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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 method¹. This raises questions relating to the admissibility of the evidence when opinion is based on field data, particularly with respect to the hearsay rule². It also may incline experts to adopt (even unwittingly) an advocacy role³. 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 phenomenon⁴. 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 practitioners⁵. 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 stated⁶ 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 customs⁷.

The use of the term ‘society’ serves to emphasise the relationship between the people and the laws and customs⁸ 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 customs⁹.

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 otherwise¹⁰.

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 wrote¹¹ 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 society¹².

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 appeal¹⁴.

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 court¹⁵.

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


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 J¹⁶ was of the view that anthropological evidence could provide a framework for understanding Aboriginal evidence¹⁷. 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 differences¹⁸.

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 inaccurate²⁰.

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 evidence²¹. 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 days²² 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 beneficial²³.

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 claimants²⁵.

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 have²⁶. 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 region²⁷.

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 an 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 ethics²⁸. Some of the matters likely to be of concern in this regard relate to conflicts within claimant groups²⁹, communicating the anticipated consequences of research and confidentiality³⁰,

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 research³¹ and the purposes to which the research will be put³². 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 parties³³. 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 claim 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 ethnographies³⁵.

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 essential³⁶. This has caused some difficulties in the past. For example, Olney J wrote³⁷ 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 stated³⁸ 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 litigation⁴¹.

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 anthropologists⁴².

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 note⁴⁴. 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 unclear⁴⁵.

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 Lindgren 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 scholarship⁴⁷.

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 expert⁴⁸. 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 determination⁴⁹. 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 1998⁵⁰ 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’s 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, interpersonal 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 expert⁵². 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 J⁵³ 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 them⁵⁵.

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].

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