

**EVIDENCE IN CHIEF IN NATIVE
TITLE PROCEEDINGS**
LESSONS LEARNED

EVIDENCE IN CHIEF: DIFFERENT CONTEXTS

- Mediation.
- Contested hearing.




EVIDENCE IN CHIEF IN NATIVE TITLE PROCEEDINGS

- Evidence provided in mediation.
- Mediated standard of a 'reasonably arguable case' as in *Lovett on behalf of the Gunditjmarra People v State of Victoria (No 5)* [2011] FCA 932.

ISSUES

Credible evidence process in NSW


Particular issues that have in the past been identified at this stage of the State's process have included:

- **insufficient detail, scope, and breadth of claimant statements;**
 - lack of apparent basis in expert reports;
 - reliance on sources that are not available for review;
 - **insufficient coverage of key areas;**
 - **a lack of clarity in the case that is sought to be made;**
 - the veracity of significant asserted facts; and
 - issues regarding disputing or overlapping indigenous parties.
- 

CASE STUDY 1: NEAR THE SEA

- Fastest 'credible evidence process' to date in NSW. From when State provided with the evidence to when the State accepted the evidence, period of just under one year and two months. Consent determination negotiations have just commenced.
- Other native title proceedings, mediated process has lasted six – seven years.
- Evidence provided:
 - affidavits
 - neighbouring affidavits
 - historical report
 - anthropological report
 - video
 - legal submissions
 - 'join the dots'

Note – evidence was provided on a confidential and without prejudice subject to a confidentiality agreement.



VIDEO

- Presented as a day in the life of a person from the native title group. Every day activities taking place in four different Aboriginal missions/reserves in the claim area which demonstrate continuity of traditional practices. Focus on showing a lot of activities discussed in affidavits, for example:
 - Hunting, turtle diving, getting witchetty grub, preparing and cooking these traditional foods, art practices, speaking language (class room and out on country), showing places of importance (that were able to be filmed)
- Approximately 3 days of footage, edited down to an hour.

CASE STUDY 2: IN THE BUSH

- Credible evidence process of seven years.
- Set down for contested hearing.
- Court orders to file expert evidence and non-expert evidence in preparation for hearing.
- Material filed:
 - anthropological report
 - historical report
 - linguistic report
 - outlines of evidence
 - statement of cultural and customary concerns
- Went from being viewed as a weak case to a strong case due to material filed. Impacted on settlement of the proceeding, consent determination orders include some of the strongest rights to be recognised in NSW to date.

CASE STUDY 2 (CONTINUED)

- Court order re non-expert evidence:

On or before X date, the Applicant shall file and serve affidavits or outlines of evidence containing a summary of the content of the particular evidence of each proposed non-expert witness.

- Intention to file strong evidence to negotiate the settlement of the proceedings whilst preparing for contested hearing. Opted for long outlines (30 – 50 pages each).

AFFIDAVITS VS OUTLINES

In preparation for contested hearing:

- Affidavits – would be filed in unexecuted form to allow witnesses to make any corrections and sign off before the hearing.
- Outlines (comparative to a notice of evidence) would be filed, drawn in the first person, but signed by the solicitor. Option available at a hearing for outlines to be adopted as true and correct, subject to any corrections.

AFFIDAVITS VS. OUTLINES

Reasons for decision to file outlines:

- Process of producing outlines less time-consuming – summary of evidence rather than all the evidence.
- Likelihood that affidavits would stand as the evidence-in-chief of the witnesses. Therefore, would be necessary for the affidavits to contain the whole of the evidence of the witness. (Risk of not getting comprehensive affidavits in extremely tight timeframe).
- Absence of expert reports being finalised during statement taking process, may not be possible to know that a witness has covered all the relevant topics.
- Negotiations of a consent determination, anticipate that matter would settle.
- Witnesses who would be confident getting their stories across in oral evidence.

See sample [redacted]



KEEPING IN MIND THE OUTCOME

What arguments are you looking to make in the future?

What rights are you seeking recognition of?

For example, ask the clients about any restrictions on use of resources, if group can take for any purpose (subject to traditional law and custom), then why should they accept a non-commercial qualifier in the consent determination?

Note – in any event, the State and/or other parties will think what are they trying to establish by this evidence. Consider how what client has said impacts on case theory.



EXAMPLE OF ARGUMENT IN LEGAL SUBMISSIONS


The evidence does not suggest any restriction on the kind of structure that might be built without infringement of traditional law and custom. Indeed the evidence would suggest that if they had had access to the relevant technology their laws and customs would have accommodated the construction of roads, bridges, offices and so on. For the right to be limited to erecting *gunyas* would present a discredited frozen in time approach. The Applicant submits that a suitable basis for the recognition of this claimed right has been well established.

Context: provided to the State in mediation – credible evidence process



TAKING STATEMENTS

Starting the interview

- Explain statement taking process, confidentiality (client legal privilege) and that a statement will only be used if client is happy with it. We will return to go through statement with the client.
 - Work with an Aboriginal community facilitator.
 - Let the client choose the location, preference for a location where they feel comfortable and are free from distraction. Often will choose outdoors somewhere on their country.
 - Use a voice recorder.
 - Conversational.
 - Have a list of topics/questions for all clients to address. Use as a checklist rather than reading from.
- 

QUESTIONS

- Importance of trust, seeing the client on a few occasions.
- Clients from case study 2:
 - ‘I will talk to you but you have to ask me the right questions.’
 - ‘You see this plant, it’s name is X, it is a bush medicine plant used for X purpose. I was asked by this person the other day and pretended I didn’t know and said it was a weed of some sort.’
- Open questions vs closed questions.
- Active listening. Go with what they want to tell you about.
- Having knowledge of the case. And also asking ‘stupid questions’, getting the client to state the obvious to them (not obvious to a person from outside the community).


QUESTIONS (CONTINUED)

- Start with topics that are not sensitive, and easy to talk about. For example, hunting and gathering.
- Make it conversational and less like an interrogation. For example, what does it taste like? What's your favourite bush tucker? What don't you like?
- **Silence** - A part of interaction, give the space, don't jump in with another question, and witness will eventually answer.

QUESTIONS (CONTINUED)

- Break it down to simple concepts. If client doesn't understand, change the question, and use the facilitator to help break it down.
- For example, if you require evidence of traditional laws and customs relating to ceremony.
- You could ask:
 - When was the last time everyone got together? **Or** When was the last meeting? **Or** When did you last meet up with family?
 - What was the occasion?
 - Whereabouts?
 - What happened? Who was there? Eg. Children, men, women.
- Note – when, what, where, who, how – all open questions.
- Closed questions – risk getting a no. Or for that matter a yes. A client may say yes when they don't necessarily mean it, or understand what is being asked of them (concept of gratuitous concurrence).

QUESTIONS (CONTINUED)

- When you get a no. If appropriate, try to clarify whether this is a no because:
 - a. they don't want to talk about it, or
 - b. they are not allowed to talk about it.
 - Evidence of not wanting to (for example, they want to ask an elder first, they feel that its an area that another family speaks for etc.) or not being allowed to talk about something is useful evidence as continued practice of law and custom.
 - If a client is clearly fed up, then stop, ask them if they want a break.
- 

PRESENTING STATEMENTS

- Transcription of statements, be very thorough, listen to over and over again.
- Then remove information that is not relevant.
- Information that is not in the interests of your client to have in the statement should also be removed.
- Process of going through and presenting information in statements is more time consuming than the process of taking and transcribing statements.



DUTY TO DISCLOSE?


- **Duty to the court.** A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty (NSW Solicitors' Rules 2013).
- **Duty to the client.** To act in the best interests of a client in any matter in which the solicitor represents the client (NSW Solicitors' Rules 2013).
- Also, a solicitor must not deceive or knowingly or recklessly mislead the court (NSW Solicitors' Rules 2013).
- No duty to disclose information that is not in the best interests of your client and prejudicial to the case, this is different to misleading the court.

SENTENCES TO CONSIDER LEAVING OUT

- I do not know my totem.
- We do not do that anymore.
- Our culture has changed.*
- We are not allowed to do that anymore.
- We cannot access that land anymore.
- I do not know very much.
- The younger generation do not listen etc. (and similar comments)

There may be reasons for the above statements.



- Including statements about not knowing may often not be accurate.
 - There are a lot of things that people can say in conversations, for a wide range of reasons, that are not necessarily accurate and should not necessarily be included in statements in native title proceedings.
 - Clients may be saying that they don't know something for many reasons:
 - They feel shy, uncomfortable, and say 'I don't know'.
 - They don't want to talk about it.
 - They don't understand what is expected of them, or they don't understand the question.
 - On some occasions, they actually don't know something. But this doesn't mean that it needs to be signposted in their statement – remain silent on these topics.
- 

CHANGE

For example, 'the law of marriage got mixed up in the Mission. We had to marry in our mob, not with outsiders. This has changed now'.

In terms of change, that is different to no longer practicing culture, it is good to get examples of change, as it may be an acceptable change for native title purposes. Read expert reports. Get examples of way currently exercise rights.

Evidence does not need to reflect a frozen in time approach, for example:

Hunting with guns


Camping with tents, chairs etc.

Using introduced resources such as goat and rabbit, for example, selling skins




PRESENTING STATEMENTS (CONTINUED)

See sample:

- Use of consistent headings for all statements.
 - Photographs (as annexures and of witness).
 - Consistent spelling of words, grammar etc. Full sentences.
 - One word list for language words (in case 2 we used the dictionary that had been written by linguist retained in consultation with group).
 - Explanation of locations in square brackets, for example, [a station half way between X and Y].
 - Explanation of Aboriginal English and other concepts in square brackets. For example, solicitor for State, asking what sorry business is.
 - Using clients words. Not editing clients words, but presenting it in a coherent and ordered form so that it can be understood by the Court and/or parties who have not met the group.
- 


PRESENTING STATEMENTS (CONTINUED)

- Statement taken in a conversational manner, consider whether some words are accurate.
 - Words used colloquially verbally, for example, absolute terms such as 'always' and 'never' may be best to use 'often' or 'rarely'.
 - Ask for connection to traditional laws/customs – who taught you that? Aunties/uncles etc. Did they say that that had been passed down to them?
 - Asserting right under law and customs, for example, 'this is my right under our laws and customs', or 'I have this right, which was handed down to me by my mother/father etc'.
- 

CONSISTENCY

- **Crucial** that there is at least one person reading all statements and checking them for consistency. When working in a team with a couple of lawyers, must ensure that one person is across all statements.
- If something is inconsistent and no explanation as to why, leave it out of statement(s) for the time being.
- Also check consistency with all of your case theory including expert reports, video evidence, legal submissions etc.

USE OF PHOTOS IN STATEMENTS

- Ask for photographs both old and new.
 - Take photographs whilst on-country (with permission), including of landscape.
 - Take a portrait photo of each witness for the front of their statement.
 - See sample outline.
- 

KEY LESSONS LEARNED

Statement taking

- Importance of trust, and knowing what questions to ask.
 - Use open questions.
 - Importance of a facilitator, listening and trusting what they say. Especially with clients who speak English fluently, less likely to rely on an interpreter, much more likely to misunderstand what is being said.
 - Consistency between statements (and also across all evidence). Need to check them against each other, and look at your case as a whole – including the expert evidence.
 - Be patient, and use silence in statement taking.
 - Sign two originals off, leave one for your client. Read through their statement out loud with them and take time to go over, encouraging corrections.
 - Keep in mind what you are seeking, for example, evidence of occupation (s 47, 47A and 47B of the NTA), or evidence of exclusive possession, or evidence of no restriction on purpose for a non-commercial qualifier.
- 