Native Title Litigation

By Graham Hiley QC

Following are the final two parts of this eight part article. The previous six parts are to be found in the March, April and May issues of ***Balance***.

Part 7
ADVOCACY[1]

As for all litigation the advocate's task at trial is to present the case in such a way as to persuade the tribunal to provide the remedy sought. This in turn requires the primary evidence to be led in such a way that it can form the basis of clear expert opinion proffered to assist the tribunal to apply that evidence.

A major requirement for the advocate is a thorough understanding of the relevant anthropological models, descent principles, kinship rules and Aboriginal customs. The advocate must also ascertain and learn to recognise and understand the more common words and phrases used by the claimants, for example kin terms, names of dreamings, ceremonies and places.

Care must be taken to avoid causing offence - for example, in many cases, calling the names of a deceased person.[2] Another example would be the attempted eliciting of secret evidence in a public hearing (c.f. tendering evidence of a privileged communication, or disclosure to a jury of evidence given during a voir dire).

Evidence in chief will often be difficult to elicit. Quite often the evidence will have been obtained by a non-lawyer asking leading questions - perhaps by an anthropologist trying to fit people and their responsibilities into a preconceived model. The lawyer should re-proof his main witnesses and plan, with the help of the anthropologist or linguist, how he should formulate his questions in order to elicit the desired answer.

For example, an issue fundamental to most claims will be the question of ownership and/or responsibility for a particular estate, site, song, ceremony or dreaming track. Whilst the words "own" and responsibility" are readily used and understood in European society in the context of property be it real, personal or intellectual, those concepts are not usually understood by traditional Aboriginals in the same way as others would regard them. Nor are they readily capable of explanation by use of interpreters[3].

To ask the question - "who owns this place" - will not elicit a reliable answer. A slightly better question might be to ask - "who is the boss (or king) for this place?". But this may also have problems. Firstly, some Aborigines would understand that word to be used in the context of boss/manager, i.e. Kirda/Kurtungulu - both of which categories have been held to qualify for traditional ownership of country.[4] Secondly, the word "boss" or a similar word, may be understood differently, depending upon the context in which it is used.[5]

Another word commonly used by Europeans is the word "elder". The Aboriginal Land Act (Qld) for example, specifically requires the Land Tribunal to consult with and consider the views of the elders.[6] But the Act does not define "elder" and it is not a term readily capable of definition by Aborigines.

It will often be tempting to assume that the person who seems to be most knowledgeable is in fact an elder, or traditional owner, but this will not always be the case. For example, a "manager" might appear at first sight to be a "boss" because he appears to play a greater role with the performance of a particular ceremony. In some cases, a great deal of the primary evidence on behalf of the claimants has been given by knowledgeable people who are not in fact claimants or traditional owners.[7]

Ultimately, the task for the advocate will be to acquire a thorough understanding of the relevant rules about who may and who may not give what evidence and in what circumstances[8] (e.g. whether there should be any and if so what restrictions imposed). He or she will have to decide precisely how to ask the right questions in order to elicit the appropriate information. Regrettably, many questions and answers are capable of ambiguity, which fact is only realised after the transcript arrives and the witnesses have gone. Often the answer is difficult to hear and understand and errors are made transcribing the answer.[9]

Many Aboriginal witnesses are shy and/or have a tendency to speak very softly. Counsel will have to sit or stand very close to the witness in order to properly hear the reply. Similar pronunciations of parts of words have frequently led to the wrong word being recorded.[10]

Consequently, the advocate is well advised to pay careful attention to everything that is said, make notes as to answers given, and carefully check the transcript at the earliest opportunity in order to have it corrected.[11]

As always, the advocate must maintain control over his or her witness, particularly the expert who has just spent the last twelve (12) months on the case. The expert would know much about the claimants but not all of that knowledge will be relevant to the issues at hand. The relative objectivity of the advocate may be very important.[12]

With regard to sensitive matters, an advocate acting for the claimants will have to make value judgments as to the degree of disclosure of restricted material necessary in order to win[13] (the point or the case). He or she has to be constantly aware of the extreme pressure which his or her Aboriginal clients and other Aboriginal witnesses are under where they are being asked to bend traditional rules concerning publication of secret information. On the other hand, he or she will have to argue for such restrictions as are necessary and appropriate in such a way that the tribunal and other parties are not left with the feeling that they are being misled, or deprived of necessary detail. Various mechanisms have been devised during the course of land claims to enable restricted material to be presented in such a way that the risk of its improper use is minimised.

Most of the above comments apply also to the cross-examiner. Unlike the golden rule of cross-examination in civil proceedings - that is always to ask a leading question - questions of Aboriginal witnesses which merely elicit "yes" answers will often carry little weight. Unlike the experienced policeman who is being cross-examined in a criminal trial, the average Aboriginal witness will not have had any experience as a witness and may be inclined to concur with various propositions put to him or her.[14]

Part 6
INTERPRETING AND APPLYING THE EVIDENCE

The most important evidence - I say important because it will carry most weight and it will form the basis of secondary and expert evidence - will be the primary evidence of claimants, counter claimants and other knowledgeable persons.

That evidence will often be given by Aboriginal witnesses using Aboriginal English (as distinct from standard English). The probative value of such evidence will depend very much upon the experience and ability of those who seek to elicit it, and those who receive it and deal with it[15].

A substantial body of evidence which a witness is able to give will never be adduced by the questioner, or never properly heard, understood or applied by the listener[16] Indeed I would venture to suggest that up to half of the answers given by an Aboriginal witness, particularly under cross-examina-

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tion or interrogation will be: -
(a) not heard fully;
(b) misunderstood by the questioner, and by others present at the time the answer is given;
(c) not accurately transcribed;
(d) misunderstood by those later reading the transcript; and/or
(e) misapplied by the tribunal.

I suggest that a publication like Aboriginal English and the Law by Dr Diana Eades[17] be read and understood by any person dealing with Aboriginal witnesses, informants, or clients[18].

Dr Eades observes[19]that differences are to be found between Aboriginal English and Standard English in every area of language: pronunciation, grammar, vocabulary, meaning, use and style .

It is particularly important to be cognizant of cultural factors such as the speaker's position and authority within the group, kin rules and the function of indirectness in social interactions.

Questions and Answers

Much use will be made of the conventional question and answer method of adducing evidence. This requires the careful use of appropriate language by the questioner and a proper comprehension of the question and answer by the listener[20] .

For example the need for indirectness in the information gathering process can be assisted by hinting at an answer, observing for a gesture, and waiting perhaps longer than usual for the answer before proceeding further. Dr. Eades suggests that questions should not commence with auxiliary verbs (such as do, did, are, etc) and she observes that questions are often uttered with a rising intonation and ended with a question marker (eh?)[21] .

Questions to be avoided (or approached very carefully) include: -
(i) inappropriate questions asked of inappropriate people in inappropriate company[22] ;
(ii) questions or activities involving the display of photographs of certain people, places or objects[23] ;
(iii) questions which include or seek to elicit the name of a person whose name is the same as a person recently deceased;[24]
(iv) leading questions which invite gratuitous concurrence; [25]
(v) either/or questions;[26]
(vi) long or complex questions;[27]
(vii) use of double negatives;[28]
(viii) use of ambiguous words - e.g. own[29], originate[30].

Responses that are frequently misunderstood include: -
(i) answers of I don't know, I don't remember[31] , or answers that appear evasive or even misleading. These may be the witness' polite way of indicating that the question is inappropriate, that he or she is not permitted to answer it, and/or thatcertain persons are present who should not hear or know that information. Perhaps the witness did not hear or understand the question but is too shy to say so;
(ii) silence;[32] ;
(iii) avoidance of direct eye contact;[33] ;
(iv) numbers, times, dimensions[34] and distances;
(v) gratuitous concurrence with a leading question[35];
(vi) use of kin terms - e.g. mother, brother, etc[36];
(vii) words which in standard English commence with an h[37], f, v, or th[38];
(viii) words with differently pronounced vowels and diphthongs[39];
(ix) words in which the ending is omitted in Aboriginal English[40] - e.g. an ending ed which could denote the past tense;
(x) absence of the 's suffix denoting possession[41];
(xi) absence of an s denoting plural[42];
(xii) different use of prepositions[43];
(xiii) use of he or him to refer to one or more people of either sex[44];
(xiv) use of the present tense instead of the past tense[45];
(xv) words which may have different meanings to different people - e.g. owner[46], brother, kill;
(xvi) gestures - perhaps a sudden albeit slight movement of the eyes, the head, or a finger to indicate a person or a direction[47].

Transcripts may be inaccurate or misleading for various reasons: -
(i) The transcriber might not correctly hear and record the answer.[48] Indeed where the questioner (or someone else) incorrectly repeats what he or she thought the witness said, the transcriber will often be (wrongly) guided by the repetition rather than by the answer itself.
(ii) The transcript will not record pauses, emphasis or gesture.[49] I suggest that more use be made of video recording (as now occurs with records of interview by police in some places - e.g. Northern Territory). This would assist the tribunal and the participants to better remember the witness and the context of an answer.

Other forms of evidence

Some of the most significant indicia of native title will comprise evidence not proven in the conventional way - i.e. by question and answer in a court setting[50].

Chief Judge Durie of the Maori Land Court of New Zealand, and Chairman of the Watangi Tribunal cited an example[51].

"Monoculturalism in the Maori Land Court continued into this century. Some decades ago a Maori elder appeared before the Court and did no more than sing a song of the Wanganui River, on a claim to the ownership of the river bed. The Court noted that he sang a song but had nothing to say.

Of course it was usual for a people without a land transfer office to assert their ownership in other ways and the old man was simply singing his title in customary style. His song was a declaration of ownership."

Compare the tendering of a certificate of title, or certificate of incorporation in a civil court in circumstances where the judge was totally unaware of the significance of such documents.

The most compelling evidence will often be found in the performance of a ceremony, in a ritual associated with a visit to a particular site, in a gesture, a pause or in an answer misunderstood. Often the evidence which is most significant in determining who has what rights and responsibilities, is evidence that must be withheld, or heavily restricted from publication[52]. The existence and importance of such evidence may only emerge in certain circumstances - for example at a site visit with a limited audience.

A ceremony may provide evidence of some, perhaps all, of the elements of proof of native title. Words sung will commonly identify dreamings and ancestral beings with people and country. The roles played by participants, both before and during the ceremony, will often demonstrate what rights and responsibilities are held by certain people or groups in respect of country, traditional practices, transmission of knowledge, and in relation to each other. Objects used, such as tjuringa, and the manner of their use, will also provide valuable clues.

The performance of a ceremony may be as compelling evidence of custom and tradition, and indeed of native title, at least within Aboriginal tradition, as would be a certificate of title, or a binding High Court authority.

Similarly a ritual performed by particular people at particular places may provide valuable evidence of the rights and responsibilities of various people in relation to such places. Such rituals might involve calling out certain words, carrying a branch and waving it in a certain way, wearing certain

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clothes or other items, making of certain signs or gestures, and so on.

Expert to explain

Chief Judge Durie, amongst others, has emphasised the need for the tribunal to be able to understand the cultural significance of what was being said. He points out that what was required was:

"not just an anthropology that described the customs and practices of the people, but one that presented those customs and practices within the context of the underlying philosophy, ideology or jurisprudence by which those customs and practices are explained. The Maori evidence of customs tended to be anecdotal and impressionistic, leaving to the adjudicator the task of conceptualising a range of practices in ideological terms. It is not surprising that the adjudicators drew upon their own legal and cultural backgrounds. Accordingly, it is not the evidence but the interpretation of the evidence that presents the main concern."[53]

Frequently it will be necessary for the evidence to be interpreted and explained in order for its significance to be properly understood. This has occurred in (Northern Territory) land claims[54] and has been subject of debate in the ordinary courts.[55]

There are numerous examples of statements being made and ceremonies being performed, the significance of which will be missed unless an appropriate expert is available to assist. Such assistance will also be necessary to explain just why certain witnesses say certain things, or refuse to say or do certain things, perhaps because of prohibitions cast upon them by Aboriginal law.

In my view, it is primarily the responsibility of those representing the claimants to ensure that an appropriate expert is called to interpret the evidence adduced, to explain particular nuances and to therefore enable the tribunal to better understand the case being advanced. Usually the only person who can provide that assistance will be the anthropologist (or other expert) engaged to assist the claimants. In many cases one or more of the claimants can interpret, or explain, things being said or done by others[56]. For example, when a ceremony or ritual is being performed, one or more Aboriginal people might explain what is happening at various stages of the ceremony.

In summary then it is important that all possible assistance be provided to the tribunal to enable it to obtain the full benefit of all evidence available. Without such assistance the parties (both claimants and opponents) will not have advanced their best case.

Notes to the text

1 I dealt with the role of the lawyer at some length in "Aboriginal Land Claim Litigation" (1989) 5 Aust Bar Review 187 at 191-7. See too observations by G Neate in "Determining Native Title Claims" at 536-8.

2 This extends to other people (or even places) with the same name. Some time prior to the hearing of the Uluru (Ayers Rock) Land Claim a senior man Paddy Uluru died. Consequently, the word "Uluru" could not be used. The name of the land claim was amended to the "Ayers Rock Land Claim". Eventually a particular ceremony was performed thereby enabling the word "Uluru" to be used again.

3 See Yutpundji-Djindiwirritj (Roper Bar) Land Claim, AGPS, 1984, paras.53-54; and Ti-Tree Station Land Claim, AGPS, 1987, paras.107-109.

4 E.g. Willowra Land Claim, AGPS, -1980, Nicholson River (Waanyi/Garawa) Land Claim, AGPS, 1985 c.f. Warlpiri and Kartangarurru Land Claim, AGPS, 1979.

5 For example, a senior Warlpiri person/elder living in a town camp in Alice Springs may be regarded as a boss of those people living at the camp, but he would not be "boss" of the (Arrente) land where that camp (in Alice Springs) is situated. Nor would he necessarily be the "boss" of all or any Warlpiri country.

6 Sections 4.09(2) and 4.10(3).

7 For example, in the Finniss River Land Claim Abaluk gave most of the primary evidence on behalf of the Kungarakany claimants, although he was a Malak Malak man.

8 See G. Neate op.cit at 519.6.

9 See discussion later under " Interpreting and Applying the Evidence ".

10 See discussion later about "Interpreting and Applying the Evidence" .

11 See too Graham Hiley QC op.cit. pp. 194-5.

12 See Maurice J. in Warumungu (supra) at p. 244.3, and Graham Hiley QC op.cit. at 192.1-.7.

13 See quote from Toohey J. in part 6 (May issue). See too G. Neate op.cit at 533-4.

14 This factor was largely responsible for the "Anunga Rules" propounded by the Northern Territory Supreme Court in relation to police interrogation of Aboriginals. See R v. Anunga (1976) 11 ALR 412. See Diana Eades' references to gratuitous concurrence discussed later in this article.

15 See G. Neate in "Proof of Native Title" op.cit. at pp.12-14.

16 See observation by Maurice J. in Warumungu Land Claim, AGPS, 1988 at para.27.1.4.

17 Published by the Continuing Legal Education Department of the Queensland Law Society Incorporated in 1992.

18 Although the publication is largely focused on Aboriginal English in Queensland, my experience in the Northern Territory suggests that most of Dr. Eades' observations apply equally there, and probably elsewhere in Australia. Other useful publications include Koch, "Non-Standard English in an Aboriginal Land Claim" in Pride (ed), "Cross-cultural Encounters: Communication and Miscommunication" (River Seine Publications, Melbourne, 1985); Koch, "Language and Communication in Aboriginal Land Claim Hearings" in Romaine (ed), "Language in Australia " (Cambridge University Press 1991); and von Sturmer, "Talking with Aborigines" (1981) Australian Institute of Aboriginal Studies Newsletter New Series No.15. See too paper by Mildren J. (Northern Territory Supreme Court) "Redressing the Imbalance against Aboriginals in the Criminal Justice System" delivered at the Northern Territory Criminal Lawyers Association Conference in Bali in June 1995.

19 At page 22.

20 See Kriewaldt J. in Lewis v. Metcalf (1959) NTJ 639 at 641; Blackburn J. in Milirrpum v. Nabalco Pty Ltd (1971) 17 FLR 141 at 165, 173, 175 and 179; and Neate in "Determining Native Title Claims" op.cit. at 525. See too Maurice J. in Warumungu Land Claim, AGPS, 1988 at paras.2.12.2-2.21.3.

21 Chapter 4.

22 See above in part 2 (March issue). and part 6(May issue)

23 Recall Foster v. Mountford and Rigby Limited (1976) 14 ALR 71; 29 FLR 233.

24 See for example R v. Bara Bara (1992) 87 NTR 1. And see Robinson River Land Claim, AGPS, 1990 para.6.12.4. Some Aboriginal people use an alternative word for the name - in Central Australia people often refer to a person as "kumanji" .

25 See Eades pp.51-54. As previously observed the tendency for some Aboriginal people to concur with a proposition put to them although they may not really agree with it has been recognised, and allowed for, in at least one jurisdiction (Northern Territory - R v. Anunga (1976) 11 ALR 412; and R v. Butler (No.1) (1991) 102 FLR 341). Arguably, a person cross-examining an Aboriginal witness may be prevented from asking leading questions. See Mildren J. (supra) at pp.15 to 16 citing Mooney v. James (1949) VR 22 at 28.

26 See Eades p.47.

27 See Eades p.40.

28 See Eades p.66.

29 See discussion above at paras. 7.5-7.8.

30 See Ti -Tree Station Land Claim, AGPS, 1987, at para.74.

31 See Eades p.45. See too Warumungu op.cit. at para.27.3.3.

32 See Olney J. in Stokes Range Land Claim, AGPS, 1990 para.4.7.4; Eades p.46; and Mildren J. (supra) at pp.18 to 19 and 27.

33 See Eades pp.47-8.

34 See Eades pp.48 to 51.

35 See above.

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36 See Eades p.74. And see Robinson River Land Claim op.cit. para.6.12.4.

37 See Eades pp.58-9.

38 See Eades p.60.

39 See Eades p.59; and Koch.

40 See Eades pp.60-61.

41 See Eades p.61.

42 See Eades p.62.

43 See Eades p.62, and Mr. Yami Lester quoted in Australian Law Reform Commission Report No.2, "Criminal Investigation" (1975) p.119.

44 See Eades p.65.

45See Eades p.67.

46 See my discussion about this previously in part. 7 (this issue)

47 See Eades p.71 and Neate, " Determining Native Title Claims" at p.529.

48 The very first Aboriginal land claim, the Borroloola Land Claim, AGPS, 1979, featured a number of examples of inaccurate transcribing - e.g. "conception by the ocean" instead of "conception affiliation ", and "vocal dissent groups" instead of "local descent groups". See other examples listed by Koch referred to by Neate (ibid) at 525 Footnote 107. On occasion the Commissioner has gone back and listened to the tape rather than rely on the transcript - see Jila (Chilla Well) Warlpiri Land Claim, AGPS, 1987 at para.3.11.

49 G. Neate in "Aboriginal Land Rights in the Northern Territory" op.cit. at pp.216-218 refers to this problem and quotes passages from two decisions of Kriewaldt J. in Albert Namatjira v. Gordon Edgar Raabe (1958) NTJ 605 at 613-4, and Lewis v. Metcalf (1959) NTJ 639 at 641. In the former case His Honour referred to the utter impossibility to reproduce in typescript the effect of the evidence given by the majority of Aboriginals . See too G. Neate in "Proof of Native Title" op.cit. at 21-22.

50 See examples cited by G. Neate in "Aboriginal Land Rights in the Northern Territory "at pp.218-228, and in "Determining Native Title Land Claims" op.cit. at 529-531; and in "Proof of Native Title" at 22-23.

51 See "Justice by Culturalism and the Politics of Law", address to University of Waikato, 2nd April, 1993.

52 For example, evidence of the Bula ceremony tendered on a restricted basis in the Jawoyn (Katherine River) Land Claim, AGPS, 1987, may have been relevant to much of the later debate concerning mining at Coronation Hill. And see comments above in part. 2.(March issue) and 6 (May issue)

53 Paper to 25th IBA Biennial Conference at Melbourne, 13th October 1994.

54 See quotation from Toohey J. in the Limmen Bight Land Claim, AGPS, 1981 para.41 in Neate "Determining Native Title Claims" at p.524. See too Neate "Aboriginal Land Rights Law in the Northern Territory" at pp.210-215 and 255-6. And see Toohey J. in Willowra Land Claim, AGPS, 1980 para.94; Kaytej, Warlpiri and Warlmanpa Land Claim, AGPS, 1982 para.67; and Yutpundji-Djindiwirritj (Roper Bar) Land Claim, AGPS, 1982 paras.53-54, and Maurice J. in Warumungu Land Claim, AGPS, 1988, paras. 2.21.3, 27.1.4 and 27.3.6; and Olney J. in Robinson River Land Claim, AGPS, 1980 para.2.21.

55 See paper by Mildren J. (supra) and recommendation by the Australian Law Reform Commission in discussion paper 48 "Multiculturalism: Criminal Law" (ALRC 1991). c.f. Condren (1987) 28 A.Crim.R. 261 at pp.264-270, 273-275 and 296-8; R v. Condren (1991) 1 Qd.R. 574 and 587; R v. Aubrey (Queensland Court of Appeal, unreported judgment delivered 28 April 1995) per Fitzgerald JA at 16.

56 See Neate in "Determining Native Title Claims" op.cit. p.518.