

LAWYERS AND ANTHROPOLOGISTS:

WORKING TOGETHER EFFECTIVELY IN NATIVE TITLE / LAND RIGHTS CASES

1. In this paper, I argue that an effective working relationship between a lawyer and an anthropologist requires each to have a good understanding, not only of his or her own role and obligations, but also of the role and obligations of the other.
2. No doubt other factors are needed for an effective working relationship, including mutual professional courtesy and respect.
3. On occasions, I have sensed that some anthropologists, particularly those who are inexperienced as expert witnesses, have approached interactions with lawyers with a degree of wariness or even defensiveness. A proper understanding of the respective roles and obligations should help to allay any concerns on the part of the anthropologist.
4. I have also sensed over the years that at least some anthropologists feel undervalued in native title proceedings. One small example of that is that I once heard a capable and respected anthropologist describe the case on which we were both working as “an anthropology free-zone”, a statement that wasn’t literally true, but which caused me to stop and think. That case was in the post-*Jangala* environment, which probably had something to do with the degree of separation from the expert witnesses that I and the other lawyers were trying to implement. I say something further about *Jangala* below.
5. For my part, I have found anthropologists to be generally very helpful in gaining a proper understanding of the case at hand. There are many things that lawyers will not understand from merely having read the papers. For example: Why is a prospective witness saying what he or she is saying when it cannot obviously be reconciled with the case that is being put? Why is a witness reluctant to talk to the lawyers? What are the background politics that may be influencing what people are saying and what positions they are adopting?

Roles and obligations of lawyers and anthropologists in native title proceedings

Lawyers’ obligations

6. Unlike an expert witness, a lawyer is an advocate. That of course does not mean that anything goes. Focussing on barristers, their conduct is governed by the *Legal Profession Uniform Conduct (Barristers) Rules 2015* which are enforced by the Legal Services Board and Commissioner.¹
7. Among other things, these rules identify as principles that barristers owe their paramount duty to the administration of justice (Rule 4(a)) and should exercise their forensic judgments and give their advice independently and for the proper administration of justice, notwithstanding any contrary desires of their clients (Rule 4(e)). See also Rule 23.
8. These rules further provide, among other things, that:

¹ A copy of these rules may be accessed at: [Legal Profession Uniform Conduct \(Barristers\) Rules 2015 - NSW Legislation](#). The current version of these rules is dated 4 March 2022.

- (a) a barrister must not engage in conduct which is: dishonest or otherwise discreditable to a barrister; prejudicial to the administration of justice; or likely to diminish public confidence in the legal profession or the administration of justice (Rule 8);
 - (b) a barrister must not deceive or knowingly or recklessly mislead the court (Rule 24) and must take all necessary steps to correct any misleading statement made as soon as possible after the barrister becomes aware that the statement was misleading (Rule 25);
 - (c) “[a] barrister must promote and protect fearlessly and by all proper and lawful means the client’s best interests to the best of the barrister’s skill and diligence, and do so without regard to his or her own interest or to any consequences to the barrister or to any other person” (Rule 35);
 - (d) “[a] barrister must not act as the mere mouthpiece of the client or of the instructing solicitor and must exercise the forensic judgments called for during the case independently, after the appropriate consideration of the client’s and the instructing solicitor’s wishes where practicable” (Rule 42);
 - (e) a barrister must not allege any matter of fact ... unless the barrister believes on reasonable grounds that the factual material already available provides a proper basis to do so (Rule 64); and
 - (f) a barrister must not “advise or suggest to a witness that false or misleading evidence should be given nor condone another person doing so”, nor must he or she “coach a witness by advising what answers the witness should give to questions which might be asked”.
9. Lawyers also have obligations under ss 37M and 37N of the *Federal Court of Australia Act 1976* (Cth). In short, they are obliged to take into account the duty imposed on their client by s 37N(1) of the Act and to assist the client to comply with that duty. Subsection 37N(1) of the Act requires the parties to litigation to “conduct the proceeding ... in a way that is consistent with the overarching purpose”. The “overarching purpose” is defined in s 37M(1) of the Act to mean “to facilitate the just resolution of disputes ... according to law ... and ... as quickly, inexpensively and efficiently as possible”. This definition is expanded in s 37M(2) of the Act.

Anthropologists’ obligations

- 10. In native title proceedings, the anthropologist’s role is as an independent expert witness and, as such, he or she is bound by the Court’s Harmonised Expert Witness Code of Conduct.
- 11. Everyone here will be familiar with the Federal Court’s Expert Evidence Practice Notes (GNP-EXPT), which includes the annexed Harmonised Expert Witness Code of Conduct. This document is almost invariably attached to terms of reference directed to anthropologists.
- 12. Without canvassing the Code in detail, for present purposes attention is drawn to the following important provisions:

- (a) “[a]n expert witness is not an advocate for a party and has a paramount duty, overriding any duty to the party to the proceedings or other person retaining the expert witness, to assist the Court impartially on matters relevant to the area of expertise of the witness” (Clause 2);
 - (b) every report prepared by an expert witness for use in Court shall clearly state the opinion or opinions of the expert and shall “the assumptions and material facts on which each opinion expressed in the report is based” and “the reasons for and any literature or other materials utilised in support of such opinion” (Clauses 3(d), (e)); and
 - (c) “[w]here an expert witness has provided to a party (or that party’s legal representative) a report for use in Court, and the expert thereafter changes his or her opinion on a material matter, the expert shall forthwith provide to the party (or that party’s legal representative) a supplementary report ...”; (Clause 4).
13. There is also the Australian Anthropological Society’s Code of Ethics, the latest iteration of which appears to have been produced in 2012.² The Society’s members agree to abide by the Code upon their application and acceptance as members. Further consideration of this Code is beyond the scope of this paper.

Key points of interaction between lawyers and anthropologists as expert witnesses

14. Expert anthropological evidence in a native title case is different from expert evidence given in a range of other contexts. For example, in a personal injuries case, a doctor might be provided with a few papers, spend 20 minutes or half an hour with the injured person, then write a report about the nature and extent of the injuries and their cause.
15. In contrast, in native title cases, anthropologists will ordinarily have a mountain of evidence to sift through and be required to undertake fieldwork, before preparing what are sometimes voluminous reports. Further, it is not uncommon for the facts to raise issues that have not been considered or not been much considered before.
16. There are in my view three key points at which lawyers and expert anthropologists interact:
- (a) the initial engagement of the anthropologist;
 - (b) the finalisation (or “settling”) of the expert report(s); and
 - (c) prior to the expert participating in a conference of experts or giving evidence at trial.
- Careful consideration by both the lawyer and the anthropologist at each of these points should promote more effective working relationships between them.

Initial engagement

17. The initial engagement is obviously important, not only in terms of the choice of the anthropologist for the particular case, but also for identifying exactly what the anthropologist is to be asked to do. Terms of reference should not be formulaic but should be carefully tailored to the particular issues likely to arise in the case. They therefore need to be based on a proper understanding of those issues.

² See [Code of Ethics - Australian Anthropological Society](#), accessed 11 May 2025.

18. In relation to matters of law, it is common for terms of reference to include some instruction about concepts that are legal in nature, not anthropological, for example, what, for native title purposes, is meant by “society”, “traditional laws and customs”, “permissible adaptation”, “overlapping native titles” and “cultural loss”. The native title legal landscape is one that is still relatively new and one that continues to evolve.
19. I generally ask that draft terms of reference be provided to the anthropologist for consideration and comment. The lawyer is responsible for the ultimate form of the terms of reference, but that task can be assisted by feedback from the anthropologist. The objective of doing this is to ensure that there is engagement with the real issues.
20. Sometimes new issues can arise or an issue can be missed or not fully appreciated at the time the terms of reference are drawn. Where this occurs, supplementary terms of reference should be prepared.

“Settling” expert report(s)

21. In *Harrington-Smith v Western Australia (No 7)*, Lindgren J said:

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.³

[original emphasis]

This passage has been cited with approval in various subsequent cases.⁴ It does not, however, in my opinion, reflect the limits of a lawyer’s proper role in relation to an anthropologist’s report.

22. I doubt that anyone would argue against the proposition that the lawyer is entitled to draw the expert’s attention to:
 - (a) mistakes of fact or law in a draft report;
 - (b) a failure on the part of the expert to address all the terms of reference;
 - (c) a failure on the part of the expert to address evidence that the author has been asked to consider.

In my view, a lawyer is not only entitled to raise such matters but is duty-bound to do so.

23. It is also my view that a lawyer is entitled to draw attention to any internal inconsistency within the report and to ask questions such as: “At paragraph X you express opinion Y but do not mention matter Z. Have you considered matter Z in forming that opinion?”
24. Various things that a lawyer is not permitted to do are clear. For example, as noted already and as with all witnesses a lawyer comes into contact with, he or she is prohibited from coaching a witness, subtly or otherwise, by advising what answers the witness should give to questions which might be asked.

³ [2003] FCA 893; 130 FCR 424 at [19].

⁴ See, for example: *Jango v Northern Territory (No 2)* [2004] FCA 1004, [9]-[10] (Sackville J); *Risk v Northern Territory* [2006] FCA 404, [456] (Mansfield J); *Miller v South Australia (No 3)* [2022] FCA 466, [24] (Charlesworth J).

25. The authors of a recent article published in the Australian Law Journal proffer some helpful guidance in this area, including that legal practitioners should:
- (a) “be careful to avoid communications that might, or might be seen to, distort the witness’s independence”;⁵ and
 - (b) “not influence the content of the report to the extent that the report does not accurately reflect the expert’s honest and independent opinion”.⁶

The authors acknowledge, however, that there are “few bright-line rules”⁷ and they add:

The appropriate level of lawyer involvement in preparing an expert report depends on the circumstances of the case: “there is not one rule or practice which covers all experts or all situations”.⁸

26. Lawyers must therefore be vigilant not to coach witnesses, including expert witnesses, and not to compromise the independence of anthropologists or other expert witnesses.
27. For the anthropologist’s part, he or she must be vigilant to see that their independence is not compromised. They must keep in mind that:
- (a) their report and oral evidence must be true to their own opinions and their own understanding of the underlying facts; and
 - (b) they, not anybody else, will be tested in cross-examination about their opinions, understanding of the facts, manner of preparing their report and so forth.

If the anthropologist considers that a particular lawyer is conducting himself or herself in a way that might compromise their independence, they can and should say something about it.

28. I return to the question of independence below in discussing the decision of *Jango*.

Conference of experts and giving evidence at trial

29. The lawyer should in my view help to prepare the anthropologist for the processes of participating in an experts’ conference and giving evidence at trial, particularly if he or she is inexperienced in such things. That preparation is directed towards two main matters.
30. The first is to ensure that the anthropologist has a good appreciation of the process. For example, if you are at trial, is the process individual evidence-in-chief, cross-examination and re-examination or concurrent evidence and how does the relevant process work? What should you do if a question is unclear? What happens if you need to look at your report or notes in order to answer a question? How confined should your answer to a question be and is there any difference between evidence-in-chief and cross examination in that regard? What happens if you wish to qualify or add to an answer that you have

⁵ Oakeshott C and Smart C, “Walking the Tightrope: Communications with Expert Witnesses Following *New Aim v Leung*” (2024) 98 ALJ 596, 596. The case referred to in the title is *New Aim Pty Ltd v Leung* [2023] FCAFC 67; 410 ALR 190 (Kenny, Moshinsky, Banks-Smith, Thawley and Cheeseman JJ).

⁶ *Ibid.*, 597.

⁷ *Ibid.*, 596.

⁸ *Ibid.*, 598, citing a passage from the *Phosphate Co-operative of Australia Ltd v Shears (No 3)* [1989] VR 665, 683 (Brooking J).

previously given in evidence? Another matter that can be touched upon is whether the relevant judge has known likes or dislikes that may be relevant to the expert's evidence.

31. The second matter relates to the substantive issues. By this time, there will ordinarily be one or more expert reports of the anthropologist before the Court, so his or her opinions will already been laid out. There may or may not have been a responsive expert report in which the anthropologist has responded to the opinions of the opposing expert(s). If that is the case, the lawyer will obviously want the anthropologist to have considered those opinions carefully.
32. Even where there has been a responsive report, the lawyer may well want to discuss substantive and other matters with the expert in conference. For example, the lawyer might say, "you might be asked about X, so think about how you would answer that question". X might be a substantive anthropological issue, a matter that goes to the qualifications and experience of the expert or what the expert has said on previous occasions. The lawyer should never say to a witness: "You should answer question X by saying Y". The lawyer can and, in my view, should get the expert thinking about what might be thrown at them and invite them to think about how they would respond. If a particular aspect of the evidence has not been thought about in advance, the answer given may well not do justice to the expert's view.
33. In relation to concurrent expert evidence, the attention of both lawyers and experts is drawn to Annexure B to the Expert Evidence Practice Notes.

Some potential pitfalls for anthropologists as expert witnesses

Expert anthropologist performing other roles in the case?

34. In *Jango v Northern Territory* [2006] FCA 318; 152 FCR 150 Sackville J was critical of the ways in which the applicant's primary expert anthropologist, Professor Peter Sutton, had been utilised in the course of the claim preparation and hearing. His Honour acknowledged what I expect we all know to be the case, namely that Professor Sutton is "very well qualified" and has "extensive experience as a social anthropologist and linguistic anthropologist" and that his publications "are highly regarded".⁹
35. However, his Honour drew attention to Professor Sutton's involvement in the case preparation and hearing in a number of ways that were beyond his brief to prepare and expert report and to give expert evidence. Sackville J said:¹⁰

I formed the view that Professor Sutton played an active part in formulating and preparing the applicants' case and that this participation influenced both the way in which their case was presented and Professor Sutton's approach in giving evidence.

His Honour then identified various matters in which Professor Sutton had played a role:

- (a) he had spent considerable time commenting on draft witness statements and his Honour inferred that he had "clearly played a significant part in shaping witness statements";¹¹

⁹ [2006] FCA 318; 152 FCR 150, [315].

¹⁰ *Ibid.*, [322].

¹¹ *Ibid.*, [323].

- (b) he rejected the original version of the Points of Claim;¹²
 - (c) he gave some advice concerning informants whom he considered would be good witnesses, he sat in close proximity to counsel for the applicants and he suggested questions to counsel from time to time.¹³
36. Sackville J relied on these matters and some other matters (including what was found to be a tone of defensiveness during Professor Sutton’s cross-examination¹⁴) in finding that his role “had not been limited to that of a wholly objective expert observer and commentator”.¹⁵ The consequence of this was that his Honour was more prepared to accept Professor Sutton’s opinions that were supported by other evidence and it seems that, where that was not the case, careful scrutiny was applied to the reasoning underlying the opinions.¹⁶
37. A number of points may be made about this. First, Professor Sutton no doubt undertook these tasks because he was asked to do so by the lawyers. To the extent that it is profitable to apportion blame, the lawyers should in my view bear the lion’s share of it.
38. Secondly, *Jango* was mainly heard in 2003 and 2004 and was therefore one of the earlier native title claims. The ground rules had not been fully worked out at that point. Professor Sutton had given evidence in numerous statutory land claims in the Northern Territory which proceeded in a very different legal context. The Territory land rights experience was undoubtedly influential in how claimant lawyers approached the earlier native title cases.
39. Thirdly, the year before *Jango* was decided, *Gumana v Northern Territory (Blue Mud Bay)* was decided. In this case, Selway J found:¹⁷

It is clear that Professor Morphy was actively involved in the preparation of the applicants’ case, including preparing witness statements, taking and giving instructions and so on.

This fact did not, however, lead his Honour to discount Professor Morphy’s evidence; indeed, he did not have any concern about accepting his evidence. This was because Professor Morphy’s evidence was entirely supported by the Aboriginal evidence and was generally supported by the literature.¹⁸ A significant difference between the evidence in Blue Mud Bay and the evidence in *Jango* is that in the latter case the evidence was much more contested. Questions about an expert’s independence therefore come into sharper focus in heavily contested cases. With respect, Selway J stated the correct position as follows:¹⁹

¹² *Ibid.*, [324].

¹³ *Ibid.*, [325].

¹⁴ *Ibid.*, [326].

¹⁵ *Ibid.*

¹⁶ *Ibid.*, [338].

¹⁷ [2005] FCA 50, 141 FCR 457, [169].

¹⁸ *Ibid.*, [171]-[172].

¹⁹ *Ibid.*, [163].

There is an obvious risk that the involvement of the “expert” in the preparation of a case will at least affect the weight to be accorded by the court to the evidence given: see, eg the submissions referred to in *Lardil* at [89]-[90].

In light of these matters, I consider that the approach that should be taken in native title cases is to manage that risk by eliminating or at least minimizing the other roles that are to be played by the expert anthropologist in the case.

40. Fourthly, the *Jango* decision in 2006 sent shockwaves through the group of native title lawyers who typically appeared for claimants. In some later cases, external “consulting” experts (sometimes called “dirty” experts) were engaged to give advice to lawyers appearing for claimants, so as to insulate the expert anthropologist from possible criticism for being involved in such matters. The consulting experts did not give evidence in the relevant cases.
41. In 2016, however, the Expert Evidence Practice Notes were issued. The practice of engaging “consulting” experts was discouraged. Paragraph [3.2] provides:

... it is important to note that there is no principle of law or practice and there is nothing in this practice note that obliges a party to embark on the costly task of engaging a “consulting expert” in order to avoid “contamination” of the expert who will give evidence. Indeed the Court would generally discourage such costly duplication.
42. To the best of my knowledge the practice of engaging external “consulting” experts in native title cases has since faded away. That said, the role of a “consulting” expert is sometimes performed by a staff anthropologist of the NTRB or NTSP, but that is not always possible. Staff anthropologists can be of great assistance to lawyers briefed in native title cases.
43. Of the tasks that Sackville J mentioned in connection with Professor Sutton:
 - (a) I agree with respect that the expert anthropologist should not be commenting on or “shaping” draft witness statements, nor should he or she be reviewing the Points of Claim or other pleading. That said, it is undoubtedly permissible for lawyers to confer with an expert to make sure that they understand and are therefore able to articulate complicated and nuanced sets of facts and concepts that may need to appear in the pleading.
 - (b) I agree that that the expert anthropologist should not be sitting in close proximity to counsel, passing notes, suggesting questions or the like. Doing that, creates the impression that the anthropologist is part of the “team” – something that undermines, or at least appears to undermine, his or her independence.
 - (c) Although Sackville J may not have gone this far, I would not agree that the expert anthropologist should never tell the lawyers acting for claimants who they think might be good witnesses. My preference is not to ask who the anthropologist thinks would be a good witness, but to ask who he or she thinks the lawyers should speak to. In any event, in my view there is nothing wrong with doing this, particularly where the alternative is for the lawyers to proceed in relative ignorance and potentially to damage the case by not calling people who would be good witnesses. I do not see

how the anthropologist's independence is compromised by this in any significant way.

Findings that an expert anthropologist has been an advocate or had a tendency towards advocacy

44. A not uncommon submission that is made about expert anthropologists who have been called to give evidence by the lawyers acting for the native title applicant that they have crossed the line from expert witness to advocate; or that they have been predisposed in their opinions towards the claimants; or that they not been dispassionate or have lost objectivity.
45. In some cases, submissions of this kind have been rejected.²⁰
46. In other cases, however, the Court has found that the anthropologist (or other expert such as a linguist, historian or archaeologist) has assumed the role of an advocate or at least has had a tendency towards advocacy on behalf of the claimant group.²¹
47. A finding that an anthropologist or other expert has assumed the role of an advocate or has a tendency towards advocacy is generally not a finding about the person's honesty. By way of example, in one fairly recent native title case, the judge made a finding that a particular expert had "departed from his independent position as an expert" and had become an advocate, but accepted that this "stems from his genuine beliefs, based on his experience and expertise".²²
48. Equally, the mere making of the submission that an expert witness has crossed the line and become partisan can be perceived by the expert as an attack on his or her integrity and therefore deeply upsetting. A submission about partisanship should of course only be made by a lawyer where there is a proper basis for it.
49. In my view, lawyers have a role in educating experts, particularly less experienced ones, about the dangers of slippage into advocacy. Occasionally, one comes across an expert who is simply too keen to help. If this occurs, it is necessary for the lawyer to try to curb that enthusiasm. It needs to be understood by the expert that, if that kind of finding is made, his or her evidence is likely to be discounted, which obviously does not help the case.
50. A range of matters may be relied upon to support a submission about advocacy, including that the witness has:

²⁰ See, for example: *Chapman v Luminis (No 4)* (2001) 123 FCR 62, 296 (von Doussa J); *Drill v Western Australia* [2020] FCA 1510, [954] (Mortimer J); *Gumana v Northern Territory* [2005] FCA 50, 141 FCR 457, [171]-[172] (Selway J); *Harrington-Smith v Western Australia (No 9)* [2007] FCA 31, 238 ALR 1, [416], [427]; *Neowarra v Western Australia* [2003] FCA 1402, [112]-[119] (Sundberg J).

²¹ See, for example: *Briggs v Victoria (No 2)* [2025] FCA 279, [130] (Murphy J); *De Rose v South Australia* [2002] FCA 1342, [352] (O'Loughlin J); *Gordon v Western Australia* [2018] FCA 430, [118] (North J); *Malone v Queensland (No 5)* [2021] FCA 1639; 397 ALR 397, [870]-[871], [886], [888] (Reeves J); *Munkara v Santos NA Barossa Pty Ltd (No 3)* [2024] FCA 9, [1139] (Charlesworth J); *Nona v Queensland (No 5)* [2023] FCA 135, [546], [688] (Mortimer J); *Risk v Northern Territory* [2006] FCA 404, [124], [132] (Mansfield J); *Ross v Queensland (No 5)* [2022] FCA 763, [30] (Mortimer J); *Rubibi Community v Western Australia (No 5)* [2005] FCA 1025, [255] (Merkel J); *Strickland v Western Australia* [2023] FCA 270, [145]-[146] (Jackson J).

²² *Ross v Queensland (No 5)* [2022] FCA 763, [30] (Mortimer J).

- (a) accepted statements by informants at face value, when the circumstances required interrogation of those statement;
- (b) failed to address, or skated over, adverse evidence;
- (c) failed to make appropriate concessions or had to have appropriate concessions dragged out of him or her;
- (d) failed to answer questions in cross-examination, or has given long, discursive and largely non-responsive answers;
- (e) been prone to the use of hyperbole and of strong language where the facts do not warrant it, or has failed to qualify statements of opinion that required qualification;
- (f) gratuitously offered criticisms of the opposing expert, intended to discredit him or her; and
- (g) been unduly defensive in cross-examination.

To the maximum extent possible, these things are therefore to be avoided.

Munkara v Santos NA Barossa Pty Ltd (No 3) [2024] FCA 9

- 51. There are no doubt many lessons to be learned from Charlesworth J’s very lengthy decision in this case, both for lawyers and for experts.
- 52. For present purposes, I draw attention only to the following findings of her Honour:
 - (a) that a lawyer and an anthropologist had engaged in “a form of subtle coaching” of Indigenous people to tell their cultural stories in a particular way; this undermined her Honour’s confidence in the reliability of that evidence (at [994], [1133], [1135], [1152]);
 - (b) that concerns were raised about the independence of an anthropologist who had participated in discussions about “strategies” that could be adopted by the Indigenous people at a point in time when legal proceedings were in contemplation and had gone “about his task by eliciting information that would stop the pipeline, rather than as an anthropological enquiry carried out with a neutral attitude in the ultimate outcome” (at [1133]-[1134]); and
 - (c) that an anthropologist had assumed the role of advocating an arguable or defensible answer to a particular question (at [1139]).

Charlesworth J was also very critical of an expert witness whose field is marine science (at [1150]-[1151]).

- 53. In passing, I also observe that this case highlights the kind of difficulties that can arise where environmental groups enlist Indigenous people to help them pursue environmental objectives, such as stopping a particular development.

The changing role of the anthropologist over time

- 54. Finally, it may be of interest to draw attention to the changing roles that anthropologists have played since the beginning of the land rights era and in different statutory settings.
- 55. Under the Commonwealth’s Territory land rights legislation of 1976, the claim hearings proceeded by way of administrative inquiry at the end of which the Aboriginal Land

Commissioner reported to the Commonwealth Minister and the Administrator of the Northern Territory, making (or not making) recommendations for the grant of land.²³ The rules of evidence did not apply at the hearings.

56. Particularly in the early years, anthropologists played a bigger role in proceedings before the Commissioner than they do in native title proceedings. For example, in the first land claim hearing, the Borroloola land claim heard by Justice Toohey in 1977, the first witness at the inquiry was Dr John Avery, the expert anthropologist engaged on behalf of the claimants. His evidence occupied many pages of transcript and was given before any Aboriginal evidence had been given. In addition, in the 1970s, 1980s and 1990s, the Commissioner was not uncommonly assisted by a Consultant Anthropologist, as well as by Counsel Assisting.
57. Under the Queensland land rights legislation of 1991, the claim hearings also proceeded by way of administrative inquiry at the end of which the Land Tribunal made recommendations to the Minister for Lands.²⁴ The Tribunal's procedure was generally within its own discretion and proceedings were required to be conducted with as little formality and technicality as the Act and the proper consideration of matters permitted. It was not bound by the rules of evidence and could inform itself "in any way it considers appropriate".²⁵
58. Anthropologists sometimes played a bigger role in proceedings before the Land Tribunal than they do in native title proceedings. For example, at the hearing of the claims to the Lakefield and Cliff Islands National Parks in 1994, a large amount of the questioning of Aboriginal witnesses was undertaken by Professor Bruce Rigsby who was the senior author of the claim materials.
59. Since it has been enacted, the *Native Title Act 1993 (Cth)* (**NTA**) has provided for claims to be heard and determined by the Federal Court; this is clearly a big change from the Land Commissioner or Land Tribunal models. The NTA, as originally enacted, had some of the features of the statutory land rights models. In particular, the Court:
 - (a) was required to pursue the objective of providing a mechanism of determination that is fair, just, economical, informal and prompt (s 82(1));
 - (b) was required to take into account the cultural and customary concerns of Indigenous people (s 82(2)); and
 - (c) was not bound by technicalities, legal forms or the rules of evidence.
60. This regime was, however, very significantly amended in 1998. By the amended s 82 of the NTA:
 - (a) the requirement for a "fair, just, economical, informal and prompt" mechanism for determining claims was omitted;

²³ *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)*, s 50.

²⁴ *Aboriginal Land Act 1991 (Qld)*, ss 4.02, 4.03, 4.16.

²⁵ *Ibid.*, s 8.20(1).

- (b) instead of being required to take into account the cultural and customary concerns of Indigenous people, the Court now has a discretion to do so, provided that doing so does not unduly prejudice the rights of any other party to the proceedings; and
- (c) the direction that the Court was not bound by technicalities, legal forms or the rules of evidence was omitted and was replaced by a requirement, which still applies today, that the Court is bound by the rules of evidence, “except to the extent that the Court otherwise orders”.

It has been held that, for the Court to “otherwise order”, some factor must be pointed to that justifies the Court in taking that course.²⁶ Since 1998, the practice has been that the rules of evidence are simply applied. Although there have been some judicial pleas for native title proceedings to be less adversarial, it is the NTA itself that provides, with some variation, that native title proceedings be conducted as ordinary adversarial litigation.

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15 May 2025

²⁶ *Daniel v Western Australia* (2000) 178 ALR 542, [39].