THE PERPETUATION
OF ORAL EVIDENCE IN
NATIVE TITLE CLAIMS

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The Perpetuation of Oral Evidence in Native Title Claims

Jo-Anne Byrne*

Summary
This paper examines the need to consider the perpetuation of the evidence in the native title context and explores existing possibilities for achieving this. It concludes that the Native Title Act 1993 (Cth), the Federal Court of Australia Act 1976 (Cth) and the Federal Court Rules provide for it and that video taping has the potential to provide the best evidence in these circumstances.

Some associated procedural and practical issues are also discussed.

Background and Acknowledgments
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The Perpetuation of Oral Evidence in Native Title Claims

1. Introduction

The need to consider the perpetuation of oral evidence in the native title context has become apparent in recent years with the deaths of several senior native title claimants.¹ These deaths can have implications for the ability of indigenous Australians to transmit their heritage and make it difficult for groups to successfully bring applications for determinations of native title or to prove the requisite degree of connection to country under the Native Title Act 1993 (Cth) (NTA) or comparable State legislation.

Rights to land in Aboriginal society are inextricably related to knowledge of the land. Traditionally such knowledge was orally transmitted and incrementally accrued over a lifetime. The older a person was, the more knowledgeable they would generally be regarding the traditional laws and customs of their group and how those rights and interests relate to those of neighbouring individuals and groups.²

A defining feature of the knowledge transmitted in an oral tradition is its potential fragility. Never fully recorded in any permanent form its existence depends on the


² Neate G, Aboriginal Land Rights in the Northern Territory Vol 1, Alternative Publishing Co-operative Ltd, 1989, p. 191. This is not to suggest that only elderly indigenous people can speak of their culture and traditions. However, since knowledge is gained over a lifetime it stands to reason that the older a person is the more extensive and cohesive that knowledge is likely to be.
ability of its custodians to recall and relay its substance to younger members of the group. Profound and protracted social upheaval, as has occurred within Aboriginal society over the past 200 years, can severely compromise the capacity such societies to preserve and transmit their culture and traditions.

Increasingly of course, indigenous culture and tradition have been recorded in more permanent ways; initially written and aural and more recently via audio-visual and other electronic media. It is important to remember that the NTA does not require claimants to establish that their culture and traditions, including their means of transmission, have remained unchanged from the time of sovereignty. No viable culture can stagnate. Tradition can, and must, adapt to change. The Act does however, require applicants to establish the unbroken maintenance of connection to that tradition. It is in this context that the evidence of older claimants can be so important.

Obtaining a determination of native title can be a lengthy process. It is not uncommon for older claimants to die or become incapable of giving evidence by the time an

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3 The transmission of Aboriginal culture is, of course, not exclusively oral. It has always, for example, included the recording of stories and family histories in paintings on rock faces, wood, sand and other materials. These days it is more likely to be recorded in writing, on film or videotape and there is no legal bar to the recognition of these forms of recording. Report of the Land Tribunal: Aboriginal Land Claims to Cape Melville National Park, Flinders Group National Park, Clack Island National Park and Nearby Islands, May 1994, paras 229-236.

4 For example the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children and their Families estimates that between 1 in 3 and 1 in 10 indigenous children were removed nationwide between 1910 and 1970 with children born in the 1950’s and 60’s most numerically affected. Most Indigenous families have been affected, in one or more generations. Removal of children from their families has, in the majority of cases, prevented them acquiring language, culture, the ability to carry out traditional responsibilities and in many cases, from establishing genealogical links necessary to establish the requisite descent and connection to bring, or be part of an application for determination of native title. Bringing Them Home, Sterling Press, 1997, pp 43-74 and 205-207.

5 Mabo v Queensland (No 2) (1992) 175 CLR 1, per Deane and Gaudron at p. 110, Toohey J at 192 and Brennan J at pp. 61 and 70. Hayes v Northern Territory (1999) 97 FCR 32, per Olney J at 50.

6 Yorta Yorta v Victoria [2001] FCA 45. Hayes v NT, ibid at 49-50. See also definition of native title in s223 NTA.

7 See comments by Olney J, Hayes v NT ibid p.53.
application comes for determination. Aboriginal and Torres Strait Islander people die significantly earlier than non-indigenous Australians. Their life expectancy rates are an average of eighteen to nineteen years less than those for the wider Australian community.

This paper examines the need to consider the perpetuation of the evidence of vulnerable witnesses in native title applications and explores existing possibilities for achieving this. It takes as its starting point the need to perpetuate the evidence of vulnerable native title claimants but recognises that other parties may also wish to perpetuate the evidence of vulnerable witnesses.

It primarily addresses situations where an application for a determination of native title has been filed in the Federal Court. Many of the issues, however, are relevant to situations where applications are being considered and there is an immediate need to perpetuate potential evidence. It may also be relevant where records such as video-tapes have been made for other purposes, for example their heritage value, but which may

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8 The Australian Law Reform Commission Report Managing Justice: Practice, Procedure and Case Management in the Federal Court of Australia, (No 89), 1999 at para 7.42 reports that “Native title is a unique and relatively new area of law with a limited but developing jurisprudence. “Native title disputes are potentially complex with complexity deriving… from features including” (inter alia) the number of parties involved, the existence of related disputes, the need for and difficulties in obtaining expert evidence, the evidentiary burden on applicants, the complexity of the legislation, and the relative novelty of processes and practice. Adding to the length of time in native title matters is the existence of a statutory scheme which, in all but exceptional cases, includes a scheme of mediation. The Federal Court has doubled its usual eighteen month target for the disposition of matters to three years in the case of native title matters although this is “a goal” and “is not intended to be prescriptive.”( at para. 7.57).

9 The average life expectancy for all Australian males is 75.2 years and females 81.1 years. The average life expectancy for indigenous males is 56.9 years and females 61.7 years. The Health and Welfare of Australia’s Aboriginal and Torres Strait Islander People 1999, ABS 1999, p.134 –135.

10 This may include non-indigenous people whose evidence about local history is relevant.
come to be used as evidence in future native title applications which were not in contemplation at the time the videos were made.  

There is no reason in principle why the perpetuation of evidence of vulnerable witnesses in native title matters should not be used more widely. The NTA and the Federal Court of Australia Act 1976 (Cth) (the FCA) and the Federal Court Rules (the Rules) provide for it. Video taping of such evidence has the potential to provide the Court with the best evidence in these circumstances.

Some procedural and practical issues associated with the taking of evidence for the purpose of its perpetuation in the native title context are also discussed.

2. The Legal Context

“There is but one rule of evidence, the best that the nature of the case will admit”¹³ and in general terms the best evidence is that which can be tested in Court before the trier of fact whether given viva voce personally in Court or by affidavit where the maker is available for cross-examination.

However, the law has long acknowledged circumstances where there exists a need to take evidence from witnesses in other ways where a witness is abroad, or likely to be at the time of hearing, or if a witness is too ill to attend or may not be alive at the time of hearing.

¹¹ Extracts from a video documentary made years earlier primarily for its heritage value were admissible as relevant documentary evidence in Daniels v WA (2000) 173 ALR 51.
¹² See Part 3 of this paper.
¹³ Omichund v Barker (1744) 26 ER 15 at 33, per Lord Hardcastle LC.
Most procedural statutes, including the FCA, provide the Court with the power to examine a witness *de bene esse* or on commission.

### 2.1 Taking Evidence De Bene Esse or on Commission

The Court or judge may, in any cause or matter where it shall appear necessary for the purpose of justice, make any order for the examination on oath before any person, at any place, and may empower any party to give such deposition in evidence, on any terms as the Court or judge may direct.

The order is usually made when the witness is ill or abroad or likely to be abroad at the time of the hearing. A practising lawyer or officer of the Court is usually named as examiner. The witnesses, parties and advocates attend before the examiner, the witnesses are examined, cross-examined and re-examined. The examiner takes note of any objection to the admissibility of the evidence that may be raised. The judge will only allow the deposition to be read at the hearing, without the consent of the party against whom it is given, if the maker is still unable to attend.

Where questions of identity or credibility are involved the courts will not readily permit the evidence of a material witness to be taken on commission abroad.

However, such restrictions are not always applied where the evidence is audio-

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14 For example, s46 FCA and *Evidence Act 1958* (Vic) Pt 1, Div 1.
15 *De bene esse* is defined as: ‘as being good; acceptable for the present; provisionally; without prejudice; subject to further examination of a witness ill or about to go overseas.’ *Australian Legal Dictionary*, Butterworths, 1997 p. 321.
16 The relationship between *de bene esse* evidence and evidence on commission is not entirely clear. It would seem that the Court can take evidence *de bene esse* or it can grant a commission for someone else
visual as this is said to give the trier of fact every opportunity to see the demeanour of the witness.¹⁷

Video evidence of an event or thing in issue is not hearsay but real evidence of this item¹⁸ and where a transcript of an examination de bene esse is admissible, a video-tape of this examination is equally admissible.¹⁹

2.2 In Native Title Claims

The taking of evidence on commission in relation to native title claims is a well accepted practice in a number of jurisdictions. In Delgamuukw v British Columbia the Supreme Court of Canada noted that:

A total of 61 witnesses gave evidence at trial, many using translators......a further 15 witnesses gave their evidence on commission; 53 territorial affidavits were filed (and) 30 deponents were cross-examined out of Court.²⁰

In Utemorrah and ors v Commonwealth and ors²¹ Owen J of the Supreme Court of Western Australia stated:

…there is in my opinion a strong case for the taking of evidence before trial…I am prepared to take evidence from the elderly and infirmed [sic]. The primary aim will be to ensure that the evidence is preserved. The test as to which persons to do so depending on the circumstances. For the purposes of this paper however, the distinction is not crucial.

¹⁸ Beaton v McDivitt (1985) 13 NSWLR 134, p. 142-143.
fall into these categories will be applied with the flexibility to which I have earlier referred.”

Earlier in his judgement he wrote:

…this is by no means a normal or usual piece of litigation. It has elements of legal, factual and logistical difficulties that are outside the norm. It involves the public interest to a significant extent. Accordingly, it requires a degree of ‘case management’ that might not be justified in other actions. This will, on occasions, manifest itself in the exercise of judicial discretion in a way that might appear, at least at first glance, to be somewhat unusual. This is one of the advantages the adversary system offers. It is a system that has within it a greater degree of flexibility than some commentators might wish to admit.

When the plaintiffs eventually brought their application for the taking of evidence on commission in *Ejai and ors v Commonwealth & ors* Owen J wrote:

In claims touching on native title the best evidence lies in the hearts and minds of the people most intimately connected to aboriginal culture, namely the aboriginal people themselves…it is from there that it must be extracted. This is not always easy, particularly from a people whose primary language might not be English and who, historically, have depended on oral rather than written recording of tradition.

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21 Unreported 14 July 1993, SCN750576.
22 ibid p. 5.
23 ibid p. 4.
24 Unreported 18 March 1994, SCN 940150.
25 ibid p. 9.
Under O 38 r 1 of the Rules of the Supreme Court the Court may make an order for the taking of evidence before trial ‘if it appears necessary for the purposes of justice’. The power is discretionary and the discretion is wide…

Each case must be determined on its own facts…[T]his is an unusual case because the subject matter involves cultural considerations with which non-aboriginal society is not familiar. The answer will depend substantially on the oral testimony of those people able to give evidence concerning historical matters. There is a clear public interest in having this evidence taken as quickly as possible. In my view in the circumstances of this case, I need only be satisfied that there is a reasonable possibility that if the evidence is not taken soon, it may be lost forever.”

Noting that two potential witnesses had died since the institution of proceedings, his Honour stated that it would be ‘grossly unfair and not in the interests of justice’ if the possibility that further ‘vital evidence’ might be lost was to be ignored. He therefore proposed that seven witnesses provide witness statements to the defendants prior to the taking of evidence regarding the nature and content of traditional law, custom and practice, the traditional way of life about which the individual witnesses could speak, their genealogies, the area and extent of traditional lands and the use made of, and occupancy of, traditional lands by them and their predecessors. In this way the defendants had an opportunity to put submissions as to relevance before the actual taking of the evidence and to prepare cross-examination.

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26 ibid p. 8.
27 ibid p 11.
His Honour felt that it was important that the evidence be taken in a form that would be of maximum utility for the eventual trial. The method adopted was seen to be preferable to alternatives such as obtaining affidavits, as it gave him the opportunity to see and hear the witnesses and gave the parties the opportunity to view the relevant sites in the context of the evidence of individual witnesses.29

Increasingly too, the advantages of recording such evidence on video are being appreciated. As Lee J has noted:

> The difficulties Courts face in receiving and dealing with evidence of Aboriginal witnesses is well known particularly when English is at best a second, or lesser, language and the grasp of it is limited. A transcript cannot convey nuances of gesture, movement or expression that bear upon an understanding of the evidence received in such circumstances. Similarly, a transcript which presents as a seamless continuum of questions and answers may suggest more comprehension of a process by a witness than the Court observes.30

Video evidence allows the Court to observe the demeanour of the witness and with a good visual and sound recording translators have the opportunity to hear and see the evidence more than once. It also enables people to record their evidence on traditional country.

In *Apsassin v The Queen*31 the plaintiffs applied for and were granted an order under the US Federal Court Rules that commission evidence be taken at Indian reserves. The

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28 ibid p. 10.
29 ibid pp 10 -11. In the event the plaintiffs did not proceed with the taking of the witnesses evidence.
Court granted the order, defined guidelines for the conduct of the examination, and issued instructions to the examiner permitting the evidence to be videoed by a person agreed between the parties. The video evidence taken was to be shown at the trial of the action, subject to any ruling of the trial judge.32

In claims under the *Aboriginal Land Rights (Northern Territory) Act 1976* (the ALRA)33 the showing of videos of Aboriginal people giving evidence in relation to land claims have:

…usually been admitted into evidence with an agreed transcript on the basis that the people appearing in it be made available for cross-examination if required by counsel…though it has not always been possible to examine those witnesses.34

In the Borroloola Land Claim, the first under the ALRA, Commissioner Toohey accepted a video tape of a two day meeting of 200 people from a wide area. The Commissioner commented:

To receive such a record which took place would offend strict rules of evidence, not being the subject of oath or affirmation and no opportunity being presented for cross examination. Nevertheless, in proceedings such as these the use of videotapes may be a valuable way of hearing from a large number of people who might otherwise find it difficult to give evidence and in any event whose

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33 Hearings under the ALRA are administrative in character and therefore, not bound by the rules of evidence (s50). Commissioners have broad powers to regulate proceedings before them, including issuing practice directions (s51). Hearings have tended to be conducted in a formal quasi-judicial manner. See also *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327.
34 Neate G, op cit at n 2, pp 226-227.
evidence if taken in the usual way would prolong the hearing of claims unduly. I found it helpful. There is precedent in the Ranger Uranium Inquiry.\textsuperscript{35}

A native title claim must “be proved by evidence admissible according to generally applicable principles of Australian law.”\textsuperscript{36} However, there is increasing judicial acceptance nationally and internationally that:

“the rules of evidence are to be applied rationally and not mechanically. The application of a rule of evidence to the proof of novel facts, in the context of novel issues of substantive law, must be in accordance with the true rationale for the law, not merely in accordance its past application to analogous facts.”\textsuperscript{37}

In \textit{Delgamuukw v British Columbia} the Court stated that:

…a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of Aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The Courts must not undervalue the evidence presented by Aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case...

The justification for this special approach can be found in the nature of Aboriginal rights themselves…[A]lthough the doctrine of Aboriginal rights is a common law doctrine, Aboriginal rights are truly sui generis, and demand a

\textsuperscript{35} Borroloola Land Claim Report by the Aboriginal Land Commissioner to the Minister for Aboriginal Affairs and the Administrator of the Northern Territory, 1979, para 14.

\textsuperscript{36} \textit{Mabo v Q'land} [1992] 1Qd 78 at 87.

\textsuperscript{37} \textit{Milirrpum v Nabalco} (1971) 17 FLR 1412 at 154, per Blackburn J.
unique approach to the treatment of evidence which accords due weight to the perspective of Aboriginal people.\textsuperscript{38}

Lee J in \textit{Ward v WA} also acknowledged the:

disadvantage faced by Aboriginal people as participants in a trial system structured for, and by a literate society where they have no written records and depend on oral histories and accounts.\textsuperscript{39}

The Australian Law Reform Commission has recently also supported the perpetuation of the evidence of elderly or frail witnesses and recommended that the Federal Court review the arrangements for the taking of evidence in native title cases generally.\textsuperscript{40}

It is important however that the claimants themselves are involved in any decisions to perpetuate evidence. It may be that they do not wish for it to occur or may have a clear preference as to the manner in which it is done. For example, in September 1999 Justice Cooper of the Federal Court heard the evidence of twenty vulnerable witnesses in the Wellesley Island (Lardil) Sea Claim on Mornington Island.\textsuperscript{41} Witness statements were provided to other parties ahead of time and cross-examination was provided for. An interpreter was available, however fell very ill and was only intermittently available during the time. A transcript was taken but the evidence was not videoed at the request


\textsuperscript{39} op cit at n.30, p. 504.

\textsuperscript{40} op cit at n.8, paras 7.78 to 7.87.

\textsuperscript{41} The legal issues raised by this claim depend to some extent on the outcome of the Croker Island claim \textit{Yarmirr v Northern Territory} (1998) 82 FCR 533 which are taking some time to resolve. At first instance Olney J held that while native title could exist over the off-shore seas and waters it could not be claimed as an exclusive right. The Full Federal Court by 2:1 has recently affirmed this decision:
of the applicants. At the time of writing it was the Court’s intention to return to undertake site visits at a later date.42

Increasingly therefore, there is acknowledgment of the unique challenges peoples from oral traditions face when they are required to access rights through justice systems long crafted around a reliance upon ‘documentary evidence.’

However, as anthropologist Dr. Peter Sutton has noted:

Today’s ‘documentary evidence’ is just a record, sometimes poorly done, of yesterday’s ‘oral evidence’. There should be no automatic high respect for documents or automatic scepticism about oral evidence; reliability and weight have to be established for both.43

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42 Two of the claimants whose evidence was taken were subsequently killed not long afterwards in an aeroplane crash.
43 Claimant Evidence, NNAT Seminar, 8 September 1997, p. 5.
3. The Legislative Framework

The NTA and FCA together provide for the perpetuation of oral evidence where proceedings have been filed in the Federal Court.\(^44\) The Federal Court can take evidence itself,\(^45\) issue a commission,\(^46\) appoint an assessor \(^47\) to take evidence on its behalf\(^48\) or receive into evidence the transcript of evidence in other proceedings.\(^49\)

3.1 The *Native Title Act 1993 (Cth)*

The NTA provides for the appointment of assessors\(^50\) although there are none at the present time.\(^51\)

The assessor is, in relation to those proceedings, subject to the control and direction of the Court and in assisting the Court the assessor is not to exercise judicial power.\(^52\) An assessor may allow a person to participate in a conference by telephone, closed circuit television or any other means of communication\(^53\) and may take evidence on oath or affirmation.\(^54\) A person appearing as a witness before an assessor may only be cross-examined or re-examined with the leave of the assessor.\(^55\)

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\(^{44}\) All applications for determination of native title are now lodged in the Federal Court (s61(1) NTA) and the Federal Court has jurisdiction to hear and determine such applications (s81NTA).

\(^{45}\) s46(a) FCA.

\(^{46}\) s46(b) FCA.

\(^{47}\) s83 NTA.

\(^{48}\) The practical distinction between the issuing of a commission to take evidence and the appointment of an assessor to do the same is unclear. However, for the purposes of this paper it is not material.

\(^{49}\) s86 NTA.

\(^{50}\) s83 NTA. ‘Assessor’ is defined as an assessor appointed under Part VA of the FCA under s253 NTA.

\(^{51}\) The Australian Law Reform Commission Report *Managing Justice* op cit at n.7, para 7.86 has recently recommended at para 7.86 that “the Attorney-General’s Department, in consultation with the relevant parties...should establish a panel of appropriately qualified assessors which the Federal Court can draw upon for use in native title cases.”

\(^{52}\) s83(3) NTA.

\(^{53}\) s90 NTA.

\(^{54}\) s93(1) NTA.

\(^{55}\) s93(5) NTA.
In the course of proceedings, the Federal Court may receive into evidence the transcript of evidence in any other proceedings before any Court, the National Native Title Tribunal, a recognised State/Territory body, the assessor or any other person or body and draw any conclusions of fact from those transcripts that it thinks proper.56

This however, is subject to s82 NTA which provides that the Federal Court is bound by the rules of evidence, except to the extent that the Court otherwise orders and that 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 to the proceedings. [emphasis added]57

It is not clear at this stage how ss82 and 86 will interact in practice. However it is worth noting the recent judicial comments regarding s82.58

Justice Lee wrote:

In a proceeding in which native title is in issue any rules of evidence applied to the proceeding must be cognisant of the evidentiary difficulties faced by Aboriginal people in presenting such claims for adjudication and the evidence adduced must be interpreted in the same spirit, consistent with the due exercise

56 s86 NTA.
57 Order 33 r.3 Federal Court Rules provides that the Court may at any stage of the proceedings dispense with compliance with the rules of evidence:
(a) for proving any matter which is not in dispute; or
(b) where such compliance might occasion or involve unnecessary expense or delay.
58 It should be noted that these comments were made in relation to s82 as it stood prior to amendment. Pre-amendment s82 provided that the Court must take account of the cultural and customary concerns of Aboriginal and Torres Strait islanders and was not bound by technicalities, legal forms or rules of evidence. It is contended however, both comments remain relevant to s82 in its amended form.
of judicial power…Section 82 of the Act affirms those principles in respect of applications for determination of native title under the Act.59

Justice Olney has written:

…the special procedures that were previously ordained by s82 do not authorise the Court to depart from two basic principles of litigation in this Court, namely that the standard of proof is on the balance of probabilities and that the Court will have regard only to evidence which is relevant, probative and cogent.60

Perhaps the best resolution has been suggested by Justice French when he stated that:

The rules of evidence are grounded in rules of rationality and fairness which would have to be applied by the Court in any event.61

3.2 The Federal Court of Australia Act 1976 (Cth)

The FCA Part VA deals with the appointment of assessors but does not define their role. This is left to the Court to determine pursuant to s59(1) under which the Judges of the Court may make Rules of the Court for, or in relation to, inter alia the practice and procedure of the Court in relation to any matter arising under the Native Title Act 199362 and the duties of assessors appointed under Part VA of the FCA.63

59 op cit at n.30, p. 504.
61 Response to the Native Title Amendment Bill 1997, September 1997, p 64.
62 s59(1)(zj) FCA.
63 s59 (1)(zl) FCA.
The Rules of the Court may make further provision in relation to taking or receipt of evidence, where the Court or a Judge is authorised to receive the evidence under another provision of the FCA or another law of the Commonwealth.\(^{64}\)

Section 46 provides that the Court or a Judge may, for the purposes of any proceeding

(a) order the examination of a person upon oath before the Court, a Judge, an officer of the Court or other person, at any place within Australia; or

(b) order that a commission issue to a person, either within or beyond Australia, authorising him or her to take testimony on oath of a person;

and the Court or Judge may:

(c) by the same or a subsequent order, give any necessary directions concerning the time, place and manner of the examination; and

(d) empower any party to the proceeding to give in evidence in the proceedings the testimony so taken on such terms (if any) as the Court or Judge directs.

### 3.3 The Federal Court Rules

The Federal Court Rules contain a number of provisions relating to the perpetuation of evidence and the taking of evidence on commission. In particular Order 78 *Native Title Proceedings* contains a number of Rules specifically dealing with the giving of evidence in native title matters.

Rule 31 provides that, subject to this Order, the rules generally and the rules of evidence apply. The Court may, however, at any time make orders it considers appropriate

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\(^{64}\) s59(2A) FCA.
relating to evidentiary matters such as restricting access to the transcript of a proceeding or to the content of any pleading or any other document on the Court file. It may also make orders relating to the manner in which evidence may be presented to the Court and the time and place that evidence is to be taken.⁶⁵

If the Court considers that a person’s evidence should be given at a time other than when such evidence would normally be given, the Court may give directions as to how, when and in what form the evidence is to be given. This applies even if the proceeding has been referred to mediation.⁶⁶

The Court may direct an assessor to take evidence from a party to a proceeding at a time, date and place arranged with the party, to decide how the evidence is to be recorded and to prepare a report of the evidence and give it to the Court by a specified time.⁶⁷

Order 78 was promulgated after the 1998 amendments to the NTA⁶⁸ and evinces a clear intention to provide for a more flexible approach to the taking of evidence in native title matters, including the perpetuation of that evidence in appropriate cases.

In addition, Order 24⁶⁹ is a general provision dealing with the perpetuation of testimony, although the existence of Order 78 arguably makes its use less likely in native title matters.

⁶⁵ Order 78 Rule 31(1)(2) and (3).
⁶⁶ Order 78 Rule 35(1).
⁶⁷ Note: Section 83 of the Native Title Act allows the Chief Justice to direct an assessor to assist the Court in relation to a proceeding, subject to the control and discretion of the Court. Order 78 Rule 39(1).
⁶⁸ 30 September 1998.
The existing legislative framework therefore, provides for the taking of evidence by the Court, a commissioner or assessor, including the videotaping of such evidence and for the Federal Court to receive into evidence transcripts of evidence taken, *inter alia*, in respect of inquiries by the Tribunal.

Consideration therefore, should always be given to making application to the Court for the perpetuation of the evidence of vulnerable witnesses.

4. Making Application - Procedural and Practical Issues

4.1 Adverting to the Need

Legal advisers should consult with clients very early in proceedings as to whether the evidence of any potential witnesses needs to be perpetuated. Consideration of the issue should then be kept under active review as the health and circumstances of individual witnesses may change at any time before the application is determined.

Guidelines for identification of vulnerable witnesses should be developed taking into account Aboriginal morbidity and mortality rates. Steps should also be taken to ensure that witnesses are legally capable of giving evidence.

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69 ‘Evidence Taken in Australia or Abroad or Evidence taken under Part 2 of the *Foreign Evidence Act* 1994’. Rule 13 provides that:

(2) Any person who would, in the circumstances alleged by him to exist, become entitled, upon the happening of any future event, to any property, the right or claim to which cannot be tried before the happening of the future event, may commence a proceeding to perpetuate any testimony which may be material for establishing a right or claim.

(6) Subrule (2) does not affect the right of any person to commence a proceeding to perpetuate testimony in cases where that subrule does not apply.

An application for an ‘approved determination of native title’ has rights attached to it which are additional to the existing native title at common law upon which it is based.

70 see n.9.
It should be remembered that videoing evidence is not the only means, and in some cases may not be the most appropriate means, of perpetuating evidence. Sworn statement can also be taken which, while not as potentially compelling as video evidence may be more appropriate in a given situation.\(^\text{71}\)

Parties contemplating perpetuating evidence must consider their position on a case by case basis with regard to legal professional privilege, the disclosure of their case to other parties and/or claimant groups, the potential for creation of a prior inconsistent statement and the use to which the evidence may be put in the event that the witness dies.

\`\`[T]he chief purpose (and benefit) of such recordings is to capture what might otherwise be lost,\`\`\(^\text{72}\) however, claimant groups need to make an informed judgement about whether the potential loss of procedural rights and/or any cultural restrictions on the use of the material outweigh the potential loss of a particular witness’s evidence.

4.2 Issues to Consider

4.2.1 relevance

The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence

\(^{71}\) Factors such as the wishes of the potential witness, their family and the wider group should be given significant weight. More practical considerations such as time and costs may also play a role.

\(^{72}\) Graeme Neate, President NNTT, Personal communication, NNTT, April 17 1998.
of a fact in issue in the proceeding. Evidence that is relevant in a proceeding is admissible in that proceeding.

Evidence of native title claimants will prima facie be relevant for the purposes of establishing a claim to native title.

### 4.2.2 legal professional privilege

Evidence taken by the Court after an application has been lodged is evidence in the proceedings and hence is not subject to legal professional privilege.

The privilege may however attach to recordings which have been made prior to an application being lodged or subsequently provided that the information they contain is ‘confidential’ and they have been made for the ‘dominant purpose’ of obtaining legal advice or for an ‘anticipated or pending proceeding’ in which the client is, or may be, or was or might have been a party.

Some groups may wish to claim the privilege over eligible recordings so that they are not forced to reveal their case prematurely. This concern can emanate from a wariness born of negative past experiences, of dealing with the state legal

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73 Evidence Act 1901 (Cth) s55.
74 ibid s56(1).
75 s118 – 119 Evidence Act 1995 (Cth) (s119). Provided the privilege is not lost (ss121-126) it survives the death of the party and passes to their personal representative (ss117(1)). Also Mann v Carnell (1999) HCA 66. In Daniel v WA [1999] FCA 1541 para 45 Nicholson J drew a distinction between the record of an actual communication (to which the privilege attaches) and a fact observed (to which it does not).
machinery. It can also stem from concern that this information not be made available to other Aboriginal groups who may dispute the group’s claim.

If, however, proceedings are on foot and the subject of the video is capable of being cross-examined but is not made available without good reason this may diminish the weight, and in some circumstances, the admissibility of the evidence.

4.2.3 existence of prior statements

A prior statement always has the potential to become a prior inconsistent statement. There may be a perceived problem if a witness, who has given evidence prior to hearing for the purpose of its preservation, is able to give evidence at the eventual hearing. The later evidence can be compared to the earlier evidence and there may be apparent inconsistencies between the two sets of evidence.

The problem of perceived inconsistencies in prior statements in native title matters is well documented. There is a considerable body of anthropological literature attesting to the dynamic nature of oral traditions. Where there is an apparent inconsistency it is important to look at the possible explanations.

For example, it may be a situation where a person has acquired knowledge or received information after the recording was made. It may also be that at the time the evidence was first given the person knew certain things but was not at liberty to

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76 Verbal communication Sara Yu, December 1997. The KLC has initiated and co-ordinated the videoing of Kimberley elders whose knowledge was seen as vulnerable to loss primarily for their heritage value but also in the hope that they will be admissible evidence in any future land claim.


78 In Yorta Yorta op cit at n. 6, at para. 20. Olney J “…paid no regard to the content of the statements of persons who were not called to give evidence.”
speak of them at that time. S/he may later (for example, following the death of another person) have become the authoritative person to speak. Also things which may have been the subject of negotiation at the time of giving first evidence may be resolved by the time of a hearing, for example, whether certain persons are members of the group.79

Where the witness is old, frail or unwell, the potential for misunderstandings, especially where translators or interpreters are involved, greatly increases. It also stands to reason that the potential for inconsistency increases the greater the length of time between the first giving of evidence and the time a person gives evidence at any subsequent hearing.

4.2.4 restrictions on use

What restrictions, if any, may exist on the use of such evidence? For example, what cultural restrictions, if any, exist on speaking of, or presenting audio or visual images of, the dead and within what time frames?

In most Aboriginal communities there exists some temporal prohibition on the use of the names, voices or images of dead persons. The degree of the prohibition varies between groups and in response to a number of other factors. The witness and the claimant group need to consider how the evidence may be used if the witness dies and the evidence is required within the traditional mourning period.

4.2.5 access and confidentiality

Who may view it? Who may not view it? Under what circumstances can the material be released? Once created documents can always be subpoenaed (subject to legal professional privilege and other restrictions).

Should other members of the group be allowed to view the transcript or tapes prior to the hearing? This issue has also been raised with regard to claim books. If witnesses read the claim book they leave themselves open to the accusation that they have not learned about their land by traditional means. If they do not read the claim book they may be accused of lacking the necessary interest in their traditional inheritance. The same issues will arise over taped evidence.

What gender issues are relevant to the material being recorded?80

4.3 Making Application to the Court

If an application for determination of native title has been filed in the Federal Court parties can seek orders for the perpetuation of evidence through a notice of motion81 supported by affidavit stating why it is necessary or desirable to have any witnesses’ evidence taken before trial. This could be done on the basis that the evidence would only be used if the witness was unable to give evidence in person at the time of the hearing.

The application for orders to take evidence early may cause the matter to be expedited and, if not already done, a trial judge to be allocated.

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80 For discussion of gender issues in native title matters see the Full Federal Court decision in Western Australia v Ward (1997) 76 FCR 492, 145 ALR 512.
The Court will then decide whether the evidence should be taken, and if so, by whom. The Court can take the evidence itself, or appoint a commissioner or assessor to do so on its behalf. Factors such as the location of the witness(es), their capacity to give evidence and to travel, Court resources and costs will impact on this decision.

The Court may also decide on the manner in which the evidence is to be recorded. It is suggested that in addition to the usual methods of aural tape-recording and written transcript, consideration be given to the video-taping of evidence, especially if it is possible for the evidence to be taken on country.\textsuperscript{82}

\subsection*{4.4 Taking the Evidence}

The Court has a range of possibilities open to it for the taking of evidence. For example, orders could include requiring the party wishing to perpetuate evidence to provide other parties with statements containing the substance of the evidence each witness proposes to give prior to the actual taking of the evidence. This would allow other parties time to consider issues such as relevance and the need for cross-examination.

Orders could also reflect consideration for the protection of vulnerable witnesses. Given the likely fragility of some witnesses, it is extremely important that their well-being is safeguarded. To this end it might be helpful for the parties to consolidate their approach and perhaps even agree on who should ask the questions. Intense,\textsuperscript{82}

\textsuperscript{81}\ Form 27.
\textsuperscript{82}\ Subject of course, to the views of the witnesses themselves and the claimant group.
protracted evidence-in-chief or lengthy robust cross-examination are unlikely to be appropriate in many circumstances.\textsuperscript{83}

\subsection*{4.4.1 Evidence in Chief}

Each witness must swear to the truth of the testimony they will give and state on what the basis they have authority to speak of the matters about which they will give evidence.\textsuperscript{84}

There is no rule of law that says there must be one questioner. The anthropologist Peter Sutton has recommended the value of using two people: the witness’s legal counsel possibly assisted by an anthropologist who is familiar with, and trusted by, the group to assist one another in the task of eliciting the most complete and comprehensive evidence from the witness(es).\textsuperscript{85} It is a practise which has been successfully used in Aboriginal land claims under the ALRA. Alternatively, the questioner can be assisted by an expert in framing the question.

There is probably merit in this suggestion. The evidence is being taken for the very reason that the witness may not be able to give evidence at the hearing. They may not be available to expand or clarify points at a later time. It is, therefore, more than usually important that their evidence-in-chief is as comprehensible and admissible possible.

\begin{footnotes}
\item{83} Sutton argues that aggressive questioning is generally unlikely to be productive when questioning native title claimants in any event. Sutton P, “About the Gist of What was Said”: Communication in the Context of Native Title”. In Frank McKeown (ed) \textit{Native Title: An Opportunity for Understanding}, 1996, pp115-123, Perth, National Native Title Tribunal, p. 117.
\item{84} Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed (s76 Evidence Act) unless inter alia the opinion is based on special knowledge gained through training, study or experience (s79 Evidence Act). Evidence of native title claimants can be argued admissible under this exception to the hearsay rule.
\item{85} Sutton P, \textit{Claimant Evidence}, National Native Title Tribunal Seminar, 8.9.97, p. 3.
\end{footnotes}
Experience in the Northern Territory seems to indicate that the best evidence in chief is elicited not by a multiple question and answer approach but rather by one which emphasises fewer well targeted open ended questions to witnesses on country where possible, allowing them to speak uninterrupted in their own terms.86

The approach also has the advantage of avoiding leading questions87 which, could jeopardise the admissibility or weight of the evidence. It is important however, that witnesses are alerted to the style of questioning that will be adopted so that, for example, general open question will in fact elicit as much relevant information as possible.

Each person who gives evidence should outline the basis on which he or she has the authority to speak.

There may be a need for interpreters and/or translators. Representative bodies and the group’s anthropologist(s) may be in a position to assist in the identification of appropriate interpreters and/or translators.

Issues such as dialect, gender, and dreaming, or kinship grouping may be important in the selection of questioner(s), interpreters and/or translators.88

87 This might be useful if a non legally trained person does the questioning which may be necessary or appropriate in some circumstances.
88 For discussion on issues relating to interpreters and translations see Neate G, op. cit n. 73, p. 288 – 291.
4.4.2 Group Evidence

The taking of evidence should be structured in a way that does not preclude the giving of group evidence. Giving evidence before, or as a group, has been shown to be extremely valuable where people lack authority to speak, or to speak alone on a particular issue. The processes provide support to witnesses and immediate group validation of their evidence.

‘The best test of the claimants’ traditional ownership, as Toohey J has noted, is community acceptance.’ Given the real possibility that the witness may not be able to give evidence at the time of hearing it is especially important that they be given the opportunity to present their evidence as comprehensively as possible, including the opportunity to demonstrate group validation of that evidence.

The taking of group evidence or individual evidence before a group is, however, not without its problems. It can sometimes be difficult to establish whether a witness is speaking on their own behalf or on behalf of the group as a whole. It can also present difficulties ensuring that the transcript of evidence accurately reflects the individual speakers.

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89 Order 78 Rule 34, FCR provides for evidence to be given in consultation with others.
90 Australian Law Reform Commission Report: Aboriginal Customary Law at para 645. The Commission recommended that Courts and Tribunals be given express power to allow 2 or more members of an Aboriginal community to give evidence on customary law where this was necessary desirable para 648.
92 Aboriginal Land Commissioner (Toohey J) Borroloola Land Claim, AGPS, Canberra, 1979, para 63. 
Further more, while the taking of group evidence allows for the resolution of differences of opinion or recollection between group members, if this is not achieved it can create the impression of a lack of consensus and disunity which may be vulnerable to exploitation at a later date.

4.4.3 Cross-examination and re-examination.

The issue of cross-examination is complex and raises many issues for the Court’s consideration. A court always retains an inherent jurisdiction to control proceedings before it. A person appearing before an assessor may only be cross-examined with the leave of the assessor.\textsuperscript{94} It may be that a witness is not fit for cross-examination, or that the party may wish to claim legal professional privilege over the evidence. On the other hand, they may wish to allow cross-examination to increase the weight of the evidence.\textsuperscript{95} It is also conceivable that such evidence will need to be taken at a time so early in the process that other parties are not in a position to cross-examine, the proceedings not having been on foot long enough for the contentious issues to be clarified. The provision of witness statements before the actual taking of the evidence should assist in this regard.

In determining whether or not cross-examination should occur, the Court will look at what is appropriate in all the circumstances, taking into account such matters as the physical and mental capacity and well-being of the witness and the cultural circumstances in which the evidence is being given. Guidelines could be developed in this regard.

\textsuperscript{94} s93(5) NTA.
\textsuperscript{95} See n. 72.
In practical terms cross examination can only occur if the witness agrees. If a witness statement has been provided to the other parties prior to evidence-in-chief being taken and cross-examination is requested and agreed, it could be undertaken as soon after evidence-in-chief as the witness’s well-being allows.

If it is not possible to provide a witness statement prior to the taking of evidence-in-chief, the other parties could be provided with a videotape of the evidence before deciding on the need for cross-examination.

Where there are multiple parties, attempts could be made to consolidate cross-examination and consideration given to directing it through an agreed questioner.\(^{96}\)

**4.4.4 Evidence on country.**

Evidence in other jurisdictions firmly points to the value in doing this.\(^{97}\) and it is becoming an increasingly common feature of native title determination application hearings.\(^{98}\) Claimants are usually more at ease on their country than in a courtroom. The features of the landscape can prompt more detailed descriptions of knowledge of the land and demonstration of the strength of attachment to it than reference to a two dimensional representation in the form of a map or photographs.\(^{99}\)

Such visits however, obviously have cost implications and will depend to a great extent on the witness’ location and fitness to travel to country. The provision of

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\(^{96}\) For further discussion of issues relating to cross-examination see Gray P, op cit at n. 86, p. 4, and Neate G, op cit at n. 2, pp 201-205. See also comments by the Aboriginal Land Commissioner (Maurice J) Warumungu Land Claim, AGPS, Canberra 1988, para 2.7.1.

\(^{97}\) Sutton P, op cit at n. 83, p. 4–5; and Gray P op cit at n. 86, p3.

\(^{98}\) For example Ward v WA op cit n.30; Sutton P, op cit at n. 83, p. 4–5; and Gray P op cit at n. 86, p3.

witness statements beforehand should enable other parties to make an assessment as to the need for them to travel to country for the taking of evidence-in-chief.

Issues of restriction of access to videotapes of country, which clearly identify significant sites, may need to be addressed.\textsuperscript{100}

\subsection*{4.4.5 Restriction of access}

Where appropriate, consideration could be given to the need to divide the evidence taking sessions into those which deal with public, unrestricted information and those which deal with traditionally sacred, sensitive, restricted information. Such issues could be resolved by agreement between the main parties about which topics will be covered in each session. If the evidence is being audio or video taped, it may be that separate tapes will need to be used.\textsuperscript{101}

Evidence which is gender exclusive could also be dealt with in a similar way.

Forward planning in this regard will avoid future arguments about whether a transcript, or an audio or video tape can be tendered in part, or edited before it becomes evidence.\textsuperscript{102} It can also assist to deal with issues of severance if parts of the evidence are subsequently held to be in admissible.

\textsuperscript{100} For discussion of the issues relating to restriction of access to video images see hearing of the land claim to Mungkan Kaanju National Park by Q’land Land Tribunal, 10 March 1999, transcript pp1446 – 1451.

\textsuperscript{101} For discussion of the issues in relation to restriction of access to video material and transcript of that material see reasons for decision of the Q’land Land Tribunal in relation to the Aboriginal land claim to Mungkan Kaanju National Park, (unreported) 11 March 1999.
4.4.5 Technical issues.

Evidence to be taken outside the courtroom will require the availability of mobile, sound and/or video recordists. It is possible for both roles to be fulfilled by one person although this can be technically difficult. In different circumstances they may need to be male or female.

Such services are increasingly available in the private sector and could be engaged on a contract basis.

Interpreters and translators, where necessary, may need specific guidelines and additional support to ensure accuracy of translation and/or interpretation.

The evidence must be taken in a way that attests to its veracity in terms of continuity and completion. Time and date markers should be encoded on any audio or video tapes.

**visual:** It must be clear from the video tape who is actually speaking so that the viewer can assess the demeanour of the witness. The image of the speaker’s face needs to be clear. If artificial light is not used, or is inadequate, care needs to be taken in videotaping in shady areas such as under trees particularly if there is bright light in the background. Similarly, care must be taken when filming early or late in the day. A talking silhouette will not be an impressive witness.

If the evidence is filmed on country, and if location is important to the evidence, careful thought needs to be given to whether the camera is directed only at the witness or is directed, at appropriate times, at the landscape or a particular feature being described by the witness.

There may be circumstances where a person cannot be filmed on country but illustrates what he or she is saying by references to photographs or maps. In such a case it is essential to appropriately record the documents to which the witness refers.103

**audio:** The microphone must be positioned so as to capture everything that the witness says while minimising background noise from such sources as wind, motor vehicles, dogs, birds, people talking, babies crying and planes flying overheard. Even in close to ideal conditions it is difficult to capture what is said by people who are diffident, quietly spoken, who turn away from microphones or tap the microphones.104 Thought needs to be given to the use of clip-on microphones, microphones held by witnesses or directional microphones which are held by a sound recordist out of camera range.

### 4.4 Transcript of the evidence

A Transcript of a video recording is not as admissible unless it is tended as a means of assisting the understanding of taped evidence which is unclear.105 Obtaining an accurate

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103 Neate G, ibid, p. 4.
104 Neate G, ibid, p. 4.
translation of indigenous evidence can be a difficult, costly undertaking. Where group
evidence is taken such problems can be exacerbated. Where it is necessary or
appropriate to make a transcript the advantage of video evidence is that with a good
visual and sound recording translators have the opportunity to hear and see the evidence
more than once. They can also consult with linguists and other experts in making the
translation.

4.6 Storing the evidence

It is important that Aboriginal people are consulted in this regard and do not feel that
they have lost control of their heritage. It would be a sensible precaution for more
than one copy of the transcript and/or audio/video tape to be made with one copy
stored in archival conditions by a suitable institution such as the National Library or
the Australian Institute Aboriginal and Torres Strait Islander Studies (AIATSIS).
Such decisions however, must ultimately be made by the indigenous people involved.

5. Conclusion

The decision to perpetuate the evidence of a witness in native title matters is a
complex one which demands serious consideration. There is no doubt that the
legislative framework exists, but whether and exactly how it should be done, are
matters which will require considerable creativity, flexibility and cultural sensitivity
from those involved.

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106 Aboriginal Land Claim to Lakefield National Park: Report of the Land Tribunal established under the