Opening remarks prepared for the session Expert evidence and early identification of anthropological issues at the Federal Court of Australia's NSW Native Title Forum in Sydney on 14th September 2016

Expert evidence and anthropology: introductory remarks

Nicolas Peterson

Centre for Native Title Anthropology

Australian National University

Anecdotal, but reasonably reliable evidence indicates that a number of anthropologists with extensive experience as expert witnesses, are reducing their workload and moving toward retirement.

This means that there are less than a dozen fully active anthropologists with some experience as an expert witness. Yet there are many anthropologists who have long experience working in native title, some with up to twenty years, who have never appeared in court.

The reasons for this situation are several. The most important is that Principal Legal Officers at Representative Bodies want tried and true experts for the cases that they feel will go to court, and so they turn to the same small group of consultants. A second reason for the small numbers with court room experience is that the switch to being an expert witness now seems to be seen as a major rite of passage, indeed even involving a career change from that of an employee of an organisation, to being an independent consultant.

Because of this impending shortage of anthropologists with court room experience, the Attorney-General's Department has asked the Centre for Native Title Anthropology, in its new three-year funding agreement, to have a major focus on providing professional development that will encourage and enable a wider range of

anthropologists to write for the courts and to help prepare them to act as expert witnesses.

I do not want to take up too much time from our main speakers so I will not address the issues of anthropological expertise as seen from an anthropological perspective, but I do want to briefly touch on two issues.

Anthropological credibility as expert witness has been seen to be undermined by the difficulty that interests opposing Aboriginal claims, such as mining companies, have in finding anthropologists to work for them. As far back as 1994 the West Australian of the 12th August carried a story with the explicit allegation that anthropologist will not work for the industry because they 'know on which side their bread is buttered'.

But even earlier this issue had been raised by a senior anthropologist, Dr Lester Hiatt, then Reader in Anthropology at the University of Sydney, at the time of the Gove land rights case (see also Sutton 1982). The Commonwealth was finding it difficult to locate an anthropologist who would appear for them and went so far as to contemplate subpoenaing a senior public servant because of this difficulty, leading Dr Hiatt to offer his service in the interests of preserving the professional status of anthropology and anthropologists. This offer was not taken up.

It was the Gove case, however, that saw the beginning of anthropological involvement with the courts as expert witnesses, in the personages of Professor Ronald Berndt and Professor W E H Stanner, and that led Mr Justice Blackburn to comment extensively on the admissibility of anthropological evidence for the first time in the Australian courts (1971:19-26).

The issues raised by the Solicitor-General in challenging anthropologists and their evidence included the matter of hearsay; that the facts on which the anthropologists' opinions were based were often not apparent; that they made unwarranted use of concepts of their own; and that they had a habit of expressing themselves in terms that anticipated the court's findings (1971:19-26). The issue of any bias that might have made them appear as advocates was not a concern in this context.

Nevertheless, it would be wrong to deny that many anthropologists are supportive of the recognition of Aboriginal rights in land, and so run the risk both individually and

collectively as being seen to be biased. However, Aboriginal people who have lodged a claim are unlikely to consent to work with anthropologists who are explicitly opposing their interests. Further, the anthropological code of ethics requires informed consent, before research begins, making field research for interests opposing claims virtually out of the question. Desk research assessing the technical quality of an anthropological report is another issue altogether. So, the unavailability of anthropologists to some interests is not without its practical and principled basis.

The second matter I would like to comment on relates to the intrinsic nature of anthropology. As Mr Justice Neate has observed, 'The anthropologist is more than a mere recorder of facts' (1989:239). Being based on fieldwork in cross-cultural contexts, anthropology always involves building some kind of social relationship with the people one is working with which inevitably has its complexities. Such research has three steps: developing an initial understanding of the practice or belief in context, translating that into English both literally and conceptually, and finally interpreting the practice or belief. Central to the enterprise is a concern not only with what people say but what they do and how these two relate to each other, which is always complex. Together these features mean that anthropologists are tolerant of ambiguity, uncertainty and contradiction, and that their modes of reasoning are discursive.

Legal thinking and discourse contrast with this quite sharply and act as a discipline on both anthropologist and Aboriginal people. A consequence is that Aboriginal beliefs and practices frequently end up being conceptualised with a formality that they lack in everyday life. This is clearly an inevitable cost of the recognition of Aboriginal rights by our legal system, but it can also be a source of tension between anthropologists and lawyers.

This means that from an anthropological point of view the new ways in which the courts are approaching anthropological evidence, about which we are going to hear, that are more discursive and dialogic, are very positive and, I believe, a more efficient way for anthropologists to assist the court than in the purely adversarial contexts.

References

Blackburn, J. 1971. Milirrpum v NABALCO Pty. Ltd. and the Commonwealth of Australia. Sydney: Law Book Company.

Neate, G. 1989. Aboriginal land rights in the Northern Territory. Volume 1. Sydney: Alternative Publishing Cooperative Ltd.

Sutton, P. 1982. Anthropology outside the universities in Australia. Australian Anthropological Newsletter 15: 12-25.