

Land, Rights, Laws: Issues of Native Title



Native Title Research Unit
Australian Institute of Aboriginal and Torres Strait Islander Studies

Contributing to the understanding of crucial issues of concern to native title

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Abstract

In this paper, Dr Veth argues that global studies of patterns of mobility amongst hunter-gatherer groups illustrate that it is normal for groups to practice different kinds of 'abandonment' through time. This can occur at the varying geographic levels of residence, locality, region or indeed territory and can cover periods of time lasting from a 'season' through to a generation. The major theme to emerge from these studies is that despite physically leaving sites, tracts of land or indeed a territory for a period of time, groups actively maintain connections to those places through a variety of means. The central question that arises for native title is to what extent these well-documented and long-term historic processes should recalibrate the threshold for continuity of occupation and use of country. Thus Dr Veth asks, if temporary 'abandonment' of country in the past – for a myriad of reasons – did not break down the social institutions for maintenance of connection, then why should it do so in the contemporary context?

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‘ABANDONMENT’ OR MAINTENANCE OF COUNTRY? A CRITICAL EXAMINATION OF MOBILITY PATTERNS AND IMPLICATIONS FOR NATIVE TITLE

Dr Peter Veth

Under the *Native Title Act 1993* (Cth) claimants can show their connection to land or waters through their traditional laws and customs and how that connection is *defined*. The recent High Court decision, *State of Western Australia v Ward*, outlined that the absence of evidence of some recent use of the land or waters does not mean that there is no relevant connection.¹ In other words, native title can

cease to exist through a loss of connection as defined under traditional law and custom but not through the apparent absence of a physical presence. If physical evidence for recent occupation is not necessarily required for proof of connection, this raises some important questions about what constitutes a historical break with the land.² Here I wish to ask a fundamental question: how legitimate is it, in the first place, to require evidence of recent physical occupation of *all* landscapes within a groups' territory?

Global studies of mobility amongst groups that gather, hunt and fish and which are referable to mainland Australian groups, show that it is normal for them to practice different kinds of 'abandonment' through time.³ The major theme to emerge from these studies is that despite physically leaving sites, tracts of land or in fact their territory for a period of time, groups actively maintain connections to those places through a variety of means. So-called abandonment can occur at the varying geographic levels of residence, locality, region or indeed territory and can cover periods of time lasting from a 'season' through to a generation.⁴

Lack of visitation to sites, places and landscapes within country can be part of the normal scheduled settlement pattern of groups that have high residential mobility and only use 'remote' portions of their territory on an intermittent basis. Movements 'off-country' or away from sites and places can be for historical reasons, for instance major ceremonial events with neighbouring groups; it can also be due to massacre or the introduction of disease leading to catastrophic population loss. At the larger scale of territorial 'abandonment' home country may be left 'fallow' due to major impacts such as regional drought – as commonly experienced throughout Australia.⁵

Clearly, if it is normal for groups to use only portions of their territory at any one time and there are well established behaviours for longer-term avoidance of areas, say for example because of death or drought, then the automatic expectation for evidence of recent physical evidence is flawed. It is clearly a common law expectation more fitting to agricultural or industrial groups, although even in those cases there are well-established and complex processes of occupation and abandonment within group territories.⁶

In terms of the scale of the society holding native title rights over its country the *Ward* decision notes that for Miriuwung Gajerrong it resides with the larger community,⁷ rather than the subgroups variously described as estate groups, families or clans.⁸ This is reminiscent of the classic paper by Peter Sutton on the problem of group definition in native title cases.⁹ It is particularly relevant to a consideration of group mobility and longer-term land-use patterns, as it establishes that the scale of the country that needs to be considered is at the regional rather than the local level.

A range of reviewers have noted that problems of group definition often revolve around core issues concerning the local versus the regional.¹⁰ These can be summarised in the following:

- 1) The first issue concerns the rights of possession of the local group and the authority and identity that regional customary law landowners confer to these local units. Collective rights and interests are rooted in particular homeland areas: this may be portrayed as *the regional basis for local* entitlement;
- 2) the second issue concerns the need to make the group large enough to accommodate the historic process of succession and the complexity and layering of connections to country so that continuity is maintained; while,
- 3) the third canvasses the reality of *systems* of social organisation that need to be recognised historically.

On the issue of the regional basis for local entitlements, Sutton argues that a small-scale land-holding group cannot always be said to have an exclusive relationship with their land.¹¹ The customary land entitlements of smaller groups are granted to them by the larger society of which they are part.

Commenting on the need to consider a large enough group to address issues of continuity, Peterson notes that succession should be seen as part of the internal process by which people reproduce their relations to land in the face of demographic fluctuations.¹² He argues that these demographic fluctuations have been present since the beginning of Aboriginal occupancy of the land.

Finally, on the need to identify a historical system of social organisation and land use, Sutton states that claimants need to show that they have rights in country according to their own system of laws and customs.¹³ This system should be descendent in some fashion from an organised society in occupation when British sovereignty was established.

The clear message is that the definition of groups and boundaries should be considered at the regional and not the local scale. If the focus is regional then both the Australian and overseas examples show that leaving portions of land 'fallow' is absolutely predictable and will operate as part of long-term cycles.

Any test for connection that requires physical occupation at the local level, therefore, essentially misunderstands the structure of land use for Aboriginal Australia, particularly the arid zone which comprises approximately two-thirds of the continent. Examples from the Western Desert (see Figure 1) will reinforce this point.

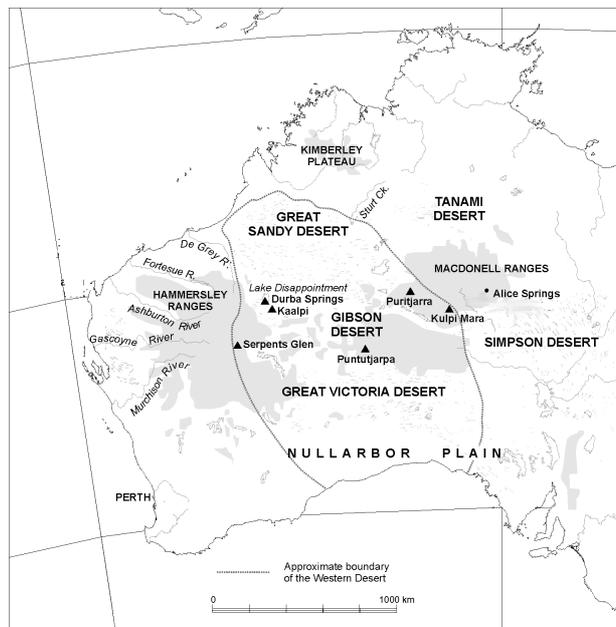


Figure 1: Approximate boundaries of the Western Desert

Australia is the most arid continent to have been occupied by people and the Western Desert arguably the most marginal landscape within it. This is largely due to its high temperatures, lack of co-ordinated drainage, paucity of permanent waters and patchy resources.¹⁴

Western Desert foragers engaged in a pattern of settlement marked by high residential mobility coupled with a 'territorial' mobility strategy whereby adjacent localities were abandoned for varying periods of time. The kinds of mobility exercised at different times were dynamic given historic evidence for 'strategy switching' in response to drought. Strategy switching describes how groups responded to drought – or other catastrophic factors – by either withdrawing into their 'home' or 'core' territory or, alternatively, avoiding areas altogether through temporary abandonment. This

extreme flexibility in mobility is seen to underpin a raft of risk-minimizing strategies in the Western Desert.¹⁵

The nature of these arid zone adaptations may be examined using a resource structure model, such as that proposed by Ambrose and Lorenz, where the behavioural responses to a patchy resource regime are defined (see Table 1).¹⁶

Behavioral Correlates	Resource Structure - Unpredictable and Scarce
Residential mobility	Very high, opportunistic
Territorial strategy	Undefended - very permeable
Information exchange	High
Group size	Very small
Population density	Very low
Diet breadth	Very high
Archaeological Correlates	
Occupation site intensity	Very low at home base
Macro-regional assemblage variability	High stylistic uniformity
Raw material sources	Local, and distant exotics
Intra-site spatial organization	Poorly structured
Faunal and floral diversity	Very high, mostly plant

Table 1: Behavioural correlates of resource structure model

A range of studies have been made in the Western Desert to establish the accuracy of this model and to see if there is evidence for such long-term behavioural patterning where, for much of the year, groups are highly nucleated and dispersed across vast areas of country.¹⁷

It is predicted that there will be a greater diversity of activities, both everyday economic as well as religious and ceremonial, at major aggregation sites when residential mobility is low. During times of a higher frequency of moves between habitation sites, activities are geared more towards the extended family unit.

There are long-term physical signatures of these differences including the diversity of extractive implements left behind at these sites (see Figure 2). These artifacts include tools for making and maintaining wooden items; spear-throwers and carrying bowls; vegetable and seed-processing platforms; and, grindstones.

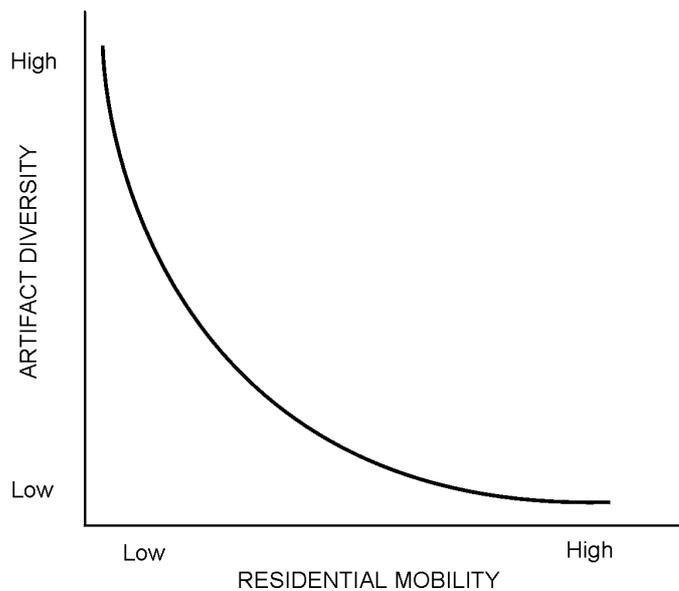


Figure 2: Artifact diversity as a function of residential mobility.¹⁸

Research designed to look at these predictions has been carried out by the author and others over the last 20 years with the Martu Aboriginal people of the Western Desert.¹⁹ A range of habitation sites utilised by the Martu before contact with Europeans, from the 1920s to the 1960s, was studied. Because of these historical associations, localities could be reliably assigned, at least for the historic period, as: a) major residential base-camps which were used for aggregations; b) smaller residential camps used in a more ephemeral fashion; and finally, c) those which were clearly task-specific or field camps. At places where a combination of more permanent waters and a higher diversity of economically important plant species occurred, a greater permanency of occupation by larger groups of people was expected. In contrast, localities near ephemeral water sources and less diverse plant patches were expected to witness the highest residential mobility.

Data collected from occupation sites adjacent water sources of varying permanency showed a clear correlation between water permanency and diversity of extractive artefacts and the number of intact grindstones – grindstones being taken as a marker of greater permanency of occupation (see Table 2).

Water permanency	Number of sites	Mean number of grindstones
Permanent	8	16.625
Semi-permanent	23	4.739
Ephemeral	16	1.188

Table 2: Mean number of whole grindstones located at sites adjacent permanent, semi-permanent and ephemeral water sources.²⁰

Martu custodians noted that the sites adjacent permanent waters had acted as major aggregation venues and that groups from many linguistic affiliations had come to such places, sometimes travelling hundreds of kilometres in small family groups.

Patterning in art also illustrates local versus regional patterns of land-use, resting largely on interpretations of inside versus outside (or exclusive versus inclusive) access to information networks.²¹ The geographic scale through which these information networks are operating in Australia, is enormous by world standards. For example, archaic faces occur from the coastal Pilbara to central Australia and many motifs, such as bird tracks, are found throughout virtually all the arid zone. These symbolic systems are understood to connect groups across hundreds and indeed thousands of kilometres and are seen to cross boundaries. In contrast, so called 'inside' motifs indicate group identifying behaviour tied up with assertions of individuality, difference and territoriality. Such art often depicts human figures or ceremonial ornaments, for example, head-dresses. This art is also seen to help establish boundaries.

Most desert societies appear to operate both symbolic systems at the same time. The point being that they occur physically as a mosaic across very large tracts of arid country. Their presence or absence at any one particular locality says nothing about the larger social system in operation.

Other physical expressions of the operation of such a large scale of territory and the rights asserted include firing of country by the Martu people in the Sandy Desert. Spinifex plains and salt lake margins are regularly fired from as far north as the Percival Lakes at the same latitude as Well 40 on the Caning Stock Route to as far south as Lake Disappointment at Well 15. The distance between these two points today taking 'intrepid' four wheel drive tourists at least a week to traverse.

Even though fires can cover very large areas the overall pattern produced by firing country through time, when viewed from aerial photographs, is a mosaic. This is perhaps a good metaphor for the 'registration' of peoples' physical presence on country as opposed to the operation of the larger and unifying social system.

At the regional scale other factors that may preclude recent evidence for physical occupation include historic massacres and epidemics. Many areas have well-documented early massacre sites where subsequent Aboriginal contact materials (such as glass artefacts and transitional shelters) are therefore largely lacking: a result of death and subsequent avoidance behaviour.²² European-introduced diseases have also resulted in epidemics with large loss of life. Such historic episodes are well described in oral narratives and the specific localities where the deaths occurred are not visited for clear reasons of avoidance. How can the active maintenance of such avoidance behaviour then be translated into lack of evidence for continuity of connection?

Conclusion

Bob and Myrna Tonkinson have recently written about the active maintenance of country by groups who, for varying historical circumstances, may find themselves removed from their land.²³ There is considerable evidence that these desert groups actively maintain landscapes and fulfill their social obligations for significant sites, despite absences running into decades, through dream spirit travel and holding objects that symbolise and embody country. As they note "For people like the Mardu, dream spirit contacts with homelands are as 'real' as visiting the places in waking life".²⁴

These actions may include recurrent renditions of song sequences which relive and recount creation events and the mythic journeys of a range of ancestral beings that are associated with known places or have become metamorphosed into physical features. Surveys carried out by the author from 1985 to 2001 with large groups of Martu, in remote portions of the Western Desert, illustrate that the location of sites, the specifics of their associated mythology and the nature of dreaming tracks, were well known to the parties. This knowledge persists despite some people not having (re)visited particular sections of their country since the 1930s. In no sense would any of the people on these surveys accept,

let alone understand, an argument for loss of connection because of historical movements throughout the desert.

Equally, strings of remote waterholes on the edge of the Sandy and Gibson Deserts, often linked through dreaming tracks, are intimately 'known' despite the fact they may only have been used on an intermittent basis before contact with Europeans.

Such very important and well-known 'peripheral' sites do not need to be visited continuously as firstly, the lines of connection are actively maintained through 'remote' ceremonial acts and fulfillment of social obligations and, secondly, their remoteness and mosaic configuration renders a scheduled cycle of visitation illogical given the patchy resource structuring outlined above.

When one considers the scale of territorial occupation in arid and semi-arid Australia, where 'core' country can cover hundreds of kilometres, and mean population density was as low as one person per three hundred square kilometres, the requirement for evidence for recent physical occupation at the local level is unsustainable. Further, if that proof is sought from larger areas that may have been subject to study by ethnographers, ethnohistorians or archaeological survey, there is often little guarantee that the mosaic of physical land uses discussed here has been adequately sampled or assessed at the scale of longer-term cycles of use and abandonment. Part of the process of demonstrating ongoing connection with country and 'proving' the existence of native title may, in fact, include an elaboration of how cycles of occupation and 'abandonment' have been a normal scenario in the past. As traditional practices they undermine the veracity of arguments that suggest that removal and separation from lands in historic times must result in the cessation of that society.

In conclusion I raise a simple question: If temporary 'abandonment' of country in the past – for a myriad of reasons – did not break down the social institutions for maintenance of connection with country, then why should it do so in the historic or contemporary context?

¹ *State of Western Australia v Ward* [2002] HCA 28 (August 2002), at [64].

² See for instance, *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (December 2002).

³ Cameron, C.M. and S.A. Tomka (eds) 1993. *Abandonment of settlements and regions: ethnoarchaeological and archaeological approaches*. Cambridge University Press, Cambridge; Kelly, R.L 1992. "Mobility/sedentism: concepts, archaeological measures, and effects." *Annual Review of Anthropology* 21: 43-66; Kelly, R.L. 1995. *The Foraging Spectrum*. Smithsonian Institution Press, Washington, DC.

⁴ Veth, P. 1993. *Islands in the Interior: The Dynamics of Prehistoric Adaptations Within the Arid Zone of Australia*. International Monographs in Prehistory. Archaeological Series 3. Ann Arbor, Michigan; Veth, P. (forthcoming), "Cycles of aridity and human mobility: risk-minimisation amongst late Pleistocene foragers of the Western Desert, Australia." *Proceedings of the Society for American Archaeology*, Philadelphia, 2000.

⁵ Gibbs, M. and P. Veth 2002. "Ritual engines and the archaeology of territorial ascendancy." *Tempus* 7: 11-19. University of Queensland Anthropology Museum, St Lucia; Gould, R.A. 1980. *Living Archaeology*. Cambridge University Press, Cambridge; Gould, R.A. 1991. "Arid-land foraging as seen from Australia: adaptive models and behavioral realities." *Oceania* 62: 12-33.

⁶ Cameron, C.M. and S.A. Tomka 1993 op. cit.

⁷ *State of Western Australia v Ward* [2002] HCA 28 (August 2002), at [92].

⁸ *Ward v Western Australia* (1998) 159 ALR 483, at [542].

⁹ Sutton, 1995 *ibid*.

¹⁰ Sutton, 1995 *ibid*; Sutton, P. 1999. "The system as it was straining to become: fluidity, stability, and Aboriginal country groups." In Finlayson, J.D., B. Rigsby and H.J. Bek (eds) *Connections in Native Title: genealogies, kinship and groups*, pp. 13-57. Research Monograph No. 13. Canberra, Centre for Aboriginal Economic Policy Research, The Australian National University; Peterson, N. 1995. "'Peoples', 'islands' and succession." In Fingleton, J. and J. Finlayson (eds) *Anthropology In The Native Title Era: Proceedings of a Workshop*, pp. 11-17. Canberra, AIATSIS.

¹¹ Sutton, 1995 *ibid*.

¹² Peterson, 1995 op. cit.

¹³ Sutton, 1999 op. cit.

¹⁴ Smith, M.A. 1988. *The Pattern and Timing of Prehistoric Settlement in Central Australia*. (Unpublished) PhD Thesis, University of New England, Armidale; Thorley, P.B. 1998. *Shifting location, shifting scale: a regional landscape approach to the prehistoric archaeology of the Palmer River catchment, central Australia*. (Unpublished) PhD Thesis,

Anthropology, School of Southeast Asian and Australian Studies, Northern Territory University, Darwin; Veth, 1993 op. cit.

¹⁵ Cane, S. 1984. *Desert camps: a case study of stone artefacts and Aboriginal behaviour in the Western Desert*.

(Unpublished) PhD Thesis, Department of Prehistory, Australian National University, Canberra; Gould, 1991 op. cit.

¹⁶ Ambrose, S.H. and Lorenz, K.G. 1990. "Social and ecological models of the Middle Stone Age in southern Africa." In P. Mellars (ed) *The Emergence of Modern Humans*, pp. 3-33. Edinburgh University Press, Edinburgh.

¹⁷ Barton, H.J. 2001. *Mobilising lithic studies: An application of evolutionary ecology to understanding prehistoric patterns of human behaviour in the Simpson Desert far western Queensland*. (Unpublished) PhD Thesis, Department of Archaeology, University of Sydney, Sydney; Cane 1984 op. cit; Smith 1998 op. cit; Thorley 1998 op. cit; Veth, 1993, 1995 op. cit.

¹⁸ Following Andrefsky, W. 1998. *Lithics: Macroscopic Approaches to Analysis*. Cambridge University Press, Cambridge.

¹⁹ See for instance, Veth, 1993 op. cit. Also see the Martu native title determination, in *James on behalf of the Martu People v State of Western Australia* [2002] FCA 1208 (27 September 2002).

²⁰ Following Veth, 1993 *ibid*.

²¹ See for instance, McDonald, J.J. 1994. *Dreamtime Superhighway: an analysis of Sydney Basin Rock Art and prehistoric information exchange*. (Unpublished) PhD Thesis, Australian National University, Canberra; McDonald, J.J. 1999. "Bedrock notions and isochrestic choice: evidence for localised stylistic patterning in the engravings of the Sydney region." *Archaeology in Oceania* 34(3): 145-160; McDonald, J.J. 2000. "Archaeology, rock art, ethnicity and Native Title" In Lilley, I. (ed) *Native Title and Transformation of Archaeology in the Postcolonial World*. Oceania Monograph 50: 54-77; Wobst, H.M. 1977. "Stylistic Behaviour and Information Exchange." In Cleland, C.E (ed.) *For the Director: Research Essays in honour of J.E Griffen*, pp. 317-342. Anthropological Papers, Museum of Anthropology, University of Michigan, No 61, Ann Arbor.

²² See papers in Harrison, R. and C. Williamson (eds) 2002. *After Captain Cook: The Archaeology of the Recent Indigenous Past in Australia*. Sydney University Archaeological Methods Series 8 2002, Sydney.

²³ Tonkinson, R. and M. Tonkinson 2001. "'Knowing' and 'Being' in Place in the Western Desert." In Anderson, A., Lilley, I. and S. O'Connor (eds) *Histories of Old Ages: Essays in Honour of Rhys Jones*, pp. 133-140. Pandanus Books, Canberra.

²⁴ *Ibid.* , at 138.

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