

# EXPERT EVIDENCE IN NATIVE TITLE CLAIMS

## Overview

A number of recent decisions have discussed the use of expert evidence in native title claims. Most recently, in *Jango v Northern Territory*, over one thousand objections were filed by the respondents in relation to the two anthropological reports. Although this does not necessarily mean that the reports do not comply with the rules of evidence, Justice Sackville noted that each of the reports 'has been prepared with scant regard for the requirements of the Evidence Act 1995 (Cth)' at [8]. Counsel for the applicants conceded that the majority of the objections were well founded and most of the reports were, as a result, inadmissible. The decision of Justice Lindgren in *Harrington-Smith v State of Western Australia* also dealt with similar issues.

Anthropological reports submitted as expert evidence in native title claims will have to comply with the *Evidence Act 1995 (Cth)* ('the Evidence Act').

## Legislation

### *Evidence Act 1995 (Cth)*

The *Evidence Act 1995 (Cth)* ('the Evidence Act'), in particular section 56 regarding relevance, ss 59 and 60 regarding the hearsay rule, ss 76(1), 79, 80 regarding admissibility of expert evidence, and ss 135, 136 regarding the Court's discretion to exclude evidence.

**Section 56(1)** of the Evidence Act states that, except as otherwise provided, evidence that is relevant in a proceeding is admissible in a proceeding. Evidence that is not relevant is inadmissible (s 56(2)). The test of relevance is whether the evidence, if accepted, could rationally affect the assessment of the probability of the existence of a fact in issue in the proceedings (s 55(1)).

**Section 59** of the Evidence Act details the hearsay rule which provides that evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation.

**Section 60** of the Evidence Act provides an exception to the hearsay rule, stating that the hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation.

**Section 76(1)** of the Evidence Act is 'the opinion rule' which provides that evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

**Section 79** of the Evidence Act relates to evidence based on specialised knowledge and provides that if a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

**Section 80** of the Evidence Act abolishes the ultimate issue and common knowledge rules. Evidence of an opinion is not inadmissible only because it is about (a) a fact in issue or an ultimate issue or (b) a matter of common knowledge.

**Section 135** of the Evidence Act gives the Court a general discretion to exclude evidence. It provides that the Court may refuse to admit evidence if its probative value is

substantially outweighed by the danger that the evidence might (a) be unfairly prejudicial (b) be misleading or confusing or (c) cause or result in undue waste of time.

Section 136 of the Evidence Act provides that the Court may limit the use to be made of evidence if there is a danger that a particular use of evidence might (a) be unfairly prejudicial to a party; or (b) be misleading or confusing.

### ***Native Title Act 1993 (Cth)***

The *Native Title Act 1993 (Cth)* ('the Native Title Act') was amended by the *Native Title Amendment Act 1998 (Cth)*. Previously, s 82(3) of the Native Title Act provided that the Federal Court was not bound by technicalities, legal forms, or rules of evidence.

Section 82(1) of the Native Title Act now provides that the Federal Court is bound by the rules of evidence, except to the extent that the Court otherwise orders.

Section 82(2) of the Native Title Act provides that in conducting its proceedings, the Court may take account of the cultural and customary concerns of Aboriginal and Torres Strait Islander peoples but not so as to prejudice unduly any other party to the proceedings.

## **Cases**

### ***Jango v Northern Territory (No 2) [2004] FCA 1004 (3 August 2004)***

The 'Yulara Anthropology Report' and a second report by a former Community/Park Liaison Officer at Uluru-Kata Tjuta National Park were submitted as expert evidence in a compensation claim pursuant to ss 50(2) and 61(1) of the *Native Title Act 1993 (Cth)*.

The respondents filed approximately 1,100 separate objections to passages in the two reports. Counsel for the applicants accepted that most of these objections were well founded and these paragraphs were, as a result, inadmissible.

Justice Sackville summarised the problems regarding The Yulara Anthropology Report [at 11] -

"[It] often does not clearly expose the reasoning leading to the opinions arrived at by the authors. Nor does it distinguish between the facts upon which opinions are presumably based and the opinions themselves. Indeed, it is often difficult to discern whether the authors are advancing factual propositions, assign the existence of particular facts, or expressing their own opinions. Certainly the basis on which the authors have reached particular conclusions is often either unstated or unclear."

Justice Sackville accepted that the vagueness of the initial instructions given to the authors, the significant time between the initial and supplementary instructions (four years), as well as the fact that the authors were not informed of the requirements under the Evidence Act all contributed to the high number of objections.

The Court adjourned (9 August 2004) to give the applicants more time to overcome the objections to the expert reports.

### ***Commonwealth v Yarmirr [2001] HCA 56 (11 October 2001)***

On appeal in the High Court, Gleeson CJ, Gaudron, Gummow and Hayne JJ noted at 62 [84] that an anthropological report had been received in evidence in that case without proof and without objection

“Despite it being a document which was in part intended as evidence of historical or other facts, in part intended as evidence of expert opinions the authors held on certain subjects, and in part a document advocating the claimants’ case.”

***Harrington-Smith on behalf of the Wongatha People v Western Australia (No 7)***  
**[2003] FCA 893**

In this native title application, 30 reports were submitted in 35 volumes to which there were 1426 objections.

Lindren J set out the relevant general principles relating to expert evidence, noting first that the Court had not been asked to exercise the discretion under s 82(1) of the Native Title Act, and therefore the objections were to be determined according to the rules of evidence.

The general principles of the rules of evidence, as set out by Lindren J [at 7-15]: Reports or parts of reports that are relevant are admissible, except as otherwise provided by the *Evidence Act* s 56(1). Reports or parts of reports that are not relevant are not admissible under s 56(2) of the Evidence Act. The evidence that is relevant is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding: *Evidence Act* s 55(1). Whether evidence, including expert opinion evidence, is relevant depends on application of the test specified in subs 55(1) (see [9] above) - an objective test grounded in human experience, on the application of which minds may differ, but which does not allow for the exercise of discretion. Section 56(2), which provides that evidence which is not relevant in the proceeding is not admissible, is mandatory. Where irrelevant evidence is admitted (where no objection is raised, or if raised, not pressed), the judge will not give the evidence any weight because it is not evidence that ‘could rationally affect...the [judge’s] assessment of the probability of the existence of a fact in issue in the proceeding.’ However, Lindren J pointed out that none of the objections to the reports are based on relevance. Rather, it is more of a matter for the judge to give the reports and the individual parts of them the appropriate weight in all the circumstances. Note also that such weight as seems appropriate in all the circumstances includes the possibility of no weight at all.

The general rule is that ‘evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed’ (s 76(1) *Evidence Act*). An exception to this ‘opinion rule’ is provided by s 79 of the *Evidence Act* which states that ‘if a person has specialised knowledge based on the person’s training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.’ In *Harrington-Smith* many of the objections contended that particular expressions of opinion lay outside the established ‘specialised knowledge based on the [author’s] training, study and experience’.

In response to the protest of Counsel that in order to ensure the requirements of admissibility are met, lawyers would have to become involved in the writing of expert witness reports, Lindren J commented [at 19]:

‘Lawyers **should** be involved in the writing of reports by experts: not, of course, in relation to the substance of the reports (in particular, in arriving at the opinions to be expressed); but in relation to their form, in order to ensure that the legal tests of admissibility are addressed. In the same vein, it is not the law that admissibility is attracted by nothing more than the writing of a report in accordance with the conventions of an expert’s particular field of scholarship. So long as the Court, in hearing and determining applications such as the present one, is bound by the rules of evidence, as the Parliament has stipulated in subs 82(1) of the *Native Title Amendment Act*, the requirements of s 79 (and s 56 as to relevance) of the Evidence Act are determinative in relation to the admissibility of expert opinion evidence.’ (Emphasis in original)

Lindren J pointed out that in order to establish the admissibility of expert opinion in accordance with the Evidence Act, it must be shown [at 20]:

- (a) That the opinion is relevant (including that the field of knowledge is one in which expert opinion can properly be called (see Cross on Evidence (Australian Edition at [29050]) – ss 55, 56 Evidence Act;
- (b) That the person put forward as an expert possesses specialised knowledge in that field – s 79 Evidence Act;
- (c) That the specialised knowledge is based on the person’s training, study or experience – s 79 Evidence Act; and
- (d) That the particular opinion tendered is based on the specialised knowledge – s79 Evidence Act.

***Daniel v Western Australia [2001] FCA 223 (14 March 2001)***

Nicholson J regarding the admissibility of hearsay [at paras 7-9] –

(7) Hearsay evidence from the [expert’s] opinion is inferred, will (subject to the application of ss 135 and 136) qualify for admission pursuant to s 56 as relevant to the purpose of the basis upon which the expert holds the opinion so that its weight can be assessed. It could then be used for a hearsay purpose as a consequence of the application of s 60.

(8) Admission of hearsay evidence with that consequence under s 60 leads inevitably to the needs for the Court to consider whether that admission should be limited under s 136 to the state purpose of testing the knowledge on which the opinion is based.

(9) Admission with the consequences flowing from s 60 would not occur if the Court considered admission should be precluded in exercise of its discretion under s 135. It would seem that hearsay evidence comprising a statement as to the existence of native title made to the expert by a party not called (and being on an issue central to the case) would qualify for exclusion or admission limited to testing the opinion in the manner required by s 78.’

Section 135 provides that ‘the Court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing; or
- (c) cause or result in undue waste of time.’

***Neowarra v Western Australia [2003] FCA 1399 (8 December 2003)***

In *Neowarra*, an Anthropological and Linguistic Report (the Joint Report), consisting of 140 pages of text and 76 pages of notes, references, tables, attachments etc. was submitted.

A high number of objections were made to the joint anthropological report on the basis that it was unclear whether various statements in the report were of opinion, assumption, hypothesis, fact or hearsay. After questioning of the anthropologists in an attempt to ‘cure’ some of the objections that were asserted, the number of objections to the joint report decreased (in general) but a large number remained, including the State’s blanket objection.

The ‘opinion rule’ now contained in s.76 of the Evidence Act is discussed at paragraph 15.

The 'basis rule' is discussed at paragraph 16. Justice Sundberg notes that although the Evidence Act does not allow the basis rule as an exception to the opinion rule, an expert should nevertheless differentiate between the fact on which the opinion is based and the opinion in question, so that it is possible for the court to determine whether the opinion is wholly or substantially based on the expert's specialised knowledge, which in turn is based on training, study or experience [at para 23].

With regard to hearsay by experts, discussed at paragraph 28 and onwards, Sundberg J notes that s.59(1) of the Evidence Act provides that 'evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation.' The expression 'previous representation' is defined as 'a representation made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be adduced.'

Section 60 of the Evidence Act provides that 'the hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation.'

Justice Sundberg referred to Nicholson J's re-statement of the case law in *Daniel v Western Australia* and the three propositions he extracted (paras 7- 9, set out above in *Daniel*).

Justice Sundberg concluded [at para 39] that:

1. The opinion provisions of the Evidence Act do not incorporate a basis rule requiring the facts upon which an opinion or conclusion is based to be established by admissible evidence;
2. The weight to be accorded an opinion or conclusion that is founded on a fact that is not established by admissible evidence may thereby be reduced;
3. While the Evidence Act does not contain a basis rule in the sense described above, the fact that hearsay material may lie behind facts ascribed or assumed does not spell inadmissibility; rather it goes to the weight to be accorded the expert's opinion or conclusion;
4. An expert's opinion that is based on hearsay is admissible under s.60 in proof of the fact intended to be asserted, though the weight to be accorded the opinion may be reduced by the hearsay quality of the material, and the hearsay material or the opinion may be excluded under s.135 or s.136; and
5. Remote hearsay is not admissible under s 60 in proof of the fact intended to be asserted.

## Interpretations

### Requirements of Section 79

Admissibility requirements of s.79 – the question is not just whether the evidence of the opinion is admissible but whether that opinion is admissible in proof of the fact that the opinion is adduced to prove. A court will have in mind – would evidence of this opinion assist the jury to determine there exists (or not) the fact which the opinion holder says exists (or not)?

The general approach to s.79 is outlined in *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at 743-744 per Heydon JA. Heydon's summary may be taken as a framework for an analysis of s.79.

1. Knowledge in a field of 'specialised knowledge'

The witness must demonstrate that she/he has acquired specialised knowledge in a field through specified training, study or experience.

2. The specialised knowledge as a reliable basis for the opinion.

Assessment as to whether the theory, or any technique used to employ the theory, is reliable in the sense that its application to the assumed facts can produce an opinion of some value to the jury in coming to a view as to whether the fact in issue exists.

Although this isn't a requirement specifically in s.79, it derives from consideration of the threshold test for the admissibility of any piece of evidence that is stated in ss. 55 and 56.

3. Specialised knowledge 'based on the person's training, study or experience'.

The question is whether, accepting that W has some specialised knowledge, that knowledge is based on the person's training, study or experience. The more critical question to be asked is whether the particular opinion expressed (and bearing in mind that more than one opinion may be expressed) is 'wholly or substantially based on that knowledge'.

4. An opinion based on specialised knowledge.

It is sufficient that the specialised knowledge is at least substantially the basis for the expert opinion. The witness may have regard to matters that are within the knowledge of ordinary persons in formulating his or her opinion.

Extracted from Peter Bayne 2003. *Uniform Evidence Law: Text and Essential Cases*, Federation Press, pp 268-280.

## Comment

James F Weiner, Johnny Jango & ors v Northern Territory of Australia & ors. An Anthropologist's Comment.

## Bibliography

The Australian Law Reform Commission's *Report No 102: Evidence* (2005) examining the operation of the *Evidence Act 1995 (Cth)*.

The Australian Law Reform Commission's, *Report No 38: Evidence* (1987) provided the basis for the *Evidence Act 1995 (Cth)*.

The Australian Law Reform Commission, *Interim Report No 26* (1985).

Bagshaw, Geoffrey 2001. *Anthropology and objectivity in native title proceedings*. Paper presented to the Native Title Conference: Expert Evidence in Native Title Court Cases: Issues of truth, objectivity and expertise. 6-7 July 2001, Adelaide University.

Burke, P, 1996. 'Law's anthropology', *Heritage and native title: Anthropological and legal perspectives*, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, pp. 215-229.

Chalk, Andrew 2001. *Anthropologists and violins - A lawyer's view of expert evidence in native title cases*. Paper presented to the Native Title Conference: Expert Evidence in Native Title Court Cases: Issues of truth, objectivity and expertise. 6-7 July 2001, Adelaide University.

Choo, Christine 2001. 'Historians and native title: the question of evidence', in D. Kirby and C. Coleborne (eds), *Law, history, colonialism: The reach of empire*, Manchester University Press, pp 261-276.

Federal Court, **Practice Direction: Guidelines for Expert Witnesses**, Witnesses in Proceedings in the Federal Court of Australia.

Finlayson, Julie 1999. 'Sustaining memories: The status of oral and written evidence in native title claims', in JD Finlayson, B. Rigsby & HJ Bek (eds), *Connections in native title: Genealogies, kinship and groups*, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra.

Gary, Edmund 2004. 'Thick decisions: Expertise, advocacy and reasonableness in the Federal Court of Australia', *Oceania*, Vol. 74, No. 3, pp 190- 230.

Johnson, Tony 2001. **Beyond the re-recognition process: Challenges for ATSIC and NTRBs**. Paper presented to the Native Title Conference: Expert Evidence in Native Title Court Cases: Issues of truth, objectivity and expertise. 6-7 July 2001, Adelaide University.

Keon-Cohen, B, 2000. 'Client legal privilege and anthropologists' expert evidence', in B. Keon-Cohen (ed) *Native title in the new millennium*, Aboriginal Studies Press, Canberra.

Morton, John 2001. **I-witnessing I the witness: courtly truth and native title anthropology**. Paper presented to the Native Title Conference: Expert Evidence in Native Title Court Cases: Issues of truth, objectivity and expertise. 6-7 July 2001, Adelaide University.

National Native Title Tribunal 2004. '**Evidence - expert**: Neowarra v State of Western Australia', *Native Title Hot Spots*, Issue 8, 12 February.

National Native Title Tribunal 2003. '**Objections to expert evidence**: Harrington-Smith on behalf of the Wongatha People v Western Australia (No 7)', *Native Title Hot Spots*, Issue 7, 11 November.

National Native Title Tribunal 2004. **Evidence - admissibility of expert reports**: Jango v Northern Territory (No. 2)', *Native Title Hot Spots*, Issue 11, 9 September.

National Native Title Tribunal 2004. **Evidence - exceptions to hearsay**: Neowarra v State of Western Australia', *Native Title Hot Spots*, Issue 8, 12 February.

Neate, Graeme 2001. **Management of native title cases by the Federal Court - does this affect the anthropologist's role?** Paper presented to the Native Title Conference: Expert Evidence in Native Title Court Cases: Issues of truth, objectivity and expertise. 6-7 July 2001, Adelaide University.

Pocock, Tig 2001. **Overview and recent developments relevant to anthropologists working on native title claims**. Paper presented to the Native Title Conference: Expert Evidence in Native Title Court Cases: Issues of truth, objectivity and expertise. 6-7 July 2001, Adelaide University.

Reilly, A. 2000. '**The ghost of Truganini: Use of historical evidence as proof of native title**', *Federal Law Review*, Vol. 28, No. 3, pp. 453-475.

Rigsby, Bruce 2001. **Representations of culture and the expert knowledge and opinions of anthropologists**. Paper presented to the Native Title Conference: Expert Evidence in Native Title Court Cases: Issues of truth, objectivity and expertise. 6-7 July 2001, Adelaide University.

Robinson, Michael 2001. *Disparate judicial approaches to the production of anthropological field notes: observations on the Daniel and Smith cases*. Paper presented to the Native Title Conference: Expert Evidence in Native Title Court Cases: Issues of truth, objectivity and expertise. 6-7 July 2001, Adelaide University.

Rummery, I, 1995. 'The role of the anthropologist as expert witness', in *Native Title: Emerging Issues For Research, Policy and Practice*, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, pp.39-57.

Shaw, Bruce 2001. *Bringing the numinous into the witness stand*. Paper presented to the Native Title Conference: Expert Evidence in Native Title Court Cases: Issues of truth, objectivity and expertise. 6-7 July 2001, Adelaide University.

Shaw, Bruce 2001. 'Expert witness or advocate? The principle of ignorance in expert witnessing', *Land, Rights, Laws: Issues of Native Title*, Vol. 2, No. 11, October.