Land, Rights, Laws: Issues of Native Title

Native Title Research Unit
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Contributing to the understanding of crucial issues of concern to native title

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Abstract

Gender-based secrecy within the religious domain is an integral feature of most Australian Aboriginal societies. Within the context of native title claims, gender restricted evidence is often important to establish and substantiate connections to country. For Aboriginal people, the presentation of such evidence is an exceptionally difficult compromise. The Federal Court has to consider the public interest in respecting the cultural concern of native title claimants, with other competing public interest presumptions, such as the right to representation by the legal representative of one's choice. Anthropologists have a professional obligation to informants to protect the confidentiality of gender-restricted material, however, as an expert witness, the first duty of an anthropologist is to the Court. This paper discusses the Federal Court's approach to these issues in respect to two recent native title cases.

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PRESERVING CULTURE IN FEDERAL COURT PROCEEDINGS: GENDER RESTRICTIONS AND ANTHROPOLOGICAL EXPERTS

GREG McINTYRE and GEOFFREY BAGSHAW

The Full Court of the Federal Court of Australia, in the case of *State of Western Australia v Ward (on behalf of the Miriuwung Gajerrong Peoples)*,[1] recognised that the public interest in respecting the cultural concern of native title claimants to maintain their tradition of placing a gender restriction upon certain religious information may be capable of over-riding other public interest presumptions, such as the right to representation by the legal representative of one's choice. The Full Court, in that decision, upheld an order of Justice Lee in *Ward and Others v Western Australia and Others*[2] and disagreed with the view taken by Justice Olney in *Mary Yarmirr & others v Northern Territory of Australia & others*[3] that the Federal Court did not have the right to deny a party the right of choice of legal representative in a Court proceeding.

This paper discusses, by reference to the approaches taken by the Federal Court in two recent native title cases, *John Dudu Nangkiriny & ors on behalf of the Karajarri People v The State of Western Australia*[4] and *Paul Sampi & Ors v State of Western Australia*,[5] the rulings which the Federal Court is prepared to make which accommodate the public interest it has recognised, and the practical issues which may arise in ensuring the appropriate balance between competing matters of public interest in this context.[6]

The Court's power to restrict access to evidence

Justice Olney[7] in *Mary Yarmirr & others v Northern Territory of Australia & others*[8] had this to say about an application by the Croker Island peoples' that evidence be heard subject to a gender restriction:

> The applicants have indicated that they propose that only males be present on the occasion that evidence is taken at Somerville Bay and further that members of the public be also excluded. In substance what is now sought is a direction similar to that given by Lee J in *Ward and Others v Western Australia and Others* (proceeding WAG 6001 of 1995) when he ordered that at the hearing of gender restricted evidence in that proceeding each party is to be entitled to be represented by no more than two lawyers of the same sex as the witnesses and to have present one anthropologist of the same sex as the witnesses for the purpose of assisting the party's lawyers. His Honour also made orders relating to the divulging of such evidence to others and restricting access to the transcript of the evidence.
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> I have no difficulty with the proposition that there are some aspects of Aboriginal customary laws and traditions which, according to those laws and traditions, should not be disclosed to persons who are not entitled to know about them. Such restraints are not necessarily confined to disclosure of "men's business" to women or to "women's business" to men but those are common instances when communication may, according to customary laws and traditions, be prohibited.
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> Successive Commissioners under the *Land Rights Act* have frequently given directions concerning such restrictions but the present proceeding is different in character from the type of administrative inquiry required to be made under the *Land Rights Act* and I do not find the established practices of the Aboriginal Land Commissioners to be of much relevance here. This is a proceeding in the Federal Court of Australia in which the applicants seek the exercise of the judicial power of the Commonwealth. Whereas the Aboriginal Land Commissioner's function is to determine the existence of traditional Aboriginal ownership (as defined in the *Land Rights Act*) of claimed land and if found, to make recommendations to the relevant Minister concerning the granting of such land, the Court in the exercise of its jurisdiction under the *Native Title Act* is required to make a determination as to whether or not native title exists in relation to a particular area of land or waters and if so to determine, inter alia, the nature of such rights and interests (NTA s 215).
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> Section 17 of the *Federal Court of Australia Act* (the FCA) provides that except when sitting in Chambers, the jurisdiction of the Court shall be exercised in open Court (FCA s 17(1)) but the Court may order the exclusion of the public or of persons specified by the Court from a sitting of the Court where the Court is satisfied that the presence of the public or of those persons would be contrary to the interests of justice (FCA s 17(4)); and the Court may, during or after the hearing of a proceeding in the Court, make an

order forbidding or restricting the publication of particular evidence as appears to the Court to be necessary in order to prevent prejudice to the administration of justice or the security of the Commonwealth (FCA s 50).

The right of a party to a proceeding under the *Native Title Act 1903* [sic] to be represented by a barrister or solicitor is established by s 78 of the *Judiciary Act* which provides that in every court exercising federal jurisdiction the parties may appear personally or by such barristers or solicitors as by the *Judiciary Act* or the laws and rules regulating the practice of those courts respectively are permitted to appear therein. Part VIIIA of the *Judiciary Act* deals with the entitlement of a person to practice in any federal court as a barrister or solicitor or both. In effect all State and Territory practitioners have (subject where appropriate to his or her name being entered in the Register of Practitioners) the right of audience in any federal court. The Native Title Act expands the right of audience in proceedings under the Act to include a barrister, a solicitor or another person (NTA s 85).

Apart from any specific power that may be conferred by the *Native Title Act*, the Court does not have the authority to deny the right of a party to be represented by a barrister or solicitor of the party's choice and *a fortiori* does not have the power to deny a party the right to be represented by a barrister or solicitor by reason of the gender of the barrister or solicitor.

In support of the direction sought the applicants call in aid s 82(2) of the *Native Title Act* which mandates that the Court, in conducting proceedings under that Act, must take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders. This raises the question as to whether s 82(2) empowers the Court to deny a party the right to be represented by a legal practitioner of the party's choice.

Section 219 of the *Native Title Act* amended s 59 of the *Federal Court of Australia Act* to enable the Court to make Rules of Court in relation to the practice and procedure of the Court in relation to any matter arising under the *Native Title Act* (NTA s 59(2)(zj)). Order 75 of the *Federal Court Rules* (Native Title Rules) came into effect on 21 March 1994 but has since ceased to be of effect. There are currently no operative rules in force specifically dealing with practice and procedure in relation to *Native Title Act* proceedings. However, the previous rules did not touch upon the matter presently under consideration and there is no other Rule of Court which entitles the Court to interfere with the right of a party to choose his or her own legal representation. I do not think that s 82(2) of the *Native Title Act*, which is expressed in very general terms can be construed as modifying the effect of the very explicit provisions of the *Judiciary Act* and this is particularly so in the light of the absolute terms in which s 85 of the *Native Title Act* is expressed. If s 85 had been expressed to be subject to s 82(2) it may well be that a different conclusion would be open, but that is not the case.

In my opinion the legislative regime presently applicable to the representation of parties in Federal Court proceedings is not such as to authorise the Court to make an order which would limit the choice of the legal representative of the party by reference to the gender of the representative. The Solicitor-General for the Commonwealth has suggested that if there were such a power it would be in conflict with Chapter III of the Constitution. I find it unnecessary to explore that aspect of the argument as I am satisfied that no such power exists under the current legislation.

> It is a generally accepted principle that the Court has no authority to exclude a party from the hearing of a proceeding except where the party's conduct may justify his or her exclusion. In my opinion it would rarely be the case where the presence of a party could be said to be contrary to the interests of justice. Indeed, the contrary is so. To exclude a party from the hearing of his or her own cause would be the very antithesis of justice. I do not think that s 17(4) of the *Federal Court Act* operates so as to authorise the Court to exclude a party who has not misconducted himself or herself and in particular the section could not reasonably be construed so as to authorise the exclusion of a party merely by reason of the party's gender.[9]

It was in that context, having heard arguments from State and Commonwealth Government representatives which echoed the view expressed by Justice Olney, that the Full Federal Court in *State of Western Australia v Ward (on behalf of the Miriuwung Gajerrong Peoples)*[10] concluded that s.17(4) of the *Federal Court Act 1976* (Cth) permitted the exclusion of certain persons (including legal representatives) from the proceedings if it would be in the interests of justice to do so. The Court concluded that the interests of justice require the weighing of competing interests, including:

(a) the interest in the open administration of justice;
(b) the interest of the parties knowing all of the evidence actually or potentially adverse to their interests;
(c) the interests of the parties being able to test all evidence actually or potentially adverse to their interests;
(d) the interest of the parties respectively being able to be represented as to all aspects of the case by the one representative or team of representatives;
(e) the interest of the parties being able to freely choose their own legal or other representatives;
(f) the interest of ensuring that the parties are equally able to give, and lead from others, the evidence relevant to their respective cases;
(g) the interest of the Court showing respect for legitimate cultural and other differences between persons involved in the legal proceedings; and
(h) the interests of advancing, rather than detracting from, the purposes of the relevant legislation.[11]

The Court indicated that before making an order allowing evidence to be presented in gender restricted circumstances, a Court would need to be "satisfied, usually following the receipt of evidence of the existence of the asserted legal or cultural rule or norm, of the extent to which (if at all) such rule or norm admits of flexibility in its application, of the importance of the relevant evidence to the case of the party seeking to call it, of the degree of likelihood that if the requested restrictions are not imposed on the publication of such evidence the evidence will not be given, and of the proportion of the total evidence to be called by the applying party in respect of which orders restricting its publication are likely to be sought."[12]

What is gender-restricted evidence?

Gender-based secrecy within the religious domain is an integral feature of most Australian Aboriginal societies. Notwithstanding some occasional and limited instances of what may be termed cross-gender 'overlap', such culturally sanctioned secrecy typically pertains to esoteric knowledge which is deemed to be the exclusive preserve of adult members of a single sex. In the case of males, access to knowledge of this kind is almost invariably confined to physically initiated men. The content and associated referents of such esoteric knowledge may variously include myths, names, designs, objects, songs and sites. In the case of females, the esoteric areas of women's knowledge

may relate to such maters as conception, birthing and reproduction and sites related to the same, as core components of personal, group and country identities.

Within the context of native title claims, the importance of evidence concerning gender-restricted knowledge is essentially two-fold. First, such knowledge typically provides the basis for establishing and substantiating connections to country through such means as song, myth and ritual. Second, it is often important in contexts where there has been no physical connection maintained by the claimant group to some or all of the claim area. Evidence in that category, which comprises evidence of a continuing spiritual connection, may be the only evidence of the continuity of connection, in accordance with traditional laws and customs, which is available to prove the continuing existence of native title rights and interests. As Justices Beaumont and von Doussa said in *Western Australia v Ward:*

> Actual physical presence upon the land in pursuit of traditional rights to live and forage there, and for the performance of traditional ceremonies and customs, would provide clear evidence of the maintenance of a connection with the land. However, the spiritual connection, and the performance of responsibility for the land can be maintained even where physical presence has ceased, either because the indigenous people have been hunted off the land, or because their numbers have been so thinned that it is impracticable to visit the area. The connection can be maintained by the community, in so far as that is possible, off the land, and that ritual knowledge including the knowledge of the Dreamings which underlie the traditional laws and customs, continue to be maintained and passed down from generation to generation.[13]

This is not to say that all native title claims will, could or even should involve the presentation of gender-restricted evidence. It is simply to affirm that, in cases where applicants are prepared to give such evidence, its value and utility are typically high.

A situation may also arise, as it did in the cases discussed below where there is gender restricted information in previously published material written or photographed by anthropologists and others. It would generally be highly offensive to native title claimants for such material to be publicly discussed in the course of native title Court proceedings. In order to accommodate cultural concerns in relation to such material, gender restrictions may also be sought in relation to the public communication during the course of the proceedings of such information.

Role and duties of expert anthropologists in respect of gender-restricted knowledge

An anthropologist, acting in accordance with generally accepted norms of the discipline, would accept a professional obligation to informants to protect the confidentiality of any gender-restricted material recorded in the course of research, whether it be in the form of field notes, tapes, or the like. That would include a duty not to speak (that is, discuss details) of gender-restricted information in open court and to only disclose such information strictly in accordance with the wishes of informants. The informants, as custodians of their law and culture, have an onerous responsibility in such situations to strike the appropriate balance between respecting their traditional law and responding, to the extent necessary, to the legal requirements of presenting their native title claim to the Federal Court.

An anthropologist engaged for the purpose of providing an expert opinion in relation to gender-restricted evidence in a native title claim would, ordinarily, regard it as a professional duty to be present at the giving of such evidence. That follows from the need to provide a professional

assessment of the significance of the evidence. In order to make such an assessment, an anthropologist would need to observe things which will not be recorded on a Court transcript, such as:

- who is present,
- who speaks,
- the age, social status and social standing of the witness,
- the volume and tone of voice employed by the witness (whether it is typically muted and reverential),
- the body language and gestures of the witness,
- the relations of deference and/or concurrence expressed in non-verbal form of others, and
- the geographical referents of the information.

Objectivity of anthropologists as expert witnesses

The first duty of an anthropologist, as an expert witness, is to the Court, not to the party who may call the expert to give evidence. An expert is not an advocate for a party.[14] An expert called by a native title claimant group is no more or less objective than an expert called by a respondent party. Each is paid a fee for a service to the respective party in an adversarial process. Each is susceptible to being influenced by the interests of that party, and each has an equivalent responsibility to resist compromising the weight of the expert opinions to be proffered to the Court by succumbing to any temptation to adopt the role of a partisan advocate.

The expert who may have conducted intensive research with a native claimant group is not necessarily to be regarded as lacking objectivity when compared to an expert contracted by a respondent party, who has had no contact with a native title claim group. The expert contracted by a respondent party is just as susceptible to the bias of adopting a cynical view towards the case of the applicants, as the expert contracted by the applicants is likely to adopt a sympathetic bias.

Partisan advocacy by an expert is to be distinguished from the entirely legitimate adoption by an expert of a considered view, which is based upon an appropriate level of research within a discipline. If an expert view is properly based in the discipline of the area of expertise being relied upon, it is irrelevant that the conclusions reached may be supportive of particular interests which may be represented in litigation.

Traditional law conditions of giving gender-restricted evidence

Aboriginal people are generally loathe to disclose or discuss **any** gender-restricted knowledge in the presence of outsiders. In part, this is because a condition of holding such knowledge is precisely that it not be disclosed to any persons who do not meet the appropriate cultural standards or qualifications. Often, too, it is the case that gender-restricted knowledge is explicitly regarded as being held for and on behalf of all members of a particular society – or even several societies within a given region. In terms of its disclosure to persons other than those traditionally qualified to receive it, it is not considered to be the sole property of an individual. Such knowledge is almost invariably held to be inherently dangerous, and those who hold it have a responsibility to protect others from that danger. Insofar as it is considered to derive from supernatural world-creating beings, and is typically regarded as a fundamental aspect or feature of these eternal entities, such knowledge is generally construed by Aboriginal people as filled with awesome metaphysical power. Improper disclosure may result in death, injury or the exacting of physical retribution, whether in respect of the giver, the receiver or both.

In the event that relevant holders of knowledge do agree to impart it within an extra-traditional context, for example a native title claim, they typically do so only on certain conditions:

1) only persons of the appropriate gender are present,[15]
2) the most senior people present it, typically in the presence of their peers,
3) it is given on location,
4) it is given face to face, and
5) those who receive it must undertake to keep it to themselves.

Even on the conditions outlined above, the giving of gender-restricted evidence in a native title claim almost invariably represents an exceptionally difficult compromise on the part of the relevant applicants. In essence, they find themselves in a position of contravening their own cultural rules, beliefs and practices by disclosing to unqualified persons their most treasured religious information for the sole purpose of obtaining basic rights to the country which they believe is, and always was, theirs. Moreover, they do so in a context in which there is a hope, but no guarantee, that the significance to them of the evidence will be understood by the Court, and that the evidence will enhance the prospects of the rights they are claiming being recognised. Having taken that risk, a failure in the case would bring great shame upon them. The difficulties, if not the very real anguish, attending this process need to be clearly understood and respected by all parties, if justice is to be adequately served.

Two case studies of judicial approaches to the issue of gender-restricted evidence

Justice North in Karajarri

The Karajarri people[16] continue to subscribe to a complex range of mythologies and associated ritual forms and practices, many of which refer directly to the supernatural constitution and definition of their traditional territorial domain.[17] Significant elements of this religious corpus are locally regarded as the exclusive preserve of initiated men.

Aware that some anthropologists (for example, Piddington and Petri) and populist writers (for example, de Grys) have previously revealed details of some of their culturally restricted beliefs and practices to the wider Australian public, senior Karajarri men categorically stated to the consulting anthropologist that they would not further compromise their valued traditions by speaking in open forum (that is, in any context where women and/or children are present) about such matters. To do so, they maintained, would amount to breaking their "Law".

Of equal importance for the conduct of any formal proceedings is the fact that senior Karajarri men extend this same view to any reference to culturally sensitive topics by others whilst in their presence and, further, to the visitation of gender-restricted sites. Geoffrey Bagshaw, the consulting anthropologist and an author of this paper, gave his opinion in his report to the Court that failure to make practical allowances for these concerns carried with it a significant risk of disruption to the Court – whether as a result of animated protests among the initiated male claimants, or their wholesale withdrawal from proceedings.

Since secrecy is itself an integral dimension of the traditional customs, values, beliefs and practices around which the Karajarri native claim revolved, the stated position of senior Karajarri men in relation to the issue of culturally restricted information disclosure should not be interpreted as mere intransigence on their part. Rather, it was an unambiguous expression of their cultural concerns, integrity and sense of responsibility. In the Karajarri case it was suggested that the men may have been prepared to reveal and speak to culturally restricted material on the prior condition that such action met with the consent and approval of other senior Law-men from the wider region and then only in an appropriate, gender-restricted (that is, adult male) setting.

Patrick Dodson, who was called as a witness in support of the Karajarri people, expressed it this way:

> Well I come from the Yawuru people and we're connected to the law that runs through the Karajarri and Nyangumarta country. We have been trying to balance what it is the court wants and needs as opposed to what our law will allow and there's been many things about the procedure of the court that have been a cause of worry for the senior law people, concerns about information and concerns about the pressure that's placed on the Karajarri bosses because we are all connected here, Yawuru, Nyangumarta people, Nyikina, Mangala people, Nyangumarta people.

Importantly, for the role of the consultant anthropologist, as was noted in the anthropologist's report, the same senior Karajarri men had unequivocally sought, and received, the anthropologist's personal and professional assurances to the effect that he would not knowingly disclose any culturally restricted material in a public setting, whether that be in open court or in documents such as the report.[18] The constraints imposed by these undertakings are, of course, considerable. Not least among them, the anthropologist had to find ways of presenting and discussing some of the most critical issues to the claim (for example, the supernatural definition of Karajarri territory, the role and nature of ritual performance, the content of traditional Law, and such like) in a manner that was not only acceptable to the Karajarri people as a whole, but which also conveyed something of the substance of the particular matters addressed. To do so within the context of the report, he often had to resort to a degree of generalisation and/or circumspection.

In relation to the issue of to whom the gender-restricted evidence might be revealed, in the Karajarri case, Patrick Dodson gave evidence that:

> The people have to be in the presence of the bosses of the law, or at the place any information is to be given. They have to be in the control of the law, as it were, from our point of view, our Aboriginal law. So they got to be there, they got to be face to face, they got to be seen and it's not only for them just to receive information or observe those things, because it's also about what kind of a human being they are, what kind of a man they will be or won't be. It can only – you can't take that information outside of those places and those times and go and talk about it privately outside. It's not permissible. It's not what the law allows. There's worry [in respect of recording that information in writing]. People are extremely worried about the loss of the control over that information, who sees it. It's not what people do, it's not what we do as Aboriginal people, we don't write these things down and hand them around. It's not permissible under the law. It's a worry for – that's why you have all these bosses here today from the various groups that I mentioned, to make sure that there's no danger, danger can be from our point of view, serious. It can be something that people lose their lives about, either because they are seen to break this law, break our law. The country punishes us or we are punished by the people of our law, so it's important that people - whatever we say, is said in the presence of the right people, the senior people and that people witness what it is we say so that no-one can say that something was said and we were responsible for breaking the law. If it's written down, then someone could say, well this person told me and in fact that person mightn't have told them because they weren't present in the meeting or in the ceremony ground to be told what it was that people want to tell them.

Justice North, in the Karajarri case, in allowing access to the restricted evidence only to those present to represent parties and hear the evidence, said, "It seems to me Mr Dodson's evidence

underscores the importance which the giving of evidence face to face and the necessary control over the evidence which Aboriginal law mandates."

Justice Beaumont in Bardi and Jawi

In the case of the Bardi and Jawi peoples,[19] in a report of Geoffrey Bagshaw filed in Court[20] concerning cultural concerns about gender restricted information (which was edited to remove any gender restricted information), it was reported that certain site names known only to initiated males could not be uttered in contexts where women and children were present. The report also noted that the esoteric details of certain places, the names of certain supernatural beings and particular ritual forms and activities associated with them were known only to initiated males. The report drew attention to a number of published documents, which contained information of the type which Bardi and Jawi peoples considered ought to be restricted to initiated males.

A Substance of Restricted Evidence had been filed on behalf of the Bardi and Jawi applicants, which indicated that the gender restricted evidence would concern certain cosmological supernatural ancestral beings and places they visited and certain ceremonies.

A public statement which was agreed to by the parties was also filed, as to the "Effect of Gender Restricted Evidence" which was contended for by the applicants. It set out the detail of which witnesses would give evidence, when they would give evidence and that they would speak about the activities of certain supernatural beings and objects in relation to certain land forms, offshore features, routes of travel and cultural practices. The statement indicated that the specific details relating to each of those matters could not be revealed in the document.

The Bardi and Jawi applicants supported their application to lead evidence in gender restricted circumstances with evidence by affidavit and confirmed by oral evidence from Paul Sampi, on behalf of the applicants. The evidence was to the effect that there was a customary rule against talking about these things with women or children; who can neither hear them, see them, or read about them. The affidavit deposed to the consequences of breaching that rule: that both those who imparted and those who received such information would get sick and die, because their law is dangerous. Counsel interpolated in argument that this was a reference to the supernatural spiritual aspects of the operation of the applicants' law, and that the effect of the affidavit was that it acknowledged that the law is a binding concept in the applicants' tradition.

The affidavit also made reference to the fact that that tradition had been breached by anthropologists in the past, and expressed the applicants' concern about that.

Importantly, in the affidavit it was stated (and statement was confirmed by oral evidence) that, "In our law we can only talk about these things with other men face-to-face. We need to see those men close up when we talk to them about these things. Those men must hear it from us, not from a book or paper". Sampi said in oral evidence that if the evidence was given to people other than face-to-face "that's breaking our law. It's like taking away the Judge's book and ripping it up and chucking it on the fire. It's as bad as that."

In the Bardi and Jawi case the respondents did not oppose the application for a gender-restriction on evidence. The Commonwealth and the Western Australian Fishing Industry Council, however, sought an order which would allow the communication of the evidence to consultant anthropologists, whom each had engaged, but who would not be present at the hearing of the evidence.

The trial Judge, Justice Beaumont, having considered the affidavit and oral evidence of Sampi and submissions from the parties, made an order restricting the publication of the evidence on a gender basis, but acceded to the application of the Commonwealth and WAFIC on the basis that it was "in the interests of justice".

In his reasons for Judgment,[21] Beaumont J gave "some weight" to the circumstance that the Commonwealth and WAFIC had "adopted the approach that, given the dimensions of the on-site evidence in this matter (spread over a period in excess of three weeks) it is not practicable [in terms of "considerations of cost and availability"] to arrange for [expert anthropologists] to be present over the period of the hearing on country." He was also "influenced by the hope (at least) and perhaps the expectation, that if access of a particular respondent to expert professional anthropological assistance is made available, this should and, at least could, assist in the process or reducing the number and scope of the issues in dispute between the parties." He described that as a "weighty consideration" to be balanced against the consideration that "*prima facie*, any professional anthropologist engaged in the conduct of litigation of this kind should have the advantage that inevitably flows from presence at the site." His Honour was only prepared to accede to the application on condition that counsel for the respondents certify that, "in their opinion, disclosure at that stage of the evidence is necessary for the proper conduct of that respondent's case; and … any such expert has first filed with the Court an undertaking not to divulge the evidence to any person."

Upon Justice Beaumont having made the ruling in the Bardi and Jawi peoples' case that the evidence might be revealed to persons not present at the hearing of the evidence, counsel for the applicants was instructed to advise that Court that the evidence would not be given in those circumstances.

The Bardi and Jawi peoples filed an appeal against the decision of Justice Beaumont, on the grounds that:

1) insufficient weight had been given to the breach of traditional law which would be occasioned by the transmission of the evidence to persons not present;
2) there was a failure to take into account the concerns of Bardi and Jawi peoples;
3) the assertions of cost and inconvenience were unsupported by evidence;
4) it was speculation that the experts might assist the administration of justice; and
5) the conditions of the order included a delegation of the judicial function to Counsel.

That appeal was withdrawn after the trial Judge acceded to an application on behalf of the Bardi and Jawi peoples to vary the orders, so as to suspend the operation of the provision allowing for disclosure to the experts not in attendance at the hearing.

Both the appeal and the application to vary the order were supported by joint affidavit evidence from a group of four senior Bardi and Jawi men. It supported the evidence of Sampi and confirmed that they could not break their law to give the evidence if it would be passed on to anybody they did not see face to face. Anthropologists Geoffrey Bagshaw and Katherine Glaskin also provided joint affidavit evidence. They expressed the opinion that it is essential for anthropologists to provide reliable comment within the discipline of social anthropology, and that they be physically present when gender restricted information is disclosed on-site in order to adequately take account of important factors which cannot be gauged from a written record.

The application to vary the orders was also supported by a variation to the itinerary of the hearing proposed by the applicants, which would condense the hearing of gender restricted evidence into two days. Justice Beaumont was satisfied that a sufficient change in circumstances had been demonstrated for him to vary his earlier order.

An issue, which pervaded the consideration of the matter, was whether the applicants could have any assurance that, having given the evidence, it would not at some later time be disclosed in a manner contrary to their traditional law. The trial Judge made it clear that an order made during the course of a trial could only ever be an interlocutory order, and that no such assurance could flow from such an order. The applicants were obliged to proceed on the basis that, in the absence of the possibility of such an assurance, their only option was to weigh that risk against the importance to

them of presenting the evidence. In doing so, they had the option of informing the Court that they chose not to rely upon evidence at any time when the circumstance might arise that the Court would indicate that it was in the interests of justice that such evidence be disclosed contrary to traditional law. Justice Beaumont indicated that if the applicants said they were not relying upon certain evidence he would not take it into account in his reasons for judgment. It followed that there would then be no interest of other parties which would justify such evidence being disclosed contrary to traditional law.

Conclusion

The cases discussed suggest a significant tension in the interface between the technical rules for the provision of justice in the Federal Court and their supervision by the Federal Court Justices, on the one hand, and the responsibility of Aboriginal leaders, on the other hand, to abide by the rules by which they preserve their culture, while feeling compelled to reveal what would not ordinarily be revealed, in order to secure recognition by the Australian community of their control over the land and waters which provide the basis of their cultural existence.

The litigation process of the Federal Court, in the tradition of the legal system upon which it is based, has as one of its precepts a faith in the process of exposure of information to challenge by the public and adversaries, to test the efficacy of asserted fact. Aboriginal culture, on the other hand, has a tradition of sparing and incremental dissemination of the information, which it regards as most crucial to its existence, and then only to those who have demonstrated that they are worthy of receiving the knowledge and will treat it with the respect which it must be accorded in order to maintain its significance. An obvious tension exists between those two cultural views when they come together in the context of a native title claim.

A heavy onus rests upon those involved in the litigation process, including the Judiciary, legal representatives and anthropological experts, to ensure that those tensions are recognised and great care is taken to ensure that an informed and accurate balance is struck between competing cultures and interests, which will ultimately accord true justice and recognition of the interests of Indigenous peoples to which the common law entitles them.

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[1] (1997) 145 ALR 512.
[2] proceeding WAG 6001 of 1995.
[3] [1997] 274 FCA (15 April 1997).
[4] WAG 6100 of 1998.
[5] WAG 49/1998.
[6] The paper, because of its focus on the limited number of Federal Court proceedings concerning native title claims which have addressed this issue, does not canvas the considerable discussion of gender restricted evidence which has occurred in the context of claims under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), for example, Rose, D.B. 'The Public, the private and the secret across cultural difference' in *Heritage and native title: anthropological and legal perspectives*, Finlayson, J. and A. Nakano-Jackson (eds), Native Title Research Unit, AIATSIS, Canberra 1996, pp. 113-128; Rose, D.B. 'Women and Land Claims', *Land, Rights, Laws: Issues of Native Title*, Issues Paper Vol.1 No.6, Native Title Research Unit, AIATSIS, January 1995; Justice Gray, Office of the Aboriginal Land Commissioner '*Aboriginal Land Rights (Northern Territory) Act 1976* re the Palm Valley land claim no.48: transcript of proceedings', Darwin: Auscript, 1992-1994; Justice Gray, Office of the Aboriginal Land Commissioner '*Aboriginal Land Rights (Northern Territory) Act 1976* re the Tempe Downs and Middleton Ponds/ Luritja land claim no.147: transcript of proceedings', Indooroopilly, Qld: Transcript Australia, 1995; Andrews N., 'Illegal and pernicious practices: inquiries into indigenous beliefs', in *Heritage and native title: anthropological and legal perspectives*, Finlayson, J. and A. Nakano-Jackson (eds), Native Title Research Unit, AIATSIS, Canberra 1996, pp. 62-90.
[7] Justice Olney had experience as an Aboriginal Land Commissioner under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).
[8] [1997] 274 FCA (15 April 1997).

[9] Having succeeded in their argument, the Government legal representatives voluntarily complied with the gender restrictions sought by the native title applicants, and so it was not necessary in that case for the native title applicants to pursue any appeal in relation to Justice Olney's decision.
[10] (1997) 145 ALR 512.
[11] Ibid per Branson J at 529-30.
[12] Ibid per Branson J at 530.
[13] (2000) 170 ALR 159, at [243].
[14] see Black CJ, 'Practice Direction; Guidelines for Expert Witnesses in proceedings in the Federal Court of Australia', revised 31 May 2001; Cooper J, 'Federal Court expert guidelines', *Australian Bar Review* (1997-8) 16, pp 203-211.
[15] This pre-condition is frequently impossible to achieve when the material is restricted to the female gender, because the Judicial officer presiding, who is an essential participant in the process, is more likely than not to be a male. Female native title claimants are thus often placed in the further difficult position of determining whether or not the evidence can be presented to a male, because of his office, and the judgment they have to make as to the essential nature of the evidence is even more pressing than for male claimants. During the trial in *Ward v Western Australia* the claimants were in three separately represented groups. The first group chose to present evidence restricted to females to a male Judge. The second group chose to present no evidence which was restricted to females, and the third group chose to give evidence through the most senior woman that she was the leader of 'women's business'. She indicated the general vicinity of where it took place, but gave no more detail as to its content.
[16] *John Dudu Nangkiriny & ors on behalf of the Karajarri People v The State of Western Australia & ors* WAG 6100 of 1998.
[17] Bagshaw, G. Expert Anthropologists Report, Chapter 4, tendered in the Karajarri case.
[18] Such assurances are consistent with sections 3.1 and 3.2 of the Code of Ethics of the Australian Anthropological Society:

> 3.1 Where a conflict of views or interests arises … the views and interests of those studied should be placed first, except where this would compromise a member's conscience of commitment to truthfulness. A member should endeavour to ascertain the views of those studied, as independently and impartially as possible, in such a context.
> 3.2 Any voluntary revelation of personal identities or of confidential information should be solely by agreement with those whose identities or knowledge have been recorded by the anthropologist. In the case of deceased persons, members should have due regard to the interests and feelings of their surviving kin and fellow community members.

[19] *Paul Sampi & Ors v State of Western Australia & Ors* WAG 49/1998.
[20] Confidential Notes on Bardi and Jawi Gender-Restricted (Male-Only) Sites and Documentary Records, 17 April 2001.
[21] *Sampi v State of Western Australia (No 2)* [2001] FCA 620.

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