

Anthropologists and Violins - A lawyer's view of expert evidence in native title cases

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Introduction

The distinguished South Australian jurist, W A N Wells, once wrote:

*"Cross-examining an expert is like playing the violin: if it is well done it is magnificent; if it is badly done it is excruciating."*¹

A fear of anthropologists in undertaking work in native title claims is the testing of the witness under cross-examination before the court. It is an understandable fear and one common to most expert witnesses. And while the comparison of expert witnesses with violins may bring little comfort to those about to enter the witness box, it at least highlights the fact that lawyers regard cross-examining experts as a difficult and risky exercise.

The purpose of this paper is to set out the legal obligations of experts appearing in native title cases and to offer some suggestions as to steps which expert witnesses can take to ensure that they give their best evidence, irrespective of on whose behalf they are called.

The burden carried by anthropologists in native title matters, irrespective of whether they are being called on behalf of claimants or respondents, is heavy. It is not only their professional reputations which are at stake. Anthropologists are acutely aware of the significance of the proceedings to claimants and often feel an overwhelming sense of responsibility to do justice to the claimants' case. Unlike expert witnesses in many other types of cases, such as a doctor in a worker's compensation claim or an engineer in a product liability case, the nature of anthropological evidence is generally not limited to a discrete issue. It does not involve a routine scientific test carried out in a laboratory. Commonly it will encompass an examination of a whole society, the relationship of the people in that society to one another, their relationship as a group to surrounding peoples and to their colonisers and, of course, their relationship to their land. It is a field of expertise which necessarily involves personal relationships between the anthropologist and the subjects of their inquiry, often over many years.

While it would be tempting to focus this paper on the cross-examination process, because that is where the humiliation of a job badly done will be inflicted in a most public fashion, the likely success or failure of an expert witness in cross-examination will usually be ascertainable long before they set foot in the box. For that reason, any guide to surviving the cross-examination process must necessarily deal with all stages of the process of giving expert testimony from the time instructions are first given, if not earlier.

The paper is structured in three parts. It begins with a discussion about the rules governing the admission of expert evidence. The second part deals with the duties of an expert to the court and the requirements in relation to the form of their evidence. The final part lists some practical suggestions that may assist in the preparation and giving of the evidence.

Opinion evidence and the expert evidence exception

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W.A.N. Wells *Evidence and Advocacy*, Sydney, Butterworths, 1988, p.187.

The common law has long held that evidence of an opinion is inadmissible to establish the truth of a fact about the existence of which the opinion is expressed.² This rule was subject to a number of exceptions, the most important of which was the exception in favour of evidence which is based on training or experience in a 'field of expertise'. In native title proceedings in the Federal Court, the admission of expert opinion is governed by section 79 of the *Evidence Act 1995* (Cth). That section provides that:

If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

In a recent High Court case involving the evidence of a psychologist, Justice Gaudron commented:

*The position at common law is that, if relevant, expert or opinion evidence is admissible with respect to matters about which ordinary persons are unable "to form a sound judgment ... without the assistance of [those] possessing specialised knowledge or experience ... which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience". There is no reason to think that the expression "specialised knowledge" gives rise to a test which is in any respect narrower or more restrictive than the position at common law."*³

There is no longer an issue that the various branches of anthropology constitute what, under the *Evidence Act*, is now referred to as "specialised knowledge"⁴. What of course will continue to be an issue is whether any particular statement contained in a report or given by the anthropologist in court, is one which is *wholly or*

² An example of this rule is a witness's statement: "I think Bob is a good bloke." Such a statement would be admissible if it were led for the purpose of showing that I held such a thought. However, it would be inadmissible as evidence of whether or not Bob is, in fact, a good bloke.

³ *HG v The Queen* (1999) 197 CLR 414.

⁴ *Milirrpum v Nabalco Pty limited* (1971) 17 FLR 141 at 159-165.

substantially based on that specialised knowledge. In the High Court case referred to above, the Chief Justice said:

“An expert whose opinion is sought to be tendered should differentiate between the assumed facts upon which the opinion is based, and the opinion in question. ... By directing attention to whether the opinion is wholly or substantially based on specialised knowledge based on training, study or experience, the section requires that the opinion is presented in a form which makes it possible to answer that question.

... [The psychologist’s] opinion was not shown to have been based, either wholly or substantially, on [his] specialised knowledge as a psychologist. On the contrary, a reading of the report, and his evidence at the committal, reveals that it was based on a combination of speculation, inference, personal and second-hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise of the psychologist. ...

This was not a trial by jury, but in trials before judges alone, as well as trials by jury, it is important that the opinions of expert witnesses be confined, in accordance with s.79, to opinions which are wholly or substantially based on their specialised knowledge. Experts who venture “opinions” (sometimes merely their own inference of fact), outside their field of specialised knowledge may invest those opinions with a spurious appearance of authority, and legitimate processes of fact-finding may be subverted.”⁵

In preparing reports for use in native title proceedings, anthropologists must be conscious that the admissibility of what they write will depend on them being able to demonstrate that the field and research methods used, the reasoning process adopted and the opinions expressed all fall within the branch of anthropology in which they have training and experience.

An inability to clearly demonstrate why their work is based on specialised knowledge will not only affect the admissibility of all or part of the report but must necessarily affect their general credibility as an expert witness. While there will often be grey areas, these should be identified by the expert and discussed with both the lawyers acting on behalf of the party retaining the expert and, where appropriate, other experts if that may assist in resolving the question.

Anthropologist’s evidence of fact

Much of the evidence in an anthropologist’s report will be in the nature of direct observations about the conduct and behaviour of members of the claimant group. These observations are admissible in their own right, in so far as they are relevant to the issues in the case. The principle exception to this is the prohibition on hearsay.

⁵ *HG v The Queen* (1999) 197 CLR 414 per Gleeson CJ at pp 427 - 429.

As noted already, at common law, statements in a report that record a conversation between the author of the report and another person, such as a member of the claimant group, are not admissible to prove the truth of what was said, only the fact that it was said, should that be relevant. This means that if an anthropologist records a person as saying “*That is my country*”, the statement is *prima facie* inadmissible as proof of the fact that it is that person’s country. Ordinarily, the claimant would need to be called to give that evidence directly to the court. However, a statement of the sort described will be admissible for the purpose of showing the basis on which an anthropologist reached a conclusion that, under traditional law and custom, a particular area of land belonged to that person. Section 60 of the *Evidence Act* now modifies the common law by providing that once hearsay evidence is properly admitted for one purpose, it may be admitted to prove the truth of the fact asserted by the representation.⁶ What weight a court attaches to a hearsay statement will depend on a range of matters including whether the information was within the personal knowledge of the maker of the statement, whether that person was called to give evidence, whether there was an opportunity for that witness to be cross-examined on the statement, and the likelihood that the statement was fabricated.

In anthropological reports, hearsay statements will usually be essential in explaining how the opinion was derived. Where witness statements have already been prepared and filed, reference can be made to them in the knowledge that the deponent of the statement is likely to be called at the trial. However, it would not be appropriate, for reasons discussed below, for an anthropologist to structure their evidence to fit the case being presented by the party which is calling them.

The use of hearsay statements in an anthropological report may create problems in the running of the case, but this is not an issue for the anthropologist. A claimant who makes a statement to an anthropologist which is recorded in the report may not be able to be called as a witness to give evidence at the trial. On the one hand, this may be because the witness’ evidence on other matters would not be helpful or, on the other hand because the witness is simply unavailable or unwilling. The failure to call such a witness will not render the report inadmissible but may affect the weight to be attached to the opinions expressed, particularly if other claimant witnesses do not give evidence to similar effect. It may also cause the court to rule the hearsay statements inadmissible for the purpose of proving the truth of the matters asserted. Sections 135 and 136 of the *Evidence Act* give the court a general discretion to exclude or limit the use of evidence where there is a danger that a particular use of the evidence may be unfairly prejudicial to a party.⁷

The expert’s duty to the court

The common law has long laid down rules regarding the duty of an expert in giving evidence to a court.⁸ The Federal Court has given its own practice directions in relation to the giving of expert evidence in that court. These directions are titled *Guidelines for Expert Witnesses in proceedings in the Federal Court of Australia*.⁹ Lawyers are obliged to give a copy of the *Guidelines* to an expert at the time the expert is retained for the purpose of giving evidence in the proceedings. The *Guidelines* cover both the expert’s duty to the court and the form in which their evidence must be presented.

⁶ *Lardil, Kaiadilt, Yangkaal, Gangalidda Peoples v State of Queensland* [2000] FCA 1548; *Daniel v State of Western Australia* [2001] FCA 223; *Yarmirr v Northern Territory of Australia* (1998) 82 FCR 533 at 562.

⁷ *Daniel v State of Western Australia* [2001] FCA 223.

⁸ These duties have been concisely summarised in *National Justice Compania Naveria SA v Prudential Assurance Co. Ltd. (“The Ikarian Reefer”)* [1993] 2 Lloyd’s Rep. 68 at 81. The Federal Court’s *Guidelines for Expert Witnesses* are modelled on the common law rules.

⁹ 15 September 1998.

In relation to the expert's duty to the court, the *Guidelines* state that:

- *An expert witness has an overriding duty to assist the Court on matters relevant to the expert's area of expertise.*
- *An expert is not an advocate for a party.*
- *An expert witness's paramount duty is to the Court and not to the person retaining the expert.*

While these three propositions are essentially different ways of stating the same principle, it is a principle which is fundamental to the whole approach which an expert must take to the preparation and giving of their evidence. From a lawyer's perspective, it can be said that it is not only a matter of duty but also practicality. An anthropological witness who is not committed to being objective always presents a much greater risk to the outcome of a claim than the witness who gives a dispassionate opinion, warts and all.

Of course saying that is often easier than doing it. Expressed in blunt terms, an anthropologist called on behalf of the claimants must be largely disinterested in the question of whether the claim succeeds or fails. This is not to say that where they reach an opinion that the claimants have a connection to an area of land in accordance with their traditional laws and customs, they are not entitled to take a real interest in defending their opinion within the proper bounds of their discipline. However, their duty in the process, the whole scope of their role, is to impartially give the court the benefit of their specialised knowledge in understanding the very complex factual issues which it is the court's job to determine. An expert who enters the witness box for cross examination with this frame of mind will have overcome one of the more difficult obstacles to giving credible expert evidence.

In the case of anthropological evidence given in native title matters on behalf of claimants, it can be assumed that the evidence of the claimants' anthropologist is likely to be challenged in relation to its independence and objectivity. If the anthropologist gives the court cause to question their independence, the likelihood is that the court will not be willing to accept their evidence, particularly in the grey areas where there is scope for doubt, and which form such a significant part of most native title claims.

There are a number of reasons why anthropologists start the process with an unavoidable cloud over their impartiality. Firstly, as noted already, the nature of their discipline will usually involve the formation of friendships with their subjects. Indeed, participant observation, where it is employed, may require this. In some cases, people working with a community over many years will be adopted into the group. Often information will be imparted with some degree of confidentiality attaching to it. Claimants may also come to depend on the anthropologist for advice and see them as a mediator on their behalf with the European system of government and justice. In this respect, part of their relationship with the claimant group may be one of advocacy.

As a profession, anthropologists have long been engaged in debate about the extent of their ethical duty to those whom they study. In the chapter on forensic anthropology in the current addition of Freckelton & Selby on *Expert Evidence*, Kingsley Palmer comments that:

The immediate consequence of the Warumungu disclosure orders for anthropologists was a good deal of agonising debate about the ethics and the practice of the profession. ... Moreover, the growing professionalism of the discipline and an increased debate about Codes of Ethics brought to the fore issues concerning the anthropologist's primary duty being to those he or she studies. If anthropologists could be required to disclose information provided in confidence, how could the central tenet of the ethical code be safeguarded? Why did anthropologists not enjoy the legal protection of professional confidences?¹⁰

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Kingsley Palmer in Freckelton & Selby *Expert Evidence*, Law Book Company, at 3-963

Dr Palmer's comments, made in the context of protecting confidential communications, are understandable and legitimate. Similar concerns about duties and disclosure have been expressed by priests, doctors and other professionals who have been compelled to give evidence against their wishes and those of the persons who confided in them. However, as Dr Palmer acknowledges later in the chapter, that is not the position of the anthropologist, or for that matter the doctor, who is asked by the subjects of his or her inquiry to give evidence on their behalf.¹¹

The judicial process is concerned with fairness. Where claimants voluntarily call an expert to give evidence on their behalf, they must expect that other parties will have the opportunity to test the validity of the opinions expressed. This cannot be done without examining the factual material and assumptions on which the opinion is based and the reasoning employed in reaching the opinion.

Secondly, anthropologists will often be involved in the drawing of the claim before the lawyers have been engaged. Where this is done before substantial research has taken place, there may be an accusation that the anthropologist had a vested interest in giving evidence that justified the original decisions about the boundaries of the claim. It should be emphasised that there is nothing at all improper in an anthropologist advising on the boundaries of a claim. What is important is that an anthropologist avoid being placed in a position where an argument can be made that subsequent research was directed to shoring up an earlier opinion which was expressed on the basis of inadequate research.

A final problem which affects anthropologists when giving evidence on behalf of claimants is that the access which experts acting for other parties have to the claimants is obviously very limited. The ability of those experts to scrutinise and test the evidence on which the claimants' anthropologist's opinions are based at an early stage is, therefore, also severely constrained. This is unlike most other fields of expert evidence and, while the reasons for it are understandable, it is difficult to avoid the impression that the process is one-sided.

The form of expert evidence in native title matters

The Federal Court *Guidelines* prescribe the form which experts' reports should take in all matters, including native title claims. Like the duty to the court, with some slight modifications the *Guidelines* represent a synthesis of the common law rules on the admissibility of expert evidence. As compliance with the *Guidelines* is mandatory, they will necessarily provide a foundation for cross-examination of expert witnesses and for that reason warrant setting out in full. The *Guidelines* provide:

- *"An expert's written report must give details of the expert's qualifications, and of the literature or other material used in making the report.*
- *All assumptions made by the experts should be clearly and fully stated.*
- *The report should identify who carried out any tests or experiments upon which the expert relied in*

¹¹ The Code of Ethics of the Australian Anthropological Society does not appear to the author to compromise the ability of members of the Society to meet all of the Federal Court *Guidelines*.

compiling the report, and give details of the qualifications of the person who carried out any such test or experiment.

- *Where several opinions are provided in the report, the expert should summarise them.*
- *The expert should give reasons for each opinion.*
- *At the end of the report the expert should declare that:*

“[the expert] has made all the inquiries which [the expert] believes are desirable and appropriate and that no matters of significance which [the expert] regards as relevant have to [the expert’s] knowledge, been withheld from the Court.”
- *There should be attached to the report, or summarised in it, the following:*
 - (1) All instructions original and supplementary and (whether in writing or oral) given to the expert which define the scope of the report;
 - (2) the facts, matters and assumptions upon which the report precedes; and
 - (3) documents and other materials which the expert has been instructed to consider.
- *If after exchange of reports or at any other stage, an expert witness changes his or her view on a material matter, having read another expert’s report or for any other reason, the change of view should be communicated in writing (through legal representatives) without delay to each party to whom the expert witness’s report has been provided and, when appropriate, to the Court.*
- *If an expert’s opinion is not fully researched because the expert considers that insufficient data is available, or for any other reason, this must be stated with an indication that the opinion is no more than a provisional one. Where an expert witness who has prepared a report believes that it may be incomplete or inaccurate without some qualification, that qualification must be stated in the report.*
- *The expert should make it clear when a particular question or issue falls outside his or her field of expertise.*
- *Where an expert’s report refers to photographs, plans, calculations, analysis, measurements, survey reports or other extrinsic matter, these must be provided to the opposite party at the same time as the exchange of reports.”*

Strict compliance with the *Guidelines*, apart from being mandatory, will assist in providing a structure to the report that facilitates the admission of its contents into evidence and a positive weighting of its reliability. It enables the court to not only assess the author’s qualifications but it ensures that a clear distinction is drawn between the factual bases of any opinion and the opinions themselves. This enables the court to consider the reliability of the factual material independently of the opinions. In native title matters, particularly where experts have had the opportunity to observe a community or group over many years, the factual base of the opinion is likely to be at least as significant in determining the outcome of the case as the opinion itself.

The significance of the *Guidelines* in ensuring the impartiality of expert evidence is highlighted by the comments of Beaumont J. in *Sampi v State of Western Australia* [2001] FCA110 where the Judge said:

“When the guidelines mandate disclosure of the material upon which the report proceeds, its aim is wider than revelation of information that supports the opinion. It requires the disclosure of material which the expert considered but decided, for good reason, not to rely upon it, or considered that it was not necessary to refer to it, because it did no more than reinforce the conclusion reached. ... the level of

disclosure is governed by what is appropriate to enable a reader to arrive at a proper understanding of the approach taken by the expert to the field information, information which is fundamental to the formation of the expert opinion in this class of case [a native title claim]."

In commenting on that statement, Nicholson J. in *Daniel v State of Western Australia* [2001] FCA 223 said:

"That view is consistent with the rules that the foundations of an expert's report should be examined not only in relation to matters on which the opinion is based but on matters which might detract from it."

While the *Guidelines* do not expressly require it, it is important that the expert identify clearly the source of all facts and assumptions relied upon. This transparency can only enhance the author's credibility, even if it means that the reliability of different facts and assumptions contained in the report are given different weight depending on the source.

As many lawyers and scientists have noted, the distinction which the law draws between a fact and an opinion is often very difficult to apply in practice.¹² Without discounting the difficulty of making a distinction in some cases, the process of attempting to draw it will itself encourage a precision in the report's expression.¹³

Factors relevant to providing good expert evidence

In considering what makes a good expert witness, it is worth noting the views of the judges themselves. In 1997, the Australian Institute of Judicial Administration conducted a study on what the Australian judiciary thought about the presentation of expert evidence in the courts. A summary of the findings was published in the August 2000 edition of the New South Wales Law Society Journal.¹⁴ Approximately 60% of the 478 judges surveyed responded. The author of the summary, Wayne Lonergan, noted that:

"From the questions of what factors were most persuasive in assessing expert evidence it was found that the clarity of explanation was most persuasive with a 52% response; impartiality was next with 24%; experience in the field, 13%; familiarity with facts, 8%; experience as a witness, 2%; and qualifications, 1%."

Some care is needed in applying these results to anthropological evidence. This is particularly the case in relation to the findings that clarity of explanation was the most significant factor when one remembers that the survey was not limited to any particular field of expertise. It is apparent that some sciences and areas of specialised knowledge may be considerably more difficult to explain to a lay person than others.

¹² S. Odgers *Uniform Evidence Law* (4th ed.) Sydney, Law Book Company, 2000 pp.171-173.

¹³ Von Doussa, *Justice Difficulties of Assessing Expert Evidence*, (1987) 61 ALJ 615.

¹⁴ Wayne Lonergan "Australian Judicial Perspectives on Expert Evidence" LSJ, August 2000 p.54

Having regard to the nature of anthropological evidence in native title cases, the following are suggested as some of the key factors which will lead to the giving of good and credible expert evidence.

Impartiality

Earlier in this paper, under the heading “Duties to the Court”, there was discussion about the importance of objectivity and the expert’s overriding duty to assist the court rather than advocate for a party. It is not necessary to repeat those comments although some additional comments on this issue are worth making.

Anthropologists should be careful that their contracts of retainer do not cause any conflict in their duty. Some organisations tend to use standard form general consultancy contracts in retaining experts for the purpose of giving evidence in court proceedings. Sometimes these contracts contain clauses which spell out an overriding duty to either the organisation or a claimant group. Such clauses are inappropriate in contracts to give expert evidence.

It is also important that the instructions to the expert are clearly defined. Where there are no precise instructions, it leaves the experts open to an accusation that their role contains an element of advocacy in that the decision as to what issues are relevant and what are not are left in their hands. Ordinarily, the instructions should take the form of clear questions written in neutral terms on which the expert is asked to express an opinion.

Transparent record keeping is another important aspect of demonstrating impartiality. It is reported that some lawyers advise retained experts to keep a minimum of records so as to narrow the opportunities for other parties to cross-examine the expert or other witnesses on adverse material, particularly if that material is not referred to in the report. However, such advice does not assist in the acceptance of the expert’s testimony as credible, quite apart from it being inconsistent with the expert’s duty to the court. In undertaking field work, the expert must keep proper and sufficient records. An absence of proper records may not only lead to an attack on the expert’s opinion, being that it lacks a sufficient basis, but may also lead to an attack on their integrity.

It is far better that evidence adverse to the opinions expressed be included and dealt with in the report than it be raised for the first time in cross-examination. If it is dealt with in the report, as the *Guidelines* require, the expert will have an opportunity to give his or her explanation for why such evidence did not result in a contrary opinion. It should be obvious that the most suspect case is one which has no apparent flaws. The same is true of anthropological reports, given the diversity of the subjects of their studies.

The evidence of the claimant witnesses, both before and after cross-examination, is likely to reveal a richness and variation of detail which one would expect in the study of any human society. An anthropological report which does not also reflect this richness and, at times, conflict, and inconsistency, will sit poorly with the evidence of the claimants themselves.

An expert who, in cross examination, persistently refuses to make any concessions in the face of evidence or hypotheses that support a contrary conclusion may emerge from the witness box “unbroken”, only to find that their evidence has been discounted by the court in its judgment. Where an expert disagrees with a proposition in cross-examination, it is important that the reasons for that disagreement are properly and fully explained. This will enable the judge to make their own assessment of the reasonableness of the witness. Without an effective explanation, the witness risks being perceived as intransigent and having a closed mind.

A comment should also be made about the fairness of tape recording claimants during field work in native title proceedings. Any tape recording made is likely to be available to the other parties to the proceedings and the court itself. Most anthropologists have had the experience of seeing a witness who is unwilling to discuss a matter, even a matter about which they have considerable knowledge, terminate the discussion by denying that they have such knowledge. The reasons they might do this are numerous and legitimate. The problem arises if, where a recording has been made of such a conversation, that person then gives detailed evidence at the trial about the matter. It is likely that their credibility will be attacked in cross-examination using the taped material to suggest that their knowledge was acquired since the making of the tape or, alternatively, that they are prone to telling lies. Even where a witness is willing to talk on tape, it is not unusual for aspects of the evidence which

they are capable of giving to be left out. If these matters are later included in a statement or given in oral evidence, they are likely to be subject to similar attack.

The opposite is also true. A claimant witness who divulges secret information in private, albeit with the conversation taped, may have their confidence as a witness damaged, and with it their willingness to continue giving evidence, if the tape is later replayed to them in cross-examination.

At the very least, if anthropologists wish to use tape recordings in their field work, they should give witnesses warning that the tape is likely to be played to the court, irrespective of the personal intention of the anthropologist conducting the interview. However, whether such a warning will mitigate the potential unfairness which can easily result is open to question.

A further practical problem which tape recordings create is that they add significantly to the cost of proceedings. Where they are made, it is usually necessary for the lawyers engaged for all active parties to listen to them for material that may assist or detract from the case.

Preparation and quality of field work

Immediately following his comment about violins, Justice Wells makes the simple and obvious point in his advice to lawyers about the cross-examination of experts:

“Preparation is of capital importance.”

The same is true for the anthropologist, not only before entering the witness box but, more importantly, in undertaking the research and writing of their report.

As anthropologists are well aware, native title cases usually involve highly complex and often conflicting, facts. The enormous task of collating and assessing relevant facts is not made any easier by the relatively uncertain state of the law. For example, as a legal issue, the question of what is a “traditional law” and a “traditional custom” in the context of the definition of “native title” is yet to be conclusively determined.¹⁵

Thorough, accurate and relevant field work is the most important foundation to the giving of credible anthropological evidence. The amount of field work which is reasonably required to form an opinion will obviously vary. While it is easy to say ‘as much as possible’ the budgets of representative bodies are stretched to breaking point. Relevant factors in deciding the amount of field work which is necessary will include the extent to which the anthropologist has worked with the claimant group previously, the size of the area involved and the nature of the claim to it, the number of people in the claimant group and the level to which they have maintained their traditional laws and customs. At either extreme, being cases where there is clearly a system of traditional law and custom in operation and cases where it has clearly been abandoned, it is easy to state, as a matter of theory, that less field work is likely to be required. In the former case, a consent determination might be likely and in the latter, no amount of field work will be likely to result in a report that supports the claimant’s position. However, many if not most native title claims which have been filed to-date do not clearly fall within one extreme or the other and therefore necessarily require careful and detailed research. Even for those claims where the evidence is strong, if they fall within a jurisdiction where the respondent parties are unwilling to negotiate an outcome acceptable to the claimants, it will be necessary to prepare them to a level that not only allows a conclusive

¹⁵ Members of the Yorta Yorta Aboriginal Community v State of Victoria & Ors [2001] FCA 45. This case is currently the subject of an application for special leave to appeal to the High Court.

opinion to be drawn but states in detail the basis for the opinion.

It is obvious that an anthropologist who relies on others to do their field work is in a more vulnerable position than those who do it themselves. Moreover, the process of communicating the research from the field anthropologist to the report's author will involve the presentation of the factual base of the opinions in a form that enables the experts advising other parties to be in a similar position to the principal expert called on behalf of the claimants. In this situation, the credibility of the respective experts, if they differ in their opinions, may turn on their qualifications. The main exception to this scenario will be where the principal author, although not undertaking the field work, already has substantial experience of the claimant group and closely supervises the field work.

The question of sufficiency of research also raises the dangers of so-called "connection reports". Commonly the term "connection reports" is used to refer to an abbreviated report prepared on the basis of limited field work where there is a possibility that a negotiated resolution of the claim might be reached. Great care needs to be taken by anthropologists in expressing firm opinions on the basis of limited or inadequate field work. Once served on the other parties, such reports may be used in cross-examining the expert if the matter is unable to settle and, in particular, an attack may be made on the basis that the expert predetermined the issues before completing the necessary factual inquiry. Subsequent field work carried out after serving a connection report may, even if it vindicates the earlier conclusions, be treated as less reliable given the expert's apparent vested interest in maintaining the earlier conclusion. It will be a simple matter for other parties to ascertain with some precision the amount of work undertaken in preparing such connection reports through the subpoena and discovery process as the matter approaches trial. The risk of handing over a connection report is obviously significantly less where the author has had lengthy field experience with the claimant group.

Another critical area of preparation is the careful review of all existing literature on both the claimant group and the area under claim. This particularly applies to the anthropologist's own earlier writings. While it is not unusual for experts to change their opinion of matters over time, such changes require a proper explanation if they are not to be the subject of attack in cross-examination. Where the expert's opinion differs with other authors who carried out their field work at an earlier point in time, a thorough statement explaining the basis of the difference will be required. Inevitably, the court will be invited to find that the later account is less reliable as it is made in the context of a claim for rights as against the earlier "disinterested" observations at a time when traditions would necessarily be presumed to be more strongly adhered to.

There is often a significant lapse of time between the filing of the anthropologist's report and their being called for cross examination. It is essential that, before appearing to give oral evidence, the expert fully familiarises themselves with not only their original research but all the evidence in the case to date, including the reports of any other experts. They must expect to be examined in detail on whether their opinions have changed in the light of other evidence given during the trial, particularly from the claimants, and the evidence of any other expert. Apart from any tactical cross-examination, the rules of fairness require that witnesses be given an opportunity to respond to any adverse submissions as to the reliability or truthfulness of their evidence which other parties propose to make.

Clarity

The writing of reports for use in proceedings demands clarity and precision. It is not advocacy for an expert to seek to persuade the court of the merit of their opinion. It is advocacy to fashion the opinion to the outcome sought by the client.

Clarity of expression begins with a clarity of thinking. If the anthropologist is unable to identify the precise basis for holding a particular opinion, it will not be surprising if their report and oral evidence also appears lacking in focus and persuasiveness.

If the contents of a report are to be accepted, they must be capable of being readily understood. Obscure language will not only fail to impress but will foster the court's suspicions. Too often such writing is used to disguise things which are either unpalatable or lack content. Judges confront the same issues in their own writings and are alive to the techniques.

The length of a report can also be an issue. On the one hand it is important that an expert is capable of effectively demonstrating the depth of their knowledge with detail that is relevant to the issues in the case. On the other hand, the court will not appreciate a treatise on issues that are not relevant. Where a report is lengthy, it is important that it includes an accurate summary of its contents, as required by the *Guidelines* in any event.

The use of technical terms in their proper context is entirely appropriate but they must be explained. The failure to give a correct explanation will invite cross-examination. The failure to give a clear explanation will only frustrate the court. It is worth also bearing in mind that, with a few exceptions, most of the Federal Court judges hearing native matters have as yet only limited experience of the issues or evidence which arise in these cases. It would be safer not to make assumptions about a judge's knowledge of the area when there is doubt about whether a concept or method should be explained.

It is not improper for an anthropologist to obtain assistance in the editing and writing of the report so long as the contents remain true to the anthropologist's understanding. Similarly, it is not improper for the report to be prepared in consultation with the party's legal advisers to ensure that the report is directed to the issues relevant to the case. However, the lawyers must not attempt to distort, nor the anthropologist allow the lawyers to distort, the substance of the opinion so that it loses its character as an independent report unaffected, in form or content, by the exigencies of the litigation.

Finally, as noted already, adherence to the *Guidelines* will go a long way to ensuring that the report has a structure and logic that is transparent and, most probably, credible. Conversely, a failure to adhere to the *Guidelines* will give the other parties' lawyers an effective blueprint to commence their cross-examination.

Conclusion

Aside from actually giving evidence, anthropologists can play a critical role in the preparation of the claim. Their knowledge and skills are often invaluable in assisting the lawyers to understand the case. Equally, where they are retained on behalf of the claimants, they will often have a role in explaining the legal processes to the claimants. These roles can be effectively discharged irrespective of whether the anthropologist is called to give evidence.

Those who do give evidence clearly face a challenging task. Few lawyers would contend that the adversarial processes currently employed by our legal system in determining facts do not suffer some serious shortcomings. In large part, the process is dependent on the good sense and experience of the judiciary in overcoming these shortcomings and, not surprisingly, the quality of judges, like anthropologists, can vary. While the particular difficulties inherent in giving expert anthropological evidence in native title matters may operate to discourage many anthropologists from giving evidence, the interests of the parties, especially claimants, would suffer significantly from their absence.

To the extent that the current processes do not fairly accommodate the extensive and complex evidence which anthropologists are expected to give, there is scope for both the legal profession, anthropological professional bodies and the court to consider changes to rules or the formulation of standard directions which may alleviate some of the problems without causing unfairness to parties wishing to challenge that expert evidence. If this cannot be done and anthropologists refrain from giving expert evidence as a consequence, the administration of justice is likely to suffer.

An honest and objective anthropological witness who prepares thoroughly and endeavours to express themselves clearly can contribute significantly to the court's understanding of the complex and important issues in the native title proceedings before it. Without that assistance, the likelihood of the court misunderstanding or misinterpreting claimant evidence is increased and the cost of that can only fall disproportionately on the claimants. Quite apart from the limitations in the common law and the Native Title Act, if claimants leave the court with a legitimate basis for feeling that its processes have not been fair, the legacy which the High Court sought to address in *Mabo* will remain unchanged.