



National  
Native Title  
Tribunal



# 'Hot Tubbing' anthropological evidence in native title mediations

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## Introduction

Within the last decade courts and tribunals across Australia have adopted innovative approaches for dealing with expert evidence. One of these approaches, the 'hot tub', has been used by the Federal Court as a means of dealing with anthropological evidence in native title trials. The 'hot tub', or several variations of it, has also been used for native title claims in mediation. This paper briefly examines the use of the 'hot tub' in native title trials and asks whether an approach developed for use in litigation can be used effectively in mediation.

There is a great deal of published material relating to expert evidence, some of which relates to anthropological evidence in native title trials; there is none, however, that discusses the use of the 'hot tub' in native title mediation. To address this gap, I interviewed six anthropologists and representatives from two state governments to identify the situations in which the 'hot tub' approach had been used outside court proceedings. The interviewees were asked to describe the processes followed, to identify what worked well and identify how they thought processes could be improved. Their responses were then collated and examined against the background developed through the literature review. It is not intended to imply that the interviewees endorse any of the options presented in this paper nor necessarily support the conclusion.

Before describing the 'hot tub' procedures adopted by various courts and tribunals, it is useful to outline some of the issues with expert evidence that these procedures were designed to address.

## Issues with expert evidence

Following the introduction of the Commonwealth *Evidence Act* in 1995, Ian Freckelton *et al* predicted there would be more expert evidence admitted in trials. In 1997 he conducted a survey of Australian judges to determine the difficulties, if any, that expert evidence presented. The 244 judges who responded to the survey identified several problems ranging from apparent bias (whether conscious or otherwise) to difficulty in understanding the evidence the experts provided. The judges were asked to assess which problems they ranked as the 'single most serious'. Bias on the part of experts and failure to prove the bases of expert opinions accounted for almost half of the responses.<sup>1</sup>

Over a quarter of the judges who responded to Freckelton's survey said that they 'often' encountered bias on the part of experts while a further two thirds said they encountered bias 'occasionally'. The problem was seen as particularly prevalent in criminal cases.

Anthropological evidence given in native title cases may also be particularly vulnerable to suggestions of bias. Anthropologists Ron Brunton and Lee Sackett have suggested that anthropology allows more room for interpretation than is the case in other disciplines where experts are called to give evidence.<sup>2</sup> Lawyer Andrew Chalk noted that personal friendships sometimes develop between the anthropologist and members of the subject

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<sup>1</sup> Ian Freckelton, Prasuna Reddy and Hugh Selby 1999, *Australian Judicial Perspectives on Expert Evidence: An Empirical Study*, The Australian Institute of Judicial Administration Incorporated, Carlton, Victoria, p. 37.

<sup>2</sup> Ron Brunton and Lee Sackett 2003, 'Anthropologists in the Hot Tub', *Native Title News*, vol. 6, no. 6, p. 86.

group over prolonged periods of fieldwork. He made this point in a paper given at a conference on expert evidence in native title cases in 2001:

There are a number of reasons why anthropologists start the process with an unavoidable cloud over their impartiality. Firstly, as noted already, the nature of their discipline will usually involve the formation of friendships with their subjects. Indeed, participant observation, where it is employed, may require this. In some cases, people working with a community over many years will be adopted into the group. Often information will be imparted with some degree of confidentiality attaching to it. Claimants may also come to depend on the anthropologist for advice and see them as a mediator on their behalf with the European system of government and justice. In this respect, part of their relationship with the claimant group may be one of advocacy.<sup>3</sup>

The question of bias has been raised in several native title trials and addressed by the judges hearing the matters. For example: in *Neowarra* the respondents submitted that two of the expert anthropologists called by the claimants were 'too close to the applicants to be accepted as independent experts. They were, it was said, advocates for the applicants.'<sup>4</sup> After reviewing the transcript of the evidence Justice Sundberg noted that the anthropologists had carried out extensive fieldwork in the claim period over lengthy periods. He concluded that 'their closeness to members of the claimant group ha[d] not affected their professional judgment or resulted in their becoming advocates for the claimants.' On the contrary, he gave their evidence greater weight than that of the anthropologist called by the State whose opinions and conclusions he characterised as having a 'desktop or academic quality'.<sup>5</sup>

It is not only anthropologists called by claimants who are susceptible to accusations of bias. In the course of the *Wongatha* native title trial, attacks were made on the testimony of three anthropologists, two of whom worked with claimants while the other had been engaged by one of the respondent parties. In the end Justice Lindgren decided that the evidence of all three should stand or fall on its own merits.<sup>6</sup>

The issue that had ranked second in significance in the *Freckelton* survey was 'failure to prove bases of expert opinion'. As *Freckelton* noted:

... the real difficulty is that when the building blocks of inferences are not properly established, the opinions themselves are of little probative value, although they may appear to be so.<sup>7</sup>

Similarly, Justice Downes, speaking of procedures within the Administrative Appeals Tribunal, noted that

... the role of the expert is not simply to arrive at a conclusion but to expose criteria which will enable that conclusion to be evaluated.<sup>8</sup>

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<sup>3</sup> Andrew Chalk 2001, 'Anthropologists and violins – a lawyer's view of expert evidence in native title cases', paper delivered to the 2001 Native Title Conference 'Expert Evidence in Native Title Court Cases: Issues of truth, objectivity and expertise', Adelaide University, 5-6 July 2001, p. 5.

<sup>4</sup> *Neowarra v State of Western Australia* [2003] FCA 1402 at 112.

<sup>5</sup> *Neowarra v State of Western Australia* [2003] FCA 1402 at 120.

<sup>6</sup> *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 9)* [2007] FCA 31 at 413 – 430.

<sup>7</sup> *Freckelton et al* 1999, p. 35.

Logically it would seem that this issue and that of bias are related: if the bases of expert opinion are clear there should be little room for accusations of partisanship.

### **The development of new approaches to deal with expert evidence**

Courts and tribunals have adopted a variety of methods to address some of the challenges that expert evidence presents. These include:

- using a single court-appointed expert or, in the case of the Family Court, a single expert agreed to by the parties<sup>9</sup>;
- convening an expert conference outside the court process; and
- having experts give evidence concurrently within the court process<sup>10</sup>.

**Concurrent evidence procedures - the Administrative Appeals Tribunal:** the AAT introduced concurrent evidence procedures in 2000. Under these procedures the parties exchange expert written reports prior to the hearing. The parties' Statement of Facts and Contentions are sufficient to identify agreed facts so no extra statement is needed. On the day of the hearing, the expert witnesses are sworn in together and the Tribunal summarises the agreed and disputed facts. The applicant's witness gives a brief oral exposition as does the respondent's expert witness. The experts question one another and then the parties' representatives can question the experts. The Tribunal can ask questions at any time.<sup>11</sup>

**Conference of experts - the Family Court of Australia:** the Family Law Rules pertaining to expert evidence provide for a conference of experts. According to these Rules, if two or more parties to a case intend to use expert evidence 'the parties *must* arrange for the expert witnesses to confer at least 14 days before the pre-trial conference'. A brochure published by the Family Court describes the procedures that it follows in convening a conference of experts: the Court can order which experts will attend the conference, the issues the experts must discuss and the questions they will answer. At the conference, the experts must identify the issues on which they agree and disagree; reach agreement if they can on any outstanding issue; identify the reasons for disagreement on any issue; and identify what actions can be taken to resolve any outstanding issues. One of the experts acts as chairperson although there is scope for someone, other than one of the experts, to chair the conference. At the end of the conference the experts must write and sign a joint statement setting out the results of the

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<sup>8</sup> Garry Downes 2006, 'Expert Witnesses in Proceedings in the Administrative Appeals Tribunal', paper delivered to the NSW Bar Association Administrative Law Section, Sydney, 22 March 2006, p. 7.

<sup>9</sup> Family Law Rules 2004. Division 15.5 deals with Expert Evidence, Division 15.5.2 deals with the Single expert witness. The focus in this paper is on resolving differences between experts so the use of a single expert will not be discussed further. However, it is worth noting, at least in passing, that the Federal Court has appointed single experts in several native title matters, including *Djabera Djabera* and *Purnululu*. It seems that in these cases, the appointment of a single expert was intended to assist unrepresented claimants in the resolution of an internal dispute. In *Purnululu*, the orders were made at the request of the Tribunal.

<sup>10</sup> Federal Court Rules – Order 34A Rule 3.

<sup>11</sup> Garry Downes 2004, 'Concurrent Expert Evidence in the Administrative Appeals Tribunal: The New South Wales Experience', paper presented to the Australasian Conference of Planning and Environment Courts and Tribunals, Hobart, 27 February 2004, pp. 9-11.

conference. Lawyers can attend the conference but are not to provide advice to the experts before the joint statement is signed. If questions are asked of them, the lawyers must respond jointly.<sup>12</sup>

**Federal Court:** the Federal Court Rules were amended in 1998 to provide a range of options that the Court or a Judge may direct. These options include both convening a conference of experts and hearing evidence from several experts concurrently. Somewhat confusingly, both the conference of experts and concurrent evidence are often referred to as 'hot tubs' despite the obvious procedural differences that were described above.<sup>13</sup>

The absence of prescriptive procedures in the Federal Court has meant that the Rules can be, and have been, applied in a fairly flexible manner.

### **Procedures followed in 'hot tubs' in native title trials**

The 'hot tub' process has been used in several native title trials in the Federal Court. The first time was in 2003 in the Wongatha proceedings but there have been variations on this process since.

The orders made by Justice Lindgren in Wongatha included both a conference of experts and concurrent evidence. It was followed by the conventional process of cross-examination and re-examination. This process, with minor variations, was followed for each type of expert evidence: anthropology, history and linguistics. The expert conferences were attended by a Deputy Registrar of the Court who assisted in the production of joint reports on points of agreement and disagreement.<sup>14</sup>

Eight anthropologists had tendered expert reports to the court but only four attended the conference of experts. One of the anthropologists had since passed away, and the others were unavailable. The potential usefulness of the conference of experts, when it is attended by all the experts concerned, is underscored in a comment made by two of the anthropologists, Ron Brunton and Lee Sackett, on issues that arose during the concurrent evidence session:

[The concurrent evidence session] led to what was seen as a significant disagreement between two anthropologists who had jointly prepared a report for one of the overlapping claimants – a disagreement which had perhaps not surfaced earlier because one of the anthropologists concerned had not attended the [experts'] conference.<sup>15</sup>

Further, the expected time savings in cross-examination were not fully realised:

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<sup>12</sup> Family Court of Australia 2004, 'Conference of experts: guidelines for expert witnesses and those instructing them in proceedings in the Family Court of Australia'. Emphasis added.

<sup>13</sup> See, for example, Elizabeth Brimer 2005, 'The Hot Tub and other controversial issues in expert evidence', paper presented to the National CA Forensic Accounting Conference, 24-25 February 2005, Sydney, pp. 6-7.

<sup>14</sup> This process was described in *Harrington-Smith on behalf of the Wongatha People v State of Western Australia* (No 9) [2007] FCA 31 at 15 and 404-406. Since there was only one archaeologist and one ethnobotanist there was no difference of expert opinion to be resolved.

<sup>15</sup> Ron Brunton and Lee Sackett 2003, 'Anthropologists in the Hot Tub', *Native Title News*, vol. 6, no. 6, pp. 87-88.

A major explanation for the additional time is probably that the cross-examination of one of our number took nearly four days. While this may have been partly due to prolixity, the person concerned was also one of those who had not participated in the [experts'] conference.<sup>16</sup>

Brunton and Sackett concluded that the concurrent evidence session was useful in clarifying for the lawyers some of the more difficult issues and they offered some suggestions that they thought would improve the conference of experts:

The most important refinements centre on the preparation of the agenda for the experts' conference and matters of timing. The agenda needs to be as detailed as possible, with appropriate input from the judge, the lawyers who will be involved in cross-examining the experts, and the anthropologists who will be called to give evidence ... This would enable the experts to focus on those "matters and issues" deemed by the court to be central to the case.

The conference should be attended by all the experts [and] should take place only after all the participants have had the opportunity to have read all of each other's reports ... Most importantly, the time set aside for the conference needs to be sufficient to the agenda so that all relevant issues can be properly addressed and discussed ...<sup>17</sup>

Justice Lindgren subsequently noted that the value of the joint report produced by the conference of experts was diminished because not all the experts had attended the conference. He added that the oral testimony subsequently given by the anthropologists revealed that the generalisations expressed in the joint report masked points of disagreement.<sup>18</sup>

Since the Wongatha evidence was heard, 'hot tubs' have been ordered in other native title matters. In these cases, the term 'hot tub' has referred only to the conference of experts (and not concurrent evidence) and there have been fewer experts involved than was the case in Wongatha.

For example, in the resolution of the Yankunytjatjara/Antakirinja native title claim, two expert conferences were held. This claim was ultimately resolved by consent determination and the use of expert conferences clearly had a part to play in that outcome. Justice Mansfield had ordered that the anthropologists (engaged by the claimants, the State and the pastoralists in the region) meet with a Registrar of the Court to determine the significant issues that would need to be addressed in detail in the expert report prepared for the claimants. Following this initial conference, the anthropologist engaged by the claimants was to produce and circulate to the other parties a draft report. The anthropologists were then to confer again on matters and issues on which they agreed or differed before final expert reports were prepared.

Justice Mansfield commented on the value of this process in making the determination:

I have ... taken into account my awareness of the process by which the agreement of the parties has been reached. It has been a thorough process, assisted by legal

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<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *Harrington-Smith on behalf of the Wongatha People v State of Western Australia* (No 9) [2007] FCA 31 at 405-406.

representation and by expert anthropological advice. The Court ... adopt[ed] its commonly used procedure in many matters involving expert evidence. It secured the respective anthropologists assisting the parties to confer, to identify the starting points for their views, to explore the extent to which they were in agreement, and to confer about the matters in respect of which they were in disagreement. Senior counsel for the State, at a directions hearing, acknowledged that that process had facilitated the steps towards the parties' ultimate agreement.<sup>19</sup>

In the Blue Mud Bay case the issues that had not been resolved in the conference of experts were ultimately resolved during the trial. In this instance, Justice Selway made orders setting out the process for a 'hot tub' to deal with the expert evidence provided by anthropologists. Eight months before the matter was set down for trial the draft expert report prepared for the claimants was served on the other parties. Two months later the two anthropologists engaged by the respondents served their draft reports. A short time later the three anthropologists met to confer on matters and issues on which they agreed and disagreed. That meeting was chaired by the District Registrar. A fortnight later the District Registrar produced a report identifying those issues on which the experts agreed and those on which they disagreed. The anthropologist engaged by the claimants filed a final expert report the following month and the conference of experts reconvened a month after that. Again the District Registrar produced a document identifying those issues on which the experts agreed and disagreed.<sup>20</sup> The document identified a series of propositions on which the experts, largely, agreed. The set of propositions was adopted by the anthropologist engaged by the claimants as part of his evidence and attached as an appendix to the Reasons for Judgment given later by the judge.

Justice Selway referred to the 'hot tub' in his Reasons for Judgment and noted that the agreement reached between the senior anthropologists

significantly reduced the extent of the factual disputes between the parties and the time involved in hearing the witnesses.<sup>21</sup>

The two issues that had divided the anthropologists in the conference of experts were resolved after the claimants' evidence was heard and after cross-examination had clarified an issue to the extent that it ceased to be an issue.<sup>22</sup>

Clearly, the conference of experts can be an effective tool for managing anthropological evidence in native title trials. The Federal Court noted in its Annual Report for 2005-06 that 'the conferences ... assist in identifying and clarifying areas of dispute amongst experts'.<sup>23</sup>

Once those areas of dispute have been identified and clarified, though, if the experts do not resolve their differences then it is the judge who does. In the Wongatha matter, for example, the anthropologists could not agree on the western extent of the Western

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<sup>19</sup> *Yankunytjatjara/Antakirinja Native Title Claim Group v the State of South Australia* [2006] FCA 1142 at 26.

<sup>20</sup> Federal Court of Australia Northern Territory District Registry, Consolidated Order D6035 of 2003, at 13-25.

<sup>21</sup> *Gumana v Northern Territory of Australia* [2005] FCA 50 at 173-175.

<sup>22</sup> *Ibid.*

<sup>23</sup> Federal Court of Australia 2006, *Annual Report 2005-06*, National Capital Printing, Fyshwick, ACT, pp. 39-40.

Desert Cultural Bloc. Nor could they agree on the significance to be attached to a history of migration throughout the Wongatha claim area and the desert country to the east. Ultimately, Justice Lindgren formed his own conclusions based on the evidence before him.<sup>24</sup>

As Justice Downes observed in an article discussing expert evidence:

The ultimate decision maker must always be the judge. Expert opinion plays a subservient role.<sup>25</sup>

### **The use of 'hot tub' procedures in mediation**

When the 'hot tub' is used as a means of reducing the issues on which a judge must rule, it sits easily within court proceedings. Where the disputing parties are expected to reach agreement themselves, however, as in mediation, the question is left open as to how they resolve apparently irreconcilable differences. Despite this, the 'hot tub' approach has great potential to be used as a mediation tool to narrow and resolve the issues in dispute. Its use in a range of situations so far has met with mixed success.

### **The 'hot tub' experience so far**

The anthropologists and State government representatives who were interviewed for this paper were asked to describe any 'hot tub'-type situations they had been involved in. Several people described situations which they referred to as 'in mediation' but it is clear from their descriptions that, while the matters may have been referred to the National Native Title Tribunal for mediation, the 'hot tub' itself was not always conducted by the Tribunal nor was there always a mediator present. Indeed, some of the descriptions suggest situations that were closer to an adversarial contest than they were to mediation.

The most common situations where the approach has been used are in the resolution of overlapping claims and as part of the connection reporting and assessment process. In one case, the 'hot tub' approach was similar to that adopted in the Yankunytjatjara/Antakirinja case described earlier. That is, the experts met after desktop research had been conducted to discuss ways in which field research should address the gaps or inconsistencies that this research identified.

'Hot tubs' convened as part of the connection reporting and assessment process mostly occurred after a State government had concluded that a connection report submitted to it had not met its requirements. In these cases, the 'hot tub' was used by the State to try to explain why the connection report failed to satisfy its requirements. Bringing the experts together in a 'hot tub' to do this can be useful if, as Justice Downes pointed out, the experts see their role as exposing the criteria by which their conclusions can be evaluated'.<sup>26</sup> Otherwise the 'hot tub' can lapse into a stalemate with little to be gained from it. One interviewee described such an experience:

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<sup>24</sup> *Harrington-Smith on behalf of the Wongatha People v State of Western Australia* (No 9) [2007] FCA 31 at 495-705.

<sup>25</sup> Garry Downes 2006, 'Problems with expert evidence: Are single or court-appointed experts the answer?', *Journal of Judicial Administration*, vol. 15, p. 186.

<sup>26</sup> Downes 2006, 'Expert Witnesses in Proceedings in the Administrative Appeals Tribunal', p. 7.

It was not so much a dialogue between two or three professionals about points of difference or agreement as an exposition of the reviewer's assessment.

It is doubtful whether a meeting between a State government and the author(s) of a connection report can really be called a 'hot tub' if the purpose of that meeting is for the State to provide further explanation of why the connection report failed to meet the assessment criteria. As such, the options which are presented at the end of this paper may not be entirely relevant to these situations. Elsewhere throughout this paper, the term 'hot tub' is used to describe a process that is intended to narrow or resolve issues that are in dispute.

### **Identifying the basis of disagreement**

One of the difficulties here, and several interviewees echoed this concern, was the importance of accurately identifying the issues in dispute and recognising the basis of those issues. The assessment of connection reports is not strictly confined to anthropological issues – they are informed by particular understandings of the case law and the requirements of government policy. One interviewee described the State's assessment reports as 'neither fish nor fowl and not something easily understood in anthropological terms'.

Some of the 'hot tubs' began on the understanding that the issues in contention were anthropological, yet the differences in legal views soon became apparent:

It was an exhausting process. We had clearly said the meeting was about the anthropology; unfortunately it got side-tracked by the law. The lawyers started to say what are the legal requirements for these requests? Then it got down to an argument about whether the State was taking a conservative view of the native title law and the rep body doesn't necessarily agree with it and from my personal and professional position I was very unhappy with it.

Others had had similar experiences and stressed the need for clearly identifying the basis of the issues in contention. As one of the anthropologists put it,

You need to clarify the legal position as part of the preparation for the hot tub process. There's no point whatsoever in two anthropologists going head to head over a matter which legally is not going to be agreed between the parties. Let me take a case in point with the concept of 'society'. Is it necessary if you have a society for that society to be largely co-resident? That is, that you're dealing with what you might call a community as much as a society so that they all, by and large, live in the same place or interact with each other on a regular basis and so on. Now one school of thought, the conservative sort of legal view, might say yes that's what a society is, that's what the High Court said in *Yorta Yorta*. But another group might say no, it doesn't have to be co-residence, you can have members [of a society] scattered all over the place. ... Where there is a fundamental difference of opinion, if lawyers can't agree, it shouldn't be up to the anthropologists to thrash it out.

This point was also made by another anthropologist:

The way the court has used "society" is very different from an anthropological use of society and if you weren't aware of that you'd be talking about one kind of society when you needed to address a wholly different kind of society, or notion of society.

Yet another anthropologist pointed to differences in understanding of the word 'tradition':

There were things that were couched in legal and anthropological terms, like the meaning of the word 'tradition', we had our view.

### **Lawyers in the 'hot tub'?**

Although the interviewees agreed on the need to separate the legal issues from the anthropological evidence, they disagreed on whether it was desirable to have lawyers present in the 'hot tub'.

When the hot tubs started it was just the parties getting together to talk constructively about the claim. The politics and the personalities made that quite difficult. Then the lawyers got involved in the next one and that made it impossible.

Another expert noted that anthropologists and lawyers need to work closely together but not necessarily in the 'hot tub'. He thought that 'if you had the lawyers there, it'd become a talk-fest for the lawyers. I can't see lawyers sitting back when some of these issues are discussed.'

Similarly, another anthropologist commented that the absence of lawyers in the 'hot tub' enabled it to proceed effectively:

By having it conducted amongst anthropologists using anthropological terms with a knowledgeable outsider there, it enabled us to function. If it had been dominated by law and the lawyers I don't think we'd have been able to do it.

Other interviewees held a different view. One of the anthropologists thought that 'the lawyers should remain firmly in charge' while another thought that lawyers could help keep the discussion more focussed:

I think sometimes if there's a whole group of anthropologists in the room then you get more involved in an academic debate which is not what's needed for native title unfortunately. I think if the lawyers are there, they can direct it back to questions of what is going to help get this through the native title process, rather than a discussion on the different views of the theory, like those issues like 'society' and relationships to land.

This view was also held by another anthropologist who said:

I think this is a very important matter because it's one thing for expert anthropologists to say I think this is a very interesting and potentially important issue if the lawyers say the court's just not going to be interested in that, it's not really relevant to the issues that have to be decided in this case.

There may be situations where it is important to have lawyers present during the 'hot tub'. Equally there may be situations where it is preferable to not have lawyers present. In either situation, skilful facilitation of the 'hot tub' should ensure that discussions do not get side-tracked into issues that are of academic interest only nor expect the expert anthropologists to resolve differences in legal views.

### **Facilitating the 'hot tub'**

An issue that emerged strongly during the interviews was the importance of the facilitator in managing the 'hot tub' so that it stays focussed and gives all parties equal opportunities to raise and discuss issues. As one of the anthropologists noted,

Often there are multiple, highly complex and inter-related issues. In a pressure situation people might elide or skirt issues. All of these depend on trust and reasonably good relations between the parties and it relies upon really, really skilful mediation or facilitation which doesn't pressure people into skating over the issues but also doesn't let them get bogged down in what may be fairly complex issues but may not be especially substantive.

Another expert, who described a 'hot tub' that had not been successful, commented that

What I wanted was genuine dialogue with give and take on both sides and a detached facilitator who could say 'let's keep the topics structured in this way and get to agreement about what needs to be done'.

Another issue seen as critical was managing the time spent on each of the issues:

It started with a much more open forum, that is: 'what do you as anthropologists think?'. So anthropologists just talked, as they do. It wasn't navigated very well.

Another said:

The facilitator needs to have a very clear sense of the pace of the thing. I've seen a number now where the first four or five hours are spent circling around and focussing on what may not be especially important issues and then after lunch people realise we've got four hours left and we've got everything substantive to do.

### **Advocacy and power imbalances**

Although the issue of bias had been raised in the course of some native title trials, none of the people interviewed for this paper suggested that bias had affected the views or behaviour of their colleagues in the 'hot tubs'. Two people, however, referred to the need for facilitators to be alert to experts who behaved as advocates in the 'hot tub':

The facilitator needs to emphasise and at various points to remind participants of their obligations and to be willing to say that someone is advocating a position and ask them to bring out the evidence on which they are basing that position. Otherwise people get away with it.

This comment reflects the point made earlier: that the role of the expert includes exposing the criteria by which their, and others', conclusions can be evaluated. Describing another 'hot tub' to discuss resolving overlapping claims, one anthropologist commented that she thought 'the other side was acting as an advocate, rather than as an expert witness':

We couldn't find points of agreement. We explained our differences of opinion but there was an unequal presentation of material. This was an indication that more work needed to be done, but that in itself meant things were moving forward.

In this case, the 'hot tub' was adjourned for more research to be conducted. This example demonstrates that focussing on the basis for an opinion will draw out quite quickly whether there is sufficient evidence to substantiate a position that has been adopted. Another interviewee made a similar observation:

[If people aren't prepared] there isn't the substance to be discussed and then there's a bit of posturing goes on and there is greater potential for it to become a bit confrontational because there isn't the substance to be discussed.

A skilled facilitator should also be alert to the power balances between the parties in the hot tub. At one level this merely means being aware of differences in personality types and verbal skills:

The facilitator needs to take into account the complexities of verbal and social interaction and some people are advantaged and some people are disadvantaged. Some people are more verbally adept and can construct a compelling argument because of the rhetorical force of their words. The facilitator needs to be alert to people who might be disadvantaged because of their verbal skills.

At another level, though, people described situations where they felt they were in a less powerful position than the others in the 'hot tub':

I've been in a recent meeting where the Tribunal wasn't involved and I think it should have been. It was lawyers and anthropologists. The counsel for the rep body was, in a sense, acting a bit like a mediator. I don't think that was the right position for them to take because they're actually respondents. It would have been better to have had an independent arbiter there. I'm surprised the Tribunal wasn't involved.

Another issue was raised that delineates quite markedly the way that expert evidence is viewed during a trial compared to the way it is viewed during the connection reporting process. One anthropologist described a 'hot tub' that had been convened to discuss the assessment of a connection report and observed a difference in the way that connection reports are treated in mediation compared to the way that expert reports are treated, as evidence, in a trial:

There is an immediate distinction between the review of a connection report done in mediation and an expert report done for the purposes of a trial where all the experts are on an equal footing. In mediation, the rep body researcher has to state his/her position but the State reviewer doesn't have to. In a trial, all the anthropologists would be called on to justify or explain their position.

It is worth noting here that the Federal Court Guidelines for Expert Witnesses stipulate that expert reports filed in court proceedings require a statement in which the expert acknowledges his or her duty to the court. This applies equally to the experts engaged by the claimants and respondents. Of the State governments that have guidelines for the preparation of connection reports, both Western Australia and South Australia require a similar statement from the claimants' expert. However, only the South Australian guidelines state that the assessors of those reports are required to sign a similar statement.

### **Using 'hot tubs' in mediation**

The people interviewed for this paper were, largely, in favour of using 'hot tubs' in native title mediations. They were asked to identify 'the key things that make a 'hot tub' successful' and the following points are a distillation of the responses to that question:

- Preparation:
  - The experts need sufficient time to prepare their own documents and read others';

- All the experts need to be committed to preparing thoroughly;
- Identifying the issues before the 'hot tub' itself starts so that discussions can be focussed:
  - A preliminary phone conference can be used to help in identifying the issues as part of the preparation for the 'hot tub';
- Good facilitation and a structured agenda:
  - The agenda can be structured around a set of propositions for the experts to address;
  - The facilitator needs to make sure that the agenda is adhered to;
  - The facilitator needs to manage the time devoted to each of the issues;
  - The facilitator needs to be aware of differences in verbal skill and power imbalances;
- The experts need to approach the 'hot tub' in a spirit of trust and collegiality to enable a robust discussion of the issues.

### **Options for dealing with disagreement**

But, if all these things are addressed in preparing for and conducting a 'hot tub', the problem remains of how to resolve those issues on which the expert anthropologists do not agree. Several options are outlined below. The authority to exercise some of these options is not likely to rest with the anthropologists without reference to the lawyers who have carriage of the matter, so some of the options refer to 'parties' rather than 'experts' or 'anthropologists'.

#### **Option 1:**

If the 'hot tub' has been convened to deal with an overlap dispute but has not resolved the issue, the anthropologists may agree that it is appropriate to meet with the claimants and put to them the issue(s) in dispute and the evidence that has been considered to date. If the claimants cannot agree, any of the following options can be considered.

#### **Option 2:**

The parties may agree to refer outstanding issues to an independent expert. They may agree to be bound by the opinion of the independent expert or at least to reconsider their positions in the light of that opinion. The 'hot tub' may need to be reconvened for that to occur. This option could be used to resolve an overlap dispute or to resolve connection reporting issues.

#### **Option 3:**

The parties may agree that the Tribunal conduct a review on the issue of whether the native title claim group holds native title rights and interests as defined in s 223(1) of the *Native Title Act* and may agree to reconsider their positions in the light of this review. This

may mean that the 'hot tub' is reconvened after the parties consider the Tribunal's report. This option could be used to resolve an overlap dispute or to resolve connection reporting issues.

#### **Option 4:**

The parties may agree that the Tribunal, under ss 138A – 138G of the *Native Title Act*, conducts an inquiry and may agree to reconsider their positions in the light of any new evidence gathered during this process or in the light of the recommendations or findings of fact in the Tribunal's report. This may mean that the 'hot tub' is reconvened after that evidence is considered. This option could be used to resolve overlap disputes or to resolve connection reporting issues.

#### **Option 5:**

The parties can request that the Tribunal, under the provisions of s 86D of the *Native Title Act*, refer a question of law or fact to the Federal Court. This option may be most useful where the 'hot tub' had been convened to resolve connection reporting issues.

#### **Option 6:**

The parties may agree that they cannot reach agreement on the issues in dispute, that mediation is to cease and the matter be referred to trial.

### **Minimising the risk of disagreement**

There are several factors that might help reduce the risk of parties reaching the point where they cannot agree. One of these is the point in time at which the 'hot tub' occurs, the other concerns the 'ownership' of the anthropological evidence being discussed.

If 'hot tubs' are to be used in the reporting and assessment of connection evidence, for example, convening it sooner rather than later may shift the focus away from an adversarial approach and toward a joint problem-solving approach.

In the Yankunytjatjara/Antakirinja case described earlier, orders for the 'hot tub' were made before the claimants' anthropologist had started preparing the expert report. The initial teleconference was used to determine the issues that had to be addressed in the report. The 'hot tub' was convened to discuss the report that had been prepared. Although one of the participants was critical of some aspects of the 'hot tub', it seems that the process circumvented the development of entrenched positions:

[The rep body] had drawn up a list of propositions ... and the State had put up a list of propositions: "we accept this, but we need evidence on this; we are disinclined to accept this but if the evidence can be provided, we'll accept it". It was a very rational response to the propositions put forward by the claimants.

A process tried by one of the States similarly convened a 'hot tub' at the start of discussions on connection reporting:

We were keen ... to ensure that we have these content discussions early on and avoid being surprised by the report that's provided and also avoid the claimants' reps doing something that isn't required. For example, spending a lot of time on things that they think

might be issues but we don't think are issues, or not addressing things that we think are issues. We were keen to meet with them early on and organise that.

As a consequence of the early discussions, the Tribunal was asked to produce a research report that canvassed the publicly available material. Once this research had been tabled, the anthropologists met again to discuss the issues that needed to be addressed and what additional research was needed. Several of the participants at this subsequent meeting thought that it was useful and productive:

It was a very general discussion: this is the ethnography that we agree and these are the issues that arise. This is what we think really needs to be addressed. There were no particular theories put forward that were attacked, defended or criticised or anything like that. It is a quite different scenario when you're discussing somebody's work.

This last point was also made by other interviewees. One said:

Personalities are a big thing. The person who's written the report is really under attack to some extent. I don't think there's any way to get around it, their work is under review. And some people take to that better than others.

Starting from a neutral body of research may be one way to get around this problem and help avoid an adversarial situation in which participants feel the need to defend their work. At least in the first instance this approach should shift the focus away from individuals and on to the evidence at hand. From that point, it might be possible to adopt a joint problem-solving approach that is directed toward reaching agreement and not just narrowing the areas of disagreement for the Court to decide.

## **Conclusion**

This paper has asked whether a process developed for use in litigation can be used effectively in native title mediation. The answer is a qualified yes. If 'hot tubs' are conducted within the mediation process, not outside it; if the experts participating in the 'hot tub' are allowed time for adequate preparation; if the agenda identifies clearly the issues under discussion; and if the discussion is facilitated so that the available time is managed to best effect and the experts have equal opportunity to address the evidence, then it can be a highly effective tool to narrow down the issues in dispute. Equally important, however, is the timing of the 'hot tub' and the way in which the participants approach it. If it is convened earlier in the mediation process, rather than later, it may be possible to avoid any differences leading to entrenched positions. Finally, if the experts approach the 'hot tub' as a joint problem-solving exercise, rather than as an adversarial contest, its use could be more effective in mediation than it is in litigation.

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