INDIGENOUS WITNESSES
AND THE
NATIVE TITLE ACT 1993 (Cth)

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Indigenous Witnesses and the Native Title Act 1993 (Cth)

Introduction
One of the most immediate challenges faced by courts and tribunals operating under the Native Title Act 1993 (NTA) is to resolve the novel issues of practice and procedure which inevitably arise with the creation of a new jurisdiction. One such issue is whether Indigenous witnesses require any particular consideration when giving evidence in native title matters.

Courts exercising criminal jurisdiction have long recognised the potential for injustice when the Australian judicial process attempts to interface with people whose language, culture and traditions are fundamentally at odds with their own. Aboriginal Land Commissioners have confirmed that many of the problems identified are generic to any jurisdiction where Indigenous people are required to give evidence in judicial or quasi-judicial proceedings.

In this paper it is argued that without sensitivity to the way in which linguistic, cultural and historical discontinuities can operate to deprive courts of the best evidence from Indigenous witnesses this can act as a critical barrier to access to justice for Indigenous people.

The Hidden Cost of Recognition
Native title is a unique jurisdiction. In seeking a determination under the NTA applicants are required to come before courts to have recognised what they have always known to be true. They must do this in a way that is not only culturally unfamiliar but fundamentally antithetical to their own values surrounding the accumulation and dissemination of knowledge.

Knowledge, particularly ritual knowledge, in Indigenous societies is an intrinsically valuable commodity. It is gradually accrued over a lifetime and to a large extent is a measure of a person’s authority within the group. People do not disclose restricted knowledge to those who ought not to know of such things. To do so risks serious consequences. Yet to succeed in a native title application that is precisely what the law requires Indigenous witnesses to do.

2 Under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) and the Aboriginal Land Act 1991 (Q’land).
7 Ward v WA (1998) 159 ALR 483, p 538. See also comments by Patrick Dodson in John Dudu Nangkiriny & Ors on behalf of the Karrajarr People v State of Western Australia & Ors 6 July 2000, pp 813 – 814.
Within the Australian legal system the rights and interests arising from their traditional laws and customs will only be protected if sufficient information can be revealed about them. However those same laws and customs are part of a knowledge system in which information is restricted and decentralised for the protection and preservation of those same laws and customs.\(^8\)

The native title process “requires the public investigation … into the most private and even secret areas of the lives and histories and laws of the … applicants.”\(^9\) The NTA\(^10\) and the Federal Court of Australia Act 1976\(^11\) provide for the giving of gender restricted and other culturally sensitive evidence. Ultimately, however, “a measure of cultural violence is involved in making the price of a determination of native title that evidence be given publicly or be reduced to writing and exchanged between parties.”\(^12\)

Having decided ‘to pay the price’, Indigenous people must then give evidence in a system which struggles to understand and come to terms with the practical consequences of that decision for both traditions.\(^13\) The Federal Court has, to date, shown a great preparedness to review practice and procedure in the light of the needs of this unique jurisdiction although Chief Justice Black acknowledges that, to date, probably “the simplest, easiest, and most obvious changes” have taken place and that many issues will continue to challenge the court.\(^14\)

One such issue is whether Indigenous witnesses require any particular consideration when giving evidence in native title matters. This paper outlines some of the factors which can affect the ability of Indigenous witnesses to give, and the courts’ capacity to interpret, evidence in native title matters.

**Language Based Evidence**

The Australian judicial system is adversarial in nature and strongly premised upon the giving of oral evidence in open court.\(^15\) Each side puts their case and has the capacity to test the opponent’s evidence. This is usually done in the question and answer format during examination and cross–examination.

It is beyond the scope of this paper to outline the way in which language fundamentally prescribes our shared meaning of the world in which we live. To speak other than the language of the dominant culture is, in itself, inherently disadvantageous.\(^16\) Many Aboriginal people speak English only as a second language.


\(^9\) North (Hon) J, *John Dudu Nangkiriny & Ors on behalf of the Karrajari People v State of Western Australia & Ors* 12 February 2002 at [16].

\(^10\) Sections 109 (2) and (3), 136F, 154(4) and 155.

\(^11\) Sections 82(1) and 91(4), 92(1) NTA; Order 78 Rules 4, 31, 32, 33, 35 and 36. Federal Court Rules.

\(^12\) Anderson L, op.cit. n.6 p 120.

\(^13\) see comments by Patrick Dodson in *John Dudu Nangkiriny & Ors on behalf of the Karrajari People v State of Western Australia & Ors* 6 op.cit. n.7.

\(^14\) Black (Hon) CJ op.cit. n.8. p 1. His Honour also acknowledges that “for all that has changed within the Australian legal system as a result of recognition of the existence of native title, indigenous people have been required to move much further to take part in the legal process for determination of native title.” at p 17.

\(^15\) Evidence can be given other than orally if the Federal Court orders otherwise or the parties agree. Order 33 Rule 1 Federal Court Rules.

A person may give evidence through an interpreter “unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make adequate reply to questions that may be put.” Assessing witnesses’ capacity to meet this threshold is, however, a more complex task than many would appreciate. Justice Gray acknowledges that judges usually “lack the ability to assess language skills.” Health issues such as the very high incidence of hearing impairment amongst Indigenous people compound the task.

Aboriginal people who speak English as a first language also confront difficulties of comprehension and which are all the more insidious for their subtlety. The majority of Aboriginal people speak a dialect of English known as ‘Aboriginal English.’ While Aboriginal English shares most of its vocabulary with Standard English there are crucial differences in grammar, style, pronunciation and usage which can create serious misunderstandings which are all the more difficult to detect because of the illusion of commonality which a largely shared vocabulary provides. Moreover, Aboriginal English itself is not fixed linguistically. Rather it is a range of dialects, some being closer to Standard Aboriginal English and others closer to Kriol.

It is arguable that, even given the well documented problems associated with interpreters and translations, with an experienced interpreter to assist, courts may fare better in establishing a climate of mutual understanding and effective communication where it is clear that an Indigenous person does not comprehend or speak English than when they simply appear to.

Languages differences however, are not the only factor that operates to disadvantage Indigenous witnesses. Fundamentally antithetical communication norms which dictate acceptable modes of social interaction also play a pivotal role in compromising effective communication.

Questions and Answers
The almost exclusive reliance on the question and answer format during examination and cross-examination forces Indigenous witnesses to engage in a process which is at best unfamiliar and at worst socially distressing.

This style of social interaction and information elicitation is so intrinsic to the European intellectual tradition that it is necessary to remind ourselves that it is not universal. It is the
culturally relative and specific reflection of an entire socialisation system whereby children learn from the earliest age both how to engage in question/answer discourse and that it is the preferred and expected method of communication.25 The process is then reinforced by an education system which is heavily reliant on the Socratic method as an instructional technique.

This style of interaction is not only unfamiliar to Indigenous people whose communication patterns emphasise narrative and indirect means of obtaining information, it is positively antithetical and can cause considerable anguish.26 Unless children become accustomed to the question-and-answer convention in early childhood, which many Indigenous children traditionally do not, research seems to indicate that it is unlikely that they will be at ease with it at any stage later in life, and this seems to hold true even for children who have some experience of schooling.27

Aboriginal people generally feel uncomfortable in being singled out for interaction before an audience. This causes the experience they call ‘shame’ and often leads to verbal minimisation – speaking softly using as few words as possible.28 They prefer to give evidence in groups or in consultation with each other.29 Sutton notes that this is not simply about people feeling emotionally comfortable having family there to support them:

> It has to do with Aboriginal customary law in relation to truth or proof…[I]t’s a matter of having the proper witnesses there so you don’t get out of line, you don’t go over the mark and so on. These are collectively held laws and fact about things; these are not private matters.30

Both Eades and Cooke note that a definitive characteristic of Aboriginal communicative styles is indirectness.31

> [This] is reflected in the use of ‘multi-functional linguistic form’ and ‘structurally ambiguous’ or ‘communicatively ambiguous’ question forms. Conversely, communicative norms permit answers to be likewise indirect, particularly in response to requests. When asked to express opinions, Aboriginal people adhere to a fundamentally cultural view that Aboriginal people can only speak for themselves and tend not to express a firm or biased view even if they hold one… This style of gradually and indirectly expressing an opinion is a significant factor in cross-cultural miscommunication. Although an indirect style is not unknown to Anglo-Australian discourse, it is not a feature of courtroom questioning where, particularly in cross-

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25 Cooke M, *A Different Story: Narrative versus ‘question and answer’ in Aboriginal Evidence*, Forensic Linguistics 3 (2) 273. Cooke reports that the Q/A interview style is not found in the inventory of speech registers and speech genres of the Aboriginal people of northern Australia. For the Yolngu of north-east Arnhemland children who ask curious questions, one after another, are criticised or teased by grown ups for behaving like white people.


28 The experience of the witness box alone must be quite intimidating for Aboriginal witnesses even before the first question is put. ‘Shame’ has no simple equivalent in non-Aboriginal English but it is like a mixture of fear and embarrassment. Diana Eades, ‘Language and the Law: White Australia v Nancy’ in Walsh M and Yallop C (eds) *Language and Culture in Aboriginal Australia*, Aboriginal Studies Press, Canberra 1993, p 188.

29 Order 78 Rule 34, Federal Court Rules provides for the giving of evidence in groups or in consultation with others.


examination, lawyers are often both aggressive and direct in their questioning and usually demand direct and unequivocal answers. In many Indigenous societies verbally aggressive behaviour will “normally be interpreted as a prelude to confrontation involving verbal, and then perhaps physical, violence.” Use of this style of questioning with Indigenous witnesses therefore, not only risks causing distress but is likely to be counter productive in terms of eliciting the information sought.

Misunderstandings can also occur when Aboriginal people reflect their culturally sanctioned communication patterns such as:

- avoiding eye contact,
- lapsing into long periods of silence,
- answering questions seeking quantitative information such as times, dates, numbers, distances in qualitative rather then mathematical terms,
- habitually agreeing with the questioner, (gratuitous concurrence) to avoid conflict or mask lack of comprehension, or
- constructing answers by building upon the fragmented words in the question that were understood (scaffolding).

Aboriginal law and culture may also impose specific restrictions on the ability of an individual to speak in the presence of certain relatives and on culturally sensitive issues. Some matters may only be spoken of on country. Without an awareness of such issues a perceived reluctance to answer may be interpreted in any number of inappropriate and possibly adverse ways.

**Cross-Examination**

The capacity to test the other sides’ witnesses’ evidence through the highly stylised question and answer technique known as cross examination is a fundamental tenet of Anglo-Australian trial jurisprudence. Its shortcomings however, in relation to Indigenous witnesses have been noted for some time. Justice Blackburn noted in *Milirrpum* that he had:

> learned from other experience in this Court, not to place too much reliance on cross examination of Aboriginal witnesses in which the questions are expressed in terms anything less than the most extreme precision.

Shortly thereafter, the Supreme Court of the Northern Territory laid down guidelines for the questioning of Aboriginal suspects. They included the warning that:

> Great care should be taken in formulating so that as far as possible the answer which is wanted or expected is not suggested in any way. Anything in the nature of cross-examination should be scrupulously avoided as answers to it have no probative value. It should be borne in mind that it is not only the wording of the question, which may suggest the answer, but also the manner and tone of the voice which are used.

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32 ibid p 11.
33 Sutton P, “…About the Gist of What was Said:” Communication in the Context of Native Title”, in Frank McKeown (ed) *Native Title: An Opportunity for Understanding*, 1996, pp 115-123, Perth, National Native Title Tribunal, p 117.
36 *Milirrpum v Nabalco Pty Ltd* (1971) FLR 141, p 179.
Toohey J found in evidence under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) that much depended on the way in which questions are framed, not because answers are evasive or the truth elusive but because the truth of particular words in questions will produce answers of a particular sort. Other Land Commissioners have made similar observations.

Lee J after hearing evidence in Ward v WA noted that:

It was apparent that for a number of witnesses the adversarial system of trial, and a limited ability to express themselves fluently in English, hindered articulation of their evidence. On some occasions it appeared that restricting oral evidence to responses to questions put by counsel left part of the story untold and where the questions of counsel relied on unstated or latent assumptions the full import of the question was not understood by some witnesses and the responses were not directed to issues raised indirectly. The remarks of Blackburn J, in Milirrump v Nabalco Pty Ltd...were equally pertinent to this case.39

For Aboriginal participants and observers of the Cubillo & Gunner trial, the misunderstandings and objections during cross examination were a source of frustration and anger. Similar observations were made in relation to the witnesses appearing before the Royal Commission into the Hindmarsh Island Bridge.41

More recently number of observers in hearings for applications for determinations of native title before the Federal Court have expressed disquiet at the content and style of some counsel in cross-examination of Indigenous witnesses.42

The capacity to test the other sides’ witnesses’ evidence may be a fundamental tenet of Anglo-Australian trial jurisprudence however the law has long recognised limits to this right. A party may question a witness in any way the party thinks fit, except as provided for by the Evidence Act or as directed by the Court.43 The court may disallow a question put to a witness in cross-examination, or inform a witness that it need not be answered if the question is unduly annoying, harassing, intimidating, offensive, oppressive or repetitive.44 Without limiting the matters that the court may take into account it must take into account any relevant condition or characteristic of the witness, including the age, personality, education, or any mental, intellectual or physical disability to which the witness is, or appears to be, subject.45

A court may also place limits on the use of leading questions.

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38 Quoted in Neate G, Aboriginal Land Rights Law in the Northern Territory, op cit n.3. Good examples of how this can occur appear at pp 215 – 214.
39 Ward v WA op. cit. n.7 at p 497.
42 Personal communications.
43 Sections 27 and 29 Evidence Act (Cth) 1995.
44 Ibid s41(1).
Leading Questions
A leading question is one which either suggests the desired answers or assumes the existence of disputed facts.46 They may be used in cross-examination though the judge has discretion to disallow them.47 They may be considered improper when put in cross-examination in some circumstances because they “may by implication put into the mouth of an unwilling witness, a statement which he never intended to make, and thus incorrectly attribute to him testimony which is not his.”48 The court is to disallow the question or direct the witness not to answer it, if the court is satisfied that the facts concerned would be better ascertained if leading questions were not used. This, however, does not limit the court’s general power to control leading questions.49

Judicial Control of Proceedings
In the adversarial system, much of the conduct of proceedings is in the hands of the parties, however, ultimate control resides with the presiding judicial officer. The duty of the judicial officer is to regulate proceedings in a way that is fair, not only to the parties, but also to the witnesses.

In hearing and determining applications for determination of native title the Federal Court is bound by the rules of evidence, except to the extent that the Court otherwise orders.50 In conducting its proceedings the Court may take account of the cultural and customary concerns of Aboriginal and Torres Strait Islanders, but not so as to prejudice unduly any other party.51

The Federal Court Rules apply to native title proceedings however the Court may, at any time, make any orders it considers appropriate relating to evidentiary matters such as the manner in which evidence may be presented to the Court, the time when and place where certain evidence is to be taken or the presentation of evidence about a cultural or customary subject.52

The Evidence Act 1995 (Cth) also provides that the court may make such orders as it considers just in relation to the way in which witnesses are to be questioned and the presence and behaviour of any person in connection with the questioning of witnesses.53

In Mooney v James Barry J said:
The basis of the rule that leading questions may be put in cross-examination is the assumption that the witness’s partisanship, conscious or unconscious, in combination with the circumstance that he is being questioned by an adversary will produce a state of mind that will protect him against suggestibility. But if the judge is satisfied that there is no ground for the assumption, the rule has no application, and the judge may forbid cross-examination by questions which go to the length of putting into the witnesses mouth the very words he is to echo back again…Answers given in such circumstances usually would not assist the court in its investigation because they would be valueless, and in the exercise of his power to control and regulate the

46 Byrne & Heydon, Cross on Evidence at [17,150].
47 Ibid at [17,465].
49 Section 42 Evidence Act (Cth) 1995.
50 Section 82(1) Native Title Act 1993 (Cth).
51 Section 82(2) Native Title Act 1993 (Cth).
52 Order 78 Rule 31 Federal Court Rules.
53 Section 26 Evidence Act (Cth) 1995.
proceedings the judge may properly require counsel to abandon a worthless method of examination. This brings out the essential feature of trial by British courts, namely, that it is the duty of the judge to regulate and control the proceedings so that the issues for adjudication may be investigated fully and fairly.54

A judge must not intervene excessively, and must be careful not to curtail lines of questioning which may later prove to be relevant55 but as the High Court in Wakeley v R recognised although cross-examination must as far as possible be left to the cross examiner’s discretion and judges should give the cross examiner leeway, particularly at the start of the cross examination:

there may come a stage when it is clear that the discretion is not being properly exercised. It is at that stage that the judge should intervene to prevent both an undue strain being imposed on the witness and an undue prolongation of an expensive procedure of hearing and determining a case.56

In the last resort it is the court, rather than the parties, that is the master of the court’s procedure, so that it has power to prevent or restrict cross-examination if this is in the interests of justice.57

The expectation that judges should take an increasingly active role in the conduct of proceedings before them has gained recognition in recent years. Concern has been expressed about “the modern tendency particularly in criminal cases, for cross examination to assume an unduly lengthy and repetitive character.”58 Justice Ipp refers to changed community expectations that judges will intervene in order to achieve justice and that although “the touchstone is that ‘what is done is to be done within the parameters established by the requirements of justice,’ those parameters – these days – are not static.” 59

Justice Mildren of the Supreme Court of the Northern Territory commented:

My experience is that, in cases involving Aboriginal witnesses…the trial judge must be fully prepared for the trial and ready, if necessary to intervene more frequently than would be necessary in ordinary trials. …Adequate preparation by the Judge can often avoid problems from occurring…The trial judge must also be ready to suggest to counsel ways of overcoming problems, such as what to do when a witness lapses into silence, and so on. Judges need to be ready to exert their authority on the parties to secure interpreters when they are plainly needed.60

There is clearly a wide discretion for judges to control cross-examination; a discretion which must be informed by the particular circumstances of each matter and each witness appearing before them.

The Criminal Justice Commission report on Aboriginal witnesses in Queensland’s Criminal Courts concluded however that this was not happening. It was evident from the Commission’s consultations that objection to leading questions in cross-examination was

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54 [1949] VLR 22 at 28.
57 Byrne & Heydon, op cit n.46 at [17,470].
58 Ibid at [17,146].
60 Mildren (Hon) D, Redressing the Imbalance Against Aboriginals in the Criminal Justice System Supreme Court of the Northern Territory, paper delivered the 5th Biennial Conference of the Northern Territory Criminal Lawyers Association, Bali 26 July 1995, p 20.
rarely made by opposing counsel regardless of whether the witnesses was Aboriginal or not. As a result, the discretion to disallow the use of leading questions was rarely exercised.\textsuperscript{61}

In their assessment the problem did not lie with the law but with how it was applied. Although courts have quite extensive power to regulate cross-examination, it was evident that many judicial officers were cautious about invoking these powers and, equally, that lawyers were often reluctant to seek the intervention of the court.

The report recommended cross-cultural awareness training for judicial officers and lawyers and was optimistic that, with increased awareness over time courts would become more active in regulating proceedings involving Aboriginal witnesses. Counsel needed to be encouraged to object if they considered that questioning of an Aboriginal witness was inappropriate having regard to the witness’s linguistic and cultural background. They considered there would be some advantage in amending s41 of the \textit{Evidence Act} to provide that a Court should take account of the witness’s cultural background when considering whether a question is misleading, unduly annoying, harassing, intimidating, offensive, oppressive or repetitive. Arguably “any relevant…characteristic” could include cultural background, however the Commission thought it useful to make this explicit.

Not everyone however, agrees that that is enough.\textsuperscript{62}

Justice Riley suggests a change in approach to the cross examination of Aboriginal witnesses will not only be fairer but will in fact result in better evidence.

A more skilful cross-examination will employ concise non-leading questions, simple in form and containing only one idea. Questions should not be lengthy, convoluted, or grammatically complex. For example they should not include double negatives or put a series of alternatives. They should avoid using legal or other formal language. This is not an easy approach for the advocate to master and of course, will often run counter to advice contained in text books on advocacy and delivered in advocacy workshops. However, in many cases it may be the only effective way to challenge the evidence of an Aboriginal witness.

None of this prevents an Aboriginal witness being challenged and challenged vigorously. What it ensures is that the product of the exercise has value and can be used with force in the final presentation of the case at the time of the closing address.\textsuperscript{63}

Flynn and Stanton have called for “a reconciliatory approach to litigation” which would involve all parties agreeing on a protocol for the reception of evidence. The protocol would reflect the many suggestions in expert literature on techniques for ensuring the reception of Aboriginal evidence in a manner that complies with the rules of evidence, is fair to the witness and does not prejudice the interests of the parties to the litigation.\textsuperscript{64}

\textsuperscript{61} \textit{Aboriginal Witnesses in Queensland Criminal Courts} – Criminal Justice Commission, June 1996, p 52.
\textsuperscript{63} Riley Hon Justice, \textit{Advocacy – The Aboriginal Witness (Part 2)} Advocacy, September 2000, 17, p 18.
\textsuperscript{64} Flynn M & Stanton S, op.cit. n.40, p 78.
Conclusion
The Australian courts, subject to the statutory framework erected by the Commonwealth Parliament, have had to construct a jurisprudence of native title within a remarkably short time. The aim of best practice should be to ensure that courts have the best possible evidence from all witnesses before them and the facility to interpret that evidence. In order to achieve that, it is necessary for the Court to be cognisant of the linguistic, cultural and historical factors that can adversely impact upon Indigenous witness evidence and, to the extent that the law provides, exercise its powers to ameliorate that impact.

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