

Land, Rights, Laws: Issues of Native Title



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

Editor: Lisa Strelein
November 2000

Volume 2
Issues paper no. 7

The common law recognition of native title in the High Court's Mabo decision in 1992 and the Commonwealth Native Title Act have transformed the ways in which Indigenous peoples' rights over land may be formally recognised and incorporated within Australian legal and property regimes. The process of implementation has raised a number of crucial issues of concern to native title claimants and other interested parties. This series of papers is designed to contribute to the information and discussion.

This paper considers the distinction between possessory native title and the exercise of native title rights as referred to by Lee J in Ward v Western Australia. Part of the international development of native title under common law, the primacy of the communal title arguably protects against partial extinguishment and invalidates the 'bundle of rights' argument.

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The Content of Native Title: Questions for the *Miriuwung Gajerrong* Appeal

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This paper examines two questions that must be considered by the High Court in relation to the appeal from the full Federal Court decision in *Western Australia v Ward*.¹ First, what are the general parameters of the 'content' of native title: must each and every right be proved by reference to a particular customary use of the land or does possessory native title confer a generally unencumbered right to use the land as native title holders see fit to support their economic and cultural development, as well as diminished sovereign rights to manage the land. (As part of this question it is important to consider the distinction between possessory native title and the exercise of individual native title rights, as well as what management powers may adhere to the exercise of these individual rights.) Second, it is necessary to consider what is meant by the rule that the pre-existing laws are recognised by the new sovereign until affirmatively changed.

The Australian High Court has rejected the proposition that recognition of native title requires any affirmative action of the Crown. Citing the *Calder* case, Justice Brennan in *Mabo (No 2)* notes that the weight of the common law authority accepts the view that an affirmative act of recognition of native title rights is not required, rather, ‘the preferable rule ... is that a mere change in sovereignty does not extinguish native title in land.’² Instead, as in North America and New Zealand, native title arises from an Indigenous community’s pre-existing occupation of land³ or as characterised by Justices Deane and Gaudron, from an Indigenous group’s established entitlement to occupy the land;⁴ or as described by Justice Toohey, from meaningful presence on the land ‘amounting to occupancy.’⁵

In addition, the Australian High Court has adopted the common jurisprudence that the extinguishment of native title requires a clear, unambiguous intention on the part of the parliament or executive to extinguish native title rights in land. That ‘intention to extinguish’ may arise expressly from legislation that manifests in clear, unambiguous language an intent to extinguish native title rights or by necessary implication from government dealings in land that are clearly inconsistent with the continuing exercise of native title rights.⁶ To date, the Court has interpreted the requirement for a clear intention to extinguish native title strictly, such that neither general assertions of sovereignty over the land at the time of colonisation,⁷ state grants of interests in land only partially inconsistent with continuing native title rights (such as pastoral leases granted pursuant to state legislation),⁸ nor assertions of a state’s interest in managing and conserving its wildlife resources⁹ have been found to extinguish native title. While it is clear that grants of interests in land which transfer the full beneficial interest in land to others, such as freehold title, will extinguish all native title rights,¹⁰ it is equally clear that other grants may only partially extinguish native title, that is, grants of rights in land may extinguish a native title right of exclusive possession without necessarily extinguishing particular native title rights, such as hunting and fishing rights.¹¹

The Miriuwung Gajerrong Appeal

Two questions were raised at the outset of this paper: first, what is the ‘content’ of native title and must each right asserted be proved independently as a customary practice or does possessory native title confer an unencumbered right to occupy and use the land and its resources; and second, what is the extent of the recognition of the pre-existing laws of a people in an inhabited territory ceded by those inhabitants or settled or occupied by a new sovereign. The Australian answer to those questions is drawn into sharp focus by the contrasting federal appeals and trial court decisions in the recent native title litigation in the *Miriuwung Gajerrong* case.

Following the acceptance of an application for determination of native title with the National Native Title Tribunal (NNTT),¹² and the failure to resolve the claim through mediation, the claim (consolidated with other related claims) was referred to the Federal Court for a determination of native title pursuant to Section 74 of the *Native Title Act 1993* (Cth) (NTA). The Aboriginal claimants asserted a right to possess, occupy, use and enjoy the land and waters comprising an area of approximately 7,900 square kilometres in the East Kimberley region of the north of Western Australia and adjacent land in the Northern Territory. The area claimed covered vacant Crown land, reserved Crown lands including national parks and Aboriginal reserves, lands granted as pastoral leaseholds, township areas, as well as lands subject to valid mining leases and an area set aside by the State of Western Australia for a vast irrigation project (Ord River Irrigation Scheme).

The determination of which areas were and were not subject to native title by each court is less relevant in the present context than the different approaches taken to the content of native title by the Federal Trial and Appellate Courts. In the event, the majority in the Full Federal Court ruling reduced the area covered by the claim, determining that mining leases¹³ and State and Territorial mining legislation extinguished native title, that the Ord Scheme

extinguished native title, and that pastoral leases partially extinguished native title,¹⁴ but with one major and one minor exception, the appellate court left largely intact the definition of native title adopted by Justice Lee in his trial court opinion.¹⁵

At trial, Justice Lee held that the native title rights held by the Miriuwung Gajerrong People in the determination area included:

- a right to possess, occupy, use and enjoy the area;
- a right to make decisions about the use of the area;
- a right of access to the area;
- a right to control access by others;
- a right to use and enjoy the resources of the area;
- a right to control the use of resources by others;
- a right to trade in those resources;
- a right to receive a portion of resources taken by others;
- a right to maintain and protect important cultural sites; and
- a right to maintain, protect, and prevent the misuse of cultural knowledge.

Justice Lee also held that these rights were subject to validly granted rights in others and that the native title rights could be regulated, controlled, suspended, or restricted by the exercise of concurrent rights granted to others or held by the Crown.¹⁶

The two judge majority on appeal was less specific and less expansive about the content of native title, but essentially agreed with Justice Lee that native title encompasses the rights to possess, occupy, enjoy and access the land as well as the right to protect important places.¹⁷ The appeals court also agreed that certain rights held by the Aboriginal plaintiffs were concurrent rights and that rights held by the Crown or exercised under Crown authority might curtail, impair, or otherwise regulate or supersede the exercise of the plaintiffs' native title rights. However, the court rejected the proposition that control of traditional, cultural knowledge could be a native title right.¹⁸ Finally, where native title rights are exercised on lands to which possessory native title is extinguished, the court limits the right to use the resources of the land to a right to use 'the traditional resources of the land.' That limitation, along with the express determination that existing mining legislation has extinguished any native title rights in minerals,¹⁹ provides the major exception to the scope of native title rights articulated by Justice Lee; that limitation goes further, because it apparently eliminates the ability of native title holders to trade in those resources, be consulted regarding their use, exercise any control over the access of others to those resources, and share in royalties from the use of those resources.²⁰

Defining Native Title

As indicated above, the fundamental conflict between the two Federal Court judgements is over the definition of native title. Relying on the Canadian Supreme Court's *Delgamuukw* judgement, Justice Lee opines that:

[native title] is not a mere 'bundle of rights'. The right of occupation that is native title is an interest in land. There is no concept of 'partial extinguishment' of native title by the several 'extinguishment' of one or more components of a bundle of rights. It follows that there cannot be a determination under the [Native Title] Act that native title exists but that some, or all 'native title rights' have been extinguished.²¹

Justice Lee concedes that that the regulation, suspension, or curtailment of particular native title rights arising from the legislative or executive grant of rights to third parties to use Crown lands may impair native title, but notes that, 'strict regulation of the exercise of such

rights of itself, will not mean that native title has been extinguished.’²²

In contrast to the trial court judgement, the appeals court majority holds that, ‘the trial judge erred in holding that there is no concept at common law of partial extinguishment of native title.’²³ Their ‘fundamental’ disagreement with Justice Lee goes further. The majority holds that:

[i]n our opinion the rights and interests of indigenous people which together make up native title are aptly described as a ‘bundle of rights’. It is possible for some ... of those rights to be extinguished by the creation of inconsistent rights by laws or executive acts. Where this happens ‘partial extinguishment of native title’ occurs.²⁴

Arguably, both judgements are both correct and incorrect. The failure to concur on the definition and the content of native title arises from a ‘failure to communicate’ what each judgement means by the term ‘native title.’ Justice Lee’s judgment refers to and cites the Court’s determination in *Delgamuukw* that native (Aboriginal) title is a right to the land which is more than a right to use the land for particular activities which do not in themselves constitute native title but which instead are parasitic on Aboriginal title, and which is limited only by the prescript that the use of lands held subject to Aboriginal title may not contradict the underlying attachment to the land which provides the basis for an assertion of Aboriginal title.²⁵ This clearly indicates that Justice Lee is speaking of what might be characterised as ‘possessory native title.’ He writes, as observed above, that ‘[t]he right of occupation that is native title is an interest in land.’²⁶ Although he notes the Canadian Court’s distinction between Aboriginal title (that is, possessory native title) and Aboriginal rights, that is, native title rights (such as hunting and fishing rights) that may be exercised in the absence of a connection to, or occupation of, land sufficient to provide for a finding of exclusive possession of the land,²⁷ Justice Lee does not make it expressly clear that he is referring only to possessory native title rather than lesser rights when he observes that there can be no partial extinguishment of native title. Considered in this light, Justice Lee is substantially correct when he asserts that there can be no partial extinguishment of (possessory) native title, for any act or interest in land which extinguishes the right to exclusively occupy the land would effectively defeat such a claim.

Possessory Title

On the other hand, if native title is defined to include both the concept of possessory title (Aboriginal Title in the Canadian context) and the exercise of particular (Aboriginal) rights and interests in land such as the right to hunt on or gather food from the land, fish in its waters, cross the land, or protect sacred sites, which seems to be the view of the majority of the appeals court,²⁸ then the majority is correct to assert that there can be a partial extinguishment of native title. In other words, the extinguishment of a claim to exclusive possession does not necessarily deprive the claimants of all their interests in the land which arise from their traditional occupancy and use of the land. As the Full Federal Court majority observes, ‘[i]n a particular case a bundle of rights that was so extensive as to be in the nature of a proprietary [exclusive possession] interest [in the land], by partial extinguishment may be so reduced that the rights which remain no longer have that character [that is, are unable to demonstrate a continuing right to exclusively occupy the land].’²⁹ That, however, does not mean that those continuing (lesser) rights do not persist.

In fact, the Full Federal Court majority opinion actually supports the proposition that there can be no partial extinguishment of possessory native title. Moreover, their reasoning, like that of the Canadian Supreme Court in *Delgamuukw*, supports Justice Lee’s determination that once a claim to exclusive possession (Aboriginal Title) is proven, that title includes the exercise of all rights parasitic on that title, that is, the right to all beneficial uses of the land

(as well as ‘sovereign’ rights to manage, allocate interests in, and control the uses of the land pursuant to the laws and customs of the native title holders).

In response to WA’s contention that Section 225 of the NTA requires the court to specifically identify precisely which rights are held and which people may exercise those rights in which particular areas of a claim area are determined to be held in exclusive possession by native title holders, the court notes that the *Mabo (No 2)* Court made no such order. Instead, the *Mabo (No 2)* Court held that the Merriam People were entitled ‘as against the whole world,’ to occupy, possess, use, and enjoy the Murray Islands, notwithstanding that Merriam Islander customary law provided for the cultivation of particular lands by individuals within the community.³⁰

The Federal Court majority notes that a claim to exclusive possession under the NTA is similar to the claim acknowledged in *Mabo (No 2)*. The majority goes on to hold:

[t]he activities which members of the community [with possessory native title] may undertake in accordance with their laws and customs are not frozen in time but may include activities of any kind undertaken from time to time by other members of the Australian community who use and enjoy freehold title.³¹

Arguably, this holding allows native title holders to control, commercially develop, and profit from the use of the resources of the land held in their exclusive possession (in the same manner as those holding freehold title).

In language reminiscent of the Canadian Supreme Court’s distinction between Aboriginal title and Aboriginal rights articulated in *Delgamuukw*,³² the Federal Court majority notes that when particular rights such as hunting and fishing rights or rights of access to the land are enjoyed by native title holders in the absence of possessory title, ‘it will be necessary to specifically identify them.’³³ However, in response to the appellants’ argument that Justice Lee’s list of rights held by native title holders in relation to land held in their exclusive possession was unsupported by the evidence at trial, the majority notes that the list is not intended ‘to reflect findings of the actual exercise of rights disclosed by the evidence, observing that:

[r]ather, the list is intended to reflect activities permitted by the native title rights and interests which arise by reason of the common law holders having an exclusive right to possess, occupy, use and enjoy the determination area ... The list [of rights] ... is not intended to be exhaustive. Other rights flowing from the right to [exclusive possession of] ... the land may include rights to carry on other activities which are not listed.

... It would be an impossible task in a case where the native title rights comprise ... [possessory native title], to specify every kind of use or enjoyment [of the land] that might flow from the existence of native title. [Given the novel nature of native title rights], Section 225 [of the NTA] cannot have been intended to impose such an impossible task on the Court.³⁴

It appears therefore, that despite ‘semantic’ differences over whether there can be a ‘partial extinguishment’ of native title, which arguably arise from the failure to articulate a clear, coherent and comprehensive definition of native title which encompasses both possessory native title and native title rights (as well as articulate the legal distinctions that attach to such a paradigm), the Trial Court and Full Federal Court are largely in agreement regarding the nature of a native title right which amounts to a right to exclusively possess the land. And that agreement mirrors the legal treatment of possessory native title in North America where Aboriginal title in Canada or Indian title in the US carries with it the full beneficial use

of the land and its resources (or in the Canadian Court's words, those rights parasitic on Aboriginal title). Moreover, given the nature of the right to full beneficial ownership of the land, a determination of possessory native title in Australia, like its counterparts in North America, must necessarily include the rights to manage the land and make decisions about the uses of the land subject to possessory native title.³⁵

Conclusion

The High Court decision in *Mabo (No 2)* establishes that native title in Australia, as in North America and New Zealand, arises from the pre-existing occupation of, and continuing association with the land by a defined group of Indigenous people.³⁶ Stripped of the semantic conflict over whether native title is or is not a bundle of rights, the Federal Trial Court and Full Federal Court *Miriuwung Gajerrong* judgements are in agreement that continuing occupation of the land by Indigenous Australians which confers exclusive possession of the land on native title holders also confers the full beneficial use of the land equivalent to that held under freehold title.³⁷ Thus, it appears that the answer to the first question raised in the introduction to this essay is that native title holders asserting exclusive possession to the land need not specifically prove each and every beneficial use associated with the land. Rather, the prescript announced in *Mabo (No 2)* that native title is given its meaning by the traditions and customs observed by the claimants, means that *in a case of exclusive possession, those customary and traditional uses of the land define the area under claim, not the extent of the rights associated with exclusive occupancy of the land*. This interpretation is consistent with the North American jurisprudence as well as the *Mabo (No 2)* judgement³⁸ and is clearly more consistent with Indigenous perspectives of their relationship to land because it does not require native title claimants to 'compartmentalise' those relationships or fragment their native title claims.³⁹ In a case where such a claim is extinguished, particular rights to use the area may remain viable. Their viability and their nature and scope depend upon proof of a substantial continuity of traditional customs and practices, and they appear to be limited to 'traditional' uses of the land.⁴⁰

The answer to the second question is less precise. The NTA provides that native title is to be held/administered by prescribed bodies corporate.⁴¹ The means and methods of that exercise of authority is less well defined. Both *Miriuwung Gajerrong* judgements confirm that possessory native title confers the right to manage and determine the uses of the land, *according to a particular Indigenous group's laws and customs*. That determination, at a minimum, means that those traditional resource management laws and customs persist, unless affirmatively extinguished. Moreover, North American and New Zealand jurisprudence also suggests that co-existing (non-possessory) rights may confer co-management rights, or at a minimum, confer a right to be consulted in respect of activities that adversely affect the viability of those resource rights.⁴² Finally, it is already clear that native title rights in Australia may include the exercise of rights not associated with any particular rights in land, such as the right to determine 'tribal' membership, which is akin to 'citizenship'.⁴³ The exact extent and contours of all these rights, however, is yet to be determined. What can be said is that all these rights are evidence of continuing rights to some form of self-government for Indigenous native title holders.

In the final analysis, the answers to both questions in Australia are generally consistent with the historical, and more importantly, contemporary answers given by the highest courts in North America and New Zealand. As for the *Miriuwung Gajerrong* case, it might have been preferable for both the Trial and Appellate Courts to avoid the 'bundle of rights' terminology and simply adopt the *Delgamuukw* and *Mabo* prescript that native title rights occur along a spectrum of rights and interests inland, ranging from exclusive possession to rights exercised on land to rights exercisable as a result of the recognition of native title holders. Again, analysis of both decisions also indicates that is the practical effect of both Courts' reasoning and both judgments are generally consistent with the North American and New

Zealand jurisprudence. Hopefully, the High Court will resolve these ‘questions of interpretation,’ as well as the broader questions regarding the content and meaning of native title in Australia when the case reaches it on appeal. The common law recognises Indigenous peoples’ rights under their own laws in respect of territory and some continuing rights of self-government. It follows that, in designing structures for ‘interface’ between the systems, national law should accord due respect to Indigenous authority structures and processes.

1. *Western Australia v Ward* (2000) 170 ALR 159 (the *Miriuwung Gajerrong* case).

2. *Mabo v Queensland* (No 2) 175 CLR 1, per Brennan J, p. 52.

3. Ibid pp. 51-52. Whether the rights developed in the context of US-Indian, Canadian-Aboriginal, and New Zealand-Maori relations are applicable to or can inform the future understanding of ‘Native Title’ law in Australia is a question that can only be addressed summarily in this paper. In the author’s view, the answer depends on identifying and understanding the source of those rights. Arguably, that source is the same in the US, Canada, New Zealand and all other common law jurisdictions (including Australia): the common law’s historical acknowledgment of the pre-existing rights of Indigenous Peoples which arise from their prior occupation of the land in organized societies: Ibid per Toohey J p. 178.

4. Ibid per Deane and Gaudron JJ p. 86.

5. Ibid per Toohey J pp. 184-88.

6. Ibid per Brennan J pp. 64-65 and per Deane and Gaudron JJ p. 111.

7. *State of Western Australia v Commonwealth* 183 CLR 373, 422-34 (1995). This case, also known as the *Native Title Act* case rejected a challenge by Western Australia to the constitutionality of the *Native Title Act 1993* (Cth) and declared invalid Western Australia’s initial legislative land rights scheme.

8. *Wik Peoples v State of Queensland* 187 CLR 1 (1996).

9. *Yanner v Eaton* (1999)168 ALR 1 (High Court of Australia).

10. *Fejo v Northern Territory of Australia* 195 CLR 96 (1998).

11. *Wik* 187 CLR per Toohey pp. 30-31, per Gaudron J pp. 166-67, per Gummow J p. 204, and per Kirby J pp. 242-43 and 250.

12. See: *Northern Territory v Lane* 138 ALR 544 (1996).

13. The proposition that mining leases, which do not confer anything approaching exclusive possession on the holders of those leases, extinguish native title is clearly at odds with the High Court’s *Wik* decision, as well as with the NTA which provides that validly granted mining leases merely suspend native title for the duration of the lease.

14. See: ‘Judges reverse decision on title,’ *The West Australian* p. 4, cols 4-5 (March 4, 2000); for a brief summary review of the Full Federal Court’s reasons for judgement on the

main issues raised on appeal, see the case note, R. Bartlett, 'WA v Ben Ward & Ors (The Miriuwung Gajerrong Case)' (2000) *AMPLJ* pp. 82-99.

[15.](#) *Ward and Ors v State of Western Australia and Ors* (1998)159 ALR 483.

[16.](#) *Ibid* pp. 639-40.

[17.](#) *Western Australia v Ward* (2000)170 ALR 159 p. 324. In his dissenting judgment in the Appeals Court, Justice North substantially agreed with the decision of Justice Lee.

[18.](#) *Ibid* p. 321. Despite the court's conclusion that protection of cultural knowledge is not a native title right, arguably such rights may be among those "sui generis" rights encompassed within the ambit of native title. One prominent commentator notes that communal intellectual property rights arising from the use or knowledge of the location or uses of traditional medicines derived from flora and fauna are one of the type of rights protected by the *Native Title Act* (and international human rights and environmental conventions). See: M Davis 'Indigenous Rights in Traditional Knowledge and Biodiversity: Approaches to Protection' [1999] 4 (No 4) *AILR* 1-32.

[19.](#) *Western Australia v Ward* *ibid* p. 324. The court fails, however, to sufficiently analyse the Western Australian legislation. Arguably, rather than extinguishing native title in minerals, that legislation actually preserves native title rights in minerals by excepting from Crown ownership, minerals (other than gold and silver) in lands granted in fee simple prior to 1899. (See the *Mining Act 1904* (WA) , as amended, *Mining Act 1978* (WA)). Thus, the legislation evidences an intention to preserve rather than extinguish pre-existing mineral rights. Space does not allow for a full exploration of this issue. See generally: G.D. Meyers, C.M. Piper, and H.E. Rumley, 'Asking The Minerals Question: Rights In Minerals As An Incident Of Native Title,' [1997] 2 *AILR* 203-50.

[20.](#) These rights, listed in Justice Lee's decision (*Ward v WA* 159 ALR p. 643) are omitted in the Full Federal Court's list of native title rights (*WA v Ward* 170 ALR p. 324).

[21.](#) *Ward v WA* 159 ALR p. 508.

[22.](#) *Loc cit*.

[23.](#) *WA v Ward* 170 ALR p. 190

[24.](#) *Ibid* p. 189.

[25.](#) *Delgamuukw* [1998] 1 CNLR p. 57.

[26.](#) *Ward v WA* 159 ALR p. 508 (emphasis added).

[27.](#) *Ibid* p. 507.

[28.](#) *WA v Ward* 170 ALR pp. 211-13.

[29.](#) *Ibid* p. 213.

[30.](#) *Ibid* pp. 211-12.

[31.](#) *Ibid* p. 212.

[32.](#) *Delgamuukw* [1998] 1 CNLR p. 67.

[33.](#) *WA v Ward* 170 ALR p. 213.

[34.](#) *Ibid* pp. 212-13

[35.](#) See *Ward v WA* 159 ALR p. 645.

[36.](#) See above notes 3-5 and accompanying text.

[37.](#) Whether that beneficial use may include rights in minerals awaits a determination of the question on appeal to the High Court.

[38.](#) See: Meyers, Piper & Rumley *ibid* pp. 232-35; H. Wooten, 'The Rights and Recognition of Indigenous People – Consequential Land Management Impacts on the Environment, and on the Recognition of Native Title,' in G.D. Meyers (ed.) *Implementing the Native Title Act: First Steps: Small Steps* 60, 71 (National Native Title Tribunal (1996)); and R. Bartlett, 'How Native Title at Common Law Upsets the Dominance of Resource Titles: Resource Security and Mabo' 118, 119 in A. Gardiner (ed.), *The Challenge of Resource Security: Law and Policy*, Federation Press 1993).

[39.](#) See: Wooten *ibid* p. 71; and N. Pearson, 'The Concept of Native Title' 118-23 in Conference Papers: *Land Rights: Past, Present and Future* (Northern and Central Land Councils, 1996).

[40.](#) See: *Washington v Washington State Commercial Passenger Fishing Vessel Ass'n* 443 US 658 (1979); *Delgamuukw v British Columbia* (1998) 1 CNLR 1; *R v Van der Peet* 137 DLR (4th) 289 (1996); and *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 682.

[41.](#) *Native Title Act 1993* (Cth), as amended by the *Native Title Amendments Act* (1998) (Cth) Part 2, Division 6 ss.55-60AA; and see *WA v Ward* 170 ALR pp. 209-10.

[42.](#) *Delgamuukw* [1998] 1 CNLR pp. 79-80. This ruling is analogous to the position in the US where Indian Tribes control game laws on their reservations and are immune from state regulation. See: Meyers & Landau *ibid* pp. 23-25.

[43.](#) See: *Mabo* (No 2) 175 CLR p. 61; and *WA v Ward* 170 ALR p. 213.

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ISSN 1326 - 0316 ISBN 0 85575 377 3

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