

Land, Rights, Laws: Issues of Native Title



Native Title Research Unit
Australian Institute of Aboriginal and Torres Strait Islander Studies

Contributing to the understanding of crucial issues of concern to native title

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Abstract

Native title is a relatively recent, complex legal process that raises particular issues for anthropologists working within it. Katie Glaskin provides an anthropological perspective on writing for the court, discussing recent decisions of the Federal Court requiring anthropologists to write expert reports that adhere to the Evidence Act (Cth) 1995 and the importance of anthropologists to properly understand native title law. The paper focuses on the exercise of anthropological expertise within the legal context of native title, examining the tension between 'improper influence' and 'permissible guidance' when working within a larger framework of positivist legal culture.

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An Anthropological Perspective on Writing for the Court

Katie Glaskin

Introduction¹

Since the *Native Title Act 1993* (Cth) was passed, anthropologists have been engaged to produce reports for the court in relation to native title cases. In a recent native title case, Mansfield J described the role that anthropological evidence might be expected to contribute to these cases:

Of course, what is central to the claim is the evidence of the Aboriginal witnesses. As has been expressed elsewhere, anthropological evidence may provide a framework for

¹ For their comments on earlier drafts of this paper, I am most grateful to David Trigger, Michael Robinson, Geoffrey Bagshaw, James Weiner, and to two anonymous reviewers. This is an amended version of a paper given at the Native Title Conference, Adelaide, 3-4 June, 2004.

understanding the primary evidence of Aboriginal witnesses in respect of the acknowledgement and observance of traditional laws, customs and practices.²

In native title cases, ‘un-specialised judges are called on to decide extraordinarily complex issues about the culture, cultural continuity and history of societies that are quite foreign from what their personal and professional lives have prepared them to do... For the most part lawyer advocates share their limitations’.³ Consequently, anthropologists may be asked to ‘give evidence about the meaning and significance of what Aboriginal witnesses say and do, so as to explain or render coherent matters which, on their face, may be incomplete or unclear’.⁴ Thus, anthropologists in the native title context perform a kind of cultural translation, which, in Wootten’s words, can leave them ‘caught in the middle, trying to mediate between mutually unintelligible worlds’.⁵ He urges anthropologists to ‘stand up to lawyers, to detect their ethnocentrism and conservatism, and to resist their tendencies either to mould the law in the interests of powerful clients, or to fall victim to the narcissism of their powerful profession’.⁶ This, he says, is ‘one of their very important functions in native title cases.’⁷ While Wootten’s view may not receive unanimous assent, I suspect that many anthropologists working in this field will be able to identify with the tensions between anthropology and law manifest in his exhortation. In terms of the admissibility of expert reports into evidence, and in terms of what Lindgren J has referred to as ‘improper influence’⁸ on their content or construction, these tensions are evident in the process of writing anthropological reports for the courts.

Anthropological reports submitted to the courts are produced in response to the contractual instructions the anthropologist has received from the body employing them, and may be constrained by the ‘practice directions issued by the relevant tribunal or court.’⁹ The kinds of reports an anthropologist may be asked to provide include:

1. Expert anthropological reports for submission to the Federal Court in litigated cases.¹⁰ In these cases, anthropologists need to be aware of the Federal Court’s *Guidelines for Expert Witnesses* in the preparation of their reports.¹¹ As the *Harrington-Smith* and *Jango* decisions¹² have recently emphasised, expert reports must comply with the requirements of the *Evidence Act 1995* (Cth). Portions of such reports that do not

² *The Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory of Australia* [2004] FCA 472, para 89.

³ H. Wootten 2004. ‘Conflicting imperatives: Finding truth in the courts’, in I. McCalman & A. McGrath (eds), *Proof and Truth: The humanist as expert*, The Australian Academy of the Humanities, p. 33.

⁴ *Alyawarr v NT*, see note 2 above, para 89.

⁵ H. Wootten 2004, see note 3 above, p. 36.

⁶ H. Wootten 2004, see note 3 above, p. 30.

⁷ H. Wootten 2004, see note 3 above, p. 30.

⁸ *Harrington-Smith on behalf of the Wongatha People v State of Western Australia* (No 7) [2004] FCA 338 (26 March 2004), para 27.

⁹ P. Sutton 1995. ‘Forensic anthropology in Australia: Does it have a case to answer?’ in J. Finlayson & D. Smith (eds), *Native title: Emerging issues for research, policy and practice*, Research Monograph No. 10, CAEPR, ANU, pp. 83-100, reference to p. 85.

¹⁰ For the only published example to date of such writing, see G. Bagshaw 2003. *The Karajarri claim: A case-study in native title anthropology*, Oceania Monograph 53, Oceania Publications, Sydney. Many of the kinds of reports listed here will be accompanied by genealogical materials to demonstrate, among other things, that the people claiming native title are the descendants of those people occupying the land at the time of acquisition of sovereignty by the British Crown.

¹¹ Available from http://www.fedcourt.gov.au/how/prac_direction.html

¹² *Harrington-Smith v State of Western Australia*, see note 8 above; *Jango v Northern Territory of Australia* (No 2) [2004] FCA 1004 (3 August 2004).

observe the legal distinctions outlined there between fact, opinion, and hearsay will not be admitted into evidence;

2. Connection reports establishing the basis of the applicants' claim to native title for the purposes of mediated native title outcomes (consent determinations or Indigenous Land Use Agreements). The West Australian Office of Native Title Guidelines ('WA Guidelines') reminds providers of connection material that they should be mindful that 'assessment of connection material is an onerous task which the Court is likely to scrutinise'.¹³ The 'Federal Court is likely to require material to be filed in the proceedings to support any determination it is being asked to make under s 87 of the *Native Title Act*';¹⁴
3. Anthropological reports commissioned by parties responding to native title claims, which are written as a response to the anthropological reports provided by the applicants or to their evidence, and draw upon relevant ethnographic literature, but usually not on fieldwork conducted by the author of the report. Such reports are sometimes referred to as a *peer review* of a connection report or expert report prepared for litigation;¹⁵
4. In a few cases where there have been significant difficulties with overlapping claims and contesting claimant groups, and/or where applicants in these circumstances are unrepresented by a representative body, the Federal Court has directly appointed anthropologists to write independent expert reports. I am aware of three such cases thus far, though there may now be others;¹⁶
5. Sometimes anthropologists may be asked to write affidavits for the court. For example, in the negotiations over the Burrup Agreement, where the agreement had to be ratified by the applicants in the *Daniel* case, the applicants brought a strike-out application under s 66B of the *Native Title Act*.¹⁷ This sought to remove one of the named applicants from the native title application (on the grounds that he was no longer authorised by the claimant group), and to remove three deceased persons from the application. The anthropologist, Michael Robinson, was asked to submit an affidavit detailing traditional decision-making processes among the Ngarluma and Yindjibarndi people in support of their application under s 66B.¹⁸ Anthropologists may also be asked to provide affidavits or reports in support of native title claimants' concerns about the impact of exploration and mining, in relation to the future act

¹³ Department of Premier and Cabinet, *Guidelines for the Provision of Information in Support of Applications for a Determination of Native Title* ('WA Guidelines'), Government of Western Australia, Office of Native Title, draft as at January 2004, p. 12.

¹⁴ WA Guidelines, see note 13 above, p. 3.

¹⁵ Anthropological reports from the first and second categories may be sent out for peer review assessment by the parties who have contracted those reports, prior to their submission to the Federal Court or, in the case of consent determinations, to the state government. These peer reviews, however, are not written 'for the court', and usually will not find their way into the court context.

¹⁶ See for example *Britten v Western Australia* [2001] FCA 1256 (5 September 2001). Bagshaw (pers. comm.) has written two such reports dealing with matters before the Federal Court in Queensland and Western Australia.

¹⁷ *Daniel v State of Western Australia* [2002] FCA 1147 (13 September 2002).

¹⁸ *Daniel v State of Western Australia* [2002] FCA 1147 (13 September 2002): see paras 5, 40-45.

provisions of the *Native Title Act*¹⁹ and a variety of other issues, such as the need for gender restricted evidence during the course of a trial;²⁰

6. Reports relating to criminal cases in court - such as prosecution under various state Fauna or Fisheries Acts - where there is a 'native title' defence. For example, anthropological reports were provided in the cases *Yanner v Eaton*, *Mason v Tritton*, *Wilkes v Johnson*, and *Underwood v Gayfer*.²¹
7. Outside of the native title context, anthropological reports relating to heritage issues at times may go to court, as in the Broome crocodile farm case.²² Anthropologists may also be asked to provide reports in relation to matters of customary law in criminal cases, as in the recent Northern Territory case *Hales v Jamilmira*.²³

While all these forms of anthropological work are worthy of discussion, my comments here are directed towards anthropological writing based on fieldwork: this will most often be those reports submitted on behalf of the applicants to the Federal Court in litigated cases and connection reports.

Writing Anthropology and the Law

In the *Gale* case, the applicants did not tender the evidence of the claimant group and expert witnesses.²⁴ These were marked as exhibits, and although there was technically no evidence before the Court, Madgwick J nevertheless 'had regard to that material' in relation to the issues before him.²⁵ Madgwick J, although not wanting to be 'unduly critical' of the main expert witness, who was described as having expertise in the field of prehistory, nonetheless suggested that this witness '(along with many others) had misunderstood *Mabo*' and that the 'original basis of the claim seems to have arisen out of a degree of confusion'.²⁶ Madgwick J also stated that the witness had 'not always displayed the rigours of inference and examination' expected of a professional, occasionally 'unjustifiably' turning 'speculations

¹⁹ Michael Robinson (pers.comm. 18/5/04) has provided such affidavits. An anthropological report was submitted in the Administrative Appeals Tribunal case *The Manbarra People and Great Barrier Reef Marine Park Authority and Anor* [2004] AATA 268 (15 March 2004), where the applicants sought to oppose the extension of a current permission to conduct pearling operations in the waters of the Palm Islands in North Queensland.

²⁰ In the *Sampi* case, Geoffrey Bagshaw and I submitted an affidavit concerning the distinction between the kinds of evaluation an anthropologist could make of gender restricted information on the basis of the restricted transcript alone, versus that which they could make on the basis of having been present to hear and observe the evidence (Affidavit of Geoffrey Colin Bagshaw and Katherine Anne Glaskin, affirmed 23rd May 2001, in *Sampi v State of WA*, No. WAG of 1998).

²¹ The reports were provided by David Trigger for *Yanner v Eaton* [1999] HCA 53, Scott Cane for *Mason v Tritton and Anor* (1994) 34 NSWLR 572, David Trigger for *Wilkes v Johnson* [1999] WASCA 74, and Patrick Sullivan for *Underwood & Ors v Gayfer & Anor* [1999] WASCA 56. Michael Robinson (pers. comm. 18/5/04) has also written a report for the defendants in a fisheries prosecution case which hasn't been tried in court yet.

²² *Western Australia v Minister for Aboriginal And Torres Strait Islander Affairs (Cth); Douglas v Hon Tickner; Minister For Aboriginal And Torres Strait Islander Affairs (Cth) v Western Australia*. Unreported judgement BC9406821 (29 July 1994). For further unreported judgements in this case see BC9507329 (7 February 1995) and BC9602124 (8 May 1996).

²³ *Hales v Jamilmira* [2003] NTCA 9. In this case, Geoffrey Bagshaw provided a NT Court with a 'brief anthropological overview of customary marriage practices among the Burarra people of north-central Arnhem Land', Geoffrey Bagsaw 2002. Customary marriage practices among the Burarra People of North-Central Arnhem Land. Unpublished report for North Australian Aboriginal Legal Aid, p 1. See P. Sutton 1995, note 9 above, p. 83, who speaks about the kinds of legal contexts anthropologists may be involved in.

²⁴ *Gale (on behalf of the Darug People) v Minister for Land & Water Conservation for the State of New South Wales* [2004] FCA 374 at paragraph 10.

²⁵ *Gale*, see note 24 above, para 10.

²⁶ *Gale*, see note 24 above, paras 132, 29 and 128 respectively.

into inference as to possible versions of events that have attractions for members of the claimant group'.²⁷

Although Madgwick J's comments here are not directed towards an anthropological report, the comments are equally applicable to our professional practice. As Nicholson J has said in *Daniel*, anthropological knowledge is 'specialised knowledge', which '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 expertise gained'.²⁸ The specialised knowledge of anthropologists called upon in native title cases arises since:

Mechanisms of inheritance and transfer of property are, as in any society including Western society, not always and necessarily fully conscious to those involved and many a ramification (even though the ground rules may be well known) may elude anyone but the trained investigator.²⁹

Madgwick's comments also reiterate the importance for anthropologists to have a sound comprehension of native title law. The High Court decision in *Yorta Yorta* has significantly impacted on how the courts consider the requirements of proof contained in s 223 of the *Native Title Act*.³⁰ Decisions like *Yorta Yorta* highlight the requirement for anthropological reports to address issues arising out of developing case law, where this affects how native title law is understood and applied by the courts. Connection Report Guidelines in various States have also been subject to change, especially following *Yorta Yorta*, and are likely to continue to do so as case law develops.³¹ Having said this, I also note however that the *Daniel*, *Neowarra* and *Lardil* cases³² were determined in 2003 and 2004, subsequent to the High Court's decisions in the *Yorta Yorta* and *Ward* cases.³³ In each of these claims, while the legal precedents set by these High Court decisions were applied, the anthropological reports had been written some time before the precedents and therefore were not written specifically to address the developments posed by them. Despite this, all the cases resulted in successful determinations of native title, indicating that the evidence presented, in total, nevertheless met the requirements posed by these developments. Notwithstanding this, anthropologists still need to be cognizant of these and ensuing decisions when formulating their reports.³⁴

My focus here then is not on discussing the kinds of things that anthropologists are required to consider in their reports, which may continue to change as case law develops, for which they

²⁷ *Gale*, see note 24 above, para 132. In *Daniel v Western Australia*, the anthropologist Ron Parker wrote a report and also led the second applicants' evidence. One would expect that this would leave him similarly open to such criticism (Michael Robinson, pers. comm. 18/5/04).

²⁸ *Daniel v Western Australia* [2000] FCA 858 at para 24.

²⁹ E. Kolig 1987. *The Noonkanbah story: Profile of an Aboriginal community in Western Australia*, Dunedin, University of Otago Press, p. 82. See also P Sutton 2003. *Native title in Australia: An ethnographic perspective*, Cambridge University Press p. xv-xvi, who similarly describes the role of anthropological investigation into these matters.

³⁰ *Members of the Yorta Yorta Aboriginal Community v State of Victoria* [2002] HCA 58 (12 December 2002).

³¹ Connection report guidelines include the Victorian Government's Guidelines for native title proof in Victoria (September 2001); The NSW Government's List of matters to be addressed in the preparation of a 'Connection Report' to satisfy the requirements of the New South Wales Government (nd); The WA Government's Guidelines for the provision of evidentiary material in support of applicants for a determination of native title (WA Guidelines) (October 2002), and see the WA Draft Guidelines (2004). The North Queensland Land Council (NQLC) also has produced Guidelines for compiling a connection report (July 2003).

³² *Daniel v Western Australia* [2003] FCA 666 (3 July 2003); *Neowarra v State of Western Australia* [2003] FCA 1402 (8 December 2003); *The Lardil Peoples v State of Queensland* [2004] FCA 298 (23 March 2004).

³³ *Members of the Yorta Yorta Aboriginal Community v State of Victoria* [2002] HCA 58 (12 December 2002); *Western Australia v Ward* [2002] HCA 28.

³⁴ See Madgwick J's summary of the propositions arising from *Yorta Yorta*, in *Gale*, see note 24 above, paras 17-18.

should have legal advice, and for which there are a number of commentaries already available.³⁵ Rather, I want to say something about the exercise of anthropological expertise within this legal context of native title, about what Trigger has identified as:

... a tension here between the necessity for a researcher to fit investigations into this legal context, yet maintain professional independence such that one's own disciplinary standards and practices are not swamped by the force of the legal process.³⁶

Permissible Guidance v Improper Influence

In the courts, expert reports are subject to the requirements of the *Evidence Act*. Wootten says that 'much of the law of evidence can be understood as a set of exclusionary rules', which 'place limits on what evidence will be admitted, if another party objects to the evidence'.³⁷ In order for evidence to be admitted it must be *relevant* to proving or disproving *facts* that are at issue in the case, it must lie within the expert's specialised area of knowledge and expertise, and is 'normally required' to be 'direct evidence rather than hearsay or opinion'.³⁸ While issues concerning admissibility of expert reports have arisen in many native title cases, decisions in the *Harrington-Smith* and *Jango* cases, in particular, have drawn attention to the requirement for anthropological reports to conform to the requirements of the *Evidence Act*.³⁹ In both cases, respondent parties had lodged copious objections to the anthropological reports (1426 objections in *Harrington-Smith*; 1100 in *Jango*).⁴⁰ Although, as Sackville J pointed out, 'the volume of objections does not necessarily indicate that the reports do not comply with rules of evidence', he nevertheless took the view that the reports had been prepared with 'scant regard for the requirements of the *Evidence Act*'.⁴¹ In order to be admitted into evidence, expert reports need to 'clearly expose the reasoning leading to the opinions arrived at', and 'distinguish between the facts upon which opinions are presumably based and the opinions themselves'.⁴² These cases are illustrative of the difficulties anthropologists encounter in preparing reports for the court that will be admissible. As Trigger has said, the court expects experts to 'carry out independent studies according to the norms, theories and methods of their own professions: yet receipt of the results of such research is inevitably subject to legal arguments and cross-examination that are often quite foreign to the expert's disciplines'.⁴³ Additionally, as Justice Lindgren has commented, experts 'cannot reasonably

³⁵ For example, see D. Ritter & F. Flanagan 2003. State Guidelines for connection reports after *Yorta Yorta*, *Native Title News* 6(2):18-20; D. Parsons. & D. Trigger 2003. Researching native title in the coming decade: Legal criteria and anthropological approaches. Paper presented at the Native Title Conference 2003, Alice Springs, 3-5 June 2003; J. F. Weiner 2003. Review of Queensland Draft Native Title Connection Report Guidelines. Submitted to Queensland Native Title Services, Department of Mines and Natural Resources, Queensland, August 2003; L. Wright 2003. *Themes emerging from the High Court's recent native title decisions*, National Native Title Tribunal Occasional Paper Series, No.1/2003, National Native Title Tribunal, Perth; G. Neate 2004. 'Speaking for country' and speaking about country: Some issues in the resolution of Indigenous land claims in Australia. Paper delivered to the Joint Study Institute, Sydney, Australia, 21 February 2004.

³⁶ D. Trigger 2004. Anthropology in native title cases: 'Mere pleading, expert opinion or hearsay'? in S. Toussaint (ed.), *Crossing Boundaries: Cultural, legal, historical & practice issues in native title*, Melbourne University Press, pp. 24-33, reference to p. 31-2.

³⁷ H. Wootten 2004, see note 3 above, p.22.

³⁸ H. Wootten 2004, see note 3 above, p.22.

³⁹ *Harrington-Smith v State of Western Australia*, see note 8 above; *Jango v Northern Territory of Australia* (No 2) [2004] FCA 1004 (3 August 2004).

⁴⁰ *Jango v Northern Territory of Australia* (No 2) [2004] FCA 1004 (3 August 2004), para 7.

⁴¹ *Jango v Northern Territory of Australia* (No 2) [2004] FCA 1004 (3 August 2004), para 8.

⁴² *Jango v Northern Territory of Australia* (No 2) [2004] FCA 1004 (3 August 2004), para 11.

⁴³ D. Trigger 2004, see note 36 above, p. 32.

be expected to understand the applicable evidentiary requirements.’⁴⁴ Thus, in the course of the *Harrington-Smith* case, Lindgren J stated that:

Lawyers **should** be involved in the writing of reports by experts: not, of course, in relation to the substance of the reports (in particular, at arriving at the opinions expressed); but in relation to their form, in order to ensure that the legal tests of admissibility are addressed.⁴⁵

Lindgren J’s concern here was with admissibility, with distinctions between opinion and whether ‘particular expressions of opinion lie outside the established “specialised knowledge based on the author’s training, study and experience”’ and ‘the assumed facts on which an opinion is based’.⁴⁶ Lindgren J stated that although lawyers should ‘avoid any possibility of suggestion of improper influence on the author...the distinction between permissible guidance as to the form and requirements of ss 56 and 70 of the *Evidence Act*, on the one hand, and impermissible influence as to the content of the report on the other hand, is not too difficult to observe’.⁴⁷

Anthropologists writing for the courts should look at Lindgren’s judgement in regard to these issues,⁴⁸ and to the practical issue he raises in relation to anthropologists numbering paragraphs in their reports. What I want to highlight here though is the distinction between *permissible guidance* and *improper influence*. This in turn brings me to the larger issue of the extent to which anthropological writing for the courts is situated within, and directed by, the positivist framework of legal ‘culture’.⁴⁹ The latter proceeds from the assumption that there are empirical facts to be ‘found’, to which the law can be applied. Anthropologists working in the field of native title must, of course, be mindful that what they are involved in is a legal process, and be familiar with native title legislation, developing case law and various connection report guidelines, according to what it is that they are required to write. In some cases, lawyers may give anthropologists very little guidance about what they require of their report; given the legal context, anthropologists should insist on ‘clearly written briefs and adequate feedback’ where this occurs.⁵⁰ Like Indigenous peoples themselves, for whom Dirlik has argued that the ‘price of admission’ into legal processes in pursuit of their rights ‘is to abide by the very culturally determined assumptions, rules, procedures of that courtroom’, anthropologists involved in native title must do likewise.⁵¹

However, there is the issue of the extent to which anthropologists may be subjected to improper influence in the writing of their reports. Stead has suggested that:

⁴⁴ *Harrington-Smith v State of Western Australia*, see note 8 above, at para 27.

⁴⁵ Original emphasis. *Harrington-Smith v State of Western Australia*, see note 8 above, at para 19.

⁴⁶ *Harrington-Smith v State of Western Australia*, see note 8 above, paras 16 and 20 respectively.

⁴⁷ *Harrington-Smith v State of Western Australia*, see note 8 above, at para 27. These points are, of course, equally applicable to any expert reports submitted in legal proceedings.

⁴⁸ Although his discussion is in the context of the Hindmarsh Island heritage case, anthropologists working in native would also do well to see P. Burke 2001. ‘The legal implications of *Chapman v Luminis* for anthropological practice’, especially his section on the preparation of anthropological reports (p. 5). Available from: <http://www.aas.asn.au/hindmarsh.htm>

⁴⁹ See D. Culhane 1998. *The pleasure of the Crown: Anthropology, law and first nations*, Talon Books, p. 66, and K. Laster 2001. *Law as culture*, Federation Press, pp. 159 and 202, for further discussion of legal positivism.

⁵⁰ Michael Robinson, (pers. comm. 18/5/04), who also suggests that this may be attributable to a lack of knowledge from the lawyers concerned regarding what anthropology offers, other than that they require an expert anthropologist to assist the case.

⁵¹ A. Dirlik 2001. Comment on ‘Lost worlds: Environmental disaster, “culture loss” and the law’, by Stuart Kirsch, *Current Anthropology*, Vol 42, No 2, pp. 181-182, reference to p.181

The most common ethical problem faced by the employee anthropologist is establishing the limits to which anthropological skills and training are used to support the cases of clients/and or the employing organisation. Pressure can be placed on anthropologists to achieve a particular result. This may range from a particular person wanting to be recognised as the main traditional owner in a royalty disbursement [and, I would add, this type of assertion by individuals can occur in native title work too], to a lawyer or other Land Council employee insisting on a particular anthropological approach to a land claim, native title determination, or cultural heritage dispute.⁵²

The kinds of ‘pressure’ that Stead identifies here may be, as he suggested, to adopt a particular anthropological model over another because of a legal view that one model will have a better chance of making the case than another.⁵³ An example I know of concerns an anthropologist who was told by the lawyers working on the case not to use a particular model in his report. In this case, the anthropologist kept to what he considered to be the most appropriate way to describe the society, and used that model. The case was the subject of a successful consent determination.

Equally, such pressure may involve reducing the complexity of the anthropological description of Aboriginal relations to country into simplified or pro-forma like descriptions to be checked off against various legal criteria: what Bagshaw has called ‘reducing such complexities to an ethnographically substantiated checklist of codifiable rights and interests’.⁵⁴

The complexity of Aboriginal relations to country will, should the applicants be successful, ultimately be rendered as codifiable rights and interests that can be recognised at law. That is the legal nature of native title. But I would argue that it is incumbent on the anthropologist not to proceed from this reductionist basis at the outset. Our task is, as faithfully and objectively as is possible, to present the required issues of connection to country, continuity of connection, laws and customs, rights and interests, and so on, in terms which are commensurate with our understanding of the ethnographic reality of the applicants. We may be working within legal frameworks, but we need to retain our anthropological vision, to continue to present our view of the complexity of the social field.

Justice French’s comments on the anthropological report in the Martu consent determination are instructive. He said that:

The anthropological report shows there was a gradual migration of Western Desert People from the desert heartland to the fringes as a consequence of the spread of European settlement. But this resulted in only a brief period of physical absence of the claimants from their traditional territories. Through the cultural mechanism of dream-spirit journeys, they kept contact with and responsibility for their countries while physically elsewhere. This is what they had always done in the desert where such absences were sometimes forced by lack of water and/or food resources in their core territories.⁵⁵

⁵² J. Stead 2002. Reflections on the past, present and future roles of anthropology in Aboriginal Land Councils and Native Title Representative Bodies. Second keynote address, Annual Conference of Australian Anthropology Society, Canberra, 3-5 October, 2002. Available at: <http://www.aas.asn.au/confpapers.htm>, p. 10.

⁵³ See also Patrick Sullivan 2002. Don’t educate the judge: Court experts and court expertise in the social disciplines. Paper presented at the Native Title Conference, Geraldton, 3-5 September 2002. Available at: <http://www.aas.asn.au/confpapers.htm>

⁵⁴ G. Bagshaw 2003, see note 10 above, p. 7.

⁵⁵ *James on behalf of the Martu people v State of Western Australia* [2002] FCA 1208 at para 8.

Evidently the anthropological report did not shy away from issues of migration,⁵⁶ absence from country and the maintenance of connection to such country through dream-spirit journeys. The report appears to have established that such practices are part of the applicants' traditional laws and customs, with French J concluding that this is 'what they had always done...'.⁵⁷

Rights and Interests - how far do we specify?

This is also an argument for not reducing complex ethnographic issues concerning land tenure, internal differentiation of responsibilities, rights, interests, and so on within the applicant group into 'results... [that may be found] legally, administratively or politically more palatable'.⁵⁸ For example, the draft WA State Guidelines say that the connection report should:

Provide a map showing the extent of the applicants' native title rights and interests in relation to the claimed area, where appropriate, the general location of areas of significance and, where relevant and practicable to the applicant group, the areas to which particular sub-groups assert specific connection.⁵⁹

As part of their expert reports, anthropologists usually provide maps, and these may include the locations of areas of specific sub-group connection, such as those of estate groups, where applicable. Where practicable, highly detailed site maps may be produced, showing a density of named topographical features and places, indicative of the claimants' knowledge and occupation of country, and their connection to it.

However, while it may be helpful for the State Government to have anthropologists represent the applicants' native title rights and interests on a map, I am unconvinced that this could depict a comprehensive representation of the ethnographic context. A complex of rights and interests distributed among the applicant group and exercisable according to various criteria is unlikely to be amenable to such kinds of representation and reductionism. For example, as Sutton has described, rights and interests may be 'core' or 'contingent', they may be 'dependent upon certain relationships with core rights holders' and so on.⁶⁰ The map reflects the bundle of rights approach that continues the artificial separation of rights and interests from a form of 'root' title, on which all rights and interests depend and flow, from the system of 'law and custom' from which those rights and interests are derived.⁶¹ Leaving aside these concerns for the moment, I would also assume that if one were to attempt to do this with any real regard to the ethnographic situation, it would take an enormous amount of concentrated mapping. In most cases, it is unlikely that anthropologists would be given the time - given the resources of NTRB's - to undertake such work. So such a map in most cases really would amount to educated estimations that could ultimately lead to the codification of native title

⁵⁶ The issue of migration also came up in *De Rose v State of South Australia* [2002] FCA 1342, see paras 316, 366, 906.

⁵⁷ *James on behalf of the Martu people v State of Western Australia*, [2002] FCA 1208 at para 8.

⁵⁸ J. Stead 2002, see note 52 above, p. 11.

⁵⁹ WA Guidelines 2004, see note 13 above, p. 10.

⁶⁰ P. Sutton 2001. *Kinds of rights in country: recognising customary rights as incidents of native title*. National Native Title Tribunal Occasional Papers Series No.2/2001, NNTT, Perth. Available at: <http://www.nntt.gov.au/metacard/research.html>, reference to p. 4. As Sutton says: The basic point here is that one can specify very generic kinds of native title rights, adding that they may be trammelled and qualified in various ways according to local customary law, but one can never go on unravelling the nature of specific rights to some mythical point of 'completeness' where every right, and all the conditions under which it might properly be exercised, can be exhaustively described and enshrined on paper (p.21).

⁶¹ K. Glaskin 2003. 'Native title and the 'bundle of rights' model: Implications for the recognition of Aboriginal relations to country', *Anthropological Forum*, Vol 13, No 1, p. 84.

rights and interests in those terms. We should always be mindful - and this is especially evident once in litigation - that respondent parties will seek to circumscribe and contain the degree to which native title rights and interests are recognised. A generic description of kinds of rights and interests, a description of the principles by which they are internally differentiated, of the 'laws and customs' through which rights and responsibilities are inherited, exercised and also negotiated, will be far less limiting in these terms than their representation on a map. Some aspects of connection report guidelines may suggest that we address things in a very particular way that is at odds with an anthropological understanding of that matter. At such points we need to remind ourselves that connection report guidelines are just that: guidelines.⁶²

At the end of the day, the anthropologist needs to be able to defend what they have written to the court as their own, carefully researched and considered analysis of the ethnographic situation.⁶³ Stead's advice to anthropologists on the issue of the degree of influence lawyers or others should have on their understanding and presentation of anthropological analyses in these cases is germane, as he says, 'the stakes are high' for Aboriginal clients:⁶⁴

...More damage will occur to Aboriginal aspirations with regards land rights and heritage protection from telling lawyers or their clients what they want to hear, rather than presenting them with sound advice based on careful, methodical research...⁶⁵

Those parties contracting anthropologists to write reports can, of course, decide whether they will take the anthropological advice, or use the anthropologist's report, or not. In *Gale*, Madgwick J said that 'the legal process makes it necessary that courts must proceed, in some matters, in ways that may dismay specialists in other fields of knowledge and endeavour'.⁶⁶ The possibilities for anthropological 'dismay' in the process of litigation, in particular, seem to be many, and are by no means restricted to the Court setting alone. What remains critical, for the applicants, is that anthropological reports are based on thorough research and a sound, carefully crafted ethnographic understanding, 'in response to a well prepared set of instructions from a qualified lawyer'.⁶⁷ Anthropologists who are confident that their reports fulfil these criteria - and address the requisite issues in respect of native title - should, where

⁶² In his review of draft Queensland Connection Report Guidelines, Weiner indicates that the State of Queensland has made this explicit: 'The State of Queensland has recognized the need for a Guide to assist a consultant anthropologist without being prescriptive as to the evidence presented or the methodologies adopted by the consultant. The Guide is also intended as a Guide and not a template.' James Weiner, Review of Queensland Draft Native Title Connection Report Guidelines. Submitted to Queensland Native Title Services, Department of Mines and Natural Resources, Queensland, August 2003, p. 4

⁶³ There is insufficient space here to address another important issue confronting anthropologists writing for the courts: questions concerning 'objectivity' and advocacy. This will remain a continuing issue where, once in court, anthropologists are required to defend the independence of commissioned reports. Federal Court guidelines stipulate that the expert witnesses' first duty is to the Federal Court of Australia, not to the party that contracts them; they are not, in any sense, to be advocates. Where the courts come to the conclusion that the objectivity and impartiality of an anthropologist working for an applicant group is compromised in that role, their evidence will be given less weight (e.g. see *De Rose v South Australia*, paragraphs 347-367). For further discussion concerning the question of objectivity in native title proceedings, see G. Bagshaw 2001. 'Anthropology and objectivity in native title proceedings'. Amended version of a paper delivered at the conference *Expert Evidence in Native Title Court Cases: Issues of Truth, Objectivity and Expertise*, Adelaide, 6-7 July 2001. Available at:

<http://www.aas.asn.au/confpapers.htm> He makes the point that the whole question of 'objectivity' poses complex philosophical questions (p.2).

⁶⁴ J. Stead 2002, see note 52 above, p. 5.

⁶⁵ J. Stead 2002, see note 52 above, p. 10

⁶⁶ *Gale*, see note 24 above, at para 42.

⁶⁷ I am grateful to an anonymous peer reviewer for this comment.

subjected to ‘strong pressure for change in approach or results’, follow Stead’s advice: ‘resist’.⁶⁸

⁶⁸ J. Stead 2002, see note 52 above, p. 11.

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