

**Does an Historian have “specialised knowledge” to provide expert evidence in Native Title Proceedings – some Recent Issues by Tina Jowett**

1. As discussed in this paper and in Vance Hughston SC’s paper, *The Role of the Expert Witness and the Admissibility of Expert Evidence in Native Title Proceedings* at this conference, evidence of an indigenous society in occupation of land at the time of colonisation and the mode of proof of continuity in traditional laws and customs, and the society to which they relate, can be provided by members of the society and also by historians, archaeologists, linguists and anthropologists.<sup>1</sup> It has been commonplace that expert reports, which include historian’s reports, are tendered in native title matters to assist the Court in determining the issues before it.
  
2. One problem that has emerged in relation to some expert reports in recent native title cases is that the courts have been concerned that they suffer from a lack of transparency.<sup>2</sup> The courts have stated that some expert reports do not clearly expose the reasoning leading to the opinions arrived at by the authors; neither have the reports distinguished between the facts upon which opinions are presumably based and the opinions themselves.<sup>3</sup> Another problem that has arisen is the questioning of whether historians, as experts, have “specialised knowledge” that enables them to give admissible opinion evidence in native title proceedings.<sup>4</sup>
  
3. This paper will argue why historians’ have relevant “specialised knowledge” under section 79 of the *Evidence Act 1995* (C’th) (“*Evidence Act*”) and why

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<sup>1</sup> In *Sampi v The State of Western Australia* [2005] FCA 777 per French J at [951] and [964].

<sup>2</sup> Sackville J in *Jango v Northern Territory of Australia (No.)* [2004] FCA 1004 at [11] “Like some of the reports discussed by Lindgren J in *Harrington-Smith* (No.7), the *Yulara Anthropology Report* often does not clearly expose the reasoning leading to the opinions arrived at by the authors. Nor does it distinguish between the facts upon which opinions are presumably based and the opinions themselves. Indeed, it is often difficult to discern whether the authors are advancing factual propositions, assuming the existence of particular facts, or expressing their own opinions. Certainly the basis on which the authors have reached particular conclusions is often either unstated or unclear.”).

<sup>3</sup> See Vance Hughston SC’s paper, *The Role of the Expert Witness and the Admissibility of Expert Evidence in Native Title Proceedings*, AIATSIS Native Title Conference, Cairns, 2007 at [23] to [31].

<sup>4</sup> *Harrington Smith v State of Western Australia (No. 7)* [2003] FCA 893.

historians are necessary experts in native title proceedings. The paper will examine two recent native title cases in relation to findings about expert historians' evidence. Those cases are *Harrington Smith v State of Western Australia* (No. 7) [2003] FCA 893 ("*Harrington Smith* (No. 7)") and *Bennell v Western Australia* (2006) 153 FCR 120 ("*Bennell*").

### **The Evidence Act**

4. When the Native Title Act 1993 (C'th) ("NTA") commenced in January 1993 the rules of evidence did not apply in native title proceedings. Since the 1998 amendments to the *NTA*, the Federal Court has been bound by the rules of evidence, unless the Court otherwise orders.<sup>5</sup> The general principles stated in s. 76(1) of the *Evidence Act* is that "*evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed*". The exception to s.76 is s.79 which states:

*"If a person has specialised knowledge based on the person's training, study and experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge."*

5. Section 79 of the *Evidence Act* contains three mandatory requirements that must be satisfied before evidence can be admitted as expert evidence as follows:
- a) The witness providing the evidence must have a "*specialised knowledge*"<sup>6</sup>;
  - b) The "*specialised knowledge*" must be "*based on training study or experience*"<sup>7</sup>;
  - c) The opinion sought to be expressed by the witness must be one that is "*wholly or substantially based on that [specialised] knowledge*".<sup>8</sup>
6. If the above requirements are not satisfied, the evidence is not admissible and will

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<sup>5</sup>*Native Title Act 1993* (Cth), s.82(1).

<sup>6</sup> *Evidence Act* s. 79.

<sup>7</sup> *Evidence Act* s. 79.

<sup>8</sup> *Evidence Act* s. 79.

not be admitted, if challenged.<sup>9</sup> If the evidence to be tendered is challenged on the basis that it is not expert evidence under s. 79, it will be necessary for the requirements above to be established on the balance of probabilities, by the party seeking to adduce and rely on the evidence.<sup>10</sup>

### **The Role of the Expert**

7. Before examining whether historians have the requisite “*specialised knowledge*” in native title proceedings it is important to note the role and the purpose of expert evidence generally in court proceedings. In discussing opinion evidence the Australian Law Reform Commission stated “[t]he ultimate criterion for the admission of opinion evidence should be whether it will assist the trier of fact in understanding the testimony, or determining a fact in issue”.<sup>11</sup>
8. With this in mind it is important to note that an expert cannot usurp the role of the trial judge who must make the necessary findings of fact<sup>12</sup> The trier of fact is bound to consider and assess all the evidence before it, including expert reports and historic documents, in order to determine whether or not to accept the evidence or to prefer that evidence over any contrary evidence. The trier of fact cannot consider or assess the evidence of the expert without an explanation of the basis on which he or she has reached their opinion so that the court may make its own independent assessment of that evidence and form its own conclusions.<sup>13</sup>

### **Specialised Knowledge**

9. What is “*specialised knowledge*” based on their “*training, study and experience*” under s. 79 of the *Evidence Act*? In *Veloski v R* (2002) 187 ALR 233, Gaudron J at [82] described what was meant by “*specialised knowledge*”. Her Honour stated that “*specialised knowledge*” means importing knowledge of matters which are outside the knowledge or experience of ordinary persons and which is sufficiently organised or recognised to be accepted as a reliable body of knowledge.

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<sup>9</sup> Unless some other basis for admission can be found in the *Evidence Act*. See discussion above at s. 82(1) of the *NTA* below at [22].

<sup>10</sup> *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [85].

<sup>11</sup> Australian Law Reform Commission Report No. 26 at [743].

<sup>12</sup> *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [59] and [88].

<sup>13</sup> *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [68].

10. To be admissible the opinion must fall within a field of “*specialised knowledge*” and that “*specialised knowledge*” must be used in reaching the opinion expressed.<sup>14</sup> It will be inadmissible if it is one which the Court could itself reach upon the material considered by the expert. As Finkelstein J stated in *Quick v Stoland*:

*"The function of an expert is to provide the trier of fact, judge or jury, with an inference which the judge or jury due to the technical nature of the facts is unable to formulate."*<sup>15</sup>

### **Expert Historians**

11. Courts have recognised that courts may use the general facts of history as ascertained, or ascertainable, from the accepted writings of serious historians: *Read v The Bishop of Lincoln* [1892] AC 644 at pp.652-54; *Australian Communist Party v Commonwealth of Australia* (1951) 83 CLR 1 per Dixon J at p.196. Deane and Gaudron JJ in *Mabo v State of Queensland* (1992) 175 CLR 1 at [78] stated: “... *In the writing of this judgment, we have been assisted not only by the material placed before us by the parties but by the researches of the many scholars who have written in the areas in to which this judgment has necessarily ventured. We acknowledge our indebtedness to their writings and the fact that our own research has been largely directed to sources which they have already identified.*”
12. Hence, the courts have access to secondary, as well as primary, sources in which to interpret history. If this is the case, what then can the historian do to assist the court, that the court cannot already do for itself?
13. In native title proceedings expert historians serve an important function in summarising the effect of complex or voluminous primary evidence that

<sup>14</sup> *Quick v Stoland Pty Ltd* (1998) 87 FCR 371 per Emmett J at 381 and per Finkelstein J at 382-83.

<sup>15</sup> *Quick v Stoland Pty Ltd* (1998) 87 FCR 371 at 382 (emphasis added) per Finkelstein J. This reflects the position long held at common law: see eg *Bugg v Day* (1949) 79 CLR 422 at 462 per Dixon CJ; *Clark v Ryan* (1960) 103 CLR 486 at 491 per Dixon CJ; *Australian Oil Refining Pty Ltd v Bourne* (1979) 54 ALJR 192. See too *Farrell v The Queen* (1998) 194 CLR 286 at 292-3 per Gaudron J: “*It is well settled that expert evidence is admissible “to furnish ... scientific information which is likely to be outside the experience and knowledge of a judge or jury”*: [*R v Turner* [1975] QB 834 at 841]”.

otherwise would be difficult to understand.<sup>16</sup> In native title cases the historian is able to provide an expert report and oral testimony to assist the Court in two important ways. Firstly, historians are able to locate, read, collate and distil the voluminous early source documents, thereby saving the court considerable time. Secondly, from their training, study and experience in accepted theories of historiography<sup>17</sup> and of epistemology<sup>18</sup>, historians are able to assist the court in interpreting those documents by examining the background and predilections of the early writers and putting their observations in context for the court.

14. For example, in the *Bennell* matter the historian examined the recordings of Daisy Bates who had received no anthropological training but who was influenced by contemporary scholars. Ms Bates published the results of her research and also wrote unpublished manuscripts in the early twentieth century.<sup>19</sup> Daisy Bates, considered that the Aboriginal people with whom she worked were savages who were “*frozen in time*” and a race “*doomed to extinction*”. Bates considered that her informants were the “*last men of their tribe*” who were the noble savages and all other Noongar people were members of a dying race.<sup>20</sup> The historian in *Bennell* assisted the Court by analysing the writings of Bates to show she was very much a woman of her time and of a Eurocentric background with notions of racial superiority and purity.
15. Historians obtain “specialised knowledge” through the various tertiary degrees they attain. An historian with a higher degree, considerable experience in researching, teaching and publishing is a desirable expert in native title claims. It is essential that an historian’s evidence assists the court with the technical knowledge only a trained historian has in relation to the theories and disciplines of historiography and epistemology. What is of utmost importance

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<sup>16</sup> *Jango v Northern Territory of Australia (No. 4)* [2004] FCA 1539 at [27], Sackville J.

<sup>17</sup> Historiography is the study of history writing by analyzing an historian’s background and examining the time in which the historian wrote the history. E H Carr wrote in his seminal paper *What is History?*, Penguin Publishing, 1961 at p. 23, “[s]tudy the historian before you begin to study the facts”.

<sup>18</sup> Epistemology is the theory of the method or grounds of knowledge.

<sup>19</sup> Daisy Bates, *The Native Tribes of Western Australia*, Isobel White edn.

<sup>20</sup> Daisy Bates, *The Native Tribes of Western Australia*, Isobel White edn.

in native title proceedings is that once the historian's "specialised knowledge" is revealed, the expert and the instructing solicitor must ensure that the contents of the report is in admissible form under the *Evidence Act*.<sup>21</sup>

### **Non-native title Cases where the admissibility of Historian's evidence has been considered**

16. The historian as expert witness has not often been the subject of judicial consideration in many non-native title matters. The evidence of two expert historians was considered by Young J in the Supreme Court of New South Wales in *Bellevue Crescent Pty Ltd v Marland Holdings Pty Ltd* (1998) 43 NSWLR 364 at 371 ("*Bellevue Crescent*").
  
17. *Bellevue Crescent* involved a property owned by the plaintiff which abutted a reserved lane in the City of Sydney. The issue before the Court was whether a portion of the lane had become part of a road through the use by the public pursuant to a right to pass and re-pass over it, and as a result had vested in the Local Government Authority. To discern the holder of the title and the use of the lane, two historians were asked to prepare reports using a number of historical documents that included plans, drawings and technical documents relevant to 1879.
  
18. Young J found that the historians' reports were inadmissible because the knowledge the historians were based on "*hearsay material of the past*" and the opinions expressed were not wholly or substantially based on "*specialised knowledge*" under s.79 of the *Evidence Act*.<sup>22</sup> Young J rejected the historians' reports because they did not contain expert opinion "*but, rather, [wa]s an analysis*".
  
19. On appeal, Stein JA in *Tomark Pty Ltd v Bellevue Crescent Pty Ltd* [1999] NSWCA 347 ("*Tomark*") at [22]-[23], (with whom Beazley and Priestley JJA agreed) relied on *Quick v Stoland Pty Ltd* (1998) 157 ALR 615 at 618, to overturn Young J in relation to the findings that the plaintiff's historian did not

<sup>21</sup> *Harrington Smith (No. 7)* at [28] – [32].

<sup>22</sup> *Bellevue Crescent Pty Ltd v Marland Holdings Pty Ltd* (1998) 43 NSWLR 364 at 371.

have “*specialised knowledge*” based on her “*training, study and experience*” as an historian.

20. In determining whether the historian in question had “*specialised knowledge*” under s. 79, Stein J referred to the historian’s curriculum vitae and concluded that she did have “*specialised knowledge*” from her “*training, study and experience*”.<sup>23</sup> Nevertheless, the Court of Appeal wholly rejected the plaintiff’s historical report as it was not “*wholly or substantially based*” on her “*specialised knowledge*” in that the historian had provided no basis for some of her opinions and the opinions did “*not flow from the material relied on*”. Accordingly, the conclusions in her report were not “*wholly or substantially based on her specialised knowledge*” and the report carried little weight.<sup>24</sup>

21. It does not appear that Young J, nor the Court of Appeal in *Tomark*, were referred to any native title cases in which the Federal Court has not only admitted the expert testimony of historians, but has placed significant reliance upon that testimony. For example, in *Neowarra v State of Western Australia* [2003] FCA 1402 (“*Neowarra*”) at [61], Sundberg J found that both historians called by the applicant, Dr Skyring and Dr Jebb, and the historian called by the State of Western Australia, Dr Green, “*have specialised knowledge in relation to history based on his or her training, study and experience*”. His Honour then proceeded to set out his findings based upon their expert evidence.

### **The Court’s Discretion to admit Expert Evidence**

22. Expert evidence is admissible if it is relevant, helpful, probative and necessary: *Murphy v The Queen* (1989) 167 CLR 94 at 127 per Deane J; 63 ALJR 422; 86 ALR 35; 40 A Crim R 361; and *Perry v The Queen* (1990) 49 A Crim R 243 at 249. Qualification and competency of an expert to give opinion evidence is a matter which is essentially within the discretion of the trial judge.<sup>25</sup> Despite s. 79 of the *Evidence Act*, the trial judge has a statutory discretion to admit an historians evidence under s.82(1) of the *NTA*. Section

<sup>23</sup> *Tomark* at [22].

<sup>24</sup> *Tomark* at [42] – [43].

<sup>25</sup> *Clarke v Ryan* (1960) 103 CLR 486 at 503 (Menzies J).

82(1) of the *NTA* provides: “[t]he Federal Court is bound by the rules of evidence, except to the extent that the Court otherwise orders”. What this means is that if a court considers that an historian’s report fails to comply with s. 79 it may exercise its discretion under s.82(1), as long as the report is both relevant and probative.<sup>26</sup>

### ***Harrington-Smith No. 7***

23. After the comments made by Sundberg J in *Neowarra* about historians the findings in *Harrington Smith (No. 7)* may seem somewhat surprising. In relation to providing evidence of “specialised knowledge” based on “training, study or experience” Lindgren J in *Harrington Smith (No. 7)* stated that the various expert reports<sup>27</sup> consisted of little more than a list of tertiary academic qualifications, positions in which the witness had been employed, and, in some cases, published works. His Honour stated, “[i]t would have be useful if there had been included a statement of the field within which the writer claims to be able to offer specialised opinions which lie beyond the capacity of the Court to arrive at without the witness’ assistance”.<sup>28</sup> In other words, a discussion on the accepted theories of epistemology and historiography would have identified the historian’s field of expertise.

24. Lindgren J also stated in *Harrington Smith (No. 7)*, that “the historians’ reports assemble and report voluminous data scattered throughout contemporary sources, and offer interpretative conclusions. The distinction between the analysis, synthesis and summary of factual and material on the one hand, and the drawing of inferences on the other, can be difficult, as the historians’ reports show”.<sup>29</sup> Lindgren J’s comments do not mean that inferences cannot be drawn from the factual material. What it does mean is that the basis of the inference must be disclosed in great detail.

25. Nevertheless, Lindgren J admitted the historians reports subject to the objections raised in *Harrington Smith (No. 7)*. His Honour stated, “[t]here is,

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<sup>26</sup> To be admissible the evidence must be relevant under s. 55 and probative. See *Harrington-Smith (No. 7)* at [24]-[25].

<sup>27</sup> The expert reports in *Harrington Smith (No. 7)* numbered 30.

<sup>28</sup> *Harrington Smith (No. 7)* at [32].

<sup>29</sup> *Harrington Smith (No. 7)* at [40].

however, a question as to how much of [the report] is admissible as evidence of expert opinion as distinct from submission as to the interpretation I should place on historical data”.<sup>30</sup> These cautionary comments indicate that historians, when drafting their reports, must be mindful of leaving submissions to counsel and providing information to the court based on their “*special knowledge*” which clearly exposes the reasoning behind it.

26. The decision of Lindgren J in *Harrington-Smith (No 7)* does not stand as authority for the proposition that historical reports are never admissible. The comments made by Lindgren J at [40]-[42] were directed to some of the reports which were in issue in that proceeding and the ruling provides a useful insight into the way in which experts, including historians, should prepare reports<sup>31</sup> and the form the reports should take.<sup>32</sup>

### ***Bennell***

27. In *Bennell* the State of Western Australia submitted that the applicant’s historian’s evidence, “[wa]s not admissible as evidence of opinion, because it is not based on specialised knowledge, and therefore doesn’t qualify under section”.<sup>79</sup>
28. In order to prove the historian’s “*specialised knowledge*” the *Bennell* applicant’s detailed the historian’s academic qualifications, employment history, awards and publications in his expert report.<sup>33</sup> The historian stated in his report that the opinions he advanced were based upon his “*training, study and experience*” as a professional historian and with painstaking detail he exposed the reasoning leading to his opinions and distinguished the facts upon which the opinions were based.
29. Further, particulars of the historian’s training and experience in the theory and disciplines of historiography and epistemology were set out in the early part of his report. The particular knowledge of the theories and disciplines of

<sup>30</sup> *Harrington Smith (No. 7)* at [42].

<sup>31</sup> *Harrington Smith (No. 7)* at [20] – [27].

<sup>32</sup> *Harrington Smith (No. 7)* at [19] and [28]-[32].

<sup>33</sup> *Evidence Act* s. 79.

historiography and epistemology proved that the historian has skills of a technical nature that went beyond the general knowledge of the Court and that prevents the court from reaching the same conclusion as the historian from examining the material the expert had considered.

30. In those circumstances, and despite the challenge from the State of Western Australia, there was sufficient evidence on which Wilcox J could find that the applicant's historian's report was admissible under s.79 of the *Evidence Act*.

31. Wilcox J noted that the applicant's historian's report had assisted his consideration and assessment of the early ethnographic writers, and quoted the historian's report as follows:

*"The idea that historical knowledge is prefigured by certain assumptions is not especially radical. All understanding begins with certain assumptions or beliefs. They are the hooks on which we hang our interpretations of the world. They enable meaningful communication to the extent that they are shared, but one who does not share them is unlikely to make much sense of what is said"*<sup>34</sup>

32. His Honour further stated, "[t]he point, of course, is that, in considering non-Aboriginal accounts of Aboriginal society, it is always necessary to make allowance for the author's (and one's own) assumptions and prejudices, including any tendency to view Aboriginal society through a Eurocentric lens."<sup>35</sup>

33. Wilcox J found the applicant's historian's report was admissible as follows:

*"... Dr Host does have specialised knowledge based on his training, study or experience. He has specialised knowledge as an historian in the collation of historical records and the analysis of the significance of those records. Although he has apparently not specialised in relation to Aboriginal studies, Aboriginal history, his work has included that area of knowledge. ... If Dr Host had simply offered opinions about historical matters without relating those opinions directly to the sources that he has collated and analysed, then his report would be of no value and I would reject it. However, I think Dr Host has been careful to have identified the relevant source documents and he comments from time to time about the reliability of*

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<sup>34</sup> Bennell at [106].

<sup>35</sup> Bennell at [107].

*the source documents, a matter that I think is clearly within his expertise*".<sup>36</sup>

34. In relation to an expert exposing the reasoning leading to an historian's opinion and the facts on which they are based. Wilcox J stated in *Bennell* that, "[t]he opinion of an expert assists a court only where two conditions are fulfilled: first, the court is appraised of the facts assumed by the expert in reaching that opinion; and, second, the truth of those facts is either proved by evidence or conceded by all other parties."<sup>37</sup> Accordingly, most of the applicant's historian's report was admitted in *Bennell* and was found to assist the court as described above.

### **Concluding comments**

35. The role of the historian in native title matters is to summarise, or otherwise refer to complex or voluminous primary evidence that may otherwise be difficult to understand and to make commentary on those documents.
36. It is abundantly clear from the cases discussed in this paper that caution must be taken when an historian prepares a report for native title proceedings. The historian must disclose the basis and the reasoning process behind the opinions they express.<sup>38</sup>
37. Further, the opinion must be "*wholly or substantially*" based on their "*specialised knowledge*" that is a result of their "*training, study or experience*"<sup>39</sup>. As Lindgren J stated in *Harrington Smith (No. 7)* that "*specialised knowledge*" must always explain the "*field within which the writer claims to be able to offer specialised opinions which lie beyond the capacity of the Court to arrive at without the witness' assistance*". Without such an explanation an historical report may be inadmissible.

<sup>36</sup> Transcript of *Bennell* at pp. 2959-60.

<sup>37</sup> *Bennell* at [316].

<sup>38</sup> See the Rules of the Federal Court and Black CJ's 2004 Practice Direction: "*Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia*" see *Practice and Procedure in the Federal Court of Australia*, Vol 2 [69,750].

<sup>39</sup> *Evidence Act* s. 79.

38. Notwithstanding the caution discussed above, the trial judge has a discretion, in relation to admitting expert evidence under s. 82(1) of the *Native Title Act* 1993 (Cth) or Order 78 rule 31(2) of the *Federal Court Rules*. In *Harrington Smith (No. 7)* Lindgren J indicated that it may have been possible for him to exercise his discretion under s. 82(1) of the *NTA* to make orders in relation to the admissibility of the expert reports.<sup>40</sup>

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<sup>40</sup> *Harrington-Smith (No. 7)* at [7].