case of each of the disputants is put to a joint meeting of senior executives of the disputants. If the mini trial is successful, the disputants settle the dispute themselves on the basis of the facts before them. Mr Justice Rogers, a supporter of the mini trial concept (which, as he points out, is really a highly structured way of exchanging information and negotiating a settlement), has pointed out its advantages as a method of dispute resolution:

- the disputants are apprised of all the facts;
- the attention of top management is engaged at an early stage, before bitterness sets in;
- each side realises the strengths of its opponent's arguments and the weaknesses of its own arguments;
- the disputants are able to reach settlements which a judge could simply not provide.

current consultations. Consultations with the business community concerning the Centre proposed for New South Wales are continuing. A survey to determine the needs of the business community has been distributed and the replies are presently being received. The survey is designed to ascertain:

- the involvement of organisations or individuals in commerical arbitration (or other forms of dispute resolution) or litigation over the past 5 years;
- the relative importance to business people of the following factors in a dispute resolution process: simplicity, choice of arbitrator, choice of venue, choice of rules, expertise of arbitrator, the possibility of resolving disputes according to commercial custom or mercantile commonsense rather than principles of law, confidentiality, preserving goodwill between the disputants, cost of obtaining a resolution, involvement of company executives, delay in obtaining a resolution, finality and enforceability of the arbitrator's decision and the independence of the arbitrator;
- ways in which skilled arbitrators could be useful in resolving typical commercial disputes for particular industries;
- the possibility of utilising the proposed Centre for international dispute resolution.

Mr Ahrens hopes that a broad cross section of interested parties will respond to the survey. While the survey results are being assessed Mr Ahrens is organising workshops involving participants from business, government and the law to consider in greater detail the functions of the Commercial Disputes Centre. The Centre will be searching for its first SecretaryGeneral early in the coming year.

aboriginals, anthropologists and the law

> there can be no withholding of information simply on the ground that an anthropological researcher is of the view that it will not assist my level of understanding or that of the other participants . . . It is for me to decide what might assist my understanding and that of the other participants. I cannot allow that function to be usurped by other persons. It is simply not tenable that in a judicial investigation such as mine relevant information may be withheld on the basis of the exercise of discretion by somebody else.
>
> Maurice J, *Warumungu Land Claim*, Reasons for Decision, 1 October 1985, 132

In the long-running Warumungu Land Claim orders were issued pursuant to the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) s54 for the production of a large volume of materials gathered over a number of years by anthropologists, linguists and others acting on their own behalf, or on behalf of the Central Land Council or the Aboriginal Sacred Sites Protection Authority. Justice Maurice, the Aboriginal Land Commissioner, had to consider claims of legal professional privilege, public immunity and confidentiality raised in an attempt to avoid disclosure of field notes and other materials.

In his reasons for decision issued on 1 October 1985, Justice Maurice, rejected claims to public interest immunity raised by the Aboriginal Sacred Sites Protection Authority. Claims to confidentiality and legal professional privilege were also rejected in respect of certain other documents, either on the basis that the privilege did not apply or that any privilege which may have attached to the documents had been waived. While the Central Land Council and some anthropologists have subsequently disclosed certain documents in accordance with the judge's orders, the Aboriginal Sacred Sites Protection Authority and the Northern Territory Government have applied to the Federal Court to have the decision reviewed under the Administrative Decisions (Judicial Review) Act 1977 (Cth). An injunction has issued restraining the Aboriginal Land Commissioner from receiving and the researchers giving to the Commission those documents in which the Sacred Sites Protection Authority has an interest and on 7 November, 1985 Justice Maurice vacated his orders in respect of further inspections and hearings.

The dispute represents yet another of the disruptions that has plagued the claim since it was first lodged on 20 November 1978. The first hearing commenced on 1 November 1982 but ended shortly thereafter when the Northern Territory Government announced that some six days previously it had alienated eight of the areas under claim. The Aboriginal Land Commissioner then ruled he had no jurisdiction to hear claims to any of the areas so alienated. The High Court ruling in *R v Kearney* that neither the alienation of the land nor the extension of the town planning boundaries would affect the areas of land under claim (by the Northern Territory Government in relation to the Jawoyn and Kenbi land claim), opened the way for the second hearing to commence on 4 March 1985.

secrecy and the disclosure of aboriginal customary laws. The *Warumungu Land Claim* raised questions of secrecy of aspects of Aboriginal customary laws and practices. In doing so it touched on areas of interest to the Commission in the context of its Evidence Reference and the Aboriginal Customary Law Reference. The importance of secrecy has been described in the following terms in Maurice J's Reasons for Decision:

> The possession of [information covering the mythology of a particular site] brings with it esteem, power and influence and is therefore sought after, but it can only be achieved by degrees over a long period of time in seemingly undefinable ways involving some sort of group acceptance. To acknowledge having information of this kind without being recognised as entitled to it may lead to the imposition of extreme sanctions. And, whilst being entitled to have knowledge according to such systems is one thing, having the right to tell others is quite another. Those who possess and control the flow of information about Aboriginal mythology control the country and in particular, control the ability of people to move about it freely and to exploit its natural resources.

In almost every land claim heard to date, Aboriginal people have chosen to present secret material to the Aboriginal Land Commissioner. Procedures adopted by the Land Commissioner have enabled the confidentiality of secret/sacred material to be protected. So too in legal proceedings, the power to regulate procedure, to hear evidence in camera, to allow the production of evidence on a restricted basis and to grant protective orders, including orders suppressing publication of proceedings are available to protect disclosure of secret material. In the context of the *Warumungu Land Claim* (Reasons for Decision) disclosure was made subject to stringent safeguards. Justice Maurice stressed:

> But the most important consideration of all is the protective measures which I propose to adopt. Production of the records sought will occur whilst I am sitting in camera. Only myself, my associate, counsel assisting, counsel for the Attorney-General, possibly my consultant anthropologist and the researcher who gathered the material will be present. They will not be permitted to use any of the information so learnt for any purpose other than the land claim.

privileged communications. Existing powers enable evidence communicated by Aboriginal informants to anthropologists, and others to be presented to the courts on a protected basis. Difficulties do not arise where this is done with the consent of the Aboriginal informants. However as occurred in the *Warumungu Land Claim,* a party opposing the claim may seek to subpoena confidential material. Disclosure may then occur against the wishes of the Aboriginal informant or the person to whom the information was communicated, unless the communication falls within recognised categories of privilege such as public interest immunity and legal professional privilege.

public interest immunity. It is difficult to conceive of circumstances in which the public interest privilege could be sucessfully invoked in a case involving aspects of Aboriginal customary law. Claims to public interest immunity in respect of materials gathered for the Aboriginal Sacred Sites Protection Authority were rejected by the Land Commissioner on the basis that while there may be public interest in the effective performance of the Aboriginal Sacred Sites Protection Authority, no parallel could be drawn between the case before him and those categories of public interest generally recognised as attracting crown privilege. Furthermore it was not considered appropriate to extend the categories of public interest to cover the material in question. One reason against extending the categories was that where Aboriginal people sought the protection of the Aboriginal Land Rights (Northern Territory) Act (Cth) 1976, they must be prepared to reveal the information necessary to bring themselves within the Act.

legal professional privilege. The Land Commissioner specifically rejected the proposition that anthropologists could claim absolute privilege akin to legal professional privilege.

> Anthropologists, linguists and bodies such as the Authority have no recognised privilege to withhold production of their field notes or other records. They are no more outside the Australian system of law than those whose interests they see themselves as protecting.

But certain documents were protected from disclosure by legal professional privilege. These included the Warumungu Land claim book, drafts of claim books which are to be regarded as draft pleadings, anthropological and other notes prepared for the purposes of legal proceedings although the documents may be in the hands of third parties, and copies of field work done for the Aboriginal Sacred Sites Protection Authority for other purposes, provided the copies themselves are made for the purposes of preparing the land claim. (Even though original field work prepared for the Aboriginal Sacred Sites Protection Authority for other purposes, for example the development of the Australian National Railway would not be considered privileged). At the same time the Land Commissioner applied a broad doctrine of waiver prompted by notions of fairness, arising from the perceived failure of the adversary process in land claim proceedings.

confidentiality. The Land Commissioner recognised the importance of maintaining the confidentiality of information of a secret nature disclosed by Aboriginal people on a confidential basis. He likened such secret material with 'what a lawyer might describe as a system of intellectual property'. However he considered that any discretion to exclude evidence on the basis of confidentiality was overriden by the public interest in ensuring the proper testing of land claims particularly given the difficulties faced by objectors and counsel assisting the Commissioner in gaining access to information with which to test the claims of the Central Land Council and experts employed by the Council.

extending protection. Notwithstanding the undertakings given in the *Warumungu Land Claim* to ensure that disclosure took place on a restricted basis, the decision to require disclosure has caused concern among anthro-

pologists. The Australian Anthropological Association, at a meeting in Darwin in August this year, resolved that the confidentiality of the relationship between the anthropologist and the informant is essential to anthropological research and that it was desirable that such a relationship be afforded appropriate legal protection. It has been argued that it will no longer be possible to ensure the confidentiality of the disclosed material and that Aboriginal people will no longer be willing to confide in anthropologists. The extent to which these fears are justified is unclear. It is only in certain very limited circumstances that anthropologists and informants may be able to bring themselves within the scope of the legal professional privilege. The Law Reform Commission, in both its Interim Evidence Report and its proposed recommendations for the recognition of Aboriginal Customary Laws, has been reluctant to create new categories of privileged communications akin to legal professional privilege, preferring instead to give the courts a broad discretion to exclude evidence of confidential communications. The creation of an absolute privilege for anthropologists is considered undesirable given that there would be no reason to limit the privilege to anthropologists as opposed to community advisors, linguists and others. It is undesirable to extend the categories of absolute privilege in this way. However a discretion to exclude confidential communications would appear to be justified. In its Interim Report on Evidence, the Commission has recommended that before exercising its discretion the court should take into account:

(a) the importance of the evidence and proceedings;
(b) if the proceeding is a criminal proceeding, whether the evidence is adduced by the defendant or by the prosecutor;
(c) the nature of the relevant offence, cause of action or defence and the nature of the subject matter of the proceedings; and
(d) any means available to limit publication of the evidence.

These matters should be weighed up against the likelihood of harm to individuals and to the confidential relationship involved. The harm to the Aboriginal community concerned is also of considerable importance. The court's powers to protect confidentiality in other ways will also be relevant. Consideration should be given to ensuring that such a provision extends to other tribunals having the power to take evidence including the Aboriginal Land Commissioner under the Aboriginal Land Rights (Northern Territory) Act (Cth), 1976.

conclusion. Underlying the *Warumungu* decision is the Land Commissioner's concern with fairness. For this reason the Land Commissioner found it an 'extraordinary proposition' that an anthropologist be 'permitted to give the evidence which she has, founded at least in part on privileged materials, without the privilege in them being waived'. In land claim hearings the control of information supplied to the Commission is very much in the hands of the claimants and their advisors. As Justice Maurice commented in Warumungu:

> what I hear is what the applicants and their advisors want me to hear, and the hearing does now always afford an adequate opportunity to go behind the claim as presented – if indeed it ever does.

Objectors have difficulty in testing the information. Greater examination of Aboriginal claimants can overcome this to some extent, but the difficulties remain. The *Warumungu Land Claim* has called into question the nature of land claim hearings and the extent to which they should be adversarial. It has raised questions of the relationship between claimants and objectors and between anthropologists, Land Councils and lawyers involved in Land Claims. Ultimately though it is the Land Commissioner who must report

to the Minister for Aboriginal Affairs. In Justice Maurice's terms:

> . . . it is fundamental to the nature of our society that the determination of disputed questions of fact are by and large committed to juries made up of ordinary people or judges and magistrates whose only specialist training is the law . . . We do not commit the decision-making function to experts in that field . . . In this way our society and others with whose liberal traditions it identifies have so far managed to avoid the tyranny of boffins.
>
> Warumungu Land Claim,
> Reasons for Decision, 1October1985,

parents, children and the pill

> Children begin by loving their parents. After a time they judge them. Rarely, if ever, do they forgive them.
>
> Oscar Wilde, 'A Woman of no Importance'

The English House of Lords has overturned the Court of Appeal in the Gillick Case ([1985] *Reform* 53). Mrs Victoria Gillick had sought a declaration that a circular issued by the Department of Health and Social Security for England and Wales which advised doctors that they can give contraceptive advice and treatment to girls under the age of 16 years without their parents' knowledge or consent was unlawful. Although losing both at first instance and in the House of Lords, Mrs Gillick had a total of five judges coming down in her favour while only four were against (The House of Lords was split 3:2 against her, but she got a unanimous decision in the Court of Appeal (0:3). She had lost at first instance (1:0).). In the House of Lords the majority was composed of Lord Fraser of Tullybelton, Lord Scarman and Lord Bridge of Harwich. Lord Brandon of Oakbrook and Lord Templeman dissented.

Lord Fraser said that the main question in the appeal was whether a doctor could lawfully prescribe contraception for a girl under 16 without the consent of parents: can a doctor ever, in any circumstances, lawfully give contraceptive advice or a treatment to a girl under 16 without her parents' consent? He said that three strands of argument were raised in the appeal:

- whether a girl under the age of 16 had the legal capacity to give valid consent to contraceptive advice and treatment including medical examination;
- whether giving such advice and treatment to a girl under 16 without her parents' consent infringed the parents' rights; and
- whether a doctor who gave such advice or treatment to a girl under 16 without her parents' consent incurred criminal liability.

Lord Fraser said that after a careful consideration of the relevant statutes he came to the conclusion that there was no provision which compelled a holding that a girl under 16 lacked the legal capacity to consent to contraceptive advice, examination and treatment, provided that she had sufficient understanding and intelligence to know what they involved.

Lord Fraser said that since the circular which was the subject of the declaration claim expressely stated that it would be 'most unusual' to provide contraceptive advice without parental consent, the contention of Mrs Gillick involved the assertion of an absolute right to be informed of and to veto such advice or treatment being given even in the 'most unusual' cases. Lord Fraser said that parent's rights to control the child existed not for the benefit of the parent but for the child.

It was contrary to the ordinary experience of mankind, at least in Western Europe in the present century, to say that a child remained in fact under the complete control of his parents until attaining the definite age of majority, and that on obtaining that age he or she suddenly acquired independence. In practice most wise parents relaxed their control gradually as children developed, and encouraged them to become increasingly independent. Moreover the degree of parental control actually exercised over a particular child did in practice vary considerably according to his or her understanding and intelligence. It would be unrealistic for the courts