Innovation in Native Title Anthropology
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Session 10

Handling Sticky Questions in Court (role play) with Rob Blowes SC and Professor David Trigger

Introduction

1. Rather than make this session strictly only a role-play we have decided on a modified role play presentation. The format of the presentation intended is:

2. BLOWES will outline a scenario likely to give rise to a sticky question in cross examination in the event that the expert in the scenario is called as a witness in a native title proceeding and is cross examined in a way that challenges the expert's expertise or impartiality. An example of the kind of 'sticky question' that might arise will be put to TRIGGER.

3. TRIGGER may then flesh out the scenarios with anecdotal experiences and also provide a response that he considers would or should be sufficient to blunt the gravamen of the question.

4. BLOWES may then provide some commentary as to how that response might be regarded by the lawyers and judge in the context of the balance of the evidence and the circumstances of the case generally.

5. We suggest that questions, anecdotal experiences &c be kept to the end as no doubt we could engage with each one of the scenarios for the whole of the time available.

Scenario 1 – challenge to impartiality

6. BLOWES: An anthropologist (reminiscent of Professor Trigger in relation to North West Queensland & adjacent Northern Territory) who has long term and continuing personal and social relationships with people who were his informants for his PhD research and who has provided an expert report for a native claim. Challenges are likely in cross examination which will suggest that because of the nature and history of the relationship between the researcher and claimants, he has personal views

about and sympathies for a successful outcome to the claim said to compromise the "independence" required of an expert witness under the Federal Court Rules.

7. TRIGGER: Yes I would take my response to an acknowledgement that intense fieldwork does mean commonly becoming close personally to people, particularly in aboriginal Australia where social relations are strongly personalised. Furthermore, anthropology attracts students who become scholars with sympathy and political support for the cause of the rights of indigenous groups. And it is true that there are some in the academic world who publicly eschew the idea of independent research in favour of the idea of advocacy. Such academic criticism finds 'apolitical professionalism' to be morally bankrupt as it is driven by 'a conservative neo-liberal philosophy' – quotes from Andrew Lattas responding in a publication to my defence in 2011 of applied independent research in native title.

8. However, as I argued in the 2011 publication, my view is that independent research is quite feasible in the context of fieldwork social relationships. In land cases and native title professionals need to be clear in their own mind about the task – not one of political or other advocacy but rigorous investigation. As well, this is an issue for researchers with relatively short fieldwork schedules as well as those with lengthy relationships with particular regions and communities.

9. BLOWES: How would you personally respond in the witness box to the assertion in a question that you are not or could not be impartial in your opinions in a case, for example in which Waanyi or Garawa people seek recognition of native title?

10. TRIGGER: I take the proposition to mean that it would be impossible or unlikely for me to investigate sufficiently what one or more claimants may say about law and custom and related matters. This would be due to my not wishing to offend them, or because I wanted to present their case for continuing connection in the strongest possible way. I would point to my academic publications where over the years I have documented and analysed the views of Aboriginal people in an open minded way. I would refer to where in my report I have considered alternative propositions to the one(s) coming from Indigenous witnesses or informants in the research process. I would refer in my report to where I have discussed aspects of connection that may have ceased or adapted so that they are now different from earlier times. I would point ideally to data other than oral statements from claimants as well. Documentary material will have been examined. (Though this may be a body of material that should be more carefully assessed in anthropology reports in native title.) Finally, I may refer to my having been engaged on native title and related matters, by parties other than claimants, though I would acknowledge this has not been the case in the Gulf Country region.

11. BLOWES: commentary on how that answer might be received in the context of the case, what re-examination there might be; what submissions might be made in reliance on it and what the Court might find about the weight of the evidence of the witness on the basis of that answer. Comment on how Sundberg J considered the evidence of Alan Rumsey and others – give brief summary account of the following, which is an extract from the reasons for judgment of Sundberg J in case of *Neowarra v WA* [2003] FCA 1402 at [112]-[120]:

Rumsey, Redmond, Blundell - too partisan?

112 The respondents submitted that Dr Rumsey and Dr Redmond were too close to the applicants to be accepted as independent experts. They were, it was said, advocates for the applicants. The following passages show how Dr Rumsey dealt with the allegation:

"MR HUGHSTON: You have known many members of this claimant group for a great many years now?

DR RUMSEY: Yes.

MR HUGHSTON: Some of them for more than quarter of a century?

DR RUMSEY: Yes.

MR HUGHSTON: You have lived with them, you have worked with them on many occasions. Have you formed any friendships amongst the claimant group?

DR RUMSEY: Yes, although I would say my closest friends among the group have all passed away.

…

MR HUGHSTON: From a personal as opposed to a professional point of view, do you support this Native Title Claim?

DR RUMSEY: Yes.

MR HUGHSTON: Do you support it strongly?

DR RUMSEY: I suppose I would say so, yes.

MR HUGHSTON: Okay.

DR RUMSEY: From a personal point of view.

MR HUGHSTON: Do you think if one combines your personal viewpoint in this matter with the close friendships that you have formed within the claimant group, that you are perhaps far too close to them to offer an objective view in relation to the various aspects of their Native Title Claim?

DR RUMSEY: Well, I think that's a danger but it's – it's one that I have to try to contravene by considering that I'm also a professional Anthropologist and have to take that into account.

MR HUGHSTON: Okay. Do you accept, though, that consciously or perhaps unconsciously that those matters may affect your selection of material and the opinions that you form in this matter?

DR RUMSEY: They may have, yes. I try to guard against it. Could well be the case."

113 Having observed Dr Rumsey in the course of his lengthy evidence in chief and cross-examination, and having read the transcript of his evidence several times, I am satisfied that despite his candour in acknowledging the risk inherent in "closeness", his evidence and opinions were at all times entirely professional. I have no hesitation in accepting his evidence as that of an expert, eminently qualified by reason, in part, of his close involvement with the claimant group (including those now dead), to give expert anthropological and linguistic evidence.

114 Dr Redmond was also cross-examined on "closeness":

"MR DONALDSON: And there is, one would have thought again - common sense would suggest - that there is somewhat of a difficulty of a party engaging in the Participant Observation Method or in Phenomenological Technique of getting too close to their subjects.

DR REDMOND: A - a closeness to one's subjects, your Honour, was held up - in my training - as being the test of good fieldwork in the sense of being able to naturalise as much as possible the – one's own presence in a quite alien social environment but without any attempt to pretend that one is an Aborigine as such.

MR DONALDSON: But can I put it to you this way: that being involved with the degree of closeness that you obviously were with these people over a period of time, it would not be uncommon for a person to get bound up in the day-to-day lives, expectations, and aspirations of these people, would it?

DR REDMOND: To a degree. That was a - that was an objective of the research.

MR DONALDSON: Deliberate strategy, as it were?

DR REDMOND: In order to - in order to try and grasp the meaning, structures, and values that people attributed to their actions. It was necessary to be close by and engaged in activities that may elicit people's expressions about values."

Later, counsel drew attention to passages in Dr Redmond's diary, including a statement that Aboriginal people had been "victims of a war of dispossession", and put it to him that holding those views he could not "dispassionately express expert opinions relating to these matters". Dr Redmond denied the claim.

115 Cross-examined by counsel for another party, Dr Redmond was challenged about his friendship with some of the claimants:

> *"DR REDMOND: Certainly bonds of affection get established with particular people over a period of that length. Working and living in people's communities, certainly - - -*
>
> *MR RANSON: Again, Mr Donaldson took you to some passages from your field notes and I, like he, gained the strong impression that at an emotional level you had engaged quite closely with a lot of these people.*
>
> *DR REDMOND: One becomes close to particular people ….*
>
> *…*
>
> *MR RANSON: … is it unfair then to suggest that, to the extent that those people want this claim to succeed to the greatest possible extent, is it unfair to suggest that that is something that you also want?*
>
> *DR REDMOND: It's unfair to suggest that the objectivity of my work as an anthropologist might be [compromised] by means of subjective - - -*
>
> *MR RANSON: … were the claim not to succeed … would that be something that you would be upset or disturbed by?*
>
> *…*
>
> *DR REDMOND: As a private individual?*
>
> *MR RANSON: Yes, I'm speaking at an emotional level I suppose you could say.*
>
> *DR REDMOND: Yes, that would be fair to say as a private individual that there would be some sense of - some sense of disappointment perhaps.*
>
> *MR RANSON: But you're confident that to the extent that that might be true, it hasn't affected your approach to your work, your fieldwork and your work?*
>
> *DR REDMOND: Yes, I am confident about that."*

116 Again I observed Dr Redmond over his even lengthier examination in chief and cross-examination, and I have since read the transcript of his evidence several times. I am in no doubt that his evidence was dispassionate and professional, and that the very closeness to his subjects that gave rise to the challenge to his independence, endows his evidence with particular value. Professor Blundell said in her evidence that participant observation is "trying, in a sense, to become a member of the culture that one is studying at the same time that one maintains one's objectivity, which is a tricky thing to do". I am satisfied that Dr Redmond managed to maintain this tricky balance.

117 The State submitted that the value of Professor Blundell's evidence was somewhat diminished by her defensive, at times evasive, approach to cross-examination. She adopted the role of an advocate rather than an independent expert. It was said that except to the extent that her evidence corroborates her earlier thesis, it should be rejected. Group 2A's challenge was more comprehensive and unqualified:

> *"It is submitted that her expert evidence was unreliable. Her evidence was little short of a disgrace. She showed no desire to answer questions properly asked of her. Her answers to simple questions were agonisingly*

> *long winded and evasive. It is impossible to determine from the morass of evidence that she provided whether she has expressed relevant opinions and if so what they are. Her demeanour and answers from the witness box displayed a complete lack of objectivity. She clearly viewed her role as being an advocate of the Applicants, rendering whatever opinions can be salvaged from her evidence worthless."*

118 Professor Blundell's acquaintance with the region goes back to 1971. Her 1975 thesis is accepted as an important contribution to the literature. She followed up her thesis with further fieldwork in 1976 and 1977. Then there was a period, from 1978 to 1993, when she was at her home base in Canada. During this period, however, she published three articles on aspects of the claim region and its inhabitants. She returned to the region for field work for short periods in 1996, 1998, 1999, 2000 and 2001. Her expertise in the area about which she gave evidence cannot seriously be challenged. Professor Blundell came to Perth from Canada especially to give evidence. When she gave evidence she was suffering from jet lag, and late on the final day of her evidence she apologised for the quality of one of her answers on the ground that she was very tired.

119 Professor Blundell's expertise meant that she was totally in command of her material, and employed with ease the many rather esoteric concepts that are the tools of her trade. From time to time she became a little impatient at the lack of precision in counsel's questions, and the repetitive nature of the cross-examination. On a number of occasions she pointed out that a particular topic had been covered more than once, saving the Court from having to make that point. Several times in the course of her cross-examination in the afternoon of the last day of her evidence, when she was complaining of tiredness, she professed to be unable to answer particular questions without being able to reflect on the proper answer. I did not see this as evasion, but as a genuine inability to provide the Court with a useful answer on the spot. I reject the challenge to her evidence.

Findings

120 I now set out my findings in relation to the anthropological and linguistic evidence.

(1) Dr Rumsey has specialised knowledge in anthropology and linguistics based on his training, study and experience.

(2) Dr Redmond has specialised knowledge in anthropology based on his training, study and experience.

(3) Professor Blundell has specialised knowledge in anthropology and archaeology based on her training, study and experience.

(4) Dr Rumsey, Dr Redmond and Professor Blundell have carried out extensive fieldwork in the claim region over lengthy periods.

(5) Their closeness to members of the claimant group has not affected their professional judgment or resulted in their becoming advocates for the claimants.

(6) Professor Sansom has specialised knowledge in anthropology based on his training, study and experience.

(7) Professor Sansom has not carried out fieldwork in the Kimberley, and his opinions and conclusions have a desktop or academic quality which renders them of less weight than those of experts who have immersed themselves in the day to day life of the claimant group, as have Dr Rumsey, Dr Redmond and Professor Blundell.

12. TRIGGER: One challenge is to not become captured by lawyers assuming the strength of their client's case. This can be difficult even when anthropologists are engaged by lawyers representing multiple indigenous parties in a case.

13. [Was Olney's complaint about me asking questions in the Robinson River Land Claim partly indicating this kind of concern about independence? The quote from that land commissioner's report could be useful? I.e. apart from requesting you to stop me asking questions as anthropologist of the aboriginal witnesses, Olney then followed up in his report:

OLNEY, J AT PARA 2.15 (PAGE 9) OF HIS REPORT ON ROBINSON RIVER SAYS:

> *[After noting that he allowed Dr Avery advising him to question witnesses] i was, however, in the present case concerned at the role taken by the senior anthropologist employed by the NLC on behalf of the claimants who during the traditional evidence on occasions took over the function of counsel in the examination of witnesses … contrary to usual practice for a person who himself is an important witness in the inquiry to also perform the role of advocate.*

14. Perhaps this incident, and the one then discussed in para 2.22 & 2.23 about a specific question I asked, points to the differences in land claims and native title litigation where there would be no suggestion an expert anthropologist would ask questions of aboriginal witnesses? So inquiries perhaps made and now make less of the issue of independence than native title cases?

15. BLOWES: that was my fault and my inexperience, though the Court may have overlooked the nature of the proceedings. It was my job to be sufficiently on top of the material and familiar enough with the witnesses and what they might say, to be able to ask all the questions that were necessary

16. TRIGGER: though it seems to me the issue of whether the anthropologist plays any role in the taking of witness statements in native title – something some lawyers ask them to do – may raise a related matter and we could perhaps address that kind of request to an anthropologist? As raising the independence issue as well as the issue of whether lawyers elicit 'data' that is any way parallel to or reproducing the findings of anthropologists.

17. BLOWES: response to above comments. Yes, Land Claims were different – they were administrative inquiries, not judicial proceedings; and the rules of evidence did not apply.

18. And Yes, the anthropologist needs to remain firmly in charge of his or her opinions on relevant matters and not “become an advocate” or yield to pressure from a lawyer about the content of your opinion. The only basis for your opinion should be your expertise, applied to your data.

19. And Yes, anthropologists who are engaged as independent experts for a case and who will be giving expert evidence in a case should not be asked to be involved in the preparation of witness statements. The lawyers need to have regard to the report of the anthropologist when preparing witness statements but any anthropological assistance in the preparation should not be from the expert who is to be a witness

Scenario 2 – ‘out of area’ anthropologist (1)

20. BLOWES: This scenario is reminiscent of Professor Trigger’s involvement in Yilka, which was a western desert claim in which he was engaged by the State of Western Australia and wrote a report and gave evidence in that capacity. It was put to him that as his primary research area was in the Gulf Country in Queensland, he should acknowledge the greater expertise of the anthropologists engaged by the Applicant.

21. A researcher who has no experience of working in the claim area or in any region culturally similar to the claim area asked to appear as an expert witness for a respondent and a suggestion of absence of relevant experience is put as a criticism of the researcher in cross examination; as a reason why his or her views are not to be accepted as against the experts engaged by the claimants where they differ. In contrast the experts engaged by the claimants will either have had long experience in that cultural region or at least will have had the opportunity to do fieldwork with the claimants.

22. So (1) where the researcher is engaged by the Applicant and is able to conduct field work, cross examination by a respondent may suggest that the absence of long term familiarity with the region or the claimants adversely affects the weight of opinions; and (2) where the researcher is engaged by the State or other respondent and has no access to the claimants or opportunity to conduct field work, he or she may be cross examined for the Applicant to the effect that there is no relevant expertise or that a bias is brought to the report from areas where the expert is familiar.

23. TRIGGER: yes I think this is a good issue to take up. Particularly given how common it is for parties to request anthropologists to give opinions about other

anthropologists' reports. I would take the matter to anthropological expertise as legitimate in the reading of and asking questions of the work of other anthropologists, whether or not the individual has done fieldwork in the region of the claim. I.e. I don't regard fieldwork in a region as a prerequisite to more convincingly arrived at opinions. Rather the opinions either stand or fall based on the empirical material supporting them. It may be of course that the researcher familiar with the region will more quickly obtain the relevant empirical material. So, perhaps to suggest a parallel from another profession where expert opinion is given, just as an engineer may not have worked on the construction of a particular bridge that may have collapsed they can still ask questions about whether the construction was done best practice in the profession and also ask questions about reports on the matter by engineers who did design that particular bridge.

24. BLOWES: Do you recall how you answered, or how you wished you had answered the question in Yilka about the area not being one with which you were familiar:

25. TRIGGER: I note from the transcript (p.1935 of Transcript: WAD 297/2008 09.09.13):

05 PROFESSOR TRIGGER: So in my - my response to the question, very minimal amounts of primary work in the Western Desert as such. In the early 90s I completed a short heritage survey with some Jigalong people in the Newman area, and then I worked collaboratively with Professor Tonkinson when he was completing his Martu Native Title work because I was the

10 director of Centre for Anthropological Works Research at the University of Western Australia which - where that work was done, and more recently I supervised one of our researchers at the University of Queensland who's carried out Native Title investigations for Widji I think in the Goldfields.

15 But all that amounts to a minor - very minor aspect of primary research, so my response to the question of relevant specialised knowledge is to say that I - I draw on 35-odd years of study of Aboriginal cultures in general across Australia, including matters of land tenure and race relations. I've carried out many applied research projects for statutory land claims and heritage surveys,

20 site reporting, Native Title claims, project negotiations.

I - I have an academic career of participation in debate on these matters in relation to the adequacy of studies, peer review of applied research reports in Native Title and related areas, and also peer review of submitted articles for

25 academic journals, supervision and examination of higher degrees theses and engagements by parties, both applicant parties, sometime respondent parties, and indeed by the Court - by the Federal Court, at the moment, for example, by the Federal Court in relation to four Native Title claims in south-west Queensland where I'm peer reviewing and advising the researchers who are

30 preparing - preparing connection reports.

26. I also note the lawyers for the applicants argued as follows (WAD 297/2008 09.09.13 P-1926 TRANSCRIPT AUSTRALIA) about what constitutes an 'expert opinion' rather than 'peer review':

> MR KEELY: what we say is that this report is, if you like, a critique of the reports of Dr Sackett and Dr Cane but one which expresses very little by way of opinion in its own right. In other words, we would suggest that in large part it's not a true report of an expert witness.
>
> For example, there are a range of examples where Professor Trigger says something like, "I'm not clear about this" or "I'm not satisfied about that," and things of that kind, so it's a peer review type report. Having said that, your Honour, we don't suggest that Professor Trigger can't participate in the experts' conference, …
> HIS HONOUR: Alright, well, that seems reasonable but I can say my immediate reaction to what you've said is that it's not clear to me, as a matter of law, that that's not the province of an expert to say that "I'm an expert in this field and I'm not persuaded about X for the following reasons," but if you wish to press that down the track, I'll most certainly retain an open mind about it.

27. Note the following treatment of the issue in the reasons for judgment: *Yilka v WA* [2016] FCA 752 of McKerracher J:

> 121 The parties are at odds in relation to the role of this expert. The Yilka applicant stresses that Professor Trigger has not carried out any fieldwork of any length in the Western Desert, nor with the claimants, and that his opinions have generally been based on his own examination of the views of Dr Sackett and Dr Cane. Often he raised queries, rather than expressing his own positive views. Other criticisms are raised of Professor Trigger, which I think are overstated. The Yilka applicant had initially filed a series of objections to Professor Trigger's evidence. It no longer seeks to maintain those objections, while reiterating its general concerns that he raised queries rather than providing opinions. The Yilka applicant contends that this should go to the weight given to Professor Trigger's evidence.
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> 122 192 Contrary to the Yilka applicant's submission, I do not accept that Professor Trigger has raised unreasonable or unfounded queries. He has explained that he used his specialised knowledge to examine the expert reports in relation to the relevant academic literature.

Scenario 3 – 'out of area' anthropologist (2)

28. BLOWES: In this scenario, an expert giving evidence about a coastal estate based cultural area, whereas the focus of the research life of that expert has been devoted to work in, e.g., the Western Desert is challenged as bringing to his or her evidence, a bias toward seeing flexibility and multiple forms of connection in the situation of the claim area

29. TRIGGER: again, yes a good exemplar to use. Again raising the relationship between expertise in general and regional fieldwork experience. I would expect

anthropologists to inform themselves about differences from the regions in which they have done detailed fieldwork when providing opinions. Indeed, in principle, we might say an anthropologist with no or little research fieldwork experience in Aboriginal Australia in general might still be expert in giving an opinion about say principles of social organisation or traditional change and adaptation.

30. BLOWES: This occurred recently in relation to a claim area just north of Broome where an expert engaged by one group of claimants was said to be too quick to find parallels with the laws and customs of another area. In that case some of the foundations of that expert's approach were said by the Court to have not been accepted by the Court. The Court also said:

> [The Expert] certainly viewed the circumstances favourably to the [Group Name] applicants where possible. His enthusiasm for that view may have coloured his assessment of some of the necessary underlying factual judgements. He may also have been too ready to transpose his deep knowledge of the social structures of [the area with which he was most familiar] to the different circumstances of the mid-Dampier Peninsula. However, when faced with this criticism, he accepted his limitations where he thought the criticism was justified. It is apparent that [the expert] had sympathy for the history of the [particular claimants].

Scenario 4 – 'out of discipline area expertise'

31. BLOWES: In this scenario, the evidence of an expert whose primary training is in archaeology, or linguistics, rather than anthropology is challenged on the basis of lacking necessary anthropological training and experience. People like Professor Rumsey, Merlan and Sutton may have done their original PhD research with as much focus on linguistics as anthropology, but they undoubtedly also qualify as expert anthropologists. Sometimes an archaeologist may have sufficient training and experience to be properly regarded as an expert in anthropology. Each case may differ, but if you are new to being an expert witness and your training and experience in another field is extensive, it may attract questions about your qualifications as an expert anthropologist and you will need to be prepared to justify your expertise by reference to your study, training and experience.

32. TRIGGER: We can note that particularly in the north American tradition, linguistic anthropology and ethnographically oriented archaeology, are regarded as sub fields of the broader discipline of anthropology. This is less so in the training in the UK and probably in Australia though with some influences from the 1970s from US approaches. But yes also historians face this issue in the native title context of research. This leads us to address what expertise in anthropology encompasses that is not in other disciplines. I think this will be argued in terms of the training backgrounds of individual practitioners given disciplinary overlaps.

33. Most significantly for the immediate future I think this is relevant to addressing compensation claims on matters of ‘spiritual loss’ or related loss. What is the expertise of anthropology compared say to psychology or social work? What is a robust methodology informed by anthropological expertise for the investigation of cultural loss due to particular developments or tenure events on the land? I found Tina Jowett’s recent paper on compensation, and what matters anthropology needs to address, prompting that kind of question.

34. BLOWES: Historians are probably in a slightly different category here, unless a particular historian also claims to be an anthropological expert. The difficulty for an historian is persuading the Court that he or she has specialised knowledge, training and experience that sustains an opinion about how a historical document should be understood otherwise than by its plain content. Some judges have been known to claim that they can read as well as the next historian.

Scenario 5 – a sticky question at the point of engagement (1)

35. BLOWES: Anthropologists are engaged by a party under a contract but usually the detailed instructions about the nature of the research and report writing required is contained in “Terms of Reference”. These are often “issued” by the legal branch of the representative body without much consultation with the researcher. There are times also when the Terms of Reference, may be unrealistic as to the amount of work they will require relative to the number of days allowed for the work in the contract of engagement. What might the anthropologist do? Can they have any say in the development of the terms of reference?

36. TRIGGER: Yes I think there is an issue here where the anthropologist should check carefully that the ToR are realistic and that they make sense in terms of the opinions sought. Both respondent parties & claimant parties engage anthropologists with a scope of the opinions sought. Does the anthropologist seek to discuss the terms and the matters to be addressed, or just go with what may be more narrow questions than the anthropologist suspects need addressing. In a recent case I generated further discussion with the lawyers in order to try to make the ToR more suited to what had emerged as the kind of opinion they were seeking. In general lawyers in my experience will have in mind the interests of their clients and at times will word ToR for the researcher accordingly.

37. BLOWES: Short of the researcher being restricted or instructed as to the content of the opinions to reach (which should not occur), but with other difficulties with what is being asked in the terms of reference, he or she should speak up as soon as the issue is detected. It is the reputation of the researcher that is on the line here, and

he or she is entitled to canvas with the representative body or any other party engaging the researcher, any concerns about the terms of reference.

38. I generally encourage discussion between the legal branch and the researcher to ensure that there is a clear understanding about the realities and requirements of proposed terms of reference and that ultimately it is a document that the research can, and agrees to, live with and fulfil.

Scenario 6 – another question about engagement - Lawyers limiting anthropological research or seeking to influence the content of an expert opinion

39. BLOWES: A worst case scenario in the context of questions about terms of reference might be where the researcher has been asked to report on a claim which is surrounded by decided claims.

40. I understand that it is not unheard of that a researcher has been told that the report must contain opinions that are consistent with determinations of native title made in surrounding areas. That might be just one example of a communication from the lawyers which appears to seek to unduly restrict the research or influence the content the findings that may be made. Clearly a problem arises when the expert realises that he or she is coming to conclusions which are inconsistent with the outcomes in other cases.

41. I have recently provided some written guidance to the AAS about such a scenario and there is not time here to go into all aspects and possible variations of the scenario, but generally, it is never proper for a lawyer to insist on the particular content of an opinion to be expressed by an expert in a report.

42. TRIGGER: yes very important. Related also to availability of other expert documents for adjacent claims. This is particularly difficult across state and territory borders as well. Should the anthropologist be assumed to have available the research for adjacent claims in order to address overlaps or differences in their own findings? Should NTRBS be required to provide adjacent reports to the researchers over and above their clients' worries about privacy which can at times be driven by competition over money and resources seen to potentially flow from who holds particular cultural information?

43. An expression I heard in conversation a while ago referred to lawyers 'gouging' anthropology reports or expertise for more convincing material and opinions in support of their client's case. So an important issue for anthropology is when to say 'that is all we can give you. Research will not provide further material in support of your client's case'?

Scenario 7 – what to do about confidential documents you have been given

44. BLOWES: you have been engaged to research a claim and by way of background have been provided with all sorts of material by the representative body, including various in-house or otherwise confidential reports about the people and area concerned.

45. Then when it comes to preparing the report, you are told that those documents are confidential and that privilege in them will be waived if you refer to them in your report.

46. TRIGGER: My thoughts on this are we simply have to then advise a) that the adequacy of the expert report being prepared may be lessened, and b) that a qualification may be necessary on signing the statement that all materials to the expert's knowledge have been addressed.

47. BLOWES: As the chair of this session will tell you, the best way to handle this issue is, from the very beginning insist that the representative body only give you material that is prepared for you to refer to in your report, with the consequence that that material will no longer be confidential or privileged regardless of whether it might be embarrassing or cause difficulties for the case. "If you don't want me to refer to it or rely on it, then don't give it to me".

48. If it turns out later that the material comes to light and you are cross examined about whether you have seen it but not referred to it, then the embarrassment might be yours, as well as the legal representatives or representative body.

Scenario 8 – Questions about "rights" – whose job is it to ascertain what the native title rights are

49. BLOWES: In this scenario a researcher is given a particular list of 'rights' (probably the list as claimed in the native title application when it was filed years ago) and is asked to report on whether those rights are the rights that are held by the claimants.

50. It is inherently a leading question. The challenge to the evidence of his or her acceptance of them as being an adequate description of the native title rights might be that the researcher started with the listed rights rather than making his or her own assessment.

51. TRIGGER: a very important issue. So common for lawyers to give the pre-existing list of rights to the researcher rather than asking for an opinion about what they are that is based on independent investigation. I guess this follows partly from the timing of

making the claim before the research is done. The matter is compounded by difficulties in eliciting consciously stated lists of rights from claimants; in my experience the researcher needs to prompt and question if individual rights are to be probed. My own preference is for rights to be worded more generally.

52. BLOWES: the proper job of the research, in my view is more open ended than posed in the scenario. It is my firm view after years of experience, that the correct job a researcher is to ascertain and report on the overall relationship of the people to their country – its quality and character and as to the level of inclusiveness of what people are able to do on their country and with its resources. A researcher would also usefully distinguish in that context between rules which establish the relationship to country and rules which regulate the activities of people vis-à-vis their country and resources. The deduction from that, of what the rights are that are embedded in that relationship, is a matter for the lawyers (as to which, see my recent article in Native Title News, also available on the CNTA website)