Indigenous culture & NATIVE TITLE

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The recognition of native title is being restricted by use of unrealistic and culturally insensitive criteria.

Native title is about the recognition of indigenous culture; but how much culture and what things do you need to show before you get recognition?

Under some statutory land rights schemes Aboriginal people have been called upon to give very detailed accounts of their spiritual beliefs and their relationship to claimed country. For example, under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (the *Land Rights Act*), the statutory criteria require claimants to satisfy a definition of 'traditional owner' which requires that they prove they are a 'local descent group' with 'common spiritual affiliations' and 'primary spiritual responsibility' for sites in land.[1]

This Act was based on a model of land ownership which was assumed and explained by anthropologists and then approximated into statutory language. Although the criteria have been interpreted very liberally by the courts and the process of land claims has to some extent been 'Aboriginalised',[2] there is no doubting the level of detail about Aboriginal culture that the claimants have to reveal for a claim to succeed under the *Land Rights Act* makes the process intrusive.

When the High Court recognised native title and the Commonwealth Government enacted the *Native Title Act 1993* (Cth) ('the *NTA*') in response, the Australian legal and political system had an opportunity to do things differently.

Native title is an opportunity to create a less intrusive system because instead of creating criteria and making the Aboriginal system of law fit into them, native title is a recognition of indigenous law. Native title is given its content by the laws and customs of indigenous peoples and not the other way around.

In this article I examine some aspects of the treatment of indigenous culture in the legal development and administration of native title. Unfortunately, initial indications reveal a trend towards restricting the recognition of native title through unrealistic and culturally insensitive criteria.

How much detail is required to prove a native title claim?

The relevant issue in an exclusive claim for communal native title is: what rights with respect to a territory vest in the *group*?

In determining a claim by an indigenous group (on the basis of exclusive connection) the issue is the existence of the system of laws and customs. Given a system exists, it will determine the existence of an identifiable group and it will also determine the nature of the group's connection to the territory. Once the authority of the system is established, the common law draws a circle around the territory in which it operates and declares that the capacity to determine land allocation within that jurisdiction vests in the landholding group alone. The group

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is the owner and *its* system of law the authority about the allocation of rights in the whole area.

In *Mabo (No.2)*,[3] the High Court did not require definite findings of fact about the workings of the Meriam people's land tenure as between individuals and subgroups within the broad claimant group. Despite Justice Moynihan's findings that some aspects of Meriam law and custom were too uncertain to be declared, the High Court made a declaration that the Meriam people's communal native title was good against the whole world.

In accord with *Mabo (No.2)*, it should no longer be necessary to prove all the intricacies of indigenous law and custom relating to land to obtain a declaration of native title rights. Of course, claimants will want to put laws and customs in evidence to show the existence of the broad system and its coverage. But evidence of a particular rule will not generally be put forward to get common law recognition for that rule. Instead, it will be presented to gain common law recognition of the system of rules of which that particular rule is part.

Some commentators and litigants have suggested that applicants must prove all the intricacies of the laws and customs regulating the internal property relations of the group to establish communal native title. For example, in argument about directions in the Miriuwung and Gajerrong peoples' claim, the State of Western Australia argued that the applicants must provide evidence of:

(i) the laws and customs and systems of land tenure from which native title is said to be derived;
(ii) the composition and structure of land owning groups;
(iii) variations in the rights, functions and responsibilities of the different groups and members of the groups;
(iv) cultural aspects including ceremonies, ritual and mythology . . .[4]

Only the first of these listed subjects is relevant for a declaration of communal native title against the Crown. Further, the only significance of 'the laws, customs and systems of land tenure' is that these exist and that these specifically connect the tenured group as a whole to the land under claim. The internal workings of the systems are relevant only to the extent that these prove the existence of the system as a whole. Claimants must prove the structure of the claimant group. However, if the 'composition' of the group is taken to mean its component parts or its membership, for reasons detailed below, I reject paragraph two as a criterion. Paragraph three is irrelevant. It goes to the internal operation of the system of laws and customs not the existence of the system. The fourth criterion suggested by the Western Australian Government is offensive. Once the claimants establish that a system of law exists, why must the system be put on trial? Indigenous peoples should not have to endanger our cultural heritage by holding it up for public inspection and possible media ridicule to assert our property rights.

The group holds native title

A similar issue about the detail required for proof of communal native title arises in relation to the definition of the claimant group. In the same way that claimants should only need to prove the existence of a system of laws and customs and not its content, I believe that claimants need only prove the rules for defining the group and not its precise membership.

In *Mabo (No.2)*, the named holders of native title rights over the Murray Islands were the 'Meriam People'. It was not necessary to prove the identity of each of the Meriam People. The evidence suggested that this designation refers to an identifiable group, and the Court saw it as unnecessary or undesirable to specify the membership of the group any further. Presumably, the Court realised that individual membership of the group would be constantly changing because of birth, death and perhaps marriage and adoption.

Native title is a communal title. Proof of the existence of a community, rather than its exact membership, is the only matter at issue.

The claimant group for native title does not have to conform to a predetermined anthropological construct. It can be a family, a clan, a tribe, a language group, a number of language groups or any combination of these, provided its rules for membership are relatively certain. The claimant group need only show that it is the same group as that which had a connection to the area before the assertion of British sovereignty or that it takes from that group according to indigenous law and customs.

Unfortunately, this is not the interpretation being applied by some members of the judiciary. Justice Olney, for example, issued practice directions in *Towney v Fahey & Ors* (the Peak Hill Claim) which required the applicant to provide:

> a list of claimants, including, so far as is reasonably practicable, in relation to each claimant, his or her:
>
> (i) name;
> (ii) date of birth;
> (iii) place of birth;
> (iv) place of residence . . .

In some cases the difference between proving the terms of membership of the group and the actual membership may be insignificant. In others, the difference may be critical. Provided the court can identify some mechanism for determining who is in and who is out of the claimant group, lists of individual names are unnecessary to a determination of native title.

Proof of historical connection

Judges and commentators have said that claimants must prove their connection to land existed at the date of the assertion of sovereignty. However, this requirement is affected by inferences that mean it cannot be taken literally. Forensic presumptions that operate in all trials of fact affect this element of the proof of native title.

The New South Wales Supreme Court gave an indication of the requirements for proof of historical continuity of native title in a case where a person charged with illegally taking abalone asserted a native title right to fish as a defence.[5] In that case there was a gap in evidence between the date to which the appellant could prove his connection to an Aboriginal group and the date of the assertion of sovereignty. The appellant argued that a presumption of continuance operates to fill in the gap. According to the appellant, the presumption arises when the existence of certain facts operates retrospectively as evidence of a former condition.

In native title claims, this inference means that claimants have to prove their connection to land back in time as far as they can with the available material. The material is likely to be the memories of the elders of the group and historical and government records. Unless some evidence is adduced to show that the connection did not exist before the time to which it can be proved, then the court will infer that it did.

Justice Kirby's comments about the inference are significant:

> . . . it is next to impossible to expect that Aboriginal Australians will ever be able to prove, by recorded details, their precise genealogy back to the time before 1788 . . . If, therefore, in this case the only problem for the appellant had been that of extending the proved use of the land by his Aboriginal forebears from the 1880s back to the time before 1788, I would have been willing to draw the inference asked. In more traditional Aboriginal communities the inference will be quite easily drawn. But, even in this case, it would have been common sense to draw it.[6]

What seems like common sense to Justice Kirby is not necessarily the universal view. In the same case, Justice Priestley set extraordinarily high standards of proof for claimants. Among other things, Justice Priestley suggested that indigenous claimants must prove their biological descent back before 1788.

This standard, if it is required to be met without the aid of presumptions, is likely to be unattainable for most indigenous peoples. It amounts to a denial of native title rights.

Justice Priestley appears unmoved by his own prognosis that the consequence of the requirements that he identifies is likely to be that:

> . . . the time that has passed since then and European settlement of the country have caused the foundation of native title to disappear in many places; the result is that at the present time it is likely to be difficult, particularly in the more settled parts of the country, for any Aboriginal group to fulfill the rather onerous requirements of proof identified by the High Court in *Mabo (No.2)* . . .[7]

Here, Justice Priestley claims that it is history that has caused dispossession. This is an old manoeuvre by which decision-makers such as judges and politicians deflect responsibility for their present choices to the immutable facts of the past. Setting an unnecessarily difficult standard of proof and then attributing indigenous peoples' inability to meet it to a loss of laws and customs is unacceptable.

Decision makers cannot pass on the responsibility for failing to accommodate indigenous connection to land to history. It is a present and pressing responsibility that belongs to governments, judges, lawyers, and the rest of us right now. Impossible requirements of proof of native title will prevent the recognition of native title rights where these plainly exist according to our systems of laws and customs. Australia's international obligation is to guarantee indigenous peoples the enjoyment of our culture, not to pretend it does not exist through the application of unrealistic standards of proof.

Abandonment of native title

Justice Brennan posits that native title can be lost where a group no longer observes the laws and customs that foster its connection to land.[8] However, all the majority judgments in *Mabo (No.2)* acknowledge that indigenous laws and customs can change without affecting the continuance of native title.[9] Justices Deane and Gaudron take this proposition further than Justice Brennan. They suggest that, where the members of an indigenous group have abandoned their traditional laws and customs but have remained on the land, their native title will survive.[10]

This contrast between the judgments indicates that a connection or a special relationship to the claim area can be maintained in at least two ways — through observance of traditional law and through physical presence.

Physical connection

The *NTA* does not make it an express requirement that claimants show physical connection to land. Despite this, some people have assumed that native title requires continuous physical presence on land. The imposition of such a requirement is a denial of indigenous culture.

The connection that claimants are required to have at common law should reflect the connection required by indigenous law. It should be proved as a question of fact in each case. The common law should not set arbitrary requirements for continuous connection when native title is supposed to get its source and content from our laws and customs. It is vital that we do not allow the common law to create new barriers to recognition of native title.

Many times in my experience in the Northern Territory I have seen that Aboriginal people can go away (or be taken away) from their country and still maintain the laws that foster their connection with it. One vivid example I remember of connection preserved through long absence from country was in one of the Warlpiri land claims in the early 1980s. One of the witnesses was a woman in her seventies who had survived the Coniston Massacre in 1927. After the massacre she had been taken away and did not return to her country until the preparation for the land claim. The woman was to give evidence about part of the claim area that was inaccessible by vehicle so she was taken in a helicopter to this place she hadn't been for 50 years.

The witness was an old lady, she was blind and partially deaf but when they sat her down and they told her where she was, there was no mistaking her knowledge of country. She sat on the ground facing west and described, in precise detail, the landscape that everyone else could see. She said the names of rocks and trees and told the stories and songs that contain the law for the place. For two hours the lady explained the land and its meaning at every point of the compass. She explained how, even while she was far away from the place, her people had made her learn the songs and the stories so that she could understand and explain that it was her country. The evidence was video taped and played back to the Aboriginal Land Commissioner. The Commissioner was 'glued to the television' as the witness demonstrated her connection to country in a way that was moving and beyond challenge.

Indigenous law will not always require traditional owners to maintain a *physical* connection with their country in order to prove their connection with it. Therefore, the common law must not impose such a requirement. I know of a mob in the Northern Territory who are the traditional owners of a region that includes a small island. These people have powerful dreamings associated with that island but they are forbidden to go there. In their law, they have dominion over the place and its surroundings but they are not permitted to make physical connection with it. A common law requirement for physical connection would clearly go against these people's law.

The requisite connection to land is not a physical connection but a juristic one. Connection in indigenous law can be expressed and maintained through spiritual observance, through memory, through kin and through information given and received from others with a common connection. The imposition of a common law requirement for physical connection would be a repudiation of the principle that native title derives from indigenous law.

Change in laws and customs

Although the judges in *Mabo (No.2)* acknowledge that customs can change, in even postulating the 'abandonment of culture' it seems the law does not have a sophisticated and fair notion of culture and tradition. The law must allow indigenous cultures to create meaning. It must not confine indigenous expression to the pristine and inaccessible past.

Indigenous culture, like every other culture, is dynamic. It changes. It adapts to and incorporates new things. It takes on new forms and explains new events. It reinvents places and things in the image of the cultural system.

By what criteria will the judges assess whether a group's culture and tradition has adapted organically or whether it has changed so radically that it has been abandoned?

The authenticity of a culture cannot be measured by the purity of its cultural products or the quaintness of its technologies. If culture can be measured at all, it must be measured against the living experience of the people who identify with the culture. Culture is a group's whole way of behaving, how they eat, how they share, how they argue, how they think, how they interact with other cultures.

Our cultures are not dead, dying or confined to museums. A culture does not die while someone remembers its stories, while someone asserts their cultural identity, even while someone starts to learn about their culture. To adminster native title fairly the courts must face up to the reality of our continuing cultures. Judges must not deny indigenous property rights by positing constrictive and outmoded definitions of culture.

Future Act procedures

It is not just the courts that have a responsibility properly to accommodate indigenous culture when administering native title. The National Native Title Tribunal is the agency created specifically to deal with native title claims and related issues. The Tribunal makes important decisions about access to certain procedures and rights created under the Act.

For example, the *NTA* provides a right for indigenous claimants and native title holders to negotiate about future Acts on land. This is an important protection for cultural and property rights and it is also an aspect of the exercise of indigenous self-determination. The right to negotiate can be removed under the NTA but only in specified limited circumstances.

One of the criteria for removing the right to negotiate is that the proposed Act must not cause a major disturbance to the land.[11] The Tribunal's current construction of this criterion does not accommodate indigenous culture and means that the provisions do not operate in the manner in which they were intended. Deputy President Seaman of the Tribunal said that 'major disturbance' is to be judged by the standards of the broader community and not by reference to the affected indigenous people's point of view.

This is unacceptable.

The concept of native title purports to recognise our laws and customs and it must be consistent with our laws and customs. Likewise the application or withdrawal of rights conferred in the NTA should be done in response to indigenous peoples' understandings. The rights at stake are indigenous rights, defined by the laws and customs of indigenous people. It is native title land, not vacant Crown land, that is affected.

Deputy President Seaman sought to justify his decision by saying that the areas involved were 'very large open areas in very remote country'.[12] This phrase exemplifies the importance of perspective in assessing the impact of an Act on land. From whose vantage point is land remote? As one observer has noted, for the people in the Tanami region in the western Northern Territory, 'Canberra is a very remote place indeed'.[13]

In administering native title we must be responsive to the fact that indigenous people may not see the world in the same way as everybody else. Native title holders are entitled to have 'major disturbance' assessed in the context of what they understand those words to mean.

A test based on the standards of the broader community undermines Aboriginal culture and ignores crucial characteristics of indigenous relationships with land. It is a Eurocentric and inappropriate approach. It will cause resentment and animosity among indigenous people affected.

Conclusion

Native title provides the promise that indigenous law and custom will be recognised for what it is and not forced to conform with some court or statute-derived prototype. To fulfill this promise, the system for recognising and administering native title must be attuned to indigenous peoples' ways of seeing and doing things.

Even in *Mabo (No.2)*, when the High Court first recognised native title and the promise of a new relationship was born, indigenous conceptions were not fully accommodated. The Court declaration gives the Meriam People exclusive rights to their lands but it does not deal with their rights to the sea. At the time the declaration was seen as a benchmark of the kind of rights to which other indigenous peoples could aspire but, compared to the way Meriam People understand *ged* (land) and *gedira i gur* (the land's sea), it is a compromise.

For Meriam People there is no separation between land and sea in terms of property. The declaration is an imperfect accommodation of Meriam understanding of 'home' because it artificially divides what the Meriam see as continuous space. To declare and protect native title rights in terms that accurately translate indigenous connection to land, the courts and other administrators must be attentive to indigenous realities and innovative in their expression of them.

If native title is seen as the challenge for the law and administrative institutions properly to accommodate indigenous difference, then native title also becomes an opportunity for genuine reconciliation. The native title process could be an opportunity for non-indigenous people to learn about our ways of looking after country in a context where Aboriginal people do not feel threatened or pressured. It could be a process that is empowering for Aboriginal people and it could be structured in a way that allows people to feel proud of the culture and law that they choose to present to a court or tribunal.

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placed on the lack of any recorded information about the 'women's business' by ethnographers without any analysis of the limitations of such ethnographic work — for example the influence on Taplin of his christianising zeal or the fact that both Tindale and Berndt worked at a time when there had already been massive cultural disruption — and in the face of inconsistency in other ethnographic information (about genealogies). Inferences were drawn from the absence of earlier opposition to the bridge or widespread knowledge of the 'women's business' without alternative explanations being explored. Emphasis was also placed on the absence of Aboriginal opposition to the building of the barrages and ferry installations in the 1930s and 1950s with no exploration of possible explanations for this. Finally and most importantly, the history of dispossession and dispersal of Ngarrindjeri people was referred to by the Commission but appeared to play no part in its conclusions. There was no consideration of the impact of that history on the transmission and transformation of cultural heritage as a basis for the beliefs entailed in the 'women's business' nor of this history as an explanation for the lack of earlier opposition.

As a forensic exercise firmly based within the dominant legal culture, the Royal Commission may be subject to critical comment. As a process for discovering and evaluating Aboriginal cultural heritage it is an example of the inadequacies of that legal culture in giving a voice to Aboriginal defined 'truths', values and meanings.

Conclusion

Conflicts between protection of Aboriginal heritage and development projects, or even low impact, inconsistent uses of land, will inevitably arise for resolution as they have in the case of the Hindmarsh Island marina development and bridge. How these might be resolved while still maintaining the integrity of Aboriginal cultural values and heritage remains at issue. The different narratives surrounding the *Hindmarsh Island Bridge* case, the manner in which these have been played out in the legal system and the privileging of the dominant narrative suggests that current regimes and processes for the protection of Aboriginal cultural heritage, within Aboriginal terms, are inadequate. It is difficult to foresee how the dominant system can provide protection when its mechanisms for protection ultimately require intrusions into that heritage with little or no place for Aboriginal voices. Perhaps the Evatt Review of the *Heritage Act* might provide some answers.

References

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2. *Chapman v Tickner*, unreported, Federal Court, 15 February 1995 at 14.
3. For a detailed discussion of the Act in relation to this case and *Douglas v Tickner* (the *Crocodile Farm* case) see N. Hancock, 'Proof of Aboriginal Cultural Heritage and the Public Interest', in this issue of *Alt.LJ*. See also, by the same author 'How To Keep A Secret: Building Bridges between Two "Laws"', (1995) 3 *Aboriginal Law Bulletin* 4.
4. *Tickner and Ors v Chapman and Ors*, unreported, Federal Court, 8 December 1995.
5. *Report of the Hindmarsh Island Bridge Royal Commission, (Royal Commission Report)*, Adelaide, 1995, p.312.
6. *Royal Commission Report*, p.311.
7. *Royal Commission Report*, p.194
8. *Royal Commission Report*, p.299.
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10. *Chapman v Tickner*, ref. 2, above, p.112.
11. Chapman v Tickner, ref. 2, above, p.119.
12. This material included the affidavit and oral evidence of the staff member as well as the fact that the Minister produced two statements of reasons for the decision, the first of which excluded reference to his having *considered* the representations.
13. *Chapman v Tickner*, ref. 2, above, pp.128-9.
14. *Chapman v Tickner*, ref. 2, above, p.124.
15. *Chapman v Tickner*, ref. 2, above, p.129.
16. *Tickner and Ors v Chapman and Ors*, ref. 4, above, at 30.
17. The Aboriginal Legal Rights Movement unsuccessfully challenged the validity of the Royal Commission: *ALRM v State of SA & Stevens*, Full Court of the Supreme Court of South Australia, 26 July 1995.
18. *Hindmarsh Island Bridge Royal Commission Rulings on Preliminary Issues*, p.2.
19. *Royal Commission Report*, p.5.
20. *Royal Commission Report*, p.7.
21. *Royal Commission Report*, p.7.
22. *Royal Commission Report*, pp.288-97.

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2. See Rose, D., 'Whose Confidentiality, Whose Intellectual Property', in M. Edmunds (ed.), *Claims to Knowledge, Australian Institute of Aboriginal and Torres Strait Islander Studies*, Canberra.
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7. *Mason v Tritton*, above, per Priestley JA, at 599.
8. *Mabo (No.2)*, above, per Brennan J, at 60.
9. *Mabo (No.2)*, above, at 61 and per Deane and Gaudron JJ, at 110.
10. *Mabo (No.2)*, above, per Deane and Gaudron JJ, at 110.
11. s.237, *NTA*.
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