Objections to expert evidence — Wongatha

Harrington-Smith v Western Australia (No 7) [2003] FCA 893

Lindgren J, 20 August 2003

Issue
The court was faced with a difficult case management problem — how to manage 1426 objections to various aspects of 30 separate expert reports contained in 35 volumes, written by fifteen separate expert witnesses, within the close timetable of the closing stages of a long and complex native title proceeding.

Background
See *Harrington-Smith v Western Australia (No 6)* [2003] FCA 663, which is summarised in *Native Title Hot Spots* Issue 7.

Consideration of expert evidentiary issues
Justice Lindgren decided to indicate the principles that would govern the court's approach to the objections and to direct the parties to identify any objections on which they consider rulings to be necessary. His Honour asked the parties to consider his proposal that the experts' reports be 'subsequently admitted (when adopted by their authors in the witness box) on the basis that all objections notified and not ruled upon will be taken into account by me as going to weight'—at [5].

Principles of evidence
Lindgren J indicated that he would not exercise the discretion given to him under s. 82(1) of the *Native Title Act* 1993 (Cwlth) (NTA) and so the objections fell to be determined in accordance with the rules of evidence—at [6] to [15].

Expert reports
His Honour gave some useful guidance on the preparation of the expert reports, which, in summary, was that:

- lawyers should be involved in relation to the form in which expert reports are written in order to ensure that the legal tests in relation to the admissibility of evidence are addressed. It is not the law that admissibility is attracted by nothing more than writing a report in accordance with the conventions of the expert's field of scholarship;
- expert reports must clearly expose the reasoning leading to the opinion arrived at;
- expert reports must distinguish between the assumed facts on which an expert's opinion is based and the opinion itself;
- the format of the reports in this matter made it difficult to apply the principles of s. 79 of the *Evidence Act 1995* (Cwlth) so as to determine whether or not an opinion is based on 'specialised knowledge, study or experience':
- substantial parts of them could be described as undifferentiated combinations of speculation, summary description of facts, opinion, hearsay, unsourced assertion and sweeping generalisation;

- each paragraph of the report should be numbered, derived statements should be adequately sourced and a careful outline of the witness's field of specialised knowledge should be included—at [19] to [32].

Some of the anthropologists' reports contained things the anthropologists were told by other, often unidentified, sources. Lindgren J adopted the approach of Justice Cooper in *Lardil v Queensland* [2000] FCA 1548 and took into account the hearsay nature of the evidence as going to its weight as evidence of the facts intended to be asserted by the representations—at [33] to [39].

In relation to historians' reports, 'the distinction between the analysis, synthesis and summary of factual ... material on the one hand and the drawing of inferences on the other, can be difficult'. These reports raised the 'question as to how much of them is admissible as evidence of expert opinion', as distinct from submissions as to the interpretation the court should place on historical data—at [40] and [42].

Decision

The court directed that all parties review their objections to the experts' reports prior to the commencement of the giving of expert evidence in the light of the principles outlined. Eventually, 184 objections were pressed. Lindgren J took some ten hours to decide the objections and three hours to give rulings on them—at [5] and [43] to [47].