



Editor: Tran Tran

March 2007

Volume 3

Issues Paper No. 7

ANTHROPOLOGY AND APPLICATIONS FOR THE RECOGNITION OF NATIVE TITLE¹

KINGSLEY PALMER

Kingsley Palmer is an anthropologist. He has worked in many areas of Aboriginal Australia including the Northern Territory, Queensland, Western and South Australia. Formerly Senior Anthropologist with the Northern Land Council in Darwin, he was appointed Director of Research at the Australian Institute of Aboriginal Studies in Canberra in 1985. He subsequently became Deputy Principal of that organisation, a post he filled until 2001. He is now a private anthropological consultant.

Dr Palmer has been involved in a number of native title claims over the last decade or more and has authored expert anthropological reports and given evidence in the Federal Court. He is currently working on or is involved in several applications for the recognition of native title in South Australia, Western Australia, Queensland and Victoria.

ABSTRACT

The practice of anthropology has become central to the process whereby applicants seek to have their native title claims recognised. Despite this, there remains uncertainty as to the role of anthropologists and what it is that they should (or can) contribute to the process. Moreover, the interface between the legal system and the profession has not always been comfortable or productive. The legal status of the anthropologist's expert views is often subject to challenge and legal debate.

In this paper I examine aspects of anthropological practice relevant to these propositions. I seek to situate that practice within the native title process and the requirements of the court. This requires an appreciation on the part of anthropologists of what the process demands as well as a better understanding of what anthropologists can offer as experts. In this paper I will also map some possible directions for the future that might have a bearing on how anthropology can contribute to processes undertaken in relation to the Native Title Act 1993 (Cth).

¹ I thank two reviewers who provided some helpful suggestions which I pursued when finalising this paper.

INTRODUCTION

Australian anthropologists are not strangers to an interface with law in the context of the recognition of rights to land. The decades following the passing of the *Aboriginal Land Rights (NT) Act 1976* (Cth) (ALRA) saw many involved in preparing reports in support of land claims made under that act. From my own experience I am aware that an issue then was the nature of the relationship that was developed between anthropologists, the law and lawyers.² The expectations of the courts and the court's requirements received less attention. This was because, for the most part, anthropologists were more or less free to pursue their science unimpeded by legal constraints. In this process, anthropologists were accommodated. Land claim reports gave scope to anthropologists to express their views and sometimes their inclinations too.³ The *Evidence Act 1995* (Cth) (*Evidence Act*) and the constraints that it imposes on the presentation of evidence by both experts and claimants alike did not apply. The term 'expert' was not generally employed and there was no formal recognition of the role of experts in a judicial process.⁴ Anthropology was mostly written in support of claims, sometimes in a scholarly manner, while cross-examination, while it did occur, was seldom protracted. However, there were exceptions.

During hearings for the Warramungu claim issues of confidentiality and privilege were aired. Some of these rocked the anthropological profession to its core as they raised issues not previously considered, at least in the Australian Aboriginal context.⁵ It required the profession to reconsider its professional practice and rewrite its ethics. While the Warramungu claim left its mark on the land rights process, most at the time saw it as an exception. Generally, anthropologists involved in land rights cases brought under the ALRA had opportunity to pursue their inquiries and present their views without being unduly constrained by external demands or requirements. It is possible that this attitude has informed anthropologists' subsequent approach to undertaking work in the context of the *Native Title Act 1993* (Cth) (NTA).

² See, for example, Layton, R, 'Pitjantjatjara processes and the structure of the Land Rights Act' in Peterson, N and Langton, M (eds), *Aborigines, Land and Land Rights* (1983), 226 – 237.

³ Maurice, J, then Aboriginal Land Commissioner, wrote in his Practice Directions that the anthropologists would write with 'candour and frankness': Maurice, M. 'Aboriginal Land Rights (Northern Territory) Act 1976. Practice Directions' (1985), Australian Office of the Aboriginal Land Commissioner, 7. While he listed topics to be covered in the 'report', which was to be authored by the 'most senior of the anthropologists whose evidence will be relied upon by the claimants in support of the claim' (ibid, 2), the report was understood to be of an explanatory nature and would provide an 'anthropological assessment': ibid, 7. Such directions left the anthropologist substantially free to frame the report according to his or her own inclinations, provided the necessary topics were covered.

⁴ However, see Toohey, J, 'Borroloola Land Claim report to the Minister for Aboriginal Affairs and to the Minister for the Northern Territory', Australian Office of the Land Commissioner (1978), 25.

⁵ See Rose, D, 'Ethics and responsibility. Some dilemmas posed by the Warumungu decision', (unpublished manuscript, 1985). For ethical issues as they may relate to native title see Morton, J, 'I-Witnessing I the Witness: Courtly Truth and Native Title Anthropology' (Paper presented to the Native Title Conference: Expert Evidence in Native Title Court Cases: Issues of truth, objectivity and expertise, 6-7 July 2001, Adelaide University).

Native title, a departure in progressing recognition of indigenous rights to land, raised some new issues while it restated old ones. The complex nature of the NTA and reliance on the legal profession for its interpretation and operation might have signalled that anthropology take a lesser role in the presentation of applications for the recognition of native title. Native title, by virtue of its complex legislative base appeared to be, for the most part, a matter for Australian law. The 1998 amendments bolstered the role of the Federal Court and applied the provisions of the *Evidence Act* to court proceedings. Native title process has been increasingly one demanding high standards of legal practice which have repercussions for anthropologists.

While it is true that native title practice is fundamentally a matter of law, it can never be exclusively so. The legal complexity is caught up in a cultural complexity, whereby issues of native title require specialist knowledge and the provision of expert views. As a consequence anthropologists have a role in most, if not all, native title matters. Their reports and evidence continue to be important to the process. This demand for anthropology carries with it a price. Anthropology is now subject to sometimes severe scrutiny in the courts and is rigorously tested.⁶ It is only recently (2004) that the force of the application of the *Evidence Act* has really caught practitioners' attention, following the interlocutory judgment of Sackville J in the *Jango v Northern Territory (No 2)*⁷ as well as his final judgment on this matter in *Jango v Northern Territory of Australia (Jango)*.⁸

This has implications for the standard of anthropology required, its type, its presentation, the mode of inquiry and the professional competence of its practitioners. This now constrains and influences both the research required and, inevitably, the sorts of researchers who can usefully be employed.

In this paper I explore issues raised in respect of the recent *Jango* case and the judgements of Sackville J. I do so since they conveniently introduce issues which it may be helpful to address in relation to the interface between anthropology and native title processes.⁹ I do not here address the specifics of this case or examine the implications of the judgement. I was not involved in the application so my knowledge of it is limited to

⁶ For a discussion of issues of privilege and discovery, two critical aspects of an expert's involvement with the court, see Pocock, T, 'Privilege – overview and developments relevant to anthropologists working on native title claims' (Paper presented to the Native Title Conference: Expert Evidence in Native Title Court Cases: Issues of truth, objectivity and expertise, 6-7 July 2001, Adelaide University).

⁷ [2004] FCA 1004.

⁸ [2006] FCA 318 (*Jango*).

⁹ Professor Basil Sansom has also written a paper addressing issues that he identifies for anthropology and anthropologists that arise from the *Jango* decision: Sansom, B, 'Yulara and future expert reports in native title cases' (Paper presented to Western Australian Government, Office of Native Title workshop, July 2006, Perth). Although Professor Sansom's approach and mine are rather different, readers interested in the issues I explore here will find Sansom's paper instructive. For a discussion of the role of the anthropologist as expert witness in native title cases generally, see Chalk, A, 'Anthropologists and Violins - A lawyer's view of expert evidence in native title cases' (Paper presented to the Native Title Conference: Expert Evidence in Native Title Court Cases: Issues of truth, objectivity and expertise, 6-7 July 2001, Adelaide University).

my reading of the judgement. Consequently my observations in relation to this case, in so far as I express them, are qualified.

Anthropological practices in the native title context are diverse. In writing generally there is a danger that aspects of the discourse will not be relevant to aspects of the practice. In this paper I focus on the role of the anthropologist as an expert in a court. I assume that the anthropologist is to be regarded as an expert (in the sense entertained by the *Evidence Act* as I understand it), is independent and has views based on specialist training and knowledge, and so on. In this my comments apply equally to an anthropologist briefed by applicants or by respondents. However, and more generally, what I write is also relevant to an anthropologist writing a connection report, a report prepared for an Indigenous Land Use Agreement, or a report written in reply to another expert.

SO, WHAT DO ANTHROPOLOGISTS DO?

The profession of anthropology has a deal of work to accomplish in educating the public about what it does. The term ‘anthropologist’ is used by a wide range of scholars (and others as well) with a variety of research interests developed from differing theoretical perspectives. This may call for a clearer enunciation of the bases of the practice by those involved in native title inquiries. Misunderstandings about anthropology and anthropologists continue to be common and are not limited to the general public. Judges also appear not to have appreciated what anthropologists do or how they do it.¹⁰ Understanding the nature of the expert is an essential first step in gaining an appreciation of the contribution they could potentially make to any legal process.

Field work and the field work process¹

In *Jango*, there were two anthropologists who prepared an expert report for the applicants; Professor Peter Sutton and Ms. Vaarzon-Morel. Sackville J, in his judgement, stated that he was surprised that Professor Sutton spent so long in the field, pointing out that the research was based on 400 research days¹¹, collecting what he (the Judge) considered to be the same material as was presented in the witness statements. Sackville J also reported that Professor Sutton had stated that his period in the field was sufficient for him and his co-researcher (Ms Vaarzon-Morel) to learn, ‘enough to enable us to reach the conclusions set out in the report’.¹² However, Professor Sutton also qualified his knowledge by stating that ideally the work (upon which he based his views and opinions relating to the application) should have been done by someone who had spent, ‘months or years’ ... ‘in the bush’, as he had done in Cape York.¹³ In summary his Honour thought

¹⁰ Cf Weiner, JF, ‘Johnny *Jango* & ors v Northern Territory of Australia & ors. An Anthropologists’ Comment’ (2004) 4 *Native Title Newsletter*, 10.

¹¹ *Jango*, [313; 320]. See also *Jango v Northern Territory (No 2)* [2004] FCA 1004, [15].

¹² *Jango*, [316].

¹³ *Jango*, [316].

the time in the field too long and duplicated the work of lawyers, while in contrast, Professor Sutton expressed the view that more time would have been beneficial.

The issue of the length of time an anthropologist needs to spend in the field and how long might be too long is a matter that has been addressed in other claims. In particular, the matter of the possible over-involvement of the anthropologist and a consequential loss of objectivity has been a matter for comment in a number of claims.¹⁴ The very nature of anthropological inquiry demands that practitioners engage in social relationships which necessarily result in the development of human relationships. Non-anthropologists understandably may conclude that this is likely to lead to a lack of objectivity. The issue is important and goes to the heart of what anthropologists do and how they can do it.

In the *Jango* decision there are two issues which I think are best separated out. First, is the data collected by an anthropologist simply a repetition of that collected in witness statements by lawyers, and then provided to the court as evidence? Second, what qualifies an anthropologist as an expert in terms of exposure to the applicant community? Does longevity in the field with one group of people form the principal basis upon which this qualification is founded?

Why witness statements aren't anthropology

Anthropologists mostly hold it as axiomatic that a statement made by an individual in a formal setting, or to a comparative stranger or in an unaccustomed form, may not accord with the ideas and views expressed in a less formal setting. Consequently, data collected in a formal process and used in an anthropological analysis may be limited, constrained by the circumstances and perhaps even be misleading or incorrect. Anthropologists seek to obtain data through indirect ways, by listening over a long period of time and by gaining the confidence and trust of those with whom they work.

This methodological fundamental lies at the core of much that anthropologists do and the way they do their anthropology. Malinowski is generally attributed with having defined what is now generally termed, 'participant observation'. For Malinowski, societies, 'cannot possibly be recorded by questioning or computing documents, but have to be observed in their full actuality'.¹⁵ Malinowski urged his students to, 'sometimes ... put aside camera, note book and pencil, and to join in himself in what is going on'.¹⁶ For Malinowski then, field work which involved close participatory interaction over time with those studied was an essential part of the anthropological quest. Without field work, an anthropologist would not have the detailed and intimate understandings of another

¹⁴ Eg, *Neowarra v State of Western Australia* [2003] FCA 1402, [71; 112-119]; *Gumana v Northern Territory of Australia* [2005] FCA 50, [152-172]; *De Rose v South Australia* [2002] FCA 1342, [352] and *De Rose v South Australia* [2003] FCAFC 286, [263].

¹⁵ Malinowski, B, *Argonauts of the Western Pacific* (1922), 18.

¹⁶ *Ibid*, 21.

culture which was one of the principal aims of anthropology. This brief summary barely scratches the surface of these methodological complexities.¹⁷

Data, as collected, should then form the basis for the provision of an expert opinion. Anthropologists develop ways of understanding social relationships, based upon that data and their theoretical or paradigmatic assumptions which are a part of the training of their discipline. They do not simply present raw data or iterate the words of those with whom they worked.¹⁸ There is a vital step between the presentation of the data and the articulation of its interpretation. Such a step, characterised by the moulding of the material consistent with theory or paradigm renders the opinion substantially different to the data.¹⁹ The two should always be clearly distinguishable and the expert view must be clearly derived (or based upon) the data and the relationship be able to be demonstrated, if required. I will return to this matter in due course.

It is then, both by virtue of the methods of data collection and the analysis to which these data are subjected, evident that the work that anthropologists do and the opinions they develop are distinct from lawyers' work when they assemble a witness statement. My own view is that the two processes should be kept quite separate. Lawyers do not do anthropology: anthropologists do not do witness statements. This is another point to which I will return later in this paper.

There is an obvious tension between participatory field work methods, which imply substantial periods of time in the field and what is practical given the limited resources of applicants, timeframes imposed by the courts and the availability of experts. Sutton reported the difficulties in this regard, as I noted above.²⁰ Some experts do have had a long history of association with claimants²¹. However, it is the methodological approach which remains central to what anthropologists do – number of days in the field aside. There are also other aspects to this matter.

How long in the field?

Anthropologists gather data consistent with their field work methods and this requires time. How much time is a matter determined to some extent by the context of the inquiry. Some fields are more productive than others; some social relationships more demanding; sometimes data are more elusive in one place rather than another, and so on. Generally, I think my colleagues would agree that knowing people before hand and

¹⁷ See Rigsby, B, 'Representations of Culture and the Expert Knowledge and Opinions of Anthropologists', (Paper presented to the Native Title Conference: Expert Evidence in Native Title Court Cases: Issues of truth, objectivity and expertise, 6-7 July 2001, Adelaide University), 7-9 for a discussion of similar issues.

¹⁸ 'Our expert knowledge does not and should not simply repeat and reproduce what the claimants say and assert, but it rests upon a complex process of assembling, surveying, ordering, comparing, assessing and interpreting evidence from a variety of sources': Ibid, 4.

¹⁹ For a brief discussion of the potential complexities of this process in the native title context see Weiner, above n 10, 8-9.

²⁰ See *Jango*, [316].

²¹ See n 14 above.

having a detailed knowledge of their culture helps in gaining early understandings and lessens the otherwise steep learning curve. A period judged to be reasonable in terms of gathering data through developed relationships with the informants and some shared experiences with them is essential to ensure the quality of anthropological data. There are evident dangers in spending too short a time in undertaking field work and the preparation required to present as an expert.²²

Expert opinions are also developed from understandings, assumptions and paradigms of the profession. An anthropologist's claim to be an expert in what he or she does is a product of the tools and methods of the discipline, exercised in relation to a study of human societies. These methodological applications may also form the principal guard against developing conclusions that are based on sentiment, a potential hazard for some anthropologists who form long-term positive relationships in the field. So, anthropologists work from a number of common place assumptions. These include such postulations as: 'people order and structure their relationships'; 'people use some concrete things as symbols for others that are less tangible'. They also base their thinking on theory-like propositions. One example would be that a good deed or a gift requires another in return and thus engenders an obligation on the part of the recipient.

Given that there is some degree of commonality across, for example, Aboriginal Australia (desert, coastal, temperate, tropical) this expertise and the training and accoutrements of the discipline equip anthropologists to make certain observations which constitute an expert view, on say, what is a traditional law or custom, and what is to be understood by the term, 'traditional'. In short, field data are the principal materials upon which analysis is based. However, provided these data are sufficient and have integrity, legitimate expert views can be developed consistent with the discipline. Data may even have been collected by another person. Longevity in the field is not, in itself, a measure of the quality of either the data or the expert views.

A helpful analogy in this regard might be a medical doctor who understands human physiology, morbidity and suitable treatments for ailments. He or she does not need to spend prolonged periods with a single patient to form an expert view provided the data upon which they base their expert view is sound. Better analogies, of course, might be provided.

One final comment in relation to first hand knowledge of a society, field work and length of stay: expert anthropologists providing a view to the court from the perspective of the respondents generally have no field work experience with the applicants and have developed no relationships from which they can derived first-hand data. Yet their contribution, based on theoretical and analytical interpretations, usually of the expert report or the evidence provided by the applicants, is rightly recognised as providing a useful contribution to the court in matters of native title.²³

²² Chalk, above n 9, 10-11.

²³ Cf *Gumana v Northern Territory of Australia* [2005] FCA 50, [164].

The Expert Report

My final comment in relation to what anthropologists do relates to the role of the expert report. My observations of these documents (in their various forms) are that while they are developed from an expert perspective they constitute *de facto* rather more than a simple expert view. They are prepared and then read by legal representatives for the applicants and the respondents – and I assume by the judge. While they may provide ideas for revealing potential flaws in the case (or grounds for rejection or acceptance) of a consent determination, they also provide an explanatory text which summarises the nature of the applicant community and the chief propositions and fields of understanding which will probably constitute the applicants' case.²⁴

While the degree to which the anthropologist succeeds in making him or herself understood varies from expert to expert, it seems to me that those with little or no knowledge of Australian Indigenous cultures and of the claimant society in particular, would find many of the beliefs, concepts, terms and ideas difficult to master in the time available. Participation in the native title process would then be a more difficult undertaking for legal practitioners and judge alike if the expert report was not available to assist them. It is possible that at least some aspects of the application might not be fully understood.

While I do not wish to overplay the role of the anthropologist, it is my observation that the report (at whatever stage) is extremely useful and helpful to the legal process. Without it, the framing and presentation of a claim might be most difficult. I also note that respondent parties (particularly the States and Commonwealth) make use of anthropologists to reply to the first expert retained by the applicants as well as to assist in the development of issues for cross examination. Anthropologists play a significant role in identifying technical issues that require the attention of the court.

This much said, I conclude not that anthropologists are indispensable but that they can be very helpful. It would be good then to get the relationship between the practice of anthropology and that of native title law, right. In this, past practice in relation to the ALRA may not provide a reliable guide to the very different world of native title practice.²⁵

I now turn to an examination of some issues which I think have a significant bearing on the role of the anthropologist as expert in the native title process. Again, I will use issues raised by Sackville J in the Jango judgement as a convenient point of departure for this discussion.

²⁴ Cf *Rubibi Community v Western Australia [No 5]*[2005] FCA 1025, [252].

²⁵ 'He 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) 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*': *Jango v Northern Territory (No 2)* [2004] FCA 1004, [6].

ISSUES FOR THE ANTHROPOLOGIST AS EXPERT

Expert evidence and applicant evidence

Sackville J makes comment on the relationship between Indigenous and expert evidence.²⁶ In the context of a trial, the judge states, courts have consistently asserted that, ‘what really matters ... is the evidence of the Aboriginal claimants’.²⁷ In the Jango case, this was a proposition put by the Commonwealth which argued unsurprisingly that expert evidence was no substitute for applicant evidence.²⁸ His Honour agreed²⁹ but also accepted that the experts, ‘might well supplement the testimony of indigenous witnesses and, in that sense, fill in some evidentiary gaps’.³⁰ In making this statement, admissibility is assumed.

These ‘evidentiary gaps’ may have resulted, in his Honour’s view, from communication difficulties in the court context rather than being the result of any absence of knowledge on the applicants’ part.³¹ Such difficulties were also lessened, his Honour noted, by taking evidence on country.³² His Honour then examines the issues of ‘gratuitous concurrence’, inconsistencies and the importance (or otherwise) of cross-examination. These matters are not my concern here.

It is important for anthropologists to understand the status of their evidence in relation to that of the primary evidence of the applicants. While anthropologists may assist in filling ‘evidentiary gaps’ the court cannot accord much weight to what they report in relation to what the applicants had told them during field work. This is, as I understand it, legally merely ‘hearsay’, the sort of ‘folktale’ of a legal twilight. If anthropologists are to have their opinions accorded any weight, then their data (what they were told or what they observed) needs to be provided to the court as evidence from the applicants.³³

While this may appear to anthropologists to be a strange requirement, they fail to grasp its fundamental significance to the process with which they are engaged at their peril. In order for these data to receive due recognition from a court, this evidence needs to be led. Such a process presumably requires that a barrister makes a list of the key evidentiary issues that could be considered helpful to the court that are found within an expert report and then ensure they are addressed clearly in evidence.

The anthropologist needs to feel confident, of course, that the data are replicable through the adoption of such a process. This is good science too. Propositions should be

²⁶ *Jango*, [287-301].

²⁷ *Jango*, [288].

²⁸ *Jango*, [290].

²⁹ *Jango*, [291].

³⁰ *Jango*, [292].

³¹ *Jango*, [292] see also [293-295].

³² *Jango*, [295-297].

³³ Cf *Gumana v Northern Territory of Australia* [2005] FCA 50, [156, 159-160].

falsifiable, research data replicable. In a court process, doubtful data will imperil expert conclusions because data must be tested and shown to have validity in the legal process.

Relationship of data and expert views

A related matter concerns the need to ensure that the expert's view is clearly based or derived from the data.³⁴ Sackville J was critical of the asserted relationship (asserted on the part of Professor Sutton) between conclusions and opinions and field data.³⁵ His Honour pointed out that,

[s]crutiny of the notes cited in the relevant footnote provides scant support for the conclusion ... [m]any 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.³⁶

His Honour goes on to provide two particular examples that, 'help to make the point'.³⁷ His Honour does not see the difficulty as cause to reject, 'all the opinions expressed in his [Professor Sutton's] Report' but that, '[n]ot all command acceptance' as a consequence.³⁸

Professor Sutton's response during the trial was one that I think would engender sympathy with all experienced practicing anthropologists. He had told the court, 'The material in the footnotes cumulatively adds up to a gradually pieced together picture of the system'.³⁹ While his Honour considered that this was somewhat defensively volunteered⁴⁰ it remains an anthropological truth that anthropologists draw their conclusions and form opinion from an accumulation of data, rather than from a single note written in a field note book. This is because an anthropology of social relations or meaning is complex and comprises many strands of knowledge and interpretation. It can seldom be explicated by reference to a single note. This is a fundamental understanding of the discipline and marks anthropology off from, say journalism or commonplace popularist commentary.

The fact that an opinion can be referenced to a line in a collection of field notes does not make it scientifically any more or less valid than one that lacks the reference. The opinion should, nevertheless, be based upon field experience, proper knowledge of the society and its members, the analysis should be falsifiable and the data should be broadly replicable. He or she who provides the opinion should be qualified to do so. Since the reported statements of those with whom an anthropologist works are likely to be, in law, hearsay, it is difficult to understand the legal technical preoccupation with sources. I do

³⁴ See Chalk, above n 9, 7-8 for a discussion of this issue from a legal perspective.

³⁵ *Jango*, [336-338].

³⁶ *Jango*, [336].

³⁷ *Jango*, [337].

³⁸ *Jango*, [338].

³⁹ *Jango*, [336].

⁴⁰ *Jango*, [336].

not argue for an anthropology which is data-free – that would be a nonsense. The anthropological process is clear enough – data, analysis, conclusion, opinion, in one manifestation. However, in my view, there needs to be a better understanding of the anthropological process and how legitimate conclusions can be drawn which are not constantly fettered by artificially imposed sanctions. These may only operate to limit the usefulness of the opinion, provided to the court.

Expert reports and Points of Claim

Sackville J comments upon, but does not pursue, the relationship between the expert report and the Points of Claim.⁴¹ His Honour notes in this respect that Professor Sutton’s views (his ‘propositions’) omitted elements pleaded in the Points of Claim.⁴² His Honour also stated that Professor Sutton had,

rejected the original version of the Points of Claim, which had relied on the concept of *ngurraritja* as the foundation for the existence, prior to extinguishment, of native title rights and interests in relation to the Application Area. Professor Sutton said in evidence that he found that version to be ‘so at variance with my own findings that I said I couldn’t possibly work with it or its author’. ... Professor Sutton was, however, apparently satisfied that the Points of Claim as ultimately drafted were ‘compatible with [his] approach’.⁴³

An independent expert, such as an anthropologist, needs to ‘tell it like it is’ – and Points of Claim, in so far as they constitute the applicants’ legal position in advocating their claim, are not a matter for the anthropologist. Yet, Points of Claim necessarily require an in-depth understanding of the Indigenous laws and culture, relationship of parts, interactions and the normative system. I doubt that such complexities can be efficiently or adequately developed without access to analyses provided by an anthropological expert who has made independent inquiry into the society of the applicants. Points of Claim would be better developed after a least some preliminary work and inquiry has been done by the expert. Points of Claim developed outside of this knowledge always run the risk of being anthropologically off the mark.

In practical terms this may mean that the Points of Claim will need to be modified as the case develops and the expert is able to conduct his or her independent research. However, if the various sorts of evidence have integrity there will be an evident consistency born of a direct relationship between the anthropologist’s data and the evidence of the applicants – and thus in the manner the case is presented by those who represent them.

⁴¹ *Jango*, [308].

⁴² *Jango*, [308].

⁴³ *Jango*, [324].

The Brief

Sackville J was also critical of the Briefs provided to the anthropologists and the apparent failure to advise the anthropologists of the requirements of the *Evidence Act*. While this related to complex issues of admissibility⁴⁴ it raises the importance of being clear as to what is asked of the anthropologist and the inquiry he or she pursues. It also flags the importance of the anthropologist having at least some awareness of the requirements of the *Evidence Act* – although, from my own experience this remains an ideal if elusive goal. Moreover, a good Brief does not guarantee a focussed report any more than attaching Justice Black’s *Practice Direction: Guidelines for expert witnesses in proceedings in the Federal court of Australia* guarantees admissibility. There is clearly much work to be done in this department between lawyers, anthropologists and the Federal Court. This is also a matter I will consider again in the final section of this paper.

The Expert as independent of the legal process

Another issue raised by his Honour related to the role of the anthropologist in the preparation of the case. His Honour remarked,

Thirdly, 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.⁴⁵

His Honour continued, stating that anthropologists can be expected to have had close contact with the people with whom they worked and that Professor Sutton was conscious of the problems that can arise from too close an identification with the claimants. He stated that he did not doubt that Professor Sutton was at pains to maintain his independence. However, he continued:

But 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. Professor Sutton acknowledged, for example, that he had spent considerable time commenting on draft witness statements. He denied that he ‘settled’ the statements, maintaining that his role was limited to ‘commenting on factual accuracy’, including pointing out disagreements with the genealogical connections he had prepared. Nonetheless, Professor Sutton and, I infer, Ms Vaarzon-Morel, clearly played a significant part in shaping witness statements. It would have been

⁴⁴ *Jango*, [313].

⁴⁵ *Jango*, [322].

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.⁴⁶

There are two issues here which it is important to separate: congruence, which I have already touched upon, and separation of experts and advocates.

In my view the degree of congruence between the expert report and the applicants' case is a measure of the expertise of the anthropologist, the accuracy of his or her data and the willingness of the barristers to structure their case consistent with the evidence which they expect to adduce. Such congruence then is not a measure of some sort of conspiracy between anthropologist and lawyer, but reflective of the fact that evidence as anthropological data or adduced as testimony is congruent and therefore likely to be valid. Anthropologists attempt to define, report upon and make sense of social reality. So too, in a different way, do advocates seek to provide to the court the evidence of the existence of customary laws. While we adopt different methods and approaches, we both treat the same material, albeit in different ways and according to different paradigms.

His Honour stated that, in his opinion, the applicants' case was, 'heavily influenced by the approach taken by the two anthropologists',⁴⁷ that this involved participation in the preparation of the 'draft witness statements' which his Honour inferred meant that they 'played a significant part in shaping'.⁴⁸ These roles were complicated because Professor Sutton apparently discarded the original version of the Points of Claim which he found to be impossibly at variance with his own conclusions.⁴⁹ His Honour was also critical of the anthropologists' apparent close proximity to Counsel for the applicants during the trial and that he (Professor Sutton), 'suggested questions to counsel from time to time'.⁵⁰ His Honour concluded that Professor Sutton had come to a realisation that, 'his role in the case had not been limited to that of a wholly objective expert observer and commentator'.⁵¹

There are a number of issues caught up together here (involvement in preparation of statements, the case founded too much after the expert's view, defensiveness of the expert under cross-examination, expert suggesting questions to Council, and so on). While I do not intend examining each in detail, one conclusion is inescapable: the expert must be independent. The line between being helpful to the development of a case (and so in turn, being helpful to the court) and being seen to be an advocate is a thin one, probably because, as his Honour has it, of 'the peculiar circumstances of a native title

⁴⁶ *Jango*, [323].

⁴⁷ *Jango*, [323].

⁴⁸ *Jango*, [323].

⁴⁹ *Jango*, [324].

⁵⁰ *Jango*, [325].

⁵¹ *Jango*, [326].

claim (including a compensation claim)'.⁵² However, it is essential to have that line clearly drawn.⁵³

In a case where difficulties of cross cultural communication and knowledge are so important, the relationship between lawyer and anthropologist has the potential to be a close one. However, anthropologists must understand their role as an expert, with a primary duty to the court, as being essentially independent. Failure to do so will imperil their standing and their usefulness to the Court. In short, their usefulness to the court only endures while they are credible. And a part of that credibility lies in being outside of the prosecution of the case. From a practical point of view this is probably best effected by having some ground rules up front for what the anthropologist can and cannot do. These need to be formulated, understood and developed from an appreciation of the importance of the expert remaining outside of the advocacy. This also underscores the need for a good brief – a matter I have already commented upon.

ANTHROPOLOGY AND ADMISSIBILITY

The Lawyer's Occam's Razor and death by a thousand cuts

William of Occam died in about 1349 and was an English scholar, philosopher and Franciscan named after his birthplace, a village in Surrey, England. Professor Sutton alludes to a well-known principal named after Occam who had, to the argument of some theologians, applied the dictum that entities ought not to be multiplied except out of necessity. The term 'Occam's razor' (applied in recent years to a radio program) signals the practice of adopting the simplest explanation of a phenomenon by reducing (or cutting away) the number of hypothesis or assumptions in any reasoning process. In this way you reduce the possibilities of inaccuracies since assumptions necessarily incur a risk of error.

Such direct simplicity should not, however, be confused with any unnecessary reduction of the knowledge-gathering processes which constitute the fabric of the data upon which understandings are based. Any undue discarding of the basis of advancing understandings through the diminution of data would be better termed, 'death by a thousand cuts'. It spells the death of good scientific inquiry by impoverishing its empirical basis.⁵⁴

In his evidence Professor Sutton likened the process adopted in the preparation of his second report to the application of a 'lawyer's Occam's razor'. From my reading of the matter, I conclude that Professor Sutton may well have understood 'the lawyer's Occam's razor' as constituting in fact, 'a death by a thousand cuts'. I do not think the allusion should be taken too far but it provides (as do the other issues raised in this judgement) a

⁵² *Jango*, [322].

⁵³ Cf Chalk, above n 9, 9-10.

⁵⁴ I thank Dr David Turnbull for his helpful comments on Occam and his razor.

useful point of departure for consideration of a vexed question relating to the form as well as the content of expert reports.

Sackville J's interlocutory judgement⁵⁵ dismissed much of Professor Sutton and Ms Vaarzon-Morel's first report (the Yulara Anthropology Report).⁵⁶ This report was the product of 398 days 'desk research' and 99 days of ethnographic field work. The report comprised 384 pages and some 6,000 pages of appendices.⁵⁷

His Honour had stated that the report had been produced with 'scant regard for the requirements of the *Evidence Act*', attributable, 'at least in part' to the vagueness of the instructions provided to the authors and a failure to inform them of the requirements of the *Evidence Act*.⁵⁸

A second expert report (the Sutton Report) was completed some three months after this ruling. It was,

in effect compiled by the applicants' legal representatives, essentially by selecting and recasting material derived from the Yulara Anthropology Report. It appears that Professor Sutton's involvement in the process was limited to perusing the revised draft with a view to correcting factual or typographical errors. When asked about the reason for the omission of some apparently relevant material from his revised Report, Professor Sutton attributed the removal to the 'lawyer's Occam's Razor.' Even taking into account time pressures, it must be said that this is an odd way for an expert to prepare the final version of a report which is to be tendered in legal proceedings and which is said to be central to the applicants' case.⁵⁹

This is a harsh judgement on an expert and, in my view, unfair. The report in question was prepared and submitted by lawyers, yet his Honour sees its failings as being those of Professor Sutton. Beyond this his Honour's statement shows that, in this case, anthropology had been compromised by what was (perhaps mistakenly) understood at the time to be legal necessity. This relates to the form of the report, as it was finally provided to the court. This procedure was designed, so I presume, in order to overcome the difficulties of admissibility identified by his Honour in his interlocutory judgement.

In a substantial departure from anthropological orthodoxy, Professor Sutton was apparently asked to consider a, 'number of propositions'.⁶⁰ He was asked to,

- state whether the Propositions involved subjects in relation to which his specialised knowledge enabled him to express an opinion;
- state whether each Proposition, in his opinion, was correct;
- identify the facts upon which he relied for that opinion; and
- demonstrate the reasoning process by which the opinion was reached.

⁵⁵ *Jango v Northern Territory (No 2)* [2004] FCA 1004.

⁵⁶ *Jango*, [313].

⁵⁷ *Jango*, [312].

⁵⁸ *Jango*, [313].

⁵⁹ *Jango*, [314].

⁶⁰ *Jango*, [306].

The Propositions on which the Sutton Report comments were formulated by Professor Sutton himself. They reproduce *verbatim* some (although not all) of the ‘criteria for being a native title holder’ pleaded in the Points of Claim.⁶¹

I have not read Professor Sutton’s ‘Propositions’, nor do I express a view on the appropriateness or otherwise of this approach, given the legal context and requirements, of which I am ignorant and not qualified to comment upon. However, I am familiar with the template of the sort set out by his Honour above. I have myself been faced with a proposition that I rewrite an expert report along lines similar to that adopted for Professor Sutton. As an anthropologist I have views on the adoption of this approach which go to the heart of the practice of our discipline.

The fundamental problem for anthropologists in this regard relates to the nature of the discourse that defines our discipline. As I have set out in an earlier portion of this paper, what anthropologists do is to attempt an understanding of a society (or, at very least, of parts of a society). Developing an anthropology of structure or meaning is not possible in a disjointed account that presents opinion as dot points. Anthropological views require the development of ideas, explication of data and the formulation of views which are accretive. The architecture of an anthropological view is one comprising many building blocks. The opinions which are derived from our conclusions are manifest in an appreciation of the whole, albeit expressed as discrete parts.

There is elemental danger in forcing anthropology into an artificial and highly constrained reductionist form, where the fabric of the discourse is discarded or so diminished that little of the dialogue and the truths it can reveal are left. In addition the anthropologist becomes uncomfortable, compromised and potentially paralysed. In these circumstances, inevitably, the value of the expert opinion to the court is either much diminished or possibly irreducibly lost. This is not a conducive circumstance whereby an expert view can be provided to the court. The court is thereby not much assisted.

The propositional process is not one of aesthetic simplicity achieved by the application of the principal of Occam’s razor. It is, rather, ‘death by a thousand cuts’. It is no way to conduct anthropology. The result is not clarity born of simplicity but anthropological impoverishment and, in my view, a resultant impoverishment for the court and the native title process.

Nor am I convinced that such an approach is necessary for the requirements of admissibility and the *Evidence Act* to be met – in so far as I understand this matter. If admissibility alters with cases, then this raises questions about the uniform application of law. Anthropology is and has been admitted in many cases (although seldom, it seems without argument).⁶² What appears to me to be required is that anthropologists and those who wish to present their expert views to courts of law need to be mindful of the

⁶¹ *Jango*, [306].

⁶² See, for example, *Rubibi Community v Western Australia [No 5]*[2005] FCA 1025, [251]; *Griffiths v Northern Territory of Australia* [2006] FCA 903, [260]. See also Transcript of proceedings, *Anthony Bennell, Alan Blurton, Alan Bolton and others v. The State of Western Australia and others* (Federal Court, Wilcox J, 11 October, 2005), 84-111 and especially 101 and Transcript of proceedings, *Anthony Bennell, Alan Blurton, Alan Bolton and others v The State of Western Australia and others* (Federal Court, Wilcox J, 12 October, 2005), 115-131 and especially 117.

requirements of the *Evidence Act* and so expert opinion must be relevant, an expert must be qualified, opinion must be separated from fact and the relationship between the research data and the conclusion established, while the derivation of data is apparent. The expert must remain objective and impartial and outside of the legal process, in so far as the ‘the peculiar circumstances of a native title claim’ allow.⁶³

CONCLUSION

If it is concluded that the careful presentation of expert anthropological views of the sort I have sketched, which allows anthropology still to be written and the discipline pursued consistent with its fundamental mode of discourse, is not sustainable in relation to the application of the *Evidence Act*, I think that the native title process, at least in the Federal Court, is facing a serious challenge. In this paper I have set out the significant contribution that anthropologists have to make to the settlement of native title applications both within the court and outside of it. If the path I have outlined is deemed by some to be legally untenable, then urgent thought needs to be given to how the process can be reformed at a fundamental level, to ensure that helpful expert views are not excluded from the Court’s considerations. Meanwhile, anthropologists and those who provide briefs to them, must be mindful of some basic ground rules and work toward ensuring, in so far as it is possible, that expert views are presented to the court (by both applicants and respondents) in a form both acceptable to the court and in a manner that will assist them in settling applications for native title.

ISSN 1326-0316

ISBN 978-0-85575-303-0

Native Title Research Unit
Australian Institute of Aboriginal and Torres Strait Islander Studies
Lawson Cres, Acton Peninsula ACT
GPO Box 553 Canberra ACT 2601
Telephone: 02 6246 1161
Facsimile: 02 6249 7714
Email: ntru@aiatsis.gov.au
Website: <http://ntru.aiatsis.gov.au/>

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⁶³ See



of Australia [2006] F

