The Legal Concept of Native Title

Cape York Land Council Workshop

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The *Miriuwung Gajerrong* appeal (*Ward v Western Australia*), with leave to appeal to the High Court heard on 4 August, has highlighted the fact that there is no clear and coherent concept of common law native title. There are a number of fundamental aspects of the nature and content of the title that are disputed and more that have not been thoughtfully considered. The Federal Court decision in *Miriuwung Gajerrong* squarely addressed the debate over whether native title is a bundle of rights or an interest in land, as well as the nature and extent of extinguishment. But the discussion in the cases lacked depth in a jurisprudential sense.

A number of people have begun to address the need for greater emphasis on the concepts behind native title as well as the practical workings of the Act, because, as *Miriuwung Gajerrong* has demonstrated, the theoretical directions taken by the courts can have serious practical effects on the extent to which native title will be recognised in determinations and negotiations.

Some time ago Noel Pearson floated the idea of a small workshop devoted to the legal concept of native title. This coincided with my own research project on this issue and the Native Title Research Unit's plans for such a workshop. Noel has been working on a research project, with the assistance of Peace Decle, and sponsored by the Cape York Land Council, examining the concept of native title as a possessory title. In July the CYLC hosted the workshop, which brought together the legal teams that had worked on the various appeals, and other practitioners, as well as a number of academics, anthropologists and Indigenous people who have been turning their minds to these issues.

With only around forty people in attendance, the workshop allowed thoughtful and thought provoking discussion of the current approach of the courts and some of the limitations of that approach as well as investigating strategic direction for future argument and presentation of cases.

Those present expressed some dismay at the judges, and particularly Kirby J, who reiterate that native title is a vulnerable and fragile title; the failure of the courts to afford native title the same protections as other property rights; and the willingness to find that native tile has been extinguished.

The workshop was designed as an opportunity for Noel and Peace to present their theory of native title and to discuss its principles, implications and

supporting authority. The idea behind the theory is a development of Noel's ideas presented to the '20 Years of Land Rights: Our Land is our Life' Conference hosted by the Northern and Central Land Councils in Canberra in 1996. It also draws heavily on the ideas of Kent McNeil, a Canadian academic, in his 1997 article, 'Aboriginal Rights and Aboriginal Title: What's the Connection'. Some aspects also draw on work by anthropologists such as Peter Sutton and Bruce Rigsby.

The theory focuses on the aspects of the judgements of Brennan and Toohey J J in the *Mabo* case that clearly discuss native title as a proprietary interest based on possession and occcupation. Pearson and Decle distinguish those aspects of the decision that highlight the variable nature of native title, which differs in accordance with the laws and customs of the group, to argue that this latter aspect is an internal dimension to native title. Externally, native title is established by proof of occupancy and gives native title holders rights of possession under the common law, similar to freehold title. They argue that if native title is something less than full ownership, then that is a result of the impact of laws and grants, not a reflection of the nature of the title itself.

The purpose of this rethinking of native title is to move away from the emphasis on law and custom as the necessary proof of native title. It seeks to avoid the misconception, characterised by the 'bundle of rights' approach, that native title is a collection of freestanding rights, each of which must be proved through evidence of law and customs and that once proved, the native title is limited to those activities and uses. It is also consistent with the kinds of determinations that have been made in cases, including the *Mabo* case, that grant rights to possession, use, occupation and enjoyment. Law and custom is, instead, only relevant to a limited number of issues, such as entitlement and extent of territory.

The workshop provided an opportunity to begin an intellectual discussion of these issues and we await the full development of the ideas in the form of a discussion paper and other publications. It is an approach to the common law that prioritises the exclusive possession aspects of native title and therefore requires close scrutiny to ensure that there is no disadvantage in diminishing the role of law and custom in the theoretical foundation of the title as well as its proof. Nonetheless it does provide an alternative conception of native title that highlights the absurdity of the bundle of rights approach and will be a valuable contribution to the thinking in this area.

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