

Disparate judicial approaches to the production of anthropological fieldnotes: observations on the *Daniel* and *Smith* cases

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Introduction

My purpose here is to examine the implications of recent Federal Court decisions about access to anthropologists' field notes. In *Daniel v State of Western Australia* ('*Daniel*') and *Clarrie Smith v Western Australia* ('*Smith*')¹, the two trial judges came to different conclusions about applications by the State to have the anthropologists' field notes produced before trial. In the first case the judge refused to allow the notes to be produced until the anthropologist gave evidence, while in the latter case the trial judge ordered that the notes be produced before the expert evidence.

The decisions have implications both for anthropologists called as expert witnesses by native title claimants and for the claimants themselves in managing the preparation of their claims in ways which might not be prejudicial to their interests. My focus is on the former – that is, on implications for anthropologists – but in doing so I also comment on what I perceive to be some problems for the management of claims. Another paper is needed, perhaps by those who represent indigenous interests in Representative Bodies, on the issues raised by these decisions and the ways in which claims should be constructed in the future to take these matters into account.

The judgements

The *Daniel* and *Smith* cases are both native title claims in Western Australia. *Daniel* is a claim brought by the Ngarluma and Yindjibarndi people whose traditional lands lie in the region between the Hamersley Ranges and the coast, encompassing Roebourne, Karratha, Dampier and Wickham. The *Smith* claim was brought by the Nganawongka Wadjari and Ngarla to lands around the Ashburton River, about 200 km south of the Yindjibarndi. Both claimant groups were represented by the Aboriginal Legal Service, then a recognised native title representative body for the whole of the state. The hearings commenced at about the same time in mid-1999.

The primary evidence has concluded in *Daniel*. I was engaged by the main applicants to write an anthropological report and give evidence in the claim. Jan Turner was also called as an anthropological witness but she carried out no contemporary fieldwork with the claimants, basing her testimony entirely on research she had done previously in the area. The case stands adjourned pending the outcome of the Ward and Yarmirr

¹ The cases will be referred to as *Daniel* and *Smith* respectively. They are cited in full in the references at the end of the paper. Quotations from the judgements are also referenced by paragraph number from the electronic versions of the texts held on the internet at <http://www.austlii.edu.au>

appeals in the High Court and, because it has not formally concluded, I am probably constrained in what I can discuss about the substantive issues.

Smith was settled by negotiation. Settlement was reached after the taking of the claimants' evidence but before the anthropologists were called. Mana Waite had been retained to provide anthropological evidence and he had filed a report before the trial began. Waite was assisted by two other anthropologists: Stuart Fisher and Sally Babidge.

Daniel

In *Daniel* an expert anthropological report was filed before trial in mid-1998. The intention was that the report would be the basis for evidence by the anthropologist following the Aboriginal evidence. It was also intended that the anthropologist should attend the hearings and listen to the Aboriginal evidence and then file a supplementary report addressing the claimants' testimony as well as the reports of experts engaged by the respondents and other applicants.

It is significant that the claim was contested not only by the State and other non-indigenous parties, but by two other Aboriginal applicants. The claim began life as a single claim and, indeed, when I first began work on it some four years before trial, all of the applicants were joined as a single group. By the time the hearings commenced in 1999 the claim had split into three. Two small groups broke away from the original group and lodged claims of their own, partly overlapping the original claim. The breakaway claims, if I can describe them as such, were later to retain their own legal advisers and anthropologists, although in the case of the second applicant group, they were not represented at trial by counsel. Their anthropologist had also filed an expert report but did not give evidence himself². The third applicants were initially not represented at trial and did not attend any of the evidence given by the first applicants. They retained their own lawyers and engaged an anthropologist who filed reports and was called by them to give evidence.

The State sought the issue of a subpoena just prior to the commencement of the first applicants' evidence. The subpoena was broadly cast. It did not confine itself to documents that might lie behind the filed report, but asked for the production of all material³ relating to members of the first, second and third applicant groups.

The subpoena was resisted by the first applicants. As they were not represented the second and third applicants did not make submissions on the application⁴.

While the matter was being argued the claim proceeded and the first applicants' evidence was taken. When Nicholson J ruled on the matter the evidence of the

² In the absence of counsel, the anthropologist (Ron Parker) led the evidence of a number of witnesses called by the second applicants.

³ For convenience I will refer to the subject matter of the subpoena as the 'material' as what was being sought was a range of source materials including 'notes, books, video tapes and other documents'. (*Daniel* para 2)

⁴ Nicholson J treated the first applicants' submissions as applying equally to the second and third applicants and left open the opportunity for them later to address the question.

Aboriginal witnesses was well advanced. Evidence of the Yindjibarndi claimants had been concluded and the evidence of the Ngarluma was close to completion. The timing of the decision, if it had been to produce the anthropologist's material, would have made it impossible for the State to cross examine on it without recalling many witnesses.

Opposition to the production of the material was in two parts. First, it was claimed that although the report had been filed, until the anthropologist went into the witness box and gave evidence, the material was protected by client legal privilege (formerly known as legal professional privilege). Secondly, it was claimed that the material was protected by public interest immunity. The claim for public interest immunity did not get very far in either case, but I will nevertheless make some comments about it later in the paper. The main argument turned on the application of client legal privilege.

The court considered the question of privilege in two parts. First, was the material, or any of it, covered by client legal privilege? Secondly, if so, had the privilege been waived by the filing of the expert report?

Was the material privileged?

Because the subpoena was broadly worded, it potentially caught not only the documents, notes and other recordings that had been brought into existence because of the report, but other material that had been generated because of the anthropologist's association with all three applicant groups. As well as research done directly for the claim, there had been a number of other research activities. In the main these were heritage surveys carried out pursuant to the future act provisions of the Native Title Act and for the purposes of getting protection for sites under the Western Australian Aboriginal Heritage Act.

Nicholson J found that (1) the recording of communications between solicitor and client, or communications to the anthropologist either for the preparation of the expert report or for a heritage survey were privileged; (2) observations⁵ by the anthropologist were not privileged; and (3) the reports of the heritage surveys themselves were not privileged.

Waiver

Having found that certain of the source materials were privileged, the court then went on to consider whether the filing of the report constituted an implied waiver of the privilege. The State contended that it was unfair for it to have only the report and not the source materials, not necessarily because it needed them to cross examine the anthropologist, but because it wished to use them to cross examine the Aboriginal witnesses.

Nicholson J held that there was no unfairness because it was acknowledged that the source materials would be available to test the evidence of the anthropologist when he was called. Although the Aboriginal evidence might have been concluded when the

⁵ For a discussion on the distinction between communications and observations see Trigger and Blowes (2001).

anthropologist was called it was still open to the State to recall any witnesses after it had had access to the source materials.

The practical consequence of the decision in *Daniel*, then, was to deny the State the opportunity to test Aboriginal witnesses against the anthropologist's notes, at least until the anthropologist had been called and had been able to contextualise those notes. It was nevertheless the case that the judgement allowed for the eventual production of the anthropologist's notes, or at least those notes that were relevant to the preparation of his report.

Smith

The subpoena in the *Smith* case was somewhat narrower than that in *Daniel*. Rather than seeking all documents relating to the applicants, the subpoena sought only those that were 'gathered for the purpose of compiling the applicants' anthropology report'. A number of site survey reports were sought, including restricted reports of those surveys (*Smith* para 1). Access to the notes made for site surveys was not sought. In *Smith* there was only one applicant group so that there was not the complication of multiple claimants that was present in *Daniel*.

Similar objections to the production of the material were made by the *Smith* applicants and their anthropologist, namely that it was protected by client legal privilege and public interest immunity.

The presiding judge, Madgwick J, found it unnecessary to consider whether privilege attached to the source materials as he came to the view that any privilege that might have applied had been waived. In the judge's view, there would be unfairness in not requiring that the source materials be produced once the report itself had been filed. He believed that the argument that they should not be produced until the expert gave evidence was a 'technical distinction' that would inconvenience the parties and the Court and add to the expense of the case. He made it clear that he differed from the finding in *Daniel*.

In this case, in my opinion, it would be unfair to allow the report to stand without disclosing the documents upon which it was based. This would in effect amount to a partial disclosure of the available material. To the extent, if any, to which this conclusion may differ from that reached in *Daniel v State of Western Australia* [1999] FCA 1541 I respectfully find it necessary to give effect to my conclusion, however unfortunate disparate approaches to such a question may be. (*Smith* para 13)

Madgwick J ordered that the anthropologist should produce his notes to the respondents, after first examining them to exclude material which was not forensically relevant.

Consequences for researchers and claimants

A major consequence of the judgements is that the question of the status of anthropological source materials is left unresolved. To use Madgwick's words, the

judgements represent ‘unfortunate disparate approaches’ to the question. If Nicholson is followed, notes and other source materials will have to be produced, but only when the expert gives evidence, and that is usually after the conclusion of Aboriginal evidence. If Madgwick is followed, however, notes and source materials that lie behind an expert’s reports will probably have to be filed at the same time as the report itself, usually in advance of the Aboriginal evidence.

At one level, the consequences are the same – notes have to be produced under both judgements and, once introduced, it is open for other witnesses to be cross examined on them, even if it means having to recall them. There are, however, particular disadvantages to the introduction of an anthropologist’s notes before the expert gives evidence.

First, when notes are introduced at the time the expert appears, the expert is likely to put context and meaning to the notes. Simple misunderstandings of what the notes represent may then be avoided. In Daniel, counsel for one of the parties enthusiastically questioned me about a passage in the notes that seemed to categorise the claimants into particular groupings. Because they were in a field notebook, the assumption was that the groupings had been communicated to the anthropologist by the applicants. In fact, the entry did not originate from the applicants at all. It was a preliminary outline that I had made for myself about the way I might structure a report to the applicants’ solicitors. If the notes had been put to Aboriginal witnesses in the belief that they originated from them, any answers from them would have been quite misleading.

Secondly, holding off on the introduction of field notes until the expert gives evidence guards against aimless ‘fishing expeditions’ by lawyers who seek to gain whatever forensic advantage is available to them. Having raw notes from which to cross examine Aboriginal witnesses will tempt lawyers to test them out, even though they do not fully understand the notes themselves or the context in which they were taken. Introducing the notes after the Aboriginal evidence has concluded might make lawyers more temperate in their choice of material for cross examination and the need to recall witnesses.

A number of pertinent issues have already been canvassed by Trigger and Blowes (2001), and I do not propose to deal with them again in any detail. I simply draw attention to some of the difficulties raised by the course chosen by Madgwick.

1. Practical difficulties of cross examining witnesses from the notes

An anthropologist’s notes are often not the orderly journals of recorded communications and facts that may be presupposed from lawyers’ keenness to see them. They can be highly idiosyncratic mixtures of recorded information ranging from facts observed, remarks made by informants, reminders, jottings, drawings, preliminary thoughts, ideas for analysis, drafts, and countless other things. They are often not contained in neat, serially numbered volumes, and can include opportunistic jottings on maps and loose scraps of paper. In their totality they make up the body of recorded information that informs the anthropologist’s analysis of social systems. They are a pathway towards synthesis and the construction of anthropological models of the social world. They are not meant to be an independent record of the truth. They

also do not stand alone in the anthropologist's assemblage of data. Very often the notes will represent only a part of an experienced situation, a set of mnemonic devices that stimulate the recall of those experiences allowing the anthropologist to reconstruct situations and order facts into an explanatory frame.

As Trigger and Blowes (2001: 16) have remarked, an anthropologist's recorded notes 'are properly understood as part of an overall body of data which is necessarily neither internally consistent nor the complete record upon which the expert has relied.' To take those notes as representative of the complete record is potentially misleading to the lawyer and the court.

The problems generally associated with examining and cross examining expert witnesses will be compounded in the case of questioning that proceeds from the expert's raw notes. Questioning someone other than the expert on those notes introduces the complication that the witness is not the author of the work and may have no direct knowledge of the circumstances in which the note was made. There will often be a real question whether Aboriginal witnesses placed in such a situation will understand what is being put or the context in which the question is being asked.

Ormrod (1968) observed that there are inherent problems for the lawyer leading expert evidence.

Unless the questioner really understands the subject matter he may phrase his questions in ways which restrict the scientific witness or misplace the emphasis. At worst, he may ask questions which are unanswerable because to the witness they have no rational content. (1968: 241)

When it comes to cross-examination the difficulties may be exacerbated because the questioner does not have the advantage of familiarity with the expert's work or the assumptions from which it proceeds. Cross-examination that is 'ill-informed or based on inadequate instructions... will, at best, be futile and, at worst, seriously misleading.' (Ormrod 1968: 241) We can take these observations about the difficulties of interrogating experts themselves and multiply the potential for problems when Aboriginal witnesses are asked about those experts' notes.

Madgwick J, however, was unconcerned about arguments that an anthropologist's notes would be difficult to interpret. He observed:

It was suggested in the submissions prepared for Dr Waite that any notes that may have been taken in preparing the report can not be attributed any significance (or even meaning) by any person other than the note taker. That is not of legal significance. (*Smith* para 4)

Madgwick J was of the view that such issues really went to matters of the utility or weight of evidence taken in relation to such notes. Against this it could be argued that, without an adequate understanding of the cultural difficulties experienced by Aboriginal witnesses in answering questions in such situations, the court may not be

able to reach proper conclusions about utility or weight⁶ and may risk being severely misled.

2. Unfairness to the Aboriginal witnesses

The inherent difficulties of using an anthropologist's notes for cross examination have the potential to create unfairness for the Aboriginal witnesses. Part of that unfairness is that more weight may be placed on the recorded material in the expert's notebooks than on the oral evidence of the Aboriginal witnesses. The inclination of the courts to privilege the written records of non-indigenous observers over Aboriginal evidence has already been demonstrated in *Yorta Yorta*⁷. Where there is a conflict between an Aboriginal witness's account of a matter and a note about it in an anthropologist's field book, the court may prefer to give weight to the apparent evidence of the independent expert⁸.

In commenting on his approach to the anthropologists' report in *Yarmirr*, Olney J had this to say:

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. (*Yarmirr* para 63)

For 'report' substitute 'notes'. What appears to be in the judge's mind is that facts recorded by an expert might be privileged over the facts asserted in the oral evidence of an Aboriginal witness unless there is evidence to suggest that the expert is wrong.

Observing that cultural interpreters can 'get it wrong', David Ritter recently remarked

Indigenous people should not be disadvantaged by having information gathered on their behalf by third party experts easily disclosed through the displacement of legal professional privilege. In such circumstances, what can appear as the playing out of the "task of determining where the truth of a matter lies" can become just another instance of cross-cultural bullying....In order for justice to be done in a native title case, the native title claimants should have a capacity to heavily influence what third party accounts of their law and custom reach the Court. (Ritter 2000: 21-22)

3. Capacity to cause offence and distress to the claimants

Notes also contain material which can be highly sensitive, personal and potentially damaging of social relations. Questioning on that material can cause distress and

⁶ In my experience it is much more difficult, in the strict regime of the Federal Court, to provide continuous advice to counsel during the taking of Aboriginal evidence than it is in the less formal atmosphere of the hearings of the Aboriginal Land Commissioner in the Northern Territory.

⁷ Reference to *Yorta Yorta* case.

⁸ David Trigger has pointed out to me that the concept of weight is itself complex and goes to matters such as the expert's lack of personal interest in the matter at hand.

discomfort, not just for the witnesses but for members of the community who listen to it as part of a court audience. It is no real answer to recommend that anthropologists cease to record sensitive material or information that reveals conflict within the claimant's community. Anthropological research that does not take account of, and hence record, inter-personal dispute, rivalry, jealousy, claim and counter-claim, will risk missing vital information about the group, particularly in the field of law and custom. Indeed, the evidence of disputation may itself be evidence of the continuing existence of a system of native title.

The uninformed use of material recorded in notebooks may also raise questions of cultural propriety. Putting questions that directly challenge what others say, using the information in an anthropologist's notes, can breach cultural rules, especially where those notes attribute opposing views to identified sources.

4. Breach of anthropological ethics

Anthropologists faced with an order of the kind made in *Smith* may find themselves in an uncomfortable zone between the requirements of anthropological ethics and the court's demands of experts. The Federal Court's guidelines stipulate that an expert's 'paramount duty is to the Court and not to the person retaining the expert'⁹, favouring full and frank disclosure so that the court can deal openly with all the issues. On the other hand, most anthropological codes of ethics stipulate that an anthropologist's first duty is to the subjects of study.

Fellows of the Australian Anthropological Society must agree to abide by the Society's code of ethics, which includes the following provision:

Members should not knowingly or avoidably allow information gained on a basis of trust and co-operation of those studied to be used against their legitimate interests by hostile third parties.¹⁰

Clause 2.1 of the code stipulates that where conflict exists between the various parties involved in research, 'the views and interests of those studied should be placed first'. It is conceivable that an anthropologist engaged in a native title claim could decide that court directions requiring the anthropologist to hand over effective control of their field materials in a situation where those materials could be misused or deployed against the interests of those studied put him or her in breach of the code.

Ethical considerations also arise when, as in *Daniel*, there is a fracturing of the claimant group and attempts are made to use the anthropologist's notes in disputes between the applicants themselves.

Where there are competing claimants the anthropologist may be placed in a very difficult position. A researcher usually cannot know beforehand that splits are going to occur, or if he or she does, not be in a position to influence their outcome. Splits

⁹ *Federal Court of Australia: Practice Direction. Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia*. Reproduced in Keon-Cohen (2001: 263).

¹⁰ *The Australian Anthropological Society Interim Code of Ethics 1992*, clause 3.8. Reproduced in Keon-Cohen (2001: 259).

will often be accompanied by hostilities between the parties and this will increase the likelihood that one or other group will want to use the anthropologist's notes to contest issues between the opposing camps. An anthropologist caught in such a dispute may have to withdraw from appearing for one of the protagonists in order to protect his or her obligations to the wider group.

Public Interest Immunity

An argument that the anthropologist's notes were protected by public interest immunity was run in both *Daniel* and *Smith*.

Nicholson J did not give it much emphasis, dismissing it in five short paragraphs. Taking *Aboriginal Sacred Sites Protection Authority v Maurice* into account, Nicholson J was of the view that the correct approach to public interest immunity was a weighing exercise involving two factors: the 'proper protection of minority rights including deeply held spiritual beliefs' and whether disclosure would involve a breach of confidence [*Daniel*, para 61].

In a manner reminiscent of the stance taken by the Central Land Council in *Maurice*, the Aboriginal Legal Service agreed that the parties could have access to the anthropologist's research materials when his report was introduced into evidence. In this situation it was therefore difficult for the anthropologist to sustain an argument that the materials should remain confidential. It was also difficult to argue that the materials would not be properly protected because they would be covered by court orders agreed to by the applicants' lawyers and their opponents.

It was perhaps not surprising, therefore, that Nicholson J disposed of the claim for public interest immunity in the following terms:

There are two features which I think are particularly important here. The first is that the first applicants have no objection to the discovery of all the subpoenaed materials at the time the expert report of Mr Robinson goes into evidence, so far as that report makes use of that subpoenaed material. It is not therefore maintained that there are any of the public interest considerations such as I have referred to which endure beyond that point in time. Secondly, the first respondents here expressly abjure that the response to the subpoena should in any way disturb the orders of the Court in respect of secret or culturally sensitive information. [Para 63]

Madgwick J gave the question even less space than Nicholson. In his view, the appropriate procedure for dealing with public interest immunity was to make suitable orders of the court protecting the information.

The protection of and respect for aboriginal rights and beliefs are manifestly matters in the public interest, however the concept of public interest immunity does not exist merely to enable tactical advantages or disadvantages in litigation. Where the interests of the Court doing justice and the public interest in the protection of confidential material concerning Aboriginal spiritual beliefs can both be reasonably accommodated by an appropriately framed

order, this should be done. Where questions of the balance of competing interests are involved, their reconciliation should not be discouraged. This may be achieved in this case by restricting access to the materials collected or prepared by Dr Waite to counsel, instructing solicitors and the expert anthropologist engaged by the first respondent, and counsel and instructing solicitors for the third respondent. Further, these parties may uplift only one copy of the documents, which may not be reproduced, and will upon conclusion of the trial be returned to the Court and destroyed. Obviously no extraneous use of these materials may be made and any necessary gender restrictions will be complied with. [*Smith* Para 17]

Recent developments in the Sampi case

The matter of production of anthropological field notes has arisen again in the *Sampi* case (the Bardi Jawi native title claim in the Kimberley region of Western Australia). There, two anthropologists, Katie Glaskin and Geoffrey Bagshaw, have been the subject of applications for the issue of subpoenas to produce their field materials. As in *Smith*, the subpoenas are specifically directed at material used to bring their expert reports into existence.

It appears that the judge (Beaumont J) has come at the issue in a different way both to *Daniel* and *Smith*. He starts with the Federal Court Guidelines for Expert Witnesses and, in particular, the guideline that states:

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 assumption upon which the report proceeds; (iii) the documents and other materials which the expert has been instructed to consider.

He sees the issue first and foremost as a matter of the duties and responsibilities of expert witnesses and as a question of case management. His order is then one of directing the anthropologists to confirm that their reports comply with the guidelines, subject to any legitimate claim for client legal privilege.

Presumably what is being sought here is the attachment of relevant field notes and other documentary sources to the expert reports. The same guidelines were also considered in *Daniel* where Nicholson J specifically concluded that they did not require such an action. This is what Nicholson said:

The Federal Court practice direction concerning expert evidence requires that "an expert's written report must give details of ... the ... other material used in making the report". Furthermore it directs that "there should be attached to the report, or summarised in it ...the facts, matters and assumptions upon which the report proceeds". In my view this direction did not require Mr Robinson as an expert anthropologist

to attach field notes to the report where these have been summarised in it, or otherwise. (*Daniel* para 38(A))

Concluding Remarks

Maintaining client privilege

Even on the judgement in *Daniel*, researchers will need to be careful about how they set about their work if client privilege in their source material is to be maintained. For example:

- Researchers should ensure that communications are made confidentially. As I understand it, a communication that is not made confidentially cannot be covered by client legal privilege. Given the relatively open-ended way in which some field research is carried out, anthropologists will have to exercise care in carrying out their work to ensure that their enquiries remain confidential.
- There should be an awareness of the distinction drawn by lawyers between communications and observations. In *Daniel*, even though the court found that the anthropologist's record of communications was privileged, those parts of the notes that recorded observations were not.
- It should be remembered that it is only communications involving the clients or their lawyers that will be privileged:

If there are communications to Mr Robinson by persons other than any of the applicants, that is persons other than any client, there is no basis for a client based privilege. (*Daniel* para 26)

It will often be the case that groups with whom an anthropologist works will not be restricted to the applicants or members of the native title claim group. To carry out investigations of sites, for example, it might be necessary to involve other traditionally knowledgeable people who would participate in discussions about the site's significance. As I understand the *Daniel* ruling, the recorded communications of such people will not be privileged.

- The content of the source materials should not be communicated to any parties other than the clients and their legal advisers. Again, there are difficulties in some situations where fieldwork involves mixed groups of people who may become privy to what has been communicated to the anthropologist.
- Particular issues might arise when site surveys are carried out. While the notes taken on such surveys might be protected if the intention is to pass on the information to the client's legal advisers, *Daniel* leaves open the question whether privilege in the notes is waived when the survey results in the presentation of a report to a third party.

A number of practical suggestions have also been made by Keon-Cohen (2001) which apply generally to anthropological research and the preservation of client privilege.

Do the interests of anthropologists and the claimants always meet?

Or more properly, do the interests of anthropologists and the claimants' lawyers always meet?

Anthropologists need to remind themselves that in these actions the anthropologist might stand alone because the interests of the researcher and the claimants do not necessarily coincide. Lawyers acting for the claimants may see a forensic advantage in having a researcher's notes admitted into evidence while the researcher may not see it that way. This was highlighted in the *Maurice* case when the Central Land Council argued against the anthropologist's attempts to seek public interest immunity for his documents. After considering the findings of Maurice J in the case, Toohey J commented:

In the present case it must be remembered that the Central Land Council, speaking for the claimants, submitted that none of the documents ordered to be produced had been shown to involve the adverse consequences adverted to by the Authority. Furthermore, the Council acknowledged that, on such evidence as there was and on such instructions as it had been able to obtain, the claimants wished the documents produced so that the hearing might continue. [*Maurice*, para 69]

On a practical level, separate representation can be costly. The anthropologist who wants to put separate submissions to the court will have to instruct solicitors and, if representation in court is required, will have to brief a barrister. Courts operate according to their own timetables and adjournments and delays occur. Delays can add substantially to the final legal costs. Where an application to contest a subpoena is lost, as in *Smith*, costs may also be awarded against the anthropologist as well as the native title claimants.

Making sense of it all

It is early in the history of native title claims. As the processes for hearing claims develop opposing parties' eagerness to pursue anthropologists' notebooks to gain a forensic advantage over the claimants may abate. There is probably an inverse relationship between the amount of interlocutory activity generated by a claim's opponents and their actual understanding of the substantive issues of the claim itself. As native title lawyers become more familiar with the anthropological issues in claims, they may expend less energy on procedural and evidentiary issues and more on understanding the content of the claim.

It may also be the case, as David Trigger (in press) has foreshadowed that the pursuit of anthropological fieldnotes before trial might diminish as it becomes obvious to lawyers that they are really of limited usefulness to anyone other than the person who brought them into existence.

The manoeuvres in *Daniel* and *Smith* may also amount to little more than a warning shot or two to put anthropologists on notice that their opinions will not be accepted unchallenged. It might be expected that anthropologists themselves will become increasingly mindful of the procedures they use to research claims, how they record

their investigations and how they might comply with the court's guidelines for experts.

Is Public Interest Immunity a lost cause?

It would seem that arguments about public interest immunity are not fertile ground in native title cases. In *Daniel* and *Smith* they were summarily dismissed by the court. The matter was apparently not even raised in *Sampi*.

The difficulty seems to be that while the courts are sympathetic to the view that indigenous cultural information should attract public interest protection, the practical effect of this sympathy is negated by the court's view that a balancing of interest is possible through the adoption of protective procedures. In both *Daniel* and *Smith*, the courts have comforted themselves with the notion that, so long as there are strict orders restricting audience, distribution and eventual disposition of culturally sensitive documents then the court's interests outweigh those of the indigenous applicants. Madgwick J persuaded himself that strict arrangements about access to the anthropologist's materials aided the reconciliation of competing interests. He ordered, for example, that only one copy of the material could be uplifted by the parties, that they were not to be copied and were to be returned to the court to be destroyed at the conclusion of the proceedings. What was apparently not considered, however, was the possibility that making available even one copy of the material might be culturally inappropriate if the revelation was not made according to traditional laws and customs.

If the *Native Title Act* is to be regarded as beneficial legislation it should not be applied in a manner that has a deleterious effect on other indigenous rights. Indigenous rights in land were recognised by the common law in *Mabo*, but the statutory processes of actually gaining benefit from that decision may themselves contribute towards the erosion of other rights – in this case the right of indigenous people to control the flow of information and who is able to access information under Aboriginal law.

At another level, there is also the question whether public interest immunity should not apply to anthropological research materials generally, whether or not they are prepared as part of a native title claim.

In the United States, limited privilege is available to social scientists to protect their field notes from scrutiny. The District Court in New York, for example, refused to allow the Grand Jury access to a sociologist's field notes, concluding that a serious scholar collecting data for publication was entitled to protection unless there was a substantial government need to gain access to his materials. Chief Judge Weinstein observed that

Affording social scientists protected freedom¹¹ is essential if we are to understand how our own and other societies operate. (*In Re Grand Jury Subpoena* 583 F.Supp 991 at 993 (1984))

The judge went on to quote extensively, and with approval, from the views of sociologists and anthropologists about the need to preserve the confidentiality of their field notes.

In a native title context, such a recognition might only serve to offer partial protection for the research materials of scholars who were not themselves participating in a claim, such as anthropologists who had carried out other research with the claimants. In *Daniel*, the State sought the research notes of a number of scholars who had worked in the Pilbara, even though they were not directly involved in the claim. Some of them acceded and handed over copies of their notes; in at least two cases, however, vigorous objection was taken and the notes were not produced, or only partly produced.

While it might be possible for independent researchers to achieve such success, I suspect that anthropologists who consciously engage in native title claim work will not be able to resist production of their notes. On the basis of *Daniel* and *Smith*, a claim for public interest immunity will probably not succeed. The most that might be hoped for is that the anthropologist's notes will not be made available before expert evidence is led and, therefore, will not be available for the cross examination of Aboriginal witnesses until the expert has had an opportunity to put the materials into their proper context. Whether that is so will depend upon whether the courts follow Nicholson's lead in the *Daniel* case, or the alternative course laid out by Madgwick in *Smith* and, now, Beaumont in the *Sampi* case.

Resolving uncertainty

The disparities between the judgements may require review from higher courts in order to resolve the uncertainties for researchers and claimants, indeed all parties to native claims. *Daniel* and *Smith* are effectively concluded so that there can be no appeals from those decisions and review may have to wait until the next appearance of the question in a native title claim.

Perhaps one approach to this difficulty might be to re-appraise the way anthropologists are used in native title claims. Anthropologists might be used principally as expert advisers rather than expert witnesses. This will ensure that whatever they do is covered by client privilege. Where expert evidence is needed, the applicants could engage an independent expert on a strictly limited brief to give opinion evidence on defined aspects of the case. This might be done only on the basis of evidence heard in the court so that there is no separate contact with the clients that might generate communications and observations that are recorded by the expert. The expert called by the applicants would then be more or less on the same footing as those called by respondents who do not, as a rule, have separate access to the claimants.

¹¹ A reference to the First Amendment right to freedom of speech. The judgement notes that some courts considering the issue have relied exclusively on the First Amendment, but others have relied on the Federal Rules of Evidence. (at 992)

The judgements in *Daniel* and *Smith* are not catastrophic to the way that anthropological research is carried out for native title claims, but they put anthropologists on notice that they need to give careful attention to the way they perform their research and record its results. It remains for anthropologists and lawyers to structure a suitable framework¹² for that to occur.

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¹² The Australian Law Reform Commission (1999) has recently supported a suggestion from the Federal Court that professional bodies and the legal profession develop codes of practice for expert witnesses. Such a code might include procedures for dealing with an anthropologist's fieldnotes.