EXPERT ANTHROPOLOGICAL EVIDENCE – A JUDGE'S PERSPECTIVE

(Speech by Justice Rangiah to the Future of Native Title Anthropology Conference at Brisbane on 4 February 2016)

Many anthropologists might be surprised to know that 350 years before Captain Cook reached Botany Bay, the Chinese had not only reached and explored the continent but had also settled here and lived in harmony with the Aboriginal people.

We know this because in 2003, President Hu Jintao of the People's Republic of China addressed a joint sitting of the Australian Parliament and opened by saying:

> Back in the 1420s, the expeditionary fleets of China's Ming Dynasty reached Australian shores. For centuries, the Chinese sailed across vast seas and settled in what they called 'the Southern Land', or today's Australia. They brought Chinese culture here and lived harmoniously with the local people, contributing their proud share to Australia's economy, society and thriving pluralistic culture.

According to David Hunt in his book *Girt*, President Hu's words were inspired by Gavin Menzies' book *1421: The Year China Discovered the World*, which sold over a million copies.

Not everyone shares Menzies' perception of ancient Sino-Aboriginal relations. Professor Felipe Fernández-Armesto of the University of Notre Dame offered this scathing review of Menzies' book:

> It is almost without exception wrong, factually wrong, and the conclusions drawn from it are logically fallacious, I mean, they are the drivel of a two-year-old...To say that it is devoid of evidence, logic, scholarship and sense was just about the nicest thing one could say about it.

The point I make is that history and anthropology often involve matters of perception; and often perception depends on the particular agenda of the person doing the perceiving. That is a great commonality of anthropology and law: the role of perception and agenda.

I would like to share some observations from my perspective as a judge that anthropologists may find useful when presenting expert evidence to the Federal Court in native title cases.

The evidence of an anthropologist takes two forms, written and oral. I would like to discuss both forms: the writing of reports, and the giving of oral evidence in the Court.

I come back to the theme of perspective. The perspective of an anthropologist will be influenced by his or her background. It is often an academic background where the anthropologist is used to writing papers that will only be read by other academics. A report for a legal proceeding is quite different: it is intensely practical.

At the risk of being too simplistic, my advice is that when you write a report in a legal setting, you must first consider who you are writing for, and then write taking into account the perspective of that target audience.

So, who are you writing the report for? Well, you are not writing it for yourself; and you are not writing it for other anthropologists. You are writing it for the lawyers who have engaged you. You are writing it for the members of the native title claim group (your report will provide a valuable record of the history, laws and customs of the claim group). Ultimately, however, you are engaged to write the report for the purpose of a native title proceeding, and your audience is the judge who will decide the case.

Everyone in a courtroom has an agenda. For a barrister, it will be winning the case and impressing the instructing solicitor and everyone else with his or her brilliant oratory. For a solicitor it will be winning the case and trying to keep the client happy. The judge has an agenda too. When everyone else has gone home, the judge is left with a morass of papers, inconsistent evidence and conflicting opinions which he or she has to sort out. The judge's agenda is to decide the case as quickly, efficiently and simply as possible.

The judge is vitally interested in what anthropological reports say that will assist in deciding whether the requirements of ss 223 and 225 of the *Native Title Act 1993* (Cth) are met. No more and no less. A judge will appreciate and respect an expert who can write reports in a style and a manner which is direct, relevant, succinct and without surplusage.

Surprisingly, too few reports have the qualities I have described. I think that is because many anthropologists have not shifted their perspective to consider the audience, and are still writing scholarly articles that read as if they are directed towards other anthropologists. Some reports are dense and use language and references penetrable only by other anthropologists. Others are discursive and disorganised.

The target is ultimately a judge; and judges are not anthropologists. Judges do not have the years of study, experience and expertise in the anthropology of indigenous communities anthropologists have. The judge's task is a practical one. The pages and pages concerning anthropological methodology that we often see are not usually of much relevance. I can appreciate that such discussion may have been relevant when the question of whether anthropology was an appropriate discipline for expert evidence was very much in issue in native title proceedings. However, that time seems to have passed. The report must be practical rather than scholarly.

What judges want are simple reports using simple language and containing simple concepts that are as succinct as possible. I fully understand that this is not always possible to achieve, but my advice is to try to achieve it as far as possible. Why produce a 200 page report, if you can do it in 50 pages using less florid language and fewer diversions into interesting but irrelevant topics?

In the course of the case, a judge will want to be able to quickly and easily find the passages dealing with, for example, the existence of a particular right or interest. Judges, and the lawyers who engage anthropologists, want well-structured, well-ordered reports containing headings and sub-headings, so that the reports are easy to follow.

Judges decide things. So a judge is vitally concerned to know what is in dispute and what is not. When I come to read the report of an anthropologist responding to the report of another anthropologist, I want to be able to find out very quickly what is in dispute, and what is agreed. Very often, there is no place to easily find out. It would be very useful if, for example, the second anthropologist were to say in the introduction "I agree with Dr X's report except in relation to the following issues…".

One of the problems the Court has with anthropological reports is they are often delayed. We all have pressures. Judges are under pressure to deal with their caseloads. In turn, judges place pressure on lawyers by imposing timetables. We can understand that it takes substantial time to prepare a well-researched, well-written anthropological report. We are prepared to give that time. But once a judge is told it will take six months for a report to be prepared and makes an order to that effect, the Court expects that the timetable will be adhered to.

Sometimes we get the impression, rightly or wrongly, that expert anthropologists see themselves as being beyond the processes of the Court; that they can dictate the pace at which they work. If there are anthropologists with that attitude charging significant fees for their work, then it might be time to slip back into academia where they can proceed at a more leisurely and unstructured pace. Anthropologists have contractual obligations to their clients, and as expert witnesses they have obligations to the Court. The Courts do not seem to have problems with other expert witnesses providing their reports within the time they have committed to. The position tends to be different with anthropologists; by no means all, but too many. I think that requirements of professionalism, if nothing else, mean that if you make a commitment you have to stick to it.

I suspect that the problems I have discussed are often due to a lack of communication between lawyers and anthropologists. An expert anthropologist cannot stay aloof from the legal issues involved in the case, nor can lawyers be divorced from the anthropological issues. The instructions given to anthropologists by lawyers are vitally important. Sometimes instructions seem to have a generic quality rather than being specifically tailored to the particular nuances of the case. Sometimes reports dwell at great length on issues that are not seriously in dispute between the parties. A lack of communication with the lawyers may result in an anthropologist wasting time when the report could have otherwise been completed much earlier.

One way of improving the quality and timeliness of reports would be for the anthropologist and the lawyers to meet and discuss in detail the scope of the report and the issues likely to be in dispute before the final instructions for the report are given. This should occur after the anthropologist has had some chance to reach an informed preliminary view as to the scope of the work required. That way, the instructions can be designed to meet the specific requirements of the case, and both the lawyers and anthropologists know exactly what is required. As an expert engaged to perform a very important function, an anthropologist should not be hesitant about making his or her specific requirements known to the lawyers, and seeking clarification of what is required of him or her. The sheer volume of work required to be done by the anthropologist and the length of time it takes to complete makes open and frank communication vital. I would also suggest regular ongoing meetings, rather than the “See you in a year” approach.

I had always thought of anthropologists as mild-mannered and temperate people. That image is belied by the vitriolic exchanges that we sometimes see in anthropologists' reports. When writing reports, be polite and professional in your disagreement with colleagues. Judges expect courtesy between professionals. A lack of courtesy is an indication of a lack of professionalism. We notice when reports use intemperate language and attack the man or woman, and not the issue.

I will move to the topic of oral evidence. In many, if not most, cases these days, where more than one expert gives oral evidence, the evidence will be given concurrently. The experts will be sworn in at the same time and sit together in a witness box or area. Different judges have different styles of taking concurrent evidence, but the method I prefer is to ask the parties to prepare a list of questions they want the experts to answer and then conduct the questioning of the experts myself. I will usually ask the applicant's expert to speak first and then the respondent's expert. I allow the experts to comment on each others' answers. I allow experts to ask each other questions. There are no fixed rules other than that the experts must not interrupt each other's answers. When I have finished questioning the experts, I allow the parties' lawyers to cross-examine. Often there is little left to cross-examine about.

I find concurrent evidence a very useful way to proceed for a number of reasons. Among those reasons is that when one expert puts forward a proposition, we get the other expert's immediate response to that proposition, and then the response to the response. Under the traditional system where witnesses give evidence consecutively, it may be days before an expert gets a chance to respond to a proposition put by another expert. I find that concurrent evidence allows me to get a better and more immediate understanding of the competing evidence.

One of the criticisms made of concurrent evidence is that an expert with a more dominant or forceful personality can overbear the others and dominate the evidence. I have not seen that happen yet.

Getting back to the theme of agendas, like everyone else in a courtroom, expert anthropologists have an agenda. Anthropologists have egos. Egos, like reputations, are fragile, and dictate that part of the expert's agenda will be to have his or her opinion accepted by the Court. It is natural to feel defensive when your opinions are disputed by your fellow anthropologists and you are under heavy attack from a cross-examining barrister.

When a judge is faced with conflicting opinions, the judge is looking for a way to decide which opinion should be accepted. We look to the evidence that supports an opinion and the logic with which the opinion is constructed. The judge may also be influenced, whether at a conscious or subconscious level, by the demeanor of the witness. I have seen experts called to regularly give expert evidence, not because they are particularly well regarded by their peers, but because they look and sound so impressive when they give evidence. On the other hand, the defensiveness of a witness may show through aggression, sniping comments, evasiveness and belligerence. I caution against slipping into that behavior in the witness box. Demeanor does play a role.

Occasionally, an expert giving evidence can be seen as having a different agenda. That agenda can be taking up the cause of a client and becoming an advocate for them. The job of an expert witness is to remain objective. When an expert is no longer objective and has become an advocate, it quickly becomes apparent to the judge. There is nothing that more readily undermines a judge's confidence in the expert. Again, I think this is a matter of having to adopt a different mindset as an expert witness. It is one thing to passionately argue a cause in academic publications, but that is not what you are engaged to do as an expert witness.

My advice is to remember that the barrister has his or her own agenda, which is to win the case, and that may involve trying to discredit you. Your best response if you do not want to be discredited is to be dispassionate, remain calm, remain courteous and not be so defensive that you refuse to make concessions even where it is clearly appropriate to do so. The judge sees all of these things, and this does influence whether your opinion is ultimately accepted or rejected.

I have never seen it, but I have heard plenty of stories about court-ordered conferences between expert anthropologists characterized by aggression, rudeness and an unwillingness to listen to an opposing view. I recall being told by one anthropologist about how another anthropologist threw a pencil at him in a heated moment. It might be entertaining, but it is important to remember that judges expect more moderate behavior.

I have not intended to be too negative. We see many excellent, well-researched and well-written anthropological reports. I count several anthropologists amongst the most brilliant and

interesting people I have ever met. My purpose has not been to be critical for the sake of it, but to make some suggestions which I hope will be of assistance to you when presenting evidence.