

**Management of native title cases by the
Federal Court – does this affect the
anthropologist’s role?**

by

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Management of native title cases by the Federal Court – does this affect the anthropologist’s role?¹

1. INTRODUCTION

The objective of a native title determination application - obtaining a determination of native title

Most native title proceedings commenced by Indigenous Australians are made for the purpose of obtaining legal recognition of their native title rights and interests. If the applicants are successful, that recognition will take the form of a determination of native title. A determination that native title exists in relation to a particular area of land or waters is a determination of:

- “(a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and
- (b) the nature and extent of the native title rights and interests in relation to the determination area; and
- (c) the nature and extent of any other interests in relation to the determination area; and
- (d) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of the [*Native Title Act 1993*]; and
- (e) to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease - whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.”²

The process for achieving that outcome is regulated by a detailed scheme contained principally in the *Native Title Act 1993* but also in other legislation such as the *Federal Court of Australia Act 1976* and the rules of the Federal Court.³ Consequently, the legal process governs the significant steps from application to determination.

Anthropologists and other professionals (including historians, archaeologists and linguists) can have a significant role at critical steps along the way.

¹ The author acknowledges the research assistance of Stephen Beesley in the preparation of this paper and the observations made by Mary Edmunds, Christine Fewings, David Ritter and Colin Sheehan in relation to an early draft of the paper.

² *Native Title Act 1993* s 225.

³ Primarily Order 78 – Native Title Proceedings.

The role of anthropologists

Before considering whether or how the management of native title cases by the Federal Court affects the anthropologist's role, it is useful to consider what that role – or, more accurately, what those roles – might be. The answer to that question may depend on the purpose of an anthropologist's work and the use to which the anthropologist's observations, research, analysis and opinions are put. As this paper concerns native title matters, it is appropriate to focus on the role of anthropologists in relation to native title and land rights applications.

There is an ongoing discussion about the role of anthropologists in society, the way they conduct their work, their relationships with informants and the use to which the information they gather and the views they form can be put. I do not propose to enter that debate. For the purpose of this paper, I note that in 1981 the late Professor RM Berndt argued that professional anthropology has a two-fold orientation:

- extending knowledge and understanding of human societies and cultures in both specific and general terms; and
- applying that knowledge in the interests of the people concerned (as an anthropologist has obligations and responsibilities to the people with whom he or she works).⁴

Writing a decade after the judgment in the Gove land rights case and some years after the land rights scheme in the Northern Territory had been in operation, Professor Berndt discussed the changing role of anthropologists as intermediaries between Aborigines (the deprived) and government (as the possessor). He suggested that with the advent of professional anthropologists on the Aboriginal scene, which dates from the mid- to late 1920s, their role as intermediaries “was relatively straightforward”.⁵ The more recent intervention of lawyers as intermediaries could be dated to the Gove dispute. Direct negotiation became less practicable and legal intervention was required. As a result, “legal personnel became involved to a far greater extent, with anthropologists becoming more subsidiary and identified even more closely than they were before with Aboriginal interests.”⁶

Yet, on his assessment, the roles of anthropologists and legal practitioners, separate or complementary as they may be, are here to stay. Both remain intermediaries and the discipline of anthropology continued to make “positive contributions” and have “positive potential” in the Aboriginal field.⁷

⁴ Berndt, RM 1981, “A long view: some personal comments on land rights, *Newsletter*, AIAS, Canberra, p 6.

⁵ Ibid, p 5.

⁶ Ibid pp 5-6. For an outline of Berndt's involvement in the event leading to the Gove case and the litigation itself see ibid pp 10-13.

⁷ Ibid pp 16-17.

I acknowledge that, in quoting Professor Berndt here and later in this paper, I am drawing on the experience and opinions of one anthropologist and then from one only of his many publications. His views may not be shared by all anthropologists and they need to be considered in light of anthropologists' experience of native title and land rights cases in the years after they were expressed. I am using the quotes from Professor Berndt for the limited purpose of introducing various current issues for consideration.

The interaction of legal and anthropological concepts is complex, and the relationship between lawyers and anthropologists can and ought to be a productive partnership.⁸ The roles of anthropologists and lawyers relative to each other have developed over the past 30 or more years.

The partnership of lawyers and anthropologists in relation to indigenous land issues was forged in the Aboriginal land claims era, with the passage of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and subsequently the *Aboriginal Land Act 1991* (Qld). Practices were developed for the hearing and determination of land claims by successive Aboriginal Land Commissioners in the Northern Territory and the Land Tribunal in Queensland. Although extensive resources are involved in the preparation and presentation of some of those claims, the pace of hearings over the more than 20 years has been steady, influenced by a range of factors, including the relatively few Commissioners available to hear and report on claims and the resources available to Land Councils. Since 1977, Aboriginal Land Commissioners have presented more than 60 reports on Aboriginal land claims in the Northern Territory and the Land Tribunal has presented nine reports on claims to various areas of claimable land in Queensland.

The roles that have developed include providing information about the relevant group(s) and the nature of their traditional links to land and providing expert opinions by way of analysis of the available data. In cases that are heard by a Court or Tribunal, that role may be performed by way of a written report or by giving oral evidence, or both. Such information is not only of interest and use in itself, but it also provides a contextual

⁸ For discussions about anthropological and legal concepts and practices, and practitioners, see, for example, Burke, P. (ed) 1995. *The Skills of Native Title Practice*, AIATSIS, Canberra; Edmunds, M. (ed) 1994. *Claims to knowledge, claims to country: Native title, native title claims and the role of the anthropologist*, AIATSIS, Canberra; Finlayson, J and A Jackson-Nakano (eds) 1996. *Heritage and Native Title: Anthropological and legal perspectives*, AIATSIS, Canberra; Freckleton, I. 1985. "The anthropologist on trial" 15 *Melbourne University Law Review* 360; Gray, PRA. 2000. "Do the walls have ears? Indigenous title and courts in Australia", 5 *Australian Indigenous Law Reporter*, pp 1-17; Hiley, G. 1989, "Aboriginal land claim litigation", 5 *Australian Bar Review* 187; Hiley, G. 1996. "Native title litigation", 26 *The Queensland Law Society Journal* no 4, pp 307-337; Neate, G. 1997. "Proof of Native Title" in B Horrigan and S Young (eds) *Commercial implications of native title*, Federation Press, Annandale, pp 240-319; Trigger, DS. 2000. "Anthropology in native title court cases: 'mere pleading, ... expert opinion or ... hearsay'?", paper prepared for Crossing Boundaries Native Title Workshop, University of Western Australia; Woenne Green, S. 1997. "Working with anthropologists: Teamwork as a strategy" in L Strelein (ed) *Working with the Native Title Act: Alternatives to the adversarial method*, AIATSIS, Canberra, pp 139-153; Wootten, H. 1996. "The end of dispossession? Anthropologists and lawyers in the native title process", in DE Smith and JD Finlayson (eds) *Fighting over country: Anthropological perspectives*, CAEPR Research Monograph No 12, CAEPR, ANU, Canberra, pp 101-118.

background against which the testimony of the applicants' witnesses can be better understood.

The native title era

The native title era commenced in June 1992 when, in the landmark decision in *Mabo v Queensland (No 2)*,⁹ the High Court of Australia decided that the common law of Australia "recognises a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands".¹⁰

Once the highest Court in Australia had made that decision, the national Parliament legislated, among other things:

- to provide for the recognition and protection of native title; and
- to establish a mechanism for determining claims to native title.¹¹

The policy behind the *Native Title Act 1993* includes making available a "special procedure ... for the just and proper ascertainment of native title rights and interests which will ensure that, if possible, this is done by conciliation and, if not, in a manner that has due regard to their unique character".¹²

In the native title era, particularly after the 1998 amendments to the *Native Title Act 1993*, the institutional environment has changed. Two national bodies, the Federal Court of Australia and the National Native Title Tribunal, have statutory responsibility for overseeing the resolution of most native title matters in Australia.¹³ Between 1 January 1994 when the Act commenced to operate and 25 June 2001, 1145 native title claimant applications were made. Some 581 of those are currently in mediation or trial. Others have been determined, withdrawn, amalgamated or struck out.

At 28 June 2001 there had been 21 final determinations and 3 conditional or draft determinations that native title exists, 17 of them by consent of the parties. 6 determinations that native title does not exist had been made, 3 after trial and 3 unopposed.

The native title claimant applications that remain to be resolved – by agreement, litigated determination or discontinuance – give rise to substantive and procedural issues that are different from the land claims lodged for determination under the statutory schemes in the Northern Territory and Queensland, or New South Wales.¹⁴

⁹ (1992) 175 CLR 1.

¹⁰ (1992) 175 CLR 1 at 16 per Mason CJ and McHugh J.

¹¹ *Native Title Act 1993* s 3(a), (c).

¹² *Native Title Act 1993* preamble.

¹³ Common law actions may still be commenced in State or Territory Supreme Courts but almost all native title proceedings are commenced under the *Native Title Act 1993*.

¹⁴ In the Northern Territory, 249 claims have been made under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). There have been 39 land claims made under the *Aboriginal Land Act*

Each native title claimant application, potentially at least, will require the involvement of lawyers and anthropologists at various stages. The nature and extent of the involvement of anthropologists in each matter will depend on a range of factors including the resources available to parties who require anthropological assistance, and the availability of suitably qualified persons to do the work. It will also be influenced by how the Federal Court manages the large and growing number of native title applications in its list, and whether matters in mediation are being prepared for trial.

The focus of this paper is on case management by the Court and how that affects the role of an anthropologist. Case management by a Court may seem a rather dull topic of little direct interest or relevance to anthropologists. It is, however, a matter of great practical significance to anthropologists involved in native title work, irrespective of the party to whom the anthropologist provides advice or other assistance.

The issues covered in this paper are:

- the Federal Court's role in relation to native title determination applications;
- the role (or roles) of an anthropologist in native title proceedings;
- case management in the Federal Court – both generally and in relation to native title matters; and
- case management and anthropologists.

It needs to be clearly understood that observations are, in some senses, those of an outsider. I am neither an anthropologist nor a judge or employee of the Federal Court, nor am I in private legal practice with day-to-day experience of the case management practices of the Court. Thus I do not speak for the Court nor am I able to give practical advice of the sort that a lawyer experienced in this area might offer.

My observations are based on my experience as a member of the National Native Title Tribunal, conducting mediations of native title claimant applications under the *Native Title Act 1993*, and as President of that Tribunal observing the way the case management rulings by judges and senior officers of the Court affect the mediation of native title applications.

2. THE INSTITUTIONAL FRAMEWORK – THE FEDERAL COURT'S ROLE IN RELATION TO NATIVE TITLE DETERMINATION APPLICATIONS

The statutory scheme

The scheme for the resolution of native title claimant applications is set out in the *Native Title Act 1993*. The Federal Court has jurisdiction in relation to matters arising under that

1991 (Qld). To 30 June 2000 6,458 claims were lodged under the *Aboriginal Land Rights Act* (1983) NSW, of which 1,878 claims covering an area of 67,421 hectares had been granted. During the same period, 3,153 claims were refused.

Act.¹⁵ The Court has jurisdiction to hear and determine applications filed in the Court that relate to native title,¹⁶ and that jurisdiction is exclusive of the jurisdiction of all other courts except the High Court.¹⁷

The *Native Title Act* provides for various types of applications to be made to the Federal Court, including:

- native title determination applications on behalf of persons who hold the common or group rights and interests comprising the particular native title claimed (“claimant applications”);¹⁸
- native title determination applications by persons who hold non-native title interests in relation to the areas to which determinations of native title are sought (“non-claimant applications”);¹⁹
- revised native title determination applications, which are applications for the variation or revocation of approved determinations of native title on specified grounds;²⁰ and
- applications for compensation for acts affecting native title.²¹

This paper concentrates on claimant applications, which constituted 90% of the active applications at 25 June 2001. Broadly speaking the current scheme provides that:

- claimant applications are to be filed in the Federal Court;
- applications are sent to the Registrar of the National Native Title Tribunal (the “Native Title Registrar”) who is responsible for various administrative procedures (including applying the registration test to each application and notifying the relevant persons and bodies and the public about each application);
- the Federal Court decides who should be parties to the proceedings and whether each claimant application should be referred to the Tribunal for mediation;
- the Tribunal carries out the mediation of each matter referred to it and reports to the Federal Court on the progress of mediation;
- where native title exists, the Federal Court makes an appropriate determination of native title, either in or consistent with the terms agreed by the parties or as decided by the Court after a trial.

A table setting out those stages is at Attachment A to this paper.

¹⁵ *Native Title Act 1993* s 213(2).

¹⁶ The kinds of applications are native title determination applications, revised native title determination applications, and compensation applications: *Native Title Act 1993* ss 13, 61.

¹⁷ *Native Title Act 1993* ss 13(7), 50(3), 53(2), 81, Schedule 5 at 27(2). There have been few common law actions for declarations of native title. Almost all proceedings of that type are commenced under the *Native Title Act 1993*.

¹⁸ *Native Title Act 1993* ss 13(1), 61(1).

¹⁹ *Native Title Act 1993* ss 13(1), 61(1).

²⁰ *Native Title Act 1993* ss 13(1), (4), (5), 61(1).

²¹ *Native Title Act 1993* ss 13(2), 50(2), 61(1).

The powers of the Federal Court

In dealing with native title matters in its jurisdiction, the Court has various specific powers including power to:

- make determinations of native title in relation to an area for which there is no approved determination of native title;²²
- revoke or vary an approved determination of native title on specified grounds.²³

When dealing with applications for native title determinations, revised native title determinations and compensation the Court has power, among other things, to:

- if an application is unopposed, make an order in, or consistent with, the terms sought by the applicant, without holding a hearing or, if a hearing has started, without completing the hearing;²⁴
- make an order replacing the applicant in a claimant application or compensation application;²⁵
- make orders to ensure that overlapping native title determination applications are dealt with in the one proceeding to the extent that the applications cover the same area;²⁶
- strike out an application because, for example, it does not comply with the basic statutory requirements for applications or it is an application of a type that must not be made;²⁷
- refer native title and compensation applications to the Tribunal for mediation, and make orders that mediation is to cease;²⁸
- request the Tribunal to provide reports on the progress of any mediation being undertaken by the Tribunal in relation to an application referred by the Court to the Tribunal, and specify when the report is to be provided;²⁹
- determine a question of fact or law referred to the Court by the Tribunal;³⁰
- order an adjournment of proceedings in relation to an application to allow time for some or all of the parties to negotiate with a view to agreeing on action that will result in the application being withdrawn or varied, or the parties being varied, or any other thing being done in relation to the application;³¹
- if agreement is reached between the parties on the terms of an order of the Court in relation to the whole or part of the proceedings or a matter arising out of the proceedings, make an order in, or consistent with, those terms without (where

²² *Native Title Act 1993* ss 4(7)(a), 13(1)(a), 44C, 60A(1)(a), 61, 94A, 225.

²³ *Native Title Act 1993* ss 4(7)(a), 13(1)(b), (4) and (5), 60A(1)(a), 61, 68, 94A, 225.

²⁴ *Native Title Act 1993* ss 86G, see also ss 94A, 225.

²⁵ *Native Title Act 1993* s 66B.

²⁶ *Native Title Act 1993* s 67.

²⁷ *Native Title Act 1993* s 84C. See also Federal Court Rules 1979 O 78r 10, O 78 r 11.

²⁸ *Native Title Act 1993* ss 86B, 86C.

²⁹ *Native Title Act 1993* ss 86E, 136G(2).

³⁰ *Native Title Act 1993* ss 86D, 136D(1).

³¹ *Native Title Act 1993* s 86F.

appropriate) holding a hearing or, if a hearing has started, without completing the hearing;³²

- receive into evidence the transcript of evidence in other proceedings before another court, person or body (such as an Aboriginal Land Commissioner or the Land Tribunal in Queensland), draw conclusions of fact from that transcript, and adopt any recommendation, finding, decision or judgment of the other court, person or body;³³ and
- make determinations whether native title is to be held in trust and, if so, by whom.³⁴

The *Native Title Act* provides that, when dealing with applications that relate to native title, the Federal Court is bound by the rules of evidence, except to the extent that the Court otherwise orders.³⁵ In conducting its proceedings, the Court may take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders, but not so as to prejudice unduly any other party to the proceedings.³⁶

The Judges of the Federal Court may make Rules of Court about the practice and procedure of the Court in relation to any matter arising under the *Native Title Act*.³⁷ Some of those rules are discussed later in this paper.

3. THE ROLE (OR ROLES) OF AN ANTHROPOLOGIST IN NATIVE TITLE PROCEEDINGS

Role of anthropologists – general observations

As noted earlier in this paper, the late Professor RM Berndt argued that professional anthropology has a two-fold orientation:

- extending knowledge and understanding of human societies and cultures in both specific and general terms; and

³² *Native Title Act 1993* ss 87, see also ss 94A, 225.

³³ *Native Title Act 1993* s 86.

³⁴ *Native Title Act 1993* ss 55, 56, 57, 60AA, 253. See *Mualgal People v Queensland* (1998) 160 ALR 386.

³⁵ *Native Title Act 1993* ss 80, 82(1). Subsection 82(1) was inserted on 30 September 1998 to replace s 82(3), which provided: “The Court, in conducting proceedings, is not bound by technicalities, legal forms or rules of evidence.” For observations on the repealed s 82(3) see *Mason v Tritton* (1994) 34 NSWLR 572 at 600 per Priestley JA, *Daniel v Western Australia* [2000] FCA 858 at paragraphs 26,27 and 39, *Dieri People v State of South Australia* [2000] FCA 1327 at paragraph 9, *Chapman v Luminis Pty Ltd (No 5)* [2000] FCA 1407. See also Federal Court Rules O 78 rr 31-37.

³⁶ *Native Title Act 1993* s 82(2). The subsection was inserted on 30 September 1998 to replace s 82(2) which provided that: “The Court, in conducting proceedings, must take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders.” For observations about the repealed s 82(2) see *State of Western Australia v Ward (on behalf of the Miriuwung Gajerrong People)* (1997) 145 ALR 512 at 527 per Branson J, 521 per Hill and Sundberg JJ; *Yarmirr v Northern Territory*, DG6001 of 1996, decision dated 15 April 1987 per Olney J. See also Federal Court Rules Order 78 rule 4.

³⁷ *Federal Court of Australia Act 1976* s 59(2)(zj)-(zl), *Native Title Act 1993* s 70. See Federal Court Rules Order 78 – Native Title Proceedings.

- applying that knowledge in the interests of the people concerned (as an anthropologist has obligations and responsibilities to the people with whom he or she works).³⁸

To some extent (but with a qualification discussed below), both of those aspects of anthropology are evident in the role(s) played by anthropologists in relation to native title matters.

Certainly, anthropologists and others are engaged to help the parties and, if necessary, the Federal Court know about and understand the relevant aspects of the group(s) of applicants and their links to the area of land or waters involved.

The judgments of Australian courts in relation to native title matters, as well as heritage protection and other issues, show that Australian courts have recognised and admitted into evidence the specialised knowledge of anthropologists since at least the *Gove Land Rights* case.³⁹ More recently, in *Daniel v Western Australia*, Justice RD Nicholson referred to the role of the anthropologist in native title matters when he said:

“The specialised knowledge of an anthropologist derives from the function to be performed by the anthropologist and for which he or she is trained and in relation to which study has been undertaken and experience gained.”⁴⁰

That approach may be compared, perhaps contrasted, with the way anthropological evidence was treated in the trial of the leading Canadian case of *Delgamuukw v British Columbia*⁴¹ where the trial judge placed little if any reliance on the evidence of anthropologists. The Court was criticised (for decisions about that and other evidence) by some lawyers⁴² and anthropologists⁴³ as being ethnocentric or giving inadequate weight to the oral history and to the expert evidence of anthropologists. Seminars were held, papers were written, books were published, and an appeal (ultimately successful) was launched.⁴⁴

³⁸ Berndt RM, 1981, “A long view: some personal comments on land rights”, op cit, Canberra, p 6.

³⁹ *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

⁴⁰ *Daniel v Western Australia* [2000] FCA 858 at paragraph 24.

⁴¹ (1991) 79 DLR (4th) 185, [1991] 3 WWR 97.

⁴² See G Sherrott, ‘The court’s treatment of the evidence in *Delgamuukw v BC*’ *Saskatchewan Law Review*, vol 56, 1992, p 441; M Storow and M Bryant, ‘Litigating Aboriginal rights cases’ in F Cassidy, ed, *Aboriginal title in British Columbia: Delgamuukw v The Queen*, Montreal, Oolichan Books and The Institute for Research on Public Policy, 1992, pp 178-192. See also B Slattery, ‘The basis of Aboriginal title’ *ibid* p 43.

⁴³ See R Ridington, ‘Fieldwork in courtroom 53: A witness to *Delgamuukw*’ in F Cassidy, ed, *Aboriginal title in British Columbia: Delgamuukw v The Queen*, Montreal, Oolichan Books and The Institute for Research on Public Policy, 1992, pp 206-220; M Asch, ‘Errors in *Delgamuukw*: An anthropological perspective’ in F Cassidy (ed), *Aboriginal title in British Columbia: Delgamuukw v The Queen*, *ibid*, pp 221-243; A Mills, *Eagle down is our law: Witsuwit’en law, feasts, and land claims*, Vancouver, University of British Columbia Press, 1994, pp 27-32.

⁴⁴ See the judgments on appeal in *Delgamuukw v British Columbia* (1993) 104 DLR (4th), 5 WWR 97 (British Columbia Court of Appeal) and *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193 (Supreme Court of Canada) and Neate G, “Three lessons for Australians from *Delgamuukw v British Columbia*” in Strelein L and Muir K (eds) *Native Title in Perspective: selected papers from the Native Title Research Unit 1998-2000*, AIATSIS, Canberra, pp 221-270.

Professor Berndt's statement that anthropologists apply their knowledge in the interests of the people concerned needs to be qualified in light of more than two decades of experience of anthropologists being called to give evidence as experts by a range of parties and by tribunals. The perception that anthropologists apply their knowledge in (what they understand to be) the interests of the people concerned because they have obligations and responsibilities to those people may be sustainable only in some cases, but on occasions there are issues about the perceived partisanship of some anthropologists and hence the extent to which such an expert anthropologist can be relied on to give intellectually rigorous and independent evidence.⁴⁵

In recent years, particularly after the Hindmarsh Island controversy, anthropologists in Australia have had to weather attacks on their integrity, competence, and credibility,⁴⁶ and have faced the risk that they might be sued on the basis that they were negligent or engaged in misleading or deceptive conduct.⁴⁷

The role of anthropologist as independent expert is emerging as the dominant role in the native title era. Anthropologists may be engaged by various parties and may sometimes be called to give evidence in court. The importance of the independence, impartiality and integrity of anthropologists is evident not only from the Federal Court's *Guidelines for Expert Witnesses* (discussed later in this paper) but also from the Code of Ethics adopted by the Anthropological Society and set as a condition of membership as a Fellow of the Society.⁴⁸ If necessary or appropriate, questions about the independence, impartiality and integrity of a particular anthropologist in particular proceedings can be explored with the

⁴⁵ For a discussion of this issue see Neate G, 1997, "Proof of Native Title", in B Horrigan and S Young (eds) *Commercial Implications of Native Title*, Federation Press, pp 306-310 and the judgments, reports, books and articles cited there. See also B Rigsby, 1995, "Anthropologists, land claims and objectivity: some Canadian and Australian cases" in J Finlayson and D Smith (eds) *Native Title: Emerging issues for research, policy and practice*, CAEPR, ANU, pp 23-38.

⁴⁶ For example see Hills, B "Trouble in the myth business", *The Sydney Morning Herald*, 3 July 1999, Hills, B "Unmaking the myth", *The Courier Mail*, 7 July 1999, G McCall, "Dispelling a few of the myths", *The Sydney Morning Herald*, 9 July 1999, "The myth business is widespread", three letters by T O'Meara, M McLaine, R Sandall to the editor, *The Sydney Morning Herald*, 10 July 1999, Brunton, R "Covering up a multitude of social, ethical sins", *The Courier Mail*, 10 July 1999, Lee, R "Belittling of culture disguised as debate", *The Sydney Morning Herald*, 10 July 1999, Hagan, R "Hard call without fieldwork", *The Sydney Morning Herald*, 12 July 1999, Goldman, L "Claims about UQ 'baseless'", *The Courier Mail*, 29 July 1999.

⁴⁷ See the *Chapman v Luminis Pty Ltd* litigation in the Federal Court at (1998) 86 FCR 513 and subsequent decisions.

⁴⁸ In addressing relations with those studied, the Code of Ethics states that where a conflict of views or interests arises among the parties (those studied, gatekeepers, sponsors and anthropologists) the views and interests of those studied should be placed first "except where this would compromise a member's conscience of commitment to truthfulness": paragraph 3.1. In addressing relations with the profession, the Code of Ethics directs members to maintain integrity in the recording and presentation of anthropological data, and members "should not discredit the profession of anthropology by knowingly colouring or falsifying observations or interpretations, or making exaggerated or ill-founded assertions, in their professional writings, as expert witnesses, or as authors of any other form of reportage related to their work": paragraph 4.2. Members should avoid receiving favours or being placed under obligations to persons or organizations in ways that could affect their professional integrity and impartiality of judgment: paragraph 4.8.

witness, for example, by reviewing the person's research methods, the links the person has with the applicant group, and the code(s) of ethics to which the person subscribes.⁴⁹

Anthropologists' evidence in courts

Courts have accepted anthropologists' evidence on a range of matters⁵⁰ including evidence in relation to:

- genealogies of groups of Aboriginal people,⁵¹ including genealogies prepared by, or drawing on, the genealogies of earlier researchers (such as Elkin, Tindale and Birdsell, Robinson)⁵² or other archival records;⁵³
- the nature and identity of a group (or sub-groups) or community of Aboriginal people;⁵⁴
- how the name of a group came to be established;⁵⁵
- the extent of a group's traditional country;⁵⁶

⁴⁹ See, for example, the reports of the Land Tribunal of Queensland on *Aboriginal Land Claim to Lakefield National Park*, 1996, State of Queensland, Land Tribunal, paragraphs 146-152, *Aboriginal Land Claim to Ten Islands near Cape Grenville: The Wuthathi Claim*, 1998, State of Queensland, Land Tribunal, paragraphs 108-112, *Aboriginal Land Claims to Mungkan Kandju National Park and Unallocated State Land near Lochinvar Pastoral Holding*, State of Queensland, 2001, paragraphs 130-137.

⁵⁰ For example see *Ward v Western Australia* (1998) 159 ALR 483 at 526-531.

⁵¹ *Ward v Western Australia* (1998) 159 ALR 483 at 527-528, 531-535; *Western Australia v Ward* (2000) 99 FCR 316, 170 ALR 159 at paragraph 146, 153-156, 228, 234-236, 253; *Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 paragraphs 51, 71; *Yarmirr v Northern Territory* (1998) 82 FCR 533 at 563, 567-568, 569; *Cubillo v Commonwealth of Australia* (2000) 174 ALR 97 at 576; *Rubibi Community v Western Australia* [2001] FCA 607 at paragraphs 145, 150, 152, 157-160; see also *Yanner v Eaton* (1999) 166 ALR 258 at 293, *Daniel v Western Australia* [2000] FCA 858 at paragraphs 27-28.

⁵² *Ward v Western Australia* (1998) 159 ALR 483 at 525, 531-532, 535, 548, 551; *Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 paragraphs 32, 54-63, 73-76, 82-89, 97; *Sampi v Western Australia* [2001] FCA 110 at paragraph 3.

⁵³ *Shaw v Wolf* (1998) 83 FCR 113, 163 ALR 205 at paragraphs 61-63, 80, 81, 83, 87, 90, 118, 119, 121, 122, 137, 324.

⁵⁴ *Ward v Western Australia* (1998) 159 ALR 483 at 521-522, 528-530, 540-541, 551; *Western Australia v Ward* (2000) 99 FCR 316, 170 ALR 159 at paragraphs 149-151; *Rubibi Community v Western Australia* [2001] FCA 607 at paragraphs 96-97, 102-113, 126, 128-136; *Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 paragraphs 50-52, 62, 71; *Passi v Queensland* [2001] FCA 697 at paragraphs 14-15; see also *Northern Land Council v Olney* (1992) 34 FCR 470 at 480, 105 ALR 539 at 548-549; *Taylor on behalf of the Kalkadoon People v North Queensland Electricity Commission* [1996] FCA 913, paragraph 14.

⁵⁵ *Western Australia v Ward* (2000) 99 FCR 316, 170 ALR 159 at paragraphs 264-270.

⁵⁶ *Ward v Western Australia* (1998) 159 ALR 483 at 544-552; *Western Australia v Ward* (2000) 99 FCR 316, 170 ALR 159 at paragraphs 163-169; *Smith on behalf of the Gunggari people v Tenneco Energy Queensland Pty Ltd* (1996) 66 FCR 1 at 3; *Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 paragraph 61.

- the location of significant sites;⁵⁷
- the use of land by Aboriginal people and the significance of the land for them;⁵⁸
- the significance of ceremony and ritual to a group's traditional links to particular areas;⁵⁹
- descriptions of the rights and duties of Aboriginal people to land acknowledged under traditional law and custom;⁶⁰
- the right of a member of a clan to take bush resources within and beyond a clan's estate;⁶¹
- radio carbon dating and archaeological information that indicated the period in which people occupied an area;⁶²
- the extent to which traditional knowledge, laws, customs and practices continue;⁶³
- the likely consequences for a group of Aboriginal people of having certain types of traditional information disclosed beyond that group.⁶⁴

There has been judicial reference to “participant observation” as a research technique that anthropologists use.⁶⁵ In preparing or giving evidence, however, anthropologists are not confined to the product of their own fieldwork or direct observation. They may review existing ethnographic literature.⁶⁶ Some anthropologists may be called to comment on the opinions of other anthropologists in their reports,⁶⁷ or on the evidence of Aboriginal witnesses.⁶⁸

⁵⁷ *Yarmirr v Northern Territory* (1998) 82 FCR 533 at 563.

⁵⁸ *Ward v Western Australia* (1998) 159 ALR 483 at 521-523; see also *Minister for Aboriginal and Torres Strait Islander Affairs v Minister for Lands (WA)* (1996) 67 FCR 40 at 44, 45; 149 ALR 48 at 82, 83.

⁵⁹ *Ward v Australia* (1998) 159 ALR 483 at 530-531, 535-536, 538; *Western Australia v Ward* (2000) 99 FCR 316, 170 ALR 159 at paragraph 152.

⁶⁰ *Ward v Western Australia* (1998) 159 ALR 483 at 529; *Passi v Queensland* [2001] FCA 697 at paragraph 19.

⁶¹ *Walden v Hensler* (1987) 163 CLR 561 at 564, 590; 75 ALR 173 at 175, 195.

⁶² *Yanner v Eaton* (1999) 166 ALR 258 at 293; *Passi v Queensland* [2001] FCA 697 at paragraph 12.

⁶³ *Ward v Western Australia* (1998) 159 ALR 483 at 538-539.

⁶⁴ *Western Australia v Minister for Aboriginal and Torres Strait Islander Affairs* (1994) 54 FCR 144 at 147.

⁶⁵ See *Daniel v Western Australia* [2000] FCA 1334 at paragraph 12.

⁶⁶ *Ward v Western Australia* (1998) 159 ALR 483 at 526-527, 530; *Western Australia v Ward* (2000) 99 FCR 316, 170 ALR 159 at paragraph 146; *Rubibi Community v Western Australia* [2001] FCA 607 at paragraphs 48-52, 96.

⁶⁷ *Ward v Western Australia* (1998) 159 ALR 483 at 528; *Western Australia v Ward* (2000) 99 FCR 316 at 358; 170 ALR 159 at 197 paragraph 147 per Beaumont and von Doussa JJ; *Rubibi Community v Western Australia* [2001] FCA 607 at paragraphs 49-52, 135-136, 139-140.

⁶⁸ *Rubibi Community v Western Australia* [2001] FCA 607 at paragraph 75.

The extent to which a Court relies on the evidence of anthropologists will vary from case to case, and a judge may give different weight to it in different proceedings.

Where anthropological evidence is not contested it may be accepted, and relied on by the Court. In *Hayes v Northern Territory*⁶⁹ Olney J included, in summary form, a description of some aspects of the social organisation and cultural traditions of the members of the claimant groups. What is written was based upon a report prepared by Dr John Morton, a consultant anthropologist engaged by the applicants. The report was tendered in evidence without objection. His Honour wrote:

“Its contents are not controversial and accordingly these paragraphs represent a commentary on undisputed aspects of the evidence of an expert witness and as such provide a context in which the evidence of the Aboriginal witnesses can be more readily understood. To the extent that assertions of fact are made, they represent Dr Morton’s evidence which is unchallenged; and to the extent that opinions are expressed, they are Dr Morton’s and stand uncontradicted. The respondent did not call any expert evidence.”⁷⁰

Similarly, in *Yarmirr v Northern Territory*,⁷¹ Olney J observed that the anthropological evidence relied upon by the claimant group was virtually unchallenged and served the very useful purpose of providing the contextual background upon which the oral testimony of the claimant group’s witnesses can be better understood. Subject to certain reservations, which are not presently relevant, Olney J said the anthropologist’s report provided an informative background to the oral testimony of the other witnesses and assisted the Court’s understanding of the cultural significance of much of that evidence.⁷²

In some cases there will be a diversity of expert opinions about matters. Where necessary, the Court will resolve the issue in dispute having regard to all the available evidence.⁷³ On other occasions, the Court will leave the issue unresolved. So, for example, in the *Yorta Yorta* case the anthropologist engaged by the applicants put a thesis that an “overarching” group comprising named “nations” occupied the relevant lands in the 1840s. That thesis was “severely challenged” by an anthropologist called by a State and a linguist called by that State. Justice Olney wrote:

“The pros and cons of the argument occupy many pages of evidence and are dealt with in detail in both the written reports of the witnesses and the written submissions of counsel. The Court is not in a position to resolve disputed questions of anthropological interpretation. None of the persons whose original observations and records are relied upon

⁶⁹ *Hayes v Northern Territory* (1999) 97 FCR 32.

⁷⁰ *Hayes v Northern Territory* (1999) 97 FCR 32 at 16.

⁷¹ (1998) 82 FCR 533 at 560-563, 156 ALR 370 at 400.

⁷² *Commonwealth v Yarmirr* (1999) 101 FCR 171 at 316, 168 ALR 426 at 650 paragraph 636.

⁷³ See, for example *Rubibi Community v Western Australia* [2001] FCA 607 at paragraphs 136-143.

could be called to give evidence and accordingly no assessment can be made of the credibility of the primary material. There are no objective facts to which the Court can have regard to support a conclusion one way or another. That being so, if scholars learned in the relevant discipline are unable to provide an authoritative answer, the Court must have resort to such credible primary evidence as is available and apply the normal processes of analysis and reason.”⁷⁴

It is clear that not every issue can, or needs to be, resolved by reference only to the evidence of anthropologists. For example, the composition or description of a “group” is often in issue in land claim and native title proceedings. How that is resolved will depend on the evidence and the understanding by the court or tribunal of what the law requires. Traditional land claims under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) are successful if there is a “local descent group” with members who satisfy the statutory criteria in the definition of “traditional Aboriginal owners”.⁷⁵ In a 1980 land claim report, the then Aboriginal Land Commissioner (Justice Toohey) wrote:

“... each land claim involves a particular group of people claiming traditional ownership of a particular area of land. Naturally, as claims proceed, some general body of principles emerges and in a real sense each claim builds upon the knowledge and experience gained in earlier ones. But in the end findings and recommendations must have regard to the material presented. Hence decisions about the identity of traditional Aboriginal owners may vary. This may not always reflect orthodox anthropological thought but, as I have tried to stress in earlier reports, the Land Rights Act is not an exercise in anthropology. Anthropologists are recorders of material and their capacity to collate it, aid in its presentation to a hearing and comment on it has proved invaluable. The views of anthropologists concerning the language of the Act, especially where the statute uses terms having a reasonably understood meaning in anthropology, is of great assistance and I have relied upon them in earlier hearings. But, in the end, what has to be done is to determine the meaning of the words used in the Act, construe the definition accordingly and then apply it to the material presented.”⁷⁶

When discussing the term “local descent group”, his Honour noted relevant passages from the anthropological literature but also noted that the words “local”, “descent” and “group” are ordinary English words to which a meaning could be attached in the context of the Act.⁷⁷ He continued:

⁷⁴ *Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 paragraph 62. See also the comments of Justice Olney on judicial views about anthropological issues in Edmunds M (ed), 1994, *Claims to Knowledge, Claims to Country*, AIATSIS, p 30.

⁷⁵ *Aboriginal Land Rights (Northern Territory) Act 1976* s 3.

⁷⁶ *Anmatjirra and Alyawarra Land Claim to Utopia Pastoral Lease*, AGPS, Canberra, 1980, paragraph 89.

⁷⁷ *Ibid*, paragraphs 109-121.

“Whatever the situation in anthropology (and I am happy to skirt what Leach has referred to as ‘the minefields of Cambridge anthropological scholasticism’ – *Current Anthropology* December 1966, p. 548), I do not think I should approach the matter with some preconceived model in mind to which the evidence must accommodate itself. Rather it is a matter of listening to the witnesses and asking, in the light of that evidence, who may fairly be said to constitute the local descent group for the land claimed. The answer in this case may not be the answer in the next. I find persuasive the observation that:

... a confusion between natives’ concepts and the anthropologist’s analytical concepts ... is ... involved in the anthropologist’s procedure of establishing the ‘objective’ fact ... Ultimately it is not the anthropologist but the natives who define the members of the anthropologist’s analytical categories (L Holy: Kin Groups: Structural Analysis and the Study of Behaviour, in *Annual Review of Anthropology*, 1976, p. 120).”⁷⁸

In a subsequent land claim report he wrote that “he was not concerned here to resolve possible issues of anthropology”⁷⁹ and reached a conclusion about the group “that represents an extension of the concept of local descent group described in earlier reports”.⁸⁰

In other contexts the tribunal of fact will have even fewer anthropological concepts to assist. The word “group” in the *Aboriginal Land Act 1991* (Qld) has been the subject of extensive discussion in the reports of the Land Tribunal. In its most recent report the Tribunal considered in detail both the meaning of the word “group”⁸¹ and whether particular claimants constituted groups for the purpose.⁸²

In a dispute about the registration of a particular claimant application under the *Native Title Act 1993*, Justice O’Loughlin considered what was a “native title claim group” for the purposes of the registration test under that Act.⁸³ His Honour, in deciding that eight members of a particular family “may be part of the group but they are not the group”, stated that the Act “now ensures that applications can only be lodged on behalf of properly constituted groups – not individuals or small sub-groups. This approach is consistent with the principle that native title is communally held”.⁸⁴ He concluded that a

⁷⁸ Ibid, paragraph 117.

⁷⁹ *Daly River (Malak Malak) Land Claim*, AGPS, Canberra, 1982, paragraph 146.

⁸⁰ Ibid, paragraph 177.

⁸¹ *Aboriginal Land Claims to Mungkan Kandju National Park and Unallocated State Land near Lochinvar Pastoral Holding*, State of Queensland, 2001, paragraphs 171-185.

⁸² Ibid, paragraphs 348-380, 381-385, 445-465, 587-605, 716-740, 805, 820-841, 948-975.

⁸³ *Risk v National Native Title Tribunal* [2000] FCA 1589.

⁸⁴ *Risk v National Native Title Tribunal* [2000] FCA 1589 at paragraph 29, citing *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 109-110, *Western Australia v Ward* (2000) 170 ALR 159 at paragraph 181.

“native title claim group is not established or recognised merely because a group of people (of whatever number) call themselves a native title claim group”.⁸⁵

Anthropologists who give evidence in proceedings are, like any other witnesses, susceptible to comment about both the contents of their evidence and their general credit as a witness. The following examples illustrate some of the observations made in native title proceedings.

In one case, the evidence of anthropologists was described as “clear, objective and helpful”.⁸⁶ By contrast, in the Canadian case of *Delgamuukw v British Columbia*, the trial judge placed little, if any, reliance on the evidence of anthropologists and was critical of them. He noted that two of the researchers had studied the plaintiff groups intensively, living with them for two and three years respectively after the commencement of the action. They had studied by way of participant observation but had dealt almost exclusively with the chiefs and that was, in his Honour’s view, “fatal to the credibility and reliability of their conclusions”.⁸⁷ There were criticisms of the methodology that they used, and of the close association between the researchers and the plaintiffs after the commencement of the litigation. One of the anthropologists was described as “more an advocate than a witness”. He was also criticised for making conclusions that were not supported by the evidence before the Court and because his 691 page report was “exceedingly difficult to understand ... highly theoretical and ... detached from what happens, ‘on the ground’”. Little reliance was placed on his evidence.⁸⁸ The Court concluded that “apart from urging almost total acceptance of all Gitksan and Wet’suwet’en cultural values, the anthropologists add little to the important questions that must be decided in this case. This is because, as already mentioned, I am able to make the required important findings about the history of these people, sufficient for this case, without this evidence.”⁸⁹

Australian judges are sometimes critical of anthropologists or their evidence. In the *Yorta Yorta* case, for example, Olney J described the evidence of one anthropologist as suffering from a combination of factors, notably, that the anthropologist had no prior experience in the area under consideration, she had not read the ethnographic literature of the region and had relied upon written witness statements, not all of which were in evidence and some of which were shown to be inaccurate.⁹⁰ There is a risk that some witnesses may be thought to be too close to the applicants. However, even where it appears that an anthropologist has a close association with the applicants and perhaps a degree of partisanship, the expert’s comprehensive and detailed research still may be given appropriate weight as evidence.⁹¹

⁸⁵ *Risk v National Native Title Tribunal* [2000] FCA 1589 at paragraph 60.

⁸⁶ *Western Australia v Ward* (2000) 99 FCR 316, 170 ALR 159 at paragraph 149.

⁸⁷ (1991) 79 DLR (4th) 185 at 248-249.

⁸⁸ (1991) 79 DLR (4th) 185 at 249-251.

⁸⁹ (1991) 79 DLR (4th) 185 at 251.

⁹⁰ *Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 paragraph 55, see also paragraph 61; see also *Members of the Yorta Yorta Aboriginal Community v Victoria* [2001] FCA 45 per Black CJ at paragraph 19.

⁹¹ *Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 paragraph 55.

The evidence of anthropologists will not be considered in isolation. It will be assessed along with the primary evidence of applicants and other expert evidence, such as the evidence of archaeologists,⁹² linguists,⁹³ historians,⁹⁴ and genealogists.⁹⁵

In some cases it will be necessary to choose between the evidence of anthropologists or the weight to be given to the evidence of each,⁹⁶ or to choose between the evidence of anthropologists and the primary evidence of Aboriginal witnesses.⁹⁷

There may be issues about the nature and extent of the anthropologists' work in a particular case. It should be remembered that some (and in some instances most or all) of the work of anthropologists will be done outside a Court. In those cases which are resolved by agreement, the work (or at least the written record of it) may not be done in the detail or length required for a trial in which the application is being tested or contested.

Matters such as the level of detail and analysis that is necessary for the purposes of resolving a native title application need to be dealt with in consultation between lawyers and anthropologists. The relevance of data and analysis to the matters in issue in a proceeding will need to be considered. But even when those issues are resolved there may be legal challenges to some evidence or assertions.

Thirty years ago, Professor Berndt expressed his opinion that "legal practitioners regard anthropologists, when they do not consider them to be obstructive, as being 'raw' material; or, to put it more kindly, as a kind of resource".⁹⁸ Reflecting on the early years of Northern Territory land claims, as well as the experience of the Gove case, Berndt "wondered how much detail is really necessary to provide justification – or to satisfy the adjudicator".⁹⁹ He pointed to the "danger of framing or trying to frame claims so that they conform with specifications laid down" in the relevant law. He recognised that the practice is necessary, but cautioned that it can lead to the over-simplification of data for legal consumption.¹⁰⁰ He also suggested that the material presented in early land claims was "primarily at the ethnographic level. That is, in anthropological terms it remains essentially un-analyzed and the enunciation of implications is kept at a low key or not spelt out."¹⁰¹

⁹² *Ward v Western Australia* (1998) 159 ALR 483 at 513-515, 538.

⁹³ *Ward v Western Australia* (1998) 159 ALR 483 at 523-525, 536, 538.

⁹⁴ *Ward v Western Australia* (1998) 159 ALR 483 at 513-514.

⁹⁵ *Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 paragraphs 23, 58, 74, 76, 85.

⁹⁶ *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 159-160.

⁹⁷ *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 168-171, compare 172-174, 178-179.

⁹⁸ Berndt RM, 1981, "A long view: some personal comments on land rights, op cit, p 16.

⁹⁹ *Ibid* p 12.

¹⁰⁰ *Ibid* p 12.

¹⁰¹ *Ibid* p 15.

4. CASE MANAGEMENT IN THE FEDERAL COURT

Case management techniques used in the Federal Court

In the report into the federal civil justice system, the Australian Law Reform Commission noted that Australian courts have become more active in monitoring and managing the conduct and progress of cases before them. The process involves a deliberate transfer of some of the initiative in case preparation from the parties to the court, with the aim of controlling costs and ensuring the timely resolution of cases, without compromising the quality and fairness of the process. One of the main objectives of a system of case management is the establishment of a time goal within which cases will be disposed and the implementation of practice and procedure designed to dispose of cases within the time goal.¹⁰²

From 1 September 1997, the Federal Court has adopted a form of case management known as the individual docket system. The fundamental principle of the system is that each case before the Court will be allocated to a particular Judge who will ordinarily remain responsible for the case from commencement to finalisation. Most cases are allocated at random with adjustments being made to ensure a fair allocation of the workload.¹⁰³

Before 30 September 1998, the Court had a native title panel and the matters referred to the Court under s 74 of the *Native Title Act* were allocated to judges on the panel. As at 30 September 1998 there were 51 matters which fell within that category. With the large number of native title cases in the Court after 30 September 1998 the panel system was discontinued for native title matters. It was necessary to utilise all members of the Court for this work.¹⁰⁴

The Federal Court's 1999-2000 Annual Report states that the individual docket system will assist judges in the management of their docket caseload, enhance the collection and analysis of information about the Court's work, and provide better access to case information for litigants, lawyers and the public. The design process has involved extensive input from judges and staff of the Court about the services the system must provide.¹⁰⁵

It should be noted that the docket system represents a significant change, as responsibility for the progress of a case is no longer seen as a matter only for the parties. Some of the implications of that for anthropologists are discussed later in this paper.

¹⁰² Australian Law Reform Commission, 2000, *Managing Justice: A review of the federal civil justice system*, Report No 89 at paragraph 6.3.

¹⁰³ Federal Court of Australia, *General Guide to the Individual Docket System*, <http://www.fedcourt.gov.au/aboutct/aboutct_IDS.html> (21 June 2001).

¹⁰⁴ North, AM, 2000 "From the Internet to the outback – a world class court", in B Keon-Cohen, *Native Title in the New Millennium*, AIATSIS, Canberra, p 25.

¹⁰⁵ Federal Court of Australia, *Annual Report 1999-2000*, p 12.

The period within which matters are usually determined in the Federal Court

The Federal Court has set the period of eighteen months from commencement as the goal within which it should dispose of at least 85 per cent of its cases. During the five year period to 30 June 2000, 88.3 per cent of matters were completed in less than eighteen months, 81.1 per cent in less than twelve months and 64.8 per cent in less than six months.¹⁰⁶

In summary, the current case management system in the Federal Court aims at providing:

- identifiable stages through which most cases will proceed;
- management of each matter through all stages by a single judge;
- the disposal of each matter in a timely manner;
- overall efficiency in the use of the Court's resources in dealing with the numerous cases on various issues commenced within its jurisdiction.

5. CASE MANAGEMENT OF NATIVE TITLE CASES

Some special features of native title cases

The Australian Law Reform Commission noted in 2000 that native title is a “unique and relatively new area of law with a limited but developing jurisprudence” and that native title disputes “are potentially complex, with complexity deriving in particular cases, from features including:

- the number of parties involved
- the existence of related disputes including overlapping boundaries representing areas of shared indigenous responsibility, different responsibilities for country in an area of competing claims, indigenous groups with historical and traditional connection to the same country, and family or other group conflicts, as well as conflicting interests between land users and between different State and Territory agencies
- the need for historical, genealogical and anthropological evidence and the difficulties parties experience in obtaining expert assistance in such matters
- the evidentiary burden on, and complex factual investigations required of claimants to prove that their group, at the date of sovereignty, held native title and that their group maintains a connection with their traditional lands based on their traditional laws and customs
- the cultural understanding required and practical difficulties associated with taking evidence effectively from claimants
- complexity of the legislation, including state and territory legislation
- State divisions and differences
- the relative novelty of the processes and practice – many parties lack understanding about native title and the processes of the National Native Title Tribunal (NNTT) and the Court

¹⁰⁶ Federal Court of Australia, *Annual Report 1999-2000*, p 41.

- complex determinations of the impact of colonial and State and Territory property law and legislation
- the concept of a communal title
- complex land use issues such as how native title can be used consistently with existing federal, state, territory and local government land use management systems.”¹⁰⁷

In institutional terms also, the methods for resolving native title issues are significantly different from the processes for dealing with other matters before the Federal Court. Rather than give the Court complete control of the proceedings, the Parliament has divided the functions and powers between the Court and the National Native Title Tribunal. The various stages in the resolution of native title applications and the respective roles of the Court and Tribunal are outlined earlier in this paper and in Attachment A.

An important procedural difference between native title litigation and other litigation is the statutorily mandated, and increasingly central, role of mediation which may relieve the Court of the need to adjudicate in most cases. Although the Court has power to mediate,¹⁰⁸ the *Native Title Act 1993* clearly contemplates that most native title mediation will be done in private by the Tribunal, under the general supervision of the Court.¹⁰⁹

Native title mediation is different in many respects from other types of mediation. The differences are illustrated by the following five factors:

- Most mediation (such as the mediation of commercial or matrimonial issues) involves two parties, yet native title mediation often involves scores if not hundreds of parties (eg the Wotjobaluk people’s application involves 447 parties organised into 17 groups according to their interests).
- Most mediation involves people who know each other and have an existing relationship. Although some native title cases involve people who have been sharing the land for generations, native title mediation often involves people who do not know (or even know of) the applicants and hence a relationship or series of relationships is developed in the course of and for the purpose of the mediation. Even where relationships are in place before the native title process unfolds, the nature of those relationships is likely to change by virtue of the assertion that native title rights exist and as a consequence of the process by which the issues are resolved. Existing relationships are unlikely to be based on the rights of indigenous people that are legally enforceable rights *in rem*.¹¹⁰ Native title rights attach to the land. They are not just rights held by particular people. New relationships are created in a context where, whatever the relative position and power may have been previously,

¹⁰⁷ Australian Law Reform Commission, 2000, *Managing Justice: A review of the federal civil justice system*, op cit, pp 459-460, paragraph 7.42.

¹⁰⁸ See *Federal Court of Australia Act 1976* ss 53A-53C, Federal Court Rules Order 72.

¹⁰⁹ *Native Title Act 1993* ss 86A-86E, 136A-136H.

¹¹⁰ See *Wik Peoples v Queensland* (1994) 49 FCR 1, 120 ALR 465; *Fourmile v Selpam Pty Ltd* (1998) 80 FCR 151 at 175, 152 ALR 294 per Drummond J.

indigenous people are now asserting that they have significant rights. Their assertions have consequences for the local community generally. The applicants should be taken seriously. Like it or not, governments, corporations, landholders and others (sometimes including other indigenous people) have to sit down and talk face to face with the applicants. Whether the relationship is old or new, a power shift is foreshadowed by a native title application and is precipitated by the process of resolving it.

- Most mediation is supported by a common understanding of or background to the matters in issue, yet native title mediation involves an attempt to understand and reconcile culturally different (and divergent) views of land and waters.
- Most mediation is a form of alternative dispute resolution, yet native title mediation does not commence because of a dispute but by an application for a determination of rights which may affect the rights and interests of others.¹¹¹
- Native title mediation can take a long time. Various factors (including the number of parties, the area of land or waters covered by the application, the number and range of issues that need to be resolved, whether there are overlapping and competing applications to the same area of land or waters, and the human and financial resources available to the parties and the Tribunal) will influence the pace and duration of the mediation process. Experience to date shows that it takes years.

The development of appropriate procedures for dealing with native title matters has presented a significant challenge to the Court. In some aspects native title cases are like any other case before the Court and are subject to the same initiatives, including intensive case management. The Federal Court, however, is aware of the distinguishing features of native title proceedings and has developed particular case management practices and Federal Court Rules to accommodate them.

Provisional docket judge v substantive allocation of matters to judges

Unlike other matters before the Court, native title cases are assigned to the provisional docket judge for native title cases in each registry who, with the assistance of a Deputy Registrar, is responsible for initially managing the case. The provisional allocation usually continues while the Native Title Registrar is considering the matter for registration. It may also continue while the matter is in active mediation with the National Native Title Tribunal. Once the matter requires substantive action (such as the hearing of a contentious interlocutory application), or is ready for a main hearing, the matter is referred to the Court's Native Title Secretariat for substantive allocation to a trial judge.¹¹²

¹¹¹ The *Native Title Act 1993*, in ss 86B(3), 86G and 87, contemplates that some matters may be opposed or settled without the need for mediation.

¹¹² Federal Court of Australia, *Annual Report 1999-2000*, p 49; see also North, AM, 2000, "From the Internet to the outback – a world class court", op cit, p 27.

The volume of native title cases before the Federal Court

When the amendments to the *Native Title Act* commenced on 30 September 1998, the 794 native title applications before the National Native Title Tribunal were taken to be filed with the Court. In addition, at that time some 51 matters were already before the Court.¹¹³

Since 30 September 1998, a further 257 claimant native title determination applications were made under the “new” Act; and over 550 claimant applications were combined, withdrawn, rejected or otherwise discontinued. Therefore, as at 25 June 2001 there were 581 claimant applications along with 38 non-claimant native title determination applications and 22 compensation applications active.

To put those numbers in perspective, it should be noted that the jurisdiction of the Federal Court is derived from over 120 federal statutes¹¹⁴ and in 1999-2000 6,276 matters were commenced in the Court, including 99 new native title matters.¹¹⁵

Referral of applications to the National Native Title Tribunal for mediation

As noted earlier in this paper, the statutory scheme for resolving claimant applications involves the following steps:

- claimant applications are to be filed in the Federal Court;
- applications are sent to the Native Title Registrar who is responsible for various administrative procedures (including applying the registration test to each application and notifying the relevant persons and bodies and the public about each application);
- the Federal Court decides who should be parties to the proceedings and whether each application should be referred to the Tribunal for mediation;
- the Tribunal carries out the mediation of each matter referred to it and reports to the Federal Court on the progress of mediation;
- where native title exists, the Federal Court makes an appropriate determination of native title, either in or consistent with the terms agreed by the parties or as decided by the Court after a trial.

As a general rule, the Federal Court must refer every native title claimant application to the National Native Title Tribunal for mediation as soon as practicable after various administrative steps have been taken.¹¹⁶

¹¹³ Those applications had been referred to the Court by the Tribunal under section 74 of the old *Native Title Act*. See North, AM “From the Internet to the outback – a world class court”, op cit, p 26.

¹¹⁴ Australian Law Reform Commission, 2000, *Managing Justice: A review of the federal civil justice system*, op cit, pp 459-460, paragraph 7.2.

¹¹⁵ Federal Court of Australia, *Annual Report 1999-2000*, Table 6.1 and Figure 6.12.

¹¹⁶ *Native Title Act 1993* s 86B(1).

The purpose of mediation is to assist the parties to reach agreement on some or all of the following matters:

- “(a) Whether native title exists or existed in relation to the area of land or waters covered by the application;
- (b) If native title exists or existed in relation to the area of land or waters covered by the application:
 - (i) who holds or held the native title;
 - (ii) the nature, extent and manner of exercise of the native title rights and interests in relation to the area;
 - (iii) the nature and extent of any other interests in relation to the area;
 - (iv) the relationship between the rights and interests in subparagraphs (ii) and (iii) (taking into account the effects of this Act);
 - (v) to the extent that the area is not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease – whether the native title rights and interests confer or conferred possession, occupation, use and enjoyment of the land or waters on its holders to the exclusion of all others.”¹¹⁷

Although most applications are referred to the Tribunal for mediation soon after they have been registration tested and notified, they could be referred to the Tribunal later in the process, for example, during a trial. The Court is expressly empowered to refer the whole or a part of the proceeding for mediation at any time in a proceeding if the Court considers that the parties will be able to reach agreement on, or on facts relevant to, any of the relevant matters.¹¹⁸

The Tribunal has wide discretionary powers to conduct mediation conferences and can tailor the processes having regard to the particular features of an application. Factors such as the number of parties, the area covered by the application, whether there are overlapping and competing applications to the same area of land or waters, the area covered by the application, the number and range of issues that need to be resolved, and the human and financial resources available to the parties and the Tribunal will influence how mediation is to proceed.¹¹⁹

¹¹⁷ *Native Title Act 1993* s 86A(1).

¹¹⁸ *Native Title Act 1993* s 86B(5).

¹¹⁹ *Native Title Act 1993* ss136A-136F, Edmunds M, and D Smith, 2000, *Members’ Guide to Mediation and Agreement Making under the Native Title Act 1993*, NNTT, Neate, G. 2000. “Meeting the challenges of native title mediation”, paper presented to the LEADR 2000: ADR International Conference, Sydney.

The role of mediation progress reports from the National Native Title Tribunal in case management

Once the Federal Court has referred an application for mediation by the Tribunal, the *Native Title Act* provides that the presiding member of the Tribunal, in relation to a matter being mediated:

- must provide a written report to the Court setting out the progress of mediation if requested to do so by the Court;¹²⁰
- may provide a written report to the Court setting out the progress of the mediation if the presiding member considers that it would assist the Federal Court in progressing the proceeding in relation to which the mediation is being undertaken;¹²¹
- must, as soon as practicable after mediation is successfully concluded, provide a written report to the Court setting out the results of the mediation.¹²²

The Court's Native Title Coordination Committee and the Tribunal have given careful consideration to what a mediation report should contain. In summary, the current practice is that:

- each mediation report should usually be in the form agreed to by the Court and the Tribunal which contains basic information about the application;
- the report should include a statement about the progress of mediation to date and an assessment about the prospects of mediation (in particular, whether the mediation should continue, or the mediation should continue with appropriate orders or directions from the Court, or mediation should cease) together with proposals for future meetings or actions to be taken by parties;
- the report should contain relevant background information but should not contain any confidential information unless the parties agree to it;
- if the parties agree, a mediation report must include any agreement on facts between the parties that was reached during the mediation concerned;¹²³
- although practice varies, draft mediation reports are sometimes provided to parties before they are sent to the Court, and each mediation report should be prepared on the basis that it will probably become available to the parties at some stage of the proceeding.¹²⁴

Although practice varies between judges and is influenced by the circumstances of each application, when judges request mediation progress reports in relation to matters in active mediation, it is common for those reports to be required on average every three to six months.

¹²⁰ *Native Title Act 1993* ss 86E, 136G(2).

¹²¹ *Native Title Act 1993* s 136G(3).

¹²² *Native Title Act 1993* s 136G(1).

¹²³ *Native Title Act 1993* s 136G(4).

¹²⁴ See Australian Law Reform Commission, 2000, *Managing Justice: A review of the federal civil justice system*, op cit, paragraphs 7.65-7.68.

As well as noting on the progress of mediation of a particular claimant application, the report can provide the Court with a broader context within which the mediation is taking place. In some instances, for example, it might be useful to:

- inform the Court of the overall strategy being adopted in the mediation (such as dealing with some issues or interests before moving onto others); or
- explain to the Court that progress is slower than might be expected because, for example, the native title claim group is simultaneously involved in negotiations regarding apparently unrelated future act negotiations, indigenous land use agreements or other claimant application mediations. Such other activity, sometimes under fairly demanding time constraints, affects the time and resources available to a key party to invest in the mediation of the claimant application before the next reporting date.

The *Native Title Act 1993* requires the Court to take into account a mediation progress report when deciding whether to make an order that mediation is to cease in relation to the whole or a part of a proceeding.¹²⁵ It is reasonable to infer that the Act contemplates that the Court will take into account a mediation progress report requested by the Court,¹²⁶ and to expect that the Court will have regard to a mediation progress report provided on the initiative of a Tribunal member to assist the Court in progressing the proceeding in relation to which the mediation is being undertaken.¹²⁷ Experience to date shows that is usually the case.

On the basis of those reports, and information provided to the Court by parties at directions hearings (often scheduled soon after the receipt of mediation progress reports), the Court can assess whether there is any prospect that some or all of the relevant matters will be resolved by agreement between the parties. The Court may direct that parties take certain steps or may indicate that, if the Tribunal cannot present a firm timetable for resolution by a nominated date, the Court will list the application for hearing by a judge.

In setting a timetable for progress of a matter the Court may sometimes feel the pressure of competing priorities. For example, the Court may consider that it is in the interests of the broader community as well as the parties for native title matters to be resolved in a timely manner. On the other hand (and not necessarily in conflict with that objective) is the need for enduring outcomes which, in many if not most instances, may emerge from mediated determinations and supporting agreements.

The resolution of claimant applications by agreement is clearly contemplated in numerous provisions of the *Native Title Act 1993* and has been endorsed by the Federal Court. Chief Justice Black recently stated that “it is always a cause of great satisfaction

¹²⁵ *Native Title Act 1993* s 86C.

¹²⁶ *Native Title Act 1993* ss 86E, 136G(2).

¹²⁷ *Native Title Act 1993* s 136G(3).

when native title claims are settled by agreement rather than through litigation”¹²⁸ Although the Court acknowledges and encourages the desirability of mediated outcomes, the Court manages these matters in light of various perceived imperatives such as public confidence in the system and public interest in the timely resolution of native title matters. Some judges have expressed their concern about the length of time some matters are taking, and have indicated that the parties and the Tribunal will need to provide a convincing basis for those matters remaining in mediation. In making a consent determination for part of the Wik peoples’ application, Justice Drummond said:

“I still accept, at least for the moment, that an agreed resolution of the balance of the Wik peoples claim is preferable to a Court-imposed result. That is so because that is more likely to provide a more useful framework than a court decision limited to specific issues for dealing with the resolution of conflicting interests of the Wik peoples and particularly the pastoralists over the specific access and usage questions that are likely to arise in the future.

But the Court cannot allow the remainder of the Wik peoples claim to be the subject of yet more protracted negotiations. The cost benefits of such a negotiated resolution of a case, if that is ultimately achievable, in comparison with the costs of a Court-imposed decision are likely to be largely illusory. The uncertainty for all with interests in the Wik peoples lands, if allowed to continue for any extended further period, is unacceptable both to the public interest and to the interest of all the parties involved in this litigation.”¹²⁹

Such close supervision by the Court means that the parties need to seriously engage with each other, clarifying what is agreed and what is in dispute between them. One way of expediting the process is the provision of relevant information by the applicants or persons engaged by them, such as anthropologists, particularly in the form of connection reports (discussed later in this paper).

The pace of mediation under the supervision of the Court, as well as the degree of involvement of the parties and their requirements for information, may influence the nature and volume of the information to be provided, and the timing of its production. In practical terms, applicants or their representative bodies may need to adjust the priorities of their research to meet the revised schedules as the Court closely manages some matters and allows others to proceed at a slower pace.

Case management conferences

The Court may also convene case management conferences, sometimes presided over by an officer of the Court (such as a Deputy District Registrar), to resolve practical issues

¹²⁸ *Passi v Queensland* [2001] FCA 697 at paragraph 9, citing *Mark Anderson on behalf of the Spinifex People v Western Australia* [2000] FCA 1717 at 7-8.

¹²⁹ *Wik Peoples v Queensland* [2000] FCA 1443 at paragraphs 5-6.

and to assist in progressing matters. Orders may be made obliging parties to take specific actions.

The Federal Court has identified the purpose of a case management conference as being

“...to consider settlement, administer dispute resolution options and review compliance with directions made at the Directions Hearing, to set a trial date range and make such further directions as may be shown to be necessary.”¹³⁰

Managing overlapping claims

Many claimant applications overlap to some extent with one or more other claimant applications. Sometimes the overlap represents a dispute between neighbouring groups about the extent of their traditional countries. In other cases the overlap indicates an area in which two or more groups have native title rights and interests. Such areas are sometimes referred to as “shared” country.¹³¹

It is often the case that overlapping claims are lodged in the Federal Court some years apart and there has been little if any contact between the respective native title claim groups or their representatives. Although it might be thought that each application could be dealt with independently of each other and progress through each stage of the process in a serial fashion, in practice that is unlikely to occur. The reason, in summary, is that there should be only one determination of native title per area and the Federal Court is obliged to make orders to ensure that the overlapping parts of applications are dealt with together.

The *Native Title Act* provides as follows:

“67 Overlapping native title determination applications

- (1) If 2 or more proceedings before the Federal Court relate to native title determination applications that cover (in whole or in part) the same area, the Court must make such order as it considers appropriate to ensure that, to the extent that the applications cover the same area, they are dealt with in the same proceeding.

Splitting of application area

- (2) Without limiting subsection (1), the order of the Court may provide that different parts of the area covered by an application are to be dealt with in separate proceedings.

¹³⁰ Federal Court of Australia, *General Guide to the Individual Docket System*, <http://www.fedcourt.gov.au/aboutct/aboutct_IDS.html> (4 May 2001).

¹³¹ What is meant by “shared” (for example, whether one group has primary rights and another has secondary rights) would need to be ascertained on a case by case basis.

68 Only one determination of native title per area

If there is an approved determination of native title (the *first determination*) in relation to a particular area, the Federal Court must not:

- (a) conduct any proceeding relating to an application for another determination of native title; or
- (b) make any other determination of native title; in relation to that area or to an area wholly within that area, except in the case of:
- (c) an application as mentioned in subsection 13(1) to revoke or vary the first determination; or
- (d) a review or appeal of the first determination.”¹³²

In addition, the Federal Court Rules state that any party to an application who knows of another proceeding before the Court that relates to a native title determination that covers (in whole or in part) the same area as the application must give notice immediately to the Court identifying the other application.¹³³

The practical implications of this are that claims which are at different stages of readiness for litigation or mediation may be joined together (in part or in whole) in the same set of proceedings by orders that the Court considers appropriate to ensure that, to the extent that the applications cover the same area, they are dealt with in the same proceeding.

This may mean, for example, that a representative body which has developed a strategy for resourcing the preparation and presentation of claimant applications in its area in a particular sequence may find that it has to redeploy or reallocate resources (including anthropological research) to applications in a different sequence to meet demands arising from another overlapping application or applications, some of which may not otherwise involve the representative body.

As a consequence, research priorities may change so that anthropologists and others need to be engaged to give priority to certain applications and, having regard to the financial resources available, some other research is deferred and the researchers are either redeployed or not engaged as planned.

Factors influencing whether mediation should cease and matters should be set down for trial

The *Native Title Act* contemplates that mediation will cease when:

- the parties reach an agreement about relevant matters or otherwise agree to settle the matter; or
- the parties do not agree and the Federal Court orders that mediation is to cease.

¹³² Note: *Native Title Act 1993* s 13(1)(a) provides that no native title determination application can be made in relation to an area for which there is already an approved determination of native title.

¹³³ Order 78 rule 45.

Agreement: If the parties agree on all of the matters set out in s 86A(1) of the *Native Title Act*, the mediation can be described as successfully concluded. The parties will set out their agreement in the form of an order of the Federal Court in relation to those matters.¹³⁴ As soon as practicable after mediation is successfully concluded, the presiding member of the Tribunal (or the consultant) must provide a written report to the Federal Court setting out the results of the mediation.¹³⁵ It is then for the Court to take the proceedings to conclusion. The Court may adopt any agreement on facts between the parties reached during mediation.¹³⁶

The terms of the agreement, signed by or on behalf of the parties, will be filed in the Federal Court. If:

- the Court is satisfied that an order in, or consistent with, those terms would be within the power of the Court; and
- it appears to the Court appropriate to make an order in, or consistent with, those terms,

the Court may give effect to the terms of the agreement without dealing with the matters at a hearing.¹³⁷

An order making a determination of native title must set out details of the matters mentioned in s 225 of the *Native Title Act*.¹³⁸ Where the Court proposes to make an approved determination of native title to the effect that native title exists, the Court must, at the same time as it makes the determination, make an appropriate determination under s 56 (which deals with holding the native title on trust) or s 57 (which deals with the non-trust functions of prescribed bodies corporate).¹³⁹

No agreement: If the parties do not agree on the matters listed in s 86A(1) and have not reached an agreement under s 86F the mediation has failed. The Federal Court may order that mediation ceases (and that the matter be set down for trial) in various circumstances.

- The Court may, of its own motion, at any time in a proceeding, order that mediation is to cease in relation to the whole or a part of the proceeding if the Court considers that any further mediation will be unnecessary in relation to the whole or that part or there is no likelihood of the parties being able to reach agreement on (or on the facts relevant to) any of the matters set out in s 86A(1) in relation to the whole or that part.¹⁴⁰

¹³⁴ *Native Title Act 1993* s 87(1)(a)(iii).

¹³⁵ *Native Title Act 1993* s 136G(1).

¹³⁶ *Native Title Act 1993* s 86D(2).

¹³⁷ *Native Title Act 1993* s 87. See Beesley, S, 2001 “The role of the Federal Court when parties reach agreement : s 87 of the *Native Title Act 1993*”, *Native Title News*, Vol 5 No 1, pp 5-10.

¹³⁸ *Native Title Act 1993* ss 94A, 225.

¹³⁹ *Native Title Act 1993* ss 55-60AA; see also *Mualgal People v Queensland* (1998) 160 ALR 386, C Mantziaris and D Martin, 1999, *Guide to the design of native title corporations*, NNTT.

¹⁴⁰ *Native Title Act 1993* s 86C(1).

- At any time after three months after the start of mediation, a party may apply to the Court for an order that mediation cease in relation to the whole or a part of the proceeding.¹⁴¹

In deciding whether to make an order that mediation cease the Court must take into account any report provided by the Tribunal or the presiding member of the Tribunal.¹⁴²

Even when the Court decides to set a matter down for trial, it may decide not to order that mediation cease. Justice French, for example, has listed some Western Australian matters for hearing but has left them with the Tribunal for ongoing mediation, apparently in the hope that mediation may result in some parties withdrawing and the issues for trial being narrowed.

Pre-trial actions

Where a matter is listed for trial, the Court will manage the process before, as well as during, the trial. By making pre-trial orders, the Court will attempt to ensure that each party is aware of the issues and the evidence to be called and so can participate to the appropriate extent in the trial.

The Court will hold directions hearings, presided over by a judge, to ensure that parties have complied with orders or to vary or make new orders.

Examples of pre-trial orders in native title cases are quoted and discussed a little later in this paper, with a focus on the aspects of orders that are of direct interest or practical significance to anthropologists.

Federal Court Rules: Order 78 – Native Title Proceedings

The Court has made special rules of court for native title proceedings. They include rules:

- enabling the Court to give directions and make orders to take account of the cultural or customary concerns of a party or another person, for example, making a ruling on the naming of recently deceased people;¹⁴³
- enabling the Court to restrict access to the transcript of a proceeding or another document;¹⁴⁴
- about evidence of a cultural or customary subject to be given by way of singing, dancing, story telling or in any way other than in the normal course of giving evidence;¹⁴⁵

¹⁴¹ *Native Title Act 1993* s 86C(2)-(4).

¹⁴² *Native Title Act 1993* s 86C(5), *Federal Court Rules* O 78 r 21.

¹⁴³ *Federal Court Rules* Order 78 rule 4.

¹⁴⁴ *Federal Court Rules* Order 78 rule 31(3), see also *Sampi v Western Australia* [2001] FCA 695.

¹⁴⁵ *Federal Court Rules* Order 78 rule 32.

- about documents that refer to material relating to a cultural or customary subject that a party claims is of a confidential or secret nature;¹⁴⁶
- enabling the Court to receive into evidence statements from a group of witnesses, or a statement from a witness after that witness has consulted with other persons;¹⁴⁷
- about adducing evidence or inspecting a document that might disclose evidence or information relating to the culture, genealogy, customs or traditions of Aboriginal peoples or Torres Strait Islanders contrary to a direction or order of a court or tribunal (such as an Aboriginal Land Commissioner or the Queensland Land Tribunal).¹⁴⁸

National trends in case management

Native title litigation is unusual and still relatively novel. Each case will have a number of distinguishing features. The way in which the Court (through judges and senior court officers) manages the native title list or individual matters may vary from case to case having regard to relevant factors. It is unlikely that uniform case management orders will (or should) be developed for use by provisional docket judges or the judges to whom applications are substantively allocated.

The Court is attempting, however, to adopt a nationally consistent approach to the management of native title cases. It does so by way of the Native Title Coordination Committee, which comprises the provisional docket judge for each State. The Committee is concerned with matters of practice and procedure, including the allocation and listing of native title cases.¹⁴⁹

Increasing consistency may also emerge from the development and use of the Native Title Benchbook, a comprehensive guide to all judges and officers of the Court which contains template orders derived from the experience of some judges in native title cases.¹⁵⁰

The period within which native title matters are usually determined in the Federal Court

As the Australian Law Reform Commission has reported, the Federal Court aims to ensure “that native title cases will be managed, heard and determined in a timely and appropriate manner”.¹⁵¹ The Federal Court told the Commission that, following consultations with participants at user group meetings, it has set a goal of three years to dispose of the majority of the native title cases currently before the Court. This is a goal. It is not intended to be prescriptive. The Court has stated:

¹⁴⁶ *Federal Court Rules* Order 78 rule 33.

¹⁴⁷ *Federal Court Rules* Order 78 rule 34.

¹⁴⁸ *Federal Court Rules* Order 78 rule 36.

¹⁴⁹ North, AM. 2000. “From the Internet to the outback – a world class court”, op cit, p 26.

¹⁵⁰ Ibid, p 27.

¹⁵¹ Australian Law Reform Commission, *Managing Justice: A review of the federal civil justice system*, op cit, paragraph 7.57.

“For many matters this may not be achieved because of their complexity, the issues involved, the number of parties and the location of the native title claim. In addition, in some matters the trial Judge’s decision may be appealed to a Full Court, and that Full Court decision itself may then be appealed to the High Court of Australia. The time goal, however, will ensure that all parties involved in native title litigation will be aware, from the commencement of proceedings, that their cases will be actively case managed through all stages of the litigation.”¹⁵²

The Federal Court’s 1999-2000 annual report states that the average time span from filing to disposition for native title matters determined by consent is 3 years and 5 months, and for matters determined by a trial judge it is 4 to 5 years. The Court expects that the 3 year time goal will, in part, be achieved through the active case management of matters.¹⁵³

It is too early to make a statistically valid prediction of how long native title cases will take to resolve. In 2000 the Court listed some matters for hearings to commence up to September 2003. Other cases have been listed for hearing but no dates have been allocated. Not all of the cases that have been listed for trial may go to trial. Judgments of the High Court in test cases, such as the appeals from the Full Federal Court in *Western Australia v Ward*¹⁵⁴ and *Commonwealth v Yarmirr*,¹⁵⁵ increasing experience in resolving applications by consent determinations (and supporting agreements such as indigenous land use agreements), and changing attitudes by some governments and major parties may affect the number of matters that go to trial, the range of issues that are tried in each case, or the prospects of settlement during a trial. Those factors may result in changes to the average length of time between the lodgment of a native title claimant application and its final determination by the Court. Whatever happens, the “average” is likely to be little more than a statistical calculation rather than a predictive tool in any particular case.

Factors influencing the management of native title cases by the Federal Court

Justice North has identified a number of external constraints that may limit the Court’s ability to process native title cases. These factors include:

- relatively few experienced counsel;
- limited pool or availability of experts;¹⁵⁶
- the influence of climatic conditions on the time frames for which evidence can be taken on country;
- funding for applicants; and,
- judge availability.

¹⁵² Federal Court of Australia, *Annual Report 1999-2000*, p 41.

¹⁵³ Federal Court of Australia, *Annual Report 1999-2000*, p 48.

¹⁵⁴ *Western Australia v War* (2000) 99 FCR 316, 170 ALR 159.

¹⁵⁵ *Commonwealth v Yarmirr* (1999) 101 FCR 171, 168 ALR 426.

¹⁵⁶ As noted earlier, the Australian Law Reform Commission listed among the features of native title cases the need for historical, genealogical and anthropological evidence and the difficulties that parties experience in obtaining expert assistance in such matters.

The Court takes into account these factors, if raised by the parties, when the Court is considering making directions requiring procedural steps to be completed.¹⁵⁷

To date, the Court has declined to grant adjournments of the scheduled start of hearings where parties have asserted that the resources available to them are insufficient to proceed.

The Registrar of the Court informed the Senate in May 2001 that there had not been an occasion where the Court has proceeded to force on a hearing where the applicants have not been funded. He continued:

“However, what we have found is that a gentle approach of not removing the hearing date has produced the result that ultimately funding has been found for the applicants and the trials have been able to proceed in a properly prepared fashion.”¹⁵⁸

Resources and case management

It is increasingly apparent that, at each stage in the process, significant issues arise about the resources available to the parties and the institutions that facilitate the resolution of native title issues. Most of the parties are directly or indirectly funded by the Commonwealth and the way each party conducts themselves and each institution performs its functions will influence whether the matters are resolved in a just, enduring and timely manner.

Since the latest amendments to the *Native Title Act 1993* commenced to operate on 1 July 2000, the primary (if not sole) source of funding for native title claim groups is the relevant native title representative body.¹⁵⁹ Much focus is given to the demonstrably limited resources of native title representative bodies to perform their functions under the Act, including their functions in relation to claimant applications.

For the purposes of this paper it is appropriate to acknowledge the significance of the resourcing issue for all those involved in the resolution of claimant applications and repeat what I wrote in the 1999-2000 Annual Report of the National Native Title Tribunal.¹⁶⁰

The pace of the resolution of native title issues is influenced by the human and financial resources available to the parties to proceedings or negotiations, and to the other major institutions and bodies involved. Those bodies include the Federal Court, the Tribunal, ATSIC and representative bodies funded by ATSIC, the Legal Aid Branch of the Federal

¹⁵⁷ North, AM, 2000, “From the Internet to the outback – a world class court”, op cit, p 28.

¹⁵⁸ Senate Legal and Constitutional Legislation Committee, *Hansard*, 28 May 2001, p 57.

¹⁵⁹ *Native Title Act 1993* ss 183(6), 203C.

¹⁶⁰ National Native Title Tribunal, *Annual Report 1999-2000*, pp 24-26.

Attorney-General's Department, the Indigenous Land Corporation (ILC), and the State and Territory Governments.

Parties need assistance. They need information, sound technical and practical advice, and the financial and other resources to explore outcomes without regular resort to expensive, protracted and potentially acrimonious court cases.

Each of the major institutions and bodies, as well as the parties, has to attempt to optimise the use of resources available to it. What each does, and when it acts, is influenced to some extent by the actions or requirements of others. Decisions may have to be made about how resources are to be allocated to deal with a range of native title issues, not just the resolution of claimant applications.

From the Tribunal's perspective, the increased demand on resources will result from an increase in claimant applications (many of them in response to future act notices), an increase in mediation work (including part-heard matters referred back to the Tribunal from the Federal Court), an increase in future act work (particularly in the Northern Territory) and an increase in requests for ILUA assistance and applications to register ILUAs.

Resource pressures similar to those experienced by the Tribunal affect all major participants. For example:

- Each State or Territory Government is a party to every claimant application within its jurisdiction. Consequently, it needs to be involved in the mediation of each application. If all the matters raised by the application are not resolved by agreement, and the matter goes to a hearing before the Federal Court, the State or Territory is likely to play a major role as the first named respondent. In cases to date, that role has involved substantial financial costs and has drawn on the resources of people (such as lawyers and anthropologists) who might otherwise be involved, say, in mediation or negotiation activity.
- The Federal Court has a range of roles in relation to native title applications. All applications are filed in the Court. The Court settles the list of parties to each application, refers matters to the Tribunal for mediation, deals with any applications to have matters struck out, supervises the mediation, determines questions of fact or law referred to it by the Tribunal, determines whether mediation should continue, settles the terms of agreements for consent determinations, or where it orders that mediation ceases, sets matters down for trial, and hears and determines the matters in issue. The resource implications of native title proceedings for the Court were discussed in the Australian Law Reform Commission's report.
- Representative bodies have limited financial resources and are competing for appropriate staff and professional advisers. In performing their statutory functions, representative bodies are involved in such activities as attempting to ensure that claimant applications meet the requirements of the registration test within statutory

timeframes (so that applicants gain the right to negotiate and other procedural rights), representing or assisting applicants in mediation of their claims, preparing other matters for trial, negotiating in relation to future act matters, negotiating indigenous land use agreements, as well as attempting to resolve disputes between indigenous people and other activities.

Strains emerge if, for example, the orders or directions of the Federal Court are not complied with because one or more of the parties is unable to meet those requirements as well as meet other demands within the broader native title regime.

6. CASE MANAGEMENT AND ANTHROPOLOGISTS – THE POTENTIAL ROLE FOR ANTHROPOLOGISTS AT EACH STAGE IN THE PROCESS

Overview

The implications of the case management system for the role of anthropologists will depend on the stage (or stages) at which an anthropologist is engaged in the process.

In most litigation, the party commencing the proceedings will have received legal and, where necessary, other expert advice including advice about the prospects of success having regard to the law and the evidence on which their case is based. Such advice may have been prepared for the purpose of seeking a negotiated settlement of the matters in dispute between the parties.

Ideally an appropriate degree of professional assistance would be provided when each claimant application is prepared. The native title claim group would be clearly described, as would the native title rights and interests. The information which supports such a description would also be identified. A native title application could move through the various stages towards resolution with an increased level of work involved as required for negotiations or trial.

However, many native title applications, particularly those made before the 1998 amendments to the *Native Title Act 1993*, were lodged without the benefit of legal or anthropological advice. Many were made by people without any legal or other representation and without the assistance of a representative body. Some of those applications have been withdrawn, amended or amalgamated with other applications in the course of being subjected to the registration test imposed by the 1998 amendments.

In some cases, anthropological advice is sought after an application has been lodged and when:

- an application is registration tested; or
- documents are prepared in the context of mediation for the purpose of satisfying a State or Territory government or other party that the applicants have the native title rights and interests that they assert; or

- a matter is listed for trial in the Federal Court and witness statements or anthropological reports are required.

Requests for anthropological assistance after an application has been made and is being case managed can raise practical problems. For example, mediation may have commenced and:

- a connection report is required to determine whether agreement can be reached with the State or Territory government (and other parties); or
- detailed advice is requested to assist neighbouring applicant groups resolve contested overlapping claimant applications (including where previously commissioned reports contain inconsistent information).

By that stage, the Federal Court may have requested mediation reports from the Tribunal by nominated dates and the Tribunal may have established (or be seeking to establish) a timetable for negotiations. In some instances, the Federal Court may have set a date for the trial to commence but have left the matter in mediation. An anthropologist brought in then might be working within time and budget constraints to prepare documents in an appropriate form and with adequate content for the purpose of mediation. If a matter has been set down for trial, the anthropologist may be preparing material for two purposes – mediation and trial.

The nature and extent of the work involved may vary significantly from case to case and will be influenced by a variety of factors, such as whether the application is opposed by other Aboriginal groups and whether relevant research has been undertaken previously (and independently of a native title application) and the results of that research are available to the anthropologist. The work may include:

- literature searches;
- a review of previous published and unpublished material;
- researching contemporary information, such as oral histories and genealogies;
- analysis of all relevant information.

The following summary notes some aspects of the work that anthropologists may be asked to assist with at various stages of the process.

Preparation of an application

The *Native Title Act 1993*¹⁶¹ and the Native Title (Federal Court) Regulations 1998 provide that a native title claimant application must include, among other things:

- the names (including Aboriginal names) of the persons on whose behalf the application is made or a sufficiently clear description of the persons so that it can be ascertained whether any particular person is one of those persons;

¹⁶¹ *Native Title Act 1993* ss 61(5), 62.

- information that enables the boundaries of the area covered by the application (and any areas within those boundaries that are not covered by the application) to be identified and a map showing the boundaries of the area;
- a description of the native title rights and interests claimed in relation to particular land or waters (including any activities in exercise of those rights and interests);
- a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist;
- details of any activities that the native title claim group currently carry on in relation to the land or waters;
- a draft of the order to be sought if the application is unopposed;
- a statement that the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it.¹⁶²

Those are matters where anthropologists may be able to assist applicants in the preparation of a claimant application.

The registration test – supplementary information

The *Native Title Act* contains various statutory conditions, now commonly known as the registration test, which most claimant applications must meet before being entered on the Register of Native Title Claims. The registration test conditions include various conditions about the merits of the claim and various conditions about procedural and other matters.¹⁶³ The Native Title Registrar (or his or her delegate) must be satisfied that the claimant application satisfies every one of the conditions. Failure to satisfy any one condition means that the application will not be entered (or remain) on the Register of Native Title Claims.¹⁶⁴ Applicants whose claimant application does not satisfy one or more of the conditions may amend their application or provide additional information in order to have the application entered on the Register of Native Title Claims.¹⁶⁵

The *Native Title Act* sets out a number of categories of information to be considered by the Registrar in considering a claim for registration. Section 190A(3) states that:

“In considering a claim under this section, the Registrar must have regard to:

- (a) information contained in the application and in any other documents provided by the applicant; and
- (b) any information obtained by the Registrar as a result of any searches conducted by the Registrar of registers of interests in relation to land or waters maintained by the Commonwealth, a State or a Territory; and

¹⁶² Section 251B of the *Native Title Act 1993* states what it means for the applicant to be authorised by all the persons in the native title claim group.

¹⁶³ *Native Title Act 1993* ss 190B, 190C.

¹⁶⁴ *Native Title Act 1993* s 190A(6).

¹⁶⁵ *Native Title Act 1993* s 190.

(c) to the extent that it is reasonably practicable to do so in the circumstances – any information supplied by the Commonwealth, a State or a Territory, that, in the Registrar’s opinion, is relevant to whether any one or more of the conditions set out in section 190B or 190C are satisfied in relation to the claim; and may have regard to such other information as he or she considers appropriate.”¹⁶⁶

The *Native Title Act* goes on to state that the information referred to in s 190A(3) “may include information about current or previous non-native title rights and interests in, or in relation to, the land or waters in the area covered by the application.”¹⁶⁷ Apart from rare cases, information arising in the course of mediations, whether claim related mediation or future act mediation, would not be taken into account when the registration test is applied to an application.¹⁶⁸

Anthropological advice could assist meet some of the registration test conditions, including those conditions that provide that the Native Title Registrar must be satisfied that:

- the persons in the native title claim group are named in the application, or the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.¹⁶⁹ In *Quall v Risk*,¹⁷⁰ O’Loughlin J found that he was unable to identify, with any degree of certainty, the composition of the native title claim group that the applicant represented and noted that “The identification of the native title claim group and the authorisation of all members of the group are such vital matters to the success of a native title application that it may become obvious that their absence means that any pursuit of the application would be an exercise in futility.”¹⁷¹
- That the description contained in the application is sufficient to allow the native title rights and interests claimed to be readily identified.¹⁷² In determining the sufficiency of the description there is scope for evaluative judgment and “sometimes the only appropriate way in which to describe claimed rights and interests may be to use broad and general language.”¹⁷³
- That the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion.¹⁷⁴

¹⁶⁶ *Native Title Act 1993* s 190A(3).

¹⁶⁷ *Native Title Act 1993* s 190A(4).

¹⁶⁸ National Native Title Tribunal *Registration Test Procedures*, <<http://www.nntt.gov.au>> at paragraph 4.7.

¹⁶⁹ *Native Title Act 1993* ss 190B(3). See also s 190C(3) and compare s 225(a).

¹⁷⁰ *Quall v Risk* [2001] FCA 378.

¹⁷¹ *Quall v Risk* [2001] FCA 378 at paragraph 69.

¹⁷² *Native Title Act 1993* ss 62(2)(d), 190B(4).

¹⁷³ *Western Australia v Strickland* (2000) 99 FCR 33 at paragraph 85 per Beaumont, Wilcox and Lee JJ. See also *Strickland and Nudding v Native Title Registrar* (1999) 168 ALR 242.

¹⁷⁴ *Native Title Act 1993* s 190B(5). See also the definition of native title in s 223(1).

- Prima facie, at least some of the native title rights and interests claimed in the application can be established.¹⁷⁵ The provision of material establishing a factual basis for the claimed native title rights and interests, for the purposes of registration, is ultimately the responsibility of the applicant. There is no requirement on the Registrar to undertake a search for such material and he is not obliged to accept “very broad statements about association which had no geographical particularity” or “very general assertion[s]” in the application as disclosing the requisite factual basis.¹⁷⁶
- At least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or previously had and would reasonably have been expected currently to have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to land or waters) by the Crown, a statutory authority of the Crown, any holder of a lease over any of the land or waters, or any person acting on behalf of any such leaseholder.¹⁷⁷

The conditions about procedural and other matters are, in summary, as follows:¹⁷⁸

- no person included in the current native title claim group was a member of a previous (and still registered) native title claim group in relation to all or any of the area covered by the current application;¹⁷⁹ and
- either:
 - the application has been certified by each relevant representative Aboriginal/Torres Strait Islander body,¹⁸⁰ or
 - the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.¹⁸¹

An anthropologist may be able to advise on the authorisation (or certification) process, which is relevant to the registration of each application and the subsequent registration testing of amended applications.

Decisions of the Federal Court have given a clearer understanding of the statutory scheme in relation to the registration test. In *Strickland and Nudding v Native Title Registrar*,¹⁸² Justice French found that there is nothing in sections 190C(4) and 190C(5)

¹⁷⁵ *Native Title Act 1993* s 190B(6). If the claim is accepted for registration, the Registrar must enter on the Register of Native Title Claims details of only those claimed native title rights and interests that can, prima facie, be established: *ibid* s 186(1)(g). See also ss 31(2), 39(1).

¹⁷⁶ *Martin v Native Title Registrar* [2001] FCA 16 at paragraphs 23, 26, 28.

¹⁷⁷ *Native Title Act 1993* s 190B(7). If an application fails the registration test only in relation to this condition, the Federal Court may consider other historical circumstances and order the Registrar to accept the claim for registration: see s 190D(4). See also *Queensland v Hutchison* [2001] FCA 416 at paragraphs 6, 12, 26.

¹⁷⁸ *Native Title Act 1993* s 190C.

¹⁷⁹ *Native Title Act 1993* s 190C(3).

¹⁸⁰ *Native Title Act 1993* ss 190C(4)(a) and (6), 202(4)(d) and (5), 251B.

¹⁸¹ *Native Title Act 1993* s 190C(4)(b) and (5), 251B.

¹⁸² *Strickland and Nudding v Native Title Registrar* (1999) 168 ALR 242.

of the *Native Title Act* to confine the Registrar to the statements made in the affidavit or the information provided in the application in reaching the relevant state of satisfaction that the authorisation requirements have been met. He could, for example, refer to anthropological material supplied to him.¹⁸³ The findings of Justice French were subsequently confirmed by a Full Court of the Federal Court.¹⁸⁴

Preparation of a connection report for mediation

In applying for a determination of native title, the applicants bear the onus of proving that they have native title rights and interests. To succeed, the applicants must satisfy the other parties or the Federal Court about various matters including that they constitute a group and that they have native title rights and interests (which may need to be described) and whether those rights and interests are exclusive.

In practical terms, the amount of information that the applicants may have to provide to one or more other parties may vary from case to case, influenced by such factors as:

- whether a party is willing to mediate or whether the party insists on the matter going to trial;
- whether the claimant application is contested by other groups of Aboriginal people or Torres Strait Islanders;
- whether the party has conducted its own research in relation to the application (or has access to advice in relation to the application) or is relying on information provided by the applicants;
- what standard of information a party requires before it will consider whether to consent to a determination of native title;
- whether a party is willing to accept an assessment of the application made by another party (eg the State government); and
- whether a party requires information in respect of one aspect of the application rather than every aspect.

Experience to date shows that State or Territory governments play a significant role in the mediation (or litigation) of claimant applications. Their response to a claimant application may determine whether the application is resolved by mediation or has to go to trial. Some parties may be willing to rely on the assessment made by the government of a particular claimant application.

A clear articulation of each government's policies assists each group of applicants to know what information the government requires before it will consider a consent determination rather than go to court. A clear State or Territory negotiating policy can also assist the Tribunal to develop a mediation strategy when the Federal Court refers an application to it.

¹⁸³ *Strickland and Nudding v Native Title Registrar*, (1999) 168 ALR 242 at 259 (paragraph 57).

¹⁸⁴ *Western Australia v Strickland* (2000) 99 FCR 33 at paragraphs 78,79 per Beaumont, Wilcox and Lee JJ. See also *Risk v National Native Title Tribunal* [2000] FCA 1589.

In 1999-2000 two State governments published their guidelines on what they required in connection reports:

- *Guide to Compiling a Connection Report*, Queensland Government, July 1999 (the *Guide*);
- *General Guidelines—Native title determinations and agreements*, Government of Western Australia, March 2000 (the *Guidelines*).

The guidelines deal with such matters as the contents of a connection report, when a report is required, and the degree of confidentiality attaching to each report.

The preparation and assessment of connection reports is likely to involve a high level of participation by anthropologists (and possibly others, such as historians and linguists), whether they are engaged by the applicants, a government or another party (such as pastoralists or miners).

Queensland: The Queensland Government's policy favours negotiated agreements between native title claimants and other land users. An important starting point for agreements between native title claimants and the State is the compilation and presentation of a connection report. These reports provide the State with a basis for recognition that an applicant group holds native title over the land or waters claimed and the rights and interests sought under native title. The connection report becomes central to mediating agreements between the State and the applicant group.

The purpose of the *Guide* is to set out clearly and fully what the State requires in such a report. The *Guide* includes a suggested format to be followed in compiling a report and identifies various potential sources of information.

A connection report (also known as an anthropological report, historical report, claimants' statement) has three essential elements:

- evidence that the applicants are in fact the traditional owners of the land and waters claimed;
- evidence of continuity of connection; and
- evidence of existence of traditional law and custom which gives rise to the claim, and of continued holding of the native title rights and interests by the group in accordance with those laws and customs.

A connection report is presented at an early stage in the mediation process. The assessment process undertaken by the State looks at:

- the range of sources (both contemporary and retrospective) which have been used in the compilation of the report;
- how the contemporary and the retrospective information have been reconciled to present a continuous record; and
- how the sources have been analysed and interpreted to support the applicants' claim.

If there are gaps or questions arising from reading the connection report, the applicant group may be asked to supply more information.

The assessment process enables a recommendation to be made to the Executive of State Government confirming that the connection report has presented credible evidence that clearly identifies the applicant group as the traditional owners of the land and waters.

Acceptance of the connection report by the State during mediation is a type of preliminary acknowledgment of the nature and scope of the rights and interests sought in relation to the claimed country. The State notes that its requirements for the proof of native title may not necessarily be the same as other parties to the same claim.

The State is particularly conscious of its obligations to maintain and ensure the confidentiality of culturally sensitive material provided for the purposes of a connection report. All aspects of a connection report prepared as part of mediation of a claim, including the State's response, are confidential to the mediation process. Each report is kept in a locked place within the Historical and Anthropological Unit in the Department of Premier and Cabinet. If required, specific procedures can be negotiated to limit access to the material to those directly involved in the connection report.

The *Guide* states that it will be constantly revised and welcomes suggestions and comments for its improvement.

Western Australia: The published *Guidelines* of the previous Western Australian Government stated that the Government would consider negotiation of native title claims where:

- the native title claimants provide satisfactory evidence of their ancestry and their continuous traditional connection (the evidence to be incorporated in what is referred to as a 'connection report');
- there are no overlapping claims other than those which reflect shared native title rights and interests;
- the native title claim excludes tenures granted by the Crown;
- native title rights and interests claimed over non-exclusive tenures are consistent with other parties' rights and interests; and
- the native title claimants acknowledge that any native title rights and interests are subject to State laws of general application.

Each native title claim would be assessed on its merits to determine if there is scope for a consent determination of native title. The support of other people, indigenous and non-indigenous, with interests in the same area was said to be important in reaching a consent determination.

The detail provided in a connection report should be no less than is required to prepare a case for the Federal Court, with the exception that the native title applicants are not expected to provide oral testimony. Native title applicants are not, however, precluded from providing some evidence in the form of video or audio recordings or witness statements.

On 19 April 2001 the new Labor Government of Western Australia announced a review of native title negotiating practices in that State. Issues to be considered by the review are to include:

- the level of evidence required in reports on indigenous connection to country;
- the scope for cooperation between government and native title claimants in the production of reports;
- potential for joint planning and prioritisation of claims; and
- the applicability of negotiation principles and practices of other states

The report of the review is expected to be provided to the Government by 31 July 2001.

Pre-trial exchanges

Where mediation is unsuccessful, or succeeds only in part, the matter will be listed for trial. Preparation for a trial is usually controlled by detailed directions made at case management hearings. The directions have regard to the novel nature of the litigation. The directions in *Ward v Western Australia*,¹⁸⁵ for example, provided for documents to be filed which:

- set out the tenure history of the land;
- outlined the facts to be relied upon by the applicants to show the historical connection of the applicants with the land and water claimed;
- outlined the facts to be relied upon by the applicants to show contemporary connection of the applicants with the land and water claimed;
- outlined the facts to be relied upon to show the applicants were members of an identifiable group which observed or acknowledged traditional laws and customs;
- provided the reports of expert witnesses and any documents referred to in those reports not available to experts instructed by other parties; and
- set out particulars of dealings with the land and waters on which respondents would rely to argue there had been extinguishment of native title and any documents relevant thereto.

In lieu of pleadings the parties were directed to file statements which set out the relevant issues, facts and contentions as perceived by the parties. In addition, directions were made dividing the trial process by requiring counsel for the applicants to open their cases in detail after which the trial would be adjourned to allow the respondents to analyse the cases to be presented by the applicants and prepare their cases in response. Further directions were made for the appropriate manner of conducting the hearing having regard to the requirements indicated by the opening statements.

¹⁸⁵ (1998) 159 ALR 483 at 495-496.

The orders made by Justice Drummond during a directions hearing relating to *Yirrganydji People #2 v Queensland* are an example of the types of orders that might be made and give an idea of the order of events in pre-trial case management.

Justice Drummond ordered that:

- “2. By 31 December 1999 the applicants file and serve:
 - (a) a list of all persons on behalf of whom the application is made;
 - (b) a concise statement of the material facts to be relied upon to show the connection (including physical and spiritual connection both historically and of a contemporary nature) of the Yirrganydji with the land claimed;
 - (c) a concise statement of the material facts to be relied on to identify the Yirrganydji group, including the social, cultural and political elements of the group including supporting genealogies. The supporting genealogies will show:
 - (i) the biological or other relationship between each of the adult applicants and any ancestors belonging to the Yirrganydji group who are alleged to have native title rights and interests in the land claimed; and
 - (ii) proper genealogical diagrams showing how the adult applicants trace their ancestry to those ancestors;
 - (d) where the connection to the land refers to sites on the land of special significance to the applicants, a statement identifying those sites, with sites in respect of the locations of which the applicants seek confidentiality being identified in a confidential schedule to the statement;
 - (e) a statement as to where a restriction upon publication is intended to be sought in relation to any evidence to be relied upon, together with a brief statement of the grounds to be relied on in support of each restriction;
 - (f) a statement of the nature of the rights and interests said to be exercisable under the native title sought to be determined by the application; and
 - (g) a statement of the orders sought in the proceeding.
3. By March 2000 any respondent who wishes to dispute any fact or contention relied upon by the applicants, or to raise additional facts and/or contentions shall file and serve a statement of facts, issues or contentions in reply which is to include, inter alia, details of:

- (a) the matters in dispute;
 - (b) any additional facts or contentions relied upon in opposition to the applicants' claim;
 - (c) any further or alternative orders sought.
4. By 7 April 2000 the State of Queensland file and serve a set of documents to be relied upon as establishing the current and historical tenure of the land claimed; including
 - (a) copies of all title documents necessary to establish the status of the land;
 - (b) where the land or any part of it has been set apart or dedicated to public purposes, copies of relevant notices published in the Government Gazette;
 - (c) copies of all compiled plans and other maps kept by the Land Titles Office or the Department of Natural Resources which show the boundaries of the land claimed.
5. By 28 April 2000 the applicants are to identify on a map the land the subject of the application and specify on that map the land excluded from it, and that map shall then be filed in the Registry, and a copy of the map as so filed is to be filed and served on the respondents.
6. By 30 June 2000 the applicants shall file and serve the report from the expert or experts whose evidence will be relied upon by the applicants in support of the claim, containing a statement of the qualifications and experience of, and account of the fieldwork and other sources relied upon by each author in preparation of the report/s.
7. By 30 June 2000 each respondent shall file and serve any other documents, including experts' reports, upon which it intends to rely.
8. Save in so far as the parties may by their solicitors in writing otherwise agree, access to experts' reports to which a claim of confidentiality is made shall be restricted, until further order, to each counsel briefed by a party and consultant anthropologist, linguist, genealogist or historian retained by that party and a reasonable number of assistants to each such consultant, such reports to be used solely for the purpose of this proceeding.
9. Costs be costs in the proceedings.

10. Liberty to the parties to apply for further directions on seven days notice.”

Pre-trial orders may include orders that evidence be taken from vulnerable witnesses who, because of age, illness or frailty may not live or be well enough to give evidence at a trial. The recording of such evidence raises practical and technical legal issues, but such a record may constitute valuable information which will assist in the resolution of claimant applications.¹⁸⁶

Preparation and presentation of expert evidence in Court

The movement of a matter from mediation to trial can have significant implications for the form in which an anthropologist’s work is presented. It might be expected that any documents prepared for the proceedings will be more detailed than those prepared for mediation. Attention also needs to be given to aspects of the content of a document that a party intends to tender as evidence in the proceedings. Documents that were uncontroversial for use in mediation (and which are not confidential to the mediation) may be challenged, in part, at trial.

Rules of evidence: As noted earlier in this paper, the *Native Title Act 1993* states:

“82(1) The Federal Court is bound by the rules of evidence, except to the extent that the Court otherwise orders.”

That provision was inserted on 30 September 1998 in place of a section that stated:

“82(3) The Court, in conducting proceedings, is not bound by technicalities, legal forms or rules of evidence.”

The previous provision was cited by the Court in a number of cases involving rulings on evidence.

Because the Court is bound by the rules of evidence, those rules need to be borne in mind when documents are prepared for use in a trial. Challenges can be made to the admissibility of evidence, on the basis that the evidence is in breach of one of those rules. For example, objections have been raised to the admission of field notes containing records of conversations with native title applicants,¹⁸⁷ the oral evidence of anthropologists as to statements made to them during fieldwork,¹⁸⁸ or the opinion evidence of an expert witness.¹⁸⁹ Consequently, the relationship between lawyers and anthropologists is important in the pre-trial process.

¹⁸⁶ For a detailed discussion of the issues see Ritter D and Flanagan F “The most obvious of dodges: preserving the evidence of Aboriginal elders in native title claims” in B Keon-Cohen (ed), *Native Title in the new millennium*, op cit, pp 285-304.

¹⁸⁷ *Daniel v Western Australia* [2001] FCA 223.

¹⁸⁸ *Lardil and Others v Queensland* [2000] FCA 1548.

¹⁸⁹ *Daniel v Western Australia* [2000] FCA 858.

During the hearing of a native title claim in the Pilbara region of Western Australia, Justice RD Nicholson was called upon to deal with a number of objections relating to the admission of anthropological evidence. In particular, the question of whether the opinion of an expert anthropologist was inadmissible because, among other things, it was based on hearsay evidence of out of court statements by persons available to give evidence. Justice Nicholson noted that, while evidence of an opinion is generally not admissible to prove the existence of a fact about the existence of which the opinion was expressed:¹⁹⁰

“if a person has specialised knowledge based on the person’s training, study or experience, the opinion rule does not apply to the evidence of an opinion of that person that is wholly or substantially based on that knowledge”.¹⁹¹

Even so, for the court to find that such opinion evidence is admissible it will be necessary for examination and cross-examination to take place to make apparent the extent to which the opinion is the product of an inference founded on “knowledge based on expert witnesses' training, study or experience.”¹⁹²

Such challenges, usually on what seem highly technical points, can result in some evidence being excluded. From an anthropologist’s point of view, it may be thought that the Court and the other parties are deprived of important information and hence the complete picture. It is worth noting (though it may be of little comfort) that the frustration that anthropologists feel when working with lawyers dates back more than 30 years. Professor Berndt recalled that, when working on the Gove land rights case, he and Professor WEH Stanner provided either too much or too little material. He wrote:

“I was concerned with interpreting the local ethnographic situation to the best of my ability, ensuring that Aboriginal views were faithfully presented. I believe that Stanner was concerned with that dimension too; but he – in my view – erred on the side of over-generalizing and attempting to fit facts into a broader abstract model which, if I understand him correctly, was designed to establish a bridge between the ‘raw material’ and legalistic theory and practice.”¹⁹³

Berndt thought that, in presenting material to the lawyers preparing the Aborigines’ case, he was forced to “over-simplify”, and he referred to “the trap of over-simplifying data for legal consumption”.¹⁹⁴

Berndt also recalled his frustration when giving expert testimony in the trial.

¹⁹⁰ *Evidence Act 1995 (Cth)* s 76.

¹⁹¹ *Daniel v Western Australia* [2000] FCA 858 at paragraph 12.

¹⁹² *Daniel v Western Australia* [2000] FCA 858 at paragraph 30.

¹⁹³ RM Berndt “A long view: some personal comments on land rights”, *op cit*, p 11.

¹⁹⁴ *Ibid* p 12.

“During the proceedings I was often misunderstood or misinterpreted; and when I wanted a free hand to explain what I considered to be quite vital points, I was interrupted or stopped because I was going beyond the limitations of the question posed. One thing that struck me at times was the growing complexity of legal interpretation of what I regarded as straightforward anthropological statements about how the north-eastern Arnhem Landers regarded (regard) rights to land in terms of both ownership and usage”.¹⁹⁵

Guidelines for expert witnesses: The Federal Court’s *Guidelines for Expert Witnesses* state that an expert witness has an overriding duty to assist the Court on matters relevant to the expert’s area of expertise. The expert is not an advocate for a party and their paramount duty is the Court and the person retaining them.¹⁹⁶

The Guidelines set down the form expert evidence to the Court should take and state that:

- 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 expert should be clearly and fully stated;
- the report should identify who carried out any tests or experiments upon which the expert relied in 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: (i) all instructions (original and supplementary and whether in writing or oral) given to the expert which define the scope of the report; (ii) the facts, matters and assumptions upon which the report proceeds; and (iii) the 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

¹⁹⁵ Ibid p 12.

¹⁹⁶ *Guidelines for Expert Witnesses in proceedings in the Federal Court of Australia*, Federal Court Practice Direction <http://www.fedcourt.gov.au/pracproc/practice_direct.html> (21 June 2001).

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; and
- where an expert's report refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter, these must be provided to the opposite party at the same time as the exchange of reports.

The guidelines for expert witnesses were considered in *Sampi v Western Australia*,¹⁹⁷ when Justice Beaumont dealt with an application by the State to issue subpoenas against two expert anthropologists seeking all records used in the preparation of their reports.

In particular, the State submitted that one anthropologist did not attach, or summarise, the instructions given to her which defined the scope of the genealogies. The anthropologist stated that she had not received “specific instructions... defining the scope of the genealogies” she had been commissioned to prepare. Justice Beaumont read the anthropologist’s response as being that she had been commissioned to report on the relevant genealogies “without any particular direction from the client” that is, by an “open” retainer or commission. Thus it appeared that the relevant guidelines had been complied with.¹⁹⁸

The State also referred to statements in the reports describing extensive fieldwork, recorded in field notes, to which (to some extent) reference was not made in the reports. In those circumstances, the State argued that the requirement to attach, or summarise, all of the facts, matters and assumptions upon which the reports proceeded applied to the whole of the fieldwork and related field notes and “not merely the facts (etc.) relied upon in the formation of the opinions expressed in the report.”¹⁹⁹

Justice Beaumont found “substantial force” in the State’s arguments and found that the intent of the relevant guideline was

“to ensure adequate disclosure of the basis upon which the expert opinion is formed. Where that opinion is (in whole or in part) based upon fieldwork, an appropriate description of that fieldwork ought to be provided, sufficient to enable a reader to understand fully the actual process of reasoning which led to the formation of the opinion... In other words, 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 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.”²⁰⁰

¹⁹⁷ *Sampi v State of Western Australia* [2001] FCA 110.

¹⁹⁸ *Sampi v State of Western Australia* [2001] FCA 110 at paragraphs 7-9.

¹⁹⁹ *Sampi v State of Western Australia* [2001] FCA 110 at paragraph 12.

²⁰⁰ *Sampi v State of Western Australia* [2001] FCA 110 at paragraph 20.

His Honour went on to say that the level of disclosure is governed by what is appropriate to enable the reader to reach a proper understanding of the approach that the expert has taken to the field information.²⁰¹

Anthropologists need to be aware of the possible legal requirements when they decide whether to accept engagement in relation to native title proceedings.

Use of anthropologists' reports: In *Yarmirr v Northern Territory of Australia*,²⁰² Justice Olney summarised his approach to the anthropologists' report in the following terms:

- “(i) to the extent that it sets out the basis upon which the applicants' claim to native title is formulated, it is in the nature of a pleading;
- (ii) it contains, to some extent, expert opinion evidence of persons qualified in the relevant field of learning;
- (iii) to the extent that it contains assertions of fact in the nature of hearsay, based upon information supplied by informants who later gave evidence, regard must be had to the evidence of the informants rather than to the contents of the report;
- (iv) inconsistencies between facts asserted in the report and the evidence of the witnesses may reflect upon the credit of the witnesses, but this would not necessarily be so if the weight of evidence suggests that the report is inaccurate;
- (v) the weight to be accorded to assertions of fact not in the nature of expert opinion which are not supported by the evidence of witnesses will depend upon the particular circumstances including whether or not the respondents have had a real opportunity to test the accuracy of the matters asserted in the report.”²⁰³

He continued:

“In the present case the anthropologists' report serves the very useful purpose of providing the contextual background against which the oral testimony of the applicants' witnesses can be better understood. Whether or not a particular statement in the report is to be classified as mere pleading, as expert opinion or as hearsay is not always readily apparent but to a very large extent the report can be accepted as both reliable and informative. It contains some speculation but not much, and to the extent that it does, I have not found it necessary to refer to it.”²⁰⁴

²⁰¹ *Sampi v State of Western Australia* [2001] FCA 110 at paragraph 21.

²⁰² *Yarmirr v Northern Territory* (1998) 156 ALR 370.

²⁰³ *Yarmirr v Northern Territory* (1998) 156 ALR 370 at 400 paragraph 63.

²⁰⁴ *Yarmirr v Northern Territory* (1998) 156 ALR 370 at 400 paragraph 64.

Justice Olney reached his decision having regard to the provisions of the *Native Title Act* in s 82 as they were prior to amendment in 1998, that section then providing that the Federal Court was not bound by the rules of evidence. As mentioned earlier, s 82(1) now provides that the Court is bound by the rules of evidence, except to the extent that the Court otherwise orders.²⁰⁵

During the hearing of the *Daniel* native title case, Justice RD Nicholson was called on to consider the admissibility of anthropological evidence in light of the new provisions and found it was appropriate to “first resolve the objections in the context of the rules of evidence before considering whether there is any proper discretionary basis to otherwise order.”²⁰⁶ He noted that:

“By enacting s 82(1) of the *Native Title Act* in 1998 and abandoning the prior provision that the court was not bound by the rules of evidence, Parliament evinced an intention that the rules of evidence should apply to native title applications except where the court order otherwise... The utilisation of the rules of evidence provides the Court with appropriate direction to properly resolve the issues arising on the evidence at hand.”²⁰⁷

Court appointed experts: Instead of being engaged by a party to the proceeding, an anthropologist may be engaged to provide expert assistance to the Court. Under the Order 34B of the *Federal Court Rules*, the Court or a Judge of the Court may, at any stage of a proceeding and with the consent of the parties, appoint an expert to assist the Court in the proceeding. The expert must be a person who has specialised knowledge based on the person's training, study or experience. The Rules go on to state that:

- “ (1) An expert assistant in a proceeding must give the Court a written report on the issues identified by the Court or Judge only.
- (2) However, at the direction of the Court or a Judge and with the consent of the parties, the expert assistant may assist the Court by making other comments in the report.
- (3) The expert assistant must:
 - (a) state in the report each issue identified by the Court or Judge; and
 - (b) give a copy of the report to each party.
- (4) The Court must give each party a reasonable opportunity to comment on the report and may allow a party to adduce evidence, or further evidence, in relation to an issue identified, but not to examine or cross-examine the expert assistant.

²⁰⁵ See *Daniel v Western Australia* [2000] FCA 858 at paragraphs 26, 29 per RD Nicholson J.

²⁰⁶ See *Daniel v Western Australia* [2000] FCA 858 at paragraph 26.

²⁰⁷ *Daniel v Western Australia* [2000] FCA 858 at paragraph 39.

- (5) A party must not communicate, directly or indirectly, with the expert assistant about any issue to be reported on, without the leave of the Court or a Judge.
- (6) The expert assistant must not give evidence in the proceeding.”

To date, the Federal Court has made limited use of experts with history or linguistic qualifications to assist it in some native title proceedings.

7. CONCLUSION

There are currently about 581 claimant applications awaiting resolution by agreement or a litigated determination. More claimant applications are expected to be made.

The volume and complexity of native title applications, as well as the number of parties to them, raise numerous practical issues for the applicants, other parties to each application and the institutions with responsibility to administer parts of the scheme – primarily the native title representative bodies, the Federal Court and the National Native Title Tribunal.

The pace and management of native title applications is not left to the parties. The *Native Title Act 1993* sets out administrative steps to be taken after a claimant application is made, and gives timeframes within which some of those steps are to be taken. The Federal Court actively manages the matters before it, referring most of them to the National Native Title Tribunal for mediation. The mediation process, which is tailored to the practical circumstances of each application, is generally supervised by the Court.

Not only does the Court actively manage the progress of each matter; the progress of some matters may be linked to the progress of part or all of other matters (particularly where claimant applications overlap). The consequence of this is not so much that case management affects the anthropologist’s role but that it may significantly affect when, where, how and why the anthropologist performs his or her role(s).

Anthropological assistance is likely to be required in respect of each claimant application. That assistance could be specific to a particular aspect of the application or be relevant to its progress at each stage. For example, anthropological advice could be required in:

- the preparation of a claimant application;
- the provision of information to accompany the application for the purpose of meeting registration test conditions;
- the preparation of a connection report or similar material for use in mediation;
- assisting parties to the mediation to deal with issues as they arise (eg the resolution of overlapping and competing claimant applications);
- assisting parties to assess the prospects of success of an individual application in mediation or at trial;
- assisting in the preparation of a question of fact that is referred by the Tribunal to the Federal Court in the course of mediation;

- the preparation of witness statements or an expert report for use in a trial, and the giving of evidence;
- assisting lawyers and others to develop strategies for the conduct of mediation or litigation.

Those who work in this area will know that claimant applications do not necessarily proceed in the same order or at the same pace through the native title process. To some extent, the direction an application takes and the pace at which it proceeds will be influenced by case management in the Federal Court. Other factors, such as the capacity of a representative body to assist applicants and the requirements of a State government or other party, will influence the progress of an application and, among other things, the level of anthropological assistance that is required.

The volume and variety of the work will increasingly make demands on individual anthropologists and will test the capacity of anthropologists collectively to provide an appropriate level of advice in a timely way to a range of parties in various circumstances.

Although applicants and other parties would be well advised to plan each stage in relation to the processing of a claimant application, the demand for anthropological assistance may not arise in accordance with that plan. If, for example, the Court divides or joins overlapping applications in order to make a determination of native title for an area of land or waters, the focus and priorities of the research may shift and other work may be reordered.

Nine years after the High Court's decision in *Mabo v Queensland (No 2)* and more than seven years after the *Native Title Act 1993* commenced, we are still refining the best ways to deal with native title claimant applications. Although the jurisdiction and power of the Federal Court is clearly set out in legislation, the way in which it operates is developed on a case by case basis by individual judges. A body of rulings or practices is emerging, but it is unlikely that uniform practices will be adopted.

The Court is well aware of the practical and broader social implications of the native title process. In a recently published paper delivered last year, Justice North wrote:

“Although the management initiatives implemented by the Court are world class, they can not transform native title litigation from the complex, lengthy and expensive process that it is. The features of complexity, length and expense militate against such litigation contributing positively to reconciliation. The Court has a limited role in that bigger issue. It is for the policy makers, not judges, to find a cheaper, simpler and quicker system which would more readily advance the process of reconciliation.”²⁰⁸

There are many challenges for anthropologists working in this area. To meet those challenges, anthropologists (and other experts) need to work as part of teams with

²⁰⁸ North, AM, 2000, “From the Internet to the outback – a world class court, op cit, p 29.

lawyers so that coordinated approaches are taken and outcomes can be achieved in ways which best use scarce professional and financial resources.

Attachment A

TABLE 1

Main steps in Native title Applications	Responsible agency	National Native Title Tribunal or equivalent State or Territory body	Relevant section of the Native Title Act
Filing	Application filed and checked for compliance with procedural requirements		S61 S61A S62
Referral #1	Application referred to Tribunal or equivalent body		S63
Notification #1		State or Territory Government and Native Title Representative Bodies provided with a copy of application	S66(2) S66(2A)
Registration		New registration test applied to native title application	S190B S190C
Notification #2		Native title application advertised and other potential parties notified	S66(3)
Parties	Applications for party status assessed and determined		S84 (S84A)
Referral #2	Native title application referred to Tribunal or equivalent body for mediation		S86B
Mediation		Mediation conducted	S136A
Agreement		Mediated agreement referred to Federal Court	S136G(1)
Agreed determination	Court considers if appropriate to make determination of native title		S81 S87 S94A
No agreement		Tribunal makes mediation report to Federal Court	S86E S136G(3)
Contested determination	Court decides whether to make a determination of native title (Court may refer matter back to Tribunal or equivalent body for further mediation)		S81 S94A S86B(5)