INFORMATION SERVICE

QUEENSLAND*

QUEENSLAND'S FIRST[1] LAND RIGHTS AWARD

The Queensland Land Tribunal has presented its first report to the Lands Minister,[2] recommending that three areas of national park and six parcels of vacant Crown land (39,000 hectares) be vested in trustees for the claimant group, under the State's *Aboriginal Land Act* 1991[3] ("ALA"). The ALA offers statutory "land rights" as distinct from "Mabo title". The Minister has accepted the recommendations subject to certain formalities;[4] before a grant of national park land can occur a "management plan" must be agreed, and the grantee must agree to lease the land back to the State in perpetuity. The lands are situated on and off Cape York between Cooktown and Coen and may conveniently be called "the Melville Claim". The Cape Flattery silica mine is in the area.

The Melville claim was made without prejudice to any common law native title in the area. It has already been held that statutory grants to Aborigines do not extinguish native title[5] and the *Native Title (Queensland) Act* 1993, yet to be proclaimed, will amend the ALA accordingly.

Land granted under the ALA is not ipso facto immune from mining activities[6] and existing mines are not affected. Claims may only be made over Crown land which the government has declared "open" for that purpose. Claimants may rely upon on (a) traditional affiliation; (b) an historical association; or (c) economic or cultural viability of activities proposed for the land claimed.[7] The Melville Claim was based on "traditional affiliation" alone.

While a claim may succeed under the ALA without proof of a "continuous connection" according to the Mabo doctrine, a brief review of the evidence which satisfied the Land Tribunal is of wider interest. In the political and legal debates about native title far too little attention has been paid to realities of evidence and procedure in this novel form of litigation. There are authoritative claims that only claimants are likely to have access to appropriate lay and expert evidence, but they need not be repeated here.[8] It is no purpose of this article to canvass the wisdom of increasingly large dispositions of land and money to Aborigines. The question here is whether the tests are precise enough, and the vital evidence

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1. Apart from simple administrative conversions of former Aboriginal reserves to statutory title under the *Aboriginal Land Act* 1991.
2. *Aboriginal Land Claims to Cape Melville National Park, Flinders Group National Park, Clack Island National Park and Nearby Islands* (Report to the Minister for Lands), May 1994, Land Tribunal, Brisbane; pages i-vi; 1-224 and Appendices.
3. For a general introduction to the Act see J R Forbes, "Queensland's Aboriginal Land Act 1991" (1992) 11 *AMPLA Bulletin* 16.
4. *Courier Mail* (Brisbane), 10 September 1994, p 11: "State Settles on first Black Claim".
5. *Pareroultja v Tickner* (1993) 117 ALR 206.
6. See "Queensland's Aboriginal Land Act 1991", above, at 19.
7. ALA s 4.03. The third ground cannot be relied upon where national parks are involved.
8. For other articles making this point see J R Forbes, "Mabo and the Miners" in Stephenson and Ratnapala (eds), *Mabo: A Judicial Revolution*, University of Queensland Press, 1993, pp 215ff; J R Forbes, "Native Title Issues in Australia: Operation of the Native Title Act" being a paper presented to the 18th Annual Conference of AMPLA, Perth, August 1994, pp 14ff.

available enough to enable judicial or quasi-judicial awards to be a serious and balanced exercise. It would not be in the public interest to use those techniques merely (or mostly) as a facade.

PARTIES AND REPRESENTATION

The Melville Claim was made by eight persons representing "clan groups" (26)[9] descended from 13 named Aborigines (216). In all some 200 people may be involved (135). It appears that the only party which opposed or attempted to test the claim was a small local authority, the Cook Shire Council. (The Council was concerned that a large part of its territory would become exempt from rates while it remained bound to provide basic services (220).)[10] The Tribunal noted that "the State of Queensland, the legal person most directly . . . affected . . . is not a party" (Appendix E page 3). The Department of Environment and Heritage supported the claim to the National Parks (223 and Appendix A). The only other party was the Queensland Professional Fishermen's Association. (The Report painstakingly and "correctly" refers to "fishers".) The fishermen had no interest in opposing the claim (219). The Commonwealth has been criticised for improper passivity, even connivance, in withdrawing from the Mabo litigation. But in these cases the State makes the initial decision to expose lands to a claim under the ALA, and it has an opportunity for second thoughts if the Tribunal recommends that a grant be made. However, it could do that more effectively by appearing and testing the evidence at the hearing.

None of the parties was represented by a duly qualified legal practitioner although (as appears below) this statement conveys the literal rather than the whole truth. Legal representation requires the special leave of the Tribunal[11] and leave was not given in this case. The Cook Shire Council was represented by a councillor without legal qualifications and presumably without experience as an advocate, and other laymen appeared for the Fishermen's Association and the Environment Department. The claimants, however, were represented by Mr Noel Pearson, a gentleman who has considerable legal training and is the author of numerous technical[12] and popular articles on "land rights". He presented a detailed and sophisticated argument to the effect that even if the application were granted the title conferred would be inferior and discriminatory (146-151). Mr Pearson is an experienced and able advocate of Aboriginal affairs in Canberra and elsewhere, and he played a leading part in negotiations with the federal government concerning the *Native Title Act*.[13] His base at Hopevale sponsored the Melville claim (219).

9. For economy in footnotes all references to the Melville Claim Report, from this point on, will be by page number, in round brackets, in the main text.
10. Subsequently this point was taken up by two Shire Councils in the Cape York area. One warned that if Aboriginal lands were immune from rates (or from enforcement of same) "This could well see a privileged class created like a feudal nobility at the expense of local ratepayers": *Courier Mail* 28 Sept 1994, p 18: "Blacks, Councils Fighting on Rates".
11. ALA s 8.19.
12. See eg N Pearson "204 Years of Invisible Title" in Stephenson and Ratnapala (eds), *Mabo: A Judicial Revolution*, Univ Qld Press, 1993, p 75.
13. See eg *Australian*, 18 August 1993, p 3: "Goss May Reissue Leases to Comalco"; *Australian*, 20 August 1993, p 3: "Wik People Threaten to Contest Title Laws"; *Australian*, 14 Sept 1993, p 1: "Mabo Bill 'Breaches Human Rights Duties'"; *Courier Mail* (Brisbane), 4 October 1993, p 5: "Black Attack on Goss"; *Courier Mail*, 9 Oct 1993, p 3: "Mabo Bitterness Explodes: Blacks Attack PM, Goss"; *Courier Mail*, 11 November 1993, p 5: "Libs Labelled Racist 'Klan'".

VAGUE CONCEPTS

Claims under the ALA may be made by a "group", which term includes a "community" linked "by kinship or otherwise" (54). The Report considers the vagueness of "aboriginality" (26-28). Where "traditional affiliation" with the land is relied on the Tribunal looks for a "common connection with the land based on spiritual and other associations".[14] The "connection" need not amount to occupancy, and the "connections" of various claimants may vary according to age, gender and so on (55). "Spiritual and other associations" are a sufficient connection. The meaning of "other associations" is not specified (54). That which is "spiritual" need not involve "sacred or religious things"; it also includes "conscious thoughts or emotions". A connection involves "rights in relation to, and responsibilities for the land". (Does this proposition assume that which should be proved?) The Melville claimants spoke of "look(ing) after and us(ing) the land in accordance with Aboriginal tradition", and in the case of Melville National Park to "rock art conservation, cultural interpretation of the landscape, and managing or controlling visitor access to the area" (58).

Tradition is "the tradition as it currently exists ... no Aboriginal community ... retains complete and unchanged the body of traditions ... held by their ancestors at the time of first contact with European colonisers. There are numerous factors which will influence how much of that body of traditions is lost ... Those factors include the extent to which members of a group have been dispersed ... whether the group has remained on or near the group's traditional land or visit it periodically, the effect of technological change with respect to such things as transport and communication ... education ... Christianity and other religions". And, the Report added gravely, "alcohol".

These statutory mantras, like their judge-made equivalents in Mabo,[15] are extremely elastic, not to say slippery. It is hard to see that any non-claimant could confidently attempt a rebuttal, except in patently fraudulent or ill-conceived cases. If terms of reference are arranged, legislatively or judicially, so that serious contests are seldom possible the panoply of *judicial* government is neither appropriate nor necessary.

The Tribunal found it "apparent that the dispersal of the ancestors ... led to the breakdown and possible disappearance of important aspects of the traditional ceremonial life". However, some claimants had retained native language, or fragments thereof and the "detailed knowledge of clan names and place names" (60). "(T)he practice of orally passing on the culture of the group ... has been augmented ... in writing and on film and in videotape, as, in the past, it was recorded in cave paintings." One now deceased member of the group joined an Institute of Aboriginal Affairs which was set up in 1975 and published recollections in 1986. Another had traditional stories published in 1984 and revised them in 1989 (61). Of course we all have traditions, but "connections" which confer rights over large tracts of land are the real issue.

The Cook Shire councillor argued that all claimants must show a "common connection". The Tribunal replied: "What the common connections are and how they are to be proved will vary from claim to claim. In most instances it will not be necessary for all or even the majority of the claimants to be heard

14. ALA s 4.09(1).
15. J R Forbes, "Mabo and the Miners", above, at 214, referring particularly to dicta of former land rights Commissioner Toohey J.

in evidence . . . What is required is sufficient evidence of connections with the land which are shared and evidence of the extent to which they are shared" (56). The Shire's complaint that it was not consulted before the land was gazetted as claimable land fared no better. It appears that under the ALA the contemporary deference to "consultation" does not assist authorities which may have very relevant local knowledge.

EVIDENCE

It is all too common for judgments (or reports) which really turn on the facts — as most judgments do — to discourse repetitively upon statutory provisions and judicial interpretations which are really not in issue, while they deal briefly with the significance and credibility of the evidence. One quarter of the Melville Report is under the heading "Evidence".

Much of the evidence in the Melville Claim was of relatively recent origin, although it made assertions about earlier times. The claim book, prepared by anthropologist Dr Sutton at the behest of the sponsor Cape York Land Council, recorded what "old people" told him (63). Their memories could scarcely antedate the 1920s. We are told that most of the evidence of "common connection" was in the claim book which was compiled by reference to numerous documentary sources and interviews . . . confirmed and supplemented by oral evidence" (77). (A "claim book" may be compared with a statement of claim in conventional litigation, greatly enlarged by records of assertions by claimants — often hearsay upon hearsay — and the opinions of the anthropologist-drafter.) The book was received in evidence "on the basis that the author, Dr Peter Sutton, was available for cross-examination, and (that) recourse to source materials (could) be required by the Tribunal" (Appendix E page 5). But the value of such recourse may be small when one is dealing with hearsay or opinions which the tribunal and non-claimant parties are not in a position to contradict.[16]

There were occasional European contacts with the area between 1820 and 1890 but none "resulted in the specific identification . . . of Aboriginal groups or individuals". In 1898 an adviser to the Police Commissioner counted "20 Aboriginal males and ten females in the neighbourhood of Barrow Point" but there were estimates of about 1000 in Princess Charlotte Bay region (78). In 1899 about 80 people were photographed at Cape Melville but actual identification seems to date from 1927 when 20 Aborigines were contacted in the area, some of whom were said to be forebears of the applicants. The possibility that these people have moved into the area long after European settlement is not discussed in the Report. In the 1970s Aboriginal informants believed some clans to be extinct (79). At that time traditional social organisation and land tenure no longer existed but they were "remembered" (80). Even in 1993 "very little cultural information and family history (was) on the public record" (Appendix E page 7). It is observed that much of the "traditional" material would have been lost had it not been for writings between the 1930s and the 1970s (62). But if these are reliable they are very recent records compared with the immemorial traditions and connections of which we constantly hear these days. One claimant family traced its ancestry to "people with links to the claimed land at least three generations before the

16. On the extreme difficulty of scrutinising or rebutting "lay" or "expert" evidence in these cases see J R Forbes, "Native Title Issues in Australia: Operation of the Native Title Act" being a paper presented to the 18th Annual Conference of AMPLA, Perth, August 1994, pp 14ff.

oldest living inhabitants" (81). Quite a few non-Aboriginal Australians could make similar claims.

Oral evidence was taken from 42 persons (Appendix B). "Group evidence" was allowed (35), as in hearings under the 1976 Northern Territory Act. It is conceded (31) that this is "an unusual feature . . . when compared with conventional court proceedings" but it was allowed so that the witnesses could be "comfortable" and so that a "hierarchy of knowledge" could be observed (36). Discomfort is felt by many witnesses who are not allowed to testify in groups. We are told that the witness groups did not exceed three persons at a time and that speakers could always be clearly indentified. Where there is little effective opposition, and legal representation is not allowed this may not make much practical difference, but at least one QC has found "group evidence" confusing and extraordinarily difficult to scrutinise in the Northern Territory tribunal.[17]

The Tribunal noted that claimants who asserted historical and family connections to the places claimed had "spent most or all of their lives away from those areas. Few have visited the claimed areas" (92). Vaguely the Report adds that some claimants have "plans to live on the land if it becomes Aboriginal land . . . Others would like to visit (it) from time to time" (102). But it is not suggested that "all, or even most, of the claimants intend to live on the claimed land or even to visit it for extended periods" (142).

Evidence of common connection was found in beliefs about "the spirits of named and unnamed ancestors at places on the land", in "knowledge of stories relating to the ancestral creative beings which travelled through the region" and in "an acknowledgment that certain places are dangerous" (92). "Mr Paddy Bassani and Mr McGinty Salt each recalled the late Johnny Flinders (who died in 1979) saying his country was Flinders Island . . . Although he spent most of his life away from (it) he maintained an interest in it as his country and told his children about it" (110, 111). Some witnesses claimed that "young people have strong feelings for the land" (98). (Do not many intending buyers of land, not to mention hopeful donees, experience similar emotions?) Others claimed a feeling of responsibility to protect cave paintings, to keep the area clean, to look after the forest, and to ensure that national parks were properly used. The Tribunal inferred that "the recognition by people that they have responsibililities for land is itself evidence that (they) have traditional affiliations with the land" (101).

RESTRICTED ACCESS

An exhibit (to which access was restricted) was a genealogical diagram. A similar restriction was placed on parts of the "claim book". The Shire Council argued in vain that the genealogies were "incomplete, inaccurate and unverified, and that they lacked dates of births and deaths". The Tribunal replied that witnesses "gave evidence about their forebears" which enabled this material to be "verified and revised" (73). It is not clear that this evidence involved anything more than a repetition of the ex parte assertions on which the diagram was based. Another exhibit on restricted access was a commercially made videotape of a visit to Flinders Island (37; Appendix E page 14). It showed an incident involving a goanna — an incident to which the Tribunal evidently attached some significance. The fact that the goanna did not run away when children threw

17. G Hiley, "Aboriginal Land Claims Litigation" (1989) 5 Aust Bar Rev 187 at 195.

sticks at it was seen by an elderly claimant as the reptile trying "to show us something, to make us understand" (94-5).

The restricted-access orders were explained as follows: "The genealogies, for example, contain both biological and social information (which) . . . may be private and not commonly known or spoken about" (Appendix E page 9). While "Aboriginal people may be willing (albeit reluctantly) to breach some protocols or taboos" to obtain a grant of land that should not be taken as a waiver of those taboos (Appendix E page 10). Such privacy is not assured to other Australians whose birth, marriage and other details are recorded on government registers.

The Tribunal concluded: "The oral and written evidence . . . established that the claimants . . . as a group, have a body of traditions . . . relating to the claimed areas." (109) It added: "In Dr Sutton's opinion, the broad basis for the claim by one group to the whole area . . . could be supported by reference to the facts in the early part of the 20th century [sic], so far as that situation can be notionally reconstructed by reference to the recollections of aged informants and other records" (125). Elsewhere Dr Sutton has expressed some trenchant views about anthropological evidence in cases of this kind: "The content of the land rights legislation itself has largely been engineered by anthropologists in concert with lawyers";[18] "the closed ranks of anthropologists [are] denying [miners] access to . . . scientific expertise[19] . . . a sociological diagnosis can have quite a lot to do with an anthropologist's politics".[20]

Perhaps there should be more discussion of the question whether very large tracts of land (or compensation) should be allocated to fairly small groups of people where the vagueness of the statutory criteria is matched by elusive ex parte evidence. Is it really possible to controvert evidence and inferences of the present kind, even with resort to experienced counsel, and even in tribunals whose raison d'être is not a quest for "land rights". A problem about special agencies is that if they do not readily make the relevant awards the government, or the interest group which had them created, will soon begin to question their existence.

WHO IS TO BENEFIT?

The Tribunal clearly had difficulty with the vague notions of "groups", "clans", "communities" etc[21] bequeathed to it by Mabo and the ALA. Even close disciples of the native title movement accept that it is impossible to return to "traditional" boundaries or to accommodate the overlapping of tribal claims which existed in nomadic times.[22] In the Melville case it was estimated that about 200 people might be involved although "some . . . have not yet activated those traditional affiliations" (135). The claimants would not, or could not define the list of beneficiaries and it was envisaged that others with "relevant socially recognised parents" might be added later on (128-9). However, the ALA makes no provision for amendment of a class of beneficiaries if it turns out to be inaccurate or incomplete (77).

18. P Sutton, "Anthropology Outside the Universities in Australia" *A (American) AS Newsletter*, 15 June 1982, 12, 21.
19. Ibid.
20. Ibid at 22.
21. For a fuller list of collective terms among which the High Court moved to and fro see "Mabo and the Miners", above, at 213.
22. *Summary of Proceedings of a Workshop: Proof and Management of Native Title*, 31 Jan-1 Feb 1994, Aust Institute of Aboriginal and TSI Studies, Canberra, 1994, p 2 (Nicholas Peterson).

Evidently aware that "communities" conjured up by political rhetoric or hopeful legislation may in truth be far from communal[23] the tribunal decided to treat the claimants as a single group in the hope that it would so remain — or, if not, that the differences would be resolved in another place at another time: "We have concluded that, although there was evidence which pointed to some families having stronger affiliations to certain focal areas than to other areas, there was sufficient evidence to support the claimants' joint claim . . . to all the areas" (128). Accordingly it recommended that all land claimed be granted in fee simple to "the group", represented by 15 trustees (216). Will a second wave of native title litigation consist of old fashioned equity suits between vaguely described beneficiaries and trustees alleged to be feathering their own nests or the nest of favoured sub-groups?

The meticulously compiled Melville Claim Report probably does all that could be done to apply judicial techniques to the available evidence and the vague statutory criteria to arrive at an affirmative answer, but those techniques are only appropriate when there is an institutional culture and an evidential regime which enables claims to be rigorously tested. Absent those conditions, it behoves our rulers to proceed openly and honestly by legislative and administrative means. Absent tests and issues precise enough to be justiciable, and without equal access to evidence there is no point in trying to judicialise transfers of property based on broad policy grounds, with or without broad hints that few who claim should go empty-handed away.

23. See *The Australian*, 20-21 Aug 1994, p 13: "Tribunal Strikes a Balance", quoting NNTT President French: "An area of potential difficulty is the resolution of conflict between different Aboriginal groups".