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Exercise of native title rights

Modern anthropology is founded on observation – anthropologists should seek to study what goes on around them. In a native title inquiry the focus of that observation should be the claimants’ relationships with their country and their activities and behaviour in relation to it. With respect to proprietary interests in land, rights are manifest through their exercise. Some customary actions then, performed in relation to country, are significant signals of the exercise of rights or duties and potentially, then, also to the continuity of that exercise and the system that underpins it over continuing generations. Consequently, doing the anthropology for a native title claim should ideally involve observation of the exercise of rights to country by the claimants. However, in practice it may only be possible to record how claimants assert that they exercise certain of their rights to country. Both sources of data provide a means whereby the anthropologist can create a representation of the social interactions and normative values and principles that determine how rights and their exercise are managed. It is from these data that the system of land tenure is explicated.

Before I turn to an examination of these practical manifestations of the exercise of customary rights to country, there are a couple of preliminary matters that require attention. The first is definitional; the second a creature of native title law.

Understanding the anthropology in a native title context

Groups local and residential

As studies of local organisation in Australia developed it became evident that there was a necessary differentiation to be made between the form and structure of two quite different groups. One was the exogamous descent group (or 'local descent group', 'local group', and sometimes a 'clan' or 'country group'). The other was an extended family group or those who recognise bonds of kinship (sometimes the 'band' or 'horde'¹ or 'residence group'). I noted above that Radcliffe-Brown's account of local organisation resulted in some ambiguities and lack of lucidity. These developed from his failure to distinguish these two key components of customary Australian Indigenous local organisation.

The distinction between the local group and the band was regarded as fundamental by R.M. Berndt (1959, 96) and L. Hiatt (1962, 284). Berndt concluded that it was the local group that was the land-owning group while the band was the land-occupying group (1959, 98, 103). Keen (acknowledging Sutton) called the descent group a 'country group' (2004, 277) in recognition of the fact that not all land-owning groups were strictly speaking descent groups – that is, recruited according to filiative links to forebears but members could be enlisted by means other than descent, as I have discussed in the previous chapter. Keen termed the band (*ibid.*, 427) a 'residence group' in recognition of the fact that its membership was potentially impermanent and could change over time. The members of the residence group went about together hunting and gathering and are sometimes termed the 'band' or 'horde'. The band was likely made up of two or more descent groups since the rule of descent group exogamy requires that spouses come from different descent groups.

Based on this analysis it is evident that the country group and the residence group are different types of social formation. While both are identified with respect to relationships of constituent members, country groups comprise those who recognise filiative, kinship or spiritual relationships with one another and with an area of land held in

1 The term 'horde' was used by Radcliffe-Brown and other earlier writers, rather confusingly, for what later writers termed the local descent group.

common by country group members. Residence groups comprise those with lived social relationships engendered from daily economic activity and lived experience. The former is a description of how relationships are calculated and thought out. The latter is a description of how relationships are actuated.² Early observers of Aboriginal Australia witnessed residence groups moving across the countryside as hunters and gatherers. While the residence groups comprised two or more country groups, it was the latter not the former that represented land-owning corporations by virtue of their members' spiritual or filiative relationships to country. Thus, members of a residence group together as congeries of members of several country groups were likely to have claim to rights in more than one estate. To the extent that a member gained rights to different country through more than one pathway, members of the hunting and gathering residence group together were likely to claim rights to multiple estates. This arrangement would explain why the Piddingtons found that the exercise of rights to country was not effected with respect to singular hermetic estates.³

Claim groups and local groups

In native title law, application for recognition of prior rights is generally made by a claim group whose laws and customs are the subject of examination by the court. In this it is the claim group that makes the application and, in the event that there is a subsequent determination in their favour, it is the group as a legal entity that will enjoy the native title rights that have been recognised. The relationship between the country groups and the claim group is oblique: the former is a product of the anthropology and our understandings of how customary systems worked. The latter is a product of the native title law. This means that while the anthropology may instruct that, according to customary systems, rights were (and are) not spread homogeneously across those who comprise the claim group, this is not a matter that the court needs to consider. The rights are allocated in native title law equally between those who made

2 Sutton considered that country groups were 'typological units' defined in relation to types of relationship. Residence groups were 'land-utilising aggregates' (2003, 96).

3 Some years later Norman Tindale reported that, for the Yindjibarndi in the Pilbara region of Western Australia, 'there are no separate family territories, all people may hunt over the whole of Indjibandi country. Adults may hunt unquestioned. Young men may hunt but there are restrictions on some foods they may eat' (1953a, 333).

application for recognition of native title. Thus, the court generally takes the view that the intra-mural allocation of rights within an application area is not a matter for its consideration.⁴

This issue was raised in the Daniel claim where Nicholson J made comment on Professor K. Maddock's, one of the experts, view:

[Maddock] was sceptical a language group had been regarded as having owned land although there would be some correlation with the area within which a language is spoken or mythologically identified. However, Professor Maddock was not prepared to start from a *priori* position of estate groups.⁵

His Honour continued:

I do not consider it is necessary to explore further these aspects of the anthropological evidence. Following the decisions in Ward HC and in Yorta Yorta it became apparent that the concentration on notions of composite community and estate groups, which had featured so heavily in the anthropological evidence given earlier in the trial, were not to be the central focus of the inquiry.⁶

The appeal judges did not find that the trial judge had erred in relation to the groups that held native title rights and that these were not held 'at the estate group level' (*Moses v State of Western Australia* [2007] FCAFC 78 [344]).

Sections 223 and 225 do not require the Court to search for an anthropologically identified form of community or group. The NTA [*Native Title Act*] makes clear the Court is to examine the evidence to see who holds native title, if anyone, and so whether there are communal, group or individual rights and interests. Anthropological theory and research may inform that examination but cannot determine it.⁷

This manner of treating customary systems does not mean that the proper characterisation of local organisation is unimportant. Understanding how Aboriginal systems of land tenure worked and how rights were transmitted through time is an essential driver to the process whereby native title can

4 However, determinations also record that the rights are 'exercisable subject to and in accordance with traditional laws and customs' and courts may acknowledge that the rights are not shared equally. I thank Robert Blowes for this information.

5 *Daniel v State of Western Australia* [2003] FCA 666 [241].

6 *ibid.*, [244].

7 *ibid.*, [334].

be proved. Establishing that the system remains substantially intact is a key component in any evidence of the continuity of laws and customs – as they relate to land and rights in country. Moreover, the intra-mural allocation of rights within the different constituent estates of the claim area will be significant in the post-native title administration of the country of a determined application – notwithstanding the court's lack of interest in such matters when considering the application in the first place.

There is a related issue where the framing of a native title claim can perhaps too readily accommodate substantial changes in the system of gaining and asserting rights to country and so neglect the customary arrangements. In places where the estate system has more or less vanished, rights are often conceptualised by claimants and their advocates as being universally and evenly spread across all members of a claim group. Members of the claim group say that they recognise commonalities and so are a 'society' in native title terms. They comprise, then, an undifferentiated modern day 'tribe'⁸ and may also be a language group. According to this view, all members of the claim group can freely exercise rights to the country of the former estates of the language group members in aggregation. There is reason to conclude that this is based on a customary system by reference to the multiple pathways I have discussed above. However, to be shown as a customary system, based on rules and principles, there can be no automatic right to the country of others simply because they share commonalities and are, for the purposes of a native title claim, a single society. In the system as I have described it in the previous chapter, the extent of a person's range would be defined by reference to legitimating references as well as the rights of fellow residence group members who could bring their kinsfolk into country wherein they were, in fact, visitors not owners. Proof of native title requires continuity with the past. This means that the present-day arrangements must be shown to have some connection with the customary system such that it can reasonably be argued that the contemporary structure is based upon and rooted in past

8 Sutton (2003, 133) wrote in this regard, 'In regions heavily impacted by colonial and postcolonial developments, it is sometimes the case that some people maintain proximate entitlements to small areas such as classical estates as well as an identification with more widely-cast landed entities such as language groups, but at the same time others from the same region may maintain only the wider form of identification with land'. Sutton goes on to note that the neglect of a distinction between estate groups and a wider society or group may sometimes lead to disputes.

practice. A substantial or total move away from country group ownership to claim group ownership, should the ethnography reveal such, would weaken the case for recognition of native title.

Exercising and asserting rights in a customary system

Given the potential to benefit from a right to several different estates, by reference to a number of different governing principles, it is likely that there were in customary systems arrangements in place to order the acquisition of rights and their command. These worked to ensure governance and management of real assets in an orderly fashion. In short, it seems reasonable to assume that people knew where their country was and who commanded authority with respect to it as well as to all other areas known to them. Native title research needs to establish which principles are evident in the ethnography and how rights develop and are differentiated with respect to their originating belief and associated rules. Given this complexity, it is also essential to understand how the allocation and exercise of rights to country are a part of social process and the product of social relationships. It is important, then, to take a closer look at how rights to country were ordered in customary systems and gain an appreciation of the implications of this system for contemporary bids to gain recognition of customary title to land.

Descent, cognatic descent and the exercise of choice

What emerges from the Australian ethnography is that descent played a central role in how rights to country were transmitted. As Hiatt pointed out, this may not have been the only way to gain rights to country, but it was probably, in most cases, 'an important credential, and probably in many areas the most important' (1984, 9). Systems of descent that recognise filiative links through both the mother and the father (patrification and matrification) are sometimes called 'cognatic'. The implications of a cognatic system are that rights to country can be gained through both matri- as well as patri-filiative links, effectively giving ego the right to two countries gained from their parents – as Kaberry reported for the Kimberley. Potentially in a cognatic system ego gains rights in the country of four grandparents and eight great grandparents,

assuming each had a different country. With each ascending generation the number of possible estates increases exponentially. This means that ego could potentially claim rights to up to eight different countries over three ascending generations from ego. I have drawn a diagram to illustrate the theoretical descent of rights in a cognatic system over three generations (Figure 4.1).

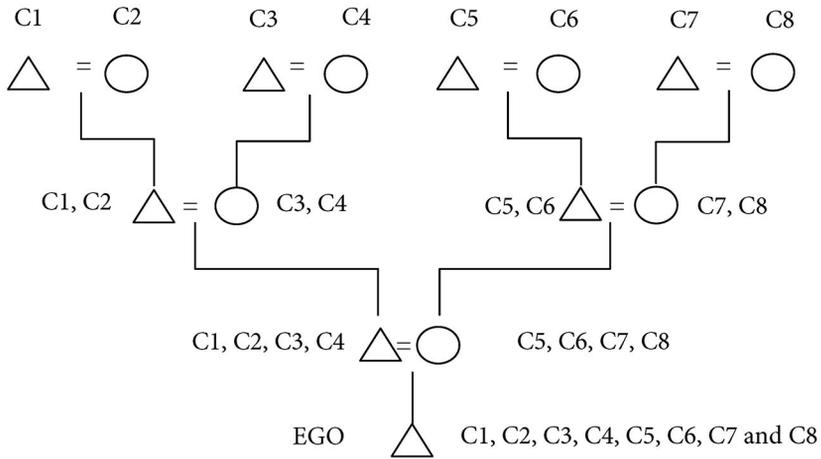


Figure 4.1: Cognatic descent over four generations

Note: 'C' denotes the country or estate wherein an individual gains rights through descent

Source: Diagram designed by author.

According to this account, then, a person potentially might claim rights in many countries through descent. Add to this a system that recognised that rights to country could be gained via other pathways and there develops, on the face of it, potential for a situation where there is no clear rule as to who was the principal owner of the country. Were such an open-ended system to be the ethnographic reality, claims to rights to country would have been open to a seemingly never-ending spectrum of individuals. This would have made the management of rights to country according to an ordered system next to impossible. Rather than a principled system there would be a seemingly random set of options and choices that might be selected without discrimination on the whim of the individual. Subject to no normative principles the arrangement would be no system at all. As such, it would run the danger of failing to qualify as a system of laws and customs, subject to normative values, and so would be incapable of being recognised in Australian native title law as a continuing system of native title.

Radcliffe-Brown identified this as a difficulty for a cognatic system which he considered had the potential to become dysfunctional. He wrote:

If any society established a system of corporations on the basis of kinship – clans, joint families, incorporated lineages – it must necessarily adopt a system of unilineal reckoning of succession ...

Thus the existence of unilineal (patrilineal or matrilineal) succession in the great majority of human societies can be traced to its sociological ‘cause’ or ‘origin’ in certain fundamental social necessities. Chief amongst them, I have suggested, is the need of defining, with sufficient precisions to avoid unresolvable conflicts, the rights *in rem*⁹ over persons. The need of precise definition of rights *in personam*¹⁰ and of rights over things would seem to be secondary but still important factors. (Radcliffe-Brown 1952, 46)

Radcliffe-Brown postulated that there had to be a normative system of laws that regulated the rights of a horde (country group) to its country and in relation to each other (*ibid.*). He considered such an arrangement to rely upon a principled system of succession that would avoid ‘unresolvable conflict’. He thus sought to establish that unilineal systems had a functional origin that if absent would have dysfunctional consequences.

In summary then, recognition of the fact that multiple pathways to country is a part of the Australian ethnography must be understood in the context of its operation and the social process whereby rights to country are gained and perpetuated. Accepting cognation and multiple pathways requires that the system in evidence exhibits some mechanism that would counter the potential for this ‘unresolvable conflict’. Generally in the Australian ethnography these mechanisms are evident as qualifiers to the exercise of rights, whether by reference to descent or other means. Meeting these qualifications is a necessary requirement before the rights can be exercised in practice. These operational requirements have the quality of a normative system of rules in that they are accepted within

9 Radcliffe-Brown defines what he means by ‘rights *in rem* over a person’ earlier in his paper. He states, ‘rights over a person “as against the world”, i.e. imposing duties on all other persons in respect of that particular person. This is the *jus in rem* of Roman law in relation to persons’ (1952, 33). However, the definition provided by the Merriam-Webster online legal dictionary for *jus in rem* reads, ‘a right enforceable against anyone in the world interfering with that right founded on some specific relationship, status, or particular property accorded legal protection from interference by anyone (as the right to be free from slander or to enjoy one’s property)’. www.merriam-webster.com/dictionary/jus%20in%20rem, accessed 16 July 2014.

10 ‘Rights over a person imposing some duty or duties upon that person’ (*ibid.*, 32).

a population as being mandated by past practice and typically are believed to have been sanctioned by metaphysical forces in the distant past. They are, in the claimants' parlance, matters of 'the Law'. These are as much a part of the system of the acquisition of rights and their exercise as are the means whereby the rights are gained in the first place.

One fundamental example of a requirement to be in evidence before a right to country can be realised and so exercised according to customary belief is an acknowledgement of a spiritual relationship between a person and their country. This may be understood in terms of a totemic bond or the product of descent itself where a person is believed to be linked 'through the blood' to the ancestor and the country from time immemorial. In any event, rights to country are not exercised in a spiritual vacuum. Rights are seldom unqualified in their exercise and may require that other conditions be met before they can be put into effect. Additionally, and in the ethnographies with which I am familiar, not all rights are regarded as yielding the same degree of entitlement and their manner of acquisition is generally important in this regard. Not all who command a right are equal and the pressing of rights is a part of social process that is characterised by relationships between people. The manner whereby these relationships are socially constructed is an important factor in the way rights were (and are) asserted consistent with customary practices.

There is a danger that these aspects of the system whereby rights to land are allocated and perpetuated receive too little attention in native title claims. Indeed, it is perhaps a commonplace observation that many of the disputes that develop between native title claimants are the result of too many people making a claim over too few countries. In a number of areas where I have worked there is a common (and to my mind misplaced) assumption on the part of some claimants that all that has to be proved for a person to be a native title holder is descent from an ancestor. This may be sourced to Tindale, some other early genealogy, or simply be a product of the oral account. The claim is made regardless of the network of social relationships, acquisition of knowledge and the gaining of qualifications that I show below to be an essential part of the social process of gaining rights to country. One Native Title Representative Body with which I am familiar adopted the rule that a person could only be a claimant on one claim – thus attempting to obviate potential conflicts. However, the fact is that in customary arrangements, as far as we are able to discover, there were robust systems in place that yielded a relatively stable system of land tenure. This must have been sustained by the observance of rules

that rendered what is evidently quite a flexible system stable, reliable and predictable. It is important, then, for the native title anthropologist to understand how the system operated in customary terms to ensure that everyone knew whose country was whose.

It is to the ways that rights could be used in customary systems to articulate relationships between people and the control and use of resources that I now turn. In the following sections I examine some of the more common ways whereby relationships between people and country are characterised in customary systems. These may be used to assert a right in a particular country or give an avowed right greater weight than, say, those of others who also press rights to the same country.

Cognation plus?

An eminent Australian anthropologist coined the term ‘cognation plus’¹¹ with respect to the descent of rights in his review for a respondent party of an expert report I had written for a native title application. By this I took him to mean that the system of gaining rights to country (in the particular ethnography that we had both been commissioned to study) was cognatic, but it required an additional dimension. This was that a person’s relationship to country was embedded within a totemic or spiritual environment that rendered the person a spiritual representation of the country and its metaphysical characteristics and potentialities. The implication of this was that descent (whether through matrilineation or patrilineation) was insufficient of itself to yield rights to country. Rather, there had to be evidence that there continued to be a spiritual correspondence between the person and that country, articulated by reference to a totemic principle, which had been documented, in this case, by the early ethnographer Daisy Bates, who had undertaken fieldwork in a neighbouring area (Palmer 2010a, 81–86). The argument put by the expert for the state in this matter was that there was an absence of the ‘plus’ factor, and consequently the descent of rights could not be considered to be based on customary principles. While ‘cognation plus’ was not a term used by the trial judge in his judgment,¹² he concluded

11 I acknowledge Professor Basil Sansom as the originator of this term.

12 *Graham on behalf of the Ngadju People v State of Western Australia* [2012] FCA 1455 [47–48].

that there was evidence that there continued to be a spiritual relationship between the claimants of the application area¹³, and he found in favour of the applicants.

Establishing a spiritual link between people and country provides the basis for asserting a correspondence between a person and the land. This is a noumenal phenomenon but provides legitimation for the belief in the immanence of land-based spirituality inherent in those who assert rights to country. This has been a theme in the writings of Australian anthropology. T.G.H. Strehlow wrote in this regard:

The religious and totemic ties that united not merely whole groups with their group areas, but the individuals constituting each group with one or more defined mythological centres with each group area, were of the utmost importance. ... The depth of this emotional attachment was a result of the identification of the human beings born or conceived in a certain totemic landscape with the supernatural beings who were believed to have created that landscape. (Strehlow 1965, 127)

R.M. Berndt wrote of Arnhem Land:

Where land was concerned, man's relationship with it was not merely social, but socio-religious. In other words, while relationships between persons belonging to a particular stretch of country or to a site were expressed genealogically or otherwise, there was believed to be an additional *quality* which the bare social relationship itself did not define. Or, to put in another way, the social relationship was *underpinned* by a spiritual association which defined all relationships of that kind and no others. (Berndt 1970, 1; emphasis in original)

This spiritual dimension may not only be expressed in terms of a totemic link of the sort referred to by writers like Strehlow and Berndt and documented by Bates as noted above. Where it is believed that ancestors were autochthonous – that is, they originated from the very land that is subject to claim – their spirituality is believed to be a part of the same spirituality that informed the landscape. This metaphysical quality is believed to have been transmitted through the blood to subsequent generations and thus to the present-day claimants. While the belief in the spirituality derived from ancestors is not commonly asserted in my experience, it is usual for claimants to express a strong and abiding spiritual relationship with the country they claim as their own. The task

13 *ibid.*, [94].

for the native title anthropologist is to provide a view, based on sound data, that such a belief has customary content. It is probably not likely to be argued that such spiritual connection was not a part of customary systems.¹⁴

Realising rights and dangerous places

In common with many other legal systems, Australian law requires that many rights must be realised before they can be acted upon. By this I mean that while the right exists, it cannot be exercised until certain conditions are met. For example, the right to drive a motor car in Australia is conditional upon the acquisition of a licence, itself dependent upon age and demonstrated competence and the payment of a fee. In Aboriginal Australia the exercise of the right to use country is dependent upon detailed knowledge of that country. Such knowledge is not to be understood merely in terms of the geography, although that is important from a practical point of view. In my experience, the greater emphasis is placed amongst those with whom I have mostly worked on the metaphysical dimensions of the landscape. Some places are believed to be spiritually potent and thus actually physically dangerous.¹⁵ Examples include ritual grounds that may contain places forbidden to women or areas where sacred objects are stored. Generally, places where it is known that rituals were practised in times past are avoided since the details of the forbidden places (some for men and some for women) are no longer known. Consequently, it is judged wisest to avoid the area altogether rather than run the risk of inadvertent trespass on dangerous ground. Other examples of dangerous places are areas associated with malevolent or negative spirituality, including sites that are believed to cause sickness or a natural disaster. The presence of a mythic water snake in certain pools and reaches of rivers and creeks mandates particular attention, observance of protocols and ritual greetings. Without this knowledge practical use of the country remains impossible. Country that is redolent with powerful spirituality, some of it potentially dangerous, is like a minefield. Lack of knowledge of the location of danger might result in fatal consequences. Knowledge of country, whether it be practical, economic or spiritual is

14 However, see *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland* (No. 2) [2010] FCA 643 [655]. It was submitted that 'the absence of the spiritual element ... is almost probably unique to this case' (ibid., [172]).

15 To my mind, the classic Australian article written about safe and dangerous places is by Biernoff (1978). Kaberry also noted the significance of spiritual danger in country for different areas of Aboriginal Australia (e.g. 1939, 138–139, 203–204).

then an essential component for the exercise of rights to country. The continuity of rights to country, however legitimated, requires possession of this qualification. Without it, so it might be argued, the exercise of rights remains potential. In those cases where there is now no longer anyone to teach and pass on this esoteric information, it would never be possible to achieve the exercise of rights to country according to customary principles, although the rights may remain all the same.

Given cases where ego has potential claim to several countries, there is likely to be a limit to his or her knowledge of the range of estates involved. This may be considered to be a reflection of place of residence, since familiarity with country implies at least a degree of physical presence. Thus, one or two (maybe more) countries may be privileged in that person's dealings with country by virtue of the knowledge of the land concerned. Thus, country claimed via filiative links with a distant forebear that is little known might be classed as country wherein ego would choose to exercise rights to a very limited extent, perhaps under the guidance of a kinsman who knew the country better. To do otherwise would be to risk spiritual danger in unknown and potentially fatal country.

Ranking rights

In native title research the pressing of rights to a particular country by members of different groups may be an issue that gives rise to dispute or controversy. Typically perhaps members of one group might claim that their rights to the country should prevail over the rights asserted by another group to the same area. This may be argued on the basis that their rights are superior (stronger) or have greater customary legitimacy than the competing claims of others. The former argument gives rise to the question as to whether in customary systems some rights had greater weight within the community of rights holders than others. If so, what was the system that regulated and legitimated the ranking of rights to country? In my experience, this is a complex and fraught matter. There is a small literature on the distinction between a primary and a secondary right that developed from the *Aboriginal Land Rights Act* where such a distinction was implicit in the legislation (see Peterson, Keen and Sansom 1977; Stanner 2001, 113–114). As I noted in the previous chapter, Radcliffe-Brown also differentiated rights in this manner. This distinction typically rests on the manner whereby the right in question was acquired (cf. Peterson 1983, 137–139). Kolig, writing of the central Kimberley region, distinguishes what he terms 'secondary rights' of

access and usufruct from 'ownership', by which, presumably, he meant a spiritually legitimated absolute connection with the country in question (1988, 83). He considered that members of the patriline had rights in the intellectual (or religious) knowledge of the patri-lodge (1978, 57; 1981, 31). This included the rights to use (or sanction the use of) knowledge of sites, narratives, songs and ritual performances associated with the lodge and its Dreaming attributes (1980c, 281). For Kolig, by my reading, the rights of the members of the patriline were superior to those who only had rights of access and usufruct.

In a native title inquiry, then, it may be helpful to examine the field data collected to see if there is a clear system in evidence that stipulates that, say, rights gained via descent are somehow regarded as superior to those gained via totemic attachment occasioned through birth or conception. A difficulty is likely to be that rights that are articulated through social relationships and concomitant interaction are pressed in complex ways according to the manner whereby the relationship is negotiated. While some writers have suggested a dyadic distinction between primary and secondary rights (Kolig 1980b, 42; Peterson, Keen and Sansom 1977; Peterson 1983, 137–139; Stanner 2001, 113–114), my own view is that this does not adequately represent the social processes involved or the range of choices exercised in the assertion of rights to country. A distinction between 'primary' and 'secondary' rights, neat dyad though it may be, is unlikely to be evidenced in social practice. Understanding how rights are pressed and so ranked requires examination of the social process involved.

I have already set out what I regard as some of the important qualities and qualifications that may be required for rights to be realised through their exercise. The manner of this exercise and the rules that regulate it are important to an understanding of the process involved. For example, the degree to which the rights may be pressed in the face of competition for recognition of rights within social interplay that characterises contested environments will depend upon an individual's status and eminence. This is consistent with a system that generally honours the senior members of the community, placing value on age, experience and knowledge. In Aboriginal Australia, as a general rule, it is senior members who command respect and who through their command of sacred as well as mundane knowledge are regarded as decision-makers, the source of information, sage advice, comprehension and understanding, qualities that are highly esteemed (Berndt 1965). Being of a certain age is insufficient to obtain this status on its own since it must be accompanied by the

qualities enumerated above. Attainment of this status I call 'standing', recognising that it is a relative attribute so that one man may have greater standing than another depending on the accumulated knowledge and its manner of disposition. The category of person so qualified is often today referred to generically as 'elders'. In areas of Aboriginal Australia where ritual practice continues, such men and women are sometimes referred to as 'Law Bosses' in recognition of their eminence in ritual matters.

According to customary systems in matters related to the pressing of rights to specific country, standing is recognised with respect to that country through the legitimating pathways discussed above, including knowledge of the country in question. According to this process standing is achieved through social and ritual maturity, as well as through the nature of the connection claimed to a specific area of country. In terms of personal predilection, it is a matter for an individual to negotiate the degree of standing claimed with respect to a particular country. A person with standing with respect to country that is not the subject in question would likely make clear that his or her interests lay elsewhere and that they had no intention of pressing a right to the country being discussed. In these cases, where a person decides that the country at issue is one in which they have filiative attachment but no standing, they can defer to another or others, saying, typically, that they 'come behind', 'help them out' or act as 'back stop' to those whose rights they judged (and are judged by others) to be superior. This facilitates an exercise of choice in which area or areas of country rights will be pressed. The discriminations relating to the pressing of rights in country that develop from 'standing' operate as a means whereby individuals effectively exercise a choice over the articulation of rights. Given that there are multiple ways to attain rights, this exercise of choice is an important means of regulating the geographic extent of the effective exercise of rights to country.

Permission, trespass and licence

Owning a right requires that those who do not own that right ask permission before seeking to share in the benefits derived from the exercise of the right. Acts of seeking or giving permission with respect to property signal the existence of a proprietary system where some own rights in a particular property while others do not. In native title inquiries, then, field data relating to a requirement that some seek permission with respect to

the use of country, while others have the power to grant it, is an important means whereby the normative system governing the allocation of rights to country is to be understood. The act of infringing a right in property is known as trespass and may incur censure or penalty and, in extreme cases, was punishable by death. Nancy Williams has written extensively about the nature of permission in Aboriginal Australia (1982, 1986 and 1999) and her work provides a detailed examination of the topic.

Lawyers in particular are attracted to this aspect of a normative system and often seek out examples of permission when eliciting evidence. This is not always as straightforward as one might expect. Take the following examples from the transcripts of a native title hearing.

Example 1

Counsel: Now, what about if something happens on ... Yanturi country ... who, according to law way, who's got to be asked about that?

Claimant:¹⁶ Me.

Counsel: And just you?

Claimant: Me and my brother, because we're the eldest, and then we're going to call up the other Nungali mob.¹⁷

Example 2

Counsel: What about if it's your father's mother's country? Can you give permission for that one, your father's mother's country?

Claimant: Yes, I can give permission if old people not around here. They come to me and I'll go there, and I'll look around with them, and I'll call a meeting, ask R H or D to come along to talk up.

Counsel: And why are R and D the ones who should be talking up?

Claimant: Because it's their Kakung country.¹⁸

In the first exchange the female claimant told the court that she had the right to be asked in relation to any proposed action within a named area of country. However, she quickly added that this was not solely her responsibility. Permission would require participation of her brother

16 I have removed the names of claimant and counsel.

17 *Griffiths v Northern Territory & Anor. D6012*, transcript of evidence, 335.

18 Father's father's country; *ibid.*, 336.

(because he and she were 'the oldest') but additionally members of a named language group would be called together as well. The evidence does not tell us what might happen if there was disagreement between the variously defined participants in this process. Permission is evidently the product of a group rather than an individual.

In the second exchange, which features the same claimant as witness, the rules for granting permission in ego's father's mother's country are more circumspect. The witness considered she could give permission 'if old people not around here', implying, by my reading, that these unnamed 'old people' had precedence in this matter. She then adds that she would accompany the prospective visitors and 'look around with them', presumably in the country, which I take to mean that she would escort them on their visit for reasons not there explained. Finally, she adds that she'd 'call a meeting', naming two individuals who she regarded as significant in relation to the granting of permission for this country. These two people had filiative links to the country in question through their father and father's father.

These accounts are entirely consistent with a system where rights to country are not singular but are rather the product of a network of relationships and socially endorsed protocols and rule-based referents. These relationships may include an arrangement whereby a right of access is provided to another by some form of agreement or understanding. This has sometimes been called 'standing permission'. Standing permission is not a right but a licence and may be revoked. In native title research it is important to distinguish rights (determinative or contingent) from access or use offered on licence since the two are easily confused and can give rise to misunderstandings amongst claimants. One example, in some areas, is the privilege provided to a spouse over her husband's (or his wife's) country. Spousal unions seldom give rise to absolute rights to country in Aboriginal Australia, but there may be recognition that a wife gains a licence in her husband's country (and vice versa). These arrangements, where evident in the ethnography, need to be carefully probed and subject to close scrutiny in terms of their likely antiquity.

In my experience, the complexity of the way whereby rights to country are distributed throughout a given population means that answers to questions of permission are seldom simple. There is also another aspect to the 'permission' question, apparent from a close reading of the second extract set out above. It relates to duty and danger in country.

Working with a group of senior male claimants when undertaking an inquiry for a native title claim, I sought to gain ethnography relevant to the different sorts of rights claimants might consider they could freely exercise in the land over which they sought recognition of native title. My success in this regard was limited because I found that these senior men found the concept of listing rights alien – it was, after all, in their view their country in which they could do what they pleased, consistent with customary practice. The qualifier is important. It was their exclusive property (their right) but nevertheless subject to rules that governed how this right was to be exercised. One principal consideration was the nature of the spiritual potentialities of the country and the danger inherent in access gained in ignorance of the totemic geography of the country. This reflected the complexity of the spiritual hazards of the country that I have outlined above (see ‘Realising rights and dangerous places’) and the need to possess knowledge of places and to know where it was safe to go and where it was wise to avoid. But the minefield that is spiritual country also imposes an obligation upon those who know in relation to those who are ignorant but who seek permission for access. These people who are ignorant of spiritual danger must be protected from spiritual harm. The best way to do this and ensure that nothing untoward occurs is to accompany them and ‘look around with them’. Given spiritual danger in country, trespass acquires a rather different complexion to that common in mainstream Australian thinking, where to trespass is simply to enter someone else’s land or property without permission. Trespass in customary Aboriginal dealings is an act of great folly and has potentially fatal consequences. There would, then, need to be good reason to take such risks. Owners of the country who also know its spiritual particularities have a duty to protect strangers and feel responsible if something untoward happens to them.¹⁹ Given the nature of country and entry upon it by the ignorant it is understandable that the senior men with whom I worked provided me with data relating to conditions of access and duty of care, rather than an enumeration of rights such as might be found in a native title application.

19 A well-known example of this duty of care is the request, issued by the traditional owners of Uluru, that visitors to the Rock do not climb it. ‘Anangu have a duty to safeguard visitors to their land. They feel great sadness if visitors to their land are killed or injured. As such, traditional owners would prefer that as guests to their land, visitors will respect Anangu law and culture by not climbing.’ www.ayersrockresort.com.au/uluru-and-kata-tjuta/uluru-and-kata-tjuta-national-park/can-i-climb-uluru accessed 25 January 2017.

This does not mean that trespass was unknown in times past. The early ethnographic literature indicates that trespass occurred, presumably by those who felt confident in their knowledge of country and perhaps their spiritual status to enter another's country for gain or murderous intent (e.g. Radcliffe-Brown 1913, 146; Roth 1906, 8; see Sutton 2003, 23–24 for a review). The lesson for native title work is to present a complete picture of how rights to country worked in practice, about how they are possessed and how rules govern their exercise, without confusing the two. The account will include consideration of the requirement to ask permission when seeking access to another person's country and its resources. Permission and trespass need to be explained within the matrix of the complex set of relationships between people whose links to country are variously articulated. These relationships must be understood in terms of the special spiritual characteristics which are believed to inform country – land is fundamentally imbued with spiritual potency such that it can provide potentially fatal consequences if crossed.

A common manifestation of the duty of the owner of country to others who lacks rights in his estate is the act of welcoming or greeting country. I have come across many manifestations of this small ritual, ranging from simple 'calling out' to country to more elaborate head wetting, spraying water from the mouth across a pool or the use of body sweat. In areas where language remains more or less intact, there is often a requirement for the use of the local language in rituals of greeting on the ground that the spirits of a place will only understand the language of the country. Speaking in any other language, including English, will cause the greeting to fail. Words typically introduce the visitors (as well as the owners) and seek protection of the spirits, who are often characterised as the spirits of 'the old people' – that is, those who lived generations ago but whose presence continues to inform the spiritual environment of the place. Good luck may also be sought for fishing, hunting and gathering expeditions that are the occasion of the visit to country. In some instances, specific mythic beings may need to be placated – the water snake being notable in this regard. Water taken from a pool may be poured over the heads of visitors as a kind of ritual induction – a task which is usually done by one who exercises rights within the country. Sometimes, owners take water from a pool and blow it in a fine spray across a pool. One explanation for this given to me was that the spirit of a mythic being²⁰ in the pool

20 The term 'mythic' is discussed in Chapter 5 of this book – see footnote 5.

recognises the saliva of the visiting countryman and so accepts their presence along with those who accompany him. Much the same applies to the use of body sweat; the smell from an owner being transferred to the visitor as a form of assimilation, so spirits and mythic beings are not offended or disturbed by exotic sweat.

Native title research that yields examples of these ritual greetings provides good evidence of customary behaviour since rituals of greeting have been recorded in the early literature and are likely to have been a part of past practice (Biernoff 1978, 103–104; Roth 1897, 160; Williams 1986, 85). While they demonstrate that owners of country have the right to bring others into their estates, they also show that there is a duty to protect visitors which, as I have noted above, is in my experience more often in evidence in the ethnography than a preoccupation with actual trespass.

Rights and process

Applications for the recognition of native title must necessarily be supported by strong ethnographic evidence that there is a customary system whereby the title to country is sustained. Appreciating how this continuity is substantiated to the present cannot be found solely in an account of the system that was likely to have been in place at sovereignty. What is required is data that supports the contemporary observance of the laws and customs that sustain rights to country and their orderly exercise. In this chapter I have set out a number of topics that I consider may be helpful when attempting to accomplish this. While rights may be understood to reside in proof of descent from apical ancestors (or other customary system), the complex of rules about how they are to be exercised (and so realised in action) requires much more. The exercise of rights is subject to social process where group status, standing and seniority are essential markers of an ability to command rights before others. Within this complex social process, an understanding of which I argue is needful in any native title report, lies the fundamental relationship between a person and country. This is a relationship that attributes sentience to country. It consequently prescribes the manner whereby engagement is had with the country: the laws, customs and normative values that define customary dealings with the land. Thus, the exercise of rights, the granting of permission, the idea of trespass and the exercise of duty are

best understood in this ethnography in terms of the management of the relationship between people and sentient country. These are all important matters for anthropological consideration in any native title inquiry.

This discussion about the exercise of rights also provides a useful analytical distinction between the possession of a right itself and the rules and normative referents evoked to govern their exercise. Native title law, as I understand it, seeks to inquire whether there are rights that are possessed under traditional laws and customs. The manner of their exercise is a separate but obviously related issue – although one that had undoubted relevance to the continuity of the observance of laws and customs since sovereignty and to the present.

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