

Lawyers and Anthropologists in Native Title Cases

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Introduction

- ◆ Good afternoon and thank you for giving up your Sunday afternoon in such a wonderful setting to listen to a paper on the apparently esoteric topic of social anthropology and native title.
- ◆ I hope that our observations and experience in this area can further the debate about the role of experts in litigation generally.
- ◆ It is easy to tell this is not a native title related conference as we have not yet been welcomed to the country by the traditional owners – an essential first part of any getting together of the native title community.
- ◆ You may already be aware that areas in and around Broome have now been the subject of a formal determination that native title exists.
- ◆ I would acknowledge the Yawuru people in this regard.
- ◆ My role in the Federal Court is as District Registrar in the Northern Territory Registry where about 85% of our caseload is native title.
- ◆ It is a great shame that my colleague Louise Anderson, the Court's National Registrar for Native Title could not be here to co-present with me today – I hope to do justice to her views and not to fall too severely into a northern Australian centric approach.

- ◆ I should also clearly note that the views expressed are those of myself and Ms Anderson and not necessarily the views of the Federal Court or of any particular judge.
- ◆ I plan to speak for about 40 mins and then open up for discussion.
- ◆ I put my hand up to give a presentation at this conference on the basis of experience which I, together with Louise Anderson, have had in chairing conference of expert anthropologists in native title matters. These conferences, I believe, have the potential to greatly expedite native title cases and trials.
- ◆ The long timetables involved in native title cases are very much in need of expedition as Aboriginal and Torres Strait Islander people grow old waiting for their interests in land to be recognised and other land holders live unsure as to the effect of native title on their lives and business.
- ◆ However as this is not a native title conference – I wanted to spend a little time setting the scene of the native title caseload in Australia so that the initiatives with experts can be seen in their proper context.

System overview

- ◆ Native title was first recognised in the decision of the High Court in *Mabo v Queensland No.2* in 1992.
- ◆ The Court found that colonisation had not of itself extinguished the rights and interests held by Aboriginal People in land.
- ◆ Those rights and interests are recognised by the common law although vulnerable to destruction by inconsistent laws or executive grants.

- ◆ In addition some State laws and executive acts which would previously have extinguished native title were now prohibited by the Racial Discrimination Act 1975.
- ◆ In the wake of the decision, questions began to be asked including:
 - * the extent to which the decision would apply to areas on mainland Australia;
 - * how the decision would affect land management into the future;
 - * and interestingly, the status of any land grants made since 1975 which might be found invalid by virtue of the Racial Discrimination Act.
- ◆ In 1993, the Native Title Act was passed – a piece of legislation which did four fundamental things:
 - * recognised and protected native title;
 - * validated past grants (past acts);
 - * provided a system for allowing development on land the subject of native title (future acts); and
 - * provided a system for the claiming and determination of native title.
- ◆ Importantly – the 1993 Act provided for claims to be lodged with the National Native Title Tribunal (NNTT).
- ◆ It was thought that many, if not most claims could be mediated to an agreed result by the NNTT and those settlements then registered with the Court.

- ◆ Under this system the Federal Court would only be called upon to determine native title cases in the event of an inability to reach a settlement or in relation to specific legal points referred to the Court.
- ◆ Three things happened:
 - ◆ Firstly – the Wik decision made it clear that native title could continue to exist over those vast expanses of Australia which are or had been covered by a pastoral lease.
 - * This was the context in which the bitterly fought debate about the need for “certainty” emerged.
 - ◆ Less explosively – two other factors prompted change.
 - ◆ The decision of the High Court in *Brandy v HREOC* cast doubt on the constitutional validity of lodging with the NNTT and registering with the Court.
 - ◆ Further, it became clear that the then scanty provisions for agreements to be reached about doing things on land which is or might be affected by native title were insufficient.
 - ◆ The Act was substantially amended in 1998 – the legislation passed very narrowly with the support of Senator Harradine – among the amendments were:
 - * Provision of a comprehensive scheme for Indigenous Land Use Agreements;
 - * Insertion of a statutory definition of native title in section 223;
 - * Imposition of a registration test such that claims are required to meet certain criteria prior to the claimants accessing certain procedural rights in relation to development of land;

- * Validation of additional tenure grants – in relation to areas where, pre-Wik, many thought native title could not have survived;
 - * Dramatically changing the regime for allowing and regulating future acts – this aspect was the subject of much of the controversy;
 - * And finally – and most importantly for the current discussion - it realigned the system for dealing with claims in response to the *Brandy* decision and gave the court a much bigger role.
- ◆ Since the 1998 amendments – all claims have been filed with the Court and are managed under the auspices of the Court.
 - ◆ Of course the NNTT continues to perform a very important role including:
 - * Application of the registration test,
 - * Notification of potential parties,
 - * As the primary mediation service in the system, and
 - * Performing a number of arbitration roles in relation to future acts,
 - ◆ Meanwhile – the Court is responsible for managing the progress and judicial determination of claims;
 - * settling the list of parties to each application,
 - * referring matters to the NNTT for mediation and supervising the mediation,
 - including deciding whether mediation should continue,
 - * dealing with any interlocutory matters including strike out applications,
 - * determining questions of fact or law referred to it by the Tribunal,

- * settling the terms of agreements for consent determinations, AND
 - * where an agreed outcome is not reached, setting matters down for trial, and hearing and determining the matters in issue.
- ◆ In many ways native title litigation takes the same path as any other case in the Federal Court – for the most part, the same rules of court apply and the same judges deal with the various jurisdictions.
 - ◆ However as a young and novel area, native title matters tend to lend themselves to different and innovative approaches. The Court takes seriously its responsibility for working towards the utmost efficiency and effectiveness in its administration of justice.
 - ◆ The Court and the NNTT must maintain close communication to manage the parallel judicial and administrative systems that operate under the Native Title Act.
 - ◆ Reference should also be made to the parties who come before the Court in the native title arena.
 - ◆ Firstly – most claimants are represented – or at least funded – by the local native title representative body which is recognised under the Native Title Act.
 - ◆ These bodies which were funded by ATSIC until its demise are now funded by the Office of Indigenous Policy Coordination. The Native Title Representative Body routinely complains of insufficient funding and rely on the lack of resources as a reason for inability to progress claims whether in mediation or litigation.
 - ◆ Claimants who do not secure the support of their local representative body have very few options for securing alternative assistance.

- ◆ The compositions of the claimant groups are as varied as are Indigenous Australians themselves.
- ◆ The relevant State or Territory is the primary respondent in each matter.
- ◆ They have set up varying administrative structures to deal with native title claims acknowledging the native title ranges across a number of portfolio areas; justice, land management, indigenous affairs, mining and often others.
- ◆ The Commonwealth has a right to be a party and takes advantage of this right in only about 15% of cases either where a Commonwealth owned interest might be affected or where it perceives an important policy or legal point to be at issue.
- ◆ Other respondents include pastoralists, miners, other non-freehold interest holders, amateur and commercial fishing interests, local government authorities, Telstra, mortgagees, apiarists and many, many others.
- ◆ Some claims have over 200 respondent parties.
- ◆ Again many of these respondents are publicly funded by means of a scheme administered by the Attorney general's department.
- ◆ As at the end of last week (14 October 2005) there were 618 applications seeking native title determinations and 72 determinations of native title, of which 45 were reached by consent. This figure includes 53 determinations that native title exists in the whole or in part of the determination area and 19 determinations that native title does not exist.

- ◆ Of the current applications, 346 are subject to active mediation by the NNTT. Only 9 are expected to be heard in the coming 2-year period.
- ◆ 618 cases may not, of itself, suggest a highly complex and resource intensive caseload. However every case has its idiosyncrasies, and there can be little doubt that the jurisdiction has created particular challenges for the practice of the Court.
- ◆ Native title litigation tends to be time consuming and expensive. It involves the proofing and preparation of the evidence of indigenous witnesses who may be resident in very remote areas of the nation, research by anthropologists and other experts, which includes many number of interviews with indigenous people, and the preparation of anthropological, historical, archaeological and linguistic expert reports. It also involves the analysis of the current and past land tenure information in the area of the claim including the history of dealings with the land generally.
- ◆ The Court and indeed the parties to an application can only run a relatively small number of hearings at any one time. The resources available to participants, including governments, applicants and other parties, to conduct native title litigation are insufficient to support a high volume of such litigation. Nor is it the preferred way to resolve these matters. The regime set up by the Native Title Act, as previously mentioned, emphasises the importance and desirability of resolving these matters through mediation.
- ◆ The time it takes to properly conduct a native title proceeding and prepare for the litigation or mediation impacts on the Court in many

ways. Judges hearing such cases often devote significant amounts of their time to the hearing process and the preparation of judgments, which can be substantial.

- ◆ As with other litigation, native title cases are subject to intensive case management. It is only in more recent times that such case management has been applied to the expert evidence part of the proceedings, bringing with it, in my view, substantial benefits.
- ◆ The actual examination and cross-examination of expert anthropologists in court by counsel can also be time consuming. For example in the hearing of the *de Rose* native title determination application before Justice O'Loughlin, 24 hearing days were given to the expert evidence and related cross examination. Prior to trial, a lengthy period of time was given to allow the preparation of the primary evidence, the tenure material and expert reports. The hearing ran for 67 days 24 of which were given to the evidence of 9 experts. Notably the Court did not take a managerial approach to the conduct of the expert evidence in this proceeding.
- ◆ In contrast, the Blue Mud Bay matter, under the inspired direction of Justice Selway, was the subject of an innovative approach especially in relation to the expert evidence. That matter took only two weeks of hearing time and only 1.5 days of expert evidence.

Progress of matters

- ◆ Although it is open to a judge to run a hearing in any manner he or she wishes, most native title trials take a similar path.

- ◆ There may be a hearing in advance to preserve the evidence of any old or infirm witnesses.
 - * This is occurring more and more and has been identified by the judges of the court as an important activity especially given the duration of mediation and preparation for trial.
- ◆ Once a matter is earmarked for trial – this may be after years of mediation or inactivity – lead time of about a year is required to allow for exchange of pleadings, expert reports and witness statements and for other interlocutory steps.
- ◆ The form of the trial tends to reflect the key questions which the judge is required to determine:
 - * Does the claimant group comprise a society with an ongoing system of traditional laws and customs and a continuing connection with the area claimed?
 - * To what extent has any law or executive act extinguished native title which might otherwise exist?
- ◆ The first of these questions is primarily dealt with by the taking of evidence from members of the claimant group.
 - * It is established that this evidence is of paramount importance.
 - * And it is this part of the evidence which is most usually heard on country – that is at or near the area of claim.
- ◆ Also germane to answering this question is the evidence of various experts – social anthropologists, linguists, archaeologists and historians.

- ◆ Respondents may also call their own witnesses in relation to this “connection” question – such as the relevant pastoralist and responsive anthropological experts.
- ◆ The second question usually involves voluminous tenure history documents and sometimes the evidence of witnesses in relation to the building of public works or development projects.
- ◆ However, the extinguishment question nearly always turns on complex and sometimes tedious legal argument as to the effect of each of the current and historical tenure grants, the effect of public works and the operation of sections 47A and 47B of the Native Title Act (a topic outside the scope of this talk).
- ◆ So the anthropological evidence generally appears as part of the hearing of the connection question.

Why do matters move so slowly?

- ◆ The matters tend to cover large areas of land and waters.
- ◆ The harshest of climate and remoteness of terrain can make it hard to get instructions, to arrange a hearing and to comply with a timetable.
- ◆ Language barriers and remoteness can make the applicants’ lawyer’s task very onerous.
- ◆ Matters may involve large numbers of respondents.
- ◆ May raise complex issues of law and fact.
- ◆ May involve a number of interlocutory steps -
 - * Including a requirement for mediation which itself is often a lengthy process not least because of the cross-cultural context.

- ◆ Almost all parties are publicly funded and the sufficiency or otherwise of that funding is continually raised as a reason why matters cannot be progressed.
- ◆ The subject matter is often very different to other matters dealt with in the Court.
- ◆ There is fierce competition for the few available experienced counsel and, of course, expert witnesses including social anthropologists.

What is social anthropology and what can it add?

- ◆ Native title matters involve social or cultural anthropology, as opposed to any form of physical anthropology – and although other experts have a role to play - it is the social anthropologists who take centre stage.
- ◆ Simplistically put, social anthropology is concerned with culture - the operation of human societies - what makes people act in the way that they do.
- ◆ The anthropologist will look for patterns and society wide practices and will draw on this data to devise a model of the broadly operating framework – the culture – operating within the group under study.
- ◆ It is an intrinsically academic subject which does not always lend itself to the formation of simple and directed opinions.
- ◆ A key stone of the discipline is the primary research methodology of “participant observation” – the intensive study of whole cultures – involving fieldwork to observe human action; ie to watch people.
- ◆ Anthropologists preferably interact with people in the local language.

- ◆ Best practice anthropology waits for behaviour to present itself rather than by asking of direct questions in the abstract – rather than ask “what do you do when someone dies” – the anthropologist waits for a funeral to observe.
- ◆ The need to gain an understanding first and to wait for events while the anthropologist is present makes solid anthropological fieldwork a lengthy process – preferably over a full year cycle.
- ◆ Questions asked early in the inquiry or without an insight into the cultural framework operating can yield unreliable answers.
- ◆ For example, questions about family members may yield misleading answers. The traditional family structures dominant in European Australia may be completely inapplicable. In many communities, the term mother or brother may be used to denote a whole classificatory group within the community which has little correlation to immediate biological kin.
- ◆ Further, a questionnaire approach can yield wrong results because the person being questioned may not be able to accurately describe the society wide system even though he or she is complying completely with it. How many fluent English speakers can accurately describe grammatical system which they apply?
- ◆ The aim of the anthropologist is to embed in the group, observe behaviours over time and then extrapolate a model which explains that system.
- ◆ An understanding of the method highlights how slow and expensive the development of an anthropological opinion can be.

- ◆ Sometimes an expert will have a pre-existing long term relationship and knowledge of a group making him or her an obvious choice for expert witness.
- ◆ Other times, gaining the services of a suitably qualified and authoritative expert can be a major task in itself.
- ◆ It must be noted that the timeframe imposed by litigation – even the relatively long timeframes of native title litigation means that anthropological evidence cannot always be based on the best practice model.
- ◆ The value of that evidence must be weighed in this light.
- ◆ Of course the experts engaged by a respondent, generally provides a responsive desk top analysis rather than embarking on field work of their own.
- ◆ But how can this discipline add value to the task of the judge in deciding whether the claimants comprise a society which a continuing body of laws and customs and a continuing connection with the land claimed?
- ◆ This is an issue in relation to which views differ – some have expressed doubt that the perspective of an anthropologist provides anything that the primary witnesses cannot themselves explain.
- ◆ However, it is our view that anthropologists can help in a number of ways.
 - * Importantly the anthropologist can contribute as a cultural interpreter drawing on a wealth of experience in dealing with

Aboriginal people generally and often with the particular claimant group. He or she may be able to speak the local language.

* He or she may be an essential part of the party's professional team providing skills simply not held by lawyers.

- ◆ In terms of giving expert evidence, we see three particular areas of assistance:
 - ◆ Firstly, anthropologists are able to provide an overview of the society and to attest to the existence (or not) of laws and customs which govern individual behaviour.
 - ◆ The second area in relation to which anthropology has value to add arises in relation to the concept of "traditional" – that is whether laws and customs relied upon are laws and customs – a normative system – which has continued uninterrupted since sovereignty.
 - ◆ Anthropologists have various tools with which to reconstruct a picture of the society as it existed at the time of first contact – so that it can be compared with the group now. The evidence of the position, 200 years ago and at intervals since may be scant. Inferences may need to be drawn and an opinion formed as to the extent that the system and its observance has continued.
 - * The anthropology must draw on diverse historical sources as well as applying comparative analysis.
- ◆ The third area of assistance worth mentioning is that some anthropologists will have such a long term experience and wealth of understanding of the claimant group that he or she is herself qualified

to give evidence of the laws and customs of the group. Not as opinion evidence - but as direct, primary evidence of the facts.

- ◆ A note of caution. It is also our view that the role of anthropologists should not be overstated. Their opinions can never be determinative of the final issue.

- * It is not trial by anthropologist.

- ◆ An anthropologist is qualified to provide an opinion as to the current and historical nature of the social organisation and culture operating in relation to a group of people. The anthropologist is not equipped to take the next step and conclude whether native title – a concept known to the common law of Australia – can be established.
- ◆ It will be the judgment of lawyers, having regard to all of the evidence, to advise their clients as to the prospects of their case. This may be a difficult task, especially given the novelty of the jurisdiction and the profound variety of circumstances in which Aboriginal people find themselves. However, it is fundamentally a task for lawyers.
- ◆ It will be up to the Court to decide whether the changes wrought on the claimants as the result of European occupation and development preclude a finding that native title exists.
- ◆ However important their role may be – we should not lose sight of the fact that anthropologists are but one piece of the puzzle in any native title case.

The Legal framework

- ◆ Speaking to an audience such as this, one of esteemed judges,

lawyers and experts, I propose to keep my reference to the legal framework brief. The main game of this paper, as it were, is the discussion of the Court's innovation in respect of managing the expert evidence.

- ◆ Having said that, the rules of evidence applicable to the receipt of expert evidence are to be found in the Commonwealth *Evidence Act 1995*. The opinion rule is set out in s 76. One of the exceptions to the rule is the case of expert evidence as set out in s 79:

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

- ◆ Also relevant is the hearsay rule in s 59, and a relevant exception is to be found in s 74, which provides:

- * *'The hearsay rule does not apply to evidence of reputation concerning the existence, nature or extent of a public or general right.'*

- ◆ Relevantly the Court's way of operating is affected by s 82 of the Native Title Act which provides

- * *'The Federal Court is bound by the rules of evidence, except to the extent that the Court otherwise orders.'*

- ◆ The application of the provisions of the *Evidence Act* to anthropological expert evidence, then, is something that the Court must contemplate. A number of the Court's Judges have recently considered the admissibility of anthropological reports in native title cases (see *Lardil*,

Daniel, Neowarra, Wongatha, Jango, Bardi). As a result judicial concern has been expressed about insufficient understanding among experts and some legal practitioners regarding the need to demonstrate that expert opinion is based on the application of specialised knowledge to relevant facts or assumptions, particularly in native title cases. In all cases due regard was had to the following three principles:

- * The person whose opinion is in question must have specialised knowledge.
 - * The specialised knowledge must be based on the person's training, study or experience.
 - * The person's opinion must be entirely or substantially based on that specialised knowledge.
- ◆ Some Judges have held that expert reports in native title cases are a mixture of statements of historical and other facts, advocacy and opinion and that sometimes the lines between these categories are blurred. Indeed, in the *Wongatha* native title matter Justice Lindgren focused on the deficiencies of various expert reports filed in the proceeding, and in so doing commented that: "substantial parts of them can be described as undifferentiated combinations of speculation, summary description of facts, opinion (including opinion beyond the witness's field of specialised knowledge), hearsay, unsourced assertion and sweeping generalisation".
- ◆ Sackville J, critical of the 'quality' of expert evidence being presented in the Yulara native title proceeding said in *Jango*: "The volume of

objections does not necessarily indicate that the reports do not comply with the rules of evidence. However, it is apparent that each of the reports, in particular the Yulara Anthropology Report, has been prepared with scant regard for the requirements of the *Evidence Act 1995 (Cth)*”.

- ◆ In that matter, the government party made at least 1,100 objections to two expert reports.
- ◆ The applicants invest significant time and resources in their expert material. Where large numbers of objections are pursued or where the evidence was criticised or disregarded by the judge, the consequences are great, including wasted costs and enormous delays in the litigation.
- ◆ French J in the recent determination of the Bardi people’s case took a different approach and in considering the objections raised to the applicants’ experts report noted that aspects of the report offered what might properly be called argumentative conclusions or inferences relevant to the claimed determination of native title. Further he said that such opinion is by way of characterisation of primary evidence and is essentially argumentative in character.
- ◆ Selway J pointed out in *Blue Mud Bay* that the ‘expert’ opinion offered in the case was not really opinion evidence at all. His Honour said that anthropological evidence which results from significant fieldwork over a lengthy period may be the direct evidence of observations of the anthropologist rather than comprising any opinion.
- ◆ The Court’s *Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia*, like the case law, emphasise that the role of

an expert is to assist the Court to determine the issues in dispute. To do this, the Court must be able to assess the evidence adduced, including the independent expert's opinion. The case law also shows that an expert must identify the facts on which his or her opinion is based and the underlying facts or assumptions must be proved. Failure to do so may undermine the expert evidence, either entirely or result in it being given little weight.

- ◆ Whatever may be said of the rules of evidence in relation to expert anthropology reports, it is also clear that reports (whether formally admissible or not) are often not in a form, which is easy for a judge to digest. They tend to be lengthy, written in the form of an essay or related academic manuscript, and to use language and terminology not otherwise familiar to judges. A report may contain substantial background material, canvass the written literature and consider various aspects of the culture of the claimants not directly related to the land tenure issues. From a lawyer's perspective much of this material does not go directly to the question to be determined by the Court.
- ◆ It may be that from the anthropologist's perspective, the manner in which an analysis is built is completely essential in order for that expert to arrive at the opinion sought of him or her. However the question remains as to how much of that analysis is required to be put before the Court and in what form.

Hot tubbing

- ◆ So this brings us to the conferral of experts – the core topic of the work which led to the preparation of this paper.
- ◆ Generally, this method of dealing with expert evidence involves one or more of two steps. The first step is a “conference of experts”. This is a meeting of all expert witnesses involved in a matter, to determine their areas of agreement and disagreement. The second step is in court where the expert witnesses discuss their opinions simultaneously under oath.
- ◆ The process is often referred to as a “hot-tub”.
- ◆ That term – to the extent that it is useful at all is better applied to the process of multiple experts giving sworn evidence simultaneously.
 - * a process that has only occurred in one native title matter so far although North J has made murmurings that it may be embarked on in another.
- ◆ Between us we have been involved in the convening of three of the four conference of anthropologists held in relation Federal Court native title matters.
 - * The first – *Wongatha* in the Goldfields of Western Australia - happened without us. It did involve the simultaneous sworn evidence – the hot tub.
 - * We jointly convened *Blue Mud Bay* and are in the course of convening *Gunditjmarra* in relation to an area of south western Victoria.

- * I am convening a conference together with another registrar in relation to *Yankunytjatjara/Antakirinja* (YA) in northern South Australia later this year.
- ◆ On a personal note – I think we would both regard the work with experts over recent years as among the most challenging and the most interesting we have done.
- ◆ It has been fascinating to be confronted with such a different methodology and framework for thinking.
- ◆ The “hot tub” procedure, of course is not a native title invention – it was initially developed in the then Trade Practices Tribunal, apparently suggested by (then) counsel, Sir Gerard Brennan QC, and adopted by the President of the Tribunal, Justice Lockhart.
- ◆ The procedure is provided for in the Rules of Court, has been used sparingly in non-native title jurisdictions of the Court, and is specifically dealt with in the Guidelines.
- ◆ Those Guidelines emphasise the duty which the expert has to the Court and specify that it “*would be improper conduct for an expert to be given or to accept the instructions not to reach agreement*”.
- ◆ There are risks and disadvantages of embarking on a non-traditional course – such as when the experts cannot agree on the most straightforward of matters or where an expert seeks to withdraw or modify his opinion following discussions with lawyers.
- ◆ But these dangers should not arise where the principles set out in the Guidelines are followed.

The Conference of Experts

- ◆ A key requirement of a conference of expert anthropologists is that it does not consider any final issues in the matter
 - * nor any conclusions of law.
- ◆ Much of the nervousness of some practitioners as to the holding of a conference seems to lie in exactly this misapprehension.
 - * The expert anthropologist can only discuss issues in anthropology in accordance with their duties to the Court.
 - * They are neither permitted nor qualified to make any concession as to the position of the party engaging them.
 - * Indeed a party is not bound by the opinions of its expert expressed at a conference or otherwise although a contrary expert opinion may make the lawyers think hard about settlement.
- ◆ The four conferences of experts held over recent years can be seen as an evolution of the concept with each being designed having regard to the strengths and weaknesses of the previous. As *Gunditjmarra* and *YA* matters are currently in train – we focus on the *Wongatha* and *Blue Mud Bay No. 2* matters in this paper.
- ◆ The *Wongatha* matter was the Federal Court's first foray into innovative expert processes in native title.
- ◆ Participating anthropologists, Dr Ron Brunton and Dr Lee Sackett, wrote a very useful article on their experiences.

- ◆ While broadly supporting the initiative, they made suggestions in their article for improvement – suggestions which we have taken on board in designing later conferences.
- ◆ One significant problem in *Wongatha* was low attendance. Of the eight expert anthropologists who had prepared reports in the matter on behalf of the various parties, only four were available to participate in the conference.
- ◆ Subsequent conferences have been compulsory and attended by all experts.
- ◆ This has led to substantial logistical challenges – for example the reconvened *Blue Mud Bay* conference proceeded by way of a five way telephone conference on a Sunday afternoon with a link to a mobile phone only just in range in outback South Australia.
- ◆ Another problem identified by Sackett and Brunton was the desirability for specific and detailed outcomes to be recorded. This has also been taken on board.
- ◆ Brunton and Sackett also complained of a lack of time to fully consider the material and this is a complaint which has been echoed by some others in conference.
- ◆ While enough time is obviously vital – we do not agree that a longer conference will necessarily be a better conference.
- ◆ A full and comprehensive anthropological analysis of the issues might require very lengthy discussion, even further primary research, ranging over weeks or months.

- ◆ But, the conference of experts is a hybrid mechanism, not as confrontational and directed as examination in chief or cross examination but also not as lengthy and comprehensive as best practice anthropological method might demand.
- ◆ Giving the experts a flavour for the need to arrive at an opinion and justify it within a limited timeframe is part of the deal.
- ◆ Although Brunton and Sackett were less positive about the hot tub itself which they say was a little under organised they conclude with optimistic comments on the processes of conferral amongst anthropologists.

The conference of experts in Blue Mud Bay No. 2

- ◆ The *Blue Mud Bay No. 2* matter was heard by the late Justice Selway at Yirrkala, close to the claim area in east Arnhemland in the Northern Territory.
- ◆ Selway J brought a fresh and innovative approach to this native title matter and his insistence that matters can be run more quickly and efficiently will have a lasting impact on native title law and practice.
- ◆ Selway J's untimely death shortly after delivering judgment was a great loss – it was very sad that he was unable to be present for the delivery of the formal order and the determination of native title at Yilpara this week.

- ◆ There is no doubt that the conference of experts in the case had a major impact both in relation to the nature and extent of the expert evidence and in relation to the conduct of the matter generally.
- ◆ The conference was held
 - * before pleadings were finalised,
 - * on the basis of draft reports rather than final positions on the part of the experts, and
 - * without any lawyers present (a factor about which there was considerable grumbling at the time).
- ◆ In addition to a broad ranging discussion, the experts considered a list of propositions which had been drafted by counsel – there was a high level of agreement amongst the anthropologists at the conference and virtually complete agreement at the reconvened conference which followed a revision of the applicants' expert report to take account of the discussion.
- ◆ The conference led to progress in the matter in two important ways.
- ◆ First it greatly narrowed the scope of the anthropological debate in the case.
- ◆ Secondly the areas of agreement among the experts assisted the parties in their consideration of the matter as a whole.
- ◆ Indeed at a directions hearing held shortly after the initial conference, the respondents made substantial concessions as to the existence of native title.
- ◆ Of course, it would be wrong to uncritically applaud the success of the conference of experts in the *Blue Mud Bay No. 2* case.

- * The case involved an area of remote east Arnhemland which had been the subject of very late contact with non-Aboriginal Australia and where Aboriginal tradition is very strong.
 - * Also, the anthropologists involved were of the highest qualification and expertise, with the applicants' expert, Professor Morphy, having worked with the claimant group for decades.
 - * And the conference was but one limb of a dynamic and interventionist approach by Justice Selway.
- ◆ Nonetheless, the case gives encouragement for the utility of such conferences and holds clues as to how to run them well.
 - ◆ The conference must be tailored to the case at hand in order to maximise use of resources and the value of the conferral.
 - ◆ For example, the *Gournditjmarra* conference was ordered by North J to proceed as part of a mediation process which appeared to have hit an impasse. That conference is continuing.
 - ◆ The YA conference which is also in train has been designed to assist in speedy and effective targeting of the limited resources to the real issues in the matter.
 - ◆ Without saying never, we are generally supportive of the approach of excluding lawyers.
 - ◆ It fosters a collaborative atmosphere and reduces the chance of the discussion straying into legal matters which are clearly not the area of expertise of the participants.
 - ◆ It may also be a relief to some of the anthropologists who have suffered at the hand of exacting cross-examination in the past.

- ◆ The consideration of draft material rather than of final reports is also a useful strategy.
 - * peer review of a draft is a familiar method for the anthropologists.
 - * and the discussion will occur before the expert has signed off on his or her final opinion and hence when he or she is more open to suggestion.
- ◆ This correlates with our view that conferences are best held earlier in the proceedings.
- ◆ If nothing else, a mechanism which attracts the interest of counsel early in the piece will be well placed to lead to substantive concessions or even settlement earlier thus saving the massive resources required to run a full blown native title trial.
- ◆ Our experience has been that the events are relaxed and collaborative discussions to which the experts bringing a focussed, well prepared and professional approach.
- ◆ It certainly seems to be the case the experts themselves enjoy the experience and find them productive.
- ◆ To be clear, it is not our view that a conference should be held in every case.
- ◆ Sometimes the anthropology is not the main game and another innovation in practice is better suited to progressing the litigation.
- ◆ The conference has been used in native title cases in the Federal Court to better focus the conduct of the matter and to optimise use of resources.
 - * To elevate the process to mandatory would undermine this aim.

- ◆ Nonetheless, we think the process can usefully be used on a regular basis in cases across Australia and would encourage parties to raise the possibility with the Court at an early stage in proceedings.

Conclusion

- ◆ There has been a spotlight in recent times on the issue of expert evidence in litigation as evidenced by this conference.
- ◆ The native title jurisdiction has not escaped this attention.
- ◆ And the position of the social anthropologist as an expert witness presents specific challenges for both the Court and for the parties.
- ◆ We are making continuing efforts to respond to these challenges and to develop innovative case management strategies to better deal with the weight of the native title caseload.
- ◆ The evolving practice of the conference of experts has been an important element of these developments.
- ◆ Three overarching themes have emerged.
- ◆ First - lawyers and expert anthropologists must work together within the parameters of the Court's Guidelines for expert witnesses.
 - * This requires a high level of mutual respect between the disciplines and sound judgment.
- ◆ Secondly the case management process must be tailored to the particular facts at hand.
 - * A proscriptive or inflexible approach would be counter productive.

- * Nonetheless, a carefully thought through process for a conference of experts can be usefully employed on a regular basis in cases across Australia.
- * We would encourage parties to raise the possibility with the Court at an early stage in proceedings.
- ◆ Finally, it is imperative that everyone involved in the native title process - the Court, practitioners, and the expert witnesses themselves - continue to assess and consider new methods of preparing, presenting and dealing with expert anthropological evidence.
- ◆ Thank you for your time. I would be happy to take any questions