THE CONTENT OF NATIVE TITLE

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An examination of the role of traditional laws and customs and the identification of the content of native title is conducted. It is suggested that Ward is not necessarily inconsistent with the degree of full ownership found in Mabo No 2, and that the particularisation of native title rights and interests is not necessarily destructive of native title. Such particularisation serves the purpose of identifying the degree of extinguishment and compensation, and enabling the determination of whether an act is a future act. It is observed that exhaustive or comprehensive listing of rights and interests may mislead. A native title determination, being abstract in nature, is not conducive to a precise identification of rights. Absolute clarity about the content of native title may only come about with the resolution of a particular dispute.

1. AN HISTORICAL CONTEXT

Identifying the content of native title involves no more, and no less, than an analysis of the relationship between particular indigenous peoples or indigenous communities and identifiable areas of land. This exercise is not a novel enterprise for the law. In a past era, it was an inevitable part of colonial administration. Broadly speaking, the acquisition of colonies was not advanced by the destruction of colonial people or their social systems, nor by the creation of anarchy. Nor could an indigenous social system be effectively administered without some understanding of its internal operation. As a result, English lawyers have long been required to come to grips with systems of landholding which did not conform to principles of property ownership as understood in English common law.

The pragmatic emphasis given by the common law to the fact of possession was not ill-suited to this exercise. However, a significant conceptual leap was required by the primary emphasis given under the common law to the relationship between an individual and a precisely defined area of land, being a concept often at variance with indigenous understandings of relationship with land, which were based upon collective ownership by communities. It was an important conclusion of Sir Henry Maine's classic text *Ancient Law*, published in 1861, that communal ownership involved a form of proprietary interest in land recognisable by the common law. Over the last century, much classical anthropology has been devoted to the identification of coherent and rational systems of social organization which identify people with particular areas of land.[1] This understanding is clearly reflected in decisions in the Privy Council, including *Amodu Tijani v*

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[1] See, eg, Malinowski, *Coral Gardens and their Magic* (1935); Gluckman, *Essays on Lozi Land and Royal Property* (1943) and *Ideas in Barotse Jurisprudence* (1965). For a critique of Maine, see Pospisil, *Anthropology of Law: A Comparative Theory* (1971) 143 ff.

Secretary, Southern Nigeria[2] where Viscount Haldane observed, in a passage quoted by Brennan J in *Mabo v Queensland [No. 2]*:[3]

> The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but may be that of a community.

That understanding, now reflected in the *Native Title Act* 1993 (Cth),[4] is an accepted part of our jurisprudence.[5]

Furthermore, the recognition of difference has led to repeated warnings, particularly in the High Court, that conceptual assumptions underlying the common law should not be used as a framework into which traditional indigenous concepts must be forced.

Although a decade has now passed since the judgment of the High Court was handed down in *Mabo [No. 2]*, courts and lawyers still struggle to define the content of native title. There are political and strategic reasons which partly explain the lack of progress, but the following comments focus on certain legal tensions.

2. ROLE OF TRADITIONAL LAWS AND CUSTOMS

When attention is turned to the two stage process of identifying native title rights and interests explained in *Ward*, further difficulties arise, but they are difficulties which were recognised, at least in passing, in the majority judgments.[6] The first stage of the process requires identification of the connection of Aboriginal people with particular land, under traditional laws and customs. The relationship of Indigenous people to particular areas of land must first be identified in accordance with those traditions. That is necessary, the Court has said on more than one occasion, because the rights and interests in question do not arise under the common law, or pursuant to grants made by the government, whether pursuant to statute or otherwise.

The starting point of this inquiry has been trenchantly criticised, particularly by Noel Pearson.[7] That critique finds support in the judgment of Toohey J in *Mabo [No. 2]* in a discussion of the requirements of proof of the existence of traditional title, which concludes in the following terms:[8]

> There must, of course, be a society sufficiently organised to create and sustain rights and duties, but there is no separate requirement to prove the kind of society, beyond proof that

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2 [1921] 2 AC 399 at 403.

3 (1991-92) 175 CLR 1 at 50 ("*Mabo [No. 2]*").

4 S 223(1) ("the NTA").

5 Some anthropologists struggled through the 20th century with concepts of "property" and "ownership" as they understood them to be used in Anglo-American law: see Nadasdy, "'Property' and Aboriginal Land Claims in the Canadian Sub-Arctic: Some Theoretical Considerations" (2002) American Anthropologist 104(1): 247-261.

6 The principal judgment is that of Gleeson CJ, Gaudron, Gummow and Hayne JJ; however, Kirby J agreed generally with the majority, whilst taking a more beneficial approach to the content of native title in particular respects.

7 See, most recently, Pearson, "Native Title's Days in the Sun are Finished", *The Age*, 28 August 2002.

8 (1991-1992) 175 CLR at 187-188.

> presence on land was part of a functioning system. It follows from this discussion that requirements that aboriginal interests be proprietary or part of a certain kind of system of rules are not relevant to proof of traditional title.
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> It is the fact of the presence of indigenous inhabitants on acquired land which precludes proprietary title in the Crown and which excites the need for protection of rights. Presence would be insufficient to establish title if it was coincidental only or truly random, having no connection with or meaning in relation to a society's economic, cultural or religious life. It is presences amounting to occupancy which is the foundation of the title and which attacks protection, and it is that which must be proved to establish title. Thus traditional title is rooted in physical presence.[9]

The result of that approach should be, absent any level of abandonment or extinguishment, to provide a full beneficial ownership of the land by the native title holders, without detailed analysis of the content of traditional laws and customs.

As a matter of principle, there is much to be said for that view. It should have been adopted or imposed by the British Parliament at the time sovereignty was asserted over the land and waters which made up the various Australian colonies. It should further have been recognised at that time that native title, although not an estate held from the Crown, would be "protected by the common law as Crown tenures are protected against impairment by subsequent Crown grant."[10] However, that did not happen and, native title only being properly recognised under Australian law in 1992, after some 200 years of destruction and dispossession of Indigenous communities, there are relatively few who will now benefit from such an approach. However, some will: the people of Mer were amongst them, despite the fact that the findings of the trial judge provided an unpromising basis for the Court's order. Land ownership, according to Meriam laws and customs, was not based on "public or general community ownership" but involved individual or group landholding.[11] By contrast, the "obvious example of the kind of traditional native title which was assumed to be recognised and protected under the law of a British Colony", in *Amodu Tijani*, was the communal right of occupation and use of large tracts of uncultivated land or water.[12] Nevertheless, following this line of authority, the High Court transformed the factual matrix of group and individual rights into a right of exclusive possession vested in the Meriam people as a community.

There is no reason why a similar result would not be achieved on mainland Australian where a traditional community established, in fact, exclusive occupation of an area of land. Some inquiry might be necessary into the traditions of the community, both in order to describe its identity or membership,[13] and the boundaries of the land in question.

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9 See also C. Bell and M. Asch, "Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation" in M. Asch (ed) *Aboriginal and Treaty Rights in Canada* (1997), Ch 2 at 72-73.

10 These words are taken from the judgment of Brennan CJ in *Wik Peoples v Queensland* (1996) 187 CLR 1 at 84, his Honour recognising that that was not the case.

11 *Mabo [No. 2]*, (1991-1992) 175 CLR at 22.

12 See *St Catherine's Milling and Lumber Co v The Queen* (1888) 14 AC 46 at 51, discussed in *Mabo [No. 2]* at 84-85.

13 Without, of course, seeking to identify individual members at any particular time.

Subject to the question of ownership of minerals and petroleum, to which reference is made below, there is nothing in *Western Australia v Ward*[14] which is necessarily inconsistent with this approach. *Ward* was not, in the High Court, a case about the content of native title or connection with particular land or waters: it was largely a case about extinguishment, because in almost every area, there had been acts which might have extinguished, in part or in whole, any existing native title. Accordingly, care must be taken in treating comments made in this context as inconsistent with the approach adopted in *Mabo [No. 2]*.

What is more problematic is that the NTA speaks of "rights and interests" that are "possessed under" traditional laws and customs, "by which" Indigenous people have a "connection" with particular land or waters. In *Ward*, the majority returned to the concept of connection in the following passage:[15]

> As is now well recognised, the connection which Aboriginal peoples have with 'country' is essentially spiritual. In *Milirrpum v Nabalco Pty Ltd* Blackburn J said that:[16]
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> > The fundamental truth about the aboriginal's relationship to the land is that whatever else it is, it is a religious relationship. … There is an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble whole.
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> It is a relationship which sometimes is spoken of as having to care for, and being able to 'speak for', country. 'Speaking for' country is bound up with the idea, at least in some circumstances, others should ask for permission to enter upon country or use it or enjoy its resources. But to focus only on the requirement that others seek permission for some activities would oversimplify the nature of the connection that the phrase seeks to capture. 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.

Their Honours might have added that the need to seek permission is not merely a matter of obligation, but reflects customary respect for the Beings which inhabit the country and, in pragmatic terms, the importance of being warned as to dangers known to the custodians.

Because *Ward* was not ultimately a case about connection, the majority did not address in terms the extent to which the partial destruction of traditional law and custom might affect the rights and interests to which they give rise.[17] The tension which arises in this respect is inherent in the principle that "native title has its origins in and is given its content by" traditional laws and customs.[18] Those traditional laws and customs provide the basis of a social order pursuant to

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14 [2002] HCA 28 (8 August 2002).
15 Ibid at [14].
16 (1971) 17 FLR 141 at 167.
17 C.f. Deane and Gaudron JJ in *Mabo [No. 2]*, (1991-1992)175 CLR at 110.4.
18 (1991-1992)175 CLR at 58.5 (Brennan J).

which relations between Aboriginal people were governed, prior to the acquisition of British sovereignty. It has long been accepted that there is no Aboriginal nation which can make a claim to sovereignty over the Australian continent,[19] but the recognition of rights in relation to land, derived from a system of traditional law and custom, suggests that such traditional systems may themselves be capable of recognition and demand protection under the general law. That question was raised, perhaps obliquely, in *Ward* by assertion of a right to maintain, protect and prevent the misuse of cultural knowledge. The majority held that such a right did not fall within the scope of s 223 of the NTA,[20] Kirby J took a broader view of the scope of the NTA and the logic by which such a right might be recognised and protected.[21]

3. APPROPRIATE DESCRIPTION OF NATIVE TITLE

The majority judgment in *Ward* is widely understood as requiring courts making a determination of native title to isolate and particularise the native title rights and interests derived from traditional law and custom which remain for recognition by the general law.

A number of comments may be made about the approach adopted by the High Court in this respect. First, immediately a question of extinguishment arises, the native title is likely to be less than a right of possession, occupation, use and enjoyment, as against the whole world. The Court pointed out that, in this situation, it is not helpful to seek to breakdown the portmanteau phrase into its constituent elements.[22] The relevant passage reads as follows:[23]

> Where, as was the case here in relation to some parts of the claim area , native title rights and interests that are found to exist do not amount to a right, as against the whole world, to possession, occupation, use and enjoyment of land or waters, it will seldom be appropriate, or sufficient, to express the nature and extent of the relevant native title rights and interests by using those terms.

Secondly, their Honours made the point that that concept is directed to control of access to land and use of resources. Their Honours noted:[24]

> … 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 what others may do on or with the land.

The truth of the last statement is undoubted: the problem it raises, however, which the Court did not pursue, is how to translate such elements into rights and interests which may be recognised by the common law.

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19 See *Coe v Commonwealth* (1979) 53 ALAR 403.

20 [2002]HCA28, (8 Aug 2002) at [59].

21 At [576]–[587]. C.f. *Walker v State of New South Wales* (1992-93) 182 CLR 45, Mason CJ rejecting an argument based on the survival of customary criminal law.

22 At [94].

23 See [51].

24 At [95].

This form of analysis, however incomplete in its present terms, is by no means destructive of native title. In order to appreciate why this is so, it is necessary to consider the reasons for defining the content of native title. These are threefold: first, there is a need to identify what native title remains after there has been some level of extinguishment; secondly, when any part of the native title is lost, it may be necessary to put a value on that which has been lost, for the purposes of compensation; and, thirdly, it may be necessary to identify the content in order to determine whether an act is a future act because it affects the existence, enjoyment or exercise of native title rights and interests. The third of these purposes, which will be of importance after a determination has been made in which the content of the title is defined, allows consideration of each respect in which the content is important.

An act having any legal consequence may be an act affecting native title, if it satisfies the definition in s 227. That provision states:

> An act **affects** native title if it extinguishes the native title rights and interests or if it is otherwise wholly or party inconsistent with their continued existence, enjoyment or exercise.

The recognition by the Court that a spiritual connection is at the heart of the traditional relationship to land and that the spiritual or religious must be translated into the legal,[25] makes it important to seek to reflect that aspect of the relationship in the native title rights and interests identified in the determination. To that end, Olney J in *Hayes v Northern Territory*[26] accepted that a determination should properly include:

> The right to protect places and areas of importance in or on the land and waters within the determination area, and
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> The right to manage the spiritual forces and to safeguard the cultural knowledge associated with the land and waters of their respective estates within the determination area.

Once such rights are acknowledged, any significant interference with land or waters subject to native title will properly be understood as being at last partly inconsistent with a continued enjoyment of native title in relation to the area. That is because such acts would impinge upon the integrity of the spiritual connection with the area. Such an act would be a act affecting native title in relation to the land or waters, to an extent, and would therefore be a "future act".[27]

It is important to note that the nature of the rights and interests in question need not be such as to constitute proprietary interests in land under the general law. In *Yanner v Eaton*[28] the Court quoted with approval the following comment by Professor Kevin Gray in relation to the concept of "property" as an analytical tool of the common law.

> An extensive frame of reference is created by the notion that 'property' consists primarily in control over access. Much of our false thinking about property stems from the residual

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25 At [14].
26 (1999) 97 FCR 32 at [169].
27 See s 233(1).
28 (1999) 201 CLR 351 at [18] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

> perception that 'property' is itself a thing or resource rather than a legally endorsed concentration of power over things and resources. [29]

Further, as the Court noted in *Ward*:[30]

> It is wrong to see Aboriginal connection with land as reflected only in concepts of control of access to it. … To impose common law concepts of property on peoples and systems which saw the relationship between the community and the land very differently from the common lawyer.

It is worth recalling in this context the passage in the judgment of Brennan J in *Mabo [No. 2]* concerning protection and enforcement of rights and interests which are dependent on a communal native title.[31]

> A sub-group or individual asserting a native title dependent on a communal native title has a sufficient interest to sue to enforce or protect the communal title.

In the footnote to that sentence, his Honour referred to classic authorities on standing, namely *Australian Conservation Foundation v The Commonwealth*[32] and *Onus v Alcoa of Australia Ltd*.[33]

Among the passages referred to in the footnote are those which note that it is not necessary for a person to have a private legal right in order to invoke the legal powers of a court, so long as the person has a special interest in the subject-matter of the litigation. In *Onus* it was found sufficient that a community of Aboriginal people sought to protect relics of their ancestors' occupation of an area, which possessed cultural and spiritual significance for the community. As succinctly stated by Mason J:[34]

> The relics here have great cultural and spiritual significance for the Gournditch-jmara community. The members of that community are the guardians of the relics according to their laws and customs and they use the relics.

Thus, any interest, material or otherwise, which would give a native title holder standing to take proceedings to protect the area against any action taken in contravention of the law should be seen as a sufficient interest to be recorded as a native title right in relation to the particular land or waters. These will be amongst the "*several kinds* of rights and interests in relation to land that exists under traditional law and custom."[35]

4. REFERENCE TO POSSESSION

With these considerations in mind, it is arguable that too much weight is commonly placed upon the need to identify "possession" of land as a native title right. Albeit in dissent, McHugh J in

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29 K. Gray, "Property in Thin Air", (1991) 50 Camb LJ 252 at 299.
30 At [2002] HCA 28, (8 Aug 2002)[90].
31 (1991-1992)175 CLR at 62.2.
32 (1980) 146 CLR 493.
33 (1981) 149 CLR 27.
34 Ibid at 43.5.
35 At [95].

Ward expressed a degree of discomfort with the concept of "non-exclusive possession" which he described as a "self-contradictory term".[36] That was said in a context in which his Honour acknowledged the possibility under the general law of joint possession, but not of separate but temporally co-existing rights of possession in different parties with different interests. However, that approach appears to be inconsistent with the majority view which prevailed in *Wik* and which is expressly preserved[37] by the NTA as amended in 1998.[38] McHugh J was content with the concept of "non-exclusive occupation" and, presumably, with a legal right to non-exclusive occupation. Whether that right is described as "possession" or not may determine little more than whether the native title holder, or the pastoralist, or neither, has a right to bring proceedings in trespass to exclude from the land any third party. However, the existence of such rights may, in procedural terms, be of limited importance. It is likely that most relief which might be sought by native title holders could be reflected in the grant of an injunction or the payment of damages for unlawful activities on land or waters subject to native title. It is likely that a native title holder would have standing to obtain such a remedy without having to establish an interest in possession sufficient to found a claim in trespass to land.

There remains, of course, a substantive issue, namely whether the native title interest in relation to land is itself a sufficient reason to exclude a particular person from the land or to prevent him or her taking its resources. For example, where a pastoral lease has been granted over land, the existence of native title may mean that a kangaroo shooter is not able to come onto the land without permission from both the pastoralist and the native title holders.

Questions of specific entitlement are not answered by the judgments in *Ward*: nor should one assume that, even where native title is not an exclusive interest in land, rights to undertake quite specific activities must be exhaustively identified. The entitlement of native title holders to use and enjoy land and waters is not susceptible to such definition. As recognised by Beaumont and von Doussa JJ in the Full Court in reference to exclusive rights, it would be "an impossible task … to specify every kind of use or enjoyment that might flow from the existence of that native title."[39]

For example, native title may encompass an entitlement to have access to the land, to move around the land, to hunt, prepare, consume and use animals such as kangaroo, euro, rock wallaby, emu, perentie, goanna, lizards, echidna, bush turkey and rabbits. It may include the right to gather and use plants as food, as bush medicine, as wild tobacco, and the products of plants such as resin for the manufacture of implements or weapons. It may include the right of access to and use of water found in soakages, rockholes, waterholes and springs, and to gather and use timber, stone and ochre from the land. The uses may be extensive and various. Access may be subject to restrictions in accordance with traditional laws and customs. It may include the right to conduct religious activities, initiation ceremonies, higher order men's ritual, women's ceremonies, and funerary ceremonies, including the right to invite other people to be present at and to participate at such ceremonies. Native title holders may be entitled to hold meetings on the land, to gather together and to invite others to meet with them. Native title may include rights to participate in cultural practices on the land relating to birth and death, to teach on the land the physical and spiritual

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36 At [477].

37 Rather than "confined to narrow areas": at [476] (McHugh J).

38 See s 23G. The NTA itself uses the term "non-exclusive possession act", a phrase which must be given meaning.

39 *Western Australia v Ward* (2000) 99 FCR 316 at [209].

attributes of places, to travel over the land and to stay on the land for the purpose of imparting knowledge of the physical and spiritual attributes of places to young people and other people entitled to receive such knowledge in accordance with traditional laws and customs.[40]

But comprehensive listing of such rights should not be rejected merely because it is an impossible task: it should be avoided because it is likely to be a misleading exercise. As Hal Wootten has argued:[41]

> To describe Aboriginal rights in land without reference to the system of native custom to which they belong would be … misleading, and would be likely to lead in the long run to dealing with those rights not only as if they were frozen in their current form, but as though they were similar sounding rights under the general Australian law. Every determination of rights and interests under native title should, as part of the description of the rights and interests, refer to the system of customary law under which they exist and which defines, and under which they may evolve … .

That approach is entirely consistent with the approach adopted by the High Court in *Ward*; it should not be dismissed because it does not find its origin in s 225 of the NTA.

5. OWNERSHIP OF MINERALS

It was noted above that the Court cast doubt on terminology reflective of a freehold grant in circumstances where the right "as against the whole world" did not exist.

As suggested above, this does not suggest that such terminology is not appropriate in the case of native title amounting to exclusive possession. However, when considering minerals and petroleum, the Court asserted that no relevant native title right or interest arose, without distinguishing between areas where extinguishment was absent and areas where there was partial extinguishment.[42] That was because there was said to be "no evidence of any traditional Aboriginal law, custom or use relating to" petroleum or minerals. Accordingly, it was held that no relevant native title right or interest in petroleum or minerals was established.

This passage could be seen as inconsistent with the general approach to the establishment of the content of native title, which did not require use of particular resources or physical presence on particular portions of the land, a view of native title which allowed for the preservation and conservation of areas of land by exclusion from use, and for the continuation of a sufficient connection with land or waters to which access was not immediately practicable.

However, the inconsistency may be more apparent than real. First, the Court was considering "ownership" of minerals and petroleum, not exploitation of those resources. Thus, it was not in

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40 For a careful analysis of the nature and kinds of rights which may form native title, see Sutton, "Kinds of Rights in Country: Recognising Customary Rights as Incidents of Native Title" (NNTT, Occasional Papers series No. 2/2001).

41 J. H. Wootton "The End of Dispossession? Anthropologists and Lawyers in the Native Title Process" in Finlayson and Smith (Eds) *Native Title: Emerging Issues for Research Policy and Practice* (CAEPR, ANU, 1995) at 110 ff.

42 [2002] HCA 28, (8 Aug 2002) at [382].

that passage considering intrusive activities such as mining and drilling. Secondly, it is clear that their Honours were not considering minerals or petroleum as part of the land or waters as such, but as severable elements. The comments thus appear to be addressed to the question whether traditional law had a concept of severing and removing elements of the land for specific purposes.

6. RIGHTS AND ACTIVITIES

In relation to rights and interests arising under the general law, it is clear that the only circumstance in which extinguishment would arise from activities carried out on land, rather than from the grant of a right to carry out an activity, is where the right does not crystallise with respect to a particular area of land until it is carried out.[43] The exercise of a right (or obligation) to establish a homestead might give rise to extinguishment over the land covered by the building and curtilage, though not over the remainder of a pastoral lease. Similarly, where, by construction of a public work on Crown land, the government creates in itself a full beneficial interest in the land,[44] extinguishment will occur as a result of a statutory authority providing the basis for the activity, giving rise to extinguishment, but the area being identified only when the power is exercised.

In this context, the Court was at pains to emphasise that extinguishment of one set of rights occurs as a result of inconsistency with another. In neither case is one looking at activities as such.

It would be curious if any different conclusion were reached with respect to the activities of native title holders. In this regard it is helpful to return to the discussion of occupation as a demonstration of traditional title.

It is clear from the passage in the judgment of Toohey J referred to above, that his Honour did not think that the bald fact of occupation at some particular time would be sufficient to establish native title, absent a connection between a traditional society and the land being given meaning, in accordance with its customs. In this context, the majority in *Ward* stated:[45]

> The fact of occupation, taken by itself, says nothing of what traditional law or custom provided. Standing alone, the fact of occupation is an insufficient basis for concluding that there was what the primary judge referred to as 'communal title in respect of the claim are' or a right of occupation of it. If, as seems probable, those expressions are intended to convey the assertion of rights of control over land, rights of that kind would flow not from the fact of occupation, but from that aspect of the relationship with land which is encapsulated with the assertion of a right to speak for country.

This qualification is important, because even within a small community rights to speak for country may be vested in different groups for different purposes and in relation to different areas of land. Where native title is found to exist in the present, one is more interested in the identification of the relevant communities now, than at the date of acquisition of sovereignty by the Crown. That is because any persons now wishing to enter upon particular lands will need to know from whom

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43 See [149] and [150].
44 See [151].
45 At [93].

they should seek permission.[46] Thus, if the fact of occupation is not critical, and recent use of land or waters is not essential,[47] it is likely that an activity on land will not in itself constitute a "right" but may, rather, provide evidence of continued exercise (and therefore existence) of rights in circumstances where there is also evidence as to the legitimacy, manner of exercise and constraints upon the activity, in accordance with tradition.[48] Generally speaking, the terminology of the NTA is entirely consistent with the distinction between the carrying out of an activity and a right to carry out, or an interest in carrying out, that activity.[49]

7. OTHER ISSUES

The purpose of the foregoing comments is to seek to identify principles which might now be derived from the judgments of the High Court in recent cases, and particularly *Western Australia v Ward*, which elucidate the content of native title. There are various other specific matters including the concept of a right to make decisions and the nature of rights in relation to water and resources of the sea, which deserve careful consideration. Further, there is a closely related issue concerning the manner of proof of native title rights and interests. In relation to sea rights, *Ward* adds little to the discussion in *The Commonwealth v Yarrmir*. In relation to the latter point, discussion seems premature until the Court hands down judgment in the matter of the *Yorta Yorta Aboriginal Community v State of Victoria*.

It should also be noted that a native title determination, whilst requiring attention to specific acts of past extinguishment, has some qualities of an abstract declaration. This aspect is not conducive to a precise identification of rights. Greater clarity will arise in cases which focus on smaller areas of land and waters, or which identify current conflicts. For example, what principles will be identified when Aboriginal people seeking to live on pastoral lease land in times of drought find themselves competing with stock for potable water? How will the native title rights to fish be defined, when native title holders seek to exclude fishermen from areas with traditional fish traps or where species on which they rely are severely depleted? Clarity about the content of a non-exclusive native title is likely to be achieved only in the resolution of such particular disputes.

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46 This question may be answered in a technical sense, by noting the role of a prescribed body corporate: see s 57(3). However, the role of a court in determining who holds native title cannot be sloughed off entirely in this manner. Such an approach is likely to defer significant problems which may not be resolved without further litigation.

47 See [64] – at least in relation to par (b) of s.223(1).

48 See, eg, *Mason v Tritton* (1994) 34 NSWLR 572 at 574E (Gleeson CJ commenting on the activity of fishing).

49 See, eg, ss 211(2) and 223(2).