Chapter Two

Proving Native Title

John Forbes

Admirable ingenuity and oceans of ink have been expended on the theory of native title. Inevitably much of the discussion is still speculative at this stage. Disproportionately little attention has been paid to the likely realities of proof. It is no purpose of this paper to canvass the principle of special assistance to indigenes. The present question is whether there is much point in dressing some of it up as litigation and presenting it to the public as "judgments of the courts".

By June, 1994 claims to 30,000 square kilometres of land and water had been lodged under the Native Title Act 1993.1 Meanwhile allocations of trust land under the Northern Territory Act and various State schemes continue. How difficult (or easy) will it be to prove 'Mabo" title in practice frivolous claims aside? What sort of evidence will pass muster? Will claimants and non-claimants have equal access to evidence? Will respondent governments seriously scrutinise claims in the public interest, or will they be as passive as the Commonwealth in Mabo itself? Will other respondents find costs, delay, lack of access to witnesses or political pressure so burdensome and exasperating that the examination of claims will be less careful than it should be? The verdicts, after all, may be very large.

In theory at least native title claimants have the burden of proof when:

(1) compensation is claimed for extinguishment or impairment between 1975 and 1 January, 1994;

(2) it is claimed that native title still exists;

(3) it is claimed that native title has survived a "Category C" or "Category D" past act; 2

(4) the "right to negotiate"3 and compensation are claimed by someone who at that stage is a mere claimant of native title (title must be established before compensation is actually collected);

(5) when compensation is claimed for compulsory acquisition and the title has not yet been proved; and

(6) when a non-claimant application for a native title "clearance" is opposed by persons claiming such a title.

But in practice, proof will only be required if the claim or objection is not satisfied by "mediation" or "negotiation". In order to enlist these official processes of persuasion it is only necessary to file a claim which is not obviously hopeless.4 Then comes the possibility of inaction, surrender or compromise by a complaisant government or a payout by a non-government party under pressure of costs or delay. In a word, native title can be obtained either by proving it or inducing others to concede it. Will more titles be created by "mediation" than by adjudication?

A native title conceded by respondents and rubber-stamped by the National Native Title Tribunal (NNTT) will be no less secure than one established in a contested hearing. It may then be exchanged for some other form of title,5 possibly of much greater value. The NTA makes no explicit provision for ensuring that exchanges are of commensurate value; indeed, one wonders how inalienable native title, for which no market exists, can be properly valued for this or for compensation purposes generally. Agreed compensation may take the form of real or personal property.6

The Tribunal

All applications with respect to native title must begin in the National Native Title Tribunal or an approved State equivalent.7 Title and compensation claims which are opposed and which are not compromised in the Tribunal go to the Federal Court.8 The NNTT is an unusual tribunal in that it decides only one of several kinds of claim filed in it, namely "right to negotiate matters"9 contested applications for approval of "future acts". Otherwise it is a complicated government bureau which processes unopposed applications and agreements, transfers others to the Federal Court, and serves the Minister as an occasional commission of inquiry.10

The composition of the National Native Title Tribunal is governed by section 110. The President is styled "Justice". Australian politicians have a deep and abiding belief that the citizenry will more readily defer to a tribunal or administrative inquiry headed by someone bearing that title. On several occasions in its short history the Federal Court has served to confer it on persons who really exercise quasi-judicial or administrative (not to say political) functions. A view that this debases the currency has not prevailed. Non- Presidential members of the Tribunal will include "assessors" (as described below), people with "special knowledge in relation to Aboriginal . . . societies", and others chosen by the federal executive.

Whether legal decision makers be called courts or tribunals, justices or commissioners they fall into two broad categories, generalist or specialist. Special-purpose tribunals sometimes function in a politicised atmosphere and tend to be staffed by converts to the relevant cause. A former High Court judge was wont to say that the main qualification for appointment to some modern tribunals is the approved form of bias. A barrister with relevant experience observes that ". . . a lot of people who take these jobs are starry eyed . . . they've got a strong sense of mission and they do their best to get applicants up."11 In these circumstances the legislative process does not cease when the Act receives the Royal assent. The Family Law Act, for example, quickly and quietly accrued judicial amendments which parliamentarians could not achieve, did not contemplate, or were not prepared to sponsor.

Even in relatively apolitical areas, special-purpose tribunals engender a "club" spirit which constrains advocates to argue within narrow bounds of "correctness". The perennial tension between the advocate's long-term relationship with the judges and his short-term duty to his clients is more acute when a substantial portion of his practice is in a special-purpose tribunal, without the daily rotation of personnel which occurs in a regular court, particularly in larger State jurisdictions: "You have to go easy, you can't lose your credibility [scil influence] as counsel, especially when you have to appear before the same commissioner for three years or more".12

The first President of the NNTT lost no time in telling the courtiers of that body that the "stated objective of [the NTA] is to provide for the recognition and protection of native title . . . [and] nobody should be a member of or on the staff of the Tribunal who does not accept the legitimacy of that objective".13

At the commencement of the Tribunal's first case the President proclaimed the Tribunal's anxiety to "mediate" and to sponsor settlements: "[Our] main function . . . is to provide a means by which you . . . may reach a fair and reasonable agreement".14 Applicants were told, in terms reminiscent of early advertisements for the Family Law Act, that NNTT mediation is "not a win/lose process".15 Whether or not a claim could be established after a full hearing, a compromise registered in the Tribunal can "provide . . . for a plan of management which would allow for Aboriginal involvement in the management of the [land] and guaranteed rights of use and development [by] Aboriginal communities".16 "One form of agreement might involve a concession of . . . native title with an agreement involving the Commonwealth, State or Territory government, under which [the conceded title] is exchanged17 for other forms of statutory title or benefit".18 But alas, if no agreement is reached the parties face "a court case with no certainty

about the outcome and all the costs and tensions that court cases generate".19 (In reality costs are unlikely to trouble claimants or sponsor corporations.) It seems reasonable to take these as broad, albeit delicate hints that titles or compensation may sometimes, and perhaps often be secured by pressure rather than proof. Another view is that the "right to negotiate", like the Northern Territory veto, is apt to be an "instrument of blackmail".20 At all events the costs of the speedy escape to which the President refers21 will doubtless be passed on to the community at large by one means or another.

The Role of the Federal Court

If a title or compensation matter is not settled the Tribunal must refer it to the Federal Court.22 In so far as one may speak of tradition in a court of limited (ie piecemeal statutory) jurisdiction created less than 20 years ago, the set-up of the Federal Court for this purpose is most unusual. It is not required to observe the law of evidence.23 This is normal drill in a quasi-judicial tribunal but probably unprecedented in a court of law. In a formula which has become a mantra among promoters of new tribunals,24 the Court is told to adopt procedures which are "fair, economical, informal and just".25

Further, the Court is directed to "take account of the cultural and customary concerns of Aboriginal peoples".26 The intent and likely effect of this provision are by no means clear. Obviously the Court would be bound to take account of those things if evidence of them were placed before it in the normal manner. But if that is all that is meant, the provision is quite superfluous. But if, in fairness to the draftsman, one assumes that it is not superfluous, it appears that a special department of statutory "judicial notice" a broad area in which the court may give evidence to itself has been created. Normally, judicial notice27 and a judge's own investigations28 are very limited sources of legitimate evidence. Are we to take it that this sub-section of the NTA is a charter for the wide-ranging, extra-curial evidence-gathering which occurred in Mabo itself?29 If so, and unless the rules of natural justice have been impliedly abrogated, it will be the duty of the court, in every such case, and before judgment, to tell all parties about any "cultural and customary concerns" which are not in evidence but which it proposes to "take into account".30

We have not yet reached the end of the list of special arrangements. The Court is to be assisted by super-witnesses and potential de facto adjudicators31 styled "assessors"32 who "so far as is practicable . . . . are to be selected from Aboriginal peoples or Torres Strait Islanders".33 The Court's infrastructure offers other congenial employment; the Registrar may engage "consultants".34 The Court may direct evidence to be taken before an assessor,35 and in that event there is no right to cross-examine.36 These provisions are seen as considerable advantages for claimants37 and as commensurate handicaps for other parties:

"[They give] rise to the suspicion that the system is being weighted against development interests and in favour of native title claimants; why should not [they] be subject to the same standard of proof . . . as are other Australians for similar claims?"38

In a formal sense the standard of proof is the same but it is not difficult to see what the author of that passage means. However, in the light of practical evidence problems explained below, these provisions may not make a great deal of difference in the end.

The NTA apart, issues affecting State land would be within the jurisdiction of our most experienced courts, the Supreme Courts of the States. Perhaps it is still possible for them to retain some jurisdiction in these cases which, after all, belong to one of the oldest areas of superior court jurisdiction, real property law.39 The Supreme Courts are still properly described as our superior courts of general jurisdiction. Their judicial histories do not cover a mere twenty years, but 100 to 150 years. The Supreme Courts are not confined to a piecemeal statutory charter, and they handle State and federal criminal matters in which the law of evidence is most

exacting. Appointments to Supreme Courts are more visible to the legal profession, and are not in the gift of just one central government which may hold the power of patronage for many years.

Issues in Native Title Cases

The NTA "does not dispense with problems"40 arising from the very broad, not to say nebulous Mabo criteria. It makes no attempt at codification.

Whose Title?

First, the proper claimants must be identified. In Mabo the High Court wandered to and fro among "indigenous inhabitants", "clan or group", "people", "community", "family, band or tribe" and several other expressions. The Act seeks to dispel this miasma by creating "approved" corporations to assist claimants and to hold property on their behalf.41 Power tends to be centripetal, and from time to time it may be doubted whether these title brokers are duly representative. Groups in the Northern Territory have challenged the hegemony of the Central and Northern Land Councils,42 and in one instance43 the Federal Court had to order a Council to assist a group of which the Council did not approve. It is to be hoped that distribution of benefits to all beneficiaries will be just and efficient although recent history is not particularly encouraging.44 There is a question whether emoluments absorbed by a labyrinth of "representative" corporations and sub- corporations will leave sufficient funds to those for whom the elaborate structure has been erected.45 If only an oligarchy prospers, the self-reliance to which we all look forward will once more be postponed.

The Customary Connection

The next step is to establish a sufficient connection between the claimants and a specific46 tract of land. This is a question of "presence amounting to occupancy" from a time "long prior" to the "point of inquiry".47 Plainly these tests leave room for creative jurisprudence, particularly when the rules of evidence and normal court procedure do not apply. It is no objection that native customs at the time of European settlement are "incompletely known or imperfectly comprehended".48 Nor does it matter that the customs did not exist at the time of British settlement or even 100 years ago, because they may continue to evolve up to the time of litigation. It is enough that "any changes do not diminish or extinguish the relationship between a particular tribe . . . [and] particular land"49 and that "the people remain as an identifiable community".50 According to Toohey J this notion of continuity is sufficiently elastic to survive European influences, such as the "profound" effects of Christianity, the use of schools and other modern facilities, and (in the case of the Murray Islanders) a change from gardening, fishing and barter to a cash economy substantially dependent upon welfare payments and other government assistance.51 These are elusive targets for any opponent, and it appears that arguments based on uncertainty or discontinuity of alleged customs can expect a rough passage,52 not least in special tribunals. Even in the Murray Islands case as Deane and Gaudron JJ conceded the evidence exhibited "areas of uncertainty and elements of speculation".53 "There may be difficulties of proof of boundaries or of membership of the community . . . but those difficulties afford no reason for denying the existence of a proprietary community title . . . 54. A court may have to act on evidence which lacks specificity . . . ".55 Mabo suggests that claimants' evidence will be treated gently.

Creativity in the Federal Court or the NNTT may be encouraged by some extra-judicial precepts of Chief Justice Mason. A remarkable sequel to Mabo was a sustained effort by the Chief Justice to defend that decision in particular and judicial legislation in general. (What would the reaction have been if the dissenting judge, Dawson J, had traversed the country or the newspaper columns expounding his view of the proper limits of judicial power?) The Chief Justice defended the

decision on two grounds: first, that judicial legislation is part and parcel of the common law. This truism was adorned with heavy patronage of anyone so "ignorant"55 and so addicted to "fairy tales"57 as to question it. However, the Chief Justice ignored the real issue, namely the difference between incremental development over many years and a sudden, major volte- face58 a difference of degree which is arguably a difference in kind.

Sir Anthony's second plea is more intriguing:

"I think that in some circumstances, governments . . . prefer to leave the determination of controversial questions to the courts rather than [to] . . . the political process. Mabo is an interesting example."59

Unfortunately we are not told how the legislative judge decides that government has "left it" to him. But can the silent thought-process be other than this? "Parliament has not legislated. I think it should have. So I will."

What Particular Rights, if Any?

Assume that a claimant group, a tract of land, and "connecting" customs have been ascertained with some degree of certainty. Now the nature and extent of the subject title have to be determined. There are no a priori answers; potentially every case is unique:

"The content of the traditional native title . . . must . . . be determined by reference to the pre-existing native law or custom . . . [It] will, of course, vary . . . It may be an entitlement . . . to a limited special use of land in a context where notions of property in land and distinctions between ownership, possession and use are all but unknown."60

The rights may range downwards from something akin to freehold to occasional rights of passage.

Access to Evidence: Will some Parties be more Equal than Others?

There will be no discussion here of technical rules of evidence. Learned papers have been written about their application to native title claims,61 but with due respect the relevance of those writings is not apparent. Even if the rules of evidence applied here (which they do not), they could formally be satisfied by appealing to some obscure exceptions to the rule against hearsay.62

The present question is not one of legal theory but of reliability and accessibility. Present indications are that, hopeless claims aside,63 it will be easy to mount a prima facie case of native title and very difficult to contest it, because the vital witnesses will often be at the beck and call of the claimants or their sponsor corporation.

Much of the evidence in these cases will come from members of the claimant group, asserting what others have told them about the words or actions of ancestors more or less remote. In Northern Territory land rights cases64 this "lay" testimony is commonly called "traditional evidence". "Traditional" witnesses will be supported by the "expert" evidence of anthropologists or other social scientists who will in turn depend, at least in part, upon what past or present members of the claimant group have told the witness or his professional colleagues. In short, "lay" evidence may be recycled in scientific packaging.

"Traditional" Evidence

This will often consist of hearsay upon hearsay, and apart from the difficulties of cross-examination which gave birth to the hearsay rule other parties may have to cope with recent invention of what purports to be ancient history. A former Supreme Court judge with more trial experience than some members of the High Court suggests that customs "are likely to be recalled in a manner favourable to the claimants which is, after all, simply human nature."65 A government lawyer in Darwin who regularly deals with land claims says that:

"Anthropologists and lawyers for claimants stay with the people concerned and work up their evidence with them the night before. There is an employee of one of the Land Councils who is notoriously unethical in preparing and presenting witnesses. Land Councils treat old and unsophisticated people who are the nominal claimants as their personal property. Land Councils have unlimited access to them, others have none."66

Another lawyer with relevant experience, Graham Hiley QC, gives an interesting account of practice in Northern Territory cases.67 He describes an extraordinary process of "group evidence" which "enables collaboration and concoction" and which makes it ". . . difficult to identify precisely which person knows what and which knows nothing . . . Reading the transcript [afterwards] one could . . . assume that all of the members of that group had that knowledge"68. Hiley adds that leading questions and the paraphrasing of indistinct answers are common in the Territory tribunal.69

When cross-examination is allowed in NTA cases70 it will be hard to test direct evidence, let alone hearsay, if a non-claimant party has little or no access to alternative versions. Evidence of the kind which Hiley describes is extremely difficult to cross-examine and to assess, even if it were "correct" to attempt such an exercise in the club atmosphere which special tribunals engender. In dealing with assertions of native customs, a standard technique of cross-examiners reference to prior inconsistent statements will rarely be available. Claimants' evidence may self-levitate by finding its way into assessors' reports.71 Very occasionally it is possible to make bricks without straw. A Sydney barrister with a Territory practice states:

"If you are lucky you can go to the history books and find out that people who are claiming a connection from time immemorial only go back to 1930."72

The same barrister adds:

"It's not the same tradition when you question every one of the Aborigines. Quite often you find that there are huge73 discrepancies between what the claimants, or some of them, are now saying and what the anthropologist may have written in his report. They say `Our law never changes' but internally they're highly political, and there are struggles for control of land all the time."

However, the nearest approach to primary facts in this type of litigation is what claimants say they have been told and believe about territories and "connections".74 The first inquiry into South Australia's Hindmarsh Bridge project was told nothing about certain "spiritual beliefs" while a second inquiry, a few months later, heard a great deal about them.75 One wonders whether events of this kind will support "revised native title applications" under the NTA.76

It is uncertain whether the special adjudicators will take long-established precautions with assertions which are easy to make and well nigh impossible to check,77 and with "experts" whose professed "science" is dubious or whose impartiality is questionable. Certainly they were taken by Moynihan J, the Supreme Court judge who actually saw and heard the Mabo witnesses, but the High Court paid remarkably little attention to his pointed comments on matters of credit. (Perhaps an enigmatic remark that the primary findings "unavoidably contain areas of uncertainty"78 marks the burial place of those comments.) No doubt the traditional evidence in Mabo was strong; the area claimed was compact, well-defined, and the people were non-nomadic. It was a very carefully selected, if not unique, test case. However, some of Moynihan J's comments are of wider significance. He suspected that evidence of certain "immemorial customs" owed a good deal to "The Drums of Mer", a travelogue by a popular writer of the 1940s.79 He questioned a lavish use of interpreters:

"On a number of occasions I soon gained the impression that the witness both understood and could speak English . . . The arrangement gave the opportunity to . . . hear the question twice and time for the witness to collect his or her thoughts and to collaborate . . . on an answer".80

Moynihan J was "not impressed with the creditability of Eddie Mabo" who seemed "quite capable of tailoring his story to whatever shape he perceived would advance his cause".81 A most careful perusal of the High Court judgments will not alert the reader to these comments by the only judge who saw and heard the witnesses.

At a land rights conference in Queensland last year a federal government adviser urged delegates to go forth and research their "rights" without delay. One need not presume that the word "research" was used as a euphemism for something more creative, but the scope for reliable reconstruction seems quite limited. Maps of tribal areas which can still be recalled are hotly disputed, even when they are based on years of field research.82 Scholars in this field have observed that Land Councils "have the resources, contacts and influence to . . . establish the extent of traditional territories in [their] regions" but they and their lawyers find it convenient "to negotiate claims without any self-imposed limits".83 One map-maker recommends that native title issues be settled without "reinventing knowledge or elaborating traditions that are imperfectly known".84

The Expert Evidence

Land rights litigation has created a new and rapidly growing expert-witness industry. Anthropologists, once rarely seen in a witness box, are now as much in demand in these cases as neurologists and orthopaedic specialists are in personal injury litigation.85 But while most of the latter are independent practitioners, the "experts" used by native title claimants are usually employees of the Land Council which sponsors the claim86 and have spent long periods in close association with the nominal applicants on whose behalf they testify. In other litigation this would certainly not enhance an expert's credit, but special tribunals develop cultures of their own. Judicial doubts about "experts" who thrive on forensic appearances and practise advocacy from the witness box are not so candidly expressed today, but ruminations of a distinguished English judge are still worth considering:

"[I]n matters of opinion I very much distrust expert evidence, for several reasons. In the first place, although the evidence is given upon oath . . . the person knows he cannot be indicted for perjury, because it is only evidence as to a matter of opinion . But that is not all. Expert evidence . . is evidence of persons who sometimes live by [testifying]".

Similar doubts still surface now and then88 but they tend to be unfashionable.

More unfashionable in an age of ubiquitous tertiary certificates and proliferating "disciplines" is any suggestion that an expert's professed science is better described as pseudo-science. However, an English judge recently made so bold as to say:

"In the lush pastures of the common law a number of sacred cows graze. One answers to the name `expert evidence' . . . Properly cared for it could provide good progeny, but some strains are not worth encouraging."89

And an Australian psychologist with long clinical and teaching experience bravely writes90:

"It is time academics admitted that the whole of modern psychology is not so much a coherent discipline as a ramshackle collection of quasi-scientific annexes under constant renovation. It simply does not hang together. . . . Dozens of ingenious laboratory gimmicks do not add up to a single good theory."

But the legal culture is less confident these days; judges sense that hell hath no fury like a "social science" scorned, and they are reluctant to subject debatable claims of expertise to a searching voir dire.91 They are unlikely to change tack here. But surely the new "expert evidence industries" are no less open to temptation or error than the old? On the contrary, the vaguer a purported science, the greater scope, in the heat of litigation, for fallacies conscious or unconscious, misrepresentations well or ill-intentioned.

Yet the law has always prescribed a threshold test before a purported expert is entitled to testify as such: does the suggested science really exist?92 If so, it remains to be seen whether the witness shows sufficient professional detachment to be credible. Even if both requirements are satisfied, the expert evidence is only as good as its factual foundation, if any, in the case at hand.93 In testing expert evidence a cross- examiner often seeks to expose the foundational facts of an opinion and the way in which disputed conclusions were drawn. He needs experts of his "own" to assist him in framing his cross-examination and to give contrary evidence at the appropriate time. The best of advocates cannot produce a magic wand and regularly make bricks without straw. But for reasons soon to appear, access by non-claimants to evidence of their own may be an unattainable luxury in this jurisdiction.

In any event, there are peculiar difficulties in getting to grips with the foundational facts of land rights "experts". A barrister who has frequently attempted to do so says:

"There are very few empirical facts when you're dealing with anthropologists. They repeat what they say someone else has told them. The hearsay of claimants is fed through an anthropologist and emerges as `expert evidence'. The `facts' of an anthropologist are commonly what a client or study-subject told them about his perceived rights or wishes."94

Access to Expert Evidence

The well-established species of expert evidence are (in principle) available to all, have little ideological content and do not suffer the censorship which current patois calls "political correctness". Due to the delicacy of this subject published material is not in over-supply, but with patience a surprising amount is to be found. Some of it is in a form which the law sees as particularly impressive voluntary statements against interest.

Hiley QC records his impression that an anthropologist-witness who fails to support, let alone criticises a "land rights" claim risks the "resentment of, and possible alienation from his peers".95 Elsewhere the same senior counsel observes96:

"To the best of my recollection an expert anthropologist has never been called to give evidence in a land claim except on behalf of the claimants or by counsel assisting the Land Rights Commissioner . . . It seems that parties other than the claimants usually find some difficulty in retaining an anthropologist who has the appropriate experience . . . and who is willing and able to positively testify against the claim . . . During the Jawoyn claim, when counsel assisting did in fact seek to call an anthropologist who had some experience with the Jawoyn people, the attempt to call him was met with repeated and strenuous objections . . . There has been an understandable reluctance by anthropologists to be seen to be advising parties other than Aborigines".

Hiley adds that access to primary materials (that is, what an anthropologist claims to have been told or shown by his clients) is difficult to obtain, and in Northern Territory cases at least, is often strongly resisted. The National Native Title Tribunal may prohibit the disclosure of evidence,97 but presumably natural justice will require disclosure to all parties of anything which is likely to influence its decisions. The same point has already been made about judicial notice of "cultural and customary concerns".98

Another barrister with experience in Northern Territory cases states:

"I was involved in an Aboriginal land claim and I rang round various universities to try and get an expert witness and no one would be in it. They were worried about their promotion. A couple of them said that they would never ever get a permit to go on to any Aboriginal land again to do work, and they would be effectively blackballed in their profession. And that's a real problem that respondents face in these applications."99

A government lawyer in Darwin adds:

"Land Councils have a mortgage on anthropologists, particularly in the areas which they have selected for claims. The government has never produced an anthropologist. They are terrified of bringing their career to an abrupt end".100

Admissions

But what of statements against interest?

In March, 1993 the President of the Australian Anthropological Society was reported as follows: "Most anthropologists are more comfortable working for Aborigines than in some situation where they could be construed as working against their interests".101 In 1991, at the Kakadu inquiry, an anthropologist in the employ of the Northern Land Council declared that the primary duty of his profession is "to represent the people they work with". The inquiry chairman asked him whether he and his colleagues would use their professional position to offer false or incomplete evidence. Obliquely the witness replied that he would lose his job if he questioned causes sponsored by his employers.102 In such circumstances there need not be positive falsehood; embarrassing information may simply be suppressed. The admissions of Mr Peterson and his colleague are in keeping with the Revised Principles of Professional Responsibility of the American Anthropological Association, to which many Australian anthropologists belong:

"Anthropologists' first responsibility is to those whose lives and cultures they study. Should conflicts of interest arise, the interests of these people take precedence over other considerations . . . Anthropologists . . . must consider carefully the social and political implications of the information they disseminate."103

It would be difficult to find a more open confession of the expert witness doing double duty as advocate. Apparently no exception is made for occasions when sworn evidence is required. Scepticism about land claims would not only conflict with these articles of faith; it would also expose the sceptic to prejudice in the public sector upon which social scientists heavily depend for employment universities, government departments, land councils and kindred organisations in which pressures to be "correct" tend to be strong. Any anthropologist who breaks ranks is liable to be denied access to the very people and places he must visit in order to prosper in his calling and to rank as an influential expert witness. Catch-22! It is hardly surprising that "as a rule" anthropologists "do not make their services available to objectors to a claim".104

The writer recalls an American "expert" who was a prospective witness in a land rights case. In conference there was no pretence of professional detachment. The witness candidly identified with the claimant "team", offering unsolicited and highly partisan views on aspects of Australian history.

Consider the likely state of personal injury litigation if the medical profession sent to Coventry any of its members who dared to give evidence on behalf of defendants. Out of court "agreements" would certainly be as common as President French hopes they will be in the NNTT, but would they commonly be free and fair?

There are other statements against interest. Dr Peter Sutton acknowledges that "the closed ranks of anthropologists [are] denying [miners] access to . . . scientific expertise".105 His colleague Professor Maddock is equally candid and more specific:

"The suspicion that anthropologists who give evidence for Aboriginal claimants are hopelessly biased is strengthened by the difficulty objectors to land claims have in getting anthropological advice. The defence lawyers in the Gove case, for example . . . ended up with nothing better than a retired missionary. In the Alligator River claim, the mining company Peko-EZ strongly contested parts of the claim, but the research on which they relied was carried out by a solicitor who apparently had no training in anthropology".106

Maddock frankly and courageously says that bias "arises from the nature of anthropological research"107 and Dr Sutton adds:

"The problem with a sociological diagnosis, as opposed to a medical one, is that in our culture a medical diagnosis has very little to do with a physician's politics, while a sociological diagnosis can have quite a lot to do with an anthropologist's politics".108

These admissions and professional experiences suggest that the comments of a senior journalist should not be dismissed out of hand:

"Most of the people who have undertaken the study of anthropology in relation to Australian Aborigines have been people who . . . tend to believe that their subjects have a grievance and they sympathise with it . . . So when it comes to the giving of evidence on land claims it is going to be difficult to find trained anthropologists . . . who are not strongly biased in favour of the claims. [S]ome individuals with a clear political agenda have been active and influential in these matters for many years. [Likewise] there are historians who believe that any invention is justified in the service of what they see as the aboriginal cause".109

If Few Real Contests, Why Have Courts?

One looks in vain for evidence or argument in answer to these criticisms. The attitude seems to be that the position of Mr Peterson and the American Anthropological Society is so natural and proper that there is no case to answer. The complete absence of self-consciousness may indicate that the present questions have not been raised in the sequestered vale of land rights litigation. If so, that is cause for concern.

Will proof of title, in any but frivolous cases, really be the "arduous process" that one interested historian110 predicts, or will rebuttal be much the harder task? How often will the existence and content of native title be based on ex parte evidence of a claimant's anthropologist? A spokesman for the mining industry predicts that "under the tribunal system . . . [there] will develop a loose interpretation of the Mabo decision and certainly the federal legislation provides room for that . . . if claims are made they will tend to be granted."111 This is consistent with Maddock's survey of Northern Territory cases in the 1980s: "[I]t has been usual for the Commissioner to recommend that most or all of the land claimed be granted".112

It also accords with the experience of a Sydney barrister who handles such cases; he recalls only one claim which was rejected, although a small minority of claims resulted in awards of substantially less than the area claimed.113 (But were these real failures? Presumably there are "ambit claims" even in this jurisdiction.) The high success rate is hardly surprising when one hears of the overwhelmingly ex parte nature of the "traditional" and anthropological evidence. Even the most impartial of tribunals must hesitate before it rejects an uncontradicted "expert".114

Perhaps the best prospects of gaining access to rebuttal evidence will arise when several groups compete for the same area. The Wik claim at Weipa faces competition115 as do some other cases brought in Mabo's name.116 More recently a native title claim has been made over land already granted to Aborigines under State legislation.117 In these instances the experts may not be quite so sure where their "first responsibility" lies and the lay witnesses will not be univocal. But in the end there may simply be a compromise division of spoils rather than absolution for other parties or for the taxpayer.

Governments and claimants have unlimited funds for litigation of this kind, but even governments meet brick walls when it comes to evidence: "Some of the claims are no doubt genuine but there is no way of testing the evidence of the traditional witnesses or the experts",118 a Darwin lawyer complains. Besides, it would be naive to suppose that all governments will rigorously test claims advanced under the NTA. Governments have political agendas and popularity with special-interest groups to consider, and they are better placed than other litigants to make the country pay for their compromises. It deserves to be better known that the Commonwealth was not a zealous guardian of the common weal in Mabo, as Sir Anthony

Mason himself has noted.119 Connolly QC puts it plainly: "The Commonwealth, instead of defending the interests of Australians generally, ran dead".120

Non-claimant parties may have their best prospects when an application turns on an extinguishment issue. Partisan evidence on other issues will not avail a claimant121 if extinguishment occurred before the Racial Discrimination Act arrived in 1975. (Of course extinguishment after that event may call for compensation.) An issue of this kind will let in "harder" and more accessible evidence than "traditional" or anthropological material, and according to Mason CJ claimants bear the onus of proving that extinguishment has not occurred.122

If the wisdom of our rulers requires greater assistance to Aborigines (and not merely fairer or more efficient distribution of present funding), is it necessary to dress a minor part of it up as complex litigation? The Land Fund,123 the 1976 Northern Territory Act and similar State laws will probably produce more "native title" than Mabo or NTA applications ever will.124 If access to evidence in native title cases is nearly so unequal as well-informed critics say, would it not be cheaper, quicker, more honest and conducive to "reconciliation" to dispense with tribunals, "assessors" and so on in favour of a simpler system within the country's capacity to pay? While it may be politically expedient to depict the fruits of the special NNTT Federal Court jurisdiction as rigorously tested "judgments", it seems that many native title actions will be pseudo-litigation producing what are really ex parte orders of a very expensive kind be this due to governmental complaisance, non-access to evidence, or (in the case of private parties) costs and exasperating delays.

A frankly administrative scheme may be better for all concerned tribunalists, expert witnesses and land rights lawyers excepted than a litigious facade to legitimise a fraction of future allocations of public assets.

Endnotes:

1. Australian Journal of Mining, June, 1995, 5.
2. As defined in ss 231 and 232 of the Native Title Act 1993 (Cth) ("NTA").
3. NTA ss 26ff.
4. NTA s 63.
5. NTA s 21.
6. NTA s 51(6).
7. A State body may replace the NNTT but only if the federal authorities approve it: ss 27(1), 43, 251.
8. NTA ss 74, 81.
9. NTA ss 26ff.
10. NTA s 137.
11. Sydney barrister, interview with author, 3 June, 1994.
12. Ibid.
13. Justice French, President of the NNTT, Working With the Native Title Act, Sydney, 16 May, 1994, National Native Title Tribunal, mimeo 41 pages at 19.
14. Introductory Notes for Mediation Conference, 14 May, 1994 (Wiradjuri claim to Wellington Common), NNTT mimeo 9 pp, at 2.
15. Ibid.
16. Ibid at 4.
17. Cf NTA s 21(3). Conceivably the conventional title received in exchange may be more marketable, and more valuable than the original acquisition.

18. Justice French, Working With the Native Title Act, op.cit. at 25.
19. Ibid at 7.
20. The Australian Financial Review, 8 April, 1993 : "Doubts Over Promised Land".
21. Justice French, Introductory Notes for Mediation Conference, op.cit. at 4; Working With the Native Title Act, op.cit. at 5.
22. NTA s 74.
23. NTA s 82.
24. Cf Electoral and Administrative Review Commission (Qld) Report on Review of Appeals from Administrative Decisions, Vol I : Govt Printer Brisbane, August, 1993, where it provides the title of Chapter 7.
25. NTA s 82(1).
26. NTA s 82(2).
27. Holland v Jones (1917) 23 CLR 149, 153; R v Dodd [l985] 2 Qd R 277; Gordon M Jenkins & Associates Pty Ltd v Coleman (1989) 87 ALR 477; Malaysian Airlines System v Wood [1988] WAR 294.
28. Middleton v Freier [1958] St R Qd 351; Kristeff v R (1969) 42 ALJR 233.
29. For a cogent criticism of the procedure in that case see S E K Hulme, QC : Aspects of the High Court's Handling of Mabo in The High Court of Australia in Mabo, AMEC, Leederville, WA 1993 23 at 36-38, 50- 55.
30. On judicial notice and natural justice see Keller v Drainage Tribunal [1980] VR 449; R v Paddington and St Marylebone Rent Tribunal; ex parte Bell London and Provincial Properties Ltd [1949] 1 All ER 720; Angaston & District Hospital v Thamm (1987) 47 SASR 177.
31. Officially of course an assessor is "not to exercise any judicial power of the Court": NTA s 82(3).
32. NTA s 83.
33. NTA s 218, inserting s 37A(4) in the Federal Court Act 1976.
34. NTA s 132.
35. NTA ss 83, 93.
36. NTA s 93(5).
37. The Electoral and Administrative Review Commission (Qld.), adopting a submission by a former President of the Victorian AAT that tribunals be "agenda free", has recently rejected the idea of "representative" tribunals (upon which representatives of sectional interests sit as adjudicators): Report on Review of Appeals From Administrative Decisions, Govt Printer Brisbane, September, 1993, 55. Of "representative tribunals" it was well said: "The result is in practice, as we all know, that a (representative) is a partisan and an advocate rather than a judge . . . It is not easy to imagine a less satisfactory tribunal, viewed as judicial body": In re Skene's Award (1904) 24 NZLR 591, 597-598 per Denniston and Chapman JJ.
38. Australian Mining and Petroleum Law Association, Submission on the Native Title Bill 1993 (1994) 13 AMPLA Bulletin 41 at 48.
39. NTA s 12.
40. Justice French, Working with the Native Title Act, op.cit. at 2.
41. NTA s 56 - 58.
42. The Australian, 11 February, 1993 : "Tribal Guide Through a Legal Maze"; Sunday Mail (Brisbane), March 7, 1993 : "How to Kill the Golden Goose"; Pareroultja & Ors v Tickner (1993) 117 ALR 206.
43. Majar v Northern Land Council (1991) 37 FCR 117.
44. The Australian, 30 August, 1993 : "ATSIC Urges Tighter Control of Funds"; 15 December, 1993 : "Auditor Slams Land Council"; 29 December, 1993 : "Black Agency Collapse Spurs

Inquiry"; 22 April, 1994 : "Staff Squander Black Funds on Luxury Goods"; Courier Mail (Brisbane), 2 December, 1993 : "Millions Wasted: Auditor"; 4 December, 1993 : "Black Leaders Should Tighten Finances: Goss"; 20 April, 1994 : "Shape Up or Be Sacked, Warner Warns Black Councils"; Sun-Herald (Sydney), 20 February, 1994 : "Prosecutions May Follow Investigation"; Sunday Mail (Brisbane), 19 June, 1994 : "Homes Company Crashed After Boss's Property Deals"; The Australian, 9-10 July, 1994 : "Black Councils in Financial Disarray" (report of Qld CJC inquiry).

45. See eg The Australian, 18-19 June, 1994 : "Darwin Sentiment May Yet Pay Off; Courier Mail (Brisbane), 25 May, 1994 : "Fourth World Shame", quoting a woman with "25 years experience in indigenous health care" to the effect that "crumbs (are received) at grass root level" while too much public money is "gobbled up in administration".

46. Coe v The Commonwealth (1993) 68 ALJR 110.

47. Mabo v Queensland (No 2) (1992) 175 CLR 1 at 188-189.

48. Ibid at 99 per Deane and Gaudron JJ.

49. Ibid at 110 per Deane and Gaudron JJ.

50. Ibid at 61 per Brennan J; see also at 70.

51. Ibid at 192 per Toohey J.

52. Ibid.

53. Ibid at 115.

54. Ibid at 51-52 per Brennan J.

55. Ibid at 62 per Brennan J.

56. The Australian, 6-7 November, 1993 : "Chief Justice Attacks Mabo Critics".

57. The Australian, 8 November, 1993 : "It's Time to Rule Legal Fairy Tales Out of Court".

58. As more recently manifested in the Court's abolition of the privilege against self-incrimination with respect to corporations: Environment Protection Authority v Caltex Refining Co Pty Ltd (1994) 68 ALJR 127.

59. "Putting Mabo in Perspective", Australian Lawyer (July 1993) Vol 28 at 23. See also The Australian, 2 July, 1993 : "Chief Justice Defends Ruling as Lawful".

60. Mabo v Queensland (No 2) (1992) 175 CLR 1 at 88 per Deane and Gaudron JJ; see also at 61 per Brennan J.

61. Eg G McIntyre, Proving Native Title, Centre for Commercial and Resources Law, Perth, June, 1994 mimeo 50 pp.

62. Statements as to pedigree and statements as to public or general rights: Simon v R [1985] 2 SCR 387 (Canada SC); Milirrpum v Nabalco Limited (1971) 14 FLR 141 at 154; P Gilles, Law of Evidence in Australia, 2nd edn, 307, 313.

63. Frivolous and vexatious cases can be weeded out by early administrative action, although the decisiveness with which these powers are exercised remains to be seen: NTA s 63(1).

64. Based on the Land Rights (Northern Territory) Act 1976 (Cth).

65. Courier Mail (Brisbane), 14 September, 1993 : "Native Title Decision Bogus".

66. Government lawyer (Darwin) to the writer, 1 June, 1994.

67. G Hiley, Aboriginal Land Claims Litigation (1989) 5 Aust Bar Rev, 187.

68. Ibid at 195.

69. Ibid at 194-195.

70. In the Tribunal cross-examination requires leave: NTA s 156(5).

71. NTA s 86. Another view is that assessors, however pro-claimant they may be, will receive no co- operation if they do not belong to the native tribe or people involved in the litigation: Government lawyer, Darwin, to author, 1 June, 1994.

72. Sydney barrister to author, 3 June, 1994.

73. Emphasis in original.
74. Ejai v The Commonwealth, unreported, Sup Ct of WA (Owen J), 18 March, 1994.
75. The Australian, 15 July, 1994 : "Bridge Probe Did Not Hear Objections".
76. NTA s 13(1)(b).
77. Such as self-serving claims against deceased estates.
78. Mabo v Queensland (No 2) (1992) 175 CLR 1 at 115 per Deane and Gaudron JJ.
79. Findings of Moynihan J of the Queensland Supreme Court delivered 16 November, 1990, entitled Determination Pursuant to a Reference of 27 February, 1986 by the High Court of Australia to the Supreme Court of Queensland to hear and determine all issues of fact raised by the pleadings, Supreme Court Brisbane, Vol I (mimeo 227 pp), 60.
80. Ibid 66. See to the same effect R v Burke (1858) 8 Cox CC 44 at 47 and Filios v Moreland (1963) 63 SR (NSW) 331 at 332-333.
81. Ibid 79.
82. The Australian, 11 February, 1993 : "Tribal Guide Through a Legal Maze" (map by Dr Stephen Davis showing that the tribal lands which can be established do not agree with the boundaries drawn by ATSIC and Land Councils); Courier Mail (Brisbane), 2 April, 1994 : "Government Hits Tribal Map".
83. S L Davis and J R V Prescott, Aboriginal Frontiers and Boundaries in Australia, Melbourne UP 1992, 2.
84. The Australian, 16 February, 1993 : (letter, J R Prescott).
85. "The content of the land rights legislation itself has largely been engineered by anthropologists in concert with lawyers": P Sutton "Anthropology Outside the Universities in Australia", A (American) AS Newsletter, 15 June, 1982, 12, 21.
86. K Maddock, Your Land Is Our Land, Penguin Books Aust, 1983, 153.
87. Lord Abinger v Ashton (1873) LR 17 Eq 358 at 373-374 per Jessel MR.
88. See eg Lynch v Lynch (1966) 8 FLR 433 and R v Turner [1975] QB 834 (psychology/psychiatry) and generally Newark Pty Ltd v Civil & Civic (1987) 75 ALR 350 at 351 per Pincus J. Some guarded scepticism about "social work" and evidence-gathering appears in Taylor v L; ex parte Taylor [1988] 1 Qd R 706.
89. Quoted in V D Plueckhan, "Legal Dilemmas in the Use of Expert Medical Evidence" (1982), 14 Aust Journal of Forensic Science, 40.
90. Ronald Conway, "Integrity Attack Ignores Fruit of Freud's Genius", The Australian, 22 June, 1994. (The writer was formerly a senior lecturer at a Victorian university and claims 30 years' practice at a Melbourne hospital.)
91. A preliminary inquiry to see whether evidence is admissible in a case of purported expert evidence, and inquiry whether the professed "science" really exists as such: Clark v Ryan (1960) 103 CLR 486; Fisher v Brown [1968] SASR 66.
92. Clark v Ryan (1960) 103 CLR 486 at 491.
93. Steffan v Ruban [1966] 2 NSWR 622; English Exporters v Eldonwall Ltd [1971] Ch 415; Crompton v Commissioner of Highways (1973) 5 SASR 301.
94. Sydney barrister to writer, 3 June, 1994.
95. G Hiley, Aboriginal Land Claims Litigation (1989), op.cit. at 191.
96. Graham Hiley, Aboriginal Land Rights in the Northern Territory [1985] AMPLA Yearbook, 491, 505- 506.
97. NTA s 155. Cf Justice French Working With the Native Title Act, op.cit., at 24: "Following acceptance of an application two files will be created, one to be designated an open file . . . There will also be a confidential file . . . at the discretion of the Registrar."
98. NTA s 82(2). See note 30 and preceding text.

99. Sydney barrister to writer, 3 June, 1994, emphasis in original.
100. Government lawyer, Darwin, interview with author, 1 June, 1994.
101. The Australian, 5 March, 1993 : "The Mabo Factor – Learning from the Past", quoting Mr Nic Peterson.
102. Ron Brunton, "Down to Earth", IPA Review, (1992) Vol 45 No 1, 51.
103. American Anthropological Society ("AAS") Newsletter, June, 1990, 44.
104. K Maddock, Your Land Is Our Land, Penguin Books Aust, 1983, 83. Any access which non-claimants do gain to relevant facts, opinions or counter-legends will be expensive. The going rate for consultant anthropologists is said to be about $500 a day, and influential "lay" witnesses with indigenous associations command between $100 and $200 a day: The Australian, 5 March, 1993 : "The Mabo Factor Learning from the Past".
105. P Sutton, "Anthropology Outside the Universities in Australia", AAS Newsletter, 15 June, 1982, 12, 21.
106. K Maddock, Involved Anthropologists in E. Wilmsen (ed), We Are Here, Univ California Press 1989, 155, 167.
107. Ibid, 168.
108. P Sutton, "Anthropology Outside the Universities in Australia", op.cit., 12, 22.
109. The Australian, 8 December, 1992 : P P McGuinness, "Strict Assay is Needed on This Mother Lode".
110. The Australian, 11 October, 1993 : "The Spirit of Mabo in Danger of Extinction".
111. The Australian, 8 February, 1994 : "Mabo's Land" (quoting P Ellery.)
112. K Maddock, Your Land Is Our Land, Penguin Books Aust, 1983, 83. Cf Government lawyer "A", Darwin, to author, 1 June, 1994: "Most applications end in favourable recommendations".
113. Interview with author, 3 June, 1994.
114. Taylor v R (1978) 22 ALR 599; Mahon v Osborne [1939] – 2 KB 14.
115. Courier Mail (Brisbane), 24 August, 1993 : "Tribes in Land Tussle"; Australian Journal of Mining, December, 1993 : "More Land Claims Over Weipa Leases".
116. The Australian, 5 January, 1993 : "Aboriginal Tensions Erupt Over Land Rights"; The Australian, 11 February, 1993 : "Tribal Guide Through a Legal Maze" (some Land Council boundaries disregard tribal areas); Sydney Morning Herald, 5 June, 1993 : "Perkins Hits Out Over Mabo Claims".
117. Over land at Hopevale, Cape York, which became Aboriginal trust land under the Aboriginal Land Act 1991 (Qld): The Australian, 15 July, 1994 : "Land Claim Over Top Island Resort".
118. Government lawyer, Darwin, to author, 1 June, 1994.
119. "Putting Mabo in Perspective", Australian Lawyer (July 1993) Vol 28 at 23.
120. P D Connolly, Should the Courts Determine Social Policy? in The High Court of Australia in Mabo, Assn. of Mining and Exploration Companies Inc. Perth 1993, 1 at 18.
121. Under the NTA at least; of course "reconciliation" may come from the Land Fund.
122. See Coe v The Commonwealth (1993) 68 ALJR 110 at 119 (Mason CJ).
123. National Aboriginal and Torres Strait Islander Land Fund: NTA. ss 17(4), 23(5), 24(2), 25(2), 54 and Part 10.
124. Minister Tickner's guess is that Mabo title will benefit only 5 per cent of the vaguely defined class of beneficiaries: The Australian, 11 May, 1994 : "Dispossessed Aborigines Get 1.4 Billion for Land".