Native Title Litigation

By Graham Hiley QC

Part 1
INTRODUCTORY

Whilst a considerable amount of material has been written about Mabo v Queensland (No 2) (1992) 175 CLR 1 (Mabo) and the legislation which followed it, little has been published or decided on the more fundamental question as to how one goes about establishing, or contesting, native title under the Native Title legislation.[1] Much of the existing material deals with matters of less fundamental importance, at least as far as Aborigines are concerned, such as extinguishment. This paper is intended to provide an outline of the main procedural aspects likely to be involved in litigation under the statutory regime[2].

Unless otherwise apparent, all references to "NTA" shall be to the Native Title Act 1993 (Cth) but will apply equally to the State and Territory equivalents. References to a "tribunal" will include references both to the National Native Title Tribunal and to whatever courts and tribunals become involved under the relevant legislation. Presumably the State tribunals will have broader jurisdiction than the National Native Title Tribunal ("NNTT") since the former will possess certain quasi judicial powers[3]. In most cases then the comments that follow will apply to the tribunals set up under State legislation, and to the Federal Court as contemplated by the Commonwealth legislation.

Jurisdiction

In general terms the NTA set up a two-tiered structure aimed at the making and recording of determinations of native title, as defined in s 225 NTA. All applications are to be made initially to the NNTT[4] and, unless they are unopposed or result in agreement, will usually proceed to the Federal Court for resolution.

The NNTT is empowered to take evidence on oath, summon witnesses, and permit cross-examination or re-examination only with leave (s 156). It may, in an appropriate case, direct that an inquiry or part of an inquiry be held in private and give directions as to who may be present (s 154(3)). It may also direct that particular evidence or contents of a document not be disclosed or only be disclosed in a particular way (s 155). Otherwise hearings are to be held in public (s 154(1)) and every party is to be given reasonable opportunity to present his or her case and to inspect documents and make submissions (s 142).

The NNTT may authorise another person (not required to have any particular qualifications) to perform some or all of its functions under s 156 (see s 157). It remains to be seen whether and to what extent a lay person will be authorised to administer oaths, summon people to appear and to take evidence. Section 123 enables the President to publish general procedures (which he first did on 16 May 1994).

As to the Federal Court, its status and general powers are to be found in the Federal Court of Australia Act 1976 (Cth). Specific powers with regard to native title matters are contained in the NTA (primarily ss 80-94 and 213), in the Native Title Rules (Order 75 of the Federal Court Rules), and in Part VA of the Federal Court Act (inserted via s 218 NTA).

Section 213(2) NTA gives the Federal Court jurisdiction in relation to matters arising under this Act. This section appears to provide the Court with a wide range of powers both procedural and substantive[5]. It has been held to confer sufficient power for the making of an injunction preserving the subject matter of an application for a determination of native title under the NTA[6], but not sufficient to empower the Federal Court to make a common law declaration of native title[7].

Part VA Federal Court Act provides for the appointment of assessors to assist the Court in the exercise of its jurisdiction under the NTA - s 37A(1). Although appointed by the Governor-General (s 37A(2)), an assessor's functions depend upon the directions given by the Court and he or she will be under the Court's control. See s 83 NTA and Order 75 rule 7(1). The NTA seems to contemplate that the Federal Court will make considerable use of assessors - primarily for the taking of evidence (s 93 and s 86(b) NTA O.75 r 7) and also to preside over s 88 conferences (see ss 88-91 NTA and O.75 r 7(6)).

At all times the Court will retain control over the assessor, and will have complete discretion as to what use it will make of evidence collected by the assessor. The Court controls the compellability of witnesses to give evidence or produce documents (s 93(2)), and the disclosure of material put before an assessor (s 92).

The power of the Court itself to conduct private inquiries and to restrict publication or use of part of the evidence will be important. Whilst there does not appear to be any express power conferred beyond that contained in s 50 Federal Court Act, I would not think it difficult for the necessary powers to be implied. See for example Re Pochi and Minister for Immigration and Ethnic Affairs[8]. The power to impose restrictions upon the distribution of materials to be relied upon by claimants has arisen for consideration in the Yorta Yorta[9] native title claim[10].

It is interesting to note that both the NNTT and the Federal Court are expressly empowered to receive into evidence transcript of evidence in other proceedings before any tribunal, any other court and indeed any other person or body, and to adopt any recommendation, finding, decision or judgment of any such court, tribunal, person or body (ss 86 and 146)[11]

Precedent

The passage of the NTA (and more recently the Evidence Act 1995 (Cth)) has done away with restrictions (and some might say protections) imposed by the rules of evidence and enables a claim to be

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presented (or challenged) without the formalities that might be required in Court proceedings. See for example ss 82 and 109 NTA. Indeed ss 82(2) and 109(2) NTA require the Court (or tribunal) to take account of the cultural and customary concerns of Aboriginal peoples.

Since no case has yet been run on its merits under the NTA, considerable wisdom must be drawn from prior experience in analogous situations, particularly under the Aboriginal Land Rights (Northern Territory) Act 1976 (C th) (the Land Rights (NT) Act) and the Aboriginal Land Act 1991 (Qld), both in relation to matters of substance[12] and with regard to appropriate practices and procedures.[13]

The procedures adopted in Northern Territory land claims and the case law developed under the Land Rights (NT) Act will be of particular assistance for several reasons including:

(a) the fact that more than 50 land claims have been heard and determined since 1978, resulting in a substantial body of knowledge to be found in the various transcripts, exhibits and reports and in the considerable body of literature that has developed during and as a result of the land claim process.[14]

(b) the fact that many of the problems likely to be encountered in native title cases have already been dealt with - e.g. restricted evidence[15];

(c) the involvement of eminent and experienced lawyers[16], anthropologists[17], linguists and other experts[18];

(d) the fact that many of the claims have involved full blood traditional Aborigines who still observe many traditional practices (including initiation, ceremony, sorcery, maintenance of sacred sites and objects etc.);

(e) the fact that the Land Rights Act (NT) is also a Commonwealth Act succeeded only by the NTA (despite the attempts some ten years before to set up a National Land Rights Model[19]).

Similarly, considerable assistance will be derived from practices, rulings and reports of the Aboriginal Land Tribunal (Qld) because of much similarity in the language used in the Aboriginal Land Act (Qld), and because of the experience and writings of the Tribunal's Chairman, Mr Graeme Neate[20].

Part 2
PRACTICE AND PROCEDURE

Section 82 NTA provides as follows:

"(1) The Federal Court must pursue the objective of providing a mechanism of determination that is fair, just, economical, informal and prompt.

(2) The Court, in conducting proceedings, must take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders.

(3) The Court, in conducting proceedings, is not bound by technicalities, legal forms or rules of evidence."

Similar provisions exist in relation to the NNTT (Section 109) and to the State tribunals.[21] Indeed s 251(2)(d) NTA requires that a State or Territory tribunal operate in a way that is informal, accessible and expeditious.

Fair, Just etc.

Whilst a requirement for a tribunal to act in a way which is "fair, just, economical, informal and prompt" exists in other legislation,[22] particular problems will arise in native title matters, especially in view of the requirement for account to be taken of relevant cultural and customary concerns. The solutions to many predicaments likely to emerge will involve restrictions upon access to evidence, the use of group evidence, evidence on site, video evidence and other practices which might not normally be regarded as fair , just etc.

Example

A very likely scenario could be something like this:

X is the acknowledged senior man/ "king"/"boss"/"headman" of a particular claimant group. Not only has he been through all of the necessary initiation processes but he has been the person chosen by his forefathers to be entrusted with certain knowledge and powers not possessed by other members of the group. He has particular knowledge about, and powers in relation to a particular site, dreaming and/or ritual and he is prohibited by Aboriginal customary law from divulging such knowledge, or exercising his powers, save in certain particular circumstances. For example he may have the power to perform sorcery at a particular site by performing a particular ritual.

Proof of the existence of such knowledge and power may provide the most compelling evidence of his (and his clan's) title - as would production of a certificate of title, a birth certificate, a certificate of incorporation, a certificate of university qualifications or whatever in the ordinary courts.

How can X establish those facts if Aboriginal customary law does not permit him to reveal them publicly, or even privately to a tribunal, albeit in closed session? If some mechanism is found by which the relevant fact is communicated to the tribunal (because this would be fair and just from the point of view of the applicant) how could this be fair or just to other participants if they are not aware of the evidence and/or have no opportunity to test it?

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As already noted the NTA contemplates some departure from the procedural fairness requirements of natural justice. See ss 82, 91, 92, 109, 154, 155, 188 and 195.

In relation to the (inquisitorial and reporting) powers of the Aboriginal Land Commissioner Toohey J said, in Aboriginal Sacred Sites Protection Authority v Maurice[23]:

> "Clearly the Commissioner may not act in an arbitrary manner and, generally speaking, he must act according to the principles of natural justice as they exist in regard to administrative inquiries.
>
> ...the Commissioner may find it appropriate from time to time to adopt adversarial procedures, particularly where it is apparent that a grant of land to traditional owners may affect the interests of adjoining landholders or townspeople, the existing or likely future plans of government or public utilities or the interests of miners. This is not to say that an adversarial approach is always appropriate or is the norm... Questions will arise as to the extent to which material should be made available to all those participating in the inquiry. As a general rule the dictates of natural justice require that material be made available to all participating. But there may be situations, in particular where evidence concerns matters of a secret sacred nature to Aboriginals, in which the Commissioner is justified in placing constraints upon the circulation of that evidence.
>
> These are matters for the judgment of the Commissioner. That is not to say that his exercise of judgment is not susceptible of review, whether under the Judicial Review Act or by means of s 39B of the Judiciary Act."(from page 6)

In circumstances where the aim of the exercise is to extract as much information as possible and not to adjudicate on credibility or to resolve other conflicts, there may be no real injustice to non-claimants if the evidence is not given or even tested in the same way as in conventional litigation.[24] On the other hand where there are real issues of credibility care will have to be taken in ensuring that contentious testimony is properly tested, preferably by opposing parties having the opportunity to cross-examine and adduce their own evidence.

Restricted Evidence

Proof of ownership, tradition and matters relevant to establishing native title will often require some disclosure of secret information[25]. Such information could concern the name, whereabouts or function(s) of a site, certain detail about a dreaming story, a song, a ceremony, or a particular object, and/or detail about particular powers possessed by a particular person. Indeed a site, ceremony etc. could have a public story or part, and a private side perhaps restricted to a particular group of initiated men or women.[26]

The right to have restrictions imposed in particular cases, and the nature and extent of those restrictions, have been subject of much debate both during land claims[27] and in the courts[28] and other tribunals.[29]

In some cases, the restriction sought (and imposed) is one preventing access by certain members of the public, such as women and uninitiated men, for example, because the material is, by reason of Aboriginal tradition, to be restricted to initiated persons. Numerous examples of such restrictions being imposed have occurred during Northern Territory Aboriginal land claims.

Another common restriction imposed in land claims precludes the copying of documents, or permits a limited number of copies to be made on condition that they be returned upon the conclusion of the proceedings. In fact it has been a frequent practice in land claims to print a numbered set of "Land Claim Guide Books" all of which have to be returned to the Land Council following the enquiry and none of which can be copied.

Generally, where access is to be restricted, the tribunal will limit access to those people who have a present relevant need to have such access, and will impose conditions that restrict the use to which such material can be put.

The problem frequently arises where a party desires to use evidence that members of the opposite sex are not permitted to see. The choices open to that party include permitting some limited relaxation of the prohibition[30], or abandoning that evidence[31].

The general question of the use of and access to material sought to be restricted from general publication on account of Aboriginal beliefs and customs was recently considered by O'Loughlin J in Chapman v Tickner (supra) and, on appeal, by the Full Federal Court in Norvill and Milera v. Chapman and Ors (supra). The secret material subject of those proceedings (secret women's business) was substantially relied upon by the (male) decision maker (cf the example mentioned above at Fn 30) although, because of his gender, he had not actually considered it. This was held to be unsatisfactory. Their Honours suggested that if a party wishes to rely upon particular evidence as part of his or her application he or she may have to contemplate that the material will have to be seen by persons who may not normally be entitled to see it[32]. Per Burchett J.[33]:

> But Aboriginals, ...if they wish to avail

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themselves of legal remedies, must do so on the law's terms. To take away the rights of other persons on the basis of a claim that could not be revealed to the maker of the decision himself would be to set those rights at nought in a way not even the Inquisition ever attempted.

Clearly then procedures will have to be set up for the distribution and tendering of secret material[34]. The types of restrictions imposed should be reviewed as the case progresses, both by the tribunal and by those appearing before it. Ultimately, a claimant may be faced with no choice but for some publication to be made of highly secret material. The tribunal will of course have to remain sensitive to the need for confidentiality on the one hand, and for natural justice on the other.

I commend the reading of the Reasons for Decision delivered 9 June 1994[35] in the Lakefield National Park and Cliff Islands National Park Land Claim and application or modification of such restrictions discussed therein as may appear appropriate.

Group Evidence.

The practice of group evidence, that is of evidence being led from more than one person at a time and for members of the group to discuss a question before one of them answers it, found its way into common usage in land claims during one of the earliest claims conducted under the Land Rights (NT) Act, the Warlpiri and Kartangarurru Land Claim[36].

The practice may not always be suitable, especially where issues of credibility are involved[37].

Location

As to the requirement of informality, there is no reason why evidence cannot be taken on site and out of doors.[38] Indeed experience has shown that better evidence can be obtained from an Aboriginal witness speaking at an appropriate place on his country, than in a court setting. Aboriginal people will usually be more comfortable and articulate if they are able to give their evidence in familiar surroundings. For example, if they are talking about a particular place, much more evidence will generally be forthcoming if the evidence is given at that place[39]. Further, the roles played by the various participants and their conduct at a particular place may constitute significant evidence of continued observance of Aboriginal traditional customs. Of course, such evidence should be transcribed (hopefully on video) so that those who are unable to attend can later have regard to it.

In some circumstances however it may not be practicable or economical for evidence to be taken on site, particularly if this might discourage any necessary involvement by other parties who would not find it "economical" to participate. It is not uncommon for evidence (in chief so to speak) to be recorded at a site on video, and for it to be shown and tendered later at the hearing, where those participating in the video can be further questioned.

Timing

I have some concern about the stipulation of promptness. Whilst the holder of an interest in the land, present or future, would wish to have any uncertainty about the status of such interest resolved promptly, it would rarely be in the best interests of the claimant to have the matter rushed on. Experience with land claims shows that a lead time of at least 12 months is necessary to enable the appropriate field work and other preparations to be done in order to get the case to a stage where it can be properly presented. This is particularly so where the claimants and other knowledgable witnesses have been dispersed from their land and have lost contact with each other and to some extent with their land and culture.[40]

Cultural and customary concerns

Much of the comment above (particularly regarding secret material) assumes that the kind of cultural and customary concerns asserted in a particular case, and observed in previous cases (such as those to which I have referred), actually exist in the case at hand. Whilst there has been a tendency in the past for bald and broad assertions of secrecy and confidentiality to be made from the bar table so to speak - usually by one or more of the experts assisting the claimants - the breadth of the assertion has sometimes been met with suspicion.

I would suggest that fairness and justice requires, at the least, that the assertion be sworn to, and that the deponent be able to be cross-examined about it. In some cases it may be appropriate to conduct some kind of voir dire, perhaps in camera, including questioning of those witnesses who are said to possess the secret information.[41]

Regrettably such a process might not seem economical, informal or prompt. But if it is desired to have the tribunal attach much weight to the evidence it is essential, in my view, for its status to be properly established early in the process.

Above are the first two sections of this article.* Balance *will continue to print the remaining six parts over the next few issues.

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Notes to text

1. Recent papers dealing with the question of proof of native title under the Native Title Act 1993 (Cth) have been written by Graeme Neate, Determining Native Title Claims - Learning from Experience in Queensland and the Northern Territory, 69 ALJ 510, and Proof of Native Title delivered at the 29th Australian Legal Convention in September 1995 and by J Fitzgerald, Proving Native Title: A Critical Guide Vol 3 No 74 Aboriginal Law Bulletin 4. Earlier papers by Brian Keon-Cohen, Some Problems of Proof: The Admissibility of Traditional Evidence in M Stephenson & S Ratnapala (eds) Mabo: A Judicial Revolution, Univ. of Qld Press, 1993 at p 185 and by Greg McIntyre Proving Native Title in R Bartlett and G Meyers (eds) Native Title Legislation in Australia, 1994, The Centre for Commercial Resources Law, The University of Western Australia and Murdoch University, pp 121-157 very carefully deal with the evidentiary aspects of establishing native title at common law. The Native Title Act, for example s 82, removes most of those technical difficulties.

2. Many of my comments will also be applicable at the mediation stage. Elaboration on many points made in this paper can be found in the various publications identified in the footnotes.

3. cf Brandy v Human Rights and Equal Opportunity Commission (1995) 69 ALJR 191; 127 ALR 1.

4. This will probably change with amendments to NTA presently being considered.

5. It will probably have similar scope to the all things necessary or convenient power contained in other legislation such as s 51 Aboriginal Land Rights (NT) Act 1976. Section 51 has received widespread use by Aboriginal Land Commissioners (eg as the basis for making practice directions, and orders for discovery) and its scope has received judicial consideration in various decisions including R v Kearney; ex parte Northern Land Council (1984) 158 CLR 365 at 382; Anthony Lagoon Station Pty Ltd v Aboriginal Land Commissioner (1987) 15 FCR 565; 74 ALR 77; rev'g (1986) 13 FCR 262; 69 ALR 177; Aboriginal Sacred Sites Protection Authority v. Maurice; re Warumungu Land Claim (1986) 10 FCR 104; 65 ALR 247; and Attorney-General for the Northern Territory v Maurice (1987) 73 ALR 326.

6. Djaigween v Douglas (1994) 48 FCR 535.

7. Yuin Council of Elders Aboriginal Corporation v State of New South Wales (Lockhart J, unreported, reasons for decision 23rd October 1995).

8. (1979) 26 ALR 247 at 272-5.

9. No VC 94/1.

10. On 13 December 1995 Olney J heard an application to restrict the distribution of certain material to a limited number of people. His Honour's decision is expected shortly.

11. French J in Re: Waanyi People's Native Title Application (1995) 129 ALR 118 relied upon evidence in and findings of the Aboriginal Land Commissioner in the Nicholson River (Waanyi/Garawa) Land Claim, AGPS, 1985 a land claim conducted under the Aboriginal Land Rights (NT) Act.

12. See Waanyi (supra) at 129-130 and Fn 11.

13. See Graeme Neate, Determining Native Title Claims- Learning from Experience in Queensland and the Northern Territory op.cit. especially at 511.3 and 515.8-516.2. See too J Fitzgerald, Proving Native Title: A Critical Guide Vol 3 No 74 Aboriginal Law Bulletin p 4 at 7.

14. This includes numerous articles and other publications particularly of anthropologists, lawyers and others who have actually been involved in land claims. See for example various publications by Graeme Neate including those referred to in footnote 1 and his book Aboriginal Land Rights Law in the Northern Territory (Alternative Publishing Co-operative Ltd, Sydney, 1989).

15. In Norvill and Milera v. Chapman and Ors (Full Federal Court, unreported, Reasons for Decision 7 December 1995) (the Hindmarsh Island Appeal) Black CJ (at 27 of his reasons) observed that all five Aboriginal Land Commissioners have developed procedures to enable their discreet receipt of sensitive material. See too Burchett J at pp 26-7 of his reasons.

16. eg Toohey J, the first Aboriginal Land Commissioner, now a Justice of the High Court of Australia. Various judges of the British Columbia Court of Appeal in Delgamuukw et al v. The Queen in right of British Columbia et al (1993) 104 DLR (4th) 470 placed considerable reliance upon certain of Toohey J's views expressed in Mabo.

17. eg Professor Stanner was engaged to assist with the understanding of the various concepts involved in the definition of traditional Aboriginal owner during the Warlpiri and Kartangarurru-Kurintji Land Claim AGPS, 1979.

18. eg Xavier Herbert, the author of numerous books including Poor Fellow My Country and Capricornia gave extensive evidence during the Finniss River Land Claim, AGPS, 1981, mainly based upon his experience with many of the claimants and their ancestors during the periods of the segregation of half-castes in the Top End in the 1940s.

19. See for example the various papers delivered at AMPLA Conference in Sydney in 1985 which dealt particularly with the likely effects of such a Model upon the mining industry in Australia.

20. Mr Neate has recently been appointed a member of the NNTT.

21. See for example Section 21 The Native Title (Qld) Act, 1993; s 13 Native Title (South Australia) Act 1994; s 20 Native Title (New South Wales) Act 1994.

22. See examples listed by G Neate, Determining Native Title Claims op. cit. at fn 65 on p 517.

23. (1986) 10 FCR 104 at 199.

24. See for example observations by the Aboriginal Land Commissioner (Toohey J) in his reports on the Warlpiri and Kartangarurru-Kurintji Land Claim, AGPS, 1979 para. 55, and the Alyawarra and Kaititja Land Claim, AGPS, 1979 para 57. (It should be noted however that the Aboriginal Land Commissioner is conducting an inquiry as to who are the traditional Aboriginal owners - Aboriginal Sacred Sites Protection Authority v. Maurice (1986) 10 FCR 104; 65 ALR 247 at 260; Northern Land Council v. Aboriginal Land Commissioner (1992) 34 FCR 470; 105 ALR 539 at 553 - whereas proceedings under NTA are aimed at deciding whether the (particular) applicants are the holders of native title.)

25. For discussion about the value of evidence that may have to be restricted see Upper Daly Land Claim AGPS, 1990, Vol 3, para 58; Murrandji Land Claim , AGPS, 1987 para 103 and Aboriginal Land Commissioner's Report for year ended 30th June 1995 at p 32. For examples of the taking of evidence on a restricted basis see Upper Daly op.cit. paras 9, 10, 13, 58, 87 and 104; Murranji op.cit. paras 2, 51, 52, 53, 66 and 103; Jila (Chilla Well) Warlpiri Land Claim , AGPS, 1987 at 49; Mount Barkly Land Claim, AGPS, 1985, para 88; Cox River Land Claim, AGPS, 1985 paras 26, 30, 31, 89; and Finniss River Land Claim, AGPS, 1981, para 202.

26. See discussion by G Neate, in Aboriginal Land Rights in the Northern Territory pp 208-210, and in Determining Native Title Claims op. cit at pp 522-3 and 533-536.

27. See for example rulings on restrictions by the Aboriginal Land Commissioner in Daly River (Malak Malak) Land Claim (Toohey J), AGPS, paras 87-8, and by the Aboriginal Land Tribunal (Qld) in Aboriginal Land Claims to Cape Melville National Park etc, GOPRINT May 1994, at Appendix E, and in Reasons for Decision in Aboriginal Land Claims to Lakefield National Park and Cliff Islands National Park, 9 June 1994. See generally G Neate in Aboriginal Land Rights in the Northern Territory at pp 228-238; and in Proof of Native Title op.cit. at pp 23-5. The debate continues - see Discussion Paper 3rd April 1995 reproduced at Appendix 3, pp 31-37, Aboriginal Land Commissioner's Report year ended 30th June 1995.

28. eg. The State of Western Australia and others v Minister for Aboriginal and Torres Strait Affairs of the Commonwealth of Australia; Douglas v. Tickner, (1994) 54 FCR 144. See too R v Bara Bara (1992) 87 NTR 1; Chapman v Tickner (1995) 55 FCR 316; and Norvill and Milera v Chapman and others (Full Federal Court, unreported, reasons for decision delivered 7 December 1995) per Black CJ at pp.27-30, Burchett J at pp 26-29 and Keiffel J at pp 30-1 respectively of their reasons for decision.

29. For example the restrictions subject of the South Australian Royal Commission into the Hindmarsh Island decision made by the Minister for Aboriginal Affairs.

30. In the course of hearing the Daly River (Malak Malak) Land Claim, AGPS, 1982, the (male) Aboriginal Land Commissioner was permitted to hear certain secret women's evidence but only on the condition that no other males were present. (See report pp 86-89). This meant that no other parties (or Counsel assisting) could hear and test this evidence unless they had the assistance of female representation. As events transpired, that particular evidence did not figure largely in the matters which his Honour took into account when

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making his findings and recommendations. See too transcript of proceedings before the Aboriginal Land Commissioner, Gray J, in the Palm Valley Land Claim (March 1994) and in the Tempe Downs Land Claim (November 1994); article by Dr Deborah Bird Rose Women and Land Claims , Issues Paper No 6, January 1995, Native Titles Research Unit, AIATSIS; and Aboriginal Land Commissioner's Report Year Ended 30th June 1995 pp 8-9 and 31-37. In the State of Western Australia and Ors v Minister for Aboriginal and Torres Strait Islander Affairs of the Commonwealth of Australia (supra) the Court did allow (one only of) the female counsel for Western Australia to have access to certain materials, notwithstanding that they were to be seen by initiated men only. Contrast this with the many land claims where females were excluded altogether in such circumstances.

31. In the Birthday Mountain Land Claim (GOPRINT, 1995) the Aboriginal Land Tribunal (Qld) declined to accept into evidence a statutory declaration regarding secret women's business, which statutory declaration was to be viewed by women only. Since all of the members of the particular Tribunal were male and could therefore not see the document the evidence never saw the light of day.

32. See Black CJ at p 29, Burchett J at 27-28 and Kieffel J at 23.

33. At 27-8 of his reasons for decision.

34. Note that in Norvill (supra) Burchett J, at p 29 of his reasons, suggested that the problem in that case could perhaps be resolved by the appointment of a female decision maker. This suggestion has apparently been taken up.

35. Aboriginal Land Tribunal (Qld).

36. AGPS, 1979 - see para 55. See too Limmen Bight Land Claim, AGPS, 1981, para 39. For more detailed discussion of this practice see G Neate, Aboriginal Land Rights Law in the Northern Territory op.cit. pp 201-207; G Neate, Determining Native Title Claims , op. cit. at pp 520.7-522.2; G Neate Proof of Native Title op.cit. p 18. See too Graham Hiley QC Aboriginal Land Claim Litigation (1989) 5 Aust Bar Review 187 at 195.

37. Toohey J departed from this practice in the Alligator Rivers (Stage II) Land Claim, AGPS, 1982, and made an order excluding two witnesses from the hearing whilst a third was giving evidence, in circumstances where credibility was critical. See too observations by Maurice J in his Reasons for Decision during the Warumungu Land Claim, reasons delivered 1st October 1985 at p 9. See too comment in The Queen v Australian Broadcasting Tribunal; ex parte Hardiman (1980) 144 CLR 13 at 35.

38. See paper by Graham Hiley QC "Aboriginal Land Claim Litigation" (1989) 5 Australian Bar Review 187 at 188-9, 194.

39. See for example critical comment made by (from page 9) Maurice J in Warumungu Land Claim, AGPS, 1988 at para 2.7.1.

40. See for example the Nicholson River (Waanyi/ Garawa) Land Claim, AGPS, 1985 where families had been split up and dispatched to various places such as Doomadgee, Mornington Island, Burketown and Palm Island. In some cases the Aborigines had been prohibited from performing ceremonies and observing their culture.

41. In the Lakefield National Park and Cliff Islands National Park Claim (supra at para 2.18) the Aboriginal Land Tribunal sat in private to hear and test assertions by the claimants' experts to the effect that certain restrictions should be imposed in relation to access to and use of certain documentary evidence. This preliminary private hearing was extensive and resulted in the Tribunal satisfying itself that it would be appropriate to order some of the restrictions sought. See Reasons for Decision 9 June 1994 especially at paras 26-30, 83-95 and Orders at pp 32-33.

Supreme court notes

Sentencing - Criminal Law - Procedure

The Queen -v- Nagas

Judgement of Gallop, Angel & Thomas JJ delivered 13 October 1995.

The respondent pleaded guilty to one count of grievous harm, one count of the deprivation of liberty and one count of steasling contrary to sections 181. 196 (1) and 210 of the Criminal Code ("the Code") respectively. In summary these charges arose from the following agreed facts: the respondent threatened the victim (a taxi driver) with a knife and directed the victim to drive to certain locations. Subsequently, the respondent stabbed the vicitm in the chest, neck and arm. The respondent then removed a tupperware container containing money from the taxi and left the area.

In sentencing the respondent, the Court said that this was an exceptional case in light of the respondent's subjective factors (such as being a female, a mother of two children, having no criminal,history, and having been in employment). Accordingly the repondent was sentenced to an effective head sentence of fifteen months imprisonment. The Court also fixed a non-parole period of five months and 13 days.

The Crown appealed against the leniency of the sentence pursuant to section 414 (1)(c) of the Code, inter alia, on three bases: (1) the ultimate sentence was manifestly inadequate in all the circumstances of the case; (2) the court erred in fixing a non-parole period that manifestly inadequate; and (3) the court misdirected itself in concluding that general deterrence was not significant because the respondent was a female and the incidence of criminal activity of the kind by females was low.

In approaching the appeal, the Court of Criminal Appeal the ("Court") bore in mind the well-established principle with respect to: appeals by the Crown in respect of sentencing; limiting the exercise of an appellant court's jurisdiction with respect to a discretionary sentence.

As to (1) and (2) above, the Court rejected the Crown submission that the evidence established that the respondent had acted with premeditation, that the Court erred in not giving sufficient weight to the objective factors of the case and the need for general and specific deterrence, and that too much weight was given to the respondent's subjective factors. In relation to the latter submission the Court said that in the circumstances of this case the sentencing court would have been entitled to take into account the effect of imprisonment upon the respondent's children. The Court went on to say that hardship caused to an offender's part in the children is not normally a circumstance which a Court may take into account, but this policy appears to be subject to three recognisable exceptions" first, family hardship may be a gound for mitigation of the sentence where the particular circumstances of the family are such that the degree of hardship is exceptional and considerably more severe than a deprivation suffered by a family in nor,al circumstances as a result of imprisonment; secondly. where the offender is the mother of young children; and thirdly where both parents have been imprisoned simultaneously or other family circumstances mean that the imprisonment of one parent effectively deprives the children of parental care.

As to (3) above, the Court said that it is clearly established that allowance is made for the fact that in practice women are treated with less severity than men. Whether the reason for that leniency is predicated upon the lower recidivism rate of women, prevalence of a particular type of crime, general deterrence or simply compassion, that principle is well established.

Accordingly, the Court dismissed that appeal.

Mr J Lawrence instructed by NAALAS for the respondent

Mr R Noble instructed by the office of the Director of Public Prosecutions for the appellant.