment. I was unaware they had a motion picture camera for a short period at the very end of their time on Mer (or Murray Island). I discovered that in my first week in Cambridge. A small poster hung on a footbridge advertised the showing of a 40-minute documentary, *The Masks of Mer*, later that week. The film recounted the Haddon expedition and contained a several minute sequence, organised by Haddon, of a secretly performed dance derived from Mer's traditional Cult of the Brethren. The dancers had created replicas in cardboard of the masks previously used, before the missionaries suppressed them and much else. This is said to be the first purely ethnographic film ever made. The actual masks used are still in Cambridge's Anthropology Museum, as is a large body of artefacts Haddon brought back to Cambridge.

During my year at Cambridge, Torres Strait and native title returned in a variety of forms – I need not expand on this here. However, I was led to reflect much on the *Sea Claim*, the *Native Title Act 1993* (Cth) (*NTA*) and on such other litigation under the *NTA* as I had experienced and, in particular, the *Noongar* (Perth) and *Larrakia* (Darwin) cases. I was invited to share some of my reflections and ruminations with you. In so doing, I will for the most part leave you with questions.

1 *Akiba v Queensland (No 3)* (2010) 204 FCR 1.

By way of background, let me simply say this. Viewed from the vantage point of the mainland, Torres Strait and the Torres Strait Islanders were, and are, distinctive. How that distinctiveness would accommodate itself to native title jurisprudence became for me – and still is – a fascinating question, notwithstanding *Mabo* was a Torres Strait case. In saying this, I would emphasise I have no intention of revisiting *Mabo* here, beyond observing that one of the laws most quoted in the *Sea Claim* originated on Mer. It was *Malo's* law,[2] and was a chilling injunction against trespass on another's property. I pass over without further comment the question of how this squared with a communal conception of property.

The defining feature of the evidence before me in the *Sea Claim* was of difference: difference from the Mainland, the absence of widespread dispossession, the remarkable marine environment in which the Islanders lived and the essentially marine character of their occupation of it, all illustrate this.

There was also difference between the Islands and between the Islanders themselves. The five distinctive Island groups varied greatly – from ancient granite rock to mudflats, to sandy islets and to relatively recent volcanic remnants. This was reflected in differing ecological conditions, food production and consumption, trading concerns and patterns, and so on. Then there was the Strait itself, a notoriously treacherous stretch of water. As Matthew Flinders put it: 'Perhaps no space of three and one half degrees in length represents more dangers than Torres Strait'.[3]

Then there was language. Apart from the now dominant language of Torres Strait creole, there were two quite different traditional language groups, Eastern and Western, one of which (the Western) had three distinct dialects. There were the distinctly isolating practices of the Islander communities. Then there were the Islanders themselves. Until the arrival of the London Missionary Society in 1871, head hunting was practised across the Strait on friend and foe alike to the point that, as the anthropologist Professor Jeremy Beckett put it, 'the rich body of myths, folk tales and traditions suggest that the fear of violent death was never far from people's minds'.[4]

I occasionally speculate on whether this helps explain the Islanders' rapid conversion to Christianity in the 1870s.

It is difficult to convey the richness of the evidence available about the Islanders. By way of preface, I note that the first recorded, and still available, evidence of contact with them dates to 1606 and Torres' passage through the Strait. After Cook, European maritime visitations became quite common – Bligh, Flinders and many others. The particular illustration I would give, though, is of the symbol of the Islanders' pre-colonial presence – the large (up to 20 metres in length) double outrigger, sea-going, sailing canoe which they are thought to have used for at least one and a half millennia.

The Islands are quite bereft of trees suited to the making of such craft, yet all inhabited Islands had a sufficient number to move their entire population. Their provenance? They were purchased and delivered from up the Fly River in Papua through an elaborate trading scheme involving the making of orders, periodic down payments

2 Attributed to an ancient cult figure of that name.
3 Matthew Flinders, *A Voyage to Terra Australis* (G and W Nicol, 1814).
4 Jeremy Beckett, *Torres Strait Islanders: Custom and Colonialism* (Cambridge University Press, 1987), 30.

(different Islands using different commodities as purchase price) and then delivery some years later. It was a *lex mercatoria* (or law merchant) of which any trading society would have been proud.

Now let me turn to my ruminations. I will raise, briefly, a number of issues, some of which enlarge on a paper I gave at a conference in 2012.[5] I will begin with the most obvious. First, native title cases are bedevilled by issues of authorisation to make a claim and, in particular, with whether the required authorisation has been given by all the claim group *as found*. An example of this is the important, very recent decision of *Weribone v Queensland*[6] of which you doubtless will hear more. Clearly, the *Sea Claim* was not properly authorised under s 251 of the *NTA* – and probably could never have been, given the diaspora from Torres Strait from the 1960s. Fortunately, complete disaster was averted by the 2007 amendment to the *NTA* which added s 84D, allowing the court to hear and determine an application, despite the defect in authorisation, after it balanced the need for due prosecution of the application and the interests of justice. One must ask whether even this state of affairs is at all satisfactory. The frame of the *NTA* – and the interaction of s 61(1) and s 251(b) in particular – has echoes of the old folk song, 'there's a hole in my bucket, dear Liza, dear Liza'. To anticipate what I have to say, the sections I have mentioned virtually necessitate quite small claim groups in most cases if authorisation is not to be an issue. The form of the *NTA*'s requirement is distinctly user-unfriendly. The same can, I think, be said of a great deal of the *NTA*.

Secondly, I turn to the supposed 'society requirement'. This, as you well know, is a term which does not appear in the *NTA*. Its provenance was in the judgment of Gleeson CJ, Gummow and Hayne JJ in *Yorta Yorta*.[7] Its advent, with respect, has been very much a mixed blessing – as it was in the *Sea Claim*. The Commonwealth and the State conceded that the claimants on each inhabited Island or Island group (in the Commonwealth's case) had native title rights in the sea (albeit of limited character and geographic reach). The real matters in issue were simply the actual character and the geographic reach of those rights. Neither issue turned on the so-called society requirement and were resolved in the main by Islander evidence. Yet 'society' was at the forefront of the case. It was large, time-consuming and controversial, and required extensive expert and Islander evidence on the more than 40 laws and customs the Islanders' counsel propounded.

I was confronted with five possible societies – the largest a single society, stretching from coastal PNG to Cape York; the most diffuse, 13 societies constituted by the individual inhabited Islands. In the event, I concluded that, despite their differences, the Islanders were part of a single society the metes and bounds of which I did not have to define. What was perfectly clear on the evidence, though, was that no matter which of the five proposed societies I might have found, it would not in any way have affected my conclusions as to the claimants' native title rights and to the geographical reach and the aggregate dimensions of those rights. Patchwork-like, they covered almost the entirety of the claim area.

5 Paul Finn, '*Mabo* into the Future' (2012) 8(2) *Indigenous Law Bulletin* 5.
6 [2013] FCA 255.
7 *Yorta Yorta v Victoria* (2002) 214 CLR 422.

My thoughts about this consequence had previously been prompted during the hearing of the appeal in *Bodney v Bennell*[8] (the *Noongar* claim). Assume, for example, that the coastal Papuans and the Kaurareg from the islands immediately north of Cape York in fact acknowledged and observed identical laws and customs in relation to the waters of Torres Strait as the *Sea Claim* group. Would they together be a 'society' in relation to any claims to rights and interests in those waters? If different social groupings have matching and interrelated rights and obligations for particular purposes, for example in relation to the use and exploitation of sea or land resources, because they each acknowledge a particular and common body of laws and customs from which those rights and obligations derive, are they a '*Yorta Yorta* society' to that extent, even if in other respects their laws and customs diverge for whatever reasons?

A distressing characteristic of our native title litigation is what I have referred to elsewhere as its tendency to Balkanise claim groups. As I discovered in the *Sea Claim*, this is manifest in the propensity for microscopic examination of laws and customs so as to discern and accentuate difference. But does difference, as such, operatively distinguish claimant groups, especially when local factors, geographic and otherwise, suggest reasons for difference? It is in answering this, I suggest, that the society concept may have real utility. I suggested in the *Sea Claim* that the defining characteristics of a particular society and its laws and customs may admit both of considerable diversity in the groups constituting the society and of differential application of, and local differences in, the laws and customs that relate to such groups.[9] The full court decision in *Sampi v Western Australia*[10] (*Sampi* claim) seems inclined to a like view. This brings me to what I consider to be the potential of the 'society' requirement.

May it not be the case that, by focusing on what is the relevant 'society' whose laws and customs are generative of native title rights and interests claimed, we may begin to identify both the groups at large who in aggregate constitute that society and identify as well the dimension of the geographic area in which native title is likely to be found?

Should not native title claims proceed at the level of the largest reasonable aggregation of the groups in a society and of the largest area within which they have their rights? Why should we not aspire to the regional, or macro, resolution of native title claims? This, I would suggest, is the real message both of the *Sea Claim* and of the *Noongar* and *Sampi* claims. And, I ask whether an approach to native title that has the aggregated claims of a whole society at its core may in the end have greater advantages in securing empowering outcomes for claimants? The one matter I would emphasise is that, in what I will call 'whole society' claims, the actual native title rights and interests are likely – as in the *Sea Claim* – to be held at the group and individual level and only in aggregate at the level of the claimant society as a whole. Again I reiterate my concern with our preoccupation with 'communal rights'.

Thirdly, being a continuing society does not always help you. I was a member of the full court in *Risk v Northern Territory*[11] that affirmed Mansfield J's decision. While the Larrakia society subsisted from sovereignty, its acknowledgment and observance of

8 (2008) 167 FCR 84.
9 *Sea Claim*, 119-127.
10 (2010) 266 ALR 537.
11 (2007) 240 ALR 75.

its traditional laws and customs did not, and for reasons for which the Commonwealth Government bore some responsibility. There had not been the 'continuity' *Yorta Yorta* required. I have commented elsewhere on the harshness of this. The Commonwealth, today, has no apparent appetite to ameliorate this despite its judicial critics.[12] The Act is much the poorer for this.

Fourthly, and uncharacteristic of mainland native title cases, the laws and customs advanced by the Islanders did not reflect an overarching, or even a particularly significant, spiritual connection with the waters of the Strait. There was no creation story. Such spiritual beliefs as were revealed were minor. In consequence, their laws and customs were informed in quite some degree by considerations of utility and practicality. I emphasise this for this reason. Normative beliefs can be held about ordinary behaviour. The Islanders' attitude to marine conservation, for example, reflected this.

Such of their laws and customs as had a utilitarian character focused more on resource exploitation and sharing, trading, and so on. I wonder whether the accentuation of the so-called spiritual dimension of native title in Aboriginal claims has, in contrast, become almost an end in itself, so deflecting attention from native title itself as a source of material advantage and advancement? What is obvious is that only by being strained did the 'connection' requirement of s 223(1)(b) of the *NTA* accommodate the Islanders' laws and customs – although their knowledge, occupation and exploitation of their respective areas of the Strait cannot be gainsaid. Their connection perhaps reflects an old song line, 'we're here, because we're here, because we're here'.

Fifthly, and again relating to water, land and sea are, to the Islanders, seamlessly and culturally associated: there is no land-sea dichotomy. This is most apparent on those islands with home reefs and sea traps. What belongs to a seafront family characteristically extends both inland and out to sea for some distance. That area is theirs.

I must confess – though I have used it myself – I have growing reservations about the 'bundle of rights' view of native title. The concept of 'rights and interests in relation to land and water' in the *NTA*'s definition of 'native title', to me, fails to capture the complexity of what it describes. May it not be the case that the rights and interests a claimant may have in relation to land and water – and the obligations both the claimant and others will characteristically have in consequence – are simply one facet of a web of social rights and obligations a claimant has in his or her community under its laws and customs? Should native title be conceptualised as a manifestation of a person's reciprocal rights and obligations in family, group and wider society albeit, because of the terms of s 223(1), these must relate to land and waters? I suspect social anthropologists – but not common lawyers – would have no trouble with this.

Sixthly, having referred again to anthropologists (and inferentially to other experts), I should make several comments on experts. It was my experience in appeals in competition law cases that economists had succeeded in some degree in contriving how the courts approached competition law. That state of affairs, thankfully, is now being undone. I would not equate anthropologists and economists – the latter are more dangerous – but I do wonder whether we have ceded too much of the field of native title to anthropological and other expert evidence without necessarily assessing the suitability of what is being offered to the particular needs of the individual case.

12 See Paul Finn, '*Mabo* into the Future' (2012) 8(2) *Indigenous Law Bulletin* 5, 6.

I am not suggesting that there is a large and urgent issue here. I do suggest, though, that we should be quite discerning in what we ask of expert evidence. I would emphasise that lawyers bear a responsibility to ensure that the language their experts use and the concepts they wish to communicate are cast in terms that are appropriate and adapted to the demands of a native title case and, especially, to the types of factual inquiry the court is called upon to make.

Anyone familiar with the social sciences is well aware that there can be heated dispute between adherents to differing schools of thought in a particular discipline which are ill-suited to judicial adjudication. In one native title appeal in which I participated, we were in effect being asked to decide between critics and advocates of post-modern historiography. Needless to say, interesting and venomous as that dispute may have been, we declined the invitation to make fools of ourselves.

I have, I hope, provided some sense both of the distinctiveness and yet the possible sameness of the *Sea Claim* as a native title case. I trust I have given you reason to see the futility of thinking or insisting, that 'one size fits all'. This, in my view, is the vice in our native title jurisprudence. It has been prescriptive in a context where reticence, a preparedness to look beyond difference and, dare I say, flexibility are called for. I am conscious though, that I have done not much more than ask questions. I make no apology, but recall that arresting observation made in one of Herman Melville's early South Sea romances. It is that '[t]he question is more final than the answer'.

4

The Significance of the Akiba Torres Strait Regional Sea Claim Case

Sean Brennan

Introduction

The successful Torres Strait Regional Sea Claim (referred to here generically as *Akiba*) saw traditional owners from that most northerly region of Australia once more make a telling contribution to the development of native title as a source of Indigenous rights and empowerment. In 1992, the Meriam people of eastern Torres Strait compelled the common law of Australia to acknowledge the pre-existing land rights of Australia's first peoples in *Mabo v Queensland (No 2)* (*Mabo*).[1] The *Mabo* decision led to the passage of national native title legislation and sparked hopes of a path towards greater empowerment for many Indigenous groups. Twenty years after the enactment of the *Native Title Act 1993* (Cth) (*NTA*), in *Akiba*, the united Islander communities of the Strait secured recognition of their native title right to take marine resources for commercial purposes, as part of their non-exclusive rights over sea country. In between, 22 consent determinations resulted in recognition of native title over most of the inhabited and uninhabited islands in the region.

The *Akiba* litigation – particularly the trial judgment of Finn J delivered in July 2010[2] and the unanimous High Court decision on appeal in August 2013[3] – crystallised a turn towards greater moderation and realism in the judicial treatment of native title. Earlier, in 2001 and 2002, some key test cases decided by the High Court (*Commonwealth v Yarmirr* (*Yarmirr*), *Western Australia v Ward* (*Ward*), *Wilson v Anderson* and *Yorta Yorta v Victoria* (*Yorta Yorta*))[4] had set a strong judicial tone of retrenchment and the prospects for socioeconomic development from native title took a battering. *Akiba*, and two other High Court decisions that followed in quick succession in 2013 and 2014

1 (1992) 175 CLR 1.

2 *Akiba v Queensland (No 3)* (2010) 204 FCR 1 (*Akiba (Federal Court)*).

3 *Akiba v Commonwealth* (2013) 250 CLR 209 (*Akiba (High Court)*). In between there was an appeal judgment from the Full Federal Court that, by a 2-1 majority, overturned Finn J's finding that a commercial native title right had survived the enactment of fisheries legislation: *Commonwealth v Akiba* (2012) 204 FCR 260 (*Akiba (Full Federal Court)*). That result was reversed, and Finn J's original finding was upheld, in the subsequent High Court appeal.

4 *Commonwealth v Yarmirr* (2001) 208 CLR 1; *Western Australia v Ward* (2002) 213 CLR 1 (*Ward*); *Wilson v Anderson* (2002) 213 CLR 401; *Yorta Yorta v Victoria* (2002) 214 CLR 422 (*Yorta Yorta*).

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General Editor's introduction

Tom Keely SC *VICTORIAN BAR*

In this edition of *Native Title News*, Robert Blowes SC of the ACT Bar Association has contributed the thought-provoking article "Getting to native title — roles and important distinctions for anthropologists and advocates". This article addresses three matters requiring consideration in every native title determination application. The first relates to the respective roles of researcher and advocate in identifying the rights and interests that are possessed under traditional laws and customs. The second relates to the framing of the traditional rights and interests, a task that involves both anthropological research and legal consideration. The third relates to the advocate's job of framing the native title rights that are to be claimed. Mr Blowes revisits the "bundle of rights" metaphor used in the majority judgment in *Western Australia v Ward*[1] in light of the subsequent High Court cases of *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth*[2] and *Western Australia v Brown*[3] and the now better-recognised distinction between the native title rights themselves and their exercise. He contends that, for researchers and legal practitioners alike, the preferred starting point for the identification of traditional rights and interests or native title rights and interests is a holistic understanding of the relationship between the particular group of claimants and their country.

Ted Besley, Special Counsel with Just Us Lawyers, has contributed the article "Section 13 of the Native Title Act — how will it be applied?". This article traverses the circumstances in which applications under s 13(1)(b) of the Native Title Act 1993 (Cth) to revoke or vary approved determinations of native title have been brought to date, and the outcomes of those cases and the reasons for them. As things stand, the jurisprudence in relation to applications of this kind is still very limited. Mr Besley also considers some of the possible circumstances in which such applications may be brought in the future and the factors that are likely to be influential in their determination. He contends that s 13 will not ordinarily offer unsuccessful claimants an alternative means of bringing better evidence or new evidence where a negative determination has been made and remains undisturbed upon appeal.

Anne De Soyza, a lawyer in private practice based in Perth, has contributed the case note "Griffiths compensation case reaches the High Court — a consideration of the special leave applications". Special leave applications have been brought by the compensation claim group, the Northern Territory and the Commonwealth. They are due to be heard by the High Court on 16 February 2018. Ms De Soyza has contributed a number of articles on the *Northern Territory v Griffiths*[4] (*Griffiths*), at first instance and on appeal to the Full Court, published in previous editions of the *Native Title News*. In this article, she identifies the main issues that have been raised for consideration in the leave applications and expresses doubts about whether these are suitable vehicles for grants of special leave. These doubts rest on Ms De Soyza's view that the *Griffiths* case has failed to engage with the central principle of the basis for a proper assessment of native title compensation.

Charles Gregory of the New South Wales Bar Association has contributed a case note dealing with the decision of the Full Court (Reeves, Barker and White JJ) in *Sandy (on behalf of the Yugara People) v Queensland*.[5] This appeal related to the negative determination made by Jessup J, following the contested trial of separate questions relating to connection. Neither the Yugara people nor the Turrbal people were represented at trial. Mr Gregory appeared for the appellants on the appeal. The Full Court delivered a joint judgment which identified five issues for determination, namely:

- whether fresh evidence should be admitted on appeal
- whether the Yugara people had been denied procedural fairness
- whether the primary judge had erred in finding that each of the Yugara people and the Turrbal people had failed to prove continuity of connection
- whether the primary judge had erred in making a negative determination (as distinct from simply dismissing the proceedings)

For the reasons canvassed in the case note, the court refused leave to admit fresh evidence and rejected each of the suggested errors on the part of the primary judge.

Justin Edwards of the Western Australian Bar has contributed a case note dealing with the abuse of process aspects of Rares J's decision in *Warrie (formerly TJ) (on behalf of the Yindjibarndi People) v Western Australia*[6] (*Warrie*). The previous edition of *Native Title News* included a case note on other aspects of his Honour's decision.[7] In *Warrie*, the applicant sought a determination of exclusive native title rights and, in *Warrie (formerly TJ) (on behalf of the Yindjibarndi People) v Western Australia (No 2)*,[8] a determination of exclusive native title rights was made in favour of the Yindjibarndi people. The earlier case of *Daniel v Western Australia*[9] (*Daniel*) had involved Yindjibarndi land and waters to the immediate north of the determination area in *Warrie*. In *Daniel*, Nicholson J determined that the Yindjibarndi people possessed only non-exclusive native title rights and interests in the land and waters there in issue. In *Warrie*, the State and Fortescue Metals Group Ltd argued that the claim for exclusive rights constituted an abuse of process on the basis that it was inconsistent with the determined rights, as found by Nicholson J in *Daniel*. For the reasons canvassed in the case note, particularly the features which distinguish native title proceedings from other types of proceedings, Rares J rejected the abuse of process defence.

Finally, I draw to readers' attention the fact that, on 29 November 2017, the Attorney-General, Senator The Hon George Brandis QC, and the Minister for Indigenous Affairs, Senator The Hon Nigel Scullion, released an options paper titled *Reforms to the Native Title Act 1993 (Cth)*.[10] The paper addresses a range of possible reforms under the following headings:

- Section 31 agreements
- Authorisation and the applicant
- Agreement-making and future acts
- Indigenous decision-making
- Claims resolution and process
- Post-determination dispute management

Submissions close on 25 January 2018. They may be emailed to native.title@ag.gov.au or posted to Native Title Unit, Attorney-General's Department, 3-5 National Circuit BARTON ACT 2600.

Thanks to our contributors. The opinions they express are their own. The Editorial Panel welcomes contributions to this newsletter, whether in the form of articles, notes of recent cases or legislative developments, book reviews or reports of other significant developments in relation to native title. Any contributions should be emailed to tpkeely@vicbar.com.au. The deadline for the delivery of contributions for the next edition of *Native Title News* is Friday 9 March 2018. Anyone proposing to make such a contribution should, however, first discuss the matter with the General Editor.

Tom Keely SC
General Editor
Victorian Bar

Footnotes

1. *Western Australia v Ward* (2002) 213 CLR 1; 191 ALR 1; [2002] HCA 28; BC200204355 at [76] and [95].
2. *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth* (2013) 250 CLR 209; 300 ALR 1; [2013] HCA 33; BC201311628.
3. *Western Australia v Brown* (2014) 253 CLR 507; 306 ALR 168; [2014] HCA 8; BC201401345.
4. *Northern Territory v Griffiths* (2017) 346 ALR 247; [2017] FCAFC 106; BC201705591.
5. *Sandy (on behalf of the Yugara People) v Queensland* [2017] FCAFC 108; BC201705723.
6. *Warrie (formerly TJ) (on behalf of the Yindjibarndi People) v Western Australia* [2017] FCA 803.
7. See T Jowett and J Edwards "Warrie (formerly TJ) (obh of the Yindjibarndi People) v Western Australia" (2017) 12(7) *NTN* 460.
8. *Warrie (formerly TJ) (on behalf of the Yindjibarndi People) v Western Australia (No 2)* [2017] FCA 1299.
9. *Daniel v Western Australia* [2003] FCA 666; BC200303526.
10. Australian Government Attorney-General's Department *Reforms to the Native Title Act 1993 (Cth)* Options Paper (November 2017) www.ag.gov.au/Consultations/Documents/options-paper-proposed-reforms-to-the-native-title-act-1993.PDF.

Getting to native title — roles and important distinctions for anthropologists and advocates

Robert Blowes SC *ACT BAR ASSOCIATION*

Introduction

While offering guidance on questions about the relevance and the form of a draft of his expert report, I was recently asked by an anthropologist: "When is a right not a right?" The question reminded me of several important issues that confront anthropologists and legal representatives engaged in native title claim processes.

These issues include:

- What instruction should be given to an anthropologist engaged to write an expert report on "connection" issues for a native title claim when it comes to the identification of rights and interests?
- What are rights and interests, as distinct from the overall relationship of people to country, from duties and responsibilities that might form part of that relationship, and from the religious or other identities underpinning that relationship?
- What are rights and interests, as distinct from the ways they may be exercised and as distinct from rules that govern that exercise?
- What are native title rights or interests, as distinct from any other kinds of rights or interests?
- What, in any event, are rights and interests?

The last question is readily disposed of for present purposes, without getting distracted by the obvious difficulties of the task. It is sufficient to understand a right as that aspect of a position in a relationship between a person and something (an object, territory or another person) which is supported by, and enforceable within, the applicable normative system. "Right" is not a word defined in the Native Title Act 1993 (Cth). However, because the word appears in the phrase "rights and interests" in the definition of native title in s 223(1), it is that composite expression, rather than the individual words, that warrants attention.

"Interest" is defined very broadly in s 253 of the Native Title Act as including at least a legal or equitable estate; or any other right, charge, power or privilege over, or in connection, with land or waters. Thus, the composite phrase is one of broad compass, but not so broad as to encompass every aspect of the relationship of a group of people to its country. It does not include duties or responsibilities and is not adequately understood by reference to bare activities. Importantly, by the qualification in s 223(1) and in s 253, it is only rights and interests "in relation to land or waters" that are "possessed under" traditional laws and customs that may be translated for recognition as native title.

Summary points

Approaching a native title claim requires a plan that will sustain the process through all stages; from research and expert report, to the formal inception and pleading of the claim, the development and presentation of the evidence, and all the way to the submissions that will be made at the close of the case. This is so even if the starting expectation is that the outcome will be a determination made with the consent of all parties. A consent determination can never be guaranteed and, in any event, is best achieved at any given point from the strength of a well-considered and informed position.

Developing and implementing a plan requires consideration of all aspects of the case and the anticipation of likely pitfalls along the way. Three only, of the myriad of matters requiring consideration, are considered here.

First, a preferred understanding is provided of the respective roles of researcher and advocate in identifying rights and interests possessed under traditional laws and customs as candidates for native title.

Second, some modelling is provided of a preferred path to the identification and framing of the traditional rights and interests for native title purposes. Both research and legal considerations are required. The research inquiry should start (and perhaps, end) with an appreciation and account of the laws and customs that together define the relationship between the relevant people and their country. A preferred account would include consideration of the relationship as an integrated whole, as well as in its various elements — including any religious or other underpinnings, and of any duties and responsibilities that are concomitant with the relationship.

The research should provide a sufficient basis upon which the advocate may identify a sustainable way in which case for native title may be put. Identifying the best way the case may be put involves identifying the

nature and extent of the traditional rights and interests, and the traditional basis upon which those rights and interests are possessed. In this process, the advocate must distinguish between laws and customs which define the rights and interests themselves from:

- laws and customs which determine the way the rights and interests are held within the group
- the ways in which they may be exercised
- the traditional rules which may govern the exercise of the rights and interests
- laws and customs about duties and responsibilities

Third, framing the claimed native title rights. This aspect of the advocate's task goes beyond the identification of the traditional rights and interests and the application of the various distinctions just referred to — in two ways. Firstly, only those rights that are "in relation to land or waters" can be native title rights. Secondly, there is the requirement to "translate" the traditional rights themselves, using terms familiar to the language of Australian property law.

The roles of researchers and advocates

The job of an advocate is to put and present a case fairly, but in its best light. The job of an expert anthropologist is to identify facts and state properly based opinions relevant to the issues in the case while at all times remaining "independent", which is to say, agnostic about the consequence of their findings on possible outcomes of the case. Legally, the overriding duty of an expert whose report is intended to be evidence in the Federal Court is to the court, and that duty is to be impartial and independent of those by whom they are engaged.[1]

That is not to say that a researcher must be and remain an unfeeling automaton; merely that they must be able to demonstrate, if called upon, that any personal sympathies for a particular outcome in the case have not influenced the approach taken to the research tasks or the opinions arrived at. It is one thing to admit to a long and personal, even sympathetic, relationship with the claimants; it is another to be shown to have allowed a bias to have influenced the expert evidence. The researcher should avoid any activity or expression in a report that would provide a basis for a submission that they are an advocate for the claimants. It usually helps this cause to stick to the expression of careful opinions systematically arrived at and on a proper and fully disclosed basis. Anthropologists often experience the demands of expert witness report writing as requiring more rigour and constraints and less creative freedoms in that respect than the demands of academic writing.

Interactions between legal representatives and researchers involved in a claim should occur regularly from the time the expert is engaged. The first interaction will likely be in the framing of terms of reference to be issued to the researcher. These are the instructions that define the research and report writing tasks. Ideally, draft terms of reference will be discussed with the researcher to ensure that they are within the expertise of the researcher and achievable in practice; and to ensure that the researcher has a clear understanding of what is required.

Some anthropologists may say that members of their profession have not always received best practice support from the legal profession in the expression of the terms of reference or otherwise during their report writing and appearance as a witness. I will confine the consideration of roles here to issues which concern that part of the research task relevant to the identification of traditional rights and interests under applicable laws and customs.

I have seen terms of reference that in effect merely direct the researcher to consider a given list of activities and to state an opinion as to whether the traditional rights are rights to undertake those activities. Such terms of reference may (incorrectly in my view) simply reproduce the list of "rights" stated in the original native title determination application (Form 1) and request an opinion as to whether those rights are the traditional rights of the group. A Form 1 list is not necessarily based on any significant research and does not necessarily reflect current best practice taking account of the current jurisprudence. Early native title claims were often lodged without significant or adequate research. A tendency to this approach was further entrenched in the aftermath of the reference in the *Western Australia v Ward*[2] (*Ward*) decision of the High Court to native title as a "bundle of rights". In my view, the use of that expression was effectively coopted by the opponents of claims and misunderstood by those representing applicants. I will return to this later, but foreshadow that I do not regard the approach as current best practice.

An expert so instructed may be excused for preparing a report that simply confirms that rights possessed by the relevant group are those itemised in the terms of reference. Such instructions do not encourage the kind of open-ended inquiry commensurate with the requirement of independence and impartiality. Nor is it conducive to arriving at the preferred starting point for the identification of traditional rights and interests or native title rights and interests, namely a good understanding of the whole of the relationship between people and country.

Similarly, listing what informants say are things that they and their ancestors have done in their country is not irrelevant to the identification of rights and interests in relation to land and waters, but it is not sufficient. Such

a list cannot properly identify the full scope of the relationship between an Aboriginal or Torres Strait Islander group and their country, or serve adequately to identify the full extent of rights possessed. There may be things people have not done because there was no technological capacity for it, no immediate need for it, or no market to warrant it. There may be an absence of certain resources and there may be resources which are or were useless or not regarded as valuable at particular points in time. There may be seasonal or cultural inhibitions on the conduct of activities at certain places by certain persons at certain times or at all. Lists of activities may point to the existence of a right and may provide examples of its exercise or indicate that there may be rules about its exercise. However, such a list is inherently incapable of standing as an account of the relationship between people and country or as a sufficient basis for determining either the existence or the nature and extent of a right or interest. Further, activities may be done otherwise than as of right.

A piecemeal, activity-focused approach to rights and interests is simplistic on any view and apt to fundamentally devalue the potential benefit of the awaited and hard-won victory over the doctrine of *terra nullius*. It fails to acknowledge that native title at its best requires the rights and interests to be identified as an aspect of and reflective of the relationship of a group with its traditional country, rather than by reference to activities. Traditional rights and interests are ultimately best stated using words which capture as much of the relationship of people and country, as can properly be understood as rights and interests.

Any holistic account of the relationship of the rights holding group to their country will necessarily identify some aspects of the relationship (aspects of religious connection, duties, responsibilities and so on) which the advocate will discard in the process of identifying and framing the rights and interests themselves. Such aspects, however, will remain relevant to the considerations of the "connection" requirement of s 223(1)(b) of the Native Title Act.

Of particular significance in the task of identifying rights and interests is the identification of those elements of the relationship of people to country that concern the use of country, the taking and use of its resources, and the controlling of access to and use of the country by others. In this context, it may be appropriate to consider whether the relationship invites any comparison, for example, with notions of "ownership" or at least some consideration of what it means for a group's members to regard a country as "*our* country".

Professor Sutton has identified the relationship between groups of Aboriginal people and their country from an anthropological perspective as inalienable and as one that is held communally, and has opined that rights flow from aspects of identity.[3] So much may be accepted. A researcher may usefully identify and flesh out such matters by reference to traditional laws and customs so as to facilitate the analysis necessary to the identification of the relevant rights and interests.

However, the categories of rights and kinds of rights considered by Professor Sutton in the same paper — "core", "contingent", "primary", "secondary" and so on — as it turns out, may not be well suited to the requirements of the Native Title Act, as now understood. Such categories are now largely overshadowed in the jurisprudence; by the distinctions between a "right itself" and the "manner of its exercise", and between a right in relation to land or waters and a right "in relation to a person".

For example, Professor Sutton's primary and secondary rights holders both may turn out to be members of a single rights holding group, but have acquired membership through different modes of descent. The difference may turn out to relate more to the exercise of the rights than to the possession of the rights themselves.

For example, if the connection of one is by descent from a person's mother and the other from a person's father, laws and customs may dictate that they each share in the right of the group to control access to country, but afford each a different status or role when it comes to making decisions in exercise of that right. Each may possess the right but their roles in its exercise may differ. Under laws and customs of that kind, Professor Sutton's secondary rights holders and "secondary rights" may not be a relevant analytical category for native title purposes. What particular members of the rights holding group may or may not do in the exercising of a right does not define the right itself or the relationship of a group to its country.

Professor Sutton's core and contingent categories, again, may not relevantly signify different kinds of rights. So far as core rights are those that arise from a fundamental proprietary relationship of a group to its country, they are likely to be native title rights. On the other hand, so far as a right arises apart from a relationship of that kind, it may not be a native title right because, for example, it is either dependent ultimately upon the permission of the rights holding group or upon the existence of a relationship with a member of that group.

In a recent decision of North J, his Honour said of the connection of a person by a conception event (*rayi*) to a place within the country of another group:

> The rayi connection holder therefore cannot engage in activity in the rayi event area without entering into this relationship of mutual respect with the rights holders by descent, and in that sense, any rayi derived rights are

> contingent upon the "core" rights of the rights holders by descent. Thus, rayi derived rights are rights in relation to persons, not land or waters.[4]

So far as a requirement of permission is concerned, any expectation that permission may be granted or not revoked says more about the manner in which the rights holders may exercise a right to control access than it is suggestive of the existence of a relationship between the permittee and the country of a group of which they are not a member. As North J put it, in the context of the *rayi* connection referred to above:

> … even though permission is not ordinarily denied, the very fact that permission must be sought is indicative of the rayi connection holder entering into a relationship with the rights holders by descent. That relationship is characterised by mutual respect. The rights holders by descent "wouldn't say no" to the rayi connection holder, but in the event of wrongful behaviour, the rayi connection holder may be excluded.[5]

Generally, so far as the condition for the existence of the right is the existence of a relationship with a member of the group (for example, a marriage or in-law relationship), the right is in relation to a person, not in relation to land and waters.[6] Thus, to classify something like the kind of *rayi* event relationship to a place considered by North J as involving a "contingent right" elides at least whether it is in relation to land and waters.

Identification of native title rights and interests and their extent must engage the terms of the Native Title Act, as it is currently understood.

Framing traditional rights and interests

In *Ward*, the Chief Justice and three other justices of the High Court in a joint judgment referred, in the area of rights possessed under traditional law and custom, to the employment of the metaphor of a bundle of rights.[7] In doing so, the plurality made clear not just the usefulness but also the limitations of the metaphor. Their Honours said of the metaphor:

> It draws attention first to the fact that there may be more than one right or interest and secondly to the fact that there may be several *kinds* of rights and interests in relation to land that exist under traditional law and custom.[8]

The plurality did not acknowledge the metaphor as a basis for any presumption that traditionally, rights are limited to the conduct of specific activities. Their Honours were at pains to make clear that native title is not necessarily "capable of full or accurate expression as rights to control what others may do on or with the land."[9]

Importantly, their Honours held that what the Native Title Act required was "expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests". They said:

> The difficulty of expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests is evident. Yet that is required by the NTA. The spiritual or religious is translated into the legal.[10]

So, the starting point of investigations about native title is the relationship between people and country. That is where the research effort is to be directed and, perhaps, end. The rest — identifying the nature and extent of traditional rights to be found within that relationship, and the further analysis necessary to identify the existence, nature and extent of native title rights — is generally an exercise of legal analysis and advocacy.

Further, the plurality in *Ward* did not declare that broadly framed rights can only be recognised as native title rights if they are "fragmented" into a list of specific activities that may be undertaken. Notwithstanding, many respondent parties have since argued that native title should be understood in that way. Too often that argument found some success, particularly in the negotiation of consent determinations. Rather, consistent with their view that native title is an expression of the relationship of people to country, the only "fragmentation" their Honours regarded as necessary was "the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and obligations which go with them."[11]

Ward does not preclude the understanding of traditional or native title rights and interests or the demarcation of research and advocacy roles urged here; it supports it. The High Court determined in *Mabo v Queensland (No 2)*[12] that native title existed on Mer as a right of exclusive possession, the broadest of rights known to the common law. In *Ward*, the plurality did indicate that where native title rights and interests are found not to amount to a right of exclusive possession, "it will be preferable to express the rights by reference to the activities that may be conducted, as of right, on or in relation to the land or waters."[13]

Bearing mind that they had already said, as noted above, that native title rights and interests are to express the relationship of people and country in terms of rights and interests, and accepting that expressing native title as a right of exclusive possession is one way of doing that where the evidence and questions about extinguishment allow it; it cannot be argued that by reference to "activities", the plurality had in mind any particular degree of specificity for the framing of the rights and interests. Indeed, the High Court did not, in *Akiba on behalf of the Torres Strait Regional Seas Claim Group*

v Commonwealth[14] (*Akiba*), comment adversely on the findings of Finn J as the trial judge[15] in terms of very broadly framed (non-exclusive) rights.

Bearing in mind that it is the relationship of a group of people to their country that is to be described in terms of the rights and interests, it is inevitable that the activities that the members may undertake as of right in their country must be very broadly framed; even where native title cannot legally (because of extinguishment) include the right to undertake the activity of controlling the access to and use of their country by others. Indeed, it would be remarkable if activities by which the description of such a relationship to a country did not include the activities of unconstrained access to and use of the country and its resources, as well activities involving control of the country against others.

Generally, the doing of an activity may indicate the presence of a right that may be exercised in a particular way, but reference to it will not sufficiently define the nature and extent of the right itself. A relationship to a country is not built on the myriad of activities people may undertake, but on the broad nature of their connection to it. Further, the presence or absence of an activity is not determinative respectively of the presence or absence of a right. Indeed, the absence of the activity of denying or revoking permission to access a country may merely indicate that one of the ways that a right to control access may be exercised is to decide not to enforce a requirement for permission in some circumstances.

In the native title context, a right in relation to land and waters must be framed such that it will express the relationship of the group to its country (or at least an aspect of it). Laws and customs about duties and responsibilities, and other aspects of the relationship of the group to its country (for example, religious aspects) may include rules that govern the exercise of the rights; but for native title purposes, these are not laws and customs that define the rights and interests themselves. Rather, they are laws and customs about the way rights and interests may be exercised.

The distinction between a right itself and its exercise, and the importance of this distinction, has been recognised by the High Court in *Akiba* and in *Western Australia v Brown*.[16] In those cases, the distinction was made not in the context of the fragmentation of the traditional rights for the purpose of framing the relevant native title rights and interests, nor in the context of identifying the nature and extent of the rights and interests; but in the context of questions about extinguishment. The High Court in *Akiba* treated each of the (in that case, non-exclusive) native title rights found to exist, as monolithic for the purposes of extinguishment and thereby not amenable to partial extinguishment by reference to particular activities (in that case, the activity of commercial fishing) by which the more general right (in that case, to take for any purpose and use resources) may be exercised.

However, the concept of a "right itself", analytically, must be the same for determining whether the right exists as for whether it is extinguished. The relevant right is distinct from the various ways in which and the various activities by which it may be exercised and from the rules that govern or regulate that exercise. The right itself is necessarily larger than any example of its exercise and qualitatively different from restrictions that may limit or qualify its exercise in particular circumstances and from any other traditional rules which may govern its exercise.

Laws and customs that relate to people and their country may give rise not only to rights and interests but also to rules about the way they may be exercised. In a native title case, the two must not be confused. There may be rules which prohibit the exercise of the right by some members of the community in certain places or at certain times, but these do not qualify the right of the group, the right itself. Rules may apply to the exercise of the right to control access, such as those mentioned by North J and referred to above. There may be a law or custom that an adult individual member of a group may give permission to an outsider to visit the country or exploit its resources for personal use; whereas the decision of the rights holding group as a group may be to require to invite another group into the area, or to exploit large quantities of resources for communal or commercial purposes. Again, such rules are not to be understood as qualifying the right itself, but rather that they are about the exercise of the right.

Framing native title rights

Framing the native title rights is a job for the advocate, best undertaken based on an adequate research account of the relationship between the relevant people and country and of the normative system that sustains that relationship. It must take account of the legal requirements of the Native Title Act and apply the relevant jurisprudence. The task will involve an analysis of the research, a stripping away of elements of the relationship of people to country that do not define rights and interests in relation to land and waters (for example, elements which comprise duties and responsibilities, the spiritual connection and so on).[17] It requires the identification of the basis or bases for the possession of such rights and interests, the application of the distinctions discussed above (between a right itself, the manner of its exercise, and rules governing its exercise; and the distinction between the possession of rights and the way they are held amongst the members of the group).

Finally, the advocate must craft a description of the native title rights and interests that is both an adequate expression of the relationship of the claimants to their country, and an adequate translation of those rights.

Putting to one side any question of extinguishment, it must be regarded as unlikely that an integrated relationship of an Aboriginal or a Torres Strait Islander group with its country would not include a general right of access and use, a general right to take and use resources, and a general right to control the access and use of others. However, each case is to be assessed on the available evidence by reference to the laws and customs comprising the traditional normative system of the claimants which define their relationship to their country.

Clearly, a right to control access to and use of country by persons who are not members of the rights holding group will sustain translation and recognition as a right of occupation, use and enjoyment as against the rest of the world. Clearly, the rights of access and use by a group to its country and the rights of the group to take and use the resources of its country, expressed to reflect the relationship between a group and its country, will be sustained by the translation expressed by Finn J in *Akiba on behalf of the Torres Strait Islanders of Regional Seas Claim Group v Queensland (No 2); sub nom Akiba v Queensland (No 3)*[18] (*Akiba No 2*) in his conclusion:

> I am satisfied that the group members of the respective individual island communities have the following traditional rights in their owned or their shared marine territories:
>
> (i) the rights to access, to remain in and to use those areas; and
>
> (ii) the right to access resources and to take for any purpose resources in those areas.
>
> In exercising those rights, the group members are expected to respect their marine territories and what is in them.

Questions about so called "water rights" and "commercial rights" have been controversial in framing native title rights over recent decades. The controversy was always misplaced. It rested on a failure to appreciate that native title is about the expression of the relationship of a group of people and their country (and thus, that reference to particular resources and particular activities is unwarranted) and on failure to maintain the distinction between the right itself and the way in which it is exercised. That controversy should be regarded as ended by *Akiba No 2*, *Western Australia v Willis on behalf of the Pilki People*,[19] *BP (deceased) on behalf of the Birriliburu People v Western Australia*,[20] *Isaac (on behalf of the Rrumburriya Borroloola Claim Group) v Northern Territory; Roper (on behalf of the Rrumburriya Borroloola Group) v Northern Territory*,[21] *Murray (on behalf of the Yilka Native Title Claimants) v Western Australia (No 6)*,[22] and the determinations made in those cases.

A brief explanation illustrates these points. "Water" is to be distinguished from "waters" in native title jurisprudence. "Waters" is a term defined in s 253 of the Native Title Act to describe a particular kind of area by reference to its association with particular kinds of water. "Water", the liquid substance, is a particular resource which may be found on, in or under areas of land or waters. So far as water may be present within the area in which a group holds traditional rights, water, in all its forms, is just one among the totality of resources which may be the subject of the relationship of the group to its country and of the rights and interests possessed by the members of the group. Thus, ordinarily, there would be no basis for singling out this particular resource, or for an argument that it was necessary to do so to properly capture the rights elemental to the relationship of the group to its country. Rather, the taking and use of water will be just an example of the way in which a right to take and use resources may be exercised.

Nor do extinguishment considerations warrant the treatment of water as respondents have contended in the course of this controversy. Following *Akiba*, even quite comprehensive regulation of water by common law and statute will not extinguish the right to take and use resources; though native title holders will be liable to comply with the regulatory regime. This is so whether the activities associated with the taking and use of water are done under a broad right to take and use resources, or under the even broader right of exclusive possession.

As to controversy over commercial rights, it is not incumbent on a native title applicant to claim rights framed in such a way as to facilitate extinguishment arguments. Rather, it is incumbent on an applicant to claim rights that properly reflect the relationship of the claimant group to its country. If the claimed right is to take resources for use for any purpose, then, regulation, or even prohibition or imposition of a universal licensing requirement for use of a particular resource for commercial purposes, or all resources for that matter, will regulate but not extinguish the right. There is literally no commercial right to extinguish where commercial activity is just one of the ways in which a right to take and use resources may be exercised.

It should be the aim of those framing claimed native title rights and interests to comprehend the completeness, and ensure the continuing integrity, of the relationship of people and country. Anything less will likely fall short of the best practice representation of native title claimants.

Conclusion

I have sought here to suggest a model for approaching some of the important research and pleading tasks of a native title claims process, taking advantage of recent developments in native title jurisprudence.[23] The contention is that the adoption of this approach, systematically and consistently, from the beginning of the claims process to incorporating it in an overall plan for a native title claim, will ensure that the end result will best reflect the traditional relationship of the people of the claim area with that area under their laws and customs, and that nothing will be left out that can properly be recognised as native title. The resulting native title will be its own best defence against future piecemeal extinguishment.

Robert Blowes SC
Senior Counsel
ACT Bar Association

About the author

Robert Blowes SC, Canberra, is a barrister with 35 years of full-time experience in representing Aboriginal people and Torres Strait Islanders in the preparation, litigation, negotiation and mediation of claims to have their traditional rights in land and waters recognised and protected in many regions of Australia.

Footnotes

1. Harmonised Expert Witness Code of Conduct, para 2 — annex A to the Expert Evidence Practice Note (GPN-EXPT) issued by the Chief Justice of the Federal Court on 25 October 2016:

   > An expert witness is not an advocate for a party and has a paramount duty, overriding any duty to the party to the proceedings or other person retaining the expert witness, to assist the Court impartially on matters relevant to the area of expertise of the witness.

2. *Western Australia v Ward* (2002) 213 CLR 1; 191 ALR 1; [2002] HCA 28; BC200204355 at [76] and [95].
3. P Sutton *Kinds of Rights in Country: Recognising Customary Rights as Incidents of Native Title* National Native Title Tribunal Occasional Papers Series No 2 (2001) 24 under the heading "Basic characteristics of Aboriginal country as property".
4. *Manado (on behalf of the Bindunbur Native Title Claim Group) v Western Australia* [2017] FCA 1367; BC201710225 at [498].
5. Above n 4, at [498].
6. *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth* (2013) 250 CLR 209; 300 ALR 1; [2013] HCA 33; BC201311628.
7. Above n 2, at [95]. The submissions made to the court in the case by some parties were replete with references to the metaphor, but there is little mention of it in the judgments.
8. Above n 2, at [95].
9. Above n 2, at [95].
10. Above n 2, at [14]. In *Yanner v Eaton* (1999) 201 CLR 351; 166 ALR 258; [1999] HCA 53; BC9906413 at [37], the plurality of Gleeson CJ, Gaudron, Kirby and Hayne JJ said that "native title rights and interests not only find their origin in Aboriginal law and custom, they reflect connection with the land." Their Honours went on to say at [38] that:

    > Native title rights and interests must be understood as what has been called "a perception of socially constituted fact" as well as "comprising various assortments of artificially defined jural right". And an important aspect of the socially constituted fact of native title rights and interests that is recognised by the common law is the spiritual, cultural and social connection with the land.

11. Above n 2, at [14].
12. *Mabo v Queensland (No 2)* (1992) 175 CLR 1; 107 ALR 1; [1992] HCA 23; BC9202681.
13. Above n 2, at [52].
14. Above n 6.
15. *Akiba on behalf of the Torres Strait Islanders of Regional Seas Claim Group v Queensland (No 2); sub nom Akiba v Queensland (No 3)* (2010) 204 FCR 1; 270 ALR 564; [2010] FCA 643; BC201004525 at [540].
16. *Western Australia v Brown* (2014) 253 CLR 507; 306 ALR 168; [2014] HCA 8; BC201401345.
17. Note, importantly, that this does not in any sense destroy or extinguish any (non-native title) rights or interests, or undermine the other elements of connection. It means only that such matters are not given status as rights and interests in Australian law. For example, the "reciprocity-based rights" held not to be native title rights in *Akiba* nevertheless remain rights enforceable within the normative system of Torres Strait Islanders.
18. Above n 15, at [540].
19. *Western Australia v Willis on behalf of the Pilki People* (2015) 239 FCR 175; 329 ALR 562; [2015] FCAFC 186; BC201512483.
20. *BP (deceased) on behalf of the Birriliburu People v Western Australia* [2014] FCA 715; BC201405322.
21. *Isaac (on behalf of the Rrumburriya Borroloola Claim Group) v Northern Territory; Roper (on behalf of the Rrumburriya Borroloola Group) v Northern Territory* (2016) 339 ALR 98; [2016] FCA 776; BC201605567.
22. *Murray (on behalf of the Yilka Native Title Claimants) v Western Australia (No 6)* [2017] FCA 703; BC201704861.
23. A suggested precedent for terms of reference for anthropological research for a native title claim consistent with the views expressed here has been provided for inclusion in the Australian Institute of Aboriginal and Torres Strait Islander Studies' Native Title Precedents Database, available at https://ntpd.aiatsis.gov.au. The database is only accessible by subscribing native title representative bodies.

Robert Blowes SC

Barrister ABN: 40 202 329 062

Memorandum of guidance

To: **Richard Vokes, President, Australian Anthropological Society**

Cc: **Gregory L Acciaiolo (President Emeritus); Jennifer Deger (President Elect)**

Date: **6 February 2018**

Re: **Instructions to provide report consistent with neighbouring consent determinations**

Contents

Introduction and background

1. I am asked by the 2017 President of the Australian Anthropological Society for general legal guidance on a question about the duties and role of an anthropological researcher engaged to undertake research and provide opinions in relation to a native title in circumstances where the researcher has been instructed by terms of reference issued by the engaging Native Title Representative Body which include an instruction that the research and report should conform to neighbouring native title determinations. The request also asks for advice about objections to an expert report on the grounds of inconsistency with findings in a neighbouring native title determination area.

2. I received the request by letter dated 20 November 2017 from Gregory L Acciaioli. This request was accompanied by an undated document of 11 pages on behalf of the Australian Anthropological Association entitled, "*Request for legal advice: Forcing*

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Anthropological Research to conform to neighbouring native title determinations" (**detailed request**).

3. Because the request does not relate to a particular case, I have previously indicated that I am strictly unable to provide legal advice applicable to any particular case. This is because general experience has it that real factual situations will most likely differ in significant ways that may affect the conclusions of any legal consideration.

4. The request is based on particular factual scenarios that may reflect common situations but are nevertheless strictly hypothetical *vis-à-vis* any other case. Thus, it cannot be said that the conclusions reached in this guidance necessarily would be the same as those reached in a similar real-world situation. There may be no strictly comparable situation. For example, the precise form of terms of reference given to a researcher may affect the legal consideration, as may the context of the surrounding determinations, the research supporting the surrounding determinations, the nature of the relationship between the particular people of the particular research area and the particular research and native title findings about the people of the neighbouring consent determination areas and so on. There is room for endless non-comparable situations in real life.

5. For the avoidance of doubt about the basis of the guidance provided here, I will set out as **ATTACHMENT A**, the entire terms of the detailed request.

6. Further, this guidance does not purport to provide legal advice about the application of any ethical rules (enforceable or otherwise) issued by any professional body that may condition the conduct of the researcher apart from the obligations imposed on an expert witness by the Rules and Practice Notes of the Federal Court of Australia.

Directing an expert researcher and potential expert witness

7. A researcher should receive clear terms of reference about the research tasks required and may be guided in the finalising of an expert report on questions of relevance and form but should not be directed as to the content of his or her conclusions or opinions.

8. The particular factual scenarios set out in the detailed request are dealt with further below. However, the question posed for consideration – whether it is ever appropriate for terms of reference and legal advice from native title representative bodies to an anthropologist engaged to undertake research for a native title claim to assert that the findings of the research should conform to neighbouring determinations - at that most general level is quickly answered.

9. An anthropologist in native title proceedings should not accept directions or instructions as to the content of an opinion or conclusion reached on the basis of relevant research.

10. It is inappropriate for a lawyer to direct or instruct an anthropologist as a potential expert witness to reach conclusions that 'conform' with other research findings or findings of a Court in other proceedings.

11. Absent any complaint about the independence of the researcher or the quality of the research and report, an anthropologist ought not be concerned about what happens to his or her report at the hands of the parties in litigation or the Court, or take it as criticism of the anthropologist. That aspects of a report may be 'given no weight' for reasons to do with judicial precedent and the finality of a native title determination, does not reflect adversely on an expert and ought not be regarded as such.

12. On the other hand, answering in the affirmative a question, "Did you accept a direction or instruction from a lawyer that any opinions expressed in the report conform with other judicial or research findings?" would amount to an admission of conduct contrary to the fundamental duty of an expert witness, that is, to be "independent".

13. Terms of reference may:

    (a) confine the scope of a research inquiry;

    (b) limit the material provided to the researcher; and

    (c) state assumptions to be accepted by the researcher.

14. Issuing such terms of reference is a legitimate approach for a lawyer to take, and one that does not compromise the independence of the researcher; though it may qualify the "open-endedness" of the research task.

15. To the extent that such terms of reference may affect the conclusions reached (even to the point that they may in fact conform to findings in adjoining areas) then, provided the anthropologist sets out such limiting terms of reference clearly, and if necessary qualifies his or her report accordingly, there can be no complaint about his or her independence.

16. "Open-ended" research instructions are not a necessary pre-requisite to the independence of a person engaged as a potential expert witness. Native Title litigation is expensive, and is subject to various pragmatic, legal strategic considerations and other imperfections. Unfettered open-endedness in research may be an academic ideal but not necessary to meet the requirements for native title research in a particular case. The "open-endedness" that a researcher *should* insist on is that he or she not be directed or otherwise influenced as to the content of their opinions; and should not be told generally how to apply their specialised knowledge to fulfilling the terms of reference.

17. On the other hand, the researcher is entitled to expect adequate guidance from the commissioning lawyer as to questions of "relevance" and "form". Evidence that is "relevant" is evidence that, if it were accepted, could rationally affect the assessment of the probability of the existence of a fact in issue in the proceeding: *Evidence Act 1995* (Cth), s 55. A researcher may not be fully informed as to what are the "facts in issue" and is entitled to receive legal guidance in that regard. Generally, the correctness of a determination of native title made by the Federal Court in relation to an adjoining area will not be a fact in issue.

18. "Form" is a short hand way of referring to the way that facts and opinions are stated and addressed in a report. Guidance as to "form" should be limited to questions about making such changes as may bring the evidence in an expert report within the rules of evidence and make it admissible as evidence. Thus, there may be circumstances in which reporting hearsay may be problematic or the way in which an opinion is arrived at is not properly disclosed.

19. Similarly, the evidentiary differences between facts and opinions, and between opinions and their "basis", are critical distinctions about which guidance may be sought and provided. However, matters of relevance and form do not extend to the content of the opinions reached by an expert. Such content is a matter for the expert, not those engaging the expert.

20. Referring to material not in the public domain, a senior anthropologist I know takes the firm view and adopts the firm practice that if a commissioning lawyer does not want an otherwise undisclosed document disclosed (referred to or relied on) in his report, the lawyer should not provide it to him. I would endorse that as a correct and wise approach.

21. Otherwise, a researcher should, within the parameters of their terms of reference, interview such persons, identify and consider such material in the public domain or has been provided as is relevant, and by application of anthropological reasoning, reach and report such conclusions as the application of specialised knowledge requires or permits.

22. To the extent that the expert's ultimate opinions are inconsistent with an adjoining or nearby determination, then a number of things may happen:

    (a) the commissioning legal representative may choose not to rely on the report or call the expert as a witness in the case;

    (b) the expert and the legal representative may discuss the implications of the opinions and whether it might be necessary to apply to amend the previous determination so as to produce consistency between it and a new claim based on the report;

    (c) the legal representative may choose to rely on the report for limited purposes relevant to the new claim and agree that the report may not be used for the purpose of undermining the previous determination (in which case the Court will give the report no weight for that purpose – as in the *Lake Torrens Case*).

23. Alternatively, perhaps preferably, the situation might have been avoided by informed and robust discussion between the anthropologist and the legal representative before finalising the engagement of the expert as to the:

    (a) scope of the intended research;

    (b) nature and extent of assumed facts to be included in the terms of reference; and

    (c) extent of the material that would be provided to the expert.

24. If, following such discussions, the expert remains concerned that the particular limitations of the engagement (for example if he or she was unable to accept the proposed assumed facts) would compromise his or her independence, the engagement could be declined.

25. What the expert may not do, and what the legal representative ought to not expect him or her to do, is to change an opinion merely so that it will conform to the previous determination.

The role and duties of an expert witness generally

26. While the anthropological researcher engaged to work on a native title claim may never in fact be called to give evidence as a witness, his or her report may be used by the parties before the Court and relied on by the Court in various ways, even in a consent determination context. Thus, unless clearly instructed otherwise, a researcher so engaged ordinarily must assume that the final report will enter formally into Court processes, and thus that the rules and other requirements of the Federal Court will apply.

27. The legal framework for expert evidence in the Federal Court context, as the detailed request at paragraph [23] notes, is provided by the *Evidence Act 1995* (Cth) (especially ss 78-80), the Federal Court Rules 2011 (**Rules**) (especially rules 23.11-23.13) and the Federal Court's Expert Evidence Practice Notes (GPN-EXPT) issued by Chief Justice Alsop on 25 October 2016 (**Practice Note**). It is unnecessary for me to provide detailed commentary on these for present purposes, though it might ordinarily be expected by an expert that they will be provided where required to the expert and guidance offered to ensure an adequate understanding the terms and implications of the overall requirements generally.

28. For present purposes, of primary concern are the requirements of:

(a) Evidence Act, s 79(1), that evidence that is relevant to a fact in issue, but is in the form of an *opinion* will be admissible (as an exception to the rule against hearsay) if the opinion "is wholly or substantially based on" "specialised knowledge based on the person's training, study or experience";

(b) Rule 23.13(1)(b), that the expert report must contain an acknowledgement at the beginning of the report that the expert has read, understood and complied with the Practice Note.

(c) Practice Note, paragraph 2, "An expert witness is not an advocate for a party and has a paramount duty, overriding any duty to the party to the proceedings or other person retaining the expert witness, to assist the Court impartially on matters relevant to the area of expertise of the witness.

This is a critical requirement and the most relevant for present purposes. It is the source of the requirement for impartiality and independence from the engaging party. However, the Practice Note does not mandate that an expert is to be given a brief to conduct open ended research over an entire region in order to come to conclusions about a part of it – even though that may be an anthropological methodological ideal. Faced with limitations on that ideal, the expert may feel constrained to qualify his or her report by reference to that ideal and the limitations of the research conducted for the purposed of the report.

(d) Practice Note, paragraph 3.1, that, "Parties and their legal representatives should never view an expert witness retained (or partly retained) by them as that party's advocate or "hired gun". Equally, they should never attempt to pressure or influence an expert into conforming his or her views with the party's interests."

(e) Practice Note, paragraph 3.3(b), relevantly, that an expert retained by a party be provided with "all relevant information (whether helpful or harmful to that party's case) so as to enable the expert to prepare a report of a truly independent nature".

(f) Practice Note, paragraph 3.4, that "Any questions or assumptions provided to an expert should be provided in an unbiased manner and in such a way that the expert is not confined to addressing selective, irrelevant or immaterial issues.

As to Practice Note, paragraph 3.4, if an expert is presented with assumptions, for example, about the correctness of the findings of a previous consent determination, and has good reason to doubt the correctness of the

assumptions, then is the time for discussion with the legal representative of the party about the position of the expert and whether, for example, the expert might regard him or herself as compromised by acceptance of the assumptions, whether a better starting for the good and sustainability of regional native title determinations might require a different approach (for example, consideration of a variation application at some point) and so on. However, acceptance of the assumptions or not will likely be based not so much on the legal framework for expert evidence in the Federal Court but on profession considerations, perceived obligations to informants and so on.

(g) Practice Note, paragraph 4.1, "The role of the expert witness is to provide relevant and impartial evidence in his or her area of expertise. An expert should never mislead the Court or become an advocate for the cause of the party that has retained the expert"

29. Thus, having regard to the above, the position of an expert faced with an assertion by a legal representative of a party that the content of opinions expressed in a report should conform to consistency with a previous consent determination, will likely be untenable.

30. However, the position of the expert faced with a discussion about the scope of the research, assumptions to be made about the basis for previous determinations and so on in the course of developing terms of reference for the research and a report, may not be untenable.

The Lake Torrens Case

31. The detailed request identifies a particular factual background based on a situation that arose in relation to the *Lake Torrens Overlap Proceedings (No 3)* [2016] FCA 899 (**Lake Torrens Case**) and poses some additional scenarios.

32. The decision in the *Lake Torrens Case*, a decision of Mansfield J, a judge well experienced in native title cases, was subsequently appealed in proceedings SAD249 of 2016 - *Andrew Starkey and Joylene Thomas on behalf of the Kokatha People and State of South Australia & O*r. The appeal was heard over 4 days from 27 February to 2 March 2017 by Justice Reeves, Justice Jago and Justice White. The appeal has been adjourned and judgment reserved. Given that the appeal has now been reserved from some 9 months it might be reasonable to expect the decision of the Full Court in the near future.

33. I am not instructed as to the grounds of the appeal or the scope of the arguments on appeal and do not know whether they call into question the way that Mansfield J approached the questions about anthropological evidence that have been raised for my consideration in this Memorandum. However, it seems unlikely that the decision will contain pronouncements that will address the questions that are the focus of this Memorandum. I may be wrong about that am willing to update this Memorandum if the decision requires it.

34. Pertinent to questions 2-4, considered below, the *Lake Torrens Case* is not an example of an anthropologist being directed to reach opinions conforming to surrounding determinations. Nor is it a case that is to be understood as involving criticism of the anthropologists for want of independence or otherwise. My reading of it is that it says nothing about the ethical position of anthropologists and a lot about the legal contests in the case and the management of those contests by the parties and the Court – matters

beyond the control of any expert witness. That anthropological reports may be the subject of such contests and management does not entail fault on the part of the anthropologists.

35. Similarly, the fact that the expert reports in that case were objected to and criticised by lawyers for competing parties does not entail fault. Even the fact that the Court attributed no weight to any use of the expert reports for the purpose of undermining a determination about a different area, does not involve criticism of the anthropologists. Rather, it might better be understood as a ruling about "relevance", that is, that use of the reports to undermine an existing determination was not relevant to the proceeding before the Court because the Lake Torrens Case was simply not about the areas of the existing determination.

36. It is for that reason that Mansfield J ruled that the evidence the subject of the objections was admitted "to inform the extent to which there are native title rights in any one of the Applicants over Lake Torrens and for any legitimate purpose": *Lake Torrens Case* [54]. If that involves criticism of the reports, it is likely not due to poor research or conduct on the part of the anthropologists. Rather, it is likely due to failure to anticipate the situation and the objections that in fact arose, which is a matter for the legal representatives, not the anthropologists.

37. I hasten to add that I was not involved in the *Lake Torrens Case*, so all I know about it is what I can read in the judgment. I am not privy to consideration of the exigencies and complexities, strategies or the overall management of the case for any party, and I am not in a position to be critical, or otherwise, of anyone involved in the case, whether as a lawyer or anthropologist.

38. Mansfield J reported at [55] that, "It was also said that certain parts of the expert reports are argumentative, hard to understand or not based on a proper foundation." Again, he is reporting advocacy here rather than the Court being critical of the anthropologists. To the extent that criticisms of that kind by an opposing party can be avoided (as to which there can never be any guarantee), it can only be by careful writing by the expert in co-operation with careful guidance from the legal representatives of the commissioning party.

39. So, in my view, the *Lake Torrens Case* is to be understood as involving a legal constraint against a particular use of an anthropological report (viz, to undermine a native title claim to a different area) rather than criticism of the independence or otherwise of any anthropologist. Indeed, the fact that a regional approach to the research was taken by an expert, and that conclusions were expressed which were contrary to earlier views and findings, speaks loudly of independence.

40. In the presence of a regional application to vary previous native title determinations in order to bring them into line with the particular anthropological findings in question, the opinions would undoubtedly have been relevant to matters in issue and would likely not have been subject to the same restrictions on their use.

41. The role of the anthropologists in the *Lake Torrens Case*, and whether it was exceeded to any extent by any of the researchers, could only be understood with full knowledge of the terms of reference under which they were operating and of the full terms of any guidance they were offered by the respective commissioning legal representatives. I am not privy to any such material.

42. It may be that one or more of the anthropologists involved insisted on taking a 'regional' approach to the research and was acceded to in this by the legal representatives. Had it not been acceded to, and had the legal representatives instructed the respective researchers to assume as fact the findings of the research upon which the Kokatha Part A decision was based and the findings of the Court in that matter, then the anthropologist could have declined the commission, or qualified his or her report accordingly by reference to the facts being assumed rather than being the subject of his or her independent research.

43. Had the commission been accepted on the assumed fact basis, it might have been subjected to the criticism that expert evidence "is only as helpful as the evidence and assumptions on which it is based" (see *Lake Torrens Case* [190]). While the anthropologists may not have accepted assumptions about the situation in the Kokatha Part A Determination area, the Court was bound to, as a matter of relevance.

44. Thus, the reason the Court in the *Lake Torrens Case* was not able to admit the reports *for the purpose of contradicting an earlier decision of the Court* was that the earlier matter is to be regarded as finalised and not open to question except in appropriate proceedings to vary or revoke that earlier decision.

45. If the research in fact commenced on an understanding between the anthropologist/s and commissioning legal representatives that a regional perspective was to be brought to the work, then what in fact happened was probably inevitable. Once the research had commenced on a regional basis it would have been too late for the anthropologist to accept an assumed fact regime and retain his or her independence.

46. Of course, had the researcher been offered an assumed fact terms of reference, he or she could have rejected the commission or alternatively accepted it and produced a qualified report. If the researcher in fact has previous knowledge or views contrary to the assumptions sought, this should be made known to the instructing representative body at the outset and a decision made about whether the researcher's involvement can or should continue consistent with the requirement to remain independent and the evidentiary benefits of an unqualified report.

47. It is to be understood also that the views of the expert anthropologists in the *Lake Torrens Case* did not all suffer the fate of being given no weight for a particular purpose. At [191] and [194] Mansfield J indicated there was no reason not to place any weight on particular views. It was simply that he could not rely on the reports in the context of the particular claim, so far as they called into question the earlier determination over another area.

48. The kind of problems that the *Lake Torrens Case* illustrates is peculiar to situations in which a previous determination of native title has been made over an adjoining or nearby area. Thus, they are likely to become more common.

49. In each particular case, it is for the legal representatives to consider at a very early stage whether these difficulties are likely to arise and to very carefully determine the way that a claim may be put, and how the research is to be undertaken. It needs to be considered whether a known regional position is to be pursued (perhaps notwithstanding that it may suggest a variation of an existing determination is required), or whether the new claim area can be put consistently in the regional context of the earlier claims. Clearly, there is serious difficulty with any idea of presenting a new claim on a particular basis if it is known

that it should be dealt with on a different basis had the earlier research for the earlier determinations been such as to have properly appreciated the regional context.

50. It is not suggested in the *Lake Torrens Case* that any of the anthropologists involved had acted inappropriately or had been directed as to the content of their opinions. It does not set a precedent which would justify a legal representative seeking to commission anthropological research on the basis that the expert is to reach a particular view consistent with neighbouring consent determinations.

The questions

51. Various numbered questions are formulated in paragraphs [10]-[13] of the detailed request. Those questions are followed at paragraphs [14]-[27] of the detailed request by a section of comments that are directed to each of the questions. The questions are set out below and a summary answer to and some further consideration of each is provided.

Question 1 – objection to expert report for inconsistency with neighbouring determinations

> Is it a legitimate ground for objection to the receipt of parts of an expert report into evidence in a native title hearing that those parts of the expert report are inconsistent with necessary findings in a neighbouring native title determination.[1]

52. This question is asked in relation to three scenarios[2] which are considered further below.

53. The answer to Question 1 (including relation to each scenario) in summary is that in the circumstances of a particular case, parts of an expert report inconsistent with findings in a neighbouring determination may, or may not be, found to be admissible under strict application of the rules of evidence. However, as in the Lake Torrens Case, the Court may manage the use of the report otherwise than by the strict application of legal rules about its admissibility.

54. Strict application of rules about admissibility would require consideration of difficult questions about severing admissible words from any inadmissible words in the report having regard to questions about relevance to matters in issue in the particular case before the court and the nature of each element of the report as to whether it comprised evidence of fact not caught by the rules against hearsay (which is subject to various technical exceptions) or opinion evidence (which is also subject to various technical requirements and exceptions. Further, under the Evidence Act, the court has discretions to exclude or limit the use that may be made of evidence that may otherwise be admissible.

55. Thus, no definitive answer can be given to the question generally or in relation to the various given scenarios, and thus, it is unlikely to be a fruitful exercise for an expert to overly concern himself or herself with the question.

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1 Detailed request paragraph [10].

2 Detailed request sub-paragraphs [10(a)-(c).

Question 1(a) – inconsistency involving socio-territorial identity of groups

56. The first scenario[3] mentions the *Lake Torrens Case* as an example of the scenario. I have already considered that case generally above. The scenario postulates "inconsistency relating to … the socio-territorial identity of the neighbouring group at sovereignty

57. In the *Lake Torrens Case* it appears there were certain matters which the Court regarded as involving true inconsistency: inconsistency such as would render a particular outcome in a proceeding unobtainable from the Court because of a previous determination.

58. The prior question in any other case is whether there is such true inconsistency. Findings about socio-territorial identity of groups, for example, depend upon a large substratum of complex fact and opinion, allowing considerable room for the possibility of reconciliation. Such possibilities require close research and consideration, rather than assumed inconsistency, where there is an apparent anomaly relating to questions of group identity.

59. The detailed request, at paragraph [18] asks, "what is the legal relationship between native title proceedings and a prior, neighbouring native title determination". The relationship at least includes that the prior determination has been made on the basis facts established to the satisfaction of the Court and that in the proceedings, the determination to be made must also be based on facts established to the satisfaction of the Court. The theory of precedent requires that the subsequent Court must respect the previous findings of the Court unless clearly wrong. If two facts are truly inconsistent, then one is wrong.

60. The bottom line is, that unless the previous determination is being challenged in the new proceeding, then the Court and parties must accept the previous determination as finally determining native title issues over the area it covers. That does not bind an expert witness in a future claim, but a report that is prepared otherwise than on the basis of assuming the findings of the previous determination to be correct either will not be relied upon or will be given no weight to the extent of inconsistency with the previous determination. An anthropologist who is not prepared to accept such assumptions for the purposes of a report, or who arrives at a point of thinking that such assumptions are not correct, should immediately alert the commissioning legal representative and seek to discuss urgently how the research, the report and the claim may properly proceed.

61. As to the comment at paragraph [19] of the detailed request about succession, I make the following observations. Firstly, succession to country in accordance with traditional law and custom is not an exception to "strict continuity". Rather, like descent, it may well be a legitimate basis for the possession of rights under traditional law and custom. Second, whether or not "succession" might explain a different result in the Lake Torrens Case, does not avoid the difficulty that the findings in *Kokatha Part A* case were not matters in issue in the *Lake Torrens Case*. Third, the *Lake Torrens Case* does not appear to have been put by any of the Applicants on the basis of succession, as I read the judgment. However, succession, if it was a possibility, was something that could have been (and perhaps was) the subject of early research and consideration and decisions may have been made not to put any of the claims on that basis.

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3 Detailed request sub-paragraphs [10(a)].

62. What might be said additionally at this point is that, as ever, there needs to be clear communication and understanding between lawyers and anthropologists involved in native title claims as to their respective roles and appropriate terms of reference for research in the context of a particular case.

Question 1(b) – inconsistency involving different sets of ancestors

63. The scenario in sub-paragraph [10(b)] and paragraph [20] of the detailed request posits that the research for a later claim identifies that perhaps some additional ancestors should have been included in the earlier adjoining or nearby determination and perhaps some were included when they should not have been.

64. Again, the researcher will be reporting for a particular claim area and identifying the correct claim group for that area. That his or her opinions indirectly may call into question the inclusion or exclusion of particular apical ancestors will be a matter for the representative body to deal with. However, again, it is not permissible for the legal representatives to insist that only those ancestors listed on the previous determination be the subject of affirmative opinion in the expert report for the new claim.

65. Such a difficulty is more readily managed than *Lake Torrens Case* situation. It is common these days for determinations to be amended to address later and better research in relation to the list of ancestors by which a native title claim group is defined.

66. Terms of reference for research for a new claim area that required a researcher to assume the identity of the members of the native title claim group (or in particular assume that they are the same as stated in a nearby determination) would be of little use to anyone. Rather, investigation as to who are the proper members of a claim group is required. If there is any discrepancy between the research findings and a nearby determination, it might be incumbent on the representative body to provide any new material to the researcher involved in the previous determination and for the researchers involved in both claims jointly to confirm a correct list.

67. Ordinarily, it might be considered unusual if a researcher were not to be given access to or permitted to consider the research findings in relation to an area clearly relevant the area to be researched; particularly if, as posited in paragraph [8] of the detailed request, the relevant adjacent earlier consent determination was over a small area surrounded by a much larger later claim area. Nor might it be considered particularly unusual if later more extensive research turned up support for a different basis for claim, or additional ancestors. There are ways of managing such a situation, but these should not include an assertion by a legal representative commissioning the necessary research that the findings are to be wholly consistent with the original determination.

Question 1(c) – inconsistency involving different socio-territorial identity of ancestor

68. This scenario in sub-paragraph [10(c)] and paragraphs [7]-[8] and [21] of the detailed request assumes a direct inconsistency between a research finding that ancestor X belongs to Y language group, and a research finding that X belongs to Z language group. It is possible that ancestor X in fact had relevant descent links capable of sustaining the conclusion he or she was a member of both language groups.

69. Generally, it seems to me that the scenario presented here is one that might be susceptible of research-based explanation rather than “inconsistency”. I would see the circumstances being dealt with first by further research and consideration by the

researcher as to whether there is any non-inconsistent explanation; and if no such explanation is available, then by consideration by the legal representatives on the claim as to how the claim might be put and as to how any inexplicable inconsistency might be dealt with.

70. Again, one thing is clear, such inconsistency cannot be dealt with by the expert simply changing his or her opinion at the request or insistence of a legal representative of the applicant.

Questions 2-4 - Research constraints asserted in different contexts

71. The detailed request asks whether it makes any difference whether an asserted constraint is sought in the context of claim that is the subject of a contested hearing[4] or a consent determination[5] and whether it is any different in the case of an in-house anthropologist[6].

72. My view is that, when a report is commissioned formally for the purposes of a native title claim, it makes no difference whether the claim is likely to be contested or uncontested. At the time of commissioning the research, it cannot can be known with certainty whether a matter or aspects of it, will go to trial or will be dealt with by consent. In any event, even a consent determination is necessarily based on an expert report or information derived from one. Thus, the requirements of an expert witness in the Federal Court are engaged.

73. As to the situation of an in-house anthropologist; if his or her report is to be used in a contested or consent determination as the report of a consultant expert might be used, then those requirements that apply a consultant engaged as an expert also apply to that person. Thus, the requirement for independence would override any duties of that person as an employer of the representative body. Such a person is no less immune from inappropriate direction as to his or her findings than a consultant expert.

74. Of course, if the in-house anthropologist is not to be involved as an expert witness or the author of an expert report but is tasked with assisting a consultant who will be, then though that person is not directly bound by rules that govern the consultant he or she must respect that the consultant is personally and professionally accountable under those rules.

Conclusions

75. In the general comments in paragraph [28] the detailed request, it is suggested that the approach taken by Mansfield J is “preferable”. It is certainly preferable to a situation where an expert is directed as to the content of his or her opinion or subjected to adverse comment by the Court. It may also be preferable to attempts to manage research outcomes through constraining terms of reference and the imposition of factual assumptions; though that might depend upon particular circumstances.

76. Anthropologists should feel at liberty to discuss any terms of reference offered to them as the basis for their engagement, including as to the geographical scope of a research

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4 Detailed request paragraphs [11, [22]-[25].

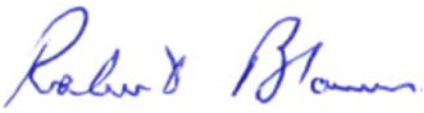
5 Detailed request paragraphs [12], [26].

66 Detailed request paragraphs [13], [27].

area considered necessary to meet the requirements of anthropological best practice. In the event that funding or other circumstances may lead some constraints on the ideal process, then the anthropologist should discuss with the legal representatives, whether or not he or she might feel compelled by the nature of the constraints to qualify the report, and if so the likely terms of any such qualification.

77. If the constraints contained in the terms of reference were such as to not preclude the expression of opinions inconsistent with other determinations, then there would be no need for any qualification about the precise terms of any use that may be made of such opinions, as that would be a matter to be sorted out between the parties and the Court.

78. On the other hand, once it is accepted that any such opinions included in the report will be given no weight for the purposes of undermining an existing determination, if they indeed serve no *other* purpose in the report then consideration might be given to revising the report to remove them. However, it is likely that it will be necessary that the opinions remain part of the report to enable the report and the *relevant* opinions in it to be properly understood.



Robert Blowes SC, Canberra

ATTACHMENT A to Memorandum of Guidance of Rob Blowes SC

REQUESTS FOR LEGAL ADVICE: FORCING ANTHROPOLOGICAL RESEARCH TO CONFORM TO NEIGHBOURING NATIVE TITLE DETERMINATIONS

Contents

Introduction

1. Some consultant anthropologists have been placed in a professional dilemma by terms of reference and legal advice from native title representative bodies asserting that their anthropological research should conform to neighbouring native title determinations. Such terms of reference and legal advice has the effect of truncating what should be open-ended research to identify all native title holders for a research area. In such research, neighbouring determinations are not usually considered to be relevant source material upon which to base an anthropological opinion. Accepting such a constraint on the formulation of anthropological opinion would also seem to conflict with the legal obligation of an expert witness to declare that they have not hidden any relevant matter from the court (see, for example, Peter Sutton in his essay 'Remembering Roxby Downs: Mythology, mining and the latent power of archives' 2017 Griffith Review Edition 55:135-159, especially p. 152-4). Some consultant anthropologists consider that on this issue their immediate interests do not necessarily converge with the interests of the representative bodies, which, understandably, seek to preserve the integrity of existing, hard-won determinations at any cost. Accordingly, the Australian Anthropological Society seeks its own independent legal advice on the issue to facilitate the development of a

best practice standard for its members who are involved in native title consultancies or who work as in-house anthropologists in native title representative bodies.

Factual background

2. Because the contractual arrangements of consultants and legal advice given to consultants and in-house anthropologists are typically confidential, the approach taken in this request for advice is to use A) publicly available factual situations, in particular, the Lake Torrens Overlap Proceedings (No. 3) [2016] FCA 899, and two hypothetical factual situations which are drawn from actual cases but with some details obscured so as to avoid breaching confidentiality. The two hypothetical fact situations are outlined below as 'B. Different sets of ancestors' and 'C. Different socio-territorial identities of particular ancestors'.

A. The Lake Torrens Overlap Proceedings

3. The Lake Torrens Overlap Proceedings (No. 3) [2016] FCA 899 seems to have been the first case in which a judge in a contested native title hearing has explicitly not given any weight to expert and lay evidence because of inconsistency with a prior neighbouring determination of native title. The Lake Torrens overlap area was in fact surrounded by three determinations of native title: two consent determinations (Kokatha Part A immediately to the west, Adnyamathanha to the east and north-east) and one determination following a contested hearing (Barngarla to the south-east). The problematic expert and lay evidence related to the area of the Kokatha Part A determination. Anthropologists engaged by the State of South Australia, by the Adnyamathanha and by the Barngarla, as part of their regional analysis of the likely native title holders at effective sovereignty, concluded that no Kokatha country extended to the western shores of Lake Torrens and instead suggested that Kokatha occupation of that area occurred after effective sovereignty.

4. Among other things, objections were made to the judge receiving into evidence those parts of the expert reports that were inconsistent with ('an attack on findings in') the Kokatha Part A determination. Rather than ruling on each specific objection, Justice Mansfield, admitted the expert reports into evidence subject to the objections, final submissions and the judge ultimately deciding upon the weight to be given to such evidence. He stated:

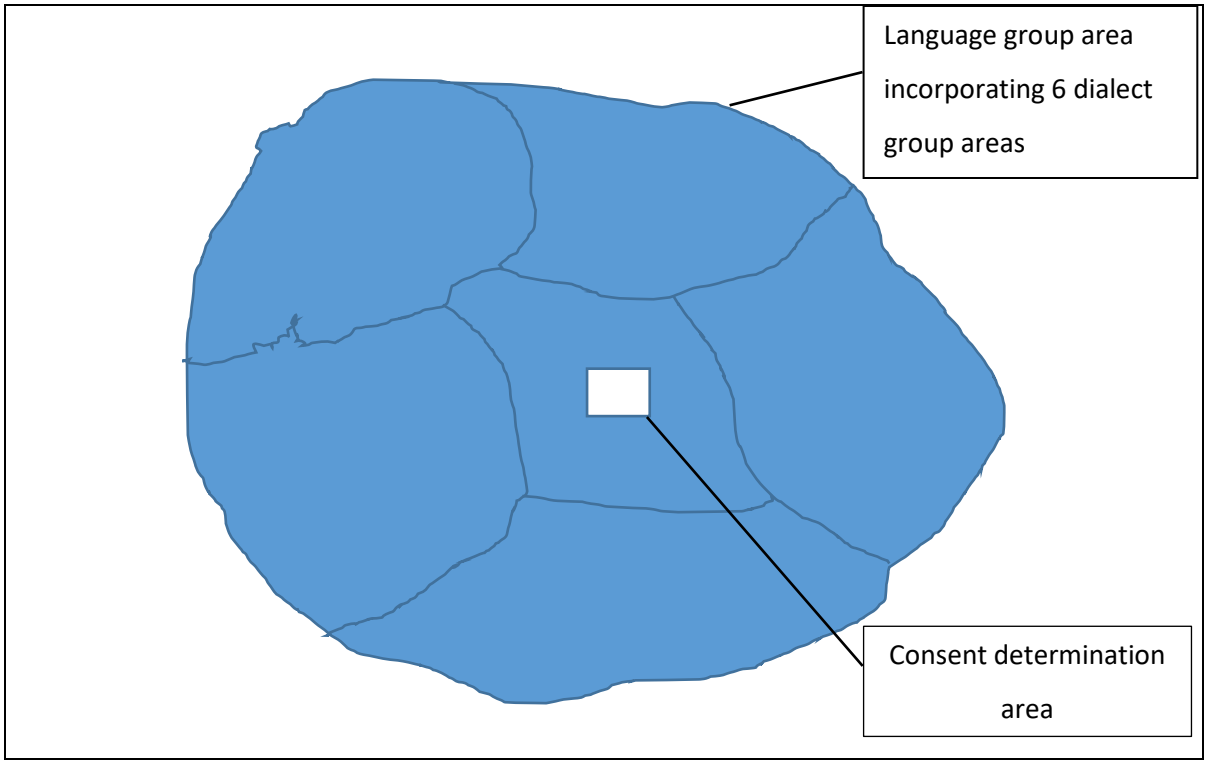
> The evidence the subject of these objections was admitted into evidence to inform the extent to which there are native title rights in any one of the Applicants over Lake Torrens, and for any other legitimate purpose. This was done on the basis that the evidence would not be used to undermine an existing determination and that, in the event that it had no other relevant use, there would be no weight accorded to it. That ruling specified that it was for the party seeking to rely on that evidence to make appropriate submissions on its legitimate use, with the objecting party to have a right of reply. Those matters were then addressed further in the final submissions. (Lake Torrens Overlap Proceedings (No. 3), para. 54).

5. Ultimately, the judge decided not to give any weight to evidence that was directly inconsistent with the necessary findings in Kokatha Part A:

> Consequently, to the extent that the expert anthropological views are premised upon the Kokatha People not having native title rights and interests in the area immediately to the west of Lake Torrens at sovereignty, I do not place weight on it. That is not to question the scholarship and integrity of any of the expert anthropologists. But, as a matter of record, the premise referred to is fundamental to the Kokatha Part A determination, and the court must proceed on the basis of it. (Lake Torrens overlap proceedings (No. 3), para. 190)

B. Different sets of ancestors

6. Another factual situation that has arisen relates to a difference over the number of ancestors who should have been included in a consent determination over a relatively isolated and confined area. Later and more comprehensive anthropological research of the surrounding region indicated that additional ancestors should have been included in the native title group recognised in the consent determination. In other words, the later research did not indicate that the socio-territorial identity in the consent determination was incorrect, rather that the list of ancestors for that socio-territorial group was incomplete. The background to this situation can be further illustrated by reference to the following diagram:



C. Different socio-territorial identities of particular ancestors

7. This is a particular problem in areas that have a long contact history and there is little evidence of the socio-territorial identity of ancestors at effective sovereignty. Sometimes the only evidence consists of early genealogies, for example, collected by Tindale or Radcliffe-Brown. Where the early collectors of genealogies did not attribute a socio-territorial identity to an

ancestor, native title anthropologists sometimes infer such an identity from the place of birth and the date of birth of that ancestor, taking into account the degree of likely disruption to local organisation in that time period. Contemporary Aboriginal family tradition about such ancestors is obviously significant. In some instances, however, contemporary family tradition has been influenced by access to the ethno-historical record. A particular socio-territorial identity which is relevant to contemporary circumstances is then projected back onto the apical ancestor. In these circumstances, the anthropologist is forced to give little weight to family tradition and must make attributions of the likely socio-territorial identity of the ancestor based on very little evidence.

8. What happens then, is that these attributions find their way into consent determinations. Anthropologists researching neighbouring areas may then come to different conclusions about the ancestor, based on a different interpretation of the meagre evidence available, and conclude that the ancestor should not have been included in the neighbouring determination but instead should have been identified as an ancestor for the research area which he/she is researching. The anthropologist then drafts a connection report along these lines, only to be informed by the lawyers of the native title representative body, that such a finding in a connection report is precluded by the neighbouring determination of native title which specifically refers to that ancestor. Consequently, the anthropologist is directed to amend the draft connection report to conform to the neighbouring determination. Note: in this factual situation, there is no indication of the existence of dual country identities at effective sovereignty, rather the patrilineal inheritance of primary rights to a single traditional country.

The questions

9. The following questions arise:

Question 1 – Ground for objection to expert report

10. Is it a legitimate ground for objection to the receipt of parts of an expert report into evidence in a native title hearing that those parts of the expert report are inconsistent with necessary findings in a neighbouring native title determination where the inconsistency relates to:

    (a) the socio-territorial identity of the neighbouring group at sovereignty (as in the Lake Torrens Overlap case);
    (b) a different set of ancestors within the same socio-territorial group (as described above); or
    (c) the socio-territorial identity of a particular ancestor in the neighbouring group (as described above)?

Question 2 – Research constraints asserted by commissioning solicitor for a contested hearing

11. Is there any legal basis for a commissioning solicitor, through terms of reference or otherwise, to direct an expert anthropologist in a contested hearing to ensure that the anthropologist's report conforms to the terms of all necessary findings relating to neighbouring native title determinations where potential inconsistencies relate to:

    (a) the socio-territorial group at sovereignty (as in the Lake Torrens Overlap case);
    (b) a different set of ancestors within the same socio-territorial group (as described above); or
    (c) the socio-territorial identity of a particular ancestor (as described above)?

Question 3 – Research constrainst asserted by commissioning solicitor for a connection report

12. Do any different considerations relate to the situation of a commissioning solicitor and a consultant anthropologist researching a connection report?

Question 4 – research constraints on in-house anthropologists

13. Do any different considerations relate to the situation of a principal legal officer of a native title representative body directing in-house anthropologists in their native title research?

Comments

Question 1 – Grounds for objections to expert report

1A - Objection to expert report (Lake Torrens Overlap Proceedings)

14. This question draws attention to two potentially problematic aspects of Justice Mansfield's reasons for decision in the Lake Torrens Overlap Proceedings: 1) the postponement of ruling on questions of admissibility and ultimately dealing with them as questions of weight; 2) lack of explicit discussion of what legal doctrine was being applied. It seems to me that both aspects may have implications for the legality of directions to anthropologists to make their reports conform to neighbouring determinations.

15. The judge's rationale for not dealing with objections raised to the admissibility of parts of the expert reports in preliminary hearings was expressed in pragmatic terms which means that another judge may approach it differently. He states at paragraph 195:

> I do not consider that particular sections of the expert reports should expressly be struck out. To do so would remove from any consideration the extent to which, if at all, any particular remaining section of the report might have been based in part on a premise which, for the reasons given, cannot be accepted. I have carefully considered whether, leaving the various reports as they stand, might have worked injustice on any other party, either because it could not properly be understood or tested or in some other way. I have had the benefit, in the light of the general ruling made at an early part of the hearing, of

> the cross examination and the submissions of each of the parties. In that light, I am confident that no party has been materially disadvantaged by adopting that ruling at the time. I am satisfied that the course of the hearing gave each party the opportunity to test potentially relevant opinion evidence, and to make submissions about the quality of that evidence or about the parts of the reports which might fall more accurately into the status of argument.

16. If another judge were to take a different view, and rule on applications by the parties to strike out parts of the expert reports at a preliminary stage of the proceedings, what would be the legal principles to be applied? Presumably, one rule can be derived from Justice Mansfield's insistence that he could not give any weight to an anthropological opinion which concluded, contrary to the necessary premise of the neighbouring determination, that the Kokatha did not have native title rights at sovereignty. Is it correct to conclude that another judge may have agreed to strike out those parts of the reports?

17. The exact legal basis for Justice Mansfield's giving no weight to those parts of the reports is not stated. Unhelpfully, Justice Mansfield recites the arguments of the parties but does not give a view about whether those arguments were successful. One argument seems to have been that those parts of an expert report which are inconsistent with the premise of a neighbouring determination are an impermissible attack on the neighbouring determination. Taken literally, it is difficult to see how this can be right because a legally effective attack on the neighbouring determination could only be undertaken via separate legal proceedings for a variation or revocation of a determination under section 13 of the Native Title Act. What the argument seems to amount to is an objection to evidence being led that may provide the factual basis for separate legal proceedings to vary or revoke the neighbouring determination. Indeed, it may be this protective attitude towards neighbouring determinations is what motivates commissioning lawyers to mobilise spurious legal arguments in an attempt to pre-emptively stop anthropologists expressing opinions inconsistent with neighbouring determinations.

18. This brings us back to the fundamental issue of what is the legal relationship between native title legal proceedings and a prior, neighbouring native title determination. It is difficult to understand why there should be any relationship. The prior, neighbouring determination authoritatively declares property rights in the determination area and one would have thought that native title legal proceedings in other areas would not have any direct legal effect on the validity of that prior determination. Therefore, the question seems to be what is the legal principle that Justice Mansfield was invoking? Is it to do with the legal theory of precedent? Is it to do with issue estoppel? Is it to do with abuse of process, as suggested by one of the parties to the Lake Torrens Overlap Proceedings? Is this a new kind of legal principle that uniquely arises in native title? I understand that Justice Mansfield's decision in the Lake Torrens Overlap Proceedings is being appealed, so that the answers to these questions may become clearer at a later date. In the meantime, we would be grateful for your opinion. However, if the appeal decision is imminent, it might make more sense to postpone the advice until after the decision is considered (rather than AAS seeking a second updated advice).

19. From an anthropological point of view, and perhaps from a legal point of view as well, there also seems to be a flaw in Justice Mansfield's reasoning. Finding that a determination of native title necessarily involves the premise that the successful claimant group held native title rights in the area at sovereignty seems to ignore the possibility of traditional succession in post-contact history. As far as I am aware, the Kokatha Part A Determination was not made on the basis of a succession argument. But there may be cases in which a determination is made on the basis of a succession argument, for example, the Waanyi determination (Aplin on behalf of the Waanyi Peoples v State of Queensland (No. 3) [2010] FCA 1515). In those cases, at least, it would not seem appropriate to infer a necessary premise of strict continuity from the position at sovereignty. Since those kind of cases exist, is it appropriate to make an assumption about the necessary premise of a determination without undertaking some investigation into the evidence presented for that determination to ensure that it was not based on a succession argument?

1B - Objection to expert report (different sets of ancestors)

20. The second factual situation differs from the Lake Torrens Overlap Proceedings. In the Lake Torrens Overlap Proceedings there was a direct inconsistency between what the judge held to be a necessary premise of the neighbouring determination and the views of expert anthropologists in the case before him. Whereas in the case of differing sets of ancestors the later research confirmed the socio-territorial identity of the group recognised in the consent determination and the correctness of the named ancestors (but not the completeness of the list of named ancestors). In theory, if the later research is accepted as more likely to be accurate, the representative body could apply for a variation of the determination. But this would bring the unwelcome attention of the state government which might then review its original agreement to the consent determination.

1C - Objection to expert report (different socio-territorial identity of a named ancestor)

21. In this case there is a direct inconsistency between the neighbouring determination which states that the named ancestor belongs to the X language group and the expert report/connection report which states that the same ancestor belongs to the Y language group.

Question 2 - Research constraints asserted by a commissioning solicitor (contested hearing)

22. The first possible situation under this heading is that of a consultant anthropologist who has been given open-ended terms of reference to give an opinion on who the native title holders are. The anthropologist produces a draft expert report ignoring neighbouring determinations and is confronted by the commissioning solicitor insisting that the final version of the expert report should conform to neighbouring determinations. The dilemma for anthropologists is the seemingly contrary legal obligation upon them to offer an independent and unconstrained opinion.

23. The legal framework for expert evidence in the Federal Court is provided by the Commonwealth Evidence Act 1995 (ss. 76-80); the Federal Court Rules 2011 (especially rules 23.11-23.15); and

the Federal Court's Expert Evidence Practice Notes (GPN-EXPT) issued by Chief Justice Alsop on 25 October 2016. At the most general level, this framework allows expert opinion provided it is based on the person's specialised training, study or experience. Even at this general level it could be argued that the legal effect of neighbouring native title determinations are not part of an anthropologist's relevant training, study or experience. More specifically, paragraphs 3(i) of the Harmonised Expert Witness Code of Conduct, which forms part of the Expert Evidence Practice Notes, states that an expert must make a declaration that, among other things, no matters of significance which the expert regards as relevant have to the knowledge of the expert been withheld from the court. If the consultant anthropologist were to comply with the request of the commissioning solicitor to refrain from expressing an opinion inconsistent with a neighbouring determination, that would seem to be a clear breach of the expert's obligation not to withhold relevant matters. Indeed, one can think of no more relevant matter than an expert opinion differing from the premise of a neighbouring determination.

24. On the other hand, I suppose it could be argued that a legal constraint (if that is what it is) to conform to prior neighbouring determinations in expert reports relates to the form of the report not to the content of the expert opinion. However, for reasons outlined in the previous paragraph, this is not an apt distinction.

25. The second possible situation under this heading is that a consulting anthropologist is offered terms of reference which specify that the expert report is not to include any opinions that conflict with neighbouring determinations. Because such terms of reference would be annexed to the expert report, this is a somewhat more transparent approach. But this would still seem to conflict with legal obligations upon the expert not to withhold matters of significance from the court. These legal obligations would justify the consultant anthropologist in refusing to accept terms of reference drafted in this way.

Question 3 - Research constraints asserted by a commissioning solicitor (connection report)

26. Most state and territory guidelines for connection reports import into their requirements the relevant parts of the Federal Court Expert Evidence Practice Notes. Accordingly, the legal dilemma for the consulting anthropologist commissioned to produce a connection report would appear to be identical to the situation of a consulting anthropologist commissioned to produce an expert report for a contested hearing.

Question 4 - Research constraints on in-house anthropologists

27. If in-house anthropologists are not going to be the author of a connection report or an expert report, the legal framework applying to expert evidence does not apply to them. They may, as members of the Australian Anthropological Society, feel that they ought to abide by the Society's Code of Ethics. But membership of the Society and compliance with the Society's Code of Ethics is voluntary. Accordingly, there would seem to be no legal basis for an in-house anthropologist to refuse to comply with an otherwise lawful direction that their research conforms with existing

native title determinations. Of course, this would not prevent in-house anthropologists making the argument for their professional independence. Typically, however, lawyers tend to occupy more powerful positions within representative bodies and the probable outcome of such an argument would be that the lawyers prevail.

General comments

28. From the point of view of the professional practice of anthropology, the approach taken by Justice Mansfield in the Lake Torrens Overlap Proceedings is highly preferable. It leaves the professional obligations of the expert witness and the expert report intact by reducing objections to a matter of weight to be given to problematic parts of the expert report. If the requested legal advice confirms the correctness of that approach, anthropologists practising in native title would be in a strong position to argue with the relevant Principal Legal Officers to adopt this approach as best practice. If the requested legal advice does not confirm Justice Mansfield's approach, anthropologists would be forced to seek a voluntary best practice agreement which respects the independence of anthropological research. This could take the form of the anthropologist expressing the conflicting expert opinion then adding a qualification along the following lines: 'however, I have been advised in the attached legal advice that this issue has been authoritatively decided in the X determination and that consequentially my opinion on this issue can be given no weight in these proceedings'. Either way, the content of the legal advice would be communicated to anthropologists via a summary of its contents in the Australian Anthropological Society's newsletter and possibly by publishing the request for advice and the legal advice on the Society's website.

On behalf of the Australian Anthropological Society

NOTE: This precedent is adapted from terms of reference used in relation to a number of native claims in Queensland and Western Australia.

It is intended for issue to an anthropological researcher engaged to research and prepare an expert report in a form that would be suitable for use in court in a contested native title claim or in support of a consent determination. This particular draft assumes that the researcher is not the only researcher so engaged and in that respect, is likely to require modification in the case of a less complex claim situation.

It is not intended as legal advice, or that it be used without consideration of the particular requirements of a given case. The circumstances of each case require careful consideration to be given to the focus of research for an expert report.

The precedent has been adapted in many ways from the versions that have been used. In particular, it has been adapted to require open investigation and consideration of the relationship of claimants and country such as will enable opinions to be expressed about the nature and extent of rights and interests possessed under traditional laws acknowledged and traditional customs observed, taking into account an important distinction – between a 'right itself' and rules about the manner in which the right is to be exercised.

Further, research under these terms of reference requires an investigation and consideration of rights and interests that goes beyond the simplicity of a list of what people say they may do with or on their country. It requires opinions to be expressed about the nature and extent of rights and interests as the conceptual outcome of the power afforded to a group of rights holders by their laws and customs to use their country and its resources and as against others who may wish to access or use their country or its resources.

Generally, the key provisions of the document in this regard are in clauses 14 and 15.

DRAFT TERMS OF REFERENCE

PROPOSED NATIVE TITLE APPLICATION

[_INSERT NAME_ _NATIVE TITLE CLAIM_]

INSTRUCTIONS WHICH DEFINE SCOPE OF CONSULTANT'S REPORT
Report by expert anthropologist, [_insert name_] "the consultant")

Contents

Introduction

1. The consultant is engaged as an expert anthropologist by the [*insert name of Rep Body*] (***insert abbreviation***) to prepare a draft report in relation to an intended native title determination application to be made under the *Native Title Act 1993* (Cth) (**NTA**) in respect of an area in the [*insert name of*] region of the State of [*insert name of State or Territory*] (**claim area**) (**draft report**).

2. The claim area will extend to [*identify region/area*] within the [*insert name of Rep Body*] Aboriginal/Torres Strait Islander Representative Body area and as shown on the Map in **Appendix 1**.

3. The draft report is to cover, in accordance with these terms of reference, a portion of the claim area, being generally the area indicated by the location of the initials of the consultant on the Map in Appendix 1 (**report area**).

4. [*If and to extent applicable*] The consultant is requested to note that other consultants will be engaged to prepare draft reports the focus of which will be:

   (a) other portions of the claim area;

   (b) the claim area as a whole, addressing the question about society posed in [14] and [15] below; and

   (c) preparation of genealogies of the people of the claim area;

   and that further researchers may be engaged in due course to prepare draft reports the focus of which will be:

   (d) gender specific information and ritual aspects of traditional laws and customs applicable in the claim area;

   (e) linguistics; and

   (f) archaeology.

5. To be clear, research for the draft report should be sufficient to enable the draft report to give a proper account of the traditional laws and customs applicable in the report area and whether they comprise multiple normative systems or a single system or whether such system or systems extends or extend beyond the report area.

6. The draft report may be filed in due course by the applicant in the proceeding, and may also be used in the context of negotiation with the State or mediation with any party to the proceeding.

7. The consultant is to undertake documentary and field research to complete the draft report.

8. The consultant is requested to liaise with the other consultants referred to in [4] above as may be directed by the [*insert abbreviation for Rep Body*] Principal Legal Officer so as to ensure that the research is undertaken as expeditiously and efficiently as possible and so that between them sufficient field research is conducted to enable the claim area to be adequately addressed as a whole and in its regional context.

9. It will be necessary for the consultant to be available to attend a conference of experts convened by the Court, to provide a final report and perhaps a supplementary report in due course and to give evidence, if required, in relation to the matters contained in these reports.

Assumptions to be made by the consultant

10. The consultant is asked to assume that sovereignty was acquired by the Imperial Crown over the land and waters within the external boundaries of the claim area on [*insert relevant date or dates for the claim area*].

11. The consultant is asked to assume that, for native title purposes, certain terms and expressions have particular meanings which must be acknowledged and assumed for the purposes of any report, regardless of whether or not they have different (or indeterminate) meanings within the discourse of anthropology. Thus, the consultant is to assume that:

"***society***" means a body of persons united in and by their acknowledgement and observance of a body of laws and customs;

"***laws and customs***" means rules having normative content;

"***traditional***" in relation to a law or custom does not require that it be exactly the same at sovereignty and today; but it must:

(a) have been contemplated by; or

(b) find its *origin* in,

pre-sovereignty laws and customs; or

(c) be "*substantially* the same"; or

(d) be "*substantially* uninterrupted",

over the period (generation by generation) from sovereignty to the present.

"***native title***" or *"**native title rights and interests***" has the same meaning as in s 223(1) NTA*,* namely, the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

(a) the rights and interests are *possessed under* the *traditional laws acknowledged*, and the *traditional customs observed*, by the Aboriginal peoples or Torres Strait Islanders; and

(b) the Aboriginal peoples or Torres Strait Islanders, *by those laws and customs*, have a *connection* with the land or waters; and

(c) the rights and interests are recognised by the common law of Australia. [emphasis added]

"***connection***" means the connection referred to in s 223(1)(b) NTA, namely connection, "by" the traditional laws and customs under which the rights and interests are possessed.

"***in relation to land and waters***" when referring to rights, does not include rights which accompany or are dependent upon a relationship between a person and a person who is

a rights holder by virtue of his or her connection to or relationship with the land and waters concerned

Content of the draft report

12. The consultant is requested to prepare a draft report that includes the content referred to in paragraphs 13 to 18 below.

13. To the extent not already undertaken or to be undertaken by another consultant, a review and an account of the relevant, available literature relating to people of the report area and laws and customs, as they were prior to the assertion of sovereignty by the Imperial Crown in [*insert year of sovereignty*] but, in any event, in arriving at opinions expressed in the draft report, the consultant should identify and take such literature into account.

14. The opinions of the consultant concerning:

(a) whether, immediately **prior to** the assertion of sovereignty by the Imperial Crown, people of the report area are likely to have comprised:

(i) part of one or more societies;

(ii) a single society; and / or

(iii) more than one society,

when "society" is given the meaning referred to in paragraph 11 above;

(b) the nature of that (**pre-sovereignty**) society or those societies, including identification and discussion of the likely laws and customs acknowledged and observed by the people of the report area, in particular, laws and customs which created, reflected or defined the relationship/s of people to country within the report area.

Here, the consultant is asked to provide an account of the relationship between pre-sovereignty people of the report area and land and waters of the report area by reference to the pre-sovereignty laws and customs of the report area, and in particular provide an account of each of the following by reference to the laws and customs:

(i) any religious or other cultural **underpinnings of the relationship**/s;

Here the consultant is asked to report about any laws and customs likely to have existed about any beliefs in events and things beyond human time and memory, about kinship, social organisation and rules governing relationships between people, about any secret, sacred or other ritual practises, about language, and about other matters deemed culturally significant and having widespread application in the report area;

(ii) **duties and responsibilities** concomitant with the relationship/s reported pursuant to (i);

(iii) the **basis** or bases (if more than one) **for membership of a rights holding group** (for example, descent, conception, birth, ritual status) **and the possession of rights and interests.**

In relation to each such basis or criteria (if more than one), the consultant is asked to provide opinions as to whether the rights are transmissible by descent; and whether the rights arise from or are dependent upon the existence of a non-descent based relationship with another person;

(iv) the **manner in which the land and waters** of the report area is likely to have been **held** by or as among the people of the report area under the laws and customs;

(v) the extent to which the people of the report area are likely to have accessed and **utilised the land and waters** of the report area, and provide examples;

(vi) the extent to which the people of the report area are likely to have accessed and **utilised resources** of the land and waters of the report area, and provide examples;

(vii) the extent to which the people of the report area are likely to have **controlled** the access of others to country and resources and provide examples;

(viii) the extent to which the people of the report area are likely to have **protected** places and things of significance and provide examples;

(ix) whether the conduct of the activities reported pursuant to (v)-(viii) above respectively is likely to have been pursuant to **rights** possessed under laws and customs;

(x) any laws or customs establishing **rules governing the conduct of** the **activities** reported pursuant to (v)-(viii) above;

(xi) whether any rights pursuant to which the activities reported pursuant to (v)-(viii) may have been undertaken were likely to have been **constrained otherwise than by** reference to any duties and responsibilities reported pursuant to (ii) above and any rules governing the conduct reported pursuant (ix) above.

(xii) the likely **nature or character of the relationship**/s of the people of the report area to the report area, taken as an integrated whole having regard to all of the matters reported pursuant to (i)-(xi) above.

15. The opinions of the consultant concerning:

(a) whether the people of the report area and their ancestors have, **at and since** the assertion of sovereignty by the Imperial Crown in [*insert year of sovereignty*], comprised:

(i) part only of one or more societies;

(ii) a single society; and / or

(iii) more than one society,

when "society" is given the meaning referred to in paragraph 11 above;

(c) the nature of that (**post sovereignty**) society or those societies, including identification and discussion of the laws and customs acknowledged and observed by the people of the report area, in particular, laws and customs which create, reflect or define the relationship/s of people to country within the report area.

Here, the consultant is asked to provide an account of the relationship between people of the report area and land and waters of the report area by reference to the laws and customs of the report area, and in particular provide an account of each of the following by reference to the laws and customs:

(i) any religious or other cultural **underpinnings of the relationship**/s;

Here the consultant is asked to report about any laws and customs about any beliefs in events and things beyond human time and memory, about kinship, social organisation and rules governing relationships between people, about any secret, sacred or other ritual practises, about language, and about other matters deemed culturally significant and having widespread application in the report area;

(ii) **duties and responsibilities** concomitant with the relationship/s reported pursuant to (i);

(iii) the **basis** or bases (if more than one) **for membership of a rights holding group** (for example, descent, conception, birth, ritual status) **and the possession of rights and interests.**

In relation to each such basis or criteria (if more than one), the consultant is asked to provide opinions as to whether the rights are transmissible by descent; and whether the rights arise from or are dependent upon the existence of a non-descent based relationship with another person;

(iv) the **manner in which the land and waters** of the report area is **held** by or as among the people of the report area under the laws and customs;

(v) the extent to which the people of the report area have accessed and **utilised the land and waters** or sought to utilise the land and waters of the report area, and provide examples;

(vi) the extent to which the people of the report area have accessed and **utilised resources** or sought to access and utilise resources of the land and waters of the report area, and provide examples;

(vii) the extent to which the people of the report area have **controlled** or sought to control the access of others to country and resources and provide examples;

(viii) the extent to which the people of the report area have **protected** or sought to protect places and things of significance and provide examples;

(ix) whether the conduct of the activities reported pursuant to (v)-(viii) above respectively is likely to have been pursuant to **rights** possessed under laws and customs;

(x) any laws or customs establishing **rules governing the conduct of** the **activities** reported pursuant to (v)-(viii) above;

(xi) whether any rights pursuant to which the activities reported pursuant to (v)-(viii) may have been undertaken were **constrained otherwise than by** reference to any duties and responsibilities reported pursuant to (ii) above and any rules governing the conduct reported pursuant (ix) above.

(xii) the **nature or character of the relationship**/s of the people of the report area to the report area, taken as an integrated whole having regard to all of the matters reported pursuant to (i)-(xi) above.

16. To the extent that the laws and customs described in response to paragraph 14 above differ from those described in response to paragraph 15 above, and provide an opinion as to whether the origins of the post-sovereignty laws and customs can be traced to and seen as having their origins in the pre-sovereignty laws and customs.

17. Opinions of the consultant as to who are the people likely to possess rights and interests in the land and waters of the report area on the basis or bases reported pursuant to paragraph 15(c)(iii) above, other than a basis that is non-transmissible or is dependent upon the existence of non-descent based relationship with another person.

18. Opinions of the consultant as to who are the ancestors of the persons referred to in the answer to paragraph 17 above.

Method of preparing draft report

19. The report must explain the basis upon which the consultant has answered the above questions and tasks and, in particular, should include:

(a) an account of what specialised knowledge the consultant has derived from his or her training, study or experience, and an explanation as to why that specialised knowledge is necessary to enable him or her to express an opinion on the matters referred to in paragraphs 13 to 18 above;

(b) a description of the consultant's training, study and experience that qualifies him or her to do the things referred to in paragraphs 13 to 18 above;

(c) an account of the research carried out by the consultant and of the methodology of that research;

(d) an explanation of how each opinion expressed in the report was arrived at, including identification of the facts, specialised knowledge relied upon and the reasoning process involved; and

(e) details of the sources and data used in preparing the report. Reliance on data provided by indigenous informants and (where required) the consultant's specialised evaluation or explanation of it, is regarded as particularly important in the formation of relevant opinions in the native title context.

20. The consultant should organise the report in accordance with the following heading structure, noting that the headings are not intended to be indicative of the consultant's conclusion in relation to a topic, but rather the order for consideration of relevant topics:

- **Introduction, research, methodology and expertise**
- **Background, environmental, historical and regional context**
- **Society and laws and customs at sovereignty**
  - **Laws and customs about land and waters**
  - **Other laws and customs**
- **Contemporary society and laws and customs**
  - **Laws and customs about land and waters**
  - **Other laws and customs**
- **Acknowledgment and observance of the laws and customs**
- **Laws and customs as normative rules**
- **Control and use of country and resources under laws and customs**
- **Continuity of laws and customs**
- **Continuity of ancestral connection – ancestors and modern families**
- **CV, bibliography, terms of reference and expert's declaration**

21. The consultant must comply with the Court's EXPERT EVIDENCE PRACTICE NOTES (GPN-EXPT) issued by the Chief Justice on 25 October 2016. A copy of those Practice Notes is set out in **Appendix 2**.

22. The consultant is advised that, subject to what appears below, if the draft report or any later version of it is filed and served in any proceeding, it is proposed that it will be filed and served on an unrestricted basis. If the consultant considers that it is necessary or desirable to report upon material relating to a cultural or customary subject that he or she considers is of a confidential or secret nature, such as gender restricted knowledge, information or beliefs, such material is to be the subject of a separate draft report.

23. Any separate report should explain the nature of the restricted material, the reasons why it should be treated as restricted and the terms of the restrictions the consultant considers to be appropriate. Any separate report should comply with Rule 34.124 of the *Federal Court Rules 2011*. A copy of this rule is set out in **Appendix 3**.

24. If the consultant is assisted by others in the preparation of the report, the nature of that assistance must be identified with details given of the work involved in that assistance and the qualifications of each person who has assisted.

25. The report should use the relevant court heading, which will be provided, and be in a format that complies with the *Federal Court Rules 2011*. A copy of Rule 23.13 of those rules is set out in **Appendix 4**. The *[insert name of Rep Body]* can provide assistance in that respect on request by the consultant.

26. If the consultant has any queries about these terms of reference or their implementation, he or she should contact the undersigned.

[Insert Name of PLO]
Principal Legal Officer
[Insert name of Rep Body]
[Insert Date]

Appendix 1

MAP SHOWING CLAIM AREA AND REPORT AREAS

FEDERAL COURT OF AUSTRALIA

Appendix 2

EXPERT EVIDENCE PRACTICE NOTES (GPN-EXPT)

General Practice Note

1. INTRODUCTION

1.1 This practice note, including the *Harmonised Expert Witness Code of Conduct* ("**Code**") (see **Annexure A**) and the *Concurrent Expert Evidence Guidelines* ("**Concurrent Evidence Guidelines**") (see **Annexure B**), applies to any proceeding involving the use of expert evidence and must be read together with:

(a) the Central Practice Note (CPN-1), which sets out the fundamental principles concerning the National Court Framework ("**NCF**") of the Federal Court and key principles of case management procedure;

(b) the Federal Court of Australia Act 1976 (Cth) ("**Federal Court Act**");

(c) the *Evidence Act 1995* (Cth) ("**Evidence Act**"**),** including Part 3.3 of the Evidence Act;

(d) Part 23 of the *Federal Court Rules 2011* (Cth) ("**Federal Court Rules**"**)**; and

(e) where applicable, the Survey Evidence Practice Note (GPN-SURV).

1.2 This practice note takes effect from the date it is issued and, to the extent practicable, applies to proceedings whether filed before, or after, the date of issuing.

2. APPROACH TO EXPERT EVIDENCE

2.1 An expert witness may be retained to give opinion evidence in the proceeding, or, in certain circumstances, to express an opinion that may be relied upon in alternative dispute resolution procedures such as mediation or a conference of experts. In some circumstances an expert may be appointed as an independent adviser to the Court.

2.2 The purpose of the use of expert evidence in proceedings, often in relation to complex subject matter, is for the Court to receive the benefit of the objective and impartial assessment of an issue from a witness with specialised knowledge (based on training, study or experience - see generally s 79 of the Evidence Act).

2.3 However, the use or admissibility of expert evidence remains subject to the overriding requirements that:

(a) to be admissible in a proceeding, any such evidence must be relevant (s 56 of the Evidence Act); and

(b) even if relevant, any such evidence, may be refused to be admitted by the Court if its probative value is outweighed by other considerations such as the evidence being unfairly prejudicial, misleading or will result in an undue waste of time (s 135 of the Evidence Act).

2.4 An expert witness' opinion evidence may have little or no value unless the assumptions adopted by the expert (ie. the facts or grounds relied upon) and his or her reasoning are expressly stated in any written report or oral evidence given.

2.5 The Court will ensure that, in the interests of justice, parties are given a reasonable opportunity to adduce and test relevant expert opinion evidence. However, the Court expects parties and any legal representatives acting on their behalf, when dealing with expert witnesses and expert evidence, to at all times comply with their duties associated with the overarching purpose in the Federal Court Act (see ss 37M and 37N).

3. INTERACTION WITH EXPERT WITNESSES

3.1 Parties and their legal representatives should never view an expert witness retained (or partly retained) by them as that party's advocate or "hired gun". Equally, they should never attempt to pressure or influence an expert into conforming his or her views with the party's interests.

3.2 A party or legal representative should be cautious not to have inappropriate communications when retaining or instructing an independent expert, or assisting an independent expert in the preparation of his or her evidence. However, it is important to note that there is no principle of law or practice and there is nothing in this practice note that obliges a party to embark on the costly task of engaging a "consulting expert" in order to avoid "contamination" of the expert who will give evidence. Indeed the Court would generally discourage such costly duplication.

3.3 Any witness retained by a party for the purpose of preparing a report or giving evidence in a proceeding as to an opinion held by the witness that is wholly or substantially based in the specialised knowledge of the witness[1] should, at the earliest opportunity, be provided with:

(a) a copy of this practice note, including the Code (see Annexure A); and

(b) all relevant information (whether helpful or harmful to that party's case) so as to enable the expert to prepare a report of a truly independent nature.

3.4 Any questions or assumptions provided to an expert should be provided in an unbiased manner and in such a way that the expert is not confined to addressing selective, irrelevant or immaterial issues.

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[1] Such a witness includes a "Court expert" as defined in r 23.01 of the Federal Court Rules. For the definition of "expert", "expert evidence" and "expert report" see the Dictionary, in Schedule 1 of the Federal Court Rules.

4. ROLE AND DUTIES OF THE EXPERT WITNESS

4.1 The role of the expert witness is to provide relevant and impartial evidence in his or her area of expertise. An expert should never mislead the Court or become an advocate for the cause of the party that has retained the expert.

4.2 It should be emphasised that there is nothing inherently wrong with experts disagreeing or failing to reach the same conclusion. The Court will, with the assistance of the evidence of the experts, reach its own conclusion.

4.3 However, experts should willingly be prepared to change their opinion or make concessions when it is necessary or appropriate to do so, even if doing so would be contrary to any previously held or expressed view of that expert.

Harmonised Expert Witness Code of Conduct

4.4 Every expert witness giving evidence in this Court must read the *Harmonised Expert Witness Code of Conduct* (attached in Annexure A) and agree to be bound by it.

4.5 The Code is not intended to address all aspects of an expert witness' duties, but is intended to facilitate the admission of opinion evidence, and to assist experts to understand in general terms what the Court expects of them. Additionally, it is expected that compliance with the Code will assist individual expert witnesses to avoid criticism (rightly or wrongly) that they lack objectivity or are partisan.

5. CONTENTS OF AN EXPERT'S REPORT AND RELATED MATERIAL

5.1 The contents of an expert's report must conform with the requirements set out in the Code (including clauses 3 to 5 of the Code).

5.2 In addition, the contents of such a report must also comply with r 23.13 of the Federal Court Rules. Given that the requirements of that rule significantly overlap with the requirements in the Code, an expert, unless otherwise directed by the Court, will be taken to have complied with the requirements of r 23.13 if that expert has complied with the requirements in the Code and has complied with the additional following requirements. The expert shall:

(a) acknowledge in the report that:

(i) the expert has read and complied with this practice note and agrees to be bound by it; and

(ii) the expert's opinions are based wholly or substantially on specialised knowledge arising from the expert's training, study or experience;

(b) identify in the report the questions that the expert was asked to address;

(c) sign the report and attach or exhibit to it copies of:

(i) documents that record any instructions given to the expert; and

(ii) documents and other materials that the expert has been instructed to consider.

5.3 Where an expert's report refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter, these must be provided to the other parties at the same time as the expert's report.

6. CASE MANAGEMENT CONSIDERATIONS

6.1 Parties intending to rely on expert evidence at trial are expected to consider between them and inform the Court at the earliest opportunity of their views on the following:

(a) whether a party should adduce evidence from more than one expert in any single discipline;

(b) whether a common expert is appropriate for all or any part of the evidence;

(c) the nature and extent of expert reports, including any in reply;

(d) the identity of each expert witness that a party intends to call, their area(s) of expertise and availability during the proposed hearing;

(e) the issues that it is proposed each expert will address;

(f) the arrangements for a conference of experts to prepare a joint-report (see Part 7 of this practice note);

(g) whether the evidence is to be given concurrently and, if so, how (see Part 8 of this practice note); and

(h) whether any of the evidence in chief can be given orally.

6.2 It will often be desirable, before any expert is retained, for the parties to attempt to agree on the question or questions proposed to be the subject of expert evidence as well as the relevant facts and assumptions. The Court may make orders to that effect where it considers it appropriate to do so.

7. CONFERENCE OF EXPERTS AND JOINT-REPORT

7.1 Parties, their legal representatives and experts should be familiar with aspects of the Code relating to conferences of experts and joint-reports (see clauses 6 and 7 of the Code attached in Annexure A).

7.2 In order to facilitate the proper understanding of issues arising in expert evidence and to manage expert evidence in accordance with the overarching purpose, the Court may require experts who are to give evidence or who have produced reports to meet for the purpose of identifying and addressing the issues not agreed between them with a view to reaching agreement where this is possible ("**conference of experts**"). In an appropriate case, the Court may appoint a registrar of the Court or some other suitably qualified person ("**Conference Facilitator**") to act as a facilitator at the conference of experts.

7.3 It is expected that where expert evidence may be relied on in any proceeding, at the earliest opportunity, parties will discuss and then inform the Court whether a conference of experts

and/or a joint-report by the experts may be desirable to assist with or simplify the giving of expert evidence in the proceeding. The parties should discuss the necessary arrangements for any conference and/or joint-report. The arrangements discussed between the parties should address:

(a) who should prepare any joint-report;

(b) whether a list of issues is needed to assist the experts in the conference and, if so, whether the Court, the parties o r the experts should assist in preparing such a list;

(c) **t**he agenda for the conference of experts; and

(d) arrangements for the provision, to the parties and the Court, of any joint-report or any other report as to the outcomes of the conference ("**conference report**").

Conference of Experts

7.4 The purpose of the conference of experts is for the experts to have a comprehensive discussion of issues relating to their field of expertise, with a view to identifying matters and issues in a proceeding about which the experts agree, partly agree or disagree and why. For this reason the conference is attended only by the experts and any Conference Facilitator. Unless the Court orders otherwise, the parties' lawyers will not attend the conference but will be provided with a copy of any conference report.

7.5 The Court may order that a conference of experts occur in a variety of circumstances, depending on the views of the judge and the parties and the needs of the case, including:

(a) while a case is in mediation. When this occurs the Court may also order that the outcome of the conference or any document disclosing or summarising the experts' opinions be confidential to the parties while the mediation is occurring;

(b) before the experts have reached a final opinion on a relevant question or the facts involved in a case. When this occurs the Court may order that the parties exchange draft expert reports and that a conference report be prepared for the use of the experts in finalising their reports;

(c) after the experts' reports have been provided to the Court but before the hearing of the experts' evidence. When this occurs the Court may also order that a conference report be prepared (jointly or otherwise) to ensure the efficient hearing of the experts' evidence.

7.6 Subject to any other order or direction of the Court, the parties and their lawyers must not involve themselves in the conference of experts process. In particular, they must not seek to encourage an expert not to agree with another expert or otherwise seek to influence the outcome of the conference of experts. The experts should raise any queries they may have in relation to the process with the Conference Facilitator (if one has been appointed) or in accordance with a protocol agreed between the lawyers prior to the conference of experts taking place (if no Conference Facilitator has been appointed).

7.7 Any list of issues prepared for the consideration of the experts as part of the conference of experts process should be prepared using non-tendentious language.

7.8 The timing and location of the conference of experts will be decided by the judge or a registrar who will take into account the location and availability of the experts and the Court's case management timetable. The conference may take place at the Court and will usually be conducted in-person. However, if not considered a hindrance to the process, the conference may also be conducted with the assistance of visual or audio technology (such as via the internet, video link and/or by telephone).

7.9 Experts should prepare for a conference of experts by ensuring that they are familiar with all of the material upon which they base their opinions. Where expert reports in draft or final form have been exchanged prior to the conference, experts should attend the conference familiar with the reports of the other experts. Prior to the conference, experts should also consider where they believe the differences of opinion lie between them and what processes and discussions may assist to identify and refine those areas of difference.

Joint-report

7.10 At the conclusion of the conference of experts, unless the Court considers it unnecessary to do so, it is expected that the experts will have narrowed the issues in respect of which they agree, partly agree or disagree in a joint-report. The joint-report should be clear, plain and concise and should summarise the views of the experts on the identified issues, including a succinct explanation for any differences of opinion, and otherwise be structured in the manner requested by the judge or registrar.

7.11 In some cases (and most particularly in some native title cases), depending on the nature, volume and complexity of the expert evidence a judge may direct a registrar to draft part, or all, of a conference report. If so, the registrar will usually provide the draft conference report to the relevant experts and seek their confirmation that the conference report accurately reflects the opinions of the experts expressed at the conference. Once that confirmation has been received the registrar will finalise the conference report and provide it to the intended recipient(s).

8. CONCURRENT EXPERT EVIDENCE

8.1 The Court may determine that it is appropriate, depending on the nature of the expert evidence and the proceeding generally, for experts to give some or all of their evidence concurrently at the final (or other) hearing.

8.2 Parties should familiarise themselves with the *Concurrent Expert Evidence Guidelines* (attached in Annexure B). The Concurrent Evidence Guidelines are not intended to be exhaustive but indicate the circumstances when the Court might consider it appropriate for concurrent expert evidence to take place, outline how that process may be undertaken, and assist experts to understand in general terms what the Court expects of them.

8.3 If an order is made for concurrent expert evidence to be given at a hearing, any expert to give such evidence should be provided with the Concurrent Evidence Guidelines well in advance of the hearing and should be familiar with those guidelines before giving evidence.

9. FURTHER PRACTICE INFORMATION AND RESOURCES

9.1 Further information regarding Expert Evidence and Expert Witnesses is available on the Court's website.

9.2 Further information to assist litigants, including a range of helpful guides, is also available on the Court's website. This information may be particularly helpful for litigants who are representing themselves.

J L B ALLSOP
Chief Justice
25 October 2016

ANNEXURE A

HARMONISED EXPERT WITNESS CODE OF CONDUCT[2]

APPLICATION OF CODE

1. This Code of Conduct applies to any expert witness engaged or appointed:

   (a) to provide an expert's report for use as evidence in proceedings or proposed proceedings; or

   (b) to give opinion evidence in proceedings or proposed proceedings.

GENERAL DUTIES TO THE COURT

2. An expert witness is not an advocate for a party and has a paramount duty, overriding any duty to the party to the proceedings or other person retaining the expert witness, to assist the Court impartially on matters relevant to the area of expertise of the witness.

CONTENT OF REPORT

3. Every report prepared by an expert witness for use in Court shall clearly state the opinion or opinions of the expert and shall state, specify or provide:

   (a) the name and address of the expert;

   (b) an acknowledgment that the expert has read this code and agrees to be bound by it;

   (c) the qualifications of the expert to prepare the report;

   (d) the assumptions and material facts on which each opinion expressed in the report is based [a letter of instructions may be annexed];

   (e) the reasons for and any literature or other materials utilised in support of such opinion;

   (f) (if applicable) that a particular question, issue or matter falls outside the expert's field of expertise;

   (g) any examinations, tests or other investigations on which the expert has relied, identifying the person who carried them out and that person's qualifications;

   (h) the extent to which any opinion which the expert has expressed involves the acceptance of another person's opinion, the identification of that other person and the opinion expressed by that other person;

   (i) a declaration that the expert has made all the inquiries which the expert believes are desirable and appropriate (save for any matters identified explicitly in the report), and that no matters of significance which the expert regards as relevant have, to the knowledge of the expert, been withheld from the Court;

   (j) any qualifications on an opinion expressed in the report without which the report is or may be incomplete or inaccurate;

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[2] Approved by the Council of Chief Justices' Rules Harmonisation Committee.

(k) whether any opinion expressed in the report is not a concluded opinion because of insufficient research or insufficient data or for any other reason; and

(l) where the report is lengthy or complex, a brief summary of the report at the beginning of the report.

SUPPLEMENTARY REPORT FOLLOWING CHANGE OF OPINION

4. Where an expert witness has provided to a party (or that party's legal representative) a report for use in Court, and the expert thereafter changes his or her opinion on a material matter, the expert shall forthwith provide to the party (or that party's legal representative) a supplementary report which shall state, specify or provide the information referred to in paragraphs (a), (d), (e), (g), (h), (i), (j), (k) and (I) of clause 3 of this code and, if applicable, paragraph (f) of that clause.

5. In any subsequent report (whether prepared in accordance with clause 4 or not) the expert may refer to material contained in the earlier report without repeating it.

DUTY TO COMPLY WITH THE COURT'S DIRECTIONS

6. If directed to do so by the Court, an expert witness shall:

(a) confer with any other expert witness;

(b) provide the Court with a joint-report specifying (as the case requires) matters agreed and matters not agreed and the reasons for the experts not agreeing; and

(c) abide in a timely way by any direction of the Court.

CONFERENCE OF EXPERTS

7. Each expert witness shall:

(a) exercise his or her independent judgment in relation to every conference in which the expert participates pursuant to a direction of the Court and in relation to each report thereafter provided, and shall not act on any instruction or request to withhold or avoid agreement; and

(b) endeavour to reach agreement with the other expert witness (or witnesses) on any issue in dispute between them, or failing agreement, endeavour to identify and clarify the basis of disagreement on the issues which are in dispute.

ANNEXURE B

CONCURRENT EXPERT EVIDENCE GUIDELINES

APPLICATION OF THE COURT'S GUIDELINES

1. The Court's Concurrent Expert Evidence Guidelines ("**Concurrent Evidence Guidelines**") are intended to inform parties, practitioners and experts of the Court's general approach to concurrent expert evidence, the circumstances in which the Court might consider expert witnesses giving evidence concurrently and, if so, the procedures by which their evidence may be taken.

OBJECTIVES OF CONCURRENT EXPERT EVIDENCE TECHNIQUE

2. The use of concurrent evidence for the giving of expert evidence at hearings as a case management technique[3] will be utilised by the Court in appropriate circumstances (see r 23.15 of the *Federal Court Rules 2011* (Cth)). Not all cases will suit the process. For instance, in some patent cases, where the entire case revolves around conflicts within fields of expertise, concurrent evidence may not assist a judge. However, patent cases should not be excluded from concurrent expert evidence processes.

3. In many cases the use of concurrent expert evidence is a technique that can reduce the partisan or confrontational nature of conventional hearing processes and minimises the risk that experts become "opposing experts" rather than independent experts assisting the Court. It can elicit more precise and accurate expert evidence with greater input and assistance from the experts themselves.

4. When properly and flexibly applied, with efficiency and discipline during the hearing process, the technique may also allow the experts to more effectively focus on the critical points of disagreement between them, identify or resolve those issues more quickly, and narrow the issues in dispute. This can also allow for the key evidence to be given at the same time (rather than being spread across many days of hearing); permit the judge to assess an expert more readily, whilst allowing each party a genuine opportunity to put and test expert evidence. This can reduce the chance of the experts, lawyers and the judge misunderstanding the opinions being expressed by the experts.

5. It is essential that such a process has the full cooperation and support of all of the individuals involved, including the experts and counsel involved in the questioning process. Without that cooperation and support the process may fail in its objectives and even hinder the case management process.

CASE MANAGEMENT

6. Parties should expect that, the Court will give careful consideration to whether concurrent evidence is appropriate in circumstances where there is more than one expert witness having the same expertise who is to give evidence on the same or related topics. Whether experts should give evidence concurrently is a matter for the Court, and will depend on the circumstances of each individual case, including the character of the proceeding, the nature of the expert evidence, and the views of the parties.

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[3] Also known as the "hot tub" or as "expert panels".

7. Although this consideration may take place at any time, including the commencement of the hearing, if not raised earlier, parties should raise the issue of concurrent evidence at the first appropriate case management hearing, and no later than any pre-trial case management hearing, so that orders can be made in advance, if necessary. To that end, prior to the hearing at which expert evidence may be given concurrently, parties and their lawyers should confer and give general consideration as to:

   (a) the agenda;

   (b) the order and manner in which questions will be asked; and

   (c) whether cross-examination will take place within the context of the concurrent evidence or after its conclusion.

8. At the same time, and before any hearing date is fixed, the identity of all experts proposed to be called and their areas of expertise is to be notified to the Court by all parties.

9. The lack of any concurrent evidence orders does not mean that the Court will not consider using concurrent evidence without prior notice to the parties, if appropriate.

CONFERENCE OF EXPERTS & JOINT-REPORT OR LIST OF ISSUES

10. The process of giving concurrent evidence at hearings may be assisted by the preparation of a joint-report or list of issues prepared as part of a conference of experts.

11. Parties should expect that, where concurrent evidence is appropriate, the Court may make orders requiring a conference of experts to take place or for documents such as a joint-report to be prepared to facilitate the concurrent expert evidence process at a hearing (see Part 7 of the Expert Evidence Practice Note).

PROCEDURE AT HEARING

12. Concurrent expert evidence may be taken at any convenient time during the hearing, although it will often occur at the conclusion of both parties' lay evidence.

13. At the hearing itself, the way in which concurrent expert evidence is taken must be applied flexibly and having regard to the characteristics of the case and the nature of the evidence to be given.

14. Without intending to be prescriptive of the procedure, parties should expect that, when evidence is given by experts in concurrent session:

   (a) the judge will explain to the experts the procedure that will be followed and that the nature of the process may be different to their previous experiences of giving expert evidence;

   (b) the experts will be grouped and called to give evidence together in their respective fields of expertise;

   (c) the experts will take the oath or affirmation together, as appropriate;

   (d) the experts will sit together with convenient access to their materials for their ease of reference, either in the witness box or in some other location in the courtroom, including (if necessary) at the bar table;

   (e) each expert may be given the opportunity to provide a summary overview of their current opinions and explain what they consider to be the principal issues of disagreement between

the experts, as they see them, in their own words;

(f) the judge will guide the process by which evidence is given, including, where appropriate:

(i) using any joint-report or list of issues as a guide for all the experts to be asked questions by the judge and counsel, about each issue on an issue-by-issue basis;

(ii) ensuring that each expert is given an adequate opportunity to deal with each issue and the exposition given by other experts including, where considered appropriate, each expert asking questions of other experts or supplementing the evidence given by other experts;

(iii) inviting legal representatives to identify the topics upon which they will cross-examine;

(iv) ensuring that legal representatives have an adequate opportunity to ask all experts questions about each issue. Legal representatives may also seek responses or contributions from one or more experts in response to the evidence given by a different expert; and

(v) allowing the experts an opportunity to summarise their views at the end of the process where opinions may have been changed or clarifications are needed.

15. The fact that the experts may have been provided with a list of issues for consideration does not confine the scope of any cross-examination of any expert. The process of cross-examination remains subject to the overall control of the judge.

16. The concurrent session should allow for a sensible and orderly series of exchanges between expert and expert, and between expert and lawyer. Where appropriate, the judge may allow for more traditional cross-examination to be pursued by a legal representative on a particular issue exclusively with one expert. Where that occurs, other experts may be asked to comment on the evidence given.

17. Where any issue involves only one expert, the party wishing to ask questions about that issue should let the judge know in advance so that consideration can be given to whether arrangements should be made for that issue to be dealt with after the completion of the concurrent session. Otherwise, as far as practicable, questions (including in the form of cross-examination) will usually be dealt with in the concurrent session.

18. Throughout the concurrent evidence process the judge will ensure that the process is fair and effective (for the parties and the experts), balanced (including not permitting one expert to overwhelm or overshadow any other expert), and does not become a protracted or inefficient process.

Appendix 3

FEDERAL COURT RULE 34.124

34.124 Documents referring to certain material

(1) A document used in a proceeding that refers to material of a cultural or customary nature that a party claims is of a confidential or secret nature, must:

(a) have the claim endorsed on the front page of the document; and

(b) be accompanied by a document, contained in a sealed envelope, that contains a short description of the material and the reason for its confidential or secret nature.

(2) The sealed envelope must not be opened except with the leave of the Court.

Note: The Court may grant leave to open the sealed envelope on the condition that the material or part of the material not be disclosed.

Appendix 4

FEDERAL COURT RULE 23.13

Rule 23.13 Contents of an expert report

(1) An expert report must:

(a) be signed by the expert who prepared the report; and

(b) contain an acknowledgement at the beginning of the report that the expert has read, understood and complied with the Practice Note; and

(c) contain particulars of the training, study or experience by which the expert has acquired specialised knowledge; and

(d) identify the questions that the expert was asked to address; and

(e) set out separately each of the factual findings or assumptions on which the expert's opinion is based; and

(f) set out separately from the factual findings or assumptions each of the expert's opinions; and

(g) set out the reasons for each of the expert's opinions; and

(ga) contain an acknowledgement that the expert's opinions are based wholly or substantially on the specialised knowledge mentioned in paragraph (c); and

(h) comply with the Practice Note.

(2) Any subsequent expert report of the same expert on the same question need not contain the information in paragraphs (1)(b) and (c).

Division 23.2 Parties' expert witnesses and expert reports

23.11 Calling expert evidence at trial

A party may call an expert to give expert evidence at a trial only if the party has:

(a) delivered an expert report that complies with rule 23.13 to all other parties; and

(b) otherwise complied with this Division.

Note ***Expert*** and ***expert report*** are defined in the Dictionary.

23.12 Provision of guidelines to an expert

If a party intends to retain an expert to give an expert report or to give expert evidence, the party must first give the expert any practice note dealing with guidelines for expert witnesses in proceedings in the Court (the ***Practice Note***).

Note A copy of any practice notes may be obtained from the District Registry or downloaded from the Court's website at http://www.fedcourt.gov.au.

23.13 Contents of an expert report

(1) An expert report must:

(a) be signed by the expert who prepared the report; and

(b) contain an acknowledgement at the beginning of the report that the expert has read, understood and complied with the Practice Note; and

(c) contain particulars of the training, study or experience by which the expert has acquired specialised knowledge; and

(d) identify the questions that the expert was asked to address; and

(e) set out separately each of the factual findings or assumptions on which the expert's opinion is based; and

(f) set out separately from the factual findings or assumptions each of the expert's opinions; and

(g) set out the reasons for each of the expert's opinions; and

(h) comply with the Practice Note.

(2) Any subsequent expert report of the same expert on the same question need not contain the information in paragraphs (1) (b) and (c).

23.14 Application for expert report

A party may apply to the Court for an order that another party provide copies of that other party's expert report.

23.15 Evidence of experts

If 2 or more parties to a proceeding intend to call experts to give opinion evidence about a similar question, any of those parties may apply to the Court for one or more of the following orders:

(a) that the experts confer, either before or after writing their expert reports;

(b) that the experts produce to the Court a document identifying where the expert opinions agree or differ;

(c) that the expert's evidence in chief be limited to the contents of the expert's expert report;

(d) that all factual evidence relevant to any expert's opinions be adduced before the expert is called to give evidence;

(e) that on the completion of the factual evidence mentioned in paragraph (d), each expert swear an affidavit stating:

(i) whether the expert adheres to the previously expressed opinion; or

(ii) if the expert holds a different opinion;

(A) the opinion; and

(B) the factual evidence on which the opinion is based.

(f) that the experts give evidence one after another;

(g) that each expert be sworn at the same time and that the cross-examination and re-examination be conducted by putting to each expert in turn each question relevant to one subject or issue at a time, until the cross-examination or re-examination is completed;

(h) that each expert gives an opinion about the other expert's opinion;

(i) that the experts be cross-examined and re-examined in any particular manner or sequence.

Note 1 For the directions a Court may make before trial about, expert reports and expert evidence, see rule 5.04 (items 14 to 18).

Note 2 The Court may dispense with compliance with the Rules and may make orders inconsistent with the Rules — see rules 1.34 and 1.35.

Part 3.1—Relevance

55 Relevant evidence

(1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

(2) In particular, evidence is not taken to be irrelevant only because it relates only to:

(a) the credibility of a witness; or

(b) the admissibility of other evidence; or

(c) a failure to adduce evidence.

56 Relevant evidence to be admissible

(1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.

(2) Evidence that is not relevant in the proceeding is not admissible.

Part 3.2—Hearsay

Division 1—The hearsay rule

59 The hearsay rule—exclusion of hearsay evidence

(1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation.

(2) Such a fact is in this Part referred to as an ***asserted fact***.

(2A) For the purposes of determining under subsection (1) whether it can reasonably be supposed that the person intended to assert a particular fact by the representation, the court may have regard to the circumstances in which the representation was made.

Note: Subsection (2A) was inserted as a response to the decision of the Supreme Court of NSW in *R. v Hannes* (2000) 158 FLR 359.

(3) Subsection (1) does not apply to evidence of a representation contained in a certificate or other document given or made under regulations made under an Act other than this Act to the extent to which the regulations provide that the certificate or other document has evidentiary effect.

Note: Specific exceptions to the hearsay rule are as follows:

- evidence relevant for a non-hearsay purpose (section 60);
- first-hand hearsay:
  - civil proceedings, if the maker of the representation is unavailable (section 63) or available (section 64);
  - criminal proceedings, if the maker of the representation is unavailable (section 65) or available (section 66);
- contemporaneous statements about a person's health etc. (section 66A);
- business records (section 69);
- tags and labels (section 70);
- electronic communications (section 71);
- Aboriginal and Torres Strait Islander traditional laws and customs (section 72);
- marriage, family history or family relationships (section 73);
- public or general rights (section 74);
- use of evidence in interlocutory proceedings (section 75);
- admissions (section 81);

- representations about employment or authority (subsection 87(2));
- exceptions to the rule excluding evidence of judgments and convictions (subsection 92(3));
- character of and expert opinion about accused persons (sections 110 and 111).

Other provisions of this Act, or of other laws, may operate as further exceptions.

Examples:

(1) D is the defendant in a sexual assault trial. W has made a statement to the police that X told W that X had seen D leave a night club with the victim shortly before the sexual assault is alleged to have occurred. Unless an exception to the hearsay rule applies, evidence of what X told W cannot be given at the trial.

(2) P had told W that the handbrake on W's car did not work. Unless an exception to the hearsay rule applies, evidence of that statement cannot be given by P, W or anyone else to prove that the handbrake was defective.

(3) W had bought a video cassette recorder and written down its serial number on a document. Unless an exception to the hearsay rule applies, the document is inadmissible to prove that a video cassette recorder later found in D's possession was the video cassette recorder bought by W.

60 Exception: evidence relevant for a non-hearsay purpose

(1) The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of an asserted fact.

(2) This section applies whether or not the person who made the representation had personal knowledge of the asserted fact (within the meaning of subsection 62(2)).

Note: Subsection (2) was inserted as a response to the decision of the High Court of Australia in *Lee v The Queen* (1998) 195 CLR 594.

(3) However, this section does not apply in a criminal proceeding to evidence of an admission.

Note: The admission might still be admissible under section 81 as an exception to the hearsay rule if it is "first-hand" hearsay: see section 82.

Division 2—First-hand hearsay

62 Restriction to "first-hand" hearsay

(1) A reference in this Division (other than in subsection (2)) to a previous representation is a reference to a previous representation that was made by a person who had personal knowledge of an asserted fact.

(2) A person has personal knowledge of the asserted fact if his or her knowledge of the fact was, or might reasonably be supposed to have been, based on something that the person saw, heard or otherwise perceived, other than a previous representation made by another person about the fact.

(3) For the purposes of section 66A, a person has personal knowledge of the asserted fact if it is a fact about the person's health, feelings, sensations, intention, knowledge or state of mind at the time the representation referred to in that section was made.

63 Exception: civil proceedings if maker not available

(1) This section applies in a civil proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.

(2) The hearsay rule does not apply to:

(a) evidence of the representation that is given by a person who saw, heard or otherwise perceived the representation being made; or

(b) a document so far as it contains the representation, or another representation to which it is reasonably necessary to refer in order to understand the representation.

Note 1: Section 67 imposes notice requirements relating to this subsection.

Note 2: Clause 4 of Part 2 of the Dictionary is about the availability of persons.

72 Exception: Aboriginal and Torres Strait Islander traditional laws and customs

The hearsay rule does not apply to evidence of a representation about the existence or non-existence, or the content, of the traditional laws and customs of an Aboriginal or Torres Strait Islander group.

73 Exception: reputation as to relationships and age

(1) The hearsay rule does not apply to evidence of reputation concerning:

(a) whether a person was, at a particular time or at any time, a married person; or

(b) whether a man and a woman cohabiting at a particular time were married to each other at that time; or

(c) a person's age; or

(d) family history or a family relationship.

(2) In a criminal proceeding, subsection (1) does not apply to evidence adduced by a defendant unless:

(a) it tends to contradict evidence of a kind referred to in subsection (1) that has been admitted; or

(b) the defendant has given reasonable notice in writing to each other party of the defendant's intention to adduce the evidence.

(3) In a criminal proceeding, subsection (1) does not apply to evidence adduced by the prosecutor unless it tends to contradict evidence of a kind referred to in subsection (1) that has been admitted.

74 Exception: reputation of public or general rights

(1) The hearsay rule does not apply to evidence of reputation concerning the existence, nature or extent of a public or general right.

(2) In a criminal proceeding, subsection (1) does not apply to evidence adduced by the prosecutor unless it tends to contradict evidence of a kind referred to in subsection (1) that has been admitted.

76 The opinion rule

(1) Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

(2) Subsection (1) does not apply to evidence of an opinion contained in a certificate or other document given or made under regulations made under an Act other than this Act to the extent to which the regulations provide that the certificate or other document has evidentiary effect.

Note: Specific exceptions to the opinion rule are as follows:

- summaries of voluminous or complex documents (subsection 50(3));
- evidence relevant otherwise than as opinion evidence (section 77);
- lay opinion (section 78);
- Aboriginal and Torres Strait Islander traditional laws and customs (section 78A);
- expert opinion (section 79);
- admissions (section 81);
- exceptions to the rule excluding evidence of judgments and convictions (subsection 92(3));
- character of and expert opinion about accused persons (sections 110 and 111).

Other provisions of this Act, or of other laws, may operate as further exceptions.

Examples:

(1) P sues D, her doctor, for the negligent performance of a surgical operation. Unless an exception to the opinion rule applies, P's neighbour, W, who had the same operation, cannot give evidence of his opinion that D had not performed the operation as well as his own.

(2) P considers that electrical work that D, an electrician, has done for her is unsatisfactory. Unless an exception to the opinion rule applies, P cannot give evidence of her opinion that D does not have the necessary skills to do electrical work.

77 Exception: evidence relevant otherwise than as opinion evidence

The opinion rule does not apply to evidence of an opinion that is admitted because it is relevant for a purpose other than proof of the

existence of a fact about the existence of which the opinion was expressed.

78 Exception: lay opinions

The opinion rule does not apply to evidence of an opinion expressed by a person if:

(a) the opinion is based on what the person saw, heard or otherwise perceived about a matter or event; and

(b) evidence of the opinion is necessary to obtain an adequate account or understanding of the person's perception of the matter or event.

78A Exception: Aboriginal and Torres Strait Islander traditional laws and customs

The opinion rule does not apply to evidence of an opinion expressed by a member of an Aboriginal or Torres Strait Islander group about the existence or non-existence, or the content, of the traditional laws and customs of the group.

79 Exception: opinions based on specialised knowledge

(1) If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

(2) To avoid doubt, and without limiting subsection (1):

(a) a reference in that subsection to specialised knowledge includes a reference to specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse); and

(b) a reference in that subsection to an opinion of a person includes, if the person has specialised knowledge of the kind referred to in paragraph (a), a reference to an opinion relating to either or both of the following:

(i) the development and behaviour of children generally;

(ii) the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences.

80 Ultimate issue and common knowledge rules abolished

Evidence of an opinion is not inadmissible only because it is about:

(a) a fact in issue or an ultimate issue; or

(b) a matter of common knowledge.

Part 3.11—Discretionary and mandatory exclusions

135 General discretion to exclude evidence

The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

(a) be unfairly prejudicial to a party; or

(b) be misleading or confusing; or

(c) cause or result in undue waste of time.

136 General discretion to limit use of evidence

The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might:

(a) be unfairly prejudicial to a party; or

(b) be misleading or confusing.

223 Native title

Common law rights and interests

(1) The expression ***native title*** or ***native title rights and interests*** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognised by the common law of Australia.

FEDERAL COURT OF AUSTRALIA

Oobagooma on behalf of the Big Springs Claim Group v State of Western Australia [2025] FCA 592

File number:	WAD 144 of 2024
Judgment of:	**O'BRYAN J**
Date of judgment:	5 June 2025
Catchwords:	**NATIVE TITLE** – native title determination application brought jointly on behalf of two separate claim groups who each claim separate and distinct native titles in the claim area – application for consent determination under s 87 of the *Native Title Act 1993* (Cth) – relevant considerations in making a consent determination – whether the proposed determination is within the power of the Court – whether s 61(1) enables a single native title determination application to be made on behalf of more than one native title claim group – whether and in what circumstances the common law is able to recognise exclusive native title rights held by more than one native title claim group – observations concerning the use of the word 'connection' in native title proceedings
Legislation:	*Acts Interpretation Act 1901* (Cth) s 23 *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) *Native Title Act 1993* (Cth) ss 61, 67, 86, 87, 223, 225
Cases cited:	*Agius v State of South Australia (No 6)* [2018] FCA 358 *Barunga v State of Western Australia* [2011] FCA 518 *Carter on behalf of the Warrwa Mawadjala Gadjidgar and Warrwa People Native Title Claim Groups v State of Western Australia* [2020] FCA 1702 *Commonwealth v Clifton* (2007) 164 FCR 355 *Drury on behalf of the Nanda People v State of Western Australia* (2020) 276 FCR 203 *Freddie v Northern Territory* [2017] FCA 867 *Hunter v State of Western Australia* [2012] FCA 690 *James v State of Western Australia* [2002] FCA 1208 *Kokatha Native Title Claim v State of South Australia* [2006] FCA 838 *Lovett on behalf of the Gunditjmara People v State of*

	Victoria [2007] FCA 474 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 *Munn (for and on behalf of the Gunggari People) v Queensland* (2001) 115 FCR 109 *Neowarra v State of Western Australia* [2003] FCA 1402 *Northern Territory v Ward* (2003) 134 FCR 16 *Smirke on behalf of the Jurruru People v State of Western Australia (No 3)* [2021] FCA 1122 *Smirke on behalf of the Jurruru People v Western Australia (No 4)* [2022] FCA 993 *Stuart v South Australia* (2023) 299 FCR 507 *Stuart v South Australia* [2025] HCA 12 *Western Australia v Ward* (2002) 213 CLR 1
Division:	General Division
Registry:	Western Australia
National Practice Area:	Native Title
Number of paragraphs:	113
Date of last submission:	11 April 2025
Date of hearing:	Determined on the papers
Solicitors for the Applicants:	Kimberly Land Council
Solicitors for the First Respondent:	State Solicitor for Western Australia
Solicitors for the Second Respondent:	Self-represented
Solicitors for the Intervener:	Australian Government Solicitor

by consent of the parties recognises the important role that negotiation is intended to play in settling applications made under the NTA. The Court's principal focus is upon the agreement of the parties. In the present case, there is no reason to doubt that the parties have made an informed decision to resolve the application by agreement.

99 As discussed earlier, it is relevant to consider whether the State, as the representative of the interests of the community generally, has had independent and competent legal representation and is acting in good faith and rationally in agreeing to the determination. The submissions filed jointly on behalf of the applicant and State confirm that the State has given due consideration to the application and is acting in good faith and rationally in agreeing to the determination. The State submitted, and I accept, that the State has played an active role in the negotiation of the proposed consent determination (including when the claim area comprised part of the Warrwa Combined application). The State assessed a body of evidence in relation to the traditional laws and customs acknowledged and observed by the Warrwa people and Worrora people respectively, their respective rights and interests in the claim area under those laws and customs, and their connection to the claim area by those laws and customs. The State also had regard to the reasons of the Court in *Carter* and *Barunga*, by which native title determinations were made in respect of the areas surrounding the claim area. The State has also conducted searches of land tenure, mining and petroleum registries to determine the extent of other interests within the claim area, and those interests are included in Sch 7 of the proposed consent determination.

100 In all of the circumstances, I am satisfied that it is appropriate to make the consent determination.

An afterword: use of the word 'connection'

101 As is common in native title proceedings, the State referred to the anthropological reports and other material concerning the Warrwa and Worrora claim groups, their traditional laws and customs, and their continued acknowledgement and observance of their traditional laws and customs, as "connection material". The phrase "connection material" is a convenient shorthand expression for evidentiary material that relates to the question whether Aboriginal peoples or Torres Strait Islanders hold native title rights and interests in particular land and waters. In many cases, the Court conducts a separate hearing of that question and such a hearing is commonly referred to as a "connection hearing".

102 However, it is important that the phrases "connection material" and "connection hearing" do not obscure the relevant legal enquiry as to the existence of native title rights and interests. The enquiry does not concern "connection" or "maintaining connection" to land and waters in any general sense. The enquiry is governed by the statutory definition of native title. Relevantly, s 223(1) defines the expressions 'native title' and 'native title rights and interests' as:

> … the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
>
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
>
> (c) the rights and interests are recognised by the common law of Australia.

103 As recently confirmed by the plurality (Gageler CJ, Gordon, Edelman, Gleeson and Beech-Jones JJ) in *Stuart* (at [3]), to hold native title in the land and waters in a given area within the meaning of s 223(1), the claimant Aboriginal peoples or Torres Strait Islanders must relevantly have rights and interests in relation to the land and waters possessed under the traditional laws acknowledged, and the traditional customs observed, by them (s 223(1)(a)), and they must have a connection with the land and waters by those traditional laws and customs (s 223(1)(b)). Thus, there are two inquiries required by s 223(1): first, identification of the traditional laws and customs and the identification of the rights and interests possessed under those traditional laws and customs; and, second, identifying the connection with land or waters by those laws and customs: *Stuart* at [19].

104 The connection required by s 223(1)(b) is a connection between Aboriginal peoples or Torres Strait Islanders and land or waters by the traditional laws acknowledged and the traditional customs observed by the Aboriginal peoples or Torres Strait Islanders. As the plurality explained in *Western Australia v Ward* (2002) 213 CLR 1 at [64] (Gleeson CJ, Gaudron, Gummow and Hayne JJ):

> In its terms, s 223(1)(b) is not directed to how Aboriginal peoples use or occupy land or waters. Section 223(1)(b) requires consideration of whether, by the traditional laws acknowledged and the traditional customs observed by the peoples concerned, they have a 'connection' with the land or waters. That is, it requires first an identification of the content of traditional laws and customs and, secondly, the characterisation of the effect of those laws and customs as constituting a 'connection' of the peoples with the land or waters in question. No doubt there may be cases where the way in which land or waters are used will reveal something about the kind of connection that exists under traditional law or custom between Aboriginal peoples and the land or waters

> concerned. But the absence of evidence of some recent use of the land or waters does not, of itself, require the conclusion that there can be no relevant connection.

105 The joint submissions in the present case contained the following statement made on behalf of the State:

> The State's view is that the Connection Material is sufficient to demonstrate that:
>
> (a) the Warrwa Native Title Holders and the Worrora Native Title Holders have each maintained a connection to the Application Area in accordance with their traditional laws and customs which have governed the acquisition and holding of rights in relation to the land within the Application Area since immediately prior to effective sovereignty; and
>
> (b) the continuing physical and spiritual involvement in the Application Area of both the Warrwa Native Title Holders and Worrora Native Title Holders is such that their connections to the area have not been severed.

106 Caution should be exercised in departing from the statutory language, lest the relevant legal enquiry be misdirected. At least three aspects of the foregoing statement depart from the statutory language.

107 First, s 223(1)(b) does not require that claimants have 'maintained a connection' to the claim area (indeed, it is impossible for present day claimants to have maintained a connection to the claim area since the assertion of British sovereignty). The section is framed in the present tense (see *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (***Yorta Yorta***) at [85]-[86] (Gleeson CJ, Gummow and Hayne JJ)) and requires that the claimants have a connection with the claim area by the traditional laws acknowledged and the traditional customs observed by them. What is required is that the acknowledgment and observance of the traditional laws and customs, by which the present day claimants have a connection to the land and waters, has continued substantially uninterrupted from the time of the assertion of British sovereignty in the sense explained in *Yorta Yorta*: see *Stuart v South Australia* (2023) 299 FCR 507 (***Stuart FC***) at [290(c)], approved by the plurality in *Stuart* at [25].

108 Second, s 223(1)(b) does not require that claimants have a connection to the claim 'in accordance with' their traditional laws and customs; it requires that claimants have a connection to the claim 'by' their traditional laws and customs. The substitution of the phrase 'in accordance with' for the statutory word 'by' may cause the relevant enquiry to miscarry. As I observed in *Stuart FC* in respect of the claim to native title made by the Arabana people (at [300]):

> … The preposition "by" has a wide range of meanings, but in the context of para (b) of s 223(1) it means "through the agency or efficacy of" (Macquarie Dictionary).

> Paragraph (b) of s 223(1) is concerned with the effect of the traditional laws and customs acknowledged and observed by the Aboriginal persons or Torres Strait Islanders. As stated in *Ward* at [64], the relevant enquiry requires first, an identification of the content of traditional laws and customs, and secondly, the characterisation of the effect of those laws and customs as constituting a connection of the peoples with the land or waters in question. In contrast, the prepositional phrase "in accordance with" means in conformity with. To ask whether the Arabana have a connection to the Overlap Area in accordance with traditional laws and customs suggests an enquiry as to whether specific conduct or behaviours of the Arabana are in conformity with traditional laws and customs. That is not the enquiry required by para (b).

109 Third, the "the continuing physical and spiritual involvement" of claimants in the claim area may or may not demonstrate that the claimants have a connection to the claim area in the sense required by s 223(1)(b). Aboriginal peoples and Torres Strait Islanders may be physically present and involved in a claim area, and may have spiritual beliefs with respect to a claim area, but have no rights or interests in the claim area or relevant connection with the claim area. The rights and interests must be possessed under the traditional laws acknowledged and traditional customs observed by the Aboriginal peoples and Torres Strait Islanders, and the connection must be by those laws and customs. As I also observed in *Stuart FC* (at [303]-[304]):

> … The "connection" requirement of the statutory definition must be determined by reference to the content of the traditional laws acknowledged and traditional customs observed by the claimants, not by reference to the existence or non-existence of particular behaviours or other facts and circumstances which may have no particular significance under traditional laws and customs that have continued to be acknowledged and observed. An example of this form of error is given in *De Rose* (at [303]-[329]).
>
> Evidence of the beliefs, conduct and behaviours of the Arabana community is, of course, relevant to the question whether the Arabana have continued to acknowledge and observe traditional laws and customs that found native title. An assessment of all such evidence, including the evidentiary effect of the 2012 Arabana Determination in respect of adjacent land, is a necessary exercise in evaluating the Arabana Claim. But that assessment informs the identification and characterisation of the laws and customs acknowledged and observed by the Arabana as a society, and a determination whether the laws and customs are traditional, as explained in *Yorta Yorta*. Once that assessment and determination has been made, the further questions under s 223(1) must be considered: whether the Arabana possess the claimed rights and interests in the Overlap Area under those laws and customs and whether the Arabana have a connection to the Overlap Area by those laws and customs. …

110 For those reasons, the statement made on behalf of the State in the joint submissions is phrased in an unfortunate manner. Nevertheless, and despite those criticisms of the form of the statement made on behalf of the State, I am satisfied that the State directed itself to the relevant issues. It is of considerable significance in the present matter that the Warrwa claim group hold native title in the adjoining area to the south of the Big Springs claim area, and that the Worrora

claim group are a subset of the native title holders in the adjoining area to the north of the Big Springs claim area. The Court's reasons for making the earlier Warrwa and Dambimangari Determinations establish that each of the Warrwa and Worrora claim groups acknowledge and observe traditional laws and customs under which they possess rights and interests in adjoining land and waters and by which they have a connection to adjoining land and waters. The additional materials taken into account by the State, which have been summarised earlier in these reasons, provide a cogent basis for the State forming an opinion that the Warrwa and Worrora claim groups also hold native title rights and interests in the Big Springs claim area.

Conclusion

111 In conclusion, I am satisfied that the proposed consent determination should be made. The native title rights and interests of each of the Warrwa and Worrora peoples in the areas of land and waters that are the subject of this proceeding should be formally recognised in the proposed consent determination under the NTA.

112 It is important to observe that this determination of native title does not create native title in the determination area. Instead, it constitutes the recognition by the Australian legal system of the Warrwa and Worrora peoples' long held native title in the determination area which has existed, according to the traditional laws and customs of the Warrwa and Worrora peoples, since long before this determination today and before the assertion of British sovereignty over the land and waters of Australia.

113 The parties and their representatives are to be congratulated on bringing this matter to a conclusion by way of agreement.

I certify that the preceding one hundred and thirteen (113) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice O'Bryan.

Associate:

Dated: 5 June 2025

SCHEDULE OF PARTIES

WAD 144 of 2024

Applicants

Fourth Applicant:	PATRICK LAWSON
Fifth Applicant:	NATHAN LENARD
Sixth Applicant:	CRAIG OOBAGOOMA
Seventh Applicant:	KIRK WOOLAGOODJA
Eighth Applicant:	GARY UMBAGAI