

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, Daniel Lavery examines the difficulties of appropriately recognising native title claim groups given the relative silence of the Native Title Act 1993 (Cth), conflicting federal court cases, the differences of legal and anthropological methodologies, and legal and policy considerations. Lavery ultimately argues that the recognition level of native title claim groups should be determined by asking whether the group of persons which claim the rights and interests are the same community which sources the traditional laws and customs. Native title determinations made by the broader legal system must be made wisely and perhaps, Lavery argues, this wisdom lies in not unduly dissecting the Indigenous societies. Above all, any native title determination should strengthen the Indigenous community of native title holders, not merely parts of them.

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The Recognition Level of the Native Title Claim Group: A Legal and Policy Perspective

Daniel Lavery¹

Introduction

Under the amended *Native Title Act 1993* ('NTA'), a native title determination application to land and/or waters may be made by a person or persons on behalf of a native title claim group. Section 61 states that the application should include all the persons "who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed." On the face of this injunction, it would seem a relatively straight-forward exercise to frame a native title claim group to

¹ The author would like to thank Jim Weiner and Scott Cane for their kind assistance with an early

achieve the recognition of their native title under the NTA. All that is necessary, as Peter Sutton says, is for a line “to be drawn around the claimant group.”

Where this line is placed is very much driven by the relationship between the requirements of the relevant legislation and the results brought forward by the anthropological and legal team assisting the claimants.²

Yet this relationship between the ‘requirements’ and ‘results’ in the native title process is becoming increasingly complex. This is because, firstly, the NTA is largely silent on the other requirements of a properly constituted native title claim group. In *Risk v Native Title Registrar*,³ O’Loughlin J had to reach deep to “the philosophy that is to be found in the table to s 61” to disqualify a small family-based sub-group as a properly constituted claim group.⁴ Secondly, a chain of Federal Court judgments at first instance says that other sub-groups are likewise not entitled to recognition at that level are disregarded or distinguished in other determinations.⁵ A conflict of authority may be developing, and if not already conflicted, the law is in need of clarification. The third reason is the gap that is widening between the legal and anthropological methodologies in the native title claim process. This was recently exposed, at its nakedest, in the case of *Jango (No 7)*.⁶

The purpose of this article is to examine each of these reasons and to argue for a potential resolution of the issues based not merely on legal or doctrinal grounds but on public policy considerations. A determination of native title under the NTA, it is argued, should strengthen the community of native title holders, not weaken it. To this end, if justified on the facts, then recognition of native title should be to the Indigenous community that ultimately sources the traditional laws and customs.

The requirements of a native title claim group

Firstly, there is a lack of guidance from the NTA itself as to the proper constitution of a native title claim group. A native title claim group must demonstrate that it has common or group rights and interests in the claimed area under traditional laws and customs in order to meet the plain words of s 61. This is consistent with native title at common law. Speaking when the Australian concept of native title was still an unwritten text, Deane and Gaudron JJ stated in *Mabo (No. 2)*:

Ordinarily, common law native title is a communal native title and the rights under it are communal rights enjoyed by a tribe or other group. It is so with Aboriginal title in the Australian States and internal Territories. Since the title

draft. The comments of the anonymous reviewers also much improved my argument.

² Peter Sutton, ‘Atomism versus Collectivism: The Problem of Group Definition in Native Title Cases’, in J. Fingleton and J. Finlayson (eds), *Anthropology in the Native Title Era: Proceedings of a Workshop*, AIATSIS, Canberra, 1995, 4.

³ *Risk v Native Title Registrar* [2000] FCA 1589 (Unreported, O’Loughlin J, 10 November 2000). This decision is sometimes referred to as *Risk v National Native Title Tribunal*.

⁴ *Risk v Native Title Registrar*, see note 3 above, [30], [31] and [60].

⁵ These decisions are examined below.

⁶ See discussion below, *Johnny Jango v Northern Territory* [2004] FCA 1029 (Unreported, Sackville J, 9 August 2004).

preserves entitlement to use or enjoyment under the traditional law or custom of the relevant territory or locality, the contents of the rights and the identity of those entitled to enjoy them must be ascertained by reference to that traditional law or custom.⁷

It was undoubted that this is a communal title which is to be held and exercised by the members of a community according to the traditional law or custom. It is notable that s 61 speaks of those persons who *hold* the native title claimed, not the persons who *claim* the native title - that is, there must be a present entitlement under traditional laws and customs. And, under the NTA, *all* persons who relevantly hold these common or group rights and interests must authorise the application. Any sub-groups of the larger community would not thus be able to meet the words of s 61 without this authorisation. Consistent with this, O'Loughlin J said in *Risk* that a native title claim group is not established or recognised merely because a group of persons call themselves such in an application.⁸ Thus, a family sub-group or a collection of individuals, when clearly acknowledged to be part of a larger community, is inconsistent with the concept of "common or group rights and interests" within s 61.⁹ The principle emerges that a sub-group of individuals or families cannot be recognised, independently of the broader group of which they form part, as a holder of native title rights and interests under the NTA.

However, clarity of the sub-group principle quickly blurs as we ascend to examine other sub-groups of a community of native title holders. Examples are clans or estate groups, entities which are typical sub-divisions found within many classical Australian Indigenous societies. Can a clan, for example, be a native title claim group properly constituted under the NTA? However, native title determination applications now bear the load that the term 'traditional' in s 223(1) NTA has been ascribed by the High Court in *Yorta Yorta Aboriginal Community v Victoria*.¹⁰ Claimants must establish as a matter of fact on the evidence that their Indigenous society, under which traditional laws and customs the native title rights and interests are sourced, has continued through the post-sovereignty epoch as a vital body, united in the acknowledgment and observance of these laws and customs.¹¹ This is a question of fact.¹² The laws and customs must be traditional, in the ordinary sense of that word, yet they must also have vital normative force since the time of sovereignty. It thus seems that an estate group or clan cannot get a positive determination of native title unless it can demonstrate that it is the society which generates these laws (or perhaps that it has the imprimatur of all of the members of that normative community to

⁷ *Mabo (No 2) v Queensland*, 107 ALR 1, 84 ('*Mabo No.2*'). The High Court has made it abundantly clear in recent years that the starting point of any discussion of the NTA is the legislation itself, not *Mabo (No. 2)*. This may be the counsel of perfection.

⁸ *Risk v Native Title Registrar* [2000] FCA 1589 (Unreported, O'Loughlin J, 10 November 2000) [60].

⁹ This comment assumes that s 61 incorporates the common law position which, given latterly comments from the High Court, is perhaps not free from some doubt.

¹⁰ *Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 ('*Yorta Yorta*').

¹¹ *Yorta Yorta* (2002) 194 ALR 538, 563.

¹² *Yorta Yorta* (2002) 194 ALR 538, 553.

make the claim).¹³ If the prism of the doctrine of normative systems enunciated in *Yorta Yorta* is held to this entity, it seems clear a clan might establish on the evidence itself to be a vital and self-contained normative system of traditional laws and customs. If that is the factual matrix established on the traditional and anthropological evidence, then there may be little room for argument. But what if the anthropological evidence shows that this clan is part only - a sub-group - of a broader normative society which generates the laws and customs in which the clan's native title rights and interests are sourced. It is presently debatable whether this claimed native title can be recognised under the NTA in the clan, independently from that of the ultimate normative society under which auspice they traditionally source this title.

A Development of Conflicting Authority?

On the one hand, there is authority that a sub-group of a native title claim group is not entitled to a determination of native title. *Risk* found acceptance in *Tilmouth v Northern Territory*,¹⁴ where an estate group acknowledged being part only of the Larrakia and being authorised by only the sub-group's membership. O'Loughlin J again found that, while there was nothing to prevent this group proving its rights and interests under the potential communal native title enjoyed by the Larrakia, their particular rights and interests cannot be separated out in an independent determination of native title. Then in *Landers v South Australia*,¹⁵ Mansfield J accepted the principle that the making of a claim by a sub-group of the native title claim group is not permitted under the NTA.¹⁶ All of these decisions were at first instance, decided in interlocutory proceedings and, it might be contended, represent a weak chain of authority.¹⁷ However, in *Neowarra v Western Australia*,¹⁸ a fully contested application in the Kimberley, the Federal Court again rejected submissions that estate groups, without more, should be recognised as the native title holders because they were sub-groups lacking a normative societal force of their own.¹⁹ The trial judge, Justice Ross Sundberg, determined that native title was extant and recognised the holder to be the Wanjina-Wungurr community. This finding was set in a complex layering of 'law', language and landholding. The Wanjina-Wungurr community sourced the common laws and customs in which the rights and interests sought to be recognised in the determination were embedded. Yet this community was a cultural bloc,²⁰ a conglomerate of three

¹³ That is, they would not be rights-holders other than as members of the broader society. Even in the situation where the broader indigenous society did not assert a contrary claim, the Federal Court's hands may be bound; see discussion of the post-determination implications below. For a development of this argument see Daniel Lavery, 'A Greater Sense of Tradition: The Implications of The Normative System Principles in *Yorta Yorta* for Native Title Determination Applications' (2003) *E Law – Murdoch University Electronic Journal of Law* <http://www.murdoch.edu.au/elaw/issues/v10n4/lavery104.html>.

¹⁴ *Tilmouth v Northern Territory* (2001) 109 FCR 240.

¹⁵ *Landers v South Australia* [2003] FCA 264 (Unreported, Mansfield J, 31 March 2003).

¹⁶ *Landers v South Australia*, see note 15 above, at [33].

¹⁷ It is notable that each of these decisions was fomented by intra-indigenous disputes.

¹⁸ *Neowarra v Western Australia* [2003] FCA 1402 (Unreported, Sundberg J, 8 December 2003) ('*Neowarra*').

¹⁹ *Neowarra* [2003] FCA 1402 (Unreported, Sundberg J, 8 December 2003) [384]-[398].

²⁰ The cultural bloc phenomenon is not uncommon in northern Australia. For an early judicial acceptance of the Yolngu as a cultural bloc, see *Milirrpum v Nabalco Pty. Ltd.* (1971) 17 FLR 141.

language groups, the Ngarinyin, Wanambal and Worrarra, and at the local land-holding level were 'dambun' estate groups.

The issue thus became: at which level should the native title be recognised. Several respondents to the application contended to Sundberg J that it was the dambun groups, or perhaps the constituent language groups, which should be recognised as the native title holders. His Honour rejected these arguments and held, correctly in my view, that the Wanjinna-Wungurr community was the holder of native title.

A dambun-based determination would not reflect the evidence that individual members of a dambun have kinship links with dambun other than their own. It would not reflect the succession laws, namely that on the death of the last members of a dambun, a neighbouring clan will take over the country, including the rights and interests. A dambun formulation of native title would see the title expire on the death of the last members, which is not what happens.²¹

His Honour similarly rejected the language group as the recognition level on the evidence before the court, finding that the shared laws and customs of the Wanjinna-Wungurr community transcended these language and estate groups.²² These reasons were not appealed and would appear to be of potent persuasive value to other courts faced with similar societal sub-groupings.²³

Yet, there are actual determinations of native title where estate groups or clans are recognised as the holders of the native title. In *Hayes v Northern Territory*,²⁴ Olney J found native title to exist within the town of Alice Springs for a composite of three estate groups. And in the trial decision of *Yarmirr v Northern Territory*²⁵ five clans were determined to be the holders of marine native title around Croker Island. Are these determinations reconcilable with *Neowarra* and the other interlocutory authorities?²⁶

The complexity of the situation is easily comprehended in the two disparate determinations issued by the Full Court of the Federal Court that finally settled the *Ben Ward* litigation. The claim area traversed the Western Australian/Northern Territory border. In the WA claim area, the determination of native title was directed to the Miriuwung-Gajerrong people, a composite community. With the NT claim area, however, the determination was to the Bindjen, Damberal and Nyawamnyawam, three estate groups of the Miriuwung. This was despite the trial judge, Lee J, expressly finding that the native

²¹ *Neowarra*, [2003] FCA 1402 (Unreported, Sundberg J, 8 December 2003) [387].

²² *Neowarra*, [2003] FCA 1402 (Unreported, Sundberg J, 8 December 2003) [386].

²³ The earlier reasoning by Lee J in *Ben Ward v Western Australia* (1998) 159 ALR 483, ('*Ben Ward*' but also known as *Miriuwung-Gajerrong No.1*) is cogent also, but that determination, relevantly followed though it was by *Neowarra*, was upset on appeal.

²⁴ *Hayes v Northern Territory* (1999) 97 FCR 32.

²⁵ *Yarmirr v Northern Territory* (1998) 156 ALR 370.

²⁶ Some might rejoin, with some force, that it should not be of concern that the community and/or the sub-group be recognised as native title holders if the determination is not contested.

title was in the community, not held by the separate sub-groups,²⁷ because these sub-groups or individuals have their customary law land entitlements granted to them by the society of which they form parts. His Honour was of the view that it was from this community that the sub-group's relationship with the estate receive their imperative and sanction.²⁸

Legal and Anthropological Methodologies

This represents the current state of the law on the level at which native title might be recognised under the NTA. It is interesting to note that the examination of whether an estate group or clan is a sub-group of a larger normative society is not so much a legal issue as a question of fact. Determining such a factual query would lead a primary court to assess the Aboriginal testimony that is accompanied, almost invariably, by expert anthropological evidence. It is at this junction, where anthropological reporting meets the legal process under the NTA, that cross-disciplinary understandings are beginning to visibly fray.

This is illustrated by the decision in *Jango No. 7*²⁹ in August 2004. In no other recent case, in my view, is the breakdown in the relationship between the requirements of the NTA and the anthropological reporting so marked.³⁰ Prior to the 1998 amendments to the NTA, the court was not bound by “technicalities, legal forms or rules of evidence”.³¹ Under the present NTA, the Federal Court is bound by the rules of evidence unless and to the extent that the court orders otherwise.³² In *Jango No. 7*, the first compensation claim to go to hearing, the consultant anthropologists spent over 500 days on desktop and field studies, and the reports, with annexures, totalled over 6000 pages. Yet the respondents took 1100 individual evidentiary objections to these reports. In the result, almost all of these objections were conceded by the applicants, so Sackville J did not have to rule on them. However, his Honour clearly stated that offering reports to the court which, perhaps engendered by unchallenged land claim reporting practices in the Northern Territory, were a *pot pourri* of “undifferentiated statements of facts, expressions of opinion and advocacy of the claimants case” should not be encouraged in the native title process.³³ Herein lies the rub. What would be otherwise viewed as an exercise in anthropological research by leading scholars in the field is seen by a court in a native title process as a discursive foray of limited forensic utility. Given the considerable cost, the begging question is need the federal courts engage in this very fine dissection of an Indigenous society. It is

²⁷ *Ben Ward v Western Australia* (1998) 159 ALR 483, 540-541. His Honour did preface this remark, stating it was “at common law” and this may be a point of distinction to any analysis under the NTA. Notable also is that the claim was filed under the old NTA.

²⁸ Although not accepted in all circumstances, this is a common view, see Peter Sutton, ‘Atomism versus Collectivism’, see note 2 above, 8.

²⁹ *Johnny Jango v Northern Territory* [2004] FCA 1029 (Unreported, Sackville J, 9 August 2004).

³⁰ The High Court has made ambiguous asides (in *Yarmirr*, for example) that suggested concern with the anthropological investigations in so far as intended to lay the factual foundations of a claimant application. However, as the point was not taken, the Court passed over it.

³¹ Section 82(3) of the old NTA.

³² Section 82(1) NTA.

³³ Black-letter lawyers would assert that the moment the legislation was amended to make the laws of evidence applicable, methodologies should necessarily have changed too.

unnecessary for a court to do so in a native title determination application.³⁴ In my submission, the only entity that can adequately capture the myriad of so-called rights and interests in relation to land and waters, and the persons who hold these rights and interests, is the Indigenous community that ultimately sources their laws and customs.³⁵ Only then are all the relevant holders known and all the relevant rights and usages captured by the determination of native title. This is essentially the position arrived at by Lee J in *Ben Ward* at first instance where he stated:

The inter-relation, and allocation of rights, between the community and its sub-groups is governed by the traditional laws and customs of the community. As stated earlier in these reasons, how the traditional laws, customs and practices of an organized Indigenous community distribute, or recognise, the exercise of rights or usages which depend upon native title is irrelevant to a determination that native title exists.³⁶

I contend the test for the recognition level to be: is the group of persons which claims the rights and interests the same community which sources the traditional laws and customs? If there is a strict correspondence then the result may be that cultural bloc entities can be recognised as holders, but equally, so may a language group or groups or a composite set of estate or clan groups, perhaps one with no emic label for itself, might likewise win recognition of native title under the NTA. Each of these claim groups may be readily able to establish on the evidence before the court, or posit to the State or Territory in a connection report that, as a matter of fact, their membership is the normative source of their laws and customs. Recognition would then be accorded at that level. Recognising more-inclusive groups does little to resolve issues of membership of the claim group or rights in the claim area at the margins. These ever-present issues at the margins of both the claim area and claim group remain, yet they remain to be resolved by the group itself.³⁷ If, however, the evidence establishes that there is not a strict correspondence between the membership of the claim group and the community of persons in which these traditional laws and customs are sourced then difficult concomitant issues arise. This is because with a sub-group claim group there necessarily is another body of persons who observe the same laws and customs yet which persons are *not* in the native title claim group. These persons may therefore have rights and interests in the claim area that might not be captured in any relevant determination of native title. Are these *others* represented in the proceedings? And apropos these *others*, how have authorisation issues been addressed? The real danger is, as Sundberg J realised in *Neowarra*, that any determination which recognises native title at a sub-group level might be disenfranchising persons who have entitlements under the traditional Indigenous law and customs.³⁸ This is because the determination may not faithfully replicate the internal traditional entitlements dimension.

³⁴ In a compensation application, it may need to delve somewhat to ascertain exactly what is to be compensated. A clearer view of these needs will emerge after several compensation matters are determined in the courts.

³⁵ The assumption here is that the finding is justified on the facts. For a discussion of the nature of the claim group following the decision of *Yorta Yorta* in the High Court, see Lavery, 'A Greater Sense of Tradition', note 13 above, and the works referred to therein.

³⁶ *Ben Ward v Western Australia* (1998) 159 ALR 483, 542.

³⁷ I was greatly assisted on this point by comments from my anonymous reviewers.

³⁸ *Neowarra* [2003] FCA 1402 (Unreported, Sundberg J, 8 December 2003) [387] and [389].

What then is beneficial to some members of the community may be, in reality, a further wash of the historical tide for other members of that same community.³⁹ The NTA being beneficial legislation, it is my contention that determinations should ideally strengthen, rather than loosen, the Indigenous community of native title holders.

The complexity of ascertaining the factual matrix internal to Indigenous societies cannot be underestimated. Not only is this complex task at the intersection of disciplines and methodologies, it is cross-cultural and, mostly, conducted across languages. Although errors and misunderstandings may occur by the anthropologists, it is also a jurisprudential intersection and this has its dangers for the lawyers and judges engaged in the process. As John Toohey, the first Aboriginal Land Commissioner in the Northern Territory, wrote after his retirement from the High Court:

Comparisons and contrasts between Aboriginal law and Australian law assume that there is some common understanding of what is meant by 'law'. The correctness of that assumption is at the forefront of this paper. It is not just a matter of semantics, it goes much deeper than that. But even at the level of semantics many Aboriginal words do not translate readily into English, at least without failing to convey the full flavour of the Aboriginal language. In particular, concepts which may be encapsulated in a word or phrase rarely admit of such conciseness in translation.⁴⁰

The 'understanding' sometimes found wanting is illustrated by the story told by the late Professor W.E.H. Stanner. After a dance and a display of religious effigies decorated by strings of coloured parrot feathers:

One of the men said to me: 'now you understand'. He meant that I had seen the holy *rangga* which, in a sense, are the clan's title-deeds to its land, and had heard what they stood for: so I could not but 'understand'. The Rirratjingu and the Gumaitj intend to take their *rangga* into Darwin to show the court. They think the court will then 'understand'. I had the sense that, although they have been warned, they cannot conceive the possibility that the court will not understand.⁴¹

It is a matter of historical and legal record - and of eternal regret for the men concerned - that the court referred to, the Northern Territory Supreme Court in *Milirrpum*, did *not* 'understand'. Sir Richard Blackburn found that although the relationship between the Rirratjingu and the Gumaitj and their ancestral lands was a deep and abiding spiritual one, it was not a proprietary interest known to the Australian common law.⁴²

Legal and policy considerations

³⁹ It might be argued that the recognition of native title in part only of the community may commence the decomposition of that indigenous construct into those parts recognised achieving recognition the NTA.

⁴⁰ John Toohey, *Understanding Aboriginal Law*, unpublished, 1999, 3.

⁴¹ W.E.H. Stanner, 'The Yirrkala Land Case: Dress Rehearsal', in *White Man Got No Dreaming*, ANU Press 1979, 278-9.

⁴² *Milirrpum v Nabalco Pty. Ltd.* (1971) 17 FLR 141.

Turning more directly to policy considerations, if we attempt to unpack ‘the philosophy’ behind s 61, it is important to enquire whether the intent of the NTA was to faithfully recognise rights and interests that Indigenous peoples possess under their traditional laws and customs in relation to land and waters? Perhaps it was intended to recognise only those rights and interests that can be categorised, in our Anglo-Australian legal culture, as proprietary interests - a return to *Milirrpum*. I would contend that if we are truly seeking to recognise *Indigenous* rights/interests/usages/connections in relation to land and waters, we must not fall back into notions of property in *non-Indigenous* Anglo-Australian law.

Black-letter lawyers rush to the Second Reading speeches and the Explanatory Memoranda on the principal and amending Bills to attempt to throw light on these purposive issues. Answers can sometimes be found there. But when looking to the native title determinations which have fallen from the courts, it is apparent that there is an essential confusion about what is sought to be achieved in the statutory native title process. Some courts are recognising that the members of a claim group are the traditional ‘owners’, in essence seizing on concepts familiar to the Anglo-Australian legal tradition and saying, “yes, this is native title”. This tendency is not surprising as it is supported by the vast anthropological literature on Indigenous Australians that has emphasised the land-holding sub-group as the locus of rights and interests in country.⁴³ Yet as Sutton says:

[O]ne finds sometimes the statement that such a[n estate] group is ‘*the* land owning group’. That only one kind of grouping is given the privilege of being the locus of features that can be translated into some form of proprietary relationship to country in this way seems contrary to the complexity of the facts.⁴⁴

The principal might be expressed that all traditional owners are native title holders, yet not all native title holders are necessarily traditional owners. One of the means adopted in the estate group-based determinations of native title such as *Ben Ward* is the division of the native title holders into primary or secondary. The primary holders are the estate group members, the so-called traditional owners, and the secondary holders are those other persons such as spouses, ritual leaders and/or members of neighbouring estate groups. This mode of determination suffers the same deficits as the pure estate group model. It requires the court, assisted by anthropologists, to minutely examine who has these rights and interests and then ‘fix’ these rights *inter se* (between) members of the community. The process of searching through the traditional systems and sifting, seeking ‘holders’, ‘owners’, and ‘users’ is not a sound methodology in the native title process. What is being seized upon is not ‘native title’ but the rights and interests that are texturally familiar in our hands and fit the legal nomenclatures in our heads. But in so doing, we are falling into the falsehood - in fairness to ourselves, not a difficult thing to do - first cautioned against by the Privy Council in *Amodu Tijani v Secretary, Southern Nigeria*,⁴⁵ that of failing to take off our blinkered cultural lenses. To seek those persons which most resemble ‘land-

⁴³ Peter Sutton, ‘Aboriginal Country Groups and the “Community of Native Title Holders”’, *National Native Title Tribunal Occasional Papers Series*, No.1/2001, 29.

⁴⁴ Sutton, see note 43 above, 29. Emphasis is in the original and footnoting omitted.

⁴⁵ *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399.

owners', as we understand that term as Australian lawyers in the common law tradition, is to spring the trap upon ourselves. It is an acceptable methodology under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). There the Aboriginal Land Commissioner must investigate and determine traditional ownership and recommend for grant. Yet that is not the task of the Federal Court in the statutory native title process. The *Aboriginal Land Rights Act* process is, if successful, one of *translation*; the NTA process is one of *recognition*. One might assert that it is not the role of a court in a recognition process, where the hegemonic Australian legal system recognises something in an Indigenous one, to determine and concretise legal relationships *within* that Indigenous system. To do so is to throw the switch on the normative force driving the relationship from one of Indigenous law and custom to that of non-Indigenous law.

If 'native title' is determined to be held by the land-owning/holding groups, then what is being recognised by Australian law is that aspect of that Indigenous society that we recognise as 'proprietary' in character. What is being ignored are the rights, interests, usages or connections which other non-estate group members may likewise hold in that estate. It sometimes proceeds on the assumption that the members of an estate group have connections to one only set of estate, yet the facts are rarely so straight-forward. Various sub-groups and individuals of an estate group have a plethora of rights in various areas and sub-areas within a particular claim. It is not uncommon in northern Australia for an estate group to have a kinship relationship, such as a *mari* one in Yolngu *rom*, with another estate group, thus creating a complex web of relationships in country through the whole kinship system. Mapping - let alone understanding - the nuances of these connections in any particular set of circumstances is the stuff of theses.

These groups are landholders for the time being, and they might change given a range of circumstances. With the death of estate groups holders, for example, an estate may lie fallow, in the sense that no other estate group is granted the estate under traditional law and custom, for several generations. Indeed, it is not uncommon that other estate groups may be rights-holders in that particular estate, such as owning stories or dances connected to, but not of, that other estate, but these rights might not be seen to be too contingent or unimportant or unrelated to land or waters.⁴⁶

There are other significant policy reasons why the recognition level should be at this ultimate community level. Perhaps the most ordinary yet most significant of all the considerations in determining at which level native title might be recognised is the weight of numbers. A more inclusive recognition level allows a greater number of persons to benefit, and to take that recognition into the future. Another linked consideration, of pragmatic importance, is the plethora of prescribed bodies corporate that may be spawned when a number of sub-groups are recognised as holders. In the native title process, it is already obvious that without sufficient resources and skills any newly-formed Prescribed

⁴⁶ It is possible to make a variation application under s 13 NTA.

Body Corporate ('PBC') faces a somewhat precarious future.⁴⁷ There are stories of good fortune and co-operation. For example, the Northern Territory government has provided some funding, and the Central Land Council organisational assistance, to Lhere Artepe Aboriginal Corporation, the PBC formed consequent upon the *Hayes* determination referred to earlier. But not all PBCs are going to be birthed in such gilded circumstances, the majority of States and Territories being most unwilling to assume this recurrent funding burden, the majority of Native Title Representative Bodies naturally leery of organisational responsibilities beyond their own. Thus, several PBCs - where one might have done - raises economies of size and skills issues, critical factors in the effective functioning of Indigenous organisations.

PBCs may be doing far different tasks than the original Territory land councils but the same essential organisational needs are required.

Conclusion

There is now a realisation that native title will not be achieved by all - or indeed most - Indigenous Australians. That has resulted is a sense of disappointment with the course that statutory native title has run since recognition of the concept at common law in Australia in 1992. Anglo-Australian titles have been confirmed by the statutory native title process, Indigenous titles are left to hurdle difficult legal, doctrinal and factual obstacles to achieve recognition. Black-letter legalism and muddled public policy have conjuncted to limit the promise of the *Native Title Act 1993*. It is, palpably, a broken Hallelujah. Native title determinations made by the broader legal system must be made wisely, and perhaps the wisdom lies in not unduly dissecting the Indigenous societies. Any native title determination should strengthen the whole Indigenous community of native title holders, not merely parts of them.

⁴⁷ See the recent comments of North J in *Nangkiriny v Western Australia* [2004] FCA 1156 (8 September 2004) on this issue (at [9]-[11].) His Honour states at [11]: "It would be an absurd outcome if, after the expenditure of such large sums to reach a determination of native title, the proper utilisation of the land was hampered because of lack of a relatively small expenditure for the administration of the PBC."

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