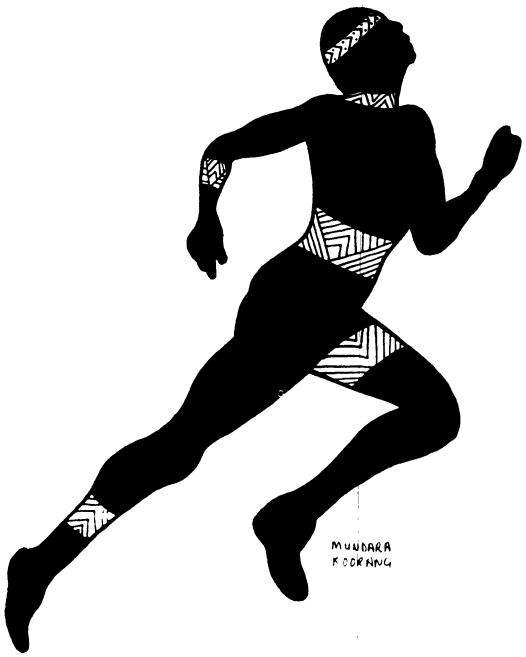
Absent OWNERS

Mark Gregory

Should native title require continuing physical occupation of the land?



Mark Gregory is a solicitor with the Aboriginal Legal Service of Western Australia (Inc.).

The orthodox answer to the question posed in the introduction to this article is 'yes'. Currently, both the decision in *Mabo v Queensland [No. 2]* (1992) 175 CLR 1 (*Mabo*) and the *Native Title Act 1993* (Cth) appear to require native title claimants to show that they are present on their traditional land, and have been present there since European settlement.

This requirement does not accord with Aboriginal peoples' own concepts of their relationship with the land. For Aboriginal people, land without traditional owners is virtually unthinkable. Land cannot be 'unowned', even if the traditional owners are not able to be present on it. At a recent conference on native title issues, several Aboriginal speakers told stories to illustrate that, under traditional law, connection with country is not lost by physical separation. In many cases the traditional connection has continued despite generations of separation. Rights can be asserted, and some ceremonies held, even at a distance.

These practices have been recorded by anthropologists. For instance, it was observed of one group that:

> Men who have special spiritual talents are believed to be able to make visits to their country in the course of natural sleep. During the course of these dream spirit journeys, men believe they are able to inspect sites and places of importance in their clan estates and report back to their fellows on the state of affairs in their distant and now vacated country.[1]

These practices existed in pre-contact Aboriginal society, due for example to dispersals caused by drought, but physical separation from land has become more common due to the disruptions caused by European settlement.

So while the introduced law holds that native title may be extinguished if the traditional owners leave the land, that is not recognised by customary law as extinguishing native title. The two systems of law clash on this point. To date, this conflict has been resolved in favour of the introduced law. In this sense, the concept of native title can be clearly seen as the imposition of rules by the more powerful over the less powerful, in the guise of sovereignty and its attendant right to extinguish native title.

What issues for native title are posed by the fact that customary connection with land survives loss of physical connection?

Basic concepts of native title

The *Mabo* decision held that the common law recognises native title, but does not create it. Native title owes its existence to, and takes it shape and content from, the customary beliefs of the Aboriginal group which has the native title over a piece of land. Therefore, the fundamental basis of native title is customary law. As Brennan J said:

> Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be

> ascertained as a matter of fact by reference to those laws and customs. [at p.58]

While customary beliefs and usages are fundamental, the *continuance* of native title must also be shown before a native title claim will succeed. Continuance of native title can be broken down into two broad notions: continuing customary connection with the land; and absence of an extinguishing act that shows a clear intention to extinguish native title, such as an inconsistent Crown grant.

While native title claims are complex, the basic requirements of a claim thus seem clear:

1. establish existence and content of native title by reference to traditional usages;
2. show that the traditional connection continues; and
3. show that there has been no extinguishing act.

Challenging the assumption that physical connection is required

An assumption that native title requires a physical connection with the subject land underlies stages two and three of the three-stage approach mentioned above, but this assumption rests on uncertain foundations. In *Mabo*, only Toohey J expressly stated that 'presence' on the land was essential (at 187-8), but this appears to be a requirement for establishing native title existed initially, not for establishing that it continues. The requirement of physical presence may arguably be inferred from Brennan J's majority judgment (at 59), but the requirement of physical connection was not reiterated in his 'summary' (at 69-70).[2]

More recently Sean Flood, as a member of the National Native Title Tribunal, has doubted that a physical connection to land is required. He has said in two recent non-claimant application determinations:

> Because traditional title has its source in the special relationship existing between the indigenous people and the land I would be reluctant to narrowly construe traditional title to a physical connection with the land in question.[3]

The *Native Title Act 1993* (Cth) requires claimants to have a customary 'connection', but this is not defined as a physical connection. Notably, a clause in the *Native Title Bill* which seemed to imply that physical connection is necessary was deleted in the Senate.

As the introduction shows, connection with country under traditional law does not require a physical connection. Aboriginal groups can live hundreds of miles from their country, and can have done so for generations, yet remain its traditional owners. The stories about the country are still told by the elders, and in their dreams the traditional owners return to their country.

This raises a serious problem for the concept of native title. On the one hand, the essential nature of native title is that it owes its existence and scope to customary law, which recognises that traditional connection with land may continue despite loss of physical connection. On the other hand, as native title is currently conceived, loss of physical connection with the land leads to its extinguishment. This can occur if traditional owners leave the land, or are *legally or illegally* forced off. A grant of a title which entails exclusive possession (such as freehold or full leasehold) extinguishes native title because it is inconsistent with continued *physical* use of the land by traditional owners.

If native title is to be true to its fundamental premise (i.e. that its existence and scope is determined by customary law), then logically native title should recognise that continuing connection with land does not always require continuing physical occupation.

Extending the native title concept

Whether this logical position will be recognised by statute or at common law may depend upon various practical and political considerations, including the practical and economic ramifications of native title recognising non-physical continuing connection.

Take the example of a grant of freehold. In theory, freehold involves an unlimited grant of exclusive possession, making it legally (and, if the land is heavily built on, factually) inconsistent with continuing traditional physical connection of the land. But it is not inconsistent with traditional owners maintaining a connection with the land, from across the road or from across the state.

But if the traditional owners can never regain access to that land, what is the point in native title recognising the continuing spiritual connection? Native title is an interest in *land*, not an interest in spiritual values. What is the point of an interest in land that can never vest in possession? Native title adds nothing to the continuing spiritual connection with the land, because the inconsistent grant does not threaten the continuation of the beliefs, stories, etc. The traditional owners are free to continue their spiritual connection with the land, regardless of native title rights to it.

There are several reasons why native title should recognise non-physical continuing connection. First, such recognition raises the status of Aboriginal law in the eyes of the non-Aboriginal population, having an educative effect and boosting Aboriginal pride and social standing.

Second, inconsistent grants may come to an end. A Crown lease, if not renewed, will lapse. In *Mabo* Brennan J held that when a Crown lease lapses, the Crown takes full ownership of the land. But this view was based on Brennan J's premise that the original grant of the Crown lease extinguished native title through force of law. If native title survives an inconsistent grant, then that native title can continue once the lease lapses. And once the lease lapses, there is no legal barrier to the traditional owners resuming their physical connection with the land. Furthermore, if spiritual aspects of native title were to survive the grant of leasehold, arguably there would be no 'clear and unambiguous' intention that the Crown's interest at the end of that lease be inconsistent with native title and prevent a resumption of physical occupation by the traditional owners.

Freehold title, on the other hand, never lapses, but it can be terminated, for example by Crown resumption. If undeveloped or lightly developed freehold is resumed by the Crown, for example, for a national park or a wildlife reserve, any native title which has survived in abeyance in the traditional owners' spiritual connection with their land, could provide a basis for them to resume physical occupation.

Re-thinking existing concepts

Extending native title so that it survives a grant of exclusive possession and continues in abeyance, with the possibility of it re-vesting in possession when the inconsistent grant lapses or ends, may seem extreme. It certainly involves a re-think of the concept of an extinguishing act. While native title still would be lost by the death of the last surviving traditional

owner, or by the displaced traditional owners eventually losing their connection, over generations, with their previous country, it would not be extinguished simply by an inconsistent grant. The concept of an 'inconsistent grant' also needs substantial re-thinking. A Crown grant may be inconsistent with physical occupation by traditional owners, but it cannot conceivably be inconsistent with continuing spiritual connection with country. But such re-thinking is necessary if the concept of native title is to be true to its basic premise — that it owes its existence and scope to customary law.

The conceptual change is perhaps not so great. The *Native Title Act 1993* (Cth) already recognises that native title can revive in a limited number of circumstances. Thus, where a previously granted freehold or leasehold estate had ceased to exist by 1 January 1994, native title may be claimed over the area (s.229). Similarly, where a pastoral lease is held by an Aboriginal group, a claim by that group for native title over the same area can succeed, regardless of the existing leasehold interest and, more importantly, regardless of any previous grants which would otherwise be inconsistent grants (s.47). Native title also revives after the lapse of mining leases (ss.15(1)(d) and 238).

In land claims under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), there is also some flexibility in the degree of physical presence on the land required by the statutory concept of 'strength of attachment' (s.50(3)). In one land claim it was noted by the Aboriginal Land Commissioner, Justice Toohey:

> Absence from the land is not necessarily destructive of attachment but absence over a long time may tend to weaken attachment to a point where it is non-existent.[4]

Practical effects on non-Aboriginal interests

In practice, extending native title as suggested need not have any radical consequences. The expanded concept of native title in abeyance would not threaten any existing non-native title interests. Freehold is entirely secure unless and until it is resumed by the Crown for a purpose which would allow the re-vesting of native title. This is not a new threat to freehold, as governments already have the power to make such resumptions. Similarly, leasehold interests are secure until they lapse through causes which are unrelated to the pressures of native title (for example, end of term, surrender by lessee, Crown resumption).

Problems raised by extension of the native title concept

While existing interests are not threatened by the concept of native title in abeyance, it does raise new problems, particularly in relation to compensation. First, will the renewal of a lease require compensation? If the lease was not renewed, any native title in abeyance would revest when it came to an end. Therefore, arguably, the lease's renewal adversely affects the native title interest and compensation for this is required. Whether this is right probably turns on the nature of the lease's renewal. If the renewal is by way of the exercise of an option within the lease, or similar mechanism, it probably should not attract compensation because an option term blends with the prior term to make one continuous term. On the other hand, in the case of a surrender and re-issue of a lease (as often happens with pastoral leases, for example) there is a stronger case for compensation.

Compensation generally would be more difficult to calculate. If an 'inconsistent grant' does not extinguish native title, but merely prevents its physical expression, the possibility of native title re-vesting in possession in the future must be considered. If less compensation is assessed because the native title is not wholly extinguished, and full native title may re-attach in the future, what is to be done if the native title never re-vests? Such problems could be resolved by legislation.

Other problems might also arise. For example, it might be feared that an extended concept of native title would give rise to spurious claims, with Aboriginal groups appearing from hundreds of kilometres away to claim an interest in land. The simple answer to this is that all such claims would need to be established by evidence in the same way as claims for full native title (except, of course, that evidence of current occupation would not be required).[5]

The common law of native title is at present quite a blunt instrument. It contemplates, for example, that the entry of a pastoral lease on a register in Perth automatically and permanently strips traditional owners 2000 kilometres away in the Kimberley of their native title, even if the lessee has never set foot on the land and the traditional owners have not been informed of the decision. A more sophisticated approach is needed. The complexities involved in recognising native title in abeyance are not beyond the ability of the common law to solve. The common law is capable of quite staggering sophistication when required — the subtleties of property law developed over the last few hundred years provide many examples. Surely the same sophistication can be applied to native title. This will obviously require much time and discussion of the complexities involved, but sophisticated outcomes are obtainable.

Conclusion

There is a tendency to assign the difficult native title questions to the 'too-hard basket', in the form of the (as yet undetermined) social justice package. Leaving continuing customary non-physical connections to country to be dealt with in this way is an under-utilisation of existing legal possibilities, and could strip many dispossessed Aboriginal people of legal recognition of their native title to their traditional country. It is time to start discussing ways of ensuring that native title is true to its fundamental premise that customary law provides its existence and scope, and thus recognising continuing connection in the absence of physical occupation.

References

1. Kingsley Palmer 'Migration and Rights to Land in the Pilbara' in Peterson, N. and Langton, M. (eds), *Aborigines, Land and Land Rights*, 1983, Canberra, Australian Institute of Aboriginal Studies, at p.175.
2. In *Coe v Commonwealth* (1993) 68 ALR 110 Mason CJ appears to have misinterpreted Brennan J. Mason CJ, referring to Brennan J's summing up at p.70 of the *Mabo* decision, says at p.119 that native title is extinguished by the cessation of 'a requisite physical connection with the land'.
3. Determination in Application QN94/2, 4 October 1994 at p.12; Determination in Application No.94/5, 5 October 1994 at p.11.
4. *Warlmanpa Warlpiri, Mudbura and Warumungu Land Claim,* Report No. 11, AGPS, Canberra, 1982, at para.243.
5. The existence of a native title interest in abeyance would involve a contingent interest in the land. I have not sought to answer whether this would offend the rule against perpetuities. It would seem odd if it did, because the rule against perpetuities is designed to prevent *disposals* of interests in land which restrict alienation. Native title does not arise from a disposal of land, but rather from customary usage rooted in prehistory.