4. The role of the anthropologist as expert witness

This paper aims to give detailed consideration to the functions of anthropologists involved in native title processes as expert witnesses. To adequately consider that role it is desirable to place it in a number of contexts.

First, there is the legal context. From the perspective of a lawyer, the inquiries undertaken by courts, tribunals and commissions into Aboriginal and Torres Strait Islander law and custom are substantially legal processes, irrespective of whether they are judicial, quasi-judicial or administrative processes. This is because what is involved are findings and determinations, whether or not these have the status of final decisions themselves or feed into a political decision-making process. In the case of processes under the Native Title Act 1993 (NTA), there is no doubt that these are legal. A determination of native title by the Federal Court creates rights in rem, that is, rights in land enforceable against the world. The Aboriginal Land Commissioner, Justice Toohey, put it in respect of Aboriginal land claims under the Aboriginal Land Rights (Northern Territory) Act 1976 (ALRA), that claims are not an exercise in anthropology. This remains true for native title processes, notwithstanding the critical role anthropologists will play in them. Within the context of the legal process, it is desirable to distinguish two sub-contexts. There is the context of the expert witness performing certain roles and functions in the proof of native title. Then there is the context of expert witnesses of many disciplines in litigation and inquiries generally. The second context is the wider sociopolitical context in which anthropological testimony is discussed. Native title, land rights and protection of sites is not a value-free arena. Comments made about these matters are frequently polarised (see Maddock 1983, 1989). The third context is the role of the anthropologist as expert witness in the overall context of anthropology as a discipline. Each of these contexts has implications for the role of anthropologists as expert witnesses.

Difficulties of proving Aboriginal law and custom

The role of the anthropologist in native title processes will be inextricably linked to the problems of proof. The existence and the content of Aboriginal traditional law and custom is a matter of fact and not of law
(Australian Law Reform Commission 1986: 453). As matters of fact, it is necessary for these matters to be 'proved'.

Rules of evidence
The Australian Law Reform Commission Report (1986: 457) on The Recognition of Aboriginal Customary Law argues that it is the rules of evidence which create difficulties for the proof of Aboriginal customary law. In the context of NTA processes the rules of evidence, at least as technical rules with exclusionary force, will not apply. Nevertheless, these rules will still have some relevance, and it is desirable to consider the effect that these rules have on proving indigenous traditional laws and customs.

The purpose of the rules of evidence is to ensure that the material to be placed before a court is relevant and reliable and that anything that is irrelevant, unreliable or excessively prejudicial has been excluded. Facts which are required to be 'proved' may only be established through the tender and reception of evidence. The ability of the court to receive evidence is subject to rules of admissibility. On objection, a court will not receive evidence unless it is relevant to establishing a material fact in issue and it is legally admissible for that purpose. Whilst 'relevance' refers to a probative relationship between evidence and the facts in issue, and is not a matter of law, 'admissibility' is a purely legal concept and a court has no discretion, at common law, to include evidence which is inadmissible. There is scope for parties to waive the rules of admissibility, but even if this occurs, the court will still be subject to considerations of public policy which transcend the interests of the parties (see Ligertwood 1994).

There are two rules of evidence which present the most difficulty to the presentation of evidence about Aboriginal law and custom. The first is hearsay and the other is the rule concerning opinion evidence.

The hearsay rule
The hearsay rule is simple enough, but is complicated by the exceptions to it which are technical and detailed, and which render the rule's scope unclear (see for example Forbes 1994a: para 58). Simply stated, the hearsay rule excludes the oral and written statements of a person who is not called as a witness, if the statements are tendered as evidence of the truth of that which is asserted. Underlying this rule are the following premises: a witness's assertions of facts should be based upon experience; information not derived from direct experience is unreliable; the accuracy of assertions is gauged through observing the witness in the witness box and in cross-examination; cross-examination is of fundamental importance in establishing the reliability of evidence. Thus the credibility of a witness relaying the hearsay cannot enhance or repair the unreliable nature of the statement itself (Forbes 1994a: paras 58–60). The rule's operation is subject to numerous exceptions under common law or statute. Some of
these exceptions are of relevance to varying degrees in proving Aboriginal law and custom: reputation evidence, statements forming part of the *res gestae*, ancient documents (that is, documents over 20–30 years of age), court reports and other public documents, and pedigree evidence. There is another very important exception, that of traditional evidence which is not yet part of the law of Australia. These exceptions were canvassed in depth in both the Gove Land Rights Case\(^7\) and the Mabo case (see Keon-Cohen 1993; McIntyre 1994). However these exceptions have limitations which curtail their effectiveness.\(^8\)

*The opinion evidence rule*

The other rule of evidence which creates difficulty for proof of Aboriginal law and custom is the rule which excludes opinion evidence. This is a common law rule which has been codified and restated in Part 3.3 of the *Evidence Act 1995*. Opinion evidence is defined as evidence which seeks to draw inferences from facts (McLeod 1994: para 37), though the dividing line between the two may not always be clear. Because opinion evidence is seen to trespass on the function of the court to determine facts and form opinions about those facts, opinion evidence is only admissible pursuant to certain exceptions. Non-expert opinion evidence is permitted to the extent that such evidence consists of observational inferences. For example, evidence may be given by a non-expert that a floor was slippery at a particular time. The other exception is expert evidence. The rationale for this exception is the expertise of the witness.\(^9\) The third exception, which is really more of a statement of the scope of the rule is that the rule does not apply to an opinion that is relevant for a purpose other than proof of the existence of a fact about the existence of which the opinion was expressed.\(^10\)

*Significance of these rules for indigenous witnesses*

If strictly applied, particularly if applied as exclusionary rules, the rules of evidence will preclude indigenous witnesses, no matter their status in their societies and no matter how knowledgeable about their own system of laws and customs, from making generalisations about them. Such evidence falls foul of either the hearsay rule, or the opinion evidence rule or both. This point is made by the Australian Law Reform Commission Report on *The Recognition of Aboriginal Customary Law*:

> Beyond a certain point, general statements about customary laws, and about their application in a particular case, would be classed as matters of opinion rather than fact and would therefore be inadmissible unless some ... exception ... applied.

In *Milirrpum v Nabalco Pty Ltd* it was assumed that the Aboriginal clan leaders who gave evidence were not experts (1986: 453, 475–6).
The traditional evidence rule

In some other jurisdictions, such evidence is admitted pursuant to the 'traditional evidence' rule (Australian Law Reform Commission 1986: 617-21). This rule permits evidence as to rights existing beyond living memory where oral tradition is the only evidence available to be admitted, given by persons 'who are supposed by native custom to be cognisant of such matters'. According to Justice Blackburn in the Gove Land Rights Case, however, the law of traditional evidence is not part of the common law of Australia. When Blackburn J. admitted evidence from Aboriginal witnesses about their customary law he did so on the basis of an exception to the hearsay rule (reputation evidence), but he used reasoning very similar to the traditional evidence rule (Keon-Cohen 1993: 194; McIntyre 1994: 146). As the Australian Law Reform Commission pointed out:

It is not satisfactory that the evidence of traditionally oriented Aborigines about their customary laws and tradition should be inadmissible in law unless it can be forced into one of the limited exception to the hearsay and opinion evidence rules, or that it should be admitted in practice only by concession of the court or counsel, or that it should be admissible where the custom is a generation old (reputation evidence ...) but inadmissible where the custom relied on is modern and possibly different.

... to say that traditional Aborigines fully initiated into their laws are nonetheless not experts in the legal sense is difficult to justify (1986: 475, 477).

Although the law as defined in the Gove Land Rights Case is clearly problematic, given the change in general approach to Aboriginal law and custom brought about by the decision in Mabo (No. 2), there is no reason why the traditional evidence rule would not become part of the law in Australia and that 'qualified' indigenous witnesses would then be able to give evidence about those laws and traditions. In actual practice, in tribunals not obliged to apply the rules of evidence (at least not strictly), and even in the general courts, there has been a marked tendency to permit evidence from Aboriginal witnesses to be given which would not otherwise be admissible.

Relevance for NTA proceedings

The rules of evidence do not apply to NTA proceedings so there is considerable scope for traditional evidence about laws and customs of a general nature to be given by indigenous witnesses. However, although the NTA can legislate away the exclusionary force of the rules, it has not legislated away the problem of the assessment of that evidence by courts. Take, for example, the case of the Aboriginal Land Commissioner in the Northern Territory. As with all quasi-judicial processes the rules of evidence of the common law do not apply to inquiries conducted by them.
unless the rules are specifically applied by legislation. The ALRA did not apply to them. The Commissioner Justice Toohey provided in his Practice Direction of 8 June 1977 that,

There will be no strict adherence to the ordinary rules of evidence. In particular as a general proposition hearsay evidence may be admitted, the weight to be attached to it to be a matter for submission and determination.

McIntyre has pointed out a similar approach in the Western Australian Equal Opportunity Tribunal which has adopted a Canadian position:

while ... administrative tribunals are not bound by ordinary rules of evidence, this flexibility usually goes only to admissibility of evidence, not to its weight ... (1994: 127).

Thus, although hearsay evidence will be admitted, the essential problem that inadmissible evidence poses (that is, its unreliable and untestable nature) continues to have effect. However, it needs to be borne in mind that in Northern Territory land claims, the Aboriginal Land Commissioners have been prepared to rely on the statements made by Aboriginal witnesses as to their laws and customs, as well as other significant departures from the rules of evidence (such as permitting unsworn evidence and group evidence),14 which raise questions about the reliability of such evidence (Forbes 1993, 1994b). There is no reason why the Federal Court would not similarly give such evidence its proper weight, provided the Court is satisfied as to its reliability.

Factors relevant to the need for anthropologists

Because the rules of evidence will not apply to exclude traditional evidence of a generalised nature, the role of anthropologists in NTA processes will not be a straightforward one as expert witnesses permitted to give evidence which Aboriginal or Torres Strait Islander witnesses are not. But the Northern Territory experience suggests that notwithstanding the less substantial role played by rules of evidence, anthropologists will still play a critical role.

There are numerous factors concerning evidence given by indigenous witnesses which make the role of the anthropologist very significant. First, evidence offered by anthropologists may still be important in dealing with perceptions about the reliability and weight of ‘hearsay’ or opinion evidence by indigenous witnesses. Second, it is well understood that there are communication difficulties in the proof of Aboriginal law and custom. Sometimes the answers of Aboriginal witnesses are seen as ‘vague and confusing’ (Aboriginal Land Commissioner 1990b: 8). Some of the difficulties arise from non-standard English (Koch 1985). There are difficulties created by the question and answer format used to elicit
evidence, compounded further by cross-examination which could include leading questions. Some communication difficulties arise from cultural differences and from a lack of shared understandings. There are also cultural constraints on the presentation of information, especially in public settings, which affect the willingness and ability of Aboriginal witnesses to answer questions.

The judicial process of evaluating oral evidence by observing the demeanour and candour of witnesses causes problems in presentation of evidence by Aboriginal witnesses. One Aboriginal Land Commissioner (1988: para 2.21.3), Mr Maurice, quoting his consultant anthropologist that 'hesitancy, awkwardness, embarrassment, even unwillingness to respond cannot be taken as evidence necessarily of ignorance ... the result is that answers recorded on the transcript of witnesses often cannot be taken at face value and any assessment of the evidence ... is a very difficult task'. The anthropologist can address specific communication problems that have emerged in any given case and put them in the appropriate context.\textsuperscript{15}

The presentation and discussion of traditional evidence

Many aspects of anthropological inquiry and discourse feed into the presentation of evidence at different levels. The anthropologist engages in primary evidence gathering by using the ethnographic skills of observation, questioning and recording. The evidence is collated and rendered into forms which reflect the anthropologist's understanding of the relevant parts of tradition and custom to be proved. In reports, genealogies, site lists and maps, the evidence is organised into a conceptual structure necessary to link traditions to the matters to be proved. This includes elucidation, generalisation and analysis of traditions as they emerge from the statements and practices of applicants. The anthropologist acts as a true expert witness, assisting the court in comprehending 'technical' facts in evidence.

This form of assistance does more than translate indigenous traditions into forms able to be assimilated by the court and other parties, because it not only bridges critical gaps in understanding (cf. Emerson 1994: 874–6), but constructs the understanding required. Anthropological inquiry isolates and describes systemic structures and relationships, and teases out complexity. Processes of social change and evolving tradition can be explained as part of a system of laws and customs dealing with historical events. Some indigenous witnesses will also discuss such issues at levels of generalisation and abstraction. If so, there would still be a place for anthropological accounts, to at least corroborate traditional evidence.
Opinion evidence

It is clearly preferable that anthropologists giving expert testimony have a good understanding of the privileges, responsibilities, and limits involved. There are sometimes said to be 'five rules' relating to the giving of expert evidence, but these are not entirely clear in scope or application, and overlap one another. The Evidence Act 1995, which applies to all Federal jurisdictions abolishes certain rules, limits the scope of others, and fails to mention another. These 'rules' should be understood as limitations and restrictions on the giving of expert testimony and the weight to be given to it, forms of 'control' exercised by the courts in limiting expert testimony. Because these rules operate in this way they will still have effect in NTA processes, notwithstanding that the rules of evidence do strictly apply.

Expertise

As the privilege of giving opinion evidence depends on the status of the witness as an expert, the witness must have sufficient knowledge and experience to be entitled to stand as an expert. This is apparent in a statement in one of the leading cases on expert evidence in Australia, Clark v Ryan in which Menzies J. argued that:

the field must be one in which human knowledge has advanced to an organisational point where it is possible to have expertise and it can be regarded as a reliable guide to inference.

It is the latter part of the statement that illuminates the rationale for the exception, that is, the reference to a 'reliable guide to inference'.

Whether an expert is permitted to testify will often depend on the relevance of specialised skills and under the new Federal evidence law, of 'specialist knowledge' (Freckleton and Selby 1993: paras 7.30, 7.330). Consequently, an expert will be asked to review their educational qualifications, publications, field experience, and employment and consultancy history. In the past there has been some doubt as to the relevance of academic qualifications as opposed to actual experience leading to the accumulation of knowledge, and to both the admissibility and weight to be given to opinions which are entirely academic and not based on any experience at all. Under the new Federal evidence law, the emphasis will be on the specialist knowledge of the expert, not how that knowledge was acquired (ibid.: para 7.330).

Giving opinion evidence is a privilege

Giving opinion evidence is a privilege justified by expertise and the court's need for assistance. Opinion evidence is likely to include discussions of the meaning and implications of other evidence (ibid.: para 1.20). Opinion evidence is problematical for courts because it potentially has an enormous impact on the outcome of litigation or inquiries. Courts ensure that such
Evidence observes certain principles and attains a certain quality, and that experts do not replace the court in deciding the facts and inferences to be drawn (ibid.: para 1.20).

**Ultimate issue rule**

This has led to the 'ultimate issue rule' under which the drawing of inferences in a case must remain the province of the tribunal of fact (which is the court unless there is a jury). This rule is often expressed by saying that the expert is not permitted to 'usurp the functions of the court'. Strictly, the ultimate issue rule would prevent the expert from expressing opinions that go directly to the issues of fact to be determined by the court (ibid.: para 10.185). However, the existence of the ultimate issue rule as a common law rule is in some doubt. In Federal jurisdictions, the rule has now been abolished by s.80 of the *Evidence Act 1995*. In any event, the rule is not strictly applied in relation to anthropologists. For example, in the Gove Land Rights Case, Blackburn allowed expert evidence which addressed, in conceptual terms, the same questions which he had to decide about the nature of Aboriginal land-owning groups. In relation to land claims in the Northern Territory it has become standard for the land claim book to refer to the central elements of the definition of 'traditional Aboriginal owners' contained in the ALRA, to present evidence and opinions grouped under those headings, and even to express views as to who the traditional owners are in respect of each part of the claim area. No one is confused about the extent to which the Aboriginal Land Commissioner will separately come to a view on the composition of the local descent group, or where to place primary spiritual responsibility.

**Common knowledge rule**

The role of the expert is to assist the tribunal of fact in drawing inferences. Consequently, expert opinion evidence is only admissible where the subject matter of the inquiry means that inexperienced persons are unlikely to be capable of drawing inferences and forming a correct judgment without assistance. This is the common knowledge rule. Under s.80 of the *Evidence Act 1995*, this rule has been abolished in Federal jurisdictions. It is highly unlikely that this rule will have any bearing on anthropologists involved in establishing custom and law in any court. Even if a court develops considerable experience in dealing with Aboriginal law and custom, there will always be the issue of how it applies in a particular locality.

**The basis rule**

This rule is about excluding opinions based on facts which are themselves not admissible or not actually admitted under ordinary rules of evidence, or which are not directly within the expert's own observation. The scope of the rule is not clear. It has not been expressly abolished by the new Federal
evidence legislation, although it is not codified and applied by it either. Opinion evidence cannot be based on statements made to the expert which are hearsay. Experts are not conduits to get into evidence matters which are otherwise inadmissible. In other words, opinion evidence ought to be based on facts which are actually put into evidence before the court. This rule tends to be applied to weight and not to admissibility, as in the Gove Land Rights Case in which Blackburn J. stated that he did;

not think it was correct to apply the hearsay rule so as to exclude evidence from an anthropologist in the form of a proposition of anthropology - a conclusion which has significance in that field of discourse ... . In my opinion such evidence is not rendered inadmissible by the fact that it is based partly on statements made to the expert by the Aboriginal (1971: 17 FLR 141; at 161).

Another aspect of the basis rule which may still be important in native title matters, is the extent to which an expert is expected to go beyond the published literature in expressing opinions. Experts are permitted to rely on their general training and skills, and knowledge acquired from the field's published literature is acceptable, so long as it forms part of the basis of their opinions, and they do not merely restate the views of the author (Freckleton and Selby 1993: paras 11.220ff especially 11.220 and 11.240). It is interesting to note that although the rule may not apply in native title processes, one of the criticisms of anthropology made in the context of native title is that it is 'recycled hearsay', or restated 'lay evidence' (Forbes 1994b: 11). In this way, non-applicable rules still haunt assessment of the anthropologist's contribution to the native title process.

Assessment of weight given to opinion evidence
Of substantial importance to the success of the anthropologist's contribution to the native title hearing, is the weight that is ultimately accorded to the evidence by the court. This court will be assessed by taking into account the following matters:

- its logical underpinnings;
- the relative skills of different witnesses;
- the certainty of the facts on which the opinion is based;
- the reliability of the procedures or methodology used;
- the impartiality of the witness;
- whether the opinions are based on surmise and conjecture; and
- whether the opinions are supported by the evidence (based on McLeod 1994: 43; Freckleton and Selby 1993: chapter 11).

Also of note is that opinion evidence of an expert may be excluded by the court exercising its residual discretion. This has been done on the basis of
the evidence being of insufficient probative value to be of assistance, or
being more prejudicial than probative. Under ss.135 and 136 of the new
Evidence Act, a Federal Court has a general discretion to exclude evidence,
and a general discretion to limit the use of evidence.

Impartiality
Because opinion evidence is considered inherently 'dangerous' by the
courts, and because it is a privilege, if an expert's opinion evidence is to
have any effect in proving matters it must be seen to be independent and
impartial. The problem of bias has been raised in relation to
anthropologists, but recurs across many disciplines involved in giving
expert testimony. Scathing comments about the unreliability of an expert's
opinion are not altogether rare in judgments, and are a common tactic for
cross-examining counsel.

Testifying as to facts
Some anthropologist evidence will not constitute opinion evidence. For
example, ethnographic material is likely to include substantial evidence as
to facts concerning how people have been observed to behave in a
particular context. When an expert testifies to facts, the evidence is subject
to the same rules of admissibility as any other witness. An anthropologist
maybe a witness of fact or of opinion, or of both, in native title processes.

Expert evidence for NTA processes

These matters have to be considered in the particular context of the NTA.

Mediations
In mediations conducted by the National or a State Native Title Tribunal or
in the Federal Court, the rules of evidence as to expert testimony have no
role to play as rules. However, it is likely that their effect will still be felt
in practice, albeit in a shadowy way.

One of the many obstacles to the native title mediation process is that
the applicants for a native title determination cannot come to the
negotiating table with a 'certificate of title' to negotiate with competing
land interests and users. Instead, the existence of their native title rights is
at issue. Applicants have to establish their native title, and that it is not
extinguished, if negotiations are to proceed. Mediation is a process which
does not readily accommodate proving title and dealing with
extinguishment. Mediation is supposed to enhance the process of resolving
disputes by focusing discussions on problem solving and goal orientation.
Mediations are unlikely to be successful if parties get stuck in the mind-set
of thinking about legal entitlements and questions of proof. Somehow,
proving native title to the satisfaction of the parties involved will have to be grafted onto this process. It is most likely that native title will have to be 'proved' to a lower standard than that required in a Federal Court hearing. For example, parties may require only that there be sufficient evidence to satisfy a general test of 'satisfaction' rather than the civil standard of proof. However, this assumes that parties are genuine in their efforts to mediate disputes and will not expect an unreasonable level of proof.

In other types of litigation, mediation is only successful after parties have had an opportunity to assess the merits of their own claim and the merits of the claims of other parties. Experts are frequently involved in this process by the production of reports which are sometimes exchanged prior to mediation commencing. Anthropologists involved in preparing information to be circulated to parties in a mediation, or who otherwise participate in a mediation, will have more effect in persuading those other parties as to the merits of the applicant's case, if they conduct themselves in a manner which reflects the role they play in the overall conduct of the native title application, that is, as independent experts assisting the parties (rather than the court) to form opinions about the evidence being relied upon to prove native title.

**Federal Court hearings**

As noted above, in Federal Court hearings under the NTA whether before judges or assessors, the rules of evidence will not apply, unless the Court decides in any given case, to give them some effect. Moreover, the Federal Court is now subject to the *Evidence Act 1995* which has reformed the law of expert evidence to a considerable extent. Prior to these reforms, Freckleton wrote:

Modernisation and clarification of the rules relating to the giving of expert testimony should also enable the anthropologist more effectively to provide useful information to the courts (1985: 386).

As explained above, the non-applicability of the rules does not mean that the rules of evidence pertaining to experts are thereby irrelevant. The philosophical problems that courts have with expert evidence will continue to have effect in Federal Court native title hearings, especially where there are competing applicant groups, each with their 'own' anthropologists. The court will assess the expert evidence in accordance with the principles outlined above. The rules are still relevant as they are grounded on strong traditions in the western legal system of fairness, weight given to different forms of evidence, and proof of matters. Inherent in the western system is the idea that assertions must be tested, corroborated or both. Opinion evidence must, in its subject matter, quality and style of presentation, still reflect the principles that have been discussed above, if it is to make a
serious contribution to the proof of matters. The issue of impartiality will be central to this process.

The issue of bias

An expert opinion is by definition that of an impartial objective observer. In theory, the expert is non-partisan, assisting the court disinterestedly. The reality is acknowledged by the courts to be quite different. Because experts are contracted to a party, paid by that party and frequently opposed by another expert contracted by the other party, experts are seen as a member of a party's team. They assist that party to present their evidence and to draw inferences from all the evidence which support that party's claims (Freckleton 1985: 380). The danger that an expert will be partisan rather than independent is a consequence of the adversarial system of litigation as much as anything else. Bias is an issue for all forms of expert testimony, and the courts are alive both to the issue and the contradictions inherent in the situation of the expert witness in adversarial proceedings. Far from resulting in the practice of expert evidence-giving becoming less, the practice is continuing unabated.

Anthropologists face an additional problem, because they are being singled out as a profession by certain commentators (lawyers, anthropologists and journalists) as being inherently subject to bias. It does seem that the nature of the anthropological methodology and the anthropological culture appear to make bias an important issue, particularly because of the ethical dimensions of involvement in native title or land claim processes.

There are a number of specific strands in the criticism of inherent bias. First, the acceptance of a commission from a party compromises the evidence given by an anthropologist, because it creates a client relationship. It is said that implicit in the contract is the understanding that the anthropologist's role is to collect and present evidence supportive of the client's case, and to omit or suppress evidence which is not supportive (Brunton 1995a: 32; Maddock 1983: 91, 153). However, this also applies to expert testimony in other disciplines. It is arguable that ethical issues do make this allegation harder to respond to than in other disciplines.

Second, is that the anthropologist will simply regurgitate what the applicants tell him or her. Forbes' (1994b: 11) colourful expression is that 'lay evidence ... is recycled in scientific packaging'. This lay evidence is, in Forbes' view, unreliable because it is hearsay on hearsay, recent invention purporting to be ancient history, and because customs are likely to be recalled in a manner favourable to the claimants. He complains that what few empirical facts there are, are what the client or subject told the
anthropologist about perceived rights or wishes. This criticism is reminiscent of the basis rule discussed above (Forbes 1994b: 11, 16).

This allegation fails to reflect the significant differences between the processes involved in gathering statements from applicants and witnesses, and in what the anthropologist does with those statements. One of the peculiarities of the land rights and native title arena of practice (from a lawyer's point of view) is that what may be seen as self-serving assertions by parties to the process, are viewed in a different light, and quite justifiably so. In the Northern Territory, the land claim books (written by anthropologists and linguists), and the Commissioner's reports, sometimes provide direct quotes of what claimants say about their relationship to land, sites and to one another, relying on such statements as evidence of the truth of what was asserted by them. Also anthropologists should take considerable comfort from Blackburn J.'s decision in the Gove Land Rights Case. Blackburn J. looked at the nature of anthropological research which included assessments of indigenous views and attitudes. He concluded that anthropologists should be able to give opinion based on their investigations (Freckleton 1985: 372-3). But the criticism again raises an issue which should be considered by anthropologists and their professional bodies; that is, how do they deal with issues concerning the veracity or 'truth' of what is being said. Anthropologists have long had to contend with differences in what people say and do. More significantly, anthropologists do discuss in their work the ideological dimensions of statements, and are well placed to contextualise many statements that applicants make. Anthropologists, however, may not feel that assessing the 'veracity' of statements is part of the anthropological discourse, if veracity is interpreted in a narrow, culturally embedded sense, of truth versus falsehood.

Third, it is said that anthropology as a discipline is inherently incapable of objectivity. This usually relies upon statements concerning the professional responsibilities and ethics of anthropologists, particularly those concerning conflicts of interests. For example, the revised principles of professional responsibility of the American Anthropologist's Association includes the following statement:

The Anthropologists' first responsibility is to those whose lives and cultures they study. Should conflicts of interest arise the interests of these people take precedence over other considerations (cited in Forbes 1994b: 19).

The Australian Anthropological Society's code of ethics differs from the American code in a significant respect. It states, in Clause 3.1 that:

Where a conflict of views of interests arises among the parties ... the views and interests of those studied should be placed first except where this would compromise a member's conscience or commitment to truthfulness. (Emphasis added).
The provisos to the Australian code of ethics could answer this allegation to a considerable extent. Nevertheless, the issue starkly shows how ethical matters sometimes create legal problems, and vice versa.

Fourth, it is inherent in the discipline of anthropology that anthropologists often spend long periods in close association with the applicants on whose behalf they testify (Forbes 1994b: 14–5). This is in contrast to other experts such as doctors and engineers who do not need to build up relationships with the clients they testify for, or the objects they study. Maddock (1989: 168) expresses this problem as bias arising from the nature of anthropological research.

Fifth, anthropologists do not oppose Aboriginal claims. It is said by critics, and even by some anthropologists, that it is impossible to get anthropologists to act against the interests of Aboriginal people especially the people they are involved with in research (Maddock 1989: 168). Forbes (1994b: 18) claims that there is (anecdotal) evidence that anthropologists would be denied promotions and access to Aboriginal communities if they were to act as witnesses against Aboriginal interests. Forbes extensively quotes Darwin barrister Hiley, QC (1985, 1989) as evidence of the deficiencies of anthropologists as experts, especially the problems of anthropologists who testify against, or fail to support, Aboriginal land claims and the reluctance of anthropologists to act as experts advising parties other than claimants. Forbes raises a valid point concerning the difficulties in contesting native title applications where only applicants have access to the relevant field of expertise. In an adversarial system, this means that evidence is not being adequately 'tested'. Maddock (1983: 156) quotes a point made by Sutton that by refusing to give evidence against Aboriginal interests, the 'closed ranks' deny miners and other parties access to what is a body of internationally recognised scientific expertise.

A sixth aspect is the problem of relativism. Relativism is increasingly at issue in anthropological inquiries and discourse. It asserts that there are no truths or objective facts which exist independently of the observer or of the observer's culture. Certainly there is a tension between this aspect of anthropology and other social sciences, and the legal approach which assumes that there are 'facts' (usually linked to 'observation') which can be ascertained by appropriate inquiries and which are different from inferences drawn from facts.

Seventh, there is the assertion that, as a discipline, anthropologists differ from other experts because of 'vagueness', 'ideological content' and the 'censorship of political correctness' (Forbes 1994b). In this context, anthropology is unfavourably compared to the so-called 'hard' sciences. Forbes (1994b: 16) questions whether anthropology is sufficiently a science to justify claims to expertise, a question settled in the Gove Land Rights Case in favour of anthropologists. However, the problem of 'ideology'
remains. Sutton is quoted by Forbes (1994b: 20) as stating that while 'a medical diagnosis has very little to do with a physician's politics, a sociological diagnosis can have quite a lot to do with an anthropologist's politics'. Anthropologists however, can point to the high level of debate about anthropological models as indicating a healthy pluralism. This is apparent in Northern Territory experience where the definition of traditional owners has been applied with increasing flexibility, and debated by anthropologists in the literature. This debate has taken place even though it potentially excluded some Aboriginal people from 'traditional owner' status under the ALRA.

Many of the issues raised in these allegations have been addressed in a considered way by Maddock (1983, 1989). He (1989: 169) concludes that 'there is no good reason to sweepingly impugn the evidence of anthropologists', but 'doubts about the veracity of their evidence cannot be stilled'. This is a reasonable summation, although the word 'reliability' should probably be substituted for 'veracity' as it is unnecessary to question the truthfulness of their evidence.

The issue of bias and reliability raises real problems not only for anthropologists, but also the parties who contract them to research their claims and provide essential opinion evidence on the traditional laws and customs applicable. Neal (1995: 2) has pointed out that there is a risk that opponents of a claim will seek to persuade the Federal Court that evidence presented by an expert must be discounted or even ignored because the expert is not impartial or unbiased. Maddock (1989: 175) concludes by asking whether anthropologists should be 'more coolly objective, or ... abandon ... claims to expertness and take up advocacy instead'? This comment poses the question of what action an anthropologist can either take or avoid in order to be seen as a reliable independent expert.

Anthropologists should be aware that the independent, impartial expert displays the following qualities: honesty, clarity, authority, calmness, and willingness to listen and discuss contrary views and explain patiently why the expert prefers their own. In so doing, the expert will persuade the judge that their opinion is justified (Ludlow 1993: 45).

Experts and advocacy

In accepting contracts as researchers and experts in native title claims, anthropologists should be aware that there is a distinction between the role of expert and of advocate. Experts of many professions have been criticised by judges for becoming advocates. For example, in one case the High Court of England:

... some ... of the experts in this case tended to enter into the arena in order to advocate their client's case. Counsel felt it necessary to challenge not only the reliability but also the credibility of experts with unadorned attacks on their veracity.
This simply should not happen where the Court is called upon to decide complex scientific or technical issues (ibid.: 1993: 39).

The criticism of experts doubling as advocates is not unique to anthropologists. It is also recognised that experts do act as advocates quite properly. For example, a leading writer on evidence, Sir Richard Eggleston, stated that one of the four functions of the expert witness was to act as an advocate (cited in Freckleton and Selby 1993: para 7.20). This statement has been adopted by the Federal Court. The conclusions to be drawn from legal writing on experts is that there is a valid distinction between being an advocate for the cause of the applicants, and being an advocate for the opinion being propounded by the expert. This distinction is put forward by a leading commentator on expert evidence, Freckleton who quotes Shaw:

One often hears it said that an expert witness should not appear to be an advocate in the cause. In one sense this is true ... He must not contend for a verdict or a judgment one or another. That is not his business. But he must be an advocate for the opinion he expresses about a matter which may have a bearing on the outcome of the trial. He must not be a protagonist of the party (by whom he has been called) but he is a protagonists of the opinion he expresses for he has come to support it and must seek to do so long as he believes in it (Freckleton and Selby 1993: para 2.210, see also para 2–250).

This same argument is put by Ludlow:

... a good expert must become an honest advocate of his own carefully considered opinion under cross examination, and if his advocacy satisfies the judge his opinion is right, it will have proved his point (1993: 45).

Clearly anthropologists can, like other experts, form opinions and argue for them. However in so doing, they must be seen to be acting on the basis of opinions formed by bringing both their research and analytical skills to bear on the evidence, testing both their own reasoning and the evidence, and being open to consideration of contrary opinions.

Consulting with lawyers for the applicants

Courts have also criticised experts for working too closely with a party's lawyers, and being too closely involved in the litigation (ibid.: 1993: 39). Ludlow examines this line of criticism and concludes that the expert must always 'guard against allowing his enthusiasm or pressure from the client or client's lawyers to turn him into an advocate of any opinion other than his own' (ibid.: 1993: 45).

Ludlow argues that the ideal is not the expert forming an opinion in isolation from the lawyers involved, but rather the expert forming, refining and testing an opinion in proper and appropriate consultation with the lawyers. Ludlow suggests that the client's lawyer should help the expert to establish in their own mind what the expert's opinion really is, based on all the relevant evidence. How does the lawyer perform this role? First, as
a sounding board who poses constructive, objective and hopefully intelligent questions. Lawyers have to look for, and test out, possible weaknesses in the expert's opinions, to test out arguments that support the case and those that damage it. The lawyer also has to find out what, ultimately, the expert's opinion will be under cross-examination. This will include ensuring that relevant published material is searched for and considered by the expert, as this may occur under cross-examination. This does not mean that the objective of consultations between lawyers and anthropologists is to cause the expert's evidence and opinion to be anything other than their own independent evidence. A lawyer may ask the expert to change the language of a report, for example to make it clearer, or to refrain from expressing opinions in a way that the court might object to (because it purports to decide disputed issues of fact). Ludlow (1993: 41, 43) claims that if this doctoring, it is both necessary and justified.

This dialogue is a two-way process. The expert can translate the 'technical' language and difficult aspects of the evidence for the lawyer. The expert will pick up nuances of meaning and matters of significance that the lawyers might miss. Just as importantly, the lawyers need to know how anthropologists come to their opinions and how in this instance the views of the testifying anthropologist were arrived at.

Conclusion

The role played by anthropologists in relation to the proof of traditional law and customs in native title processes will be crucial notwithstanding the non-applicability of the rules of evidence which make it difficult for indigenous witnesses to give evidence about their own laws and customs. Anthropologists are likely to serve the interests of the applicants best if they have a good understanding of the role of, and the limitations on, the evidence of the expert witness. The extent to which anthropologists will be able to persuade other parties and the Federal Court to accept their views will depend upon their evidence being presented in the manner of an ideal expert witness who is reliable and independent. Finally, as Ludlow (1993: 45) points out, it is the ability of the expert to express their opinions, in writing and orally, clearly, carefully and in their own words, which will make their evidence convincing.

Notes

1. This paper was produced on behalf of the Cape York Land Council, for presentation at the Native Title Session of the 1995 AAS Annual Conference. The views expressed are those of the author.
The legal context being discussed here is the western legal system, not that of Aboriginal or Torres Strait Islander law.

For example, under the Aboriginal Land Rights (Northern Territory) Act 1976, the findings of an Aboriginal Land Commissioner inform what is a political decision by the Minister for Aboriginal Affairs to make a decision whether or not to grant land, and if so, how much land to grant.

The rules of evidence will not apply to a tribunal such as the National Native Title Tribunal unless applied by the relevant legislation. In this case the NTA does not apply the rules of evidence to the Tribunal. Hearings in the Federal Court are ordinarily subject to the rules of evidence, but s.82(3) of the NTA provides that 'The Court, in conducting proceedings, is not bound by technicalities, legal forms or rules of evidence'.


Re Lilley (Deceased) [1953] VR 98 at 110; Sankey v Whitlam (1978) 142 CLR 1.

Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141. Referred to as Gove Land Rights Case throughout this paper.

For example, the reputation exception to hearsay requires that the person giving the evidence be able to identify the maker of statements. This point is made by Christine Wheeler cited by McIntyre (1994: 127).

This rule is re-stated and codified in s.79 of the Evidence Act 1995 as: 'If a person has specialised knowledge based on the person's training study or experience the opinion rule do not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge'.

This rule is stated in s.77 Evidence Act 1995.


See for example, Aboriginal Land Commissioner 1990b: 7–8.

In the Northern Territory experience, this contribution was sometimes played by the anthropologist assisting the Commissioner. For example, Aboriginal Land Commissioner Justice Olney permitted Dr Avery to ask questions to elucidate vague and confusing evidence (Aboriginal Land Commissioner 1990b: 8).

Clark v Ryan 1960 (103) CLR 486 at 501–2.

Consider the relevant weight given to the evidence of Stanner who had spent two weeks field work in the Gove Peninsula, compared to that given to the evidence of
Berndt who had spent considerable periods of time there, in the Gove Land Rights Case.

18. According to Freckleton and Selby (1993: para 11.620), the effect of the omission of the rule is that there is no formal requirement that the basis of the expert's evidence be proved by admissible evidence. However, they point out that the probative value of evidence not supported by admissible evidence is likely to be low.


20. Freckleton (1985: 379). But consider also the comment of Emerson (1994: 878) that the payment of high fees, and the dependency of some witnesses on those fees, exacerbates the tendency for expert witnesses to express opinions in accordance with the perceived interests of the party calling him.

21. See, for example, Brunton (1995a); Forbes (1993, 1994b, 1995a); and Maddock (1989). Some attacks on anthropologists go beyond that of bias. It is interesting to note the comment of W.E.H. Stanner quoted by Maddock (1983: 38) that he expected the anthropological evidence in the Gove Land Rights Case to be severely attacked: 'I have found widely in official life both hostility and derision towards the work and opinions of anthropologists'. Maddock (1983: 53–5) also quotes Middleton and Gumbert each of whom 'blames' the anthropologists for the loss of the Gove Land Rights Case although for differing reasons.

22. Brunton (1995a: 6). Consider the comments of Brunton (1995a: 4, 23) in respect of the South Australian Government Royal Commission of Inquiry into Hindmarsh Island, about whether the women's business relied upon is 'fabricated'. Brunton argues that all traditions are 'fabricated'. He goes on to make the point that it is by no means a straightforward matter to distinguish between the fabrication of tradition (which is illegitimate) and the creation or elaboration of tradition (which is acceptable).

23. Forbes (1994b: 11). In the Northern Territory, an anthropologist assists the Aboriginal Land Commissioner, weakening this argument in that context.


25. This paragraph paraphrases Ludlow (1993). It is interesting to speculate that if this was understood as the role of the expert then the issues discussed by Morphy and Morphy as to the nature of research in land claims may be viewed somewhat differently (Morphy and Morphy 1984, cited in Maddock 1989: 175).
