Native Title Litigation

By Graham Hiley QC

Following are the second two sections of this eight-part article. ***Balance*** will continue to print the remaining four parts over the next few issues.

Part 3
INTERESTS AT STAKE

Claimants

A claimant's interest in establishing that he or she is or was a native title holder is probably more important to that person than any other interest which a claimant, or for that matter an ordinary litigant, will ever have to establish. For this reason a claimant must have every opportunity to advance his or her best case, perhaps at the risk of economy and promptness, and even at the risk of offending certain customs which might otherwise prevent him or her from doing so. Accordingly claimants have frequently been prepared to divulge information to an Aboriginal Land Commissioner and others, usually in the presence of stringent restrictions, in order to ensure the complete advancement of their case. Conversely, because there is such a vital self-interest in proving native title, other parties should have proper opportunity to test the claimant's evidence, and the tribunal should take greater care in assessing evidence which either cannot be tested, or appears suspect.

Although a claimant (and other Aborigines) might regard the members of his group as being the proper traditional owners of particular country, the NTA enables, indeed requires, him to have his status as such recognised by others, in particular by the Australian legal system which provides for recognition of possession of land and of other interests.

Although a group of Aborigines may have been dispossessed for many years, even generations, they would still regard a certain part of Australia as their "country" - notwithstanding that they no longer have any legal right to exercise their native title rights under Australian law[1]. For example the Larrakia Tribe are recognised by others, including Darwin residents, as being the traditional Aboriginal owners of much of the land upon which the city of Darwin is built. Similarly the plaintiffs in Mabo would probably be acknowledged as being the traditional owners of the land upon which the sardine factory was built, although their native title rights in that land may well have been extinguished by a grant of a valid lease over it[2].

Once a native title application is brought, the claimants must prove their entitlements, once and for all. If they fail, they may have lost more than the right to assert that they are the traditional owners and that they should be recognised as such by the common law.[3] They may also have lost the ability to assert such rights to other Aboriginals.

Conflicting Claims

It seems likely that some claims to native title will be met with resistance by other Aboriginal persons[4]. It is most important that such competing claims be resolved as early as possible, and, hopefully, privately[5]. Otherwise, each group may cause damage to the claims of the other.

There have already been many occasions where conflicting claims have been made to particular country by different groups of Aborigines, leading to considerable acrimony, even violence.

Although the Finniss River Land Claim[6] began in 1979 the conflict between competing claimant groups has been such that a grant was not made until about 10 years later, Federal Court litigation has ensued[7] and a further inquiry, at times somewhat heated, has just been completed by the Northern Land Council. Despite the decision of the Northern Land Council to recognise particular groups as being the traditional owners of particular parts of the disputed land the friction between the competing parties may still not be resolved. (It will be recalled that this was a claim which involved complicated questions of migration, succession, and abandonment, and, inter-alia, extensive evidence by Xavier Herbert regarding the then practice of removing people from their country.)

Another Northern Territory land claim involving competing claimants was the Lake Amadeus Land Claim[8]. The competing claim brought by Helmut Pareroultja and his family added an extraordinary dimension to the enquiry [9]. They contended that the original claimants were not the traditional Aboriginal owners of the relevant country[10]. Indeed, some of the original claimants had already been successful claimants in the Uluru (Ayers Rock) National Park Land Claim[11].

Another case of conflicting claims occurred in the Birthday Mountain Land Claim[12], a claim brought under the Aboriginal Land Act (Queensland) 1991. In that case the conflict was not so much as to who historically would have been regarded as the traditional Aboriginal owners of the particular country claimed (both sides agreed that it would have been the initial claimant and his family) but whether the whole language group (represented by the counter-claimant, and of which group the claimant himself was undoubtedly a member) would also qualify as having traditional affiliation within the scope of that legislation. Again, the acrimony was considerable, partly because the counterclaim was inconsistent with the established Aboriginal custom and tradition in the area, and also because the ultimate decision would regulate future dealings with that land, especially with regard to who had the power and authority to participate in such dealings.

The Daly River (Malak Malak) Land Claim[13] was heard in 1981 by the Aboriginal Land Commissioner (Toohey J.). His Honour found that the Malak Malak people were the traditional Aboriginal owners of the rel-

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evant land and made recommendations for them to be granted the land. Subsequently - in the last year or so - another group, the Kamu, have asserted that they and not the Malak Malak are indeed the traditional owners of part of that land. Litigation has begun in the Supreme Court of the Northern Territory. (One of the issues concerns the conclusiveness of the findings of the Aboriginal Land Commissioner.)

The Dieri People Native Title Claim[14] is over land part of which had previously been claimed by the Arabunna language group in a Mabo type action brought in the High Court[15]. A third group, the Kuyani, has also recently lodged a claim over some of the same land. The prospects of the three groups resolving their differences appear slim, at least for the foreseeable future[16].

Competing claims have not only caused considerable difficulty in presentation and determination of land claims, but they have also caused considerable frustration, embarrassment and even violence during the land claim process and continuing for many, many years afterwards.

One obvious source of acrimony is the reluctance of one group, particularly if its members possess more knowledge than those of a competing group, to reveal information to the other. This is especially so in relation to secret material which should not even be disclosed to all members of the knowledgeable group.[17]

These disputes between competing groups are not just disputes about who might derive benefits of a material kind, although they might appear to be so to the cynical observer. Rather they go to the more fundamental issue as to who, according to Aboriginal tradition, are the traditional Aboriginal owners of the country concerned.

Other Persons

Other persons whose interests could be affected also require and need to have their legitimate rights and interests identified and protected. In relation to land claims under the Land Rights Act (NT) Act Maurice J. stated: -

> "...the requirements of fairness dictate that those whose interests might be affected by a recommendation that land become Aboriginal land must have an unfettered right to participate in any inquiry which may result in such an outcome."[18]

Those persons could be a competing Aboriginal group (see the various examples mentioned above) or a broader Aboriginal group.[19]

Another interested party will often be government and/or its instrumentalities. The Northern Territory Government has been a participant in most Aboriginal land claims, in some cases playing a relatively neutral role, and in others actively disputing a claim or attempting to protect a specified interest.[20] State Governments have to date actively participated in most cases concerning native title and the NTA[21], but political sensitivities will probably dictate the roles to be played when it comes to the actual testing of claims. The Commonwealth Government has been much less inclined to become involved unless one of its Departments or instrumentalities has a particular interest to protect.[22] Local councils have also participated in relation to town planning[23] and rating.

Numerous other interests have been in the past, and will continue to be, advanced for consideration. These include proprietary interests, personal interests and recreational interests.[24]

Right to Participate

It would seem that in order to participate in a native title matter a person must be or become a party [25].

The main prerequisite is that the person be a person included within s.66(2)(a)(i) to (vi), or be a person whose interests may be affected by a determination in the matter. See ss.68(2) and 84(2). That wording is rather similar to that contained in the Aboriginal Land Act 1991 (Qld).

The Aboriginal Land Tribunal (Qld) has made numerous rulings in relation to persons who have sought to participate on the basis of being a person whose interests (whether pecuniary or otherwise) could be affected by the grant of the land as Aboriginal land (because of the claim).[26]

Those rulings have included as parties adjoining landowners,[27] local councils,[28] public authorities[29], associations, unions and clubs[30], applicants for leases etc.[31], and recreational users[32].

Applications by persons having no particular personal interest in the land claim, above and beyond that of any member of the public, have been unsuccessful.[33] The decisions of the Aboriginal Land Tribunal (Qld) not to admit these people as parties were upheld by the Land Appeal Court.[34]

Although the NNTT initially refused to accept recreational users as parties in the Yorta Yorta Native Title Claim, the Federal Court has recently accepted as parties an individual recreational user and a fish and game association[35].

The rejections by the NNTT appeared to be based upon an assumption that the interest subject of s.68(2)(a) is (confined to) that defined in s.253 as an 'interest', in relation to land or waters . Olney J. held that this is not so.

It is submitted that the scope of ss.68(2)(a) and 84(2) is sufficiently wide to admit as parties those with interests similar to those accepted as parties by the Aboriginal Land Tribunal (Qld), and those who have been heard by various Aboriginal Land Commissioners.

Whatever the scope of ss.68(2)(a) and 84(2), there will often be numerous competing interests, some much more important and fundamental than others, all of which must be dealt with in a way that is fair and just.

Part 4
WHAT IS THE ISSUE?

Before embarking upon what could be a confusing, lengthy, expensive and frustrating exercise, each interested person must decide what interest he or she has in the litigation and what result he or she hopes and/or expects to obtain. Only when the issue(s) relevant to that person are defined, can decisions be made about evidence and presentation.

An application under s.13(1) NTA will usually be for a determination of native title in relation to a particular area of land.
S.225 NTA defines a "determination of native title" as being a determination of:

(a) whether native title exists in relation to a particular area of land or waters;
(b) if it exists:
  (i) who holds it; and
  (ii) whether the native title rights and interests confer possession, occupation, use and enjoyment of the land or waters on its holders to the exclusion of all others; and
  (iii) those native title rights and interests that the maker of the determination considers to be of importance; and
  (iv) in any case - the nature and extent of any other interest in relation to the land or waters that may affect the native title rights and interests.

Of considerable importance will be the nature and extent of the native title rights being asserted. These are questions of fact to be determined at trial[36]

Claimants

Obviously the extent and degree of proof required will depend upon what it is that the claimants seek to establish. The issue(s) must be defined at the outset.

At its broadest, the issue may concern the assertion that the claimants are the (only) native title holders of the land and of everything associated with it. Indeed most of the applications brought to date contend for full and exclusive possessory rights.

Alternatively, the claimants may recognise that other Aboriginal people also have certain rights to and in the land, whether they are rights of a complementary nature, or

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rights secondary (or even primary) to those of the claimants. For example, traditional ownership may belong to a discrete clan, but other members of the same language group (or even of some other group) may have other rights, for example, rights to visit, hunt, participate in ceremony etc.[37]

Alternatively, the claimants may simply wish to establish that they are the holders of some particular interest that entitles them to do things that might otherwise constitute an offence[38] or a tort.[39]

Alternatively, the claimants may accept that certain of their interests have been interfered with (either temporarily - e.g. by the grant of a licence - or permanently, amounting to an extinguishment) but wish to establish that they still are the native title holders of whatever remains.[40]

Finally, whilst recognising that their interests have in fact been extinguished the claimants may still wish to establish that they were once the appropriate native title holders, as a result of which they may be entitled to compensation (via s.50 NTA) and/or such other remedies as might be available.

Other parties

Other parties may not wish to (or may not have the resources to) oppose all aspects of the claim.

A party might simply wish to ensure that the claim seems legitimate, and may be content to leave it to others, such as the tribunal itself, counsel assisting, the Government, or some other party to perform this function.

More commonly, a party may simply wish to argue one or more issue concerning only part of the land claimed. For example, a party may wish to argue that its interest extinguishes native title in respect of the land subject of that interest, or that its interests (perhaps as the holder of some statutory or proprietary interest - e.g. a grazing licence[41] - or as a recreational user of the land[42]) should be protected in the event of native title being established.

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

Notes to text

1 As Brennan J. observed in Meneling Station; Re Toohey; ex parte Stanton (1982) 158 CLR 327 at 356 the relationship between particular groups and their country is such as to invest the country of each group with a unique significance for that group. See Pareroultja v. Tickner (1993) 42 FCR 32 at 38 and Tickner v. Bropho (1993) 40 FCR 183.

2 See Mabo (supra) per Brennan J. at 72-73, c.f. Deane and Gaudron JJ at 116-7 and Toohey J. at 197.

3 Under the common law the existence of traditional rights may confer certain benefits - e.g. rights of entry and use pursuant to a reservation in a pastoral lease, or rights to control access to sacred sites pursuant to sacred sites or heritage legislation. In other cases the exercise of one's traditional rights might confer a defence in criminal proceedings - e.g. Mason v Tritton (1994) 34 NSWLR 572, Sutton v. Derschaw (unreported, Supreme Court of Western Australia, Heenan J., 15th August 1995). See also s.211 NTA.

4 A similar concern has been expressed by Mary Edmunds in Conflict in native title claims , Issues paper No.7, Land, Rights, Laws: Issues of Native Title , AIATSIS. Competing and/or overlapping claims have already emerged in some early native title applications including the Wik Peoples claim (QC 94/3), Gurubana - Gunggandji claim (QC 94/8) and the Yawuru Peoples Claim (WC 94/1).

5 French J. in his undated paper (delivered in March 1995) entitled Outlook 95 - Applying the Native Title Act 1993" stressed the need for identification by applicants of their interests and objectives. His Honour says (at page 14):-
Traditional Aboriginal decision-making is non-delegable. Responsibilities for country may vary within the one language group and the processes of internal consultations within the applicant group should be commenced prior to lodgment of the application. The present reality is that in many cases consultation is time consuming and resource intensive and will not have been completed before lodgment or even mediation. Both the Tribunal and representative bodies may be involved in assisting applicants in resolving internal differences and to identify the distribution of their interests as the first element of the mediation process. In some cases this will involve resolution of differences with other Aboriginal language groups who are not applicants.

6 AGPS, 1981.

7 Majar & Ors v. The Northern Land Council (1990) 37 FCR 117

8 AGPS, 1988.

9 See report (supra) para. 10. Helmut Pareroultja suffered a tragic death a few years later.

10 This contention underlay proceedings later brought in the Federal Court aimed at preventing a grant of Aboriginal land to those original claimants for the reason that such a grant would extinguish the native title rights of the Pareroultja group. See Pareroultja v. Tickner (1993) 42 FCR 32.

11 AGPS, 1980. Note that it is not unusual for one person to qualify as a traditional owner of more than one estate (notwithstanding that those estates may be geographically separated by some considerable distance). For example a person may acquire some traditional rights from his or her father and others from his or her mother.

12 GOPRINT, 1995.

13 AGPS, 1982.

14 No.SC 95/2.

15 Action No. 105 of 1993, now discontinued.

16 Indeed a violent dispute in early 1995 between members of the Dieri and members of the Arabunna ended in one death, one serious injury and several incarcerations.

17 The right to possess and to regulate the transmission of certain information is an important indicator of power and authority under Aboriginal tradition. It is carefully guarded. See Lakefield National Park Land Claim, Reasons for Decision on application to impose restrictions, 9th June 1994, para.92. See too Dr. D.B. Rose Whose confidentiality? Whose intellectual property? , in Claims to Knowledge, claims to country (ed.) M. Edmunds, NTRU, AIATSIS, Canberra, 1994; and Dr. M. Edmunds Conflict in native title claims , Issues paper No.7, NTRU, AIATSIS, February, 1995; and observations by G. Neate, Determining Native Title Claims op.cit. at 535 and Fn 153

18 Warumungu Land Claim, (supra), p.245. See too Toohey J. in passage quoted from Aboriginal Sacred Sites Protection Authority v. Maurice at para. 2.8 above.

19 For example in the Birthday Mountain Land Claim (supra) under the Aboriginal Land Act (Qld) a "counter-claim" was brought by another member of the same language group as the primary claimants, but on behalf of the language group as a whole. Consequently the hearings lasted for some eight weeks and certainly would not have passed the "economical" and "prompt" tests.

20 In the Warumungu Land Claim, AGPS, 1988, Maurice J. carefully considered the interests of the Northern Territory (as the Crown) in the land under claim. See Reasons for Ruling at pp. 245 of the Report. The Northern Territory Government has at various times attempted to preserve access to and use of bore fields and other sources of water, stock routes and reserves, and has led evidence and made submissions concerning other utilities and public facilities including power, roads, railways. In other cases the Northern Territory Government has attempted to prevent national parks and other public places from becoming Aboriginal land, or at least to preserve existing and future rights for the public to have full and free use of such land (eg. Katherine Gorge - Jawoyn Land Claim, AGPS 1987; Ayers Rock - Uluru (Ayers Rock) Land Claim, AGPS, 1980; Tanami Desert Wildlife Sanctuary - Warlpiri Land Claim, AGPS, 1979; Kakadu National Park - Alligator Rivers (Stage II) Land Claim, AGPS, 1984; Kings Canyon - Lake Amadeus Land Claim , AGPS, 1988; and Coburg Peninsula). In respect of Coburg Peninsula and part of the land subject of the Lake Amadeus claim, Northern Territory title was granted, rather than "Aboriginal title" under the Commonwealth Act.

21 See for example Mabo (supra); Yidinji v. State of Queensland & Ors (unreported, Supreme Court of Queensland, Williams J., 22nd March 1993); Biljabu v. The State of Western Australia (1993) 11 WAR 372; The Wik Peoples v. The State of Queensland & Ors (1994) 49 FCR 1; Ejai v. The Commonwealth of Australia and the State of Western Australia (unreported, Supreme Court of Western Australia, Owen J., 18th March 1994);

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Jones v. The State of Queensland (unreported, Supreme Court of Queensland, Dowsett J., 23rd March 1994); Re. Waanyi People's Native Title Application (1994) 129 ALR 100; Re: Waanyi People's Native Title Application (1995) 129 ALR 118 (and on appeal to the Federal Court of Australia, North Ganalanja Aboriginal Corporation v. State of Queensland (1995) 132 565); Selpam (unreported, NNTT, 18th January 1995); Western Australian & Ors v. Minister for Aboriginal and Torres Strait Islander Affairs (1994) 54 FCR 144; Western Australia v. Tickner (1994) 49 FCR 507; and later (1995) 37 ALD 633; Western Australia v. The Commonwealth (1995) 128 ALR 1; 69 ALJR 309; Northern Territory v. Lane & Ors (unreported, Federal Court, O'Loughlin J. 24th August 1995); Miriuwong Gajerrong Peoples v. Western Australia & Northern Territory (unreported, Federal Court, Lee J., 21st December 1995); Yuin Council of Elders Aboriginal Corporation v. The State of New South Wales (unreported, Federal Court, Lockhart J, 23rd October 1995); Members of the Yorta Yorta Aboriginal Community & Ors v. The State of Victoria, The State of New South Wales & Ors (unreported, Federal Court, Olney J., 13th October 1995); Warren & Ors v. The State of South Australia (Federal Court Matter No.SG6001 of 1995).

22 The Director of National Parks and Wildlife has appeared in Uluru (supra) (re: Ayers Rock), and in Alligator Rivers Stage II (supra) (re: Kakadu).

23 Katherine Town Council in Jawoyn (supra); Tennant Creek Town Council in Warumungu (supra); and Cook Shire Council in Cape Melville (supra), Simpson Desert (supra) and Birthday Mountain (supra).

24 Parties have included pastoralists, miners and people with various other commercial interests such as commercial fishing and tourism. Recreational interests subject of evidence and submissions have included hobby farms, horse riding, motor cycle riding, pistol shooting and speedway racing. Associations representing various of the above interests have also participated.

25 Similarly, the Aboriginal Land Act (Qld) s.8.17 provides for parties. c.f. the Aboriginal Land Rights (NT) Act.

26 See definition of interested person in s.1.03

27 Simpson Desert National Park, GOPRINT, 1994 at pp.175-6; Lakefield National Park (unreported, reasons for decision 16 August 1993); Cliff Island National Park (unreported, reasons for decision 20th August 1993).

28 Cape Melville National Park, GOPRINT, 1994, pp.33 and 220-1; Simpson Desert National Park, GOPRINT, 1994, pp.22 and 178-9; Lakefield National Park (unreported, 13th August 1993).

29 Lakefield National Park, (unreported, 16th August 1993); Ten Islands National Park (unreported, 16th May 1994).

30 Lakefield National Park(various associations subject of unreported decisions of 13thAugust 1993).

31 Ten Islands National Park (unreported, 16th March 1994).

32 Lakefield National Park (various unreported decisions dated 16th August 1993 and 18th August 1993); Cliff Islands National Park (unreported, 20th August 1993).

33 Cape Melville National Park re: Russell, GOPRINT, 1994 at pp.32-3 and 179-180 and unreported decision dated 24th August 1992; Lakefield National Park re: McNiven (unreported decision dated 16th August 1993).

34 Russell v. G.J. Neate, Chairperson, Lands Tribunal (Land Appeal Court of Queensland, unreported, 8 February 1993); McNiven v. Lands Tribunal (Land Appeal Court of Queensland, unreported, 12th November 1993).

35 See decisions of Olney J. in Members of the Yorta Yorta Community & Ors v. The State of Victoria & Ors (unreported, reasons for judgment delivered 13th October 1995).

36 See Delgamuukw (supra) at 492, 494, 496-7, 565, 572-3, 579.

37 See for example, observation by Toohey J. in Mabo at 190. Note also that native title interests are not confined to ownership of land as we know it, see Mabo per Deane & Gaudron JJ. at 85, Toohey J. at 187 and Brennan J. at 70. Section 223(2) NTA contemplates that a person or group may hold a native title right to hunt, gather or fish, without being the traditional owner of the land where the activity may be carried out. Section 11(1) Aboriginal Land Rights (Northern Territory) Act provides for land to be granted for the benefit of Aboriginals entitled by Aboriginal tradition to the use or occupation of the land whether or not the traditional entitlement is qualified as to place, time, circumstance, purpose or permission . See discussion in Pareroultja v. Tickner (1993) 42 FCR 32.

38 For example s.404 Lands Act 1994 (Qld) and similar waste lands legislation elsewhere creates an offence of trespass where a person occupies etc. certain Crown Land unlawfully . If the relevant legislation did not extinguish native title and if that person was the holder of a native title interest that allowed him to occupy that land then he would probably not be doing so unlawfully . See too Mason -v- Tritton (1993) 70 A Crim R 28 (Young J.); (1994) 34 NSWLR 572 (C/A); Sutton v. Derschaw (unreported, Supreme Court of Western Australia, Heenan J., 15th August 1995) and generally s.211 NTA.

39 For example, absent rights of entry pursuant to a reservation in a pastoral lease or provided for by statute (e.g. s.47 Pastoral Land Management and Conservation Act 1989 (S.A.)), the claimants could be liable for trespass to land.

40 For example a number of claims have been made in Western Australia, and accepted by the NNTT, in respect of those rights preserved on account of reservations in pastoral leases.

41 c.f. R -v- Toohey; ex parte Meneling Station Pty Ltd (1982) 158 CLR 327.

42 c.f. Aboriginal Land Commissioner (Toohey J) Limmen Bight Land Claim Report AGPS, 1981; Yorta Yorta Native Title Claim (supra).

Legal Counsel needed for Vanuatu Ombudsman

The Commonwealth Fund for Technical Co-operation has been asked by the Government of Vanuatu to provide a Legal Counsel in the Office of the Ombudsman.

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