LEADERSHIP
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NATIVE TITLE LAW AND PRACTICE

Presenter

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Abstract

Three issues in understanding and proving native title:

- Limits of the usefulness of the metaphor of the bundle of rights – a bundle of one
- Recognition of a customary concept of a unitary proprietary title – an approach to proof.
- A right 'itself' and customary regulation of the manner of its exercise.

Limits of the usefulness of the metaphor of the **bundle of rights**

BUNDLE OF RIGHTS

- The actual existence of a bundle of separate rights has never been a requirement of native title jurisprudence

The metaphor of a “**bundle of rights**” which is so often employed in this area is useful in two respects. It draws attention first to the fact that there **may** be **more than one** right or interest and secondly to the fact that there **may** be **several *kinds*** of rights and interests in relation to land that exist under traditional law and custom. (Bold added, italics in original)

Western Australia v Ward (2002) 213 CLR [95]

TRANSLATING THE RELATIONSHIP DOES NOT REQUIRE A BUNDLE

- There is no requirement to sever rights into a bundle.

The difficulty of expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests is evident. Yet that is required by the NTA. 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. (Bold added).

Western Australia v Ward (2002) 213 CLR 1 [14]

- Rather the requirement is only to sever the spiritual from the prosaic when it comes to the translation

PROPERTY AS A RELATIONSHIP DOES NOT REQUIRE A BUNDLE

The word "property" is often used to refer to something that belongs to another. But in the Fauna Act, as elsewhere in the law, "property" does not refer to a thing; it is a description of a legal **relationship** with a thing. It refers to a degree of power that is recognised in law as power permissibly exercised over the thing. The concept of "property" may be elusive. Usually it is treated as a "bundle of rights". But even this may have its limits as an analytical tool or accurate description, and it may be, as Professor Gray has said, that "the ultimate fact about property is that it does not really exist: it is mere illusion)

Yanner v Eaton (1999) 201 CLR 351 [17] per Gleson CJ, Kirby, Gaudron and Hayne JJ, recently cited in Banjima People v State of Western Australia [2015] FCAFC 84 [39], per Mansfield, Kenny, Rares, Jagot And Mortimer Jj

MORE OF PROPERTY AS A RELATIONSHIP

Whatever else property may mean in a particular context, it describes a **relationship** between owner *and* object by reference to the power of the owner to deal with the object to the exclusion of all others, except a joint owner.

Yanner v Eaton (1999) 201 CLR 351[90] per McHugh J

It is the **relationship** between a community of indigenous people and the land, defined by reference to that community's traditional laws and customs, which is the bridgehead to the common law:

Yanner v Eaton (1999) 201 CLR 351[90] per McHugh

A BUNDLE OF ONE

- It follows, I argue, that not since the making of the determination in *Mabo* has it been sustainable to argue as respondents continue to do, that traditional and native title rights that are put up for recognition must not exceed some unspecified scope and should be defined by reference to a list of activities

- In any event, if the notion of a bundle requires some satisfaction, the ‘internal’ aspects of the right and the complexities of its management and exercise among the native title holders would provide the it. Just as the unitary though “composite” right of exclusive possession can be seen as a bundle of one.

- If a bundle were a requirement, it could be met by a bundle of one – a right comparable to a unitary proprietary title – fee simple – exclusive possession – a right akin to ‘ownership’

Recognition of a customary concept of a unitary proprietary title and an approach to proof of broadly stated rights.

ALL DEPENDS ON LAW AND CUSTOM

The identification of the relevant rights is an objective inquiry. This means that the legal nature and content of the rights must be ascertained. The nature and content of a right is not ascertained by reference to the way it has been, or will be, exercised. That is why the plurality in *Ward* said that consideration of the way in which a right has been exercised is relevant only in so far as it assists the correct identification of the nature and content of the right.

French CJ, Hayne, Kiefel, Gageler and Keane JJ
Western Australia v Brown [2014] HCA 8 [34]

It is important to recognise that particular considerations apply to the identification of native title rights and interests. In examining the "intersection of traditional laws and customs with the common law" (or, in this case, the intersection with rights derived from statute), it is important to pay careful attention to the content of the traditional laws and customs. .

French CJ, Hayne, Kiefel, Gageler and Keane JJ
Western Australia v Brown [2014] HCA 8 [36]

MISTAKE TO **ASSUME** NATIVE TITLE IS NOT EQUIVALENT TO FEE SIMPLE

it is a mistake to **assume** that what the NTA refers to as "native title rights and interests" is necessarily a single set of rights relating to land that is analogous to a fee simple.

Western Australia v Ward (2001) 213 CLR 1 [82], per Gleeson CJ, Gaudron, Gummow And Hayne JJ

- Nor does the concept a unitary proprietary title infringe the ruling of the High Court in *Ward* at [93] against the notion of an underlying title based of proof of mere possession – the foundation for any unitary title must be in laws and customs, not mere prior occupation. North J so found, in *Willis on behalf of the Pilki People v State of Western Australia* [2014] FCA 714 at [134]

BROADLY STATED RIGHTS *INCLUSIVE* OF "COMMERCIAL RIGHTS"

A broadly defined native title right such as the right "to take for any purpose resources in the native title areas" may be exercised for **commercial or non-commercial purposes**. The purposes may be well defined or diffuse. One use may advance more than one purpose. But **none of those propositions requires a sectioning of the native title right into lesser rights or "incidents" defined by the various purposes** for which it might be exercised. The lesser rights would be as numerous as the purposes that could be imagined. **A native title right or interest defines a relationship between the native title holders and the land or waters** to which the right or interest relates. The **right** is one thing; the **exercise of it** for a particular purpose is another.

Akiba v The Commonwealth (2013) 250 CLR 209, 224-225 [21], French CJ and Crennan J
(Footnote 48 omitted)

BROADLY STATED RIGHTS *INCLUSIVE* OF "COMMERCIAL RIGHTS"

- Whether the taking of resources for commercial purposes requires separate consideration and proof where a broad inclusive right was claimed was tested in two cases before North J:

  Willis on behalf of the Pilki People v State of Western Australia [2014] FCA 714

  BP (Deceased) on behalf of the Birriliburu People v State of Western Australia [2014] FCA 715

- The idea was upheld, that broadly stated rights proved to exist under laws and customs need not prove the existence of specific or separate right to take and use resource for commercial purposes.
- *Willis* is on appeal to the Full Court and the decision is reserved.

SOME OF WHAT CLAIMANTS SAID

But those – those trees and things, and making artefacts on this land and thing you know, that's their every right. And they – they should [sic] be asking be going asking governments and things for that. Government's got nothing to do with it. …
I don't want no – no white people coming… tell me to do this and do that. This – this – ***this is my land****. It's our land.*

As -as well as – if – if I'm talking about the –what's on this – top of this surface of this land we walk in and drive in, alright? That's our – our –land. What's under the – under the ground of this – in this- in this land. We own that. That that's our traditional owner type things. The sacred things, that, you know they can't take anything from – from Aboriginal people. What- what's on top of that – the surface of this land, as well as underneath of this ground … And these people – ***own*** *that together.*

[T]raditional owner, well, he ***got every right*** *for that land. He got every right to speak for the land.*

What's there on the land is ***ours***

It ***belong to us*** *that place when you say it* [traditional owner]

*Ngurra – ngurra Anangu…****owner's*** *country who* ***own*** *the camp.*

SOME MORE OF WHAT CLAIMANTS SAID

[W]e look at country not only what's ***on top*** *and what's there, but also what's on the ground – what's on the –* ***underneath*** *the ground. That's – we see that - what's in that area and we identify that area and what's inside that area, either on top or underneath,* ***we own that****. We – we have the right to speak for that, you know. And what we'll do with that, either what's on top or on the bottom, we can make a decision about what we're going to do and we will – there's nothing stopping us from doing what we've got to do on country.*

My ngurra. … ***My*** *home*
Well, we're the ***owners*** *of the land*

When I think about ngurra, *Think about ancestors. … And theirs. … And our Jukurrpa. …* And *Trees. …* And *animals, like marlu*. … *I think about as home*

No, it's all ***belong to*** *them. Nothing doesn't belong to them.*

The case for unitary title or at least broadly stated rights

- **Unlikely that they do no exist**

  Where in fact the relationship of people to country is truly and broadly one of 'ownership' – "its our country and what's on it is ours", that is the relevant law and custom that defines the rights and interests possessed.

  So, grave injustice may be done by continuing to put any case on the basis of narrow or activity based rights

- **Readily investigated and proved**

  Indeed more readily proved than negotiated because of the history of development of the jurisprudence to this point and entrenched attitudes

- **Resilient as against extinguishment –** as *Akiba* shows
- **Future proofed and inclusive**

  Because its not just about what the old people did, what the modern generation do, what resources are present or not present; or about the opportunities that may or may not exist from time to time.

Pleading broadly stated rights

EXCLUSIVE TRADITIONAL RIGHTS (AND NATIVE TITLE WHERE NO EXTINGUISHMENT

- the right of possession, occupation, use and enjoyment of that part as against the whole world

NON-EXCLUSIVE NATIVE TIITLE RIGHTS WHRE THE RIGHT TO EXCLUDE IS EXTINGUISHED

- the right to access, to remain in and to use for any purpose;
- the right to access and to take resources for any purpose;
- (the right to maintain and protect places and objects of significance)

Distinguishing a right 'itself' and its customary regulation or manner of its exercise in the proof of native title

The case for the distinction - extinguishment

- For extinguishment purposes, The High Court in an important series of cases has firmly established the existence and centrality of the distinction
  - *Akiba v The Commonwealth* (2013) 250 CLR 209; [2013] HCA 33;
  - *Western Australia v Brown* (2014) 88 ALJR 461; 306 ALR 168; [2014] HCA 8
  - *Karpany v Dietman* (2013) 88 ALJR 90; 303 ALR 216; [2013] HCA 47
  - *Queensland v Congoo* [2015] HCA 17

The fundamental proposition is that:

a law which merely regulates the enjoyment of native title or creates a regime of control consistent with its continued enjoyment does not, on that account only, reveal an intention to extinguish or impair native title rights and interests

Queensland v Congoo [2015] HCA 17 [32] per French CJ and Keane J

The case for the distinction – proof of rights

- What non-discriminatory principle could require such an important distinction to be recognised for extinguishment purposes but not for the purposes of properly understanding and recognising the nature of the traditional right itself?
- In the context of the jurisprudence about proof of native title, the distinction has been ignored or very poorly understood.

  E.g., *Sampi v State of Western Australia* [2005] FCA 777, French J did not include in the native title determination particular secret/sacred areas that was so important and so dangerous that the evidence generally was that access to it was highly restricted

- It is underutilised in the conceptualisation and presentation of native title cases

  Cases are still being designed, run and settled on the basis that customary regulation of traditional rights are understood as qualifications on the rights themselves

Examples of the distinction

Examples of understanding the customary regulation of the exercise of a right as distinct from [and no constituting a qualification of] ‘the right itself’

- **Rules** about **speaking for country**

  Often misconceptualised as some members of the group having more rights than others because of seniority, status, knowledge and so on. Rather, it might properly be understood as all (or collectively) having the right to speak but that there are rules about the manner of its exercise.

- **Rules** about **generosity and sharing**

  Where there are rules about such things, they are to be seen as rules about the manner in which e.g., the right to exclude and control is to be exercised

- **Restrictions** against waste, taking more than needed

  These do not warrant the conclusion that traditional rights do not contemplate commercial activity

- **Prohibitions**

  For example, on hunting certain species or extraction of resources from certain places. Again, these are properly understood as rules about the manner of exercise of the right to take and use resources

The distinction in practice and proof

Laws and customs about country

Having rights in country
- My country, our country
- *My family country*
- *Language country*
- *Inland [shared] areas*
- *Sea country – offshore waters, reefs and islands*

My rights, our rights in country
- *Control and regulation of access*
- *Access and use of country*
- *Access and use of resources*

Rules about exercising rights
- ***Responsibilities - protecting and looking after country***
- ***Rules about controlling and speaking for country***
- ***Rules about using country***
- ***Rules about using resources***

Other laws and customs
- Cosmology
- Marriage and Kinship
- Language
- Adoption
- Naming people
- Naming country
- 'Law'
- Corroboree

Reasons for not breaking rules

How old are the rules and how learned

Others who have the same laws and customs

Other people and the claim area

Occupation of areas when the claim is made

Authorisation