

Land, Rights, Laws: Issues of Native Title

Native Title Research Unit

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The High Court Mabo decision in 1992 and the passing of the Commonwealth Native Title Act in 1993 mark a fundamental shift in the recognition of indigenous rights in Australia. The Act, like the High Court decision on which it is based, transforms the ways in which indigenous ownership of land may be formally recognised and incorporated within Australian legal and property regimes. The process of implementation, however, raises a number of crucial issues of concern to native title claimants and to other interested parties. Many of these will have to be decided in the courts. Nevertheless, information about and discussion of the issues are important for those needing to address the matters raised by the claim process. This series of papers is designed to contribute to the information and discussion. The papers address the shift from notions of statutory land rights to the rights of indigenous peoples that pre-existed colonisation and exist within the broad spectrum of their human rights. Within these rights, land is an essential component.

One of the issues that has been identified as of increasing concern in the native title claim process, and one that emerged in the land claim process in the Northern Territory, is the disadvantage being suffered or likely to be suffered by Aboriginal women. Dr Deborah Bird Rose is an anthropologist who has worked extensively on Northern Territory land claims and has served as consulting anthropologist to the Aboriginal Land Commissioner on a number of claims since 1990. She is at present a Research Fellow of the North Australian Research Unit of the Australian National University.

WOMEN AND LAND CLAIMS

Deborah Bird Rose

In the Northern Territory the *Aboriginal Land Rights (Northern Territory) Act 1976* (hereafter referred to as the *Act*) has had ambivalent effects. On the one hand, it has enabled more than 36% of the land and 86% of the coast line to be transferred to Aboriginal freehold title, and has thus enabled thousands of Aboriginal people to achieve a great measure of economic and political opportunity. On the other hand, the *Act* has created inequalities among Aboriginal people.

The most publicly compelling type of inequality is derived from the fact that under the *Act* only unalienated crown land is available for claim, while land that was held as reserve land at the time of the passage of the *Act* became Aboriginal freehold land without having to go through the claim process. As a result, some groups of Aboriginal people are in legal possession of the whole or substantial parts of the country with which they assert a relationship of ownership or belonging. Other groups are in possession of portions of land so small as utterly to trivialise their aspirations. A few people are in possession of nothing at all under Aboriginal freehold title. Thus some groups have been massively advantaged

economically, culturally, psychologically, and in terms of their long range prospects for cultural and social survival.

By contrast, gender inequality has been pervasive throughout the history of claims to land, but has received far less public attention. Land claims until recently have involved a massive privileging of senior Aboriginal men vis-à-vis senior Aboriginal women.

In this brief paper I consider some of the ways in which Aboriginal women have been disadvantaged by the privileging of men in a system that is predominantly male. I then discuss attempts Aboriginal women and their anthropologists and legal counsel have made to get more of their evidence into the land claim process. My urgent intention is to alert claimants, anthropologists and lawyers who are preparing Native Title cases to some of the precedents in the *Act*. The marginalisation and exclusion that Northern Territory women have experienced is in clear contradiction to the intention of the *Act*, and must not be repeated in other parts of Australia under the more recent Native Title legislation.

Invisible women

In the seventeen years during which claims to land have been made under the *Act* there has come into existence a public record consisting of much of the written materials prepared in advance of the hearing, the transcript of the public portions of the hearing, references to evidence and performance in the context of secret/sacred knowledge, and the final report by the Aboriginal Land Commissioner. This written record can be understood to document a people's relationships to land at the time of the inquiry, but the record is extremely narrow and gives a highly biased representation of Aboriginal women as land owners and as managers of country, of kinship and other social relations, and of ecological, geographical, religious and other forms of knowledge. The spiritual dimension of their lives sometimes is not even mentioned.

The written record reflects processes of consultation, investigation, preparation, presentation and representation. It clearly reflects the male dominance of the legal profession and the greater numbers of men who have been employed as senior anthropologists in the preparation of land claims. The written record thus tends to confirm the androcentric heritage of anthropology as well as to reinforce the stereotype, commonly held by many men and women of non-Aboriginal culture, that Aboriginal societies are male dominated and that women are essentially pawns in social life. In an astonishing number of claims it has been seen to be quite adequate for men to speak for women and for women to say virtually nothing on their own behalf.¹

The written record of land claims also stands as testimony to a tunnel vision approach on the part of land councils which asserts that as long as people get their land it does not matter who gives evidence. In this view, gender equity is seen to be an optional extra that land councils simply cannot afford.

The tunnel vision approach depends on a view which rarely is articulated (but which most people involved in land claims have heard at one time or another) that the *Act* has no bearing on Aboriginal people and their Law in the further course of their lives. The idea is that people present their case, get their land, and get on with their lives. This simplistic view obscures the fact that a land claim is a process which can take up years of their lives, involve them in intense politicking, engage their deepest spiritual, emotional and intellectual endeavours, and radically change the conditions not only of their own lives but of the lives of their descendants as well.

¹ There may be historical or cultural reasons why it is appropriate for men to carry the burden of evidence, but this is a matter to be investigated rather than assumed.

The simplistic view is false as well as self-serving. Emerging from an assumption that a land claim is an alien procedure which is imposed upon Aboriginal people, this view would have us suppose that Aboriginal people do not seize the claim procedure itself. In fact, however, many land claims are treated by the claimants as a ceremony for land,² and in ceremony the right people should be involved in the right ways. Land claims which exclude women as participants have a socially disruptive potential equivalent to that of ceremony improperly conducted.

In a successful claim, Australian law recognises the authority and integrity of the claimants' Law by granting the land. One result is that a set of Law persons has been empowered, and their empowerment feeds back into the on-going life of country and community. The people who spoke to the judge as Law persons and were subsequently found to be traditional owners within the terms of the *Act* are positioned very powerfully within their own local political systems. In Aboriginal societies, ownership of knowledge is translated into social power through making things happen, whether it be ecological, social, intellectual, spiritual. Getting land back is a superb demonstration of the power not only of Law but of the person who holds it and demonstrates it. Men have been massively advantaged economically, culturally, psychologically, and in terms of their long range prospects for political action.

The disadvantage to women is not only, or even predominantly, in matters of secret/sacred knowledge. Rather, the disadvantage for many women (not all) encompasses the full dimension of their right to speak with knowledge and passion about their status as land owners. If the anthropologists work most closely with men (as most male anthropologists are encouraged to do), and if the lawyers work most closely with men (and all the lawyers who have had the responsibility of carrying a land claim have, to date, been male), and if land councils see their accountability first and foremost to Aboriginal men, the results are dishearteningly predictable. There may emerge the view, apparent in many claims, that all adult men know more, and are therefore better qualified to act as witnesses, than all women; even junior men, according to practices developed under this set of assumptions, are treated as if they know more than the most senior women. Aboriginal men may believe that only they are authorised to speak in depth in the context of the hearing. Women are unlikely to have come to understand the specifics of the *Act* and the nature of being a witness. They may not know what their rights as claimants might be, and how they might go about asserting them. They are unlikely to have been proofed to anything like the degree that men are proofed, and anthropologists and lawyers alike may be quite unaware of the depth of knowledge they have to offer. Senior women may not have indicated, or felt that they had the opportunity to indicate, to their legal counsel that they have information which bears crucially on the claim.

One of the most haunting moments of my land rights experience was being taken by the hand by a group of women in a community I was visiting, drawn away to a quiet spot back from the homes, and asked: 'What about that land rights? They going to let women talk for land too, or is it just for men?'

My experience of land claims has been that there is a continuum along which can be situated different women's desire to speak for their country, their desire to demonstrate their status as Law women, and their desire to ensure that they as individuals, their group as a whole, and their descendants are understood to be powerful land owners. Individual women, like individual men, position themselves differently, and there are also differences from group to group, region to region. Where women's desires are strong, they have, for well over a decade, regularly been frustrated.

Women's evidence

² This aspect of land claims has been commented upon by Peter Sutton (pers. comm.) and others; I take it up in Rose (forthcoming)

Men's restricted knowledge has been accepted by Land Commissioners as a dimension of Aboriginal culture which they are prepared to respect, and most land claims have included greater or lesser amounts of restricted (men only) evidence. Because of the predominance of men in the legal and anthropological positions, this has not appeared to pose a problem. Right from the first, however, women's restricted information has been objected to by opposing legal counsel.

Justice Toohey (1982) in his Report on the Daly River (Malak Malak) Land Claim discussed his decision about whether or not to receive a submission prepared by anthropologist Diane Bell in conjunction with the women claimants. Dr Bell sought to restrict the submission such that the only man to read it would be the Aboriginal Land Commissioner. Justice Toohey stated (1982: 86):

It should be clearly understood that if I receive the material it will not necessarily be denied to other parties. As it happens, all counsel participating are male but there are a number of female legal practitioners in Darwin and elsewhere whose services could be enlisted for the purpose of reading the report, just as there are female anthropologists who could be engaged for the same purpose. This may present some practical difficulties. But they are not insuperable.

His reasoning was by reference to Section 51 of the Act which reads: 'The Commissioner may do all things necessary or convenient to be done for or in connection with the performance of his functions' (1982: 87).

At one level the relationship between women's secret/sacred Law and a male Land Commissioner or Judge poses an insoluble contradiction. If women's Law is violated by the presence of men, then a male judge is unlikely to be brought into its presence. Women claimants, unlike men, are thus required to consider an inherent contradiction between the Land Commissioner and the restrictions. Throughout the Northern Territory many women have kept their secret Law secret. This was the decision made by the senior women claimants in the Jasper Gorge Kidman Springs Land Claim (heard in 1988), for example. Like other women in the Victoria River valley, the women in this area have secret/sacred sites, songs, dances, designs and objects; their secret/sacred ritual is owned according to a system of ownership which is coextensive with their system of land ownership; their organisation and performance of ritual expresses and authenticates land owning relationships. These women seriously considered showing the Aboriginal Land Commissioner, and all the relevant lawyers and anthropologists involved in the claim a portion of their most secret Law, but at the last moment they decided not to, saying: 'From Dreaming right up to now no man been look that thing. We can't lose that Law' (Rose 1992:114; 1994).

A strict identification of women's Law with the total exclusion of men, however, overlooks the complex gradations of secrecy in Aboriginal people's skilled and subtle management of knowledge (Rose 1994). The facile contention that if it is not totally secret then it must be totally public has disadvantaged women disgracefully. What matters in land claims, I contend, is not whether women reveal secrets. The important issue is whether women have opportunities fully and freely to give their evidence.

Recent developments and potentials

These issues arose in the recent Palm Valley Land Claim and the Tempe Downs Land Claim.³ Aboriginal Land Commissioner Justice Gray has made a series of decisions which radically enhance the possibilities for women to give their evidence under conditions which facilitate their authority.

The Palm Valley Land Claim was intensely contentious, with three claimant groups, two of whom were in particular and grievous dispute with each other. Unfortunately, no provisions had been made in advance for how evidence might be given so as to spare claimant groups some of the anxiety of having to speak in front of each other, while yet preserving the open hearing which natural justice requires. An extraordinary amount of evidence ended up being given in men-only sessions. Women of disputing claimant groups were in the position that they would never have access to the transcript of evidence given as part of a case against them. The situation was for them intolerable, and they became determined to ensure that they would have an opportunity to speak with the judge themselves. In consultation with a number of these women, and with Diane Smith, the anthropologist employed by the Central Land Council to make some belated efforts at consulting with the women claimants, I suggested a few options which have been trialed in the infamous Wagait dispute.

The women of one claimant group decided after much deliberation to request that they give some evidence to the judge with no men (other than the judge) present. The transcript, they proposed, would be available to be read by the legal advisers and anthropologists involved in the case, but it would not be circulated beyond that set of people. They stated, through their counsel, that these were matters which belong to a restricted domain controlled by women. The women also requested that the NT solicitor, Ms Cullity, not cross-examine them.

Their application not to be cross-examined did not succeed, but the debates around the issue of the exclusion of men other than the Land Commissioner highlight a number of interesting points. The application was put by their counsel, David Avery. Vance Hughston, barrister for the Northern Territory Government, objected:

Mr Hughston: If your Honour is to hear evidence which your Honour is to give any weight to at all, then I would submit in fairness to my clients, that I, as the only experienced land claim counsel amongst my party, should be entitled to hear that evidence...This is not, your Honour, a case of some secret sacred women's matters that cannot be revealed, as I understand it, indeed it is being revealed to your Honour. It is simply a matter that these witnesses would feel more comfortable if they could select the group in front of whom they would give their evidence, and if they could select the counsel who can or cannot ask them questions. But in fairness to other participants in an inquiry of this nature unless there are very, very sound religious sacred reasons why it should be done so, in my submissions these proceedings should be as open as possible so that people can have confidence in the conduct of these proceedings, that they are being conducted fairly and openly. If your Honour pleases (Palm Valley Land Claim Transcript, March 1994, p 246).

Mr Hughston's introduction of the issue of witnesses choosing to whom they will give their evidence and by whom they will be asked questions did not arise in connection with the men's only evidence, although exactly the same principles would appear to apply.

The judge over-ruled the objection:

³ My understanding of these two claims was formed in my capacity as Consulting Anthropologist for the Aboriginal Land Commissioner.

His Honour: The question then really is, is this evidence which involves matters which are secret from men in the ordinary course, in which case it seems to me that I ought to deal with it in exactly the same way as I deal with restricted men's evidence, namely that I should hear it under what I see as a special dispensation, and that I should otherwise exclude men...I feel obligated to hear the evidence in the same way as I would hear restricted men's evidence, and exclude anyone who happened to be female, be they lawyers representing people, anthropologists. My own consulting anthropologist [is] excluded from men's evidence, restricted men's evidence. I feel that I am obliged in the interests of resolving this claim to hear that evidence (Palm Valley Land Claim Transcript, March 1994, p248).

While the application made on behalf of this group of claimant women was to exclude all men other than the Land Commissioner, women of the opposing claimant group did not attend at this session. The transcript was, of course, later made available to their lawyer and anthropologist. This other group of women also wanted time with the judge, and a day or two later, they too made an application through their counsel for an equivalent session with the Land Commissioner.

Mr Hughston again objected, this time on slightly different grounds:

Mr Hughston: If things cannot be revealed to men, they cannot be revealed to men, and once you do reveal them to a man...I cannot see any reason why that cannot be explained to them that it has to be extended to legal representatives of parties, their chosen legal representatives...And again, your Honour, we do not have evidence of what [is] Aboriginal law on this matter, but it just seems an unusual way to approach the matter, to say that it is restricted to women only and then to have a man actually hear it. It just does not seem to me to make any sense, and there is really no evidence which can assist us in working out how it makes any sense (Palm Valley land Claim Transcript, March 1994, p 338).

Mr Hughston's appeal to biology - if the information can be imparted to one man, why not to others - is an impressive example of the way in which biological sex has become a category for arguments about restrictions. The biology argument obscures the fact that to be the recipient of knowledge is to be granted a privilege. In the context of land claims, and undoubtedly this will be the case in Native Title cases too, demonstrations of knowledge constitute for Aboriginal people demonstrations of ownership. It must be understood throughout that privately owned knowledge is presented in a public forum because the legislation requires Aboriginal people to demonstrate that they are who they say they are.

Mr Hughston's other point was that the women had not specified Aboriginal Law concerning the restrictions they sought, and that therefore it was impossible for him to know if their application was legitimate in terms of their own Law. The Aboriginal Land Commissioner refrained from engaging in this debate, and thus refrained from positioning himself as an authority on Aboriginal law. His over-ruling of the objection represents an important principle for the conduct of hearings:

His Honour: I have inherited a practice under which restrictions on evidence which is said to be the evidence of men only are freely granted, because, I suppose, commissioners have accepted the word of the representatives of claimants that certain items of evidence are desired to be restricted to men only for good reason, and that without inquiring into the details of Aboriginal law and the nature of the evidence in a public way, which would be necessary if such an inquiry were undertaken, commissioners have granted the restrictions. I think it would be most unfortunate if evidence from women, which is similarly restricted, were not able to be taken in these claims. Now, the most obvious difficulty about that is that the commissioner must be of one sex or the other, in a biological sense at least, and because I am a man it is easy for me to hear evidence which is restricted to men only. It is obviously not so easy for me to hear evidence which is

restricted to women only. In some cases necessity must triumph, and if the women are prepared to make an exception for me to hear that evidence in the interests of the claim and the matters with which the evidence deals, then I am of the view that the first principle is that I should hear it (Palm Valley Land Claim Transcript, March 1994, pp 339-340).

The Land Commissioner makes a very important point here: Land Commissioners have accepted that Aboriginal law includes restrictions, and have sought to honour the integrity of the information presented to them without seeking to assert that they exercise authority in relation to Aboriginal law.

The Tempe Downs Land Claim was heard in November 1994. Again, the claimant women sought restricted sessions during which they could give evidence to the judge. Again, Mr Hughston, acting on behalf of the Northern Territory Government, objected. Much the same ground was gone over, and Justice Gray made the percipient point:

I appreciate that it is short prior notice, and that it is not easy to find representation by experienced female counsel in relation to land claims. But I suppose it might equally be said that if we go on hearing only restricted men's evidence forever, then that is all we will ever do. And it would seem to me to be both unfair to the claimants, and a dereliction of my statutory duty if I were to refuse to hear evidence (Tempe Downs Land Claim Transcript, November 1994, p211).

There the matter might have rested, were it not for the fact that the Northern Territory barrister expressed his concern that restricted sessions were being used for the presentation of what he thought should be classed as unrestricted information. The exchange between the Land Commissioner and Mr Hughston is instructive in indicating how such concerns can be handled:

His Honour: I do not have control in advance of what evidence is to be led, and I am invited to make directions restricting evidence. I do that regularly in relation to men, and if I am invited in the same way to do it in relation to women, I propose to do so, provided that they are prepared to make an exception so that I can hear the evidence.

Mr Hughston: Your Honour, could I simply ask, is that irrespective of whether it is of a secret or sacred nature?

His Honour: Well, you would well know, Mr Hughston, that a lot of evidence that is not of a secret and sacred nature comes out in men only sessions...And sometimes there are attempts made to rectify that, to have agreement as to the portion of the transcript of a restricted session...But it is very hard to keep control over the content of the evidence, and I don't feel like stopping people when they are telling me something that could be of importance to them (Tempe Downs Land Claim Transcript, November 1994, p 273).

The concerns about whether there might have been information of a non-secret/sacred nature contained in the restricted transcript was dealt with by the provision that the claimants' woman anthropologist would prepare a report, vetted by the claimant women, which would make available to the appropriate men that portion of the information which can properly be communicated to them. To the best of my knowledge there have never been similar provisions giving women access to appropriate portions of evidence given in men-only sessions. The Tempe Downs Land Claim was a watershed. For the first time extensive evidence was given by women in restricted session with a restricted transcript. For the first time also, a land council (in this case the Central Land Council) made a helicopter available for women's site visits and site evidence. In a world where money talks, this was the first time that money began saying something about gender equity.

In the Tempe claim a whole group of women was given an opportunity to speak and to show their evidence on their own terms. I was deeply impressed with the authority and strength

which the claimant women communicated once they were in control of the context. Those of us who have worked with Aboriginal women and known their strength and authority, only to see that authority over-ridden in the course of male dominated land claim processes, will appreciate the momentous possibilities inherent in the reconfiguration of women in land claims.

The implications of Justice Gray's 1994 decision to hear women's evidence in restricted session move in two directions: 1. Within the Northern Territory the land councils and all the other institutions involved in land claims are on notice: women are refusing to be marginalised; if their potential is to be realised, there must be greater investments in research, representation, and presentation.

2. The Native Title Tribunal must seriously consider its procedures and practices in order to ensure equality. Based on the Northern Territory experience, women who want to have their say as claimants will need to press their rights vigorously in every context available to them.

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