National Native Title Conference 2014 – Australian Institute of Aboriginal and Torres Strait Islander Studies

Living with Native Title, from the Bush to the Sea

2-4 June 2014

Coffs Harbour

Characterising native title rights: a desert rose by any other name…

The Hon Justice Melissa Perry[1]
Justice of the Federal Court of Australia

4 June 2014

(1) Introduction

> "What's in a name? that which we call a rose
> By any other name would smell as sweet."
>
> *– Shakespeare, Romeo and Juliet (Act II, Scene ii)*

By these brief lines, Shakespeare conveys both the sweetness and the tragedy of two young lovers, Romeo Montague and Juliet Capulet. Their love is doomed by the bitterness between their warring families. But in these lines, Juliet puts aside their names. What matters, she proclaims instead, is the nature of things. The same sentiment is conveyed less eloquently (and with due apologies to Shakespeare) by the commonly misquoted phrase, "*a rose by any other name is still a rose*".

[1] LL.B (Hons)(Adel), LL.M, PhD (Cantab). The author extends her sincere thanks to Mr Alexander Smith for his assistance in finalising this paper.

It may seem odd to start a discussion of issues pertaining to native title with a passage from Shakespeare. But I was recently inspired by the story of the Bell Shakespeare Company who take Shakespeare's plays to school children in rural Australia, demonstrating the relevance of the themes developed in these great works of the medieval era to the youth of today – an allegory perhaps of the social continuity that underpins native title claims.

In common with the universality of Shakespeare's themes, the sentiments expressed by Juliet also resonate in many contexts. I will suggest that when it comes to native title rights, there is however much in a name: how we characterise and express native title rights can matter greatly. This process of characterisation and expression is one in which we must engage in order to resolve the issues that arise where native title rights, as rights created under the traditional laws and customs of our indigenous peoples, fall to be recognised by the Australian legal system and the consequences of their recognition worked out. More specifically, it is a process required by s 225 of the *Native Title Act 1993* (Cth) which provides that a native title determination must, among other things, determine "*the nature and extent of the native title rights and interests"* found to exist (s 225(b)). And it is a process required to be undertaken before the extinguishment of particular native title rights can be addressed. In so saying, I leave aside (and will not address today) those cases where any native title has necessarily been extinguished in whole irrespective of its content by statute or at common law, such as by the grant of an estate in fee simple.[2]

Against this background, this paper explores two themes. First, I will consider the principles by which the process of characterisation and expression of native title rights is undertaken. Secondly, I consider the relationship between the manner in which native title rights are characterised and expressed, on the one hand, and partially

[2] *Fejo (on behalf of Larrakia People) v Northern Territory* (1998) 195 CLR 96, 126 [43]; see also, eg, *Native Title Act 1993* (Cth) s 23C prescribing the extinguishing effect of previous exclusive possession acts as defined in s 23B.

extinguished, on the other hand. In short, as I will explain, the way in which a native title right is characterised and expressed can be a key determinate of whether or not it has been extinguished.

(2) Characterisation of native title rights

As I have intimated, the test for determining whether native title is extinguished turns upon whether the sovereign act in question, be it a law or grant of a right, is inconsistent with the existence of the native title right. It follows, as Gleeson CJ, Gaudron, Gummow and Hayne JJ held in *Western Australia v Ward* (2002) 213 CLR 1 (at 95 [94]) that "*questions of extinguishment of native title* ***cannot*** *be answered without first identifying the rights and interests possessed under traditional laws and customs which it is said have been extinguished"* .[3] (**Emphasis** added).

The starting point is, therefore, the definition of native title in s 223(1) of the *Native Title Act*. This poses a question of fact. In an abbreviated form, what are the rights and interests in relation to land or waters possessed by the relevant community under the traditional (ie, pre-sovereign) laws and customs acknowledged and observed by them?[4]

Despite the rights being sourced in traditional laws and customs, however, the rights are being recognised in order to accommodate and protect them under a different system of law. This means, as Gleeson CJ, Gaudron, Gummow and Hayne JJ held in *Ward,* that the "*relevant task*" is "*to identify how rights and interests possessed under traditional law and custom can properly find expression in common law terms.*"[5] More

---

[3] For example, the High Court in *Wik Peoples v Queensland* (1996) 187 CLR 1 was unable to make conclusive findings as to the extent to which native title had been extinguished by the grant of the pastoral lease once it was determined that the pastoral lease was not necessarily inconsistent with native title because there had been no findings on the evidence as to the content of the native title rights and interests in question.

[4] See, also, *Commonwealth v Yarmirr* (2001) 208 CLR 1, 39 [15] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 444 [46] (Gleeson CJ, Gummow and Hayne JJ); *Western Australia v Ward* (2002) 213 CLR 1, 66 [18] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

[5] *Western Australia v Ward* (2002) 213 CLR 1, 93 [89] where their Honours held that the portmanteau expression "*possession, occupation, use and enjoyment*" could not be split up into its component parts so as to find, for example, a non-exclusive right to possession.

fundamentally, this process of translation entails a complex fracturing of the traditional laws and customs because ultimately the rights *only* are recognised divorced from the laws and customs from which they derived and of which they form an integral part. As Gleeson CJ, Gaudron, Gummow and Hayne JJ held in *Ward*, in somewhat more eloquent language*:*

> "*The spiritual or religious is translated into the legal. This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and obligations which go with them.*"[6]

Furthermore, the concern in a native title determination application is with the right held by the community as a whole, that is, the native title claim group. It is not concerned with the "*idiosyncratic laws and customs of that community*" which may define the exercise by individuals of, for example, a right to hunt.[7]

To identify the issue as one of determining how the traditional rights and interests find expression in the common law system is not to commit the heresy of starting with common law notions rather than the traditional laws and customs. Rather, it is to recognise that the recognition of native title involves an intersection of traditional laws and customs with statute and common law in circumstances where the traditional laws and customs have ceased to exist as an operational legal system.[8] In this regard, as Viscount Haldane said in *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 in a passage approved by the High Court, there is a tendency to conceptualise native title rights in terms appropriate only to systems steeped in the English common law tradition:

---

[6] *Western Australia v Ward*, above n 5, 65 [14].

[7] *Yanner v Eaton* (1999) 201 CLR 351, 384 [74] (Gummow J).

[8] *Fejo (on behalf of Larrakia People) v Northern Territory*, above n 2, 128 [46] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). See, also, *Western Australia v Ward*, above n 5, 92 [85]: *"[a]s was pointed out in Fejo, '[t]here is… an intersection of traditional laws and customs with the common law.' Identifying the nature and location of that intersection requires careful attention to the content of traditional law and custom and to the way in which rights and interests existing under that regime find reflection in the statutory and common law."*

> *"But this tendency has to be held in check… [T]here is no such full division between property and possession as English lawyers are familiar with. A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In such cases the title of the Sovereign is a pure legal estate, to which beneficial rights may or may not be attached. But this estate is qualified by a right of beneficial user which may not assume definite forms analogous to estates, or may, where it has assumed these, have derived them from the intrusion of the mere analogy of English jurisprudence."*[9]

Once it is accepted that native title rights and interests held under traditional law and customs are not confined to "*the common lawyer's one-dimensional view of property as control over access",*[10] it follows, as the 'user-friendly' metaphor of a "*bundle of rights*" illustrates, that:

> *"there may be more than one right or interest and… there may be several* ***kinds*** *of rights and interests in relation to land that exist under traditional law and custom. Not all of those rights and interests may be capable of full or accurate expression as rights to control."*[11]

Native title rights are not, therefore, fully expressed as rights to control access to and use of the land or waters. Rather, as Gleeson CJ, Gaudron, Gummow and Hayne JJ in *Ward* held, with respect to identifying specific rights as opposed to a right to possession of land as against the whole world:

> *"it may greatly be doubted that there is any right to control access to land or make binding decisions about the use to which it is put. To use those expressions in such a case is apt to mislead. Rather… it will be preferable to*

---

[9] *Commonwealth v Yarmirr* (2001) 208 CLR 1, 37-38, citing *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399.

[10] *Western Australia v Ward*, above n 5, 95 [95]; see, further, *Yanner v Eaton*, above n 7, 366 [17]-[18] explaining in the context of construing the statutory vesting of native title fauna in the Crown that property "*refers to a degree of power that is recognised in law as power permissibly exercised over the thing"* and that, while property is usually treated as a bundle of rights, *"as Professor Gray also says, 'An extensive frame of reference is created by the notion that 'property' consists primarily in control over access.'"*.

[11] *Western Australia v Ward*, above n 5, 95 [95]. In so holding, their Honour's analysis echoed that earlier adopted in the joint judgment of the majority in *Commonwealth v Yarmirr*, above n 9, 38-39 [13]-[14] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

> *express the rights by reference to the **activities** that may be conducted, as of right, on or in relation to the land or waters."*[12] (**Emphasis** added)

The emphasis in the joint judgment upon defining the right by reference to activities in such cases is consistent with the approach adopted in s 223(2) of the *Native Title Act.* This provides that rights and interests comprised within the definition of native title include hunting, gathering, or fishing rights and interests. It is also reflected in s 211 of the *Native Title Act* which assumes that native title may include a right to undertake certain activities, including of a cultural or spiritual kind (s 211(3)(d)).

Nonetheless, activities may be described across a broad spectrum from the most general to the most specific – from 'hunting dugong' to the 'taking of resources from the land and waters'. Equally, applying *Ward,* rights may be defined across the same spectrum. While, as the High Court recently emphasised in *Western Australia v Brown*,[13] we must look to the traditional laws and customs for the content of the native title rights, the process of identifying separate and distinct rights is alien to those laws. How then, given that the process of recognising native title is one of translation and fragmentation, do we determine the degree of specificity of native title rights that are recognised as the product of that process? Such difficult issues appear largely unanswered.

(3) The relationship between the characterisation and expression of native title rights and extinguishment

The significance of how a right is characterised for questions of extinguishment is highlighted by recent cases on native title before the High Court. I speak of the decision in *Akiba v Commonwealth*[14] delivered in August 2013, which was followed shortly thereafter by *Karpany v Dietman,*[15] together with the decision earlier this year in

[12] *Western Australia v Ward*, above n 5, 82-83 [51]-[52].
[13] (2014) 88 ALJR 461, 468 [36] (The Court).
[14] (2013) 87 ALJR 916.
[15] (2013) 88 ALJR 90.

Western Australia v Brown.[16] All three cases concerned extinguishment, although the decision in *Akiba* is the primary focus of my discussion today.

Akiba v Commonwealth

In *Akiba,* the trial judge had made a determination under s 225 of the *Native Title Act* that native title existed over a substantial part of the waters of Torres Strait. That determination identified among other rights held by the native title holders, "*the right to access resources and to take* ***for any purpose*** *resources in the native title areas"* (**emphasis** added).[17] No issue was taken on appeal as to the characterisation and expression of the right in those broad terms under the traditional laws and customs of the thirteen island communities in the Torres Strait which comprised the native title holders. Nor was it contended that the right had been extinguished in whole. The focus of the appeal was squarely upon the question of whether fisheries legislation had extinguished what was described (or, as it emerged, misdescribed) as "*any right to take fish and other aquatic life* ***for commercial purposes***" (**emphasis** added).

The difficulty that the High Court perceived with that approach was that it assumed that an "*activity carried on in exercising a native title right"* (relevantly fishing for a particular purpose) "*might be treated as a distinct 'incident'"* of the right to take resources.[18] Rather, given the trial judge's findings, the High Court held that it was the native title right to take resources *simpliciter* which was the comparator for the purposes of determining questions of extinguishment.[19] This, in other words, was the right to be compared against the fisheries legislation to determine whether there was an inconsistency with the result that an intention to extinguish the native title right was revealed. The native title right to take resources could not be sectioned off or subdivided so as, in effect, to reframe the question determinative of extinguishment in

[16] *Western Australia v Brown*, above n 13.
[17] *Akiba v Commonwealth*, above n 14, 918 [1].
[18] Ibid, 922 [21] (French CJ, Crennan J).
[19] Ibid, 931 [60] (Hayne, Kiefel and Bell JJ).

circumstances where the trial judge had not found any distinct or separate native title right to take fish for sale or trade.[20]

Once this approach was adopted, the answer to the extinguishment question was inevitable. As French CJ and Crennan J held, as "*a logical proposition of general application… a* ***particular use*** *of a native title right can be restricted or prohibited by legislation without that right or interest itself being extinguished.*"[21]

Thus a law which affects the exercise of a native title right only when undertaken for a particular purpose or by a particular means is not inconsistent with the right and, where a law can be construed as doing no more than that, it should be so construed in line with the requirement for a clear and plain intention.[22]

Similarly, in *Karpany v Deitman*, the High Court held that, because the State fisheries law permitted and regulated non-commercial fishing (relevantly) by limitations on the taking of undersize fish, it did not extinguish the native title right to take fish from the relevant waters which the prosecution had conceded.[23]

However, in circumstances where a statute cannot be so construed and there is *no* room left for the exercise of the native title right, then the native title right will be extinguished.[24] The clear and plain intention of the legislature to extinguish is evident. In short, as the High Court held in *Western Australia v Brown,* "*inconsistency is that state of affairs where 'the existence of one right necessarily implies the non-existence of the other'."*[25] Nothing less will suffice. There are no degrees of inconsistency.[26]

From this analysis a number of points emerge.

---

[20] *Akiba v Commonwealth*, above n 14, 932 [67] *(*Hayne, Kiefel and Bell JJ).
[21] Ibid, 924 [27] (French CJ, Crennan J).
[22] Ibid, 925 [29] (French CJ and Crennan J).
[23] *Karpany v Deitman*, above n 15, 95 [22] and 96 [27] (The Court).
[24] Ibid, 95 [22] where the Court held that, "*[b]ecause neither s 29 [of the Fisheries Act 1971* (SA) *(FA 1971)] nor the FA 1971 more generally prohibited the exercise of a native title right to fish, the FA 1971 was not inconsistent with the continued existence of, and did not extinguish, then existing native title rights to fish*."
[25] *Western Australia v Brown*, above n 13, 468 [38] (The Court).
[26] Ibid, approving *Ward* at 91 [82].

First, the broader the scope of the native title right, the more resilient it is likely to be to extinguishment. Taking a hypothetical example, there is no necessary inconsistency between a broadly expressed native title right to 'take marine resources' on the one hand, and a specific prohibition on the 'taking of dugong' on the other. The broadly defined right can continue to be exercised notwithstanding that certain aspects of its exercise are limited. If, therefore, the statutory prohibition is repealed, there is no reason in principle why dugong could not, once more, be taken in the exercise of the native title right.

Contrast a case, however, where the native title right is characterised as a more limited right simply to take dugong. It would seem that the right would be inconsistent with the law that prohibits in an unqualified way the taking of dugong. On this scenario, the repeal of the prohibition would have no impact. The right to take dugong was already extinguished and, absent statutory intervention, would not revive.

Similarly, the High Court in *Akiba* left open the possibility that a different result might be reached if the native title right were defined by reference to a limited purpose.[27] Thus, if the native title right under traditional laws and customs is properly characterised as a right to take certain resources for the purposes of trade, a law which prohibits the taking of those resources for that purpose may extinguish the native title right (leaving aside for present purposes those cases where the prohibition is accompanied by a licensing regime or other mitigating features).[28]

The second point to emerge from the High Court's approach is found in the Court's rejection of the importation of any notion of severance, save for the "severance" of distinct native title rights from the bundle of rights held by the native title holders. For example, in *Akiba*, the native title right to take resources was not extinguished or 'cut-down' to the extent that its exercise for a particular purpose was prohibited. Nor was

[27] *Akiba v Commonwealth*, above n 14, 922 [21] (French CJ and Crennan J); 932 [67] (Hayne, Kiefel and Bell JJ).
[28] Ibid, 934 [75] (Hayne, Kiefel and Bell JJ).

the native title right to fish extinguished in *Karpany* to the extent that fishing for undersized fish was prohibited. It follows that so called 'partial extinguishment' is not concerned with the partial extinguishment of a particular native title right. It is concerned only with the extinguishment of specific rights within the bundle of native title rights, as opposed to the extinguishment of the bundle of rights as a whole.

It also follows that distinct and separate native title rights are not gradually whittled down in an incremental process of extinguishment. They either exist or they do not. This is not, of course, to deny that their exercise may be suppressed for a time such as, for example, by reason of the non-extinguishment principle[29] or yield to the inconsistent exercise of a non-native title right.[30] However, these matters pose different questions for another day.

Thirdly, native title rights are defined by traditional laws and customs and not by the scope of statutory prohibitions or non-native title rights. Identification of the native title rights is therefore, as I have earlier explained, an anterior question to that of extinguishment in line with the approach taken in *Wik*[31] and *Ward.*[32] It follows that it is an error, when moving from that anterior question to a consideration of extinguishment, to redefine the native title right with the result that an inconsistency may be created where none would otherwise exist.

Conclusion

So can we transpose Shakespeare's metaphor of a rose by any other name, to the context of an Australian desert rose? Does the sentiment so simply expressed in these

[29] *Native Title Act 1993* (Cth) s 238. As the majority explained in *Western Australia v Ward* (200) 213 CLR 1, 62-63 [7]: "*In general terms it involves the suspension of what otherwise would be native title rights and interests so that, whilst they continue to exist, to the extent of any inconsistency (which may be entire) they have no effect in relation to the 'past act' in question. The native title rights and interests again have full effect after the 'past act' ceases to operate or its effects are wholly removed.*"

[30] *Western Australia v Brown*, above n 13, 472 [63] (The Court).

[31] *Wik Peoples v Commonwealth* (1996) 187 CLR 1.

[32] *Western Australia v Ward*, above n 5, 208-212 [468] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Western Australia v Brown*, above n 13, 468 [35]; *Akiba v Commonwealth*, above n 14, 929 [51] and 931 [60] (Hayne, Kiefel and Bell JJ).

powerful words from a different culture in a different time hold true in the native title context?

In the end, I think the answer must be 'no'. When it comes to the characterisation and expression of native title rights, there is much more to a name than may at first be apparent. The recognition of native title requires a consideration "*of the way in which two radically different social and legal systems intersect*."[33] This means that questions as to the characterisation and expression of native title rights can be complex with potentially significant implications for native title holders. There is, in native title, much in a name.

[33] *Commonwealth v Yarmirr*, above n 9, 37 [10] (Gleeson CJ, Gaudron, Gummow and Hayne JJ0. See, also, *Fejo (on behalf of Larrakia People) v Northern Territory*, above n 2, 128 [46] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).