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Abstract
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Keywords
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Defining native title
(Indigenous cultural knowledge and the Native Title Act)*

Elisa Arcioni#

This article argues that the definition of native title in the Native Title Act 1993 (Cth) has been interpreted by the High Court to contain at least two restrictions. This argument is advanced through an examination of the protection of Indigenous cultural knowledge by the native title regime. Part 1 outlines a definition of cultural knowledge, establishes a proposed categorisation of rights in relation to that knowledge and identifies arguments for their protection. Part 2 introduces the Native Title Act 1993 (Cth) in the context of the development of native title jurisprudence in Australia, sets out the statutory definition of native title and the relevant part of the majority's reasons in Western Australia v Ward (2002) 191 ALR 1. Part 3 is a discussion of that definition and its treatment by the High Court in Ward. Two concepts are identified and discussed – the requirement of specificity in defining a claim and an implied restriction favouring a physical connection to land or water.

The legal protection of Indigenous rights is a problem faced by the Parliaments and the courts in Australia. The process requires cultural understanding and a testing of the limits of the established legal system. This is true of the claims for protection of rights in relation to Indigenous cultural knowledge, which are not easily defined in terms of familiar rights to land or rights over the products of creative endeavour. What is being sought is more than that: a recognition of an integrated culture with spiritual yet land and water-related foundations.

One avenue of protection of Indigenous rights is the native title regime, born of the High Court decision of *Mabo v Queensland (No 2)* (1992) 175 CLR 1 and partly encapsulated by the *Native Title Act* 1993 (Cth). That regime has caused numerous legal battles. Regardless of the complicated litigation that has ensued, the fundamental definition of native title has not been comprehensively resolved. This article explores that definition in the context of a discussion of the protection of Indigenous cultural knowledge provided by the Act. The Act is placed in its political and historical context. Central to the Act is the definition of native title as interpreted by the courts. That definition, as it specifically relates to cultural knowledge, has been considered by the High Court in the recent case *Western Australia v Ward* (2002) 191 ALR 1 and it is that consideration which is the focus of this article. In that case, the majority seems to impose considerable limits on the definition of native title and therefore limits the recognition of cultural knowledge under the Act.

1. Cultural knowledge – establishing a framework

Any discussion of the protection of cultural knowledge must explain what that knowledge is, what rights are relevant in relation to that knowledge and upon what basis any such rights should be protected by law in Australia. These three issues are addressed in this Part.

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1.1 A definition

This analysis of how cultural knowledge can be protected under the NTA begins with the caveat that the author is not Indigenous, has not spent time living in an Indigenous community and does not profess to have expertise in understanding Indigenous culture. However, in order for the discussion to be of any use, a definition of cultural knowledge must be adopted and explained. The definition adopted for the purpose of this discussion is the one developed in the *Our Culture: Our Future* report[1] (the Report), written under commission of the Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission (ATSIC) and accepted by ATSIC and the Indigenous Reference Group on Indigenous Cultural and Intellectual Property.

According to the Report, Indigenous cultural knowledge consists of:[2]

"[T]he intangible and tangible aspects of the whole body of cultural practices, resources and knowledge systems that have been developed, nurtured and refined (and continue to be developed, nurtured and refined) by Indigenous people and passed on by Indigenous people as part of expressing their cultural identity, including:

- Literary, performing and artistic works (including music, dance, song, ceremonies, symbols and designs, narratives and poetry)
- Languages
- Scientific, agricultural, technical and ecological knowledge (including cultigens, medicines and sustainable use of flora and fauna)
- Spiritual knowledge
- All items of moveable cultural property including burial artefacts
- Indigenous ancestral remains
- Indigenous human genetic material (including DNA and tissues)
- Cultural environment resources (including minerals and species)
- Immovable cultural property (including Indigenous sites of significance, sacred sites and burials)
- Documentation of Indigenous people's heritage in all forms of media (including scientific, ethnographic research reports, papers and books, films, sound recordings)."

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[1] Janke, *Our Culture: Our Future*; *Report on Australian Indigenous Cultural and Intellectual Property Rights*, Canberra, 1998.

[2] Janke, *Our Culture: Our Future*; *Report on Australian Indigenous Cultural and Intellectual Property Rights*, Canberra, 1998 at 10-11 [1.6]. The Report uses the term "heritage" in the definition rather than "cultural knowledge", notes alternative terms such as "indigenous cultural and intellectual property" and the need for further debate as to the most appropriate terminology. For the purpose of this discussion, the term "cultural knowledge" is being used to reflect its adoption by claimants in native title determinations – see Part 3.1, text accompanying fn 60-62.

There are a number of alternative, although similar, definitions of Indigenous cultural knowledge,[3] proposed by international instruments or reports,[4] commentators[5] and statutory provisions.[6] However, it is fair to state that the Report's definition encompasses most of them and seems to extend beyond many of them. Accepting the Report's definition, it is clear that what is discussed is of very great breadth, extending beyond simple and stereotypical notions of rock art, dot painting, boomerangs and other cultural artefacts. What becomes clear from the definition is that Indigenous culture is a living culture, connected to the past but continuing to evolve into the future. Cultural knowledge therefore has the same vibrant and dynamic characteristics.

1.2 What rights? A possible categorisation

In a discussion of the legal protection of Indigenous cultural knowledge, once the scope of that knowledge is understood, the next step is to identify what kinds of rights[7] are relevant in relation to it. This step in the analysis is necessary because of the way in which the Australian legal system locates legal entitlement and, specifically, the way in which the NTA requires such a categorisation. This categorisation is also part of the process of 'framing' and 're-framing' meaning,[8] which is an inherent part of the attempt to recognise Indigenous culture, law and customs within the Australian legal system. In

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[3] The references in the following footnotes use a number of terms such as "heritage" and "folklore", in addition to or as alternatives to "cultural knowledge".

[4] Erica Irene Daes, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Chairperson of the Working Group of Indigenous Populations, *Final Report on the Protection of the Heritage of Indigenous Peoples*, UN doc E/CN.4/Sub.2/1995/26. This was later adopted and elaborated upon by ATSIC's Indigenous Reference Group in 1997, where a definition of "heritage" was drafted, much in line with Janke's definition set out above in the text: reproduced in Janke, *Our Culture: Our Future*; *Report on Australian Indigenous Cultural and Intellectual Property Rights*, Canberra, 1998, Appendix 1 *Draft Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples* at [10]-[11]. See also *Draft United Nations Declaration on the Rights of Indigenous Peoples*, prepared by the United Nations Working Group on Indigenous Populations, adopted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities at its 36th meeting, 26 August 1994, resolution 1994/45; *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* done at Paris, 14 November 1970, Art 1; UNESCO/WIPO *Model Provisions for National Laws in the Protection of Folklore Against Illicit Exploitation and Other Prejudicial Actions*; Recommendation on the Safeguarding of Traditional Culture and Folklore adopted by the UNESCO General Conference at its 25th session, Paris, 15 November 1989; as well as international declarations made by groups of Indigenous peoples from around the world such as the *Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples*, adopted at the First International Conference on Cultural and Intellectual Property Rights of Indigenous Peoples, June 1993.

[5] See Mansell M, "Barricading Our Last Frontier – Aboriginal Cultural and Intellectual Property Rights", in Yunupingu G (ed), *Our Land is Our Life: Land Rights – Past, Present and Future*, University of Queensland Press, Brisbane, 1997, p 195 and Howden K, "Indigenous Traditional Knowledge and Native Title" (2001) 24 *University of New South Wales Law Journal* 60, pp 60-63 and the footnotes contained therein.

[6] Eg *Protection of Moveable Cultural Heritage Act 1986* (Cth), s 7.

[7] This term is used in a broad sense, amounting to claims made by Indigenous peoples in relation to their cultural knowledge. As will become clear in the discussion regarding the scope of native title under the NTA, these "rights" may not necessarily be enforceable claims under Australian law.

[8] Mohr R, "Shifting Ground: Context and Change in Two Australian Legal Systems" (2002) 15 *International Journal for the Semiotics of Law* 1.

doing so, the author acknowledges that she may be fragmenting the Indigenous conception of cultural knowledge without addressing any possible ramifications.

Rather than attempt to outline the innumerable[9] rights relevant to cultural knowledge, a more useful exercise is to explain possible *categories* of rights. The rights within the categories explained below are ones which the relevant Indigenous group, as a whole, may have in relation to their cultural knowledge as against the rest of the world.[10] The categorisation has emerged through consideration of rights claimed in native title cases, claims in statements by individual Indigenous people or groups of Indigenous peoples[11] and in an attempt to pre-empt the approach taken to the recognition of native title under the NTA.

Rights to cultural knowledge can be collected into three categories – rights of definition; rights of use and rights of control. The three categories are not necessarily mutually exclusive.

Rights of "definition" mean that it is Indigenous peoples who define what it is that falls under the umbrella of cultural knowledge, under their own laws and protocols. That extends to rights to develop and evolve their culture with time, as is inevitable with the mere passage of time, development of new technologies and encounters with new ideas. These rights of definition include defining what elements of the natural and spiritual worlds are covered by the concept of cultural knowledge, in whom such rights rest, the manner in which the rights change or evolve and how transfer of those rights can occur. Rights of definition include the recognition that Indigenous peoples are "the primary guardians and *interpreters*"[12] of their own cultures. Asserting the existence of such rights assumes that it is only Indigenous people who can define what constitutes cultural knowledge.

Rights of "use" cover the rights relevant to Indigenous peoples *experiencing* their culture. These include the right to use the knowledge according to the Indigenous culture as it

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[9] The range is "innumerable" because each Indigenous group may have different laws and customs relating to their knowledge.

[10] The author does not here enter into the debate concerning the options of locating rights in individuals or groups: see Kukathas C, "Are There Any Cultural Rights?" (1992) 20 *Political Theory* 105; Kymlicka W, "The Rights of Minority Cultures: Reply to Kukathas" (1992) 20 *Political Theory* 140; Kukathas C, "Cultural Rights Again: A rejoinder to Kymlicka" (1992) 20 *Political Theory* 674.

[11] See for example: ATSIC's Indigenous Reference Group, *Draft Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples*, 1997, reproduced in Janke, *Our Culture: Our Future*; *Report on Australian Indigenous Cultural and Intellectual Property Rights*, Canberra, 1998, Appendix 1; Patrick Dodson, first Chair of the Council for Aboriginal Reconciliation, the 4th Vincent Lingiari Memorial Lecture, "Until the Chains are Broken" reproduced in Grattan M (ed), *Reconciliation*: e*ssays on reconciliation in Australia*, Bookman Press, Melbourne, 2000, 264 pp 270-273; Behrendt L, *Achieving Social Justice: Indigenous rights and Australia's future*, Federation Press, Sydney, 2003; Mansell M, "Barricading Our Last Frontier – Aboriginal Cultural and Intellectual Property Rights", in Yunupingu G (ed), *Our Land is Our Life: Land Rights – Past, Present and Future*, University of Queensland Press, Brisbane, 1997, p 195.

[12] ATSIC's Indigenous Reference Group *Draft Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples*, 1997 at [2] reproduced in Janke, *Our Culture: Our Future*; *Report on Australian Indigenous Cultural and Intellectual Property Rights*, Canberra, 1998, Appendix 1 (emphasis added).

evolves, including a right to revitalise that knowledge, use it and develop it into new forms, including commercialisation. These rights are inevitably connected to rights to retain, maintain, protect and transmit cultural knowledge. Without these last-mentioned rights, any other rights of use lack any characteristic of endurance and are very limited.

Rights of "control" include the right to determine who among the Indigenous group will use the cultural knowledge and in what manner, as well as the power of determining when people outside the Indigenous group can access cultural knowledge, in what form, and with what results regarding the uses to which that revealed knowledge can be put. It also includes the right to enforce acknowledgment of Indigenous cultural knowledge in the event of another's use of it and the right to have negotiating power in the event of another attempting to gain permission to use cultural knowledge. These rights rest on an idea that others should *respect* Indigenous cultures.[13]

The rights of control are perhaps the most contentious, yet are the ones which allow the clearest understanding of what these claims mean in practice. They would include the ability of Indigenous groups to restrict tourists taking photographs of rock paintings, dance companies from performing adaptations of Indigenous dances, publishers from publishing sacred narratives and museums from exhibiting physical artefacts. These examples are at the most extreme end of the exercising of the rights – the rights would also include the right of Indigenous groups to be involved in negotiating how those elements of culture could be used by others.

1.3 Legal protection? Some arguments

This outline of a definition of cultural knowledge and the categorisation of the many rights relevant to such knowledge establishes the conceptual limits of the subject of possible legal protection. It includes rights over tangible immovable things forming part of the natural environment, tangible moveable objects and intangible elements of culture able to be represented in any form (oral, visual, physical etc). The rights include determining what is to be protected as "cultural knowledge", making use of it and controlling others' use of it – within and outside the relevant Indigenous group.

In terms of legal protection, at present there exist a range of relevant domestic legal avenues. The most obvious include the statutory intellectual property regimes[14] (copyright,[15] trade marks, designs etc) and heritage legislation.[16] In addition, depending

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[13] The word "respect" appears in many statements and is an important element in any rights debate regarding Indigenous peoples and their culture – see eg the *Barunga Statement*, reproduced in Yunupingu G (ed), *Our Land is Our Life: Land Rights – Past, Present and Future*, University of Queensland Press, Brisbane, 1997, pp 226-227.

[14] For a discussion of their effectiveness see Malcolm R & Meyers G, "Native Title Rights and the Protection of Indigenous Cultural Knowledge" (2002) 50 *Intellectual Property Forum: Journal of the Intellectual Property Society of Australia and New Zealand* 12, pp 18-21.

[15] Especially relevant may be the coverage of the recently-enacted (December 2000) moral rights under Pt IX *Copyright Act 1968* (Cth). One relevant case is *Milpurrurru v Indofurn Pty Ltd* (1994) 54 FCR 240; see also the Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003 (Cth).

[16] For lists of the numerous relevant legislative schemes and discussions of their operation, including calls for reform, see Janke, *Our Culture: Our Future*; *Report on Australian Indigenous Cultural and Intellectual*

on how cultural knowledge is transmitted to people outside of the relevant Indigenous group, more general areas of law such as that relating to confidential information[17] and contract may be relevant, as well as forms of equitable relief.[18] There are also suggestions of establishing a *sui generis* system to protect rights relating to cultural knowledge due to the incomplete protection available under existing regimes. This article will not address any of these legal avenues. The system to be discussed here is the law of native title under the NTA.

Before discussing the potential of the NTA, it is useful to consider the arguments for legal protection. There are both "internal" and "external" foundations for such protection. The "internal" foundations are claims for protection made by Indigenous groups; the "external" foundations are arguments made from outside those groups.

Claims by Indigenous people for protection of cultural knowledge[19] are in themselves a basis for such protection. As Behrendt argues, "what it is that Indigenous people want" should be the "starting point for protection of Indigenous rights" – on the basis that this is the "embodiment of the principles of self-determination that people be able to make decisions about their lives" and that "Indigenous people do not just highlight what it is that the Indigenous community needs; they offer alternative solutions, new starting points and new perspectives on institutional arrangements … [and] facilitat[e] changes that will create greater rights protection, not just for Indigenous people but for all Australians."[20]

Property Rights, Canberra, 1998, Appendix 3, pp 283-298; Ritchie D, "Australian heritage protection laws: an overview" in Finlayson J & Jackson-Nakano A (eds), *Heritage and Native Title: Anthropological and Legal Perspectives – Proceedings of a workshop conducted by the Australian Anthropological Society and the Australian Institute of Aboriginal and Torres Strait Islander Studies*, Canberra, 1996, p 28; Galvan C, "Aboriginal Art and Mabo" (1993) 3 *Aboriginal Law Bulletin* 12. In relation to "heritage" legislation, there may also be scope for protection through environmental legislation, which addresses "cultural heritage", such as the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). For a discussion of the ideas of cultural and natural heritage see Godden L, "Indigenous Heritage and the Environment: 'Legal categories are only one way of imagining the real'" (2002) 19 *Environmental Planning and Law Journal* 258.

[17] Relevant where there has been publication or use without permission in situations where the knowledge was transmitted in circumstances that imposed a duty of confidentiality: *Foster v Mountford and Rigby Ltd* (1976) 14 ALR 71.

[18] For example, the law of estoppel or the law relating to fiduciary duties: see *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 86 FCR 244.

[19] These include claims contained in formal statements such as the Barunga statement, presented by the Chairs of the Northern and Central Land Councils to the former Prime Minister Robert Hawke, 12 June 1988, at Barunga, Northern Territory, including a call for, inter alia, recognition of rights to "cultural development", "protection of and control of access to sacred sites, sacred objects, artefacts, designs, knowledge and works of art; the return of the remains of ancestors for burial; respect for promotion of Aboriginal identity", reproduced in Yunupingu G (ed), *Our Land is Our Life: Land Rights – Past, Present and Future*, University of Queensland Press, Brisbane, 1997, pp 226-227; and the Eva Valley statement, 5 August 1993, developed at a meeting to "formulate a response to the [Mabo] decision", calling for, among other things, "[t]otal security for Sacred Sites and Heritage Areas": reproduced in Moores I (ed), *Voices of Aboriginal Australia: Past Present and Future*, Butterfly Books, Springwood, 1995, p 364.

[20] Behrendt L, *Achieving Social Justice: Indigenous rights and Australia's future*, Federation Press, Sydney, 2003, p 85.

These claims should also be considered in the context of a broader Indigenous rights agenda including the sovereignty and self-determination debates.[21] As has been stated succinctly by the late prominent Aboriginal leader, Charles Perkins, "Aboriginal culture is the raison d'etre for our existence. It was our anchor in the past. It should be our anchor in the future."[22] However, as Behrendt has argued, the protection of rights, of any kind, are only a first step in addressing Indigenous concerns, and it should not be thought that all social ills experienced by Indigenous peoples will be alleviated even if the rights as outlined here are protected.[23]

The "external" arguments for protection are those found in ideas outside the Indigenous demands. These include broad international norms relevant to Australia,[24] such as those emerging from general human rights discourse[25] and the idea of substantive equality.[26] In addition, there are international movements that recognise the need for particular rights relating to Indigenous peoples,[27] including among them the need to protect "cultural integrity".[28] These broad external bases underlie Whitlam's famous assertion that Australia's treatment of Australian Indigenous peoples will be "the thing upon which the rest of the world will judge Australia and Australians".[29] Considering the "internal" and "external" foundations, it is arguable that Indigenous cultural knowledge should be protected under Australian law.

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[21] For a discussion of these concepts, see Behrendt L, *Achieving Social Justice: Indigenous rights and Australia's future*, Federation Press, Sydney, 2003, p 174.

[22] Quoted in Behrendt L, *Achieving Social Justice: Indigenous rights and Australia's future*, Federation Press, Sydney, 2003, p 113.

[23] Behrendt L, *Achieving Social Justice: Indigenous rights and Australia's future*, Federation Press, Sydney, 2003, p 132.

[24] For an analysis of a number of these, see Triggs G, "Australia's Indigenous Peoples and International Law: Validity of the *Native Title Amendment Act 1998* (Cth)" (1999) 23 *Melbourne University Law Review* 372; Pritchard S, "Native Title in an International Perspective" in *Sharing County: Land Rights, Human Rights, and Reconciliation after Wik: proceedings of a Public Forum organised by the Research Institute for Humanities and Social Sciences, University of Sydney, 28 February 1997*, Sydney, 1997, p 33.

[25] Based on *International Covenant on Civil and Political Rights* done at New York on 19 December 1966, ATS 1980 No 23; *International Covenant on Economic, Social and Cultural Rights* done at New York on 19 December 1966 ATS 1976 No 5.

[26] See Triggs G, "Australia's Indigenous Peoples and International Law: Validity of the *Native Title Amendment Act 1998* (Cth)" (1999) 23 *Melbourne University Law Review* 372, pp 379-380 where reference is made to the *International Convention on the Elimination of all Forms of Racial Discrimination* done at New York, 7 March 1966; ATS 1975 No 40 and statements of the Permanent Court of International Justice; see also Behrendt L, *Achieving Social Justice: Indigenous rights and Australia's future*, Federation Press, Sydney, 2003; Mundine D, "Negotiating Co-existence" in Grattan M (ed), *Reconciliation*: e*ssays on reconciliation in Australia*, Bookman Press, Melbourne, 2000, p 191.

[27] *Draft United Nations Declaration on the Rights of Indigenous Peoples*, prepared by the United Nations Working Group on Indigenous Populations, adopted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities at its 36th meeting, 26 August 1994, resolution 1994/45, Arts 12, 29.

[28] Howden K, "Indigenous Traditional Knowledge and Native Title" (2001) 24 *University of New South Wales Law Journal* 60, p 82, referring to *Convention on the Prevention and Punishment of the Crime of Genocide* done at Paris 9 December 1948, 1951 ATS 2; *International Convention on the Elimination of all Forms of Racial Discrimination* done at New York, 7 March 1966; ATS 1975 No 40 and the *Convention on Biological Diversity* done at Rio de Janeiro 5 June 1992, 1993 ATS 32.

[29] Statement made by The Hon E G Whitlam AC QC, PM 1972-1975, reproduced in Behrendt L, *Achieving Social Justice: Indigenous rights and Australia's future*, Federation Press, Sydney, 2003, p 169.

2. Native Title – from *Mabo* to *Ward*

2.1 The place of the Native Title Act

Early commentators considered native title to be an opportunity for the acknowledgement, enforcement and protection of Indigenous culture, law and customs in Australia. More recently, it has been said to be "unlikely that the NTA will be seen as a vehicle for the protection of cultural knowledge".[30] This may ultimately be the case due to the development of this area of law. Not only do the requirements under the Act restrict its application to only a small minority of Indigenous Australians, as is explored below it contains within it a number of significant restrictions that confine any protection of cultural knowledge to a fraction of the full definition of that knowledge. Nevertheless, the Act, born of the *Mabo* decision, should not be ignored in this debate. To the extent that it may provide some protection, albeit limited, its scope should be considered. It is important to understand the current situation of the relatively young and under-developed[31] native title jurisprudence in Australia and to consider why the law has developed in the way it has and what scope remains in terms of protection of cultural knowledge. In order to do so, this discussion will consider the definition of native title under the NTA, identify areas of uncertainty and focus upon the treatment of the definition by the High Court in *Western Australia v Ward* (2002) 191 ALR 1.

The High Court has repeatedly confirmed the central role of the NTA in determining native title issues.[32] However, the historical development of the law and politics of native title is important contextual information in determining how the Act could, should and does operate,[33] as well as allowing a reading of the Act which acknowledges the "novel legal … problems involved in the statutory recognition of native title."[34]

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[30] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2002*, p 41.

[31] Australia's native title jurisprudence is relatively young compared to other areas of the world such as North America (see cases such as *Calder v Attorney-General (British Columbia)* [1973] SCR 313 (Canada), *Johnson v McIntosh* 21 US 681; 8 Wheat 543 (1823) (United States)). See also Justice French's comment that the legal theory of native title is "still incomplete": French R, "The Role of the High Court in the Recognition of Native Title" (2002) 30 *Western Australian Law Review* 129, p 166.

[32] *Western Australia v Ward* (2002) 191 ALR 1 at 19 [25] (Gleeson CJ, Gaudron, Gummow & Hayne JJ), 157 [564] (Kirby J); *Western Australia v The Commonwealth (The Native Title Act Case)* (1995) 183 CLR 373 at 453 (Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ); *Fejo v Northern Territory* (1998) 195 CLR 96 at 118 [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne & Callinan JJ); *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 35 [7] (Gleeson CJ, Gaudron, Gummow & Hayne JJ); *Yorta Yorta v Victoria* (2002) 194 ALR 538 at 549 [32] (Gleeson CJ, Gummow & Hayne JJ); *Wilson v Anderson* (2002) 190 ALR 313 at 326 [46] (Gaudron, Gummow & Hayne JJ). The question of whether there is scope for common law protection of native title is not considered here.

[33] This is true not only to gain an understanding of the political compromise that is the NTA and the way in which it has changed since 1993, but also as a legitimate consideration in the interpretation of the NTA, applying the current purposive approach to statutory interpretation adopted by the Australian judiciary which allows for reference to be made to the history of legislation: *Acts Interpretation Act 1987* (Cth) ss 15AA, AB.

[34] *North Ganalanja Aboriginal Corporation v Queensland (the Waanyi Case)* (1996) 185 CLR 595 at 614-615 (Brennan CJ, Dawson, Toohey, Gaudron & Gummow JJ) affirmed in *Fejo v Northern Territory* (1998) 195 CLR 96 at 121 [24] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne & Callinan JJ).

The NTA, in effect from 31 January 1994, was the federal government's response to the landmark that was *Mabo*. *Mabo* was the case that overturned the legal fiction that Australia was a land not owned by anyone (*terra nullius*) prior to the arrival of the British in the late 1700s. In that case, the High Court concluded that the Australian common law would, in certain circumstances, recognise Indigenous peoples' claims to land[35] but also that certain acts would affect or extinguish the continuing existence of that title. There was, and continues to be, debate over the scope of native title under the *Mabo* decision. At the time there was a fierce political storm[36] concerning the effect the case would have on the economy of the country, security of tenure for non-Indigenous people[37] and the consequences for the aspirations of those campaigning for Indigenous rights. The reactions even within particular interest groups were not uniform. The case was variously described as "quite conservative",[38] a first step in a process of addressing Australia's history of dispossessing Indigenous peoples from their land and producing a "penumbra of uncertainty".[39]

Shortly thereafter, the federal Parliament enacted the NTA as a legislative response to the case.[40] Again there was a diversity of opinion regarding the law.[41] It was essentially a compromise, considered even by some prominent Indigenous leaders as a "fair result".[42] The Act was then heavily amended following a change of government, the decision in *Wik v Queensland* (1996) 187 CLR 1 and public debate concerning the need for "certainty" over land tenure.[43] Those amendments received less support from Indigenous

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[35] It should be noted that even before 1992 there had been statutory rights over land granted to a number of Indigenous groups around Australia: eg *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth); *Pitjantjantjara Land Rights Act 1981* (SA); *Aboriginal Land Rights Act 1983* (NSW); *Aboriginal Land Act 1991* (Qld); *Torres Strait Islander Land Act 1991* (Qld).

[36] Also labelled "Mabo madness": see McRae H, Nettheim G, Beacroft L & McNamara L, *Indigenous Legal Issues*, 2nd ed, Law Book Company, Sydney, 1997, p 223.

[37] See for example the statement in the *Sydney Morning Herald* quoted in Castan M & Kee S, "The Jurisprudence of DENIAL" (2003) 28 *Alternative Law Journal* 83, p 87, endnote 4; Behrendt L, *Achieving Social Justice: Indigenous rights and Australia's future*, Federation Press, Sydney, 2003, p 50.

[38] Pearson N, "From remnant title to social justice" (1993) 65 *Australian Quarterly* 179, p 179.

[39] Goot M & Rowse T, "Editors' introduction" (1993) 65 *Australian Quarterly* 1, p 3.

[40] The use of language of the *Mabo* decision as the basis for the legislation has been criticised: "A stimulus to legislate [*Mabo (No 2)*] may be, but hardly a blue-print for legislators.": Goot M & Rowse T, "Editors' introduction" (1993) 65 *Australian Quarterly* 1, p 4.

[41] One notable response was the State government opposition, including Western Australia enacting the *Land (Titles and Traditional Usages) Act 1993* (WA) to side-step the federal legislation regarding native title and then that State's challenge to the constitutional validity of the federal Act. The outcome was that the Western Australian legislation was declared invalid by the High Court, on the basis of it being a denial of equality before the law, while the NTA was confirmed as constitutional, except for one section: see *Western Australia v Commonwealth (The Native Title Act Case)* (1995) 183 CLR 373.

[42] Pearson N, "From remnant title to social justice" (1993) 65 *Australian Quarterly* 179, p 179.

[43] The amendments were enacted through the *Native Title Amendment Act 1998* (Cth). This Act reflected a combination of changes proposed by the Howard government upon election, as set out in its outline paper: Office of Indigenous Affairs, Commonwealth Department of Prime Minister and Cabinet, *Towards a More Workable Native Title Act*, Canberra, May 1996 and also some elements of Howard's "10 Point Plan" drafted in response to the *Wik* decision. This Plan is given critical analysis in Bartlett R, "A Return to Dispossession and Discrimination: The Ten Point Plan" (1997) 27 *University of Western Australia Law Review* 44. Not all the proposals discussed in that article were incorporated into the amending Act.

groups and their supporters than did the original Act, and the description of the NTA as "fair" dissolved.

The NTA, as it currently stands, establishes a definition of native title rights and interests, drawn heavily from Brennan J's reasons in *Mabo*. Upon that basis there is constructed a scheme dictating the way in which recognition of those rights occurs and when and how they are extinguished. The Act establishes institutions and procedures to facilitate determinations of native title and for compensation. It does not contemplate only litigious proceedings, although these are often the most publicised; it also contains procedures for mediated and negotiated agreements.[44]

2.2 The definition of native title rights and interests – a number of open questions

Whether or not cultural knowledge as a whole, or any aspects of it, is capable of protection under the NTA is essentially a matter of definition.[45] The definition of native title is central to this area of law.[46] The interaction of rights in relation to cultural knowledge and the definition of native title inevitably involves a critique of that definition. This raises a number of vexed issues, identified and outlined below.

The definition of native title is set out in section 223 of the NTA, which relevantly provides:

"(1) The expression "native title" or "native title rights and interests" means the communal, group or individual rights and interests of Aboriginal peoples and Torres Strait Islanders in relation to land or waters, where:

a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

c) the rights and interests are recognised by the common law of Australia."

Within the definition there are a number of unanswered or only partially answered questions. The first, in the chapeaux, is the nature and scope of "rights and interests … *in relation to* land or waters".[47] Within sub-section (1)(a) there is ongoing debate over the meaning of "traditional", especially how much a society and culture can evolve before it

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[44] Eg Indigenous Land Use Agreements. In addition, there are agreements being negotiated outside the native title framework: see French R, *Native Title – Promise Pain and Progress*, National Native Title Tribunal, Perth, 1996, p 32 and see the other legislative regimes established around Australia which include procedures for negotiated agreements, such the co-management regime for national parks in New South Wales available under the *National Parks and Wildlife Amendment (Aboriginal ownership) Act 1996* (NSW): see Baird W & Lenehan R, "The process in NSW leading to joint management of Aboriginal owned land and the register of Aboriginal owners" (2002) 19 *Environmental and Planning Journal* 277.

[45] However, whether or not in any case it is *protected* will be dependant not only on its recognition but also a consideration of extinguishment issues.

[46] *Yorta Yorta v Victoria* (2002) 194 ALR 538 at 548 [31] (Gleeson CJ, Gummow & Hayne JJ); *Western Australia v Ward* (2002) 191 ALR 1 at 15 [13] (Gleeson CJ, Gaudron, Gummow & Hayne JJ).

[47] Emphasis added.

loses this characteristic. In addition, that sub-section introduces the dilemma of what is meant by "acknowledged" and "observed" respectively. Within sub-section (1)(b) the nature of the necessary "connection" between Aboriginal peoples and Torres Strait Islanders and land or waters through their laws is still open to review.

Lastly, in sub-section (1)(c) the huge area of uncertainty is in the phrase "recognised by the common law of Australia".[48] To date, there has not been a full explanation of either what "recognition" entails[49] or what parts of the "common law" are relevant. Does this relate only to the idea of native title having to comply with the "fundamental tenets" of the common law?[50] Does it incorporate any other elements of the discussion in *Mabo*?[51]

2.3 Western Australia v Ward

Any consideration of the definition and the issues identified above is essentially a matter of statutory interpretation for the courts. The process of interpreting the definition in s 223, specifically as it relates to cultural knowledge, has been given some direction with the High Court decision of *Western Australia v Ward* (2002) 191 ALR 1 (*Ward*). Although the Court does not there deal with the question comprehensively, it does raise a number of issues that can be used as the means of exploring the current scope of protection.

Ward was a series of connected proceedings in relation to native title claims covering a large area of the Northern Territory and Western Australia. The proceedings were between the claimants, governments and holders of a number of kinds of competing rights held by non-Indigenous individuals or groups, thereby raising many recognition and extinguishment issues for the courts to resolve. *Ward* began as a series of claims in the Federal Court, where a determination was made, which was appealed to the Full Court of that court and then to the High Court. In the end, no one party can claim absolute success and indeed, the process is not yet finished – after delivering judgment in one of the longest ever set of written reasons the High Court has handed down,[52] the proceedings were sent back to the Federal Court for further determination.

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[48] The inclusion of this phrase has caused some to assert the definition is a "circular" or "ambulatory" one: Olney J and French J as quoted in McRae H, Nettheim G, Beacroft L & McNamara L, *Indigenous Legal Issues*, 3rd ed, Law Book Company, Sydney, 2003, pp 280, 281 respectively.

[49] *Western Australia v Ward* (2002) 191 ALR 1 at 17 [20] (Gleeson CJ, Gaudron, Gummow & Hayne JJ).

[50] The decision in *Yorta Yorta v Victoria* (2002) 194 ALR 538 at 560 [77] (Gleeson CJ, Gummow & Hayne JJ) has gone some way to clarifying this point – identifying at least two elements contained within this sub-section, being the issues of consistency with fundamental tenets and a requirement of existence of an Indigenous group with its own laws and customs at the time of sovereignty, upon which native title interests depend. However, does it also include elements such as "precision", identified by Callinan J at 587-588 [176], or consistency with "the general objective of the common law [namely] the preservation and protection of society as a whole.": *Western Australia v Ward* (2002) 191 ALR 1 at 17 [21] (Gleeson CJ, Gaudron, Gummow & Hayne JJ)?

[51] See eg *Yorta Yorta v Victoria* (2002) 194 ALR 538 at 572-573 [133] (McHugh J).

[52] Running to 282 pages in the Australian Law Reports version.

In amongst the majority reasons,[53] the section explicitly concerned with the protection of cultural knowledge was very short. Considering its brevity, it is relevant to repeat here the entirety of that section of the reasons.[54]

> "*2. Cultural knowledge and spiritual connection*
>
> [57] The determination made by the Full Court omitted any provision such as that in para 3(j) of the determination made at trial.[[55]] The majority of the Full Court took that course saying:[56]
>
> > 'Although the relationship of Aboriginal people to their land has a religious or spiritual dimension, we do not think that a right to maintain, protect and prevent the misuse of cultural knowledge is a right in relation to land of the kind that can be the subject of a determination of native title.'
>
> [58] In this court, it was submitted that the Full Court erred in this respect and that this court should restore para 3(j) of the first determination. The first difficulty in the path of that submission is the imprecision of the term 'cultural knowledge' and the apparent lack of any specific content given it by factual findings made at trial. In submissions, reference was made to such matters as the inappropriate viewing, hearing or reproduction of secret ceremonies, artworks, song cycles and sacred narratives.
>
> [59] To some degree, for example respecting access to sites where artworks on rock are located, or ceremonies are performed, the traditional laws and customs which are manifested at these sites answer the requirement of connection with the land found in para (b) of the definition in s 223(1) of the NTA. However, it is apparent that what is asserted goes beyond that to something approaching an incorporeal right akin to a new species of intellectual property to be recognised by the common law under para (c) of s 223(1). The 'recognition' of this right would extend beyond denial or control of access to land held under native title. It would, so it appears, involve, for example, the restraint of visual or auditory reproductions of what was to be found there or took place there, or elsewhere. It is here that the second and fatal difficulty appears.
>
> [60] In *Bulun Bulun v R & T Textiles Pty Ltd*,[57] von Doussa J observed that a fundamental principle of the Australian legal system was that the ownership of land and ownership of artistic works are separate statutory and common law institutions. That is the case, but the essential point for present purposes is the requirement of 'connection' in para (b) of the definition in s 223(1) of native title and native title rights and interests. The scope of the right for which recognition by the common law is sought here goes beyond the content of the definition in s 223(1)."

These reasons are the basis for the analysis in Part 3 of the scope of protection available to cultural knowledge under the NTA, although other parts of the majority's reasons will

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[53] Comprising the joint reasons of Gleeson CJ, Gaudron, Gummow and Hayne JJ. Justice Kirby, while concurring with much of the majority reasons, delivered his own reasons and dissented regarding, inter alia, the protection of cultural knowledge at 160-164 [576]-[587]. Justice McHugh at 135 [472] agrees with the orders and with most of the reasons (including those regarding the protection of cultural knowledge) of Justice Callinan, who wrote his own reasons regarding the scope of the NTA with respect to cultural knowledge at 183-184 [641]-[645].

[54] *Western Australia v Ward* (2002) 191 ALR 1 at 31-32 [57]-[60].

[55] That paragraph read, relevantly for present purposes:'(3)…the nature and extent of the 'native title rights and interests' in relation to the 'determination area' are the rights and interests of the common law holders of native title derived from, and exercisable by reason of, the existence of native title, in particular: …(j) the right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the 'determination area'': *Ward v Western Australia* (1998) 159 ALR 483 at 640.

[56] (2000) 99 FCR 316 at 483 [666].

[57] (1998) 86 FCR 244 at 256.

be referred to as necessary. In this passage the majority reaches its conclusion by adopting at least two requirements: those of specificity and physicality. These are explained and discussed in the following Part.

3. Cultural knowledge and the NTA – specificity and physicality

The lack of details, factual findings and argument before the High Court was a difficulty relevant to a number of the issues raised before it,[58] requiring the High Court to remit them to the Federal Court for determination.[59] That lack of information also applied to the claim for protection of cultural knowledge. However, the Court made its final determination on that issue on the facts found at trial and the submissions made on appeal. This lack of facts and argument may be the reason behind the dearth of explanation in the majority's own reasons for the approach they take regarding the protection of cultural knowledge under the NTA.

In order to explore the majority's reasons, two elements contained within them will be considered – the requirements of specificity and physicality. These are explained and explored in this Part, with suggestions made as to their origin, consideration of their consistency (or otherwise) with other elements of native title jurisprudence in Australia and an evaluation of the consequent implications for the protection of cultural knowledge under the NTA.

3.1 Specificity – inevitable fragmentation and a requirement of proof

The majority raised the problem of specificity as the first "difficulty" in recognising the broad cultural knowledge right claimed – "the right to maintain, protect and prevent misuse of cultural knowledge". This is in contrast to native title determinations in the Federal Court where that court seems to have been satisfied with descriptions such as "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",[60] "the right to maintain, protect and prevent the misuse of cultural knowledge within the area"[61] and "the rights … to safeguard the cultural and spiritual knowledge of

[58] 'The arguments in this court focused upon questions of extinguishment rather than upon the anterior questions of existence of native title and the particular content of native title rights and interests. That, as will appear, gives rise to some difficulty.': *Western Australia v Ward* (2002) 191 ALR 1 at 20 [29] (Gleeson CJ, Gaudron, Gummow & Hayne JJ).

[59] For example, regarding the effect of property rights granted in relation to the Ord River Project, due to the error of the Federal Court in the analysis there of extinguishment principles: *Western Australia v Ward* (2002) 191 ALR 1 at 53-57 [141]-[156] and the effect of the application of the "inconsistency of incidents" test in relation to non-exclusive possession pastoral leases: *Western Australia v Ward* (2002) 191 ALR 1 at 69 [194]-[196].

[60] *Hayes v Northern Territory* (1999) 97 FCR 32 at 148-149 [169], affirmed in the settlement of the determination in that case in *Hayes v Northern Territory* [2000] FCA 671 at [3]. However, although this aspect of the determination seems very broad, part of the reasons of the judge in that case suggests his Honour intended a restrictive interpretation of that right to cover only "the need to protect sacred and significant sites": *Hayes v Northern Territory* (1999) 97 FCR 32 at 65 [56].

[61] *Rubibi Community v Western Australia* (2001) 112 FCR 409 at 453 [193].

the common law holders".[62] In those cases there does not seem to have been a great deal of discussion concerning *what* knowledge was to be protected nor *how* that was to occur. However, it seems from *Ward* that the High Court, by stating that imprecision and lack of specific content was a barrier to recognition, now requires those further details.[63]

The NTA itself is the ultimate source for any requirement of specificity. Section 225 of the NTA currently[64] states that if a determination of native title is made it must include, relevantly:

"(b) the nature and extent of the native title rights and interests in relation to the determination area;

(c) the nature and extent of any other interests in relation to the determination area; and

(d) the relationship between the rights and interests in paragraphs (b) and (c) taking into account the effect of this Act."

The reasoning behind the specificity requirement is presumably based on the wording of the phrase "nature and extent", although it is conceivable that the broader approach taken by the Federal Court also falls within the meaning of that phrase at first sight. Why then did the High Court adopt a more onerous interpretation? This is not addressed in the majority reasons regarding cultural knowledge but there are two elements of native title law which tend toward such a requirement. One is the way in which s 225(d) operates with respect to extinguishment of native title, the other being the characterisation of native title as a "bundle of rights".

Section 225(d) requires the courts to determine the "relationship between" native title rights and interests and "any other interests in relation to the determination area". Underlying the idea of a "relationship" is the fundamental principle of native title law, that where a valid non-native title right is inconsistent with a native title right, the former

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[62] *Yarmirr v Northern Territory* (1998) 156 ALR 370 at [127], [162], affirmed on appeal in *The Commonwealth v Yarmirr* (1999) 101 FCR 171. That decision was then appealed to the High Court, but only on the limited question relating to the coverage of the NTA, and therefore protection of native title, to certain waters and the effect of public rights of fishing and navigation on the claim of exclusive native title rights. This "cultural knowledge" right was acknowledged but not addressed by the High Court in *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 33 [2] where the majority (Gleeson CJ, Gaudron, Gummow & Hayne JJ) stated 'In the course of argument of the present appeal there was no discussion about what was meant by [that determination relating to cultural knowledge] or how effect might be given to a right of access to 'protect' places or 'safeguard' knowledge. We say nothing about such issues.'

[63] It is not clear whether such specificity is necessary or only desirable, as the majority goes on to state in their reasons that "connection" was the essential barrier. Nevertheless, it is certainly a timely warning that more consideration needs to be given to the specificity issue. See also *Western Australia v Ward* (2002) 191 ALR 1 at 160 [576] (Kirby J).

[64] This section was amended in 1998. The original elements of a determination required, relevantly, in s 225(b):'(iii) those native title rights and interests that the maker of the determination considers to be of importance; and (iv) in any case – the nature and extent of any other interest in relation to the land or waters that may affect the native title rights and interests.' The relevant differences are that the original did not explicitly require an identification of *every* native title right and interest, nor did it require an explanation of *how* the Indigenous and non-Indigenous rights were to be reconciled. This was a position explicitly praised in debates of the 1993 Bill: The Honourable Senator CMA Chamarette, Commonwealth, Senate, *Parliamentary Debates (Hansard)*, 21 December 1993, p 5477.

prevails and the latter is extinguished.[65] The important question concerning any relationship between rights therefore becomes whether there is an inconsistency and if so, to what extent.

The NTA governs the way in which extinguishment is determined.[66] Following the 1998 amendments to the NTA there is a convoluted scheme regarding the effect on native title of the grant of specific types of interests in land, focusing predominantly on the notions of "exclusive" and "non-exclusive" possession.[67] The general thrust of the provisions is that any interest that grants a right of exclusive possession extinguishes native title completely. Where a competing interest grants anything less, ie "non-exclusive" possession, the latter extinguishes native title but only to the extent of any inconsistency.[68]

In order to determine the "extent of any inconsistency", the courts adopt the "inconsistency of incidents" test. What that requires is "a comparison between the *legal nature and incidents* of the existing [native title] right and of the [other non-native title] right. The question is whether the respective incidents thereof are such that the existing right cannot be exercised without abrogating the [other] right."[69] The essential point relevant to this discussion is that the rights of all parties therefore have to be determined to such a degree of detail that it is possible to conduct the exercise: "Generally, it will only be possible to determine the inconsistency said to have arisen between the rights of the native title holders and the [other interest holders] once the legal content of both sets of rights said to conflict has been established."[70] Therefore, the way in which s 225 operates, together with the approach to extinguishment and the notion of inconsistency, leads to a requirement that the native title rights and interests be defined with sufficient specificity in order for the comparison in s 225(d) to be possible.

The second element that tends towards this requirement of specificity is the conceptualisation of native title as a "bundle of rights".[71] This is the view that native title

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[65] This is the general position only, there being exceptions to it in the NTA.

[66] Section 11: 'Native title is not able to be extinguished contrary to this Act.'

[67] Note that McHugh J has continued to assert his minority opinion that the notion of "non-exclusive" possession is not logical, that the legal notion of "possession" does not allow for anything less than "exclusive" possession. His Honour seems to suggest that the drafting of the NTA was confused, that the concept of "possession" in the Act is actually to be understood as the concept of "occupation": *Western Australia v Ward* (2002) 191 ALR 1 at 136 [477]. A more fundamental debate is that of the relationship between the extinguishment principle at common law of a requirement of a clear and plain intention to extinguish compared to the 'exclusive v non-exclusive' possession ideas in the NTA. This latter approach has been described as a "false criterion": Bartlett R, "A Return to Dispossession and Discrimination: The Ten Point Plan" (1997) 27 *University of Western Australia Law Review* 44 at 54.

[68] This is somewhat connected to the notion of "partial extinguishment", a concept at issue in the *Ward* decision in the Federal and High Courts.

[69] *Wik v Queensland* (1996) 187 CLR 1 at 185 (Gummow J), 221, 238, 243 (Kirby J) applied in *Yanner v Eaton* (1999) 166 ALR 258 at 395 [106] (Gummow J); *Fejo v Northern Territory* (1999) 195 CLR 96 at 155 [112] (Kirby J); *Wilson v Anderson* (2002) 190 ALR 313 at 316 [6] (Gleeson CJ); *Western Australia v Ward* (2002) 191 ALR 1 at 35-36 [78] (Gleeson CJ, Gaudron, Gummow & Hayne JJ).

[70] *Western Australia v Ward* (2002) 191 ALR 1 at 55 [149] (Gleeson CJ, Gaudron, Gummow & Hayne JJ).

[71] This is the term that has been used by the High Court on a number of occasions. It seems to have emerged from the idea as it is used in relation to property rights in *Mabo v Queensland (No 2)* (1992) 175

is not one unitary concept but is made up of a number of individual rights, each of which can and should be identified and recognised by the law individually and then made subject to any extinguishment individually and independently of other rights. This notion is consistent with discussion by Gray and Gray concerning the nature of property and the way in which English land law has imposed a requirement of "rigorous conceptual clarity" or "hard-edged definitional integrity" upon rights amounting to "property".[72] It is interesting that Gray and Gray consider the imposition of this requirement to be based upon unstated policy choices concerning use of resources and impact on third parties. Perhaps those same types of choices underlie the High Court's adoption of the "bundle" concept?

This notion of native title as a "bundle of rights" has received some support, on the basis that the adoption of such a concept, with rights given independent existence, provides for the survival of at least some rights when others are extinguished, rather than having blanket extinguishment of all native title when any aspect of that native title is impaired by an inconsistent grant. However, giving such support to the bundle concept depends on the assumption of a worst-case scenario (blanket extinguishment) and praising any movement from that extreme. To the contrary, criticism of the bundle approach[73] arises from the argument that such a concept leaves native title "fragile" and open to extinguishment piece by piece as each "stick" in the "bundle" can be independently extinguished. That analysis is accurate, but should not be seen in isolation of the operation of the extinguishment principles under the NTA, flowing from the *Mabo* case. If it were not for the decision by the High Court in that case to create a hierarchy of rights, with native title inferior to property rights granted under English-based law and that hierarchy being maintained in the NTA, there would be no inherent fragility in native title. Therefore, although the bundle concept is problematic, it seems that it is the inferiority of native title rights to an inconsistent valid non-Indigenous property right that is the more fundamental principle leading to the "fragility" of native title rights under the NTA.

CLR 1 at 207 (Toohey J), and seen in *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 285 (Rich J): "Property, in relation to land, is a bundle of rights exercisable with respect to the land." It has subsequently appeared in relation to native title in *Fejo v Northern Territory* (1999) 195 CLR 96 at 151 [106] (Kirby J); *Western Australia v Ward* (2002) 191 ALR 1 at at 40 [95] (Gleeson CJ, Gaudron, Gummow & Hayne JJ), 183 [638] (Callinan J). At first glance, an alternative view in relation to the concept of native title is Pearson's idea of a communal title, exclusive against the whole world, proved simply by evidence of occupation, with an "internal" element of rights among native title holders, "carved out of" the communal title: Pearson N, "Principles of Communal Native Title" (2000) 5 *Indigenous Law Bulletin* 4 and "Communal Native Title" (2000) 5 *Native Title Newsletter* 3. This seems to have been developed from part of Brennan J's reasons in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 61-63. However, if the exclusive communal title were extinguished to the extent of losing its exclusivity due to one other conflicting interest (as occurred in *Commonwealth v Yarmirr* (2001) 208 CLR 1), the claimants would then be left to identify what other specific rights are contained within the communal title in order to determine how their rights (amounting to something less than exclusive title) relate to other non-Indigenous interests, for the purpose of 225(1)(d). Therefore, the requirement of specificity would be the same.

[72] Gray K & Gray SF, "The Idea of Property in Land" in Bright S & Dewar J (eds), *Land Law: Themes and Perspectives*, Oxford University Press, Oxford, 1998, 15 at 31-39.

[73] See eg Barnett K, "Western Australia v Ward; One Step Forward and Two Steps Back: Native Title and the Bundle of Rights Analysis" (2000) *Melbourne University Law Review* 17; Howden K, "Indigenous Traditional Knowledge and Native Title" (2001) 24 *University of New South Wales Law Journal* 60.

Regardless of its legislative basis, the requirement of specificity means the courts are necessarily engaged in "expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests".[74] Thus, the claimants must present a case which allows the courts to translate "the spiritual or religious … into the legal", requiring 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."[75] This requirement seems inconsistent with Indigenous perceptions of ownership or connection to land[76] and confirms that native title is not a direct reflection of Indigenous relationships to land and waters but a *construct* of Australian law.[77]

To understand what this means in practice for claimants, it is useful to consider the claim in *Ward* against the definition of cultural knowledge set out in Part 1. In *Ward*, the claim was expressed in terms of "the right to maintain, protect and prevent misuse of cultural knowledge". The reasons in *Ward* suggest this should have been split into smaller, discrete rights, enunciated in relation to specific types of cultural knowledge or, perhaps even more specifically, detailed explanations of each individual piece of cultural knowledge.

The first step would involve identifying what knowledge is in question. This could be achieved by considering the types of cultural knowledge set out in the definition adopted in Part 1 and identifying which of those apply to the claim at hand. For example, what tangible things are claimed – sites, artefacts etc, what intangible things are claimed – spiritual knowledge, narratives etc? The Court may also require further specification in terms of each *type* of knowledge, that is, requiring details of what specific knowledge is being claimed under each heading – what specific sites, artefacts, spiritual knowledge, narratives etc?

Following identification of the knowledge in question, the next step would be to identify what rights in relation to that knowledge are being claimed. This could be done in relation to the three types of rights set out in Part 1 – definition, use and control. In relation to the right of definition – this is achieved implicitly, by the Indigenous claimant group defining what is their knowledge over which they claim protection. In relation to rights of use and control, these may need to be broken down even further, for example rights of use split into rights of physical use, reproduction, alteration, commercialisation etc.

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[74] *Western Australia v Ward* (2002) 191 ALR 1 at 15-16 [14] (Gleeson CJ, Gaudron, Gummow & Hayne JJ).

[75] *Western Australia v Ward* (2002) 191 ALR 1 at 15-16 [14] (Gleeson CJ, Gaudron, Gummow & Hayne JJ).

[76] For example see McRae H, Nettheim G, Beacroft L & McNamara L, *Indigenous Legal Issues*, 3rd ed, Law Book Company, Sydney, 2003, p 285 referring to Mick Dodson.

[77] See Grattan S & McNamara L, "The Common Law Construct of Native Title: A 're-feudalisation of Australian land law" (1999) 8 *Griffith Law Review* 50; McNamara L & Grattan S, "The Recognition of Indigenous Land Rights as 'Native Title': Continuity and Transformation" (1999) 3 *Flinders Journal of Law Reform* 137, p 159.

In order to satisfy the specificity requirement, claimants are therefore faced with an evidentiary burden that every right must be proved, not only as forming part of their traditional law,[78] but as individual discrete rights. This is an ironic side-effect of the right of definition being placed in Indigenous hands but then made subject to the Australian legal system. Native title claimants have the right to define their own cultural knowledge but then will only be granted protection of that knowledge if it is proved according to standards of the Australian court system.

This evidentiary burden is superficially no different to that placed on any individual or group who calls upon the Australian legal system to recognise their rights. Any person seeking protection must prove those rights and their claim to them. However, considering that native title is essentially a process of incorporating some aspects of Indigenous law and custom into a non-Indigenous legal system, the imposition of the "same" requirements on that protection as are in place for the recognition and enforcement of established non-Indigenous rights raises the question of whether the requirement is in fact substantially "the same". There is ongoing debate concerning whether the legal system, by asserting neutrality, actually creates and/or enforces biases in favour of the established system,[79] and thus favours familiar types of existing rights. That is, although formal equality is provided for, substantive equality (treating different individuals, groups and rights differently, according to relevant differences[80]) is lost.

Regardless of the force of these arguments concerning substantive equality, it is interesting to see the changes in the NTA since its first incarnation in 1993. The Act began its life with provisions aimed at easing this evidentiary burden. This was done by stating: "in conducting proceedings, [the court] *is not bound by* technicalities, legal forms or rules of evidence"[81] and "*must* take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders".[82] It was changed in 1998 to reverse the position. Now, "[the court] *is bound by* the rules of evidence, except to the extent that the Court otherwise orders"[83] and "the Court *may* take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders, but not so as to prejudice unduly any other party to the proceedings."[84]

Whether or not the changes in the legislation lead to greater practical difficulty is another matter. Under the original section there were hints that the courts nevertheless adopted

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[78] Section 223(1)(a).
[79] Hogg R, "Law's *Other* Spaces" (2002) 6 *Law Text Culture* 29.
[80] Two relevant differences in this context may be the overwhelmingly oral history of Indigenous peoples rather than documented history of white Australians and restrictions on dissemination of cultural knowledge beyond particular individuals or Indigenous groups, restricting dissemination of that knowledge to the judicial decision-maker in a native title claim, compared with the generally public nature of the cultural knowledge of other groups in Australia.
[81] Section 82(3) in its original form (emphasis added).
[82] Section 82(2) in its original form (emphasis added).
[83] Section 82(1) in its 2003 form (emphasis added).
[84] Section 82(2) in its 2003 form (emphasis added).

some rules relating to evidence.[85] Under the latter there is at least one instance of a beneficial application of the discretion to go beyond the technical rules of evidence.[86]

The law of native title therefore requires a level of specificity and definition of rights that may be inconsistent with Indigenous notions relating to traditional lands and waters. The specificity seems to come from the wording of the NTA. In relation to both identifying what knowledge is subject to assertion of rights and what those rights are, the definition of cultural knowledge and the categorisation of rights as outlined in Part 1 may assist in framing a claim to address these requirements. It seems that general statements regarding "cultural knowledge" as one entity are no longer sufficient for a claim of native title. That cultural knowledge has to be itemised, as do the rights claimed in relation to that cultural knowledge. The way in which that occurs will of course vary according to the particular Indigenous group and the laws and customs of that group. The claimants' success or otherwise will be dependent on their ability to muster sufficient admissible evidence to prove each of those constructed rights.

3.2 Physicality – rights in relation to *use* of physical areas only?

The restriction based on specificity requires the imposition of constructed rights on Indigenous culture in order for claimants to obtain protection under the NTA. As such it is a restriction of form. The second restriction, regarding physicality, is a substantive one and therefore arguably more significant. Physicality is a characteristic that the majority of the High Court in *Ward* seems to require of rights in order for them to constitute native title. The term "physicality" is used here to mean that the rights must not only be "in relation to" land and waters (which is the wording in the definition of native title in s 223), but be in relation to *use* of physical areas. That is, native title rights must relate to *use* of physical resources, including control of their use by others and rights of access to those resources. This is a limit made explicit by Justice Callinan in his separate reasons in *Ward*, where his Honour states that the NTA is "an Act which is concerned with the enjoyment of land" through "rights and interests that involv[e] 'physical presence on the land, and activities on the land'".[87] It is argued here that this is a restriction also contained within the majority's joint reasons, albeit impliedly.

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[85] For example, consider *Yarmirr v Northern* Territory (1998) 156 ALR 370 at [62] and *Yorta Yorta v Victoria* [1998] 1606 FCA at [17], that "the special procedures … do not authorise the Court to depart from two basic principles of litigation … namely … that the Court will have regard only to evidence which is relevant, probative and cogent." This latter decision and the way in which Olney J dealt with the evidence was affirmed on appeal to the Full Federal Court and the High Court: (2001) 110 FCR 244; (2002) 194 ALR 538. For a critical commentary of Olney J's approach to the use of evidence in the latter case, see Castan M & Kee S, "The Jurisprudence of DENIAL" (2003) 28 *Alternative Law Journal* 83; Pitty R, "A Poverty of Evidence: Abusing Law and History in *Yorta Yorta v Victoria* (1998)" (2000) 6 *Australian Journal of Legal History* 41.

[86] See O'Loughlin J's approach in *De Rose v South Australia* [2002] FCA 1342, where his Honour acknowledged that native title proceedings are "not conventional", claimants are subject to "peculiar" evidentiary difficulties and he therefore did away with the hearsay rule: at [264]-[271]. See also Black M, "Developments in Practice and Procedure in Native Title Cases" (2002) 13 *Public Law Review* 16.

[87] *Western Australia v Ward* (2002) 191 ALR 1 at 186 [650] (footnote excluded).

The majority identifies the "essential" point, for the purpose of the analysis of protecting cultural knowledge as claimed in *Ward*, to be the issue of "connection".[88] This idea of "connection" comes from the definition of native title which requires, inter alia, that "the [native title claimants] by those laws and customs [under which the rights and interests are possessed], have a *connection* with the [relevant] land or waters."[89] The majority concedes that Indigenous laws respecting *physical* access to *physical* sites of *physical* manifestations of cultural knowledge (artworks on rock, performance of ceremonies at particular sites) satisfy the requirement of connection.[90] Thus, a privileged position is given to physicality, with other types of rights relegated to a position of having to argue for recognition rather than being a priori of a kind that will undoubtedly satisfy this part of the definition in s 223.

However, the majority then seems to go further and this preference becomes a necessary characteristic of native title rights. Without deciding conclusively what the nature of the "relevant" connection must be,[91] the majority nevertheless states that as far as the rights claimed go beyond the assertion of rights in relation to access to physical sites, the right goes beyond the scope of the definition in s 223. By stating that "connection" is the fatal difficulty in the path of such recognition, it is implied that the "connection" must therefore be a *physical* connection in the nature of a right respecting access, or control of access, to physical areas.

In reaching this conclusion, the majority mentions a "fundamental" principle of the Australian legal system, being a distinction between ownership of land and ownership of art.[92] This ties in with the importance of "skeletal" principles, founded on part of Brennan J's reasons in *Mabo*, which has been used by the High Court as one limitation on the "recognition" by the common law of native title.[93] That is, recognition of native title rights and interests cannot occur under s 223(1)(c) where to do so would fracture a fundamental tenet of the Australian legal system.

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[88] cf Kirby J who, in his reasons dissenting on this point, states "the critical threshold question is whether it is a right or interest 'in relation to' land or waters": *Western Australia v Ward* (2002) 191 ALR 1 at 161 [577].

[89] Section 223(1)(b) (emphasis added).

[90] *Western Australia v Ward* (2002) 191 ALR 1 at 31 [59].

[91] 'This latter question was not the subject of submissions in the present matters, the relevant connection being advanced in the absolute terms we have identified and without examination of the particular aspects of the relationship found below to have been sufficient. We, therefore, need express no view, in these matters, on what is the nature of the "connection" that must be shown to exist. In particular, we need express no view on when a 'spiritual connection' with the land … will suffice': *Western Australia v Ward* (2002) 191 ALR 1 at 32-33 [65] (Gleeson CJ, Gaudron, Gummow & Hayne JJ). Compare with "Spiritual connection by laws acknowledged and customs observed falls comfortably within the words of s 223(1)(b)" *Yorta Yorta v Victoria* (2002) 194 ALR 538 at 566 [104] (Gaudron & Kirby JJ) (diss), while Callinan J came to the opposite conclusion in *Ward*, that a spiritual connection is not sufficient: *Western Australia v Ward* (2002) 191 ALR 1 at 186-187 [649]-[650].

[92] *Western Australia v Ward* (2002) 191 ALR 1 at 32 [60].

[93] See *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 29-30 (Brennan J). This is relevant explicitly to s 223(1)(c), however, the majority raised this issue immediately before stating that the issue of "connection" was the "essential" one in relation to cultural knowledge: *Western Australia v Ward* (2002) 191 ALR 1 at 31-32 [60].

The majority adopt von Doussa J's contention from *Bulun Bulun v R & T Textiles Pty Ltd*[94] (*Bulun Bulun*) of the existence of such a principle without elaboration. They do not explain what it means, whether it has gained "skeletal" status, nor how it would apply to the recognition of rights in relation to cultural knowledge. The purported principle of a distinction between ownership in land and artistic works would appear to be connected to the distinction between real and personal property. Although perhaps an important distinction in Australian law, it cannot be assumed that it is a "skeletal" principle, of the kind envisaged by Brennan J in *Mabo*, without the Court first conducting the relevant balancing exercise explained by Brennan J.[95] Even though von Doussa J assumed the principle to be fundamental, his Honour questioned whether it would be characterised as "skeletal", went on to state that it was "not necessary to further consider these issues" as the submission regarding native title in that case was "not pursued" and in any case the court was "without jurisdiction to make a determination of native title" in those proceedings.[96] Clearly, the discussion in *Bulun Bulun* was obiter and left open the possibility of argument allowing protection to survive the existence of the purportedly "fundamental" principle.

Even assuming its fundamental status, the critical question for the purpose of this discussion is how such a principle would affect recognition of rights in relation to cultural knowledge. The majority in *Ward* presumably considered the principle to be of some relevance in the context of discussing a limitation to recognition of the right claimed. Arguably, its only relevance is to highlight the restriction placed by the Court on the recognition of native title interests that do not amount to real property interests in the land which relate to physical use of the land or access to the land. This reflects the way in which von Doussa J discussed the principle in *Bulun Bulun*, doing so in the context of assuming that native title is "some recognisable interest *in the land itself*".[97]

This implied limit based on physicality seems at odds with a number of statements of the federal courts in relation to how the notion of "connection" is to be interpreted and the well-accepted *sui generis* nature of native title rights and interests.

In relation to the interpretation of "connection", the Court has often stated that the connection is to be considered in light of what is an *Indigenous* connection to land and waters. In *Ward* the majority state that s 223(1)(b), the section in which the requirement of "connection" is situated, "is not directed to how Aboriginal peoples *use or occup*y land or waters. Section 223(1)(b) requires consideration of whether, by the traditional laws

[94] (1998) 86 FCR 244 at 256.

[95] See *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 30 where Brennan J contemplated "no case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system … it is necessary to assess whether the particular rule is an essential doctrine of our legal system and whether, if the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefit flowing from the overturning." The doctrine of terra nullius was one such skeletal principle which was overturned due to its "unjust and discriminatory" nature: *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42. See also the discussion of Kirby J in *Western Australia v Ward* (2002) 191 ALR 1 at 163 [583]-[584].

[96] *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 86 FCR 244 at 256.

[97] *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 86 FCR 244 at 256 (emphasis added).

acknowledged and the traditional customs observed by the peoples concerned, they have a 'connection' with the land or waters",[98] that "[w]hether there is a *relevant* connection depends, in the first instance, upon the content of traditional law and custom and, in the second, upon what is meant by 'connection' *by those laws and customs*".[99]

The Court has also discussed what is the *nature* of that Indigenous connection. In *Ward* the majority states that "[i]t is wrong to see Aboriginal connection with land as reflected only in concepts of control of access to it."[100] This is further expanded by statements of the High Court and Federal Court[101] whereby they explain that a traditional Indigenous connection to land is "spiritual"[102] or "religious".[103] The majority acknowledges this in *Ward* itself: "As is now well recognised, the connection which Aboriginal peoples have with 'country' is essentially spiritual."[104] If this is the case, then on what basis does the Court impliedly restrict the necessary connection to a physical one of use of, or control of access to, physical areas?

The understanding of native title as *sui generis* interests is another consideration counting against as limited an understanding of native title as evidenced in the Court's conclusion in relation to cultural knowledge in *Ward*. The idea of the interests being *sui generis*[105]

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[98] *Western Australia v Ward* (2002) 191 ALR 1 at [64] (Gleeson CJ, Gaudron, Gummow & Hayne JJ) (emphasis added).

[99] *Western Australia v Ward* (2002) 191 ALR 1 at 32-33 [65] (Gleeson CJ, Gaudron, Gummow & Hayne JJ) (emphasis added).

[100] *Western Australia v Ward* (2002) 191 ALR 1 at 39 [90], in the context of the majority's discussion of the notion of "speaking for country".

[101] See also the repeated statement of the spiritual nature of Indigenous connection to land by commentators: eg Howden K, "Indigenous Traditional Knowledge and Native Title" (2001) 24 *University of New South Wales Law Journal* 60, p 71, in 1996 Justice French, in an extra-judicial paper, stated that "the contention that a spiritual connection can sustain common law native title is open": French R, *Native Title – Promise Pain and Progress*, National Native Title Tribunal, Perth, 1996, p 4; cf Bartlett R, *Native Title in Australia*, Butterworths, Sydney, 2000, p 84 [8.6]. See also the statement by a member of the National Native Title Tribunal: "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." Determination in Application QN94/2, 4 October 1994 at 12; Determination in Application No 94/5, 5 October 1994 at 11, as quoted in Gregory M, "Absent Owners" (1995) 3(72) *Aboriginal Law Bulletin* 20, p 21.

[102] "The traditional connection was 'primarily a spiritual affair rather than a bundle of rights'": *Rubibi Community v Western Australia* (2001) 112 FCR 409 at 418 [28]; *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 358 (Brennan J); *Yanner v Eaton* (1999) 201 CLR 351 at 372-373 [38] (Gleeson CJ, Gaudron, Kirby & Hayne JJ): "an important aspect of the socially constituted fact of native title rights and interests that is recognised by the common law is the spiritual, cultural and social connection with the land."

[103] "The traditional relationship between Aborigines and their land has been said to be, above all, a religious relationship." *Rubibi Community v Western Australia* (2001) 112 FCR 409 at 411 [1].

[104] *Western Australia v Ward* (2002) 191 ALR 1 at 15 [14] (Gleeson CJ, Gaudron, Gummow & Hayne JJ).

[105] The idea of *sui generis* rights has emerged from jurisprudence in other countries: see *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 339 (PC) at 402-403: *Guerin v R* (1984) 13 DLR (4th) 321. It has clearly been adopted into Australian law: *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 58 (Brennan CJ), 84-85, 89 (Deane & Gaudron JJ); *Ward v Western Australia* (1998) 159 ALR 483 at 498-499; *Yanner v Eaton* (1999) 166 ALR 258 at 270 (Gleeson CJ, Gaudron, Kirby & Hayne JJ); *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 37 [11] (Gleeson CJ, Gaudron, Gummow & Hayne JJ). Although the characterisation of *sui generis* is used here to support a broad basis of recognition of native

begins with the fundamental notion that the basis and content of native title rights is the traditional laws and customs of the claimant group. Further, the idea of *sui generis* rights involves a concession that native title rights therefore need not correspond to any notions of land ownership in the Australian legal system. That is, the rights are not restricted to proprietary notions of interests in land but reflect "a different conception of 'property' or 'belonging'",[106] also described as "a 'perception of socially constituted fact'".[107]

It is relevant to consider the precise wording of the definition in the NTA. The opening passage of s 223 includes the words "rights or interests *in relation to* land", not rights "in" land.[108] The only occasions in which the phrase "in relation to" has been invoked by the courts in native title cases is in warnings against forcing characteristics of "property" rights onto native title rights before they be recognised by the Act.[109] Is this all it means? The phrase "in relation to" has been considered by Australian courts in a number of other statutory contexts, which may provide some guidance on how the phrase in the NTA should be interpreted.[110] Discussion of that issue is beyond the scope of this article. For present purposes, it is sufficient to question whether "in relation to" land only extends the notion of native title rights beyond concepts of property in land by removing any need to establish certain indicia of "proprietary rights" (if indeed that be possible), yet maintaining the need for the right to be related to land in the sense of being related to a

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title rights, it seems to have been hinted by some that this characterisation is in fact a weakness: *Yorta Yorta v Victoria* (2002) 194 ALR 538 at at 589 [180] (Callinan J); *Western Australia v Ward* (2002) 191 ALR 1 at 280 [969] (Callinan J); see also Bartlett R, *Native Title in Australia*, Butterworths, Sydney, 2000, p 80 [7.20], Borrows J & Rotman L, "The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference?" (1997) 36(1) *Alberta Law Review* 9.

[106] *Yorta Yorta v Victoria* (2002) 194 ALR 538 at 551 [40] (Gleeson CJ, Gummow & Hayne JJ).

[107] *Yanner v Eaton* (1999) 166 ALR 258 at 373 [38] (Gleeson CJ, Gaudron, Kirby & Hayne JJ), quoting Gray K & Gray SF, "The Idea of Property in Land" in Bright S & Dewar J (eds), *Land Law: Themes and Perspectives*, Oxford University Press, Oxford, 1998 15 at 27. It is interesting that Gray & Gray there consider the inconsistency between the notion of property as socially constituted fact and property as rights (the latter including a discussion of property as "bundles" of individual rights), suggesting a contradiction between the two. The Court has not yet addressed this question of whether the notion of native title as a "bundle" can conceptually co-exist with the statement that native title is also "socially constituted fact".

[108] The latter being the phrase used in Brennan J's classic definition of native title: '"native title" conveniently describes the interests and rights of Indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional law acknowledged by and the traditional customs observed by the Indigenous inhabitants': *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 57.

[109] 'It is, of course, important to notice that the native title rights and interests with which the Act deals are rights and interests *in relation to* land or water. Those rights and interests may have some or all of the features which a common lawyer might recognise as a species of property. Neither the use of the word "title" nor the fact that the rights and interests include some rights and interests in relation to land should, however, be seen as necessarily requiring identification of the rights and interests as what the common law traditionally recognised as items of "real property". Still less do those facts necessarily require analysis of the content of those rights and interests according to features which the common law would traditionally identify as necessary or sufficient to constitute "property" … Even if difficulties about the meaning of the word "property" were resolved, it would be wrong to start consideration of a claim under the Act for determination of native title from an a priori assumption that the only rights and interests with which the Act is concerned are rights and interests of a kind which the common law would traditionally classify as rights of property or interests in property.' *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 38-39 [12]-[14] (Gleeson CJ, Gaudron, Gummow & Hayne JJ).

[110] See for example Justice Kirby's discussion in *Western Australia v Ward* (2002) 191 ALR 1 at 161 [577] referring to *O'Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356.

physical *use* of the land, such as access. Although the courts seem on the one hand to free native title from the constraints of proving elements of proprietary interests in land,[111] it appears that there remains a bias towards rights relating to use of land.

The bias towards physicality may be a factor of the history of land rights and its relationship with native title. The *Mabo* decision and the NTA are often considered as the latest manifestations of a land rights movement within a broader Indigenous rights agenda. In terms of land rights up to 1992, the activist calls and legislative responses were all in relation to use and ownership of land. The foundation of *Mabo* itself was a claim that the Meriam people had "inhabited and exclusively possessed the islands … and that they had *land rights* over them."[112] This is then reflected in the reasons in *Mabo* where there are a number of examples of a focus on *use* of land and proprietary rights *in* land.[113]

However, *Mabo* was not a comprehenisve exposition of the idea of native title and should be considered only as the starting point for the development of this area of law in Australia.[114] It was unnecessary for the Court to there address, consider and establish principles relating to interests other than a land rights property-like claim.[115] As Justice Kirby noted in his separate reasons in *Ward*, the High Court has not had to address non-physical rights,[116] implying that the question remained open on the law. Nevertheless, it seems that a physicality bias is evident in cases since *Mabo*[117] and has affected the majority's reasoning in *Ward*.

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[111] This seems to reflect the rejection in *Mabo* of the approach in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 273 where Justice Blackburn refused protection of Indigenous rights because they did not correspond with "property, as our law, or what I know of any other law, understands that term … I must hold that these claims are not in the nature of proprietary interests"; see *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 51-52 (Brennan J), 187 (Toohey J). See also *Rubibi Community v Western Australia* (2001) 112 FCR 409 at 419 [32]; *Yanner v Eaton* (1999) 166 ALR 258 at 382 [72] (Gummow J).

[112] *Mabo v Queensland* (1988) 166 CLR 186 at 188.

[113] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 51-52 (Brennan J); 88-89, 100 (Dean & Gaudron JJ). However, it is not clear whether in fact native title can be characterised as "proprietary" – this is an ongoing debate and there are conflicting signs within the *Mabo* decision itself, with Justices Deane and Gaudron stating "the title … *does not* constitute a legal or beneficial estate or interest *in the actual land*": at 88-89, characterising it as a "personal" right, yet arguing that it may be protected under s 51(xxxi) of the Constitution: at 111. See Strelein L, "Conceptualising Native Title" (2001) 23 *Sydney Law Review* 95; Gray J, "Is Native Title a Proprietary Right?", Paper presented at the Australasian Law Teachers' Association annual conference hosted by Murdoch University School of Law, Perth, Western Australia, 29 September –2 October 2002.

[114] Strelein L, "Conceptualising Native Title" (2001) 23 *Sydney Law Review* 95, p 96.

[115] Nevertheless, at least one early commentator considered there to be scope for the *Mabo* decision to extend beyond land and to lead to protection of Aboriginal art: Gray S, "Wheeling, Dealing and Deconstruction: Aboriginal Art and the Land post-Mabo" (1993) 3 *Aboriginal Law Bulletin* 10.

[116] *Western Australia v Ward* (2002) 191 ALR 1 at 161 [578] (Kirby J).

[117] For example *Fejo v Northern Territory* (1999) 195 CLR 96 at 128 [47]: native title rights "relate to the use of the land"; in *Wik v Queensland* (1996) 187 CLR 1 at 169 (Gummow J), although not stating the outer reaches of native title interests, in giving an indication of the breadth of rights, his Honour only identified ones which relate to the use of the land.

The application of such a physical connection test has been criticised. Some of the criticisms have come from Indigenous groups,[118] others from commentators arguing that it is inconsistent with the intention of the legislature, as ascertained from the Parliamentary debates and a consideration of which of the proposed provisions survived.[119] Some argue that this interpretation and limited recognition is a bias towards familiar, common law property concepts, despite the repeated statements that the courts should avoid just such a bias.[120] Although the majority in *Ward* states it does not decide conclusively the nature of the "connection" required, by implication it does so through the way it limits the scope of protection of cultural knowledge to only those interests which relate to physical access. This has subsequently been followed in another native title application, where the judge in that case stated the "decisions in the Full Court and the High Court have made it clear that matters of spiritual belief and practices are not rights in relation to land *and do not give the connection to land that is required by s 223 of the NTA*."[121]

Although the notion of native title as a collection of *sui generis* rights and "connection" to land and waters being defined according to Indigenous law and customs are aspects of the law of native title, the outcome of *Ward* is that the statement released by the High Court, although "not a substitute for the reasons of the court", seems to be accurate – "In so far as claims to protection of cultural knowledge go beyond denial or control of access to land or waters, they are not rights protected by the Native Title Act."[122]

What does this mean in relation to the categories of rights and broad definition of cultural knowledge set out in Part 1? The right of definition is untouched – this physicality restriction does nothing to the right of Indigenous peoples to define their cultural knowledge. However, recognition of any other rights in relation to the knowledge are restricted to rights to access physical areas and restrict such access to others. Therefore, the NTA will not explicitly protect the cultural knowledge itself, but only whether and how people can access sites where cultural knowledge is manifest. This may nevertheless provide incidental protection[123] of cultural knowledge, where it is in a physical form. For

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[118] *Coexistence – Negotiation and Certainty: Indigenous Position in Response to the Wik Decision and the Government's Proposed Amendments to the Native Title Act, 1993*, Prepared by the Indigenous Working Group on Native Title, 1997, p 3.

[119] See McRae H, Nettheim G, Beacroft L & McNamara L, *Indigenous Legal Issues*, 2nd ed, Law Book Company, Sydney, 1997, p 254, referring to Gregory M, "Absent Owners" (1995) 3(72) *Aboriginal Law Bulletin* 20, p 21 and Patrick Dodson. See also the parliamentary debates in the Senate, where a representative of the government repeatedly stated the possibility of something less than physical connection being sufficient: The Honourable Senator G J Evans, Commonwealth, Senate, *Parliamentary Debates (Hansard)*, 20 December 1993, p 5333, 5346, 5348, 5353; 21 December 1993, p 5473.

[120] Armstrong S, *Drawing A (de)Constructive Frame for Native Title: Deconstruction, Difference and Native Title in Australia* (2002), Law Honours Thesis, University of Wollongong, p 4 and p 7 where she argues that not only is recognition given only to "familiar" types of rights, but they are then treated more favourably than "non-familiar" rights.

[121] *De Rose v South* Australia [2002] FCA 1342 at [51] (emphasis added).

[122] *Western Australia v Ward* (2002) 191 ALR 1 at 11.

[123] The general idea of "incidental" protection is taken from Basten J, "Recent Developments in Native Title Law and Practice: 8 June 2001: Issues for the High Court" distributed at *The Past and Future of Land Rights and Native Title*, Townsville, Queensland, 28-30 August 2001 – Native Title Representative Bodies

example, the right to restrict access to a site containing rock art will provide incidental protection of the rock art itself. However, it seems that this physicality restriction means there is no protection available to cultural knowledge that is not physically manifested – for example narratives, spiritual knowledge and knowledge about locations and uses of environmental resources, distinct from the physical resources themselves.

4. Conclusions

"Indigenous cultural knowledge" is a very broad term, potentially covering every element of Indigenous culture, from physical artefacts and sacred sites, to intangible Dreaming narratives, laws and customs. It includes knowledge about tangible and intangible things, as well as the items known about. Rights in relation to such knowledge include the right to define the knowledge, rights to use the knowledge and rights to control the knowledge, its dissemination, use and change. The value of these rights is social, cultural and financial and the protection of cultural knowledge through those rights has therefore become a significant issue for Indigenous Australians and for Indigenous peoples around the world.

There are a number of reasons for legal protection of such knowledge, including the fact of Indigenous calls for protection and broader arguments based on the ideas of substantive equality and human rights. In Australia, there are a number of legal regimes that can be used in protecting Indigenous cultural knowledge, as well as practical measures put in place due to the lack of current legal protection. These practical avenues include movements to respect and protect some Indigenous culture through protocols for researchers and libraries, to inform the way in which they should deal with Indigenous cultural knowledge in public libraries and archives[124] and the use of certification to identify "authentic" Indigenous cultural knowledge in the form of artistic works.[125]

One legal regime that does give some protection for rights respecting cultural knowledge is the notion of native title under the NTA, although, due to the requirements contained within it, that Act does not provide an avenue of protection for all Indigenous people in Australia. The NTA emerged following a long process of activism and litigation and was enacted following the landmark *Mabo* decision. One of the most important parts of the Act is the definition of native title contained in s 223 and the way it has been interpreted by the courts, especially the High Court. What emerges from an analysis of the latest authoritative decision regarding the protection of cultural knowledge, *Ward*, is that the notion of native title, although seemingly very broad on its face, has been interpreted to contain at least two relevant restrictions: specificity and physicality.

Legal Network and the Australian Institute of Aboriginal and Torres Strait Islander Studies, p 8 and by a suggestion of it in *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 86 FCR 244 at 256.

[124] See for example the Aboriginal and Torres Strait Islander Protocols for Libraries, Archives and Information Services, produced by the Aboriginal and Torres Strait Islander Library and Information Resources Network (ATSILIRN), endorsed at the December 1994 and September 1995 ATSILIRN conferences and the First Roundtable on Library and Archives Collections and Services of Relevance to Aboriginal and Torres Strait Islander People, May 1995.

[125] See the National Indigenous Arts Advocacy Association's certified trade mark Label of Authenticity at <www.niaaa.com.au/label.html> (2001) (accessed July 2003, copy on file with author).

Specificity is a requirement that Indigenous law must be fragmented into distinct individual rights, each of which must be proved, before it will be recognised under the NTA. This emerges from the wording of the NTA, a consideration of the way in which the relationship between competing interests is determined and the conception of native title as a "bundle of rights". This imposes an evidentiary burden on claimants.

The more significant restriction is the implied requirement of physicality in order for a right to be considered a native title right. This idea of physicality emerges from the way in which the majority interprets the "connection" requirement in the definition in s 223. The approach seems to be at odds with other elements of native title jurisprudence, wherein the High Court has consistently maintained the spiritual nature of Indigenous connection to land and waters and the need to avoid characterising native title as a collection of proprietary interests in land.

The NTA, as currently interpreted by a majority of the High Court, therefore seems to fall below the expectations of many who added their voice to claims for protection of Indigenous rights.[126] This analysis of the scope of protection for cultural knowledge affirms the notion of native title as a construct of Australian law. Although native title takes its content from Indigenous laws and customs, the way in which the recognition of that Indigenous system is limited to specific rights relating to access to physical areas means it is not the whole Indigenous legal system that is recognised but only some parts of it.

In relation to cultural knowledge specifically, the definition of what is cultural knowledge is unaffected by the operation of the NTA, as the Act maintains the adversarial system whereby native title claimants must identify what rights they argue are subject to protection. However, the Act does place serious limitations on the scope of any such protection. The two limitations explored here, specificity and physicality, lead to a conclusion that it is only identified rights in relation to cultural knowledge that is physically manifested and identified in discrete forms that will fall within the scope of any legal protection under the Act.

[126] *Western Australia v Ward* (2002) 191 ALR 1 at 156 (McHugh J), 280-281 (Callinan J); Castan M & Kee S, "The Jurisprudence of DENIAL" (2003) 28 *Alternative Law Journal* 83, p 87.