

Evidence – admissibility of expert reports

Jango v Northern Territory (No 2) [2004] FCA 1004

Sackville J, 3 August 2004

Issue

The issue in this case was whether a number of paragraphs in two expert reports were admissible in native title compensation proceedings.

Background

This case relates to the hearing of an application for a determination of compensation covering parts of Yulara, a town in the Northern Territory. Prior to the taking of the evidence of the authors of two experts' reports, both prepared by anthropologists, the Northern Territory and the Commonwealth filed over 1,100 objections to the admissibility of various passages of the reports. This summary is not comprehensive and interested readers are referred to the decision itself.

The reports generally

Justice Sackville noted that it was apparent that each of the reports had been prepared with scant regard for the requirements of the *Evidence Act 1995* (Cwlth). The basis on which the authors reached particular opinions was often either not stated or unclear. In particular, the Yulara Anthropology Report often did not:

- clearly expose the reasoning leading to the opinions arrived at by the authors;
- distinguish between the facts upon which opinions were presumably based and the opinions themselves;
- identify whether the authors were advancing factual propositions, assuming the existence of particular facts or expressing their own opinions—at [8] to [11].

Sackville J acknowledged that a very large investment of time in the preparation of the reports was attributable, at least in part, to a failure to define the task with precision and a lack of due regard to the rules of evidence. For example, when (some four years after their initial instructions) the authors were directed to particular questions that might be relevant, they were not informed of:

- the requirements of s. 79 of the *Evidence Act* concerning the admissibility of expert evidence;
- the need to identify clearly expressions of opinion; or
- the need to present material in a form that allowed the court to determine whether the authors' opinions were based on specialist knowledge derived from training, study or experience—at [12] and [14].

While his Honour accepted that the developing nature of the law of native title had not made it easy to identify the precise questions requiring analysis, the principal problem was the form of the reports and the manner in which the questions identified were addressed. The court was critical of a process whereby a failure to

comply with the rules of evidence produced lengthy reports of only limited forensic utility—at [16] to [17].

Effect of Land Rights Act experience

Counsel for the applicant attributed the anthropologists' failure to pay sufficient regard to the Evidence Act to practices that had grown up under the *Aboriginal Land Rights Act 1976* (Cwlth) (ALRA) which persisted in the preparation of expert evidence for claims made under the NTA. Sackville J noted that:

- claims under the ALRA are heard by an Aboriginal Land Commissioner who is not bound by the rules of evidence;
- in contrast, under s. 82 of the new Act, the court is bound by the rules of evidence in proceedings under the NTA, except to the extent it otherwise orders—at [19].

His Honour held that the practice that grew out of the ALRA process should have stopped when s. 82 of the NTA was amended in 1998—at [20].

The basis rule considered

Sackville J considered the 'basis rule' i.e. the requirement at common law that, for an expert's opinion to be admissible, it must be based on facts stated by the expert and either:

- proved by the expert; or
- assumed by the expert and proved from another place or person—at [33].

It was held that:

- proof of the facts assumed by an expert in giving their opinion goes to the weight that should be accorded to the opinion rather than the admissibility;
- however, an expert's report should be presented in a form that makes it possible for the court to determine whether the opinion is wholly or substantially based on the expert's specialised knowledge, which in turn is based on training, study or experience;
- while it might be possible that certain material in a report was intended to explain or support an opinion expressed elsewhere in that report, the relevant paragraphs would need to be linked to any expression of opinion by the author—at [34] to [36].

The objections conceded by the applicant

Sackville J invited the Northern Territory and the Commonwealth to select a limited, representative number of objections, the rulings on which might also cover other similar objections. The applicant conceded that virtually all of the representative objections were well founded. However, his Honour thought it appropriate to record the objections and the consequences of the concessions made by the applicant's representative, only some of which are summarised here—at [29].

Tindale's cards

Part of one of the reports examined certain card entries made by the late Norman Tindale, Curator of Ethnology at the South Australian Museum. The author of the report expressed views about Tindale's subjective thought processes and the

methodology employed by him in compiling the cards, including an unexplained assertion that Tindale had ‘attempted to clean up what appeared to him as anomalies’. The objection taken to this material (conceded by the applicant) was that the views expressed by the authors of the report amounted to unsupported speculation that could not be seen to be a product of the authors’ training, study or experience. The applicant was granted leave to obtain the reasons for this view of Tindale’s work and to link that view to the authors’ opinion—at [39].

Reference was also made to ‘personal data cards’ prepared by Tindale in the course of a field trip and incorporated in a table recording the birthplaces and totems of parents and offspring. The original data cards were not tendered. Sackville J held that:

- if the applicants intended to rely on Tindale’s material to prove the truth of the information it contained, the report must address either the significance or reliability of Tindale’s work for the purpose of proving matters in issue; and
- if the summary of Tindale’s cards was intended to support an opinion expressed by the author, it was not clear what the opinion was and how it was supported by the information recorded in the data cards—at [42] to [44].

Land claim book

The authors of one of the reports summarised points made in a claim book prepared for an ALRA land claim that was not tendered. Sackville J held that, if the summary was intended to provide probative evidence of facts asserted in the claim book, it was inadmissible in form. If it was intended to provide support for an opinion expressed by the authors of the report, the opinion would need to be identified—at [46].

Assertions of fact

On several occasions, the authors made certain assertions of fact, such as that:

- there were a number of sites where water serpents guard water resources against trespass;
- a particular customary activity was widely known in the region and appeared to have been retained over the generations.

Sackville J held that the basis of any such assertion needed to be identified, e.g. that the authors were relying on information given to them by the claimants—at [48].

Genealogies

Computer generated genealogical charts were appended to one report. While there were references to some sources, there was no explanation of how the charts were compiled and few of the sources referred to were in evidence.

Sackville J held that the information recorded in the charts needed to be authenticated and that an explanation of why the charts were a product of specialist knowledge was also required—at [66].

Reliance on an unpublished report of another anthropologist

Part of one of the reports summarised and drew on the work of Dr Nancy Munn, an anthropologist who carried out field work in the 1960s near the area covered by the application. There were three footnote references to Dr Munn's unpublished report of her field work. Sackville J noted (among other things) that:

- there was no reason in principle why anthropologists could not identify hearsay material in their report that went to establishing the foundation of the knowledge applied in preparing the report and forming the opinions expressed in it;
- the summary of Dr Munn's work, insofar as it provided one of the bases for the opinions expressed in the report, was relevant and, subject to the operation of ss. 135 and 136 of the Evidence Act, admissible in evidence—at [73] to [75].

However, it was found that, as the applicant was unable to identify any opinion in the report supported by the summary of Dr Munn's work, the foundation of admissibility was wanting and there was no occasion to consider the possible application of the Evidence Act. Insofar as the summary of Dr Munn's work was relied on as proof of the truth of the facts asserted in Dr Munn's report, it was not admissible for that purpose—at [76] and [78].

Decision

The court rejected the paragraphs of the reports that were subject to the objections.