KINDS OF RIGHTS IN COUNTRY: RECOGNISING CUSTOMARY RIGHTS AS INCIDENTS OF NATIVE TITLE
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Introduction

This paper discusses the kinds of rights and interests in country which people hold under Aboriginal traditions. It also addresses the problem of terminology, as we are confronted with at least the following distinctions in the literature on Aboriginal rights in country: local individual or family rights versus tribal overrights and rights granted through intertribal territorial comity; rights versus privileges; primary versus secondary rights; unmediated versus mediated rights; presumptive versus subsidiary rights; actual versus inchoate versus potential rights; generic versus specific rights; and, more recently, core versus contingent rights.

Most Aboriginal groups maintain a distinction between the kind of rights and interests held by those who have what they see as an essential relationship of identity with the country, or some other kind of ancient and intrinsic connection with it, and those rights enjoyed by others who lack such identity or such close or ancient connections. The former are people who normally have both ‘core rights’ and ‘contingent rights’, in the terms of this essay (see further discussion below). Those who lack this kind of relationship to the same country may nevertheless have rights in it, but their rights are more limited in scope and may be dependent upon certain social relationships with core rights holders, or may have come about as a result of bureaucratic or voluntary relocations of people and in time have just come to be accepted as the status quo. Such people may thus have contingent rights without having core ones, for example over the area in which they currently live, and may withhold themselves, or be constrained by others, from becoming native title claimants to areas where their rights are less than very full. It is normal for such people to assert core rights elsewhere. But where different groups, or different kinds of people, claim the same country or part of it under native title processes, and do so on the basis of differently conceived and structured rights, great complexities may arise. This paper is written partly with the intention of providing guidance to parties who seek to distinguish holders of significantly different kinds of rights rather than to amalgamate all rights-holders into a single amorphous category.

In his review of much of the existing literature on tribes and intertribal relations in 1910, Gerald Wheeler found that Aboriginal tribal territory was subdivided generally among undivided families, but there was some evidence also of private or personal ownership of land, especially in areas where fishing rights were important. There was some evidence of a ‘tribal overright’ such that rights of local groups, families or individuals over smaller areas were not entirely exclusive, as certain products of the country may be free of access to members of the same tribe generally. ‘Absolute rights’ were acknowledged and maintained over ‘the tribal’ territory and all its products, but this ‘territorial sovereignty’ was qualified by ‘certain customs of intertribal comity’ whereby members of other tribes were invited or permitted to share in the benefits of a tribe’s country at certain times and under certain conditions.2

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1 I wish to acknowledge the following people for assistance with source material or helpful comments made on earlier drafts of this paper: Geoffrey Bagshaw, Christopher Charles, Patricia Lane, David Martin, Julia Munster, David Nash, Bruce Rigsby, Nancy Williams, Susan Woenne-Green, Guy Wright, and those who attended the 1999 Summer School in Native Title and the Anthropology of Aboriginal Land Tenure at the University of Adelaide.

Mervyn Meggitt, who worked with the Warlpiri and others in the Tanami Desert area in the 1950s, distinguished between ‘rights’ to country and ‘privileges’ in it, the former being held basically as of birth, the latter being held as a consequence of marriage and co-residence.

Apparently, residence in itself gave only economic and ritual privileges (rather than rights) to immigrants, including spouses of existing [ie. natal] members. These people were free to share in the available food and to participate in many ceremonies, but they had no real authority in these situations – they could not legitimately command the actions of true members of the community. 3

It is common to hear life-long and even second and third generation Aboriginal ‘immigrants’, including incoming spouses, deferring to the local landowners even when exercising a perfectly customary right to use the ‘host’ country which has long been their home. Christopher Anderson records that at Wujalwujal in Cape York Peninsula

[one man … who was on the settlement council, and who was having trouble making any decisions go his way, said to me with a resigned sigh: ‘No one listen to me. I’m only stranger here’ (despite 35 years’ residence in the area). What he meant was that he had no real right to speak. It was not his country. This is one of the most powerful principles governing politics in Aboriginal settlements across much of Australia.4]

It is not so much ‘immigrant’ status as ‘non-core rights-holder’ status that more broadly underlies this kind of deference, as it can also apply between people with contiguous countries and a history of close co-residence, when one defers to the other on the other’s land. In such cases nobody is an ‘immigrant’ in the ordinary sense because they are both just continuing the ancient practice of owners of neighbouring estates making relatively free use of each others’ countries. But it is possible for those who lack core rights over an area where they live to describe themselves as ‘only tourists’ while staying there – the joke has a serious undertow. The same kind of deference can even apply where a person’s relationship to a country is based on indirect descent rather than a contractual relationship such as marriage or a history of long association or the facts of neighbouring estates. Such people will usually defer to those with more direct descent links to the country, at least in contexts where primary proprietary kinds of relationships are the focus of discussion.

While indirect descent links may offer people more solid life-long presumptive rights in others’ countries than links based on a history of co-residence, at least in non-Western Desert regions, it is people who commonly reside together who tend to share use rights over each others’ countries most readily. People with descent links to a country but little or no history of a social relationship with those who live on or near it may find it difficult to put into action the rights they hold in principle, especially where their descent link is rather oblique. Thus there are times when people with ancient ‘rights’ may defer to the knowledge and authority of those with more recently entrenched ‘privileges’ – yet without blurring the principle of the distinction between the kinds of rights involved. There is often a disjunction between authoritative knowledge of country and the holding of primary proprietary interests in it. Thus the right to speak for a country will usually rest on somewhat different criteria from the right to speak about a country.

The character of a right over a country or its resources cannot be determined in any depth merely by observing behaviour. In 1974, at Bathurst Head in Cape York Peninsula, Johnny

Flinders, whose clan estate was nearby at the other end of the same bay, was taking and eating rock oysters. The site which had the oysters was in his mother’s mother’s clan estate, not his own. At one point he turned to me and said, in his own language: ‘I’m eating my mother’s mother’s oysters’. His was a non-primary relationship to the country and its resources, given that his genealogical tie to it was non-patrilineal, but the link rested on a specific and quite close family connection. Johnny Flinders’s right to eat the Bathurst Head oysters was in an important way contingent on his mother’s mother’s core proprietary rights over the clan estate (Alpirr). At the level of clan groups, the relationship between Johnny Flinders’s estate and that of his mother’s mother was one of relative proximity in space, relative unity of language, and participation in overlapping networks of marriage and other connections. It is generally the case that ordinary kinds of mundane use-rights over each others’ countries are shared among owners of neighbouring countries, even in the absence of a close genealogical connection, so long as the relevant neighbours remain on reasonable terms. But from an individual’s point of view, factors like estate proximity are generally of less significance than genealogical ties in conferring a sense of rightfulness about entering and using adjacent estates, unless genealogical ties are absent.

It is perhaps somewhat misleading to speak of ‘use rights over countries’ or even ‘contingent rights in countries’ when traditional patterns of occupational use of land and waters were not aligned at all neatly with the geographic extent of such countries. Countries, in the sense of clan estates, Dreaming track segments or language group areas, are units of tenure, not units of economic use. There is no evidence that a classical band’s range - a camping group’s normal area of dwelling and resource exploitation - was the same area as a single clan estate, as it is usually described as much larger. Nor is there any evidence that a band’s range was confined to a particular clan estate, or that it was a very fixed kind of constant as compared with the relative stability and definability of the geographic scope of clan estates. Use rights – rights that are contingent on core rights - are usually rights in the use of regions that include a variety of estates or parts of them. There are often parts of estates which are not open to use by all comers. For that reason alone it is not helpful to speak of ‘use rights’ being over estates per se. Core rights are usually rights in estates as wholes, which are specific sets of sites usually considered to be relatively stable in composition.

**Degrees of connection versus kinds of rights**

**Primary and secondary rights; unmediated and mediated rights**

A distinction between ‘primary’ and ‘secondary’ rights in countries has been around in the anthropological literature on Aboriginal land rights for many years. But core rights, in the sense advanced here, are not to be equated with the ‘primary’ ones as usually described, and contingent rights are not to be equated with the ‘secondary’ ones as usually described. In an important early paper on the question of succession to Aboriginal countries, Peterson, Keen and Sansom said:

> A traditional owner of a clan estate gains primary rights in his territory by patrilineal descent. Secondary rights are a product of recognised social relationship(s) that link

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5 For a collection of some of the evidence as to this point see Hiatt (1962), and see further discussion below. Wheeler (1910:45) had referred to such privileges of vicinage as ‘tribal overrights’, widely held rights to which those of individuals and local groups were subject, although he was lacking ‘clear information’ on this point.
non-members of a clan, either to an estate owned by members of another clan or to one or more members of such a clan. Primary rights are thus direct rights while secondary rights are mediated rights. Six kinds of secondary rights can be distinguished, \( ^{6} \)

They then discussed six ways by which the acquisition of secondary rights were mediated: place of conception; place of birth; place of death/burial of an important relative; kinship ties, especially the relationship through the mother’s mother; company for ceremony (sharing totemic and ceremonial links to other estates); and being the child of a female ‘clan owner’.\( ^{7} \)

With the advantage of current knowledge such a statement would have to be revised in several ways, but these are not the concern of the present paper.\( ^{8} \) The relevant point here is that regional Aboriginal land tenure systems tend to recognise that these ongoing ‘secondary’ forms of connection to an estate may become activated as acceptable bases for claims of succession to estates whose owners have died out. Those who succeed in this way, a process which often takes many years or even decades, convert their interest in the relevant estate from a secondary one to a primary one, or at least ensure that the interests of certain of their descendants in that estate are recognised as primary ones in due course. That is, in Peterson, Keen and Sansom’s terms, a person with ‘mediated’ rights to an estate and who succeeds to core rights in it, once they become the relevant primary predecessor in title for certain of their own descendants, will retrospectively be seen to have passed on those rights in a ‘direct’ or unmediated way. It may be said, then, that the full process of succession in such cases is not complete until a ‘normal’ situation has been restored whereby at least some people again enjoy unmediated rights in the country.

Many of these processes of succession are driven by one person or by a close-knit set of siblings, for example, who hope to succeed to the estate concerned. These are cases of individual succession but they normally have implications for the re-establishment of a group with interests in the country.\( ^{9} \) In other cases it is apparent that the elders of an area ‘appoint’ an individual successor, who may be a newborn child, but again the succession starts with an individual who newly instantiates the group.\( ^{10} \) In time, such acts of individual succession would usually become the basis of the emergence of a replacement group holding the country. It is because of this, and because of the way the individual’s relationship to the country is conceptualised, that it is usual to recognise that the tenure of an Aboriginal group over its country remains communal even when the group lacks more than a single member, or even any members, for a time.

**Group succession: from neighbourly interests to insider rights?**

Group succession occurs when, for example, the territories of extinct groups are subsumed by one or more extant groups. This is said to have been the case when people of the Ganggala language group subsumed country of the defunct Min.ginda in the Burketown area, the Waanyi subsumed the country of the erstwhile Injilarija in the Lawn Hill region, and the Pangkala subsumed at least part of the territory of the much depleted Nauo (Nyawu) of Eyre Peninsula.\( ^{11} \) There are other cases where physical and cultural occupation

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\( ^{7} \) Peterson et al (1977:1006-1007).
\( ^{8} \) Part of it appeared in a revised form in Peterson (1983).
\( ^{9} \) I am indebted to Nancy Williams for pointing out to me the need to distinguish individual succession from group succession.
\( ^{10} \) For details of this process in the Arrernte area see Strehlow (1947).
of lands whose former occupants had shifted elsewhere, and/or become locally depleted, have turned into controversial bases for legal claims by members of the historically incoming groups. These are not readily categorisable as cases of succession, nor can they be likened to conquest, as they involve the assertion or assumption of rights which in some cases are recognised by descendants of the original inhabitants and in others are not, but there is no conclusive evidence of a formal handover of title nor of forcible occupation. These include the situations which form the backgrounds to the Northern Territory claims of Finniss River, Lake Amadeus and Kenbi, and native title claims by Yankunytjatjara, Pitjantjatjara, Ngaliya and Kukatha people in the Far West Coast region of South Australia, for example.¹²

These are cases of sudden population collapse due to colonisation, combined with the assumption of new rights or extension of old rights by groups moving into depopulated areas, with or without any recorded processes of the ceding of rights or the handing over of sacra from the former inhabitants. While such cases may in the long-term past have led to a relatively fast replacement of rights-holding groups for a particular area, under modern conditions the persistence of records plays a powerful role in preventing the ready extinguishment of consciousness of how things were before.

Under similar catastrophic conditions members of the surviving subgroups of a single language group or other wider regional group have at times jointly assumed responsibility for all the untenanted estates of their wider group as well as maintaining or amalgamating their own local estate interests. Details of these processes are not often available but the cases of Malak Malak, Jawoyn, Cape Melville and Lakefield provide a range of relevant examples.¹³ These are clearly not cases where existing ‘normal’ succession pathways are engaged in by one or two individuals or a small genealogical subgroup – whole language groups or similar-sized regional groups may be involved. For this reason I refer to such processes as instances of conjoint succession. These cases do not involve the extinguishment of pre-colonial rights of surviving groups so much as their transformation – usually involving considerable simplification - and their generalisation to wider ‘tribal’ areas.¹⁴

It is often the case that a person has a primary relationship to one parent’s estate and a range of other ties to, for example, the other parent’s estate, their mother’s mother’s estate, the site or country on which they were born, neighbouring estates on the same main Dreaming track as their own, the country where their mother was buried, and so on, depending on region. People may rank their connections to these various estates in terms of importance. In a succession context this kind of ranking is an attribute of an individual rather than of a group per se, even though some of the secondary interests may also be those shared among classes of kin standing in common ritual or genealogical relationships to the country.¹⁵

¹² For Finniss River and Lake Amadeus see Aboriginal Land Commissioner (1981, 1989); for Kenbi see Povinelli (1996); for the Far West Coast see claims lodged with the National Native Title Tribunal, and literature on southerly and southeasterly migration by Western Desert people from before the 1850s to the 1950s eg. Tindale (1974:213), Brady (1987).
¹⁴ One cannot exclude the possibility that similar catastrophic population losses may have occurred before the colonial era, where epidemics could have wiped people out in big numbers from time to time.
¹⁵ Eg. jungkayi (includes people whose mothers are in a primary relationship to the country) and dalnyin (includes people whose mothers’ mothers are in a primary relationship to the country), as in the Roper River region. See eg. Morphy and Morphy (1981).
Group succession seems to rely on territorial proximity and pre-existing systemic grounds for territorial amalgamation – such as commonality of language, shared rights in Dreamings, or shared kin-class standing\(^\text{16}\) – rather than on specific genealogical links. In Nancy Williams’s terms (see below), it seems that group succession may be based on potential rights, the setting for which is various proximities and commonalities between erstwhile neighbours, while individual succession is usually based on already existent but inchoate rights which become upgraded or augmented.

People whose countries are contiguous or which intersect or overlap in a number of ‘company’ areas may express a higher-order unity at any time, not just in situations of potential succession, by saying ‘We are one river’, or ‘We are the same mob, same country, but we’ve got our own areas’. The current state of relations between two such groups may determine whether or not they prefer to present themselves as one group with common rights over a single larger country, or as two groups with a high degree of shared rights in each others’ distinct countries. At times there may not be unanimity on this very question itself. During such times of negotiation or conflict it would be misleading to assert legally either that there is one group with one country or two groups with reciprocal rights in each others’ countries. The anthropologist’s job in such a case is to describe the group dynamics as far as necessary for the purpose at hand, not to stress a collectivist or atomist reading for the purpose of neatening the case to suit the demands of litigation.

A group’s members may have a strong secondary relationship to an adjacent country based on the paths taken by particular Dreaming tracks through both countries, and on their active ceremonial knowledge of both sets of sites. A group whose Dreaming track responsibilities run up close to another group’s major site, but do not extend right into the site, can say of the site and its surrounds: ‘We come in there too’ or ‘We go halfway to there’.\(^\text{17}\) To ‘come in’ to a place is not the same as to ‘belong to’ it in the fuller sense. People may often express such non-primary connections by the use of the terms ‘just’ or ‘only’ – for example: ‘We are not the traditional owners, we are just the custodians’, or ‘That’s not main place for us, we only half owner’. By contrast, I have never heard anyone say ‘We are only the traditional owners of that area’. As a vernacular English expression, often constituting a not completely happy translation of some indigenous expressions, ‘traditional owner’ is a term of first rank when specifying who has rights and interests in country. On the other hand, many people with some traditional rights in a country – even some very strong rights – normally will deny that they are ‘traditional owners’ of it if they lack a primary connection to it based on identity.

A person or group or kin class would never have both a primary and a secondary relationship to the same country, except perhaps in the rare case of someone with parents who were both from the same country, in which case they could trace a primary connection.

\(^{16}\) In many regions a group or person succeeding to an estate should ideally be of the same kin-class membership as the defining sites and Dreamings of the estate concerned. This may include being of the same subsection patricouple, the same patrimoieties, or the same semimoiety, as the country and its original (or rather erstwhile) owners. This is another reflection of the principle that, while rights may in some senses be ‘achieved’, the classical Aboriginal systems were very much geared to corralling such achievements within structural constraints which worked counter to a meritocratic approach.

\(^{17}\) These expressions are typically oblique references to the placement of song verse handover points at particular stages in the recounting of the progression of a Dreaming through a set of sites. The next group ‘picks up’ the authoritative relationship to the singing of verses from a certain geographical point onwards. This is the kind of ethnographic fine grain which gives substance to generalisations, still at least partly true for many areas, to the effect that land tenure ‘depends on’ ceremony.
to it through one parent and a secondary connection to it through the other.\textsuperscript{18} While a person with a secondary connection to a country will normally have contingent rights there, such as ordinary economic use rights and rights to certain knowledge, they will not normally assert core rights. But a person with a primary relationship to a country does also have contingent rights in the same country. Someone with a strong secondary relationship to a country may perhaps enjoy a number of core entitlements as well as contingent ones, especially if they are moving towards succession to that country.

For example, one often hears people say of a country to which they have a secondary or non-primary form of connection that they ‘got half saying on that area’ without being ‘main people to talk for that area’. To speak authoritatively \textit{for} an area is what I would normally define as a core right (see further below), one sometimes expressed as having ‘got full saying on that area’, or as ‘being boss for the area’ who can ‘talk for the country’. Someone with only a ‘half saying’ right to speak for the country does not have an untrammelled right to speak for it, but can nevertheless play some kind of role in the exercising of the core right of representing the country. They have more than the right merely to be consulted. And there are many people who enjoy only contingent rights in a country, and lack core rights, but who do not make a claim even to a secondary or tertiary relationship of connection or affiliation to the country concerned.

For example, in the classical systems, a man who came from a distant area and who had no ancestral connections to the country of his wife would not for that reason be in a ‘secondary’ (or ‘tertiary’ etc.) relationship to the country in the sense usually understood, but would still have every right, and typically also an obligation under bride-service traditions, to make normal day to day economic use of the land and its products as a hunter and forager. Today he may be more likely to have some obligation to take up employment in his wife’s residential community and enjoy (and share) the fruits of local wages.\textsuperscript{19} These usufructuary rights are rights contingent on those of having a spouse’s standing, and could be removed in the event of a separation. They would also, potentially at least, be the same rights whether he was on country to which his wife had primary claims or on country to which her claims were of a secondary kind. That is, she would be just as free to live on her primary (eg. father’s) country, as on her secondary (eg. mother’s) country, and it is improbable that her spouse’s freedom to make ordinary use of the two areas would be any different.

When we speak of primary and secondary connections to countries, we are usually speaking of ties which belong to individuals or to sets of close siblings, for example, rather than referring to features of groups such as clans or ritual groupings. It can sometimes be the case, however, that an entire group such as a clan does have a range of formal connections to one or more estates other than its own. An example is North East Arnhem Land where sets of clans with estates connected by ancestral Dreaming travels are linked in what anthropologists have at different times called ‘phratries’, sets of ‘sister clans’, or ‘strings’ of patrilines.\textsuperscript{20} The focus of anthropological analyses has been on the composition of such sets as units made up of sub-units, or as egocentric ‘strings’ whose composition varies considerably depending on context, but the relevant ethnography at least

\textsuperscript{18} In terms of small landowning groups, estate group exogamy (out-marriage) was the predominant classical pattern. In terms of language groups, linguistic endogamy (in-marriage) varied widely, from predominant to partial to rare. In recent times and in rural regions one occasionally comes across the view that language group endogamy is to be avoided as being ‘too close’.

\textsuperscript{19} This is a thought based on anecdotal evidence rather than systematic research, but one that might be explored in the first place using community employment statistics.

suggests that a patrilineal group or clan might be said to have differentially ranked connections with a set of several different estates in something like the way persons do.

**Presumptive and subsidiary rights; potential, actual and inchoate rights**

In a number of different ways, then, the primary/secondary distinction, which applies to a person’s connections to different countries, is rather different from the core/contingent rights distinction. Nancy Williams prefers to avoid the implications of ‘an automatic or fixed hierarchy of rights in land that numeric terms may convey’ and thus prefers ‘presumptive rights’ to ‘primary rights’ and prefers ‘subsidiary rights’ to ‘secondary rights’. In the Yolngu case:

Individuals acquire certain rights in a direct way determined by patrilocaliation; that is, each one succeeds to certain rights by virtue of membership in a patrilineal clan. Some subsidiary rights are inchoate rights and some are potential rights. Inchoate rights exist and need only to be activated in a specific way. Potential rights are rights that may or may not come into existence.

Inchoate rights would include, for example, a Western Desert person’s rights in the countries of that person’s father, the person’s mother, and the person’s birthplace, all of which would be established at birth:

Thus a child may belong to two or even three estates. He does so actually, not potentially. But the rights are inchoate; more is required before they can be exercised in respect of any one estate.

Here we have an operational distinction between actual rights, inchoate rights, and potential rights. A major practical difficulty in any one case, in a native title context, is that of carrying out ‘ethnography’ on who holds what kinds of rights, and therefore of writing a report which will be used to decide whose case for the assertion of native title rights is likely to be worth arguing legally. Such anthropological investigations are carried out in an already charged atmosphere, especially if there is a financial agreement in the offing, and cannot be represented as some kind of context-free scientific pursuit of ‘the facts’.

Although it is one fraught with difficulties, this situation is one in which I suggest that the anthropologist should present as clear an account as possible as to who holds what kinds of rights and in the eyes of whom, and avoid intermingling the ethnographic process with that of negotiations as to whose names will be on what lists of claimants or beneficiaries. It may be that core people associated unambiguously with a particular area will seek to limit the dimensions of the claimant or beneficiary group to those with activated rights, and may seek to exclude from the legal process those with inchoate and merely potential rights. Those with inchoate rights may seek to activate them in the native title context, thus distinguishing themselves from people who have merely potential rights or no rights and competing with core people for standing. They may have arguably valid reasons as to how their inchoate rights would have been actualised were it not for the intervention of forces beyond their control, such as the removal of children to mission dormitories.

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21 Williams’s footnote here refers to the introduction of the notion of ‘inchoate rights’ by E.A.H. Laurie QC in the Ayers Rock land claim in 1979. ‘The concept was subsequently taken up and developed by the Aboriginal Land Commissioner in his report on that claim (1980: 5, para. 27). (Williams 1986:191).

22 Williams (1986:175).

In such a situation, from whom do the lawyers take their instructions? And who decides who will give instructions? In a sense, the question of who holds native title rights has to be answered bureaucratically, at least to a degree, before it can be put to the determination process. There will usually be a tug of war between collectivist and atomist forces. These forces are likely to exist in the relevant Aboriginal community as well as among anthropologists, lawyers and administrators. In the Aboriginal community, it may be those with potential, inchoate or contingent rights only who are most active in pressing for a minimal definition of who is a holder of native title rights. The people with core rights and primary connections may seek a more substantial definition so as to reflect their values and also contain the number of claimants or beneficiaries. Within Indigenous organisations there can be a struggle between those who want to maximise the manageability of a group by keeping it small and tightly defined, and those who want to do the greatest good for the greatest number, perhaps reflecting a communalist and egalitarian ideology.

As Williams has said, ‘primary’ and ‘secondary’ are perhaps over-neat and restrictive as a way of classifying interests in country even if we restrict their application to kinds of connection rather than kinds of rights. It may be better to distinguish ‘primary’ connections simply from ‘non-primary’ ones, given that the latter may present a range of variation from substantial to quite insubstantial links to countries, and there may be times when the same links are ranked differently depending on the demands of context.

**Ranking of connections and rights**

Although the term ‘primary’ is in this instance a part of anthropologists’ usage, the concept has common equivalents in Aboriginal English and Aboriginal languages. Among the various English expressions referring to a primary country connection are ‘main-place’, ‘number-one country’, and the statement that certain people are ‘boss for’, ‘come in front for’ or are ‘longa [in the] lead for’ a certain country. Expressions of these concepts in Aboriginal languages may be semantically similar, although very much more varied in actual wording. In the *Milirrpum* case of North East Arnhem Land for example, Nancy Williams records that it was clear in every case that Yolngu witnesses regarded one group as owners, holders of radical title; they were said to be *ngurrungu* (“first”), or *bunggawa* (“boss”), for the land in question.

Quite often there is an expression in Aboriginal languages which people translate as ‘traditional owner of country’ or ‘person who really belongs to the country’, and it may be...
an idiomatic expression using ‘country’ as its stem (as in the Western Desert varieties which employ ngurraritja, ngurrara, etc., or in Mudbura’s use of ngurramarla), or it may be a semantically opaque term such as a word referring to patrilineal totems and those who hold the relevant country patrilineally (eg. mangaya (Warumungu)). In the same languages or other languages there is often a suffix denoting ‘native of’ or ‘person who really belongs to’, which is added to a name for a major site or area, as in the following: -wardingki (Warlpiri), -wartingi (Warlmanpa), -warinyi (Warumungu), and –ngarna (Mudbura).

One may also hear people asserting that a certain area is their ‘number two country’, that they ‘come into’ it ‘halfway’, that it is ‘part of my run too, you know’, or is an area for which ‘we come behind that main mob’. These expressions usually refer to a non-primary but significant form of connection. Without further research, however, such terminological categorisation of individuals should not be assigned exclusive weight and certainly should not be the only considerations driving an anthropologist’s analysis of relations between groups and countries.

This is because claims of a non-primary kind may be described in similar ways in a limited conversation but may include a wide range of degrees of connection in actual practice. One of the jobs of anthropologists in native title cases is to provide independent and detailed evidence which can flesh out such broad-brush statements. Clearly, in the absence of field mapping of Dreaming track sites and analysis of songline sequences it would be difficult to compare the foundations of the claims of several different groups who stated that they ‘came into’ the relevant parcel of land or waters on the basis of Dreaming stories or song lines. Sometimes a tenuous thread of connection is used as the basis for a person’s claims, claims which may have been publicly confirmed by the claimant group. Tenuousness of connection is not in and of itself fatal to the recognition of rights, within the practices of a certain group, although some parties to a native title case might argue this position from an outsider perspective. An anthropologist or lawyer who goes into court ignorant of the different bases and strengths of claimant connections, and the reasons why some tenuous claims have been found acceptable by the group, may find it more difficult to engage with such evidence.

I suggest that the terms ‘primary’ and ‘secondary’ or (preferably) ‘non-primary’ be reserved, in native title anthropological contexts, for forms of connection or affiliation between people and places, rather than used to speak of types of rights and interests as such, and that kinds of rights be differentiated in other ways. One axis along which I suggest rights be differentiated is that of core rights versus contingent ones.

**Core and contingent rights**

Applications for the determination of native title include listings of native title rights and interests claimed by the applicants. Some listed rights are very broad, such as:

- the right to possession of the land and waters to the exclusion of all others
- the right to occupation, use and enjoyment of the land and waters to the exclusion of all others
- the right to inherit and bestow native title rights and interests
- the right to resolve as amongst themselves disputes about land tenure

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The majority of listed rights, however, are more specific, and include such phrases as:

- the right to hunt and fish on the land or in the waters
- the right to take natural resources from the land and waters, including digging and using minerals and quarry materials such as flints, clays, soil, sand, gravel rock and all other resources
- the right to dispose of such resources by trade or exchange
- the right to move about on the land or waters, or live on and erect dwellings on the land
- the right to conduct ceremonies on the land
- the right to grant or refuse permission to any other person to do any of the above
- and so on

Such listings often make no distinctions of type among such ‘rights’ although the order in which they are given may indicate that some are more fundamental than others. But they are not all of the same order or character. It is of course a matter for investigation in each case whether or not certain rights are held by certain people over the country at issue, but ‘country’ – in the sense of units of customary tenure - is not necessarily the only framework or structure in which such rights may be held.

For example, it is common for there to be a distinction between rights over countries, rights over sites or areas within countries, and rights over things that are part of countries. A site within a country may be one over which certain people belonging to neighbouring countries have rights, while they assert no similar rights over the country of that site as a whole, or even over the ‘soil’ on which the site itself is located. That is, pre-eminent rights to control a site, and obligations to protect it, may belong to people who say it is not a part of their country. To simply define such people as ‘native title holders’ in a way which fails to distinguish them from the country’s owning group members may be to sow the seeds of conflict, especially once these relationships become bureaucratised.

Rights in ‘things’ in this context may range from access to specific natural resources, rights to use traditional trackways or ‘easements’ through countries, and other ‘material’ kinds of interests, to seemingly more ‘abstract’ rights in sacred stories, objects, designs, songs or ritual performances associated with sites and countries. There is also a widespread but not universal pattern by which traditional rights in the country where a modern residential settlement is located have been extended to privileged rights not only over the receipt of community services such as housing but also in having a corner on the supply of service delivery itself. Given that service delivery is the main or only economic activity other than transfer payments in many settlements, this can be important. An even greater emphasis on native title holder status in the allocation of benefits and job opportunities provided by native title corporate bodies is to be expected.

It is not always the case that the more or less readily identifiable group whose country it is holds such rights exclusively. Groups may have intersecting and overlapping estates, sharing full rights in certain locations. Not everyone who shares such rights necessarily

31 On easements see Doolan (1979), and on the remarkable distances some groups travelled through other countries, under strict conditions, to get red ochre, see Jones (1984), Wheeler (1910:68-69).
33 There is likely to be much resistance in mainstream Australia to the idea that an incident of native title might include privileged access to services and job opportunities, despite the fact that it may be closer to ‘self-management’ by Aboriginal rules than an egalitarian and democratic distribution of rights and things on the basis of residence in a community. This is consonant with the fact that ‘self-management’ is largely acceptable to the liberal-democratic public, and in some of its facets to the bureaucracy, only on condition that it is not based on ‘self-determination’ as to who is to benefit from it.
does so on a group basis, because the connection of a non-member to a group’s country may be by way of their own birthplace, or achieved ritual eminence, or some other individual pathway, rather than by way of group membership.

**The core/contingent distinction**

Listings of native title rights also frequently fail to make distinctions between culturally logical relations between different kinds of rights. Clearly many of these rights flow from certain others within the same list, and might therefore be distinguished as *contingent rights*, which flow from *core rights*. I mean ‘contingent’, not in the sense of ‘accidental’ or ‘uncertain’, but in the sense of ‘dependent upon something else’, ‘consequential’ or ‘conditional’.

Those rights which flow from others are often the kind of rights held over an area by non-claimants to that area in native title cases. The mere fact of having a right to fish and hunt, for example, may be one held under a standing licence on the grounds that one is married to a ‘traditional owner’, or is a long-term resident on the land, or on some other contractual or historical grounds. It might also flow from being a primary land-holder under customary law, that is, from being a holder of core rights. In all cases, however, the right to fish, or hunt, or live on the country, is a contingent one, because use rights are not self-sustaining. For a ‘traditional owner’, hunting rights may be asserted to flow from being an ‘owner’ of the country. For that person’s brother-in-law, hunting rights over the same area may be asserted to flow from being married to an owner of the country. For a next door neighbour in a settlement street, someone whose own traditional country is 300km away, hunting rights over the same local area where they live might be asserted to flow from fifty years of family residence on the country concerned and at least acquiescence in this state of affairs by the area’s ‘traditional owners’. But it does not arise directly from the cultural landed-group identity of the next door neighbour him- or herself.

An elementary core right is that which enables a person to claim a certain area as their own ‘main place’, their own ‘proper’ or ‘real’ country, and thus to assert a fundamental proprietary relationship to it. Some of the other core rights asserted by native title claimants are concerned with the bestowal or recognition of specific other rights, and might be described in particular as meta-rights (rights about rights), or rights-generating rights. These include the right to transmit further transmissible rights to make proprietary claims on the country, and the right to pass on certain aspects of group identity through the assignment of names, languages or totems to children, for example, as well as through the handing on of knowledge, including designs and songs, which may symbolise the relationship between a group and its country.

**Transmission of rights**

Transmission of such core rights may be described as either active or by default. In systems where unilineal descent is a principal means of acquiring primary land rights, for example, a person does not have to make deliberate decisions about handing on country rights, or even be mentally competent, in order to be someone through whom primary rights pass to lower generations. The system is sufficiently prescriptive for cases of unilineal descent of rights to be regarded as the default situation. In such a case a person as ancestor is in a sense a conduit for rights rather than a conscious bestower of them. In many regions of Australia the passing on of primary rights in country through the patriline was, and in some regions remains, the preferred mechanism by which core rights in country descend. The process is not completely automatic, but it is often the order to which members of the group subscribe, often doing so even after the practice of this order has diminished or has come to an end among younger group members.
The active aspect of this kind of transmission may lie in the decision to accept this default transmission of rights to oneself as descendant, but very often this is again merely the ‘understood’ normal practice. In fact most assignments of people to country, or at least to a primary country affiliation, begin at birth or in childhood, when they are in no position to make such decisions for themselves. In any case, such a system is not personally voluntary in character and in general an individual could not—and in most regions still cannot—make a unilateral decision about which ancestor’s country is their own primary country. The views of others are an essential ingredient in the assignment of rights so long as these rights are communal in nature, even when, due to recent cultural change, identification with a country group has become much more voluntary than it was before.

As they grow up, some individuals may take an active decision to shift the emphasis of their country affiliations to a usually less preferred option such as the assertion of a controlling interest over a mother’s mother’s or father’s mother’s country. Such shifts are often due to the making of succession claims over unpeopled estates, or may arise from shifts of place of primary residence, for example. But in these cases the person concerned still has to work to muster support and recognition for such non-default claims. These kinds of situations, although made more frequent by depopulation as a result of colonisation, cannot in my view be argued to be recent in origin.

In areas where there is not now, or never was, a single heavily dominant default mechanism for the transmission of rights in country, people have to more actively pursue their or their group’s case for rights in a country and may have their claims more frequently questioned by their peers. A wide variety of people, in these circumstances, may be able to mount claims of some kind or other on a multiplicity of different bases, and unanimity as to who among these contenders has a primary connection to a place or country may never occur. In these cases, and others as well, it can be impossible for the outside observer to come to ‘certainty’ as to ‘who exactly’ holds which rights in what areas. Expectations of simple certainty in these cases are naïve and unrealistic, and rest on the kind of legal and corporate rigidities that are far more realistically desired and achieved in industrial societies. In an industrial society the rules for dealing with rights in land are geared to transactions between strangers rather than to transactions between kin. Objective records, stable agreements, and fixed and codified rights are a necessity where the social fabric has to cope with transactions between unrelated persons. Kin have many claims on each other apart from relationships to do with rights in property. Kin relations have a wide range of emotional colouration, can alternate quite quickly between solidarity and conflict, and are often the focus of feelings of jealousy and rage as well as of amity.

To demand of a kin-based society that it must produce simple, stable and definitive lists of rights and right-holders in land and waters is ethnocentric. It can also be counterproductive, in the sense that attempts to arrive at definitive lists of which living persons hold which rights in what country may engender the very kind of conflict between

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34 These cases are most likely to occur in the Western Desert and in those rural and urban areas where colonial impacts have been greatest.
35 Writing of the Lozi of southern Africa, Max Gluckman said: ‘…we say that a person or a group ‘owns’ a piece of land or some item of property. We are speaking loosely when we use this sort of phrasing: what is owned in fact is a claim to have power to do certain things with the land or property, to possess immunities against the encroachments of others on one’s rights in them, and to exercise certain privileges in respect of them. But in addition other persons may have certain rights, claims, powers, privileges and immunities in respect of the same land or property. … a chattel, like land, may be subject to a cluster of rights held by different persons in terms of their relationship within the network of kinship ties.’ (Gluckman 1965:36, 44-45).
claimants which certainty-seekers fear. There is no certainty in a false simplicity. It is usually the complexity of claims over country, not some allegedly vague indeterminacy or inherent rubberiness of the claimancy situation, that prevents their reduction to fixed formulae. It is of course for the convenience of the state and bureaucracy that such demands for fixity are likely to be imposed on native title claimants. But codification, at least for many such groups, is itself contrary to their own laws and customs. As Aboriginal people say so often, ‘We’ve got it in our heads. You put it on paper.’ It will be interesting to see if codification of native title rights and interests actually succeeds in imposing itself on custom. For some, at least, codification may come as a relief from negotiation and conflict. For others, it is likely to be read as yet another ingestion of the indigenous by the exogenous.

Earlier I discussed ‘default’ mechanisms by which rights may be transmitted, and the active way in which claimants may pursue different bases of claim in the same country. There is, however, also a practice of active transmission of primary (and further transmissible) rights to country which has been documented in different forms in different places. It occurs, for example, when senior men in the Borroloola region decide to incorporate a young person into a certain country group by means of a ceremony and the making of certain objects. It occurs when a defunct land holding group is restored through the divination of a newborn’s conception site in its country, and the person so conceived may establish a new lineage of primary land holders for that country. It occurs when a grandmother, in a cognatic descent group system, decides that certain of her grandchildren will be ‘under her’ for purposes of landed and tribal identity and is able to get others to accept this. It occurs when people decide that a child born to a non-Aboriginal father and an Aboriginal mother is to belong to its mother’s country, or that of the mother’s husband, or that of the child’s place of birth, and so on. And it occurs when a couple who have no children of their own are ‘given’ a child from another family so that the child may be ‘grown up’ in such a way as to inherit country rights through one or both of the adoptive parents.

Distinct from this kind of right to assign core rights flowing from identity, a right which in theory may be passed on perpetually, is the capacity to bestow rights that are not readily transmissible by the recipient to third parties. These are rights to use the country of others, or usufructuary rights. Non-transmissible rights received in this way are not of the same character as the same rights received by birthright or incorporation, even though the concrete enactment of the rights will appear to take much the same form in both cases.

A common occurrence in the bush, in my experience, is that when land holders and others go fishing, for example, and the latter do not have much success, the difference may be attributed to the fact that the country is favouring its own people and recognises that the others are different. The difference between land holders and others is perceived by the ancestral spirits in the water as a difference of smell, in particular the smell of underarm sweat. That is, the ability to exploit fish licitly may be held in common between both kinds of person, but the relationship of land holders to the right is conceived of as an essential one, one of essence, arising from their bodily nature, usually their bodily descent. By contrast, the relationship of non-land holders to the same right to catch fish is non-essential and contractual or historical in origin.

This does not mean, by the way, that all people who smell familiar to the spirits are therefore land holders, because anyone with a history of living in the area will have been already

36 John Avery (pers. comm.).
37 Strehlow (1947).
perceived by the Old People and thus their sweat is already familiar to the country. I have seen people ‘give smell to’ (anoint with armpit sweat) newcomers to sites which the ‘baptisers’ themselves would not dream of claiming as their own, although there is a general preference in Cape York Peninsula for this ‘baptising’ or ‘anointing’ (Cape York English) where possible to be done by senior landowners. A landowner has the right ‘smell’ for their country as a matter of birth. A non-landowner may acquire a recognisable ‘smell’ through residence. Each may regard the other as ‘countrymen’, but they do not blur the distinction between those to whom the country belongs and those of its familiars to whom it does not belong.

**Generic and specific rights**

The core/contingent and primary/non-primary distinctions are different in turn from the generic/specific distinction. A generic right would be, for example, the right to use the vegetation in an area, and under such a head might be specific rights such as to take timber for making shelters, to use dead wood for fuel, to use live wood for making artefacts, and so on.

One of the pitfalls of codification, especially when it comes down to the level of cementing into legal documents people’s rights to specific natural resources, is that the more specific the rights codified, the more unwieldy the consequences. On the other hand, the vaguer the specification of rights, the greater the difficulty with which the listing of rights can be matched to daily situations and thus provide the kind of ‘certainty’ so desired by bureaucracy and industry.

For example, members of a traditional ‘community’ of rights-holders may have the right to catch marine species. But, actually, certain species at certain stages, such as mature barramundi or dugong, may be prohibited prey for anyone but older men in some groups. In some regions women may be restricted to catching fish only by line, net or hand, and may be prohibited from spearing fish at all. In at least one region (Wik) women may spear fish so long as they do not employ a spearthrower at the same time. There may be times when a person’s temporary condition (e.g. when menstruating, pregnant, recently bereaved, newly initiated) prohibits them from entering certain foraging places or from killing certain species even in their own country. The basic point here is that one can specify very generic kinds of rights as native title rights, adding that they may be trammelled and qualified in various ways according to local customary law, but one can never go on unravelling the nature of specific rights to some mythical point of ‘completeness’ where every right, and all conditions under which it might properly be exercised, can be exhaustively described and enshrined on paper.

**Can rights-holders be definitively listed?**

The unattainability of providing definitive lists of rights-holders is not just a result of the breaking down of traditional discipline, although it can be greatly exacerbated by it. It is abundantly clear that some rural and urban claimants exhibit a lot more mutual denial, overlapping claims and overt conflict over who has what rights than would have been possible among their ancestors. The erosion of ritual and gerontocratic authority in such cases, and the imposition of Australian law, may to a degree have opened Pandora’s box,

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40 Susan Woenne-Green has alerted me to the generic/specific distinction in the context of specifying native title rights.

and one cannot assume that conflict over who holds what rights is merely the result of a loss of knowledge of the country, or of each other, among the claimants.

But objectified and definitive lists of rights-holders may also be impossible even among the most classically-orientated people of remote Australia. Fred Myers, who has long worked with Western Desert Pintupi people, whose adherence to traditional religious Law is legendary, wrote:

Identification refers to the whole set of relationships a person can claim or assert between himself or herself and a place. … Identification is an ongoing process, subject to claim and counterclaim, dependent on validation and acceptance or invalidation and nonacceptance. … Such a political process … enables claims of identification to be transformed into rights over related aspects of a country. Such rights only exist when they are accepted by others. … This graded range of claims, though not well-marked by linguistic forms, is an important property of a state of affairs open to much negotiation.

Landownership in the Western Desert is thus an elusive matter. Only belatedly did I come to see the mystery as part of the system itself: Ownership is not a given, but an accomplishment.42

Such people are at one extremity of the phenomenon, and should not be taken to be archetypical of Aboriginal Australia. One could put forward descriptions of far less ‘elusive’ systems from other parts of the country. But the native title legal and administrative system, if it is to be pragmatic rather than ideological in cast, has be capable of living with the fact that it is not normally possible for an anthropologist to make simple and dogmatic statements about which rights in which areas are held by exactly which people. This cast-iron approach suffers from the legendary failings of cast-iron – it tends to fracture easily.

Rights of ‘traditional owners’ versus those of ‘historical people’

The possession of one or other of these two differently-founded kinds of right – core and contingent - marks the primary line of cleavage between ‘traditional owners’ and ‘historical people’ in many places. These expressions are both now widespread in Aboriginal English. The term ‘traditional owner’ comes from the Aboriginal Land Rights (Northern Territory) Act 1976 (Commonwealth), where it has a legal definition, and has a reasonably stable vernacular sense. The phrase ‘historical people’ seems to have arisen in Queensland soon after the passing of the Aboriginal Land Act 1991 (Queensland), and derives from the fact that under that Act it is possible to make a claim to certain lands on the basis of historical association as well as, or instead of, traditional affiliation. It took nearly twenty years for the English phrase ‘traditional owner’ to become common usage in Cape York Peninsula, where the possibility of legal recognition of land rights for so long seemed a lost cause, but it took a far shorter time for the term ‘historical people’ to spread west and south from Queensland to much of the rest of Australia during the 1990s. This seems to have been a distinction waiting for a tag.

In common Aboriginal usage, ‘traditional owners’ are deemed to have rights to assert a relationship with their country as a matter of their origin there, whether they live there or not. They ‘really come from’ or ‘properly belong to’ their country in an intrinsic sense. The ‘traditional owners’ are those with proprietary relationships to the country, possessors of core rights as well as contingent ones. ‘Historical people’ are living where they are because

of historical factors such as migration and deportation, and do not ‘really come from’ their current location. They are not landless as they usually assert themselves to be ‘traditional owners’ of country elsewhere, and assert only contingent rights in the country of current residence. This is putting it somewhat crudely, and there are cases where people whose historical ancestors were immigrants reject the second-grade standing this may impose upon them in the eyes of others, but as a heuristic distinction it is useful and it is one that is commonly important in the way groups are identified by Aboriginal native title claimants themselves.

The rights of ‘historical people’ in the resources and sites of the area where they currently reside are not necessarily geographically circumscribed along the lines of traditional land tenure units. The members of a ‘community’ - in the sense of a township’s residential population, for example - may enjoy a common foraging right within a certain radius of the township, or along certain routes between settlements, but this does not mean that all the members of the community are in customary-lawful occupation of the land in a uniform sense. This is one more reason why a residential community is a poor candidate for being described as a group holding native title.43 Such a description would combine all locally resident rights-holders regardless of the different bases on which they hold certain common rights. This is a recipe for bitter conflict.

This reminds us of a general point that is often not well understood and must be emphasised. This is that definitions of ‘incidents’ or rights that merely describe the capacity to perform a particular kind of action on or in relation to land and water are of little use or value if they stand alone. They must be located, placed in context, in terms of customary law. This means they must be located in terms of local cultural meaning. When I cut a tree it is not necessarily the ‘same action’ as when you cut a tree - even if it is the same tree and the same axe. The deeper jural facets of actions, not just their immediate permissibility, are an integral part of their rights-based status, and not just a nebulous ‘cultural background’ outside them. That is, we need to know how such actions flow from which kinds of standing the actors have, in order for descriptions of rightful actions (eg. ‘to dig clays from the ground’) to be made relevant to the task of understanding what local native title laws and customs might amount to in any particular case.

Possessing some or even most of the specific use rights listed in a native title application therefore does not of itself generate ‘traditional owner’ status, or even partial ‘traditional owner’ interests, at least as far as the relevant Aboriginal people are concerned. That is, one may be a holder of a right to live on and use country, but without a core entitlement of a proprietary kind one cannot become in general a bestower of such a use right on third parties.

This statement needs some qualification. For example, if one is a landowner and invites another person to come and live at one’s outstation, that person may be free to bring their parents-in-law, widowed mother or other relatives, where these persons are a normal part of their entourage, without requesting a specific extra permission or invitation from the land holders. This right of senior people to constitute their residential group as they normally see fit is generally not suspended simply because those senior people are enjoying a licence to be visitors on the country of another group. On the other hand, the more a visiting group is visiting as a party the more the event is formalised and ritualised, at least in classical practice.44

43 I have discussed various meanings of ‘community’ in this kind of context, and in particular the fatal problems of recognising undifferentiated entitlements to country for all members of particular residential communities, elsewhere (Sutton 1999).
Do you need to know and enact a right in order to have it?

The capacity to understand and exercise such rights is not uniformly distributed among native title claimants, many of whom will be small children and some of whom may be intellectually disabled, for example. This raises the question of whether or not individuals must show the capacity to understand and/or exercise their listed rights in order to be successful claimants.

A short answer to this question is that the nature of their entitlement is communal in its foundation. That is, the holding of a native title right is a characteristic of membership of an identifiable group, or of mutual recognition by others asserting similar rights, and therefore proof of its enjoyment by an individual entails showing that it derives from the person’s membership of or recognition by that group, not from a certain form of personal consciousness or ability. Such rights are enjoyed and enacted by individuals as far as they choose, and as far as their capacity is not hindered by mental or physical incapacity or some other form of hindrance such as distance, terrain, or human obstruction, or some form of prohibition such as the nature of a sacred site, a temporary state of closure due – for example - to a death, or a temporary state of a person who is in mourning, menstruating, pregnant, ill, or recently initiated. Indeed, observing these limitations on use of country for foraging or other pursuits is typically an obligation that is part of the Law of the country concerned.

It is the policing of land-based obligations, more than the obligations themselves - which in many cases are incumbent on anyone who goes there - that tends to be a right particularly associated with land holders. But land holders acquire the foundations of such policing rights through affiliation to a collective property-holding and identity group, not through individual realisation. On the other hand, policing is a function of senior people, and individual abilities and structural positions, not mere age and group membership, underlie the attainment of this status.

Evidence that claimants have physically exercised customary rights in country is useful in making concrete their claims before an outside audience. But to demand such evidence as an absolute necessity of proof of the existence of all of the rights claimed would be onerous and illegitimate. For example, I may have the right to use my freehold land for the harvesting of trees, or pasturing stock, or for growing crops. I do not have to cut down my trees in order to prove I have the right to do so. Were I to do so, proving the existence of the same right the next day might be difficult. What is necessary, should I want to activate such rights, is that they come to me as an incident of my title, that is, that they flow from the nature of my legal relationship with the land.

Can one have rights of which one is ignorant? In short, yes, and most citizens of any nation state have certain rights of which they are only partially or even dimly aware. Some people nevertheless seem to hold the view that unless each native title applicant, as an individual, can spell out their customary rights in country, they cannot claim title. I reject this.

There is a legal precedent from the Full Federal Court where a parallel issue has arisen and which may appear to provide a problem for the view I have just expressed. The question

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45 The right to choose not to enact a particular right - for example, to choose to avoid going fishing in one’s own waters - is just as valid a right as the right to fish. Therefore evidence that one has not enacted a certain right cannot be taken as proof that one does not have it, or has lost it.

was whether or not, under Northern Territory land rights legislation, a ‘local descent group’ s infant or otherwise spiritually ignorant members can share ‘common spiritual affiliations’ to a site on the group’s land. Briefly, to deny the proposition is to confuse affiliations with knowledge. One does not have to know anything about cricket in order to be recognised as a member of the Melbourne Cricket Club - one merely has to meet its criteria for membership and pay dues. It may be necessary for the players, at least, to know something about the game, and to be able to play it, if ‘cricket club’ is to be an apt description for the MCC - that is a matter for the laws and customs of the club concerned, and also for those of the wider public who police the accurate use of terms like ‘cricket club’. If a cricket club by definition must contain at least some members who understand cricket, then a reasonable sample of players and officials could establish this by their evidence.

It is normal for infants and disabled people to be regarded by senior and knowledgable Aboriginal people in their country-based groupings as fellow members of such groupings in spite of their lack of consciousness of the content of their affiliations to the country concerned. The idea that children of traditional landowners are to be excluded from positive determinations of native title on the grounds that they cannot enact their rights or recount how the group is connected to the country is tantamount to the state telling indigenous people that their children are landless because they are children. This is normally contrary to Aboriginal customary law.

The Listing of Rights

Is it possible to make a list of all the specific rights held under a native title, a list that will endure as a permanent account of those rights? That the answer to this must be ‘No’ is a matter not only of practicality but of principle. Hal Wootten has written:

Imagine the absurdity of trying to define say, freehold title under modern Australian law, by looking at the day-to-day activities of particular landowners. Imagine also trying to list exhaustively the rights existing in land held under freehold title in Australia without incorporating into the description the constantly changing system of Australian law of which it is part. …

In short, it would be very difficult to describe all the rights and interests in a block of freehold land in New South Wales except by saying that the owner had the rights given to such an owner by the law of New South Wales, subject to the rights given by that law to other persons (including governments) in relation to the land. Even then the description would only incorporate a snapshot of the rights at a given instance.47

There is no universal formula for setting out native title rights – they have to be analysed and presented separately in each case. In any case the rights listed are a representation – one that may not be very close to Aboriginal ways of representing such things – put together usually by a non-Aboriginal person for a bureaucratic-legal process, not a sophisticated anthropological account of the relevant practices. For that reason all such lists of rights are bound to be artificial, and rather foreign or in some areas extremely foreign to the culture of the claimants. Native title applicants or the anthropologists writing negotiation or litigation reports may, however, find the following listing useful as a guide to the kind of brief

description of rights and interests that may be applicable depending on the circumstances of the case:

**Core Rights and Interests:**

The claimants are entitled to exercise the following rights over the area subject to the native title application, in accordance with the traditional laws and customs of the [named] people:
(a) assert valid proprietary claims over the area
(b) speak for, on behalf of and authoritatively about the area as cultural property
(c) acquire and transmit the core traditional rights and interests over the area
(d) assert a requirement to be asked for permission to access, use or alter the area by those who are not holders of core customary rights and interests
(e) acquire and transmit to other core rights holders the contingent rights listed below
(f) bestow on non-holders of core customary entitlements whether by permission or agreement the contingent rights listed below
(g) resolve as amongst the claimants and, where relevant, non-holders of core customary entitlements, including members of the regional jural Aboriginal public, any decisions or disputes concerning the use of the area or the content of customary laws that define rights in the area

**Contingent Rights and Interests:**

Contingent rights are those which flow from or rest upon core rights. The claimants are entitled to exercise the following rights over the area subject to the native title application, or to permit others to exercise them whether by specific permissions or standing agreements, whether such rights be limited or qualified as to time, place, or manner of being exercised, in accordance with the traditional laws and customs of the [named] people:

(h) physically access and occupy the area
(i) use and enjoy the area
(j) live on and erect residences and other infrastructure on the area
(k) hunt, fish, gather vegetable foods and otherwise collect food from the area
(l) take from and use the natural resources of the area
(m) dig for, take and use minerals and quarry materials such as flints, clays, soil, sand, gravel, rock and all like natural resources from the area
(n) manufacture materials, artefacts or other products from the resources of the area
(o) dispose of products of the area by trade, exchange or gift
(p) learn and communicate cultural, natural and spiritual knowledge, traditions and practices concerning the area
[and so on]

**Basic characteristics of Aboriginal country as property:**
In recent years there has been a renewal of anthropological interest in questions of property. The anthropological perspective on property tends to be dominated by the idea that it is not a thing, but a network of social relations that governs the conduct of people with respect to the use and disposition of things.

By tradition, Aboriginal country is inalienable. That is, it is not a chattel. This, of course, is to focus on country as a thing rather than as a medium of transactions between people. A different way to put it is to say that country does not normally enter into relationships between people, other people and things that could be described as exchanging, giving to or stealing from.

It is not at all common for the record to suggest that territorial conquest has occurred or is even admitted as a possibility. Indeed, the ethnographic record commonly contains statements to the effect that territorial aggrandizement is alien to Aboriginal thought and practice. But in a relevant sense a person or group of people may be alienable from their birth country, but only very gradually over time, perhaps involving two or more generations of ‘forgetting’ about their former origins. For example, Hiatt reports some originally inland descent groups in north-central Arnhem Land which by 1958 had become attached to and then integrated with groups holding coastal country. This process would presumably have involved some kind of gradual self-divestment of their inland country rights and interests.

Far more common than such incorporations into other groups are cases of succession to the countries of extinct groups. Those succeeding to untenanted countries may in their own lifetimes maintain at least an equivalent interest in their original country while taking up new rights and interests, but in time, they, or more likely their descendants, cannot maintain both sets of interests and their rights in the original country will diminish or disappear. This may more often be a case of the descendants of successors simply not taking up rights in the original country of the original successors, however.

A second fundamental characteristic of rights and interests in Aboriginal country is that they are held communally. In a sense, Aboriginal country is thus defined more by inclusion than by exclusion, although both are present. Sometimes only one person is left who claims a country but this does not establish individual tenure in principle. Countries remain collective possessions in their basic construction.

Thirdly, while it is true that physical contact with and knowledge of the geography of a country plays a role in the maintenance of rights in it, as Bruce Rigsby points out, following Stanner, customary Aboriginal rights in rem [in things] in this case flow ultimately from rights in animam [in the spiritual]. Another way of putting that is to say that these kinds of rights flow from aspects of identity. Among some Aboriginal groups, the spiritual basis of one’s country identity no longer consists of a complex combination of Dreaming-based ritual and other relationships and relationships to ancestral human spirits, but has been simplified largely to the latter. For some people the identity basis of interests in a traditional country may have shifted emphasis from the spiritual to an historically, politically and racially grounded ethnic identity. However, it is also important to note that these identities still usually have their roots in the classical past of the families concerned.

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48 One of the more important books to have recently appeared is Hann (ed) (1998). In relation to Aboriginal Australia see Rigsby’s very useful survey of property theory (1998).
50 Hiatt (1965).
The extent to which these simplified or more secularised bases of interests represent a rupturing of tradition, or an attenuation of it to the point where there is no longer an observance of traditional laws and customs, is a somewhat subjective question. In a native title case, claimants may establish that their group asserts and practices certain rights in a country, and neighbouring indigenous groups may agree with them, but if the basis of such rights is no longer one of ‘traditional law and custom’, and is something quite different or is a resurrection of past practices which have fallen into desuetude, they may have a hard time getting their case accepted. Establishing this is not, however, strictly a matter for anthropological opinion. There is no technical anthropological standard for ‘measuring’ such changes. The whole idea of an anthropologist, or for that matter the judiciary, opining or deciding when it is that a group’s traditional laws and customs have been ‘washed away by the tide of history’ is highly problematic. This concept of ‘washing away’ is ill-defined, and how it gets applied in practice is intensely subject to the political inclinations of whoever applies it. It is not a concept with a history as a term of art in the social sciences, nor is it, as far as I can ascertain, a concept with a history in Australian law and its predecessors. Presumably, the concept will gradually attain an operational definition as determinations of native title accumulate. But there are already clear inconsistencies between the ways the concept is being applied on different occasions.

Traditional Aboriginal rights in country do not exist in isolation from obligations. These obligations include the observance of restrictions and taboos. In fact, the emphasis of the native title process on ‘rights’ obscures the fact that stewardship roles, even more than rights, lie at the heart of holding country in Aboriginal tradition. By stewardship I mean the care for and maintenance of different aspects of the country including its supernatural powers, knowledge of it, religious enactments or objects that relate to it, and physical care as well.

One might think of obligations as dependent on rights in the sense that the state of being obliged to care for a country rests on the prior right to claim ‘traditional ownership’ of it (ie. having both core and contingent rights) or to claim to be a licit user of it (ie. having contingent rights only). But both rights and obligations in this context flow from country-based identities of persons and rest on relationships between persons.

Fred Myers makes the important point that co-ownership of country is a sign of transactions in shared identity. The other side of this coin is that distinguishing one’s own country from those of others is an exercise in autonomy, manifested in the right to be asked, for example, about visiting the country. These two principles, which exist in tension with each other, are highly general across Aboriginal Australia. This is not to say that Aboriginal land tenure is ‘just grist for the mill’ of symbolic activity, because the land and waters of one’s own region were also, until recently, the only source of the basic necessities of life. Under new conditions they may continue to have economic importance, not only because of bush tucker but also because of royalties and rents received as owners, or because of compensation arrangements. If we make no distinction between economies of meaning and economies of economics we have lost an important distinction.

52 Even more problematic is the spectacle of a courtroom in which a number of non-Indigenous persons, at least some of whom are secular humanists and atheists, sit arguing whether or not a claimant group’s members have maintained sufficient spiritual connection to their country for it to count as an element in their proof of entitlements.
54 Myers (1982).
Use of country, access to country

Native title determination applications typically assert the claimants’ right to have access to and use the country concerned. It is important, however, to keep in mind the distinction between the minimal rights enjoyed by bona fide Aboriginal travellers who may sustain themselves with water, shade, fruit, wallabies or other resources while temporarily travelling on other peoples’ countries, and those rights of access and use enjoyed either by those with core rights in the country, or those enjoyed by others who may have contiguous countries or a long history of regular residential use of the country concerned. Particularly since the introduction of motor vehicles and roads and large regional centres, but even earlier during the movement of stock between pastoral leases, for example, modern conditions have greatly freed up the extent to which Aboriginal people might move over each others’ countries. Pax Brittanica has also played its role in relaxing physical territorial constraints.

Rights to access and make use of country that are based on the right-holder’s own connections to the country may be usefully distinguished from those that are essentially contractual in nature. This is something of a simplification, as there is often a negotiable element in a right-holder’s connection itself. But this is no reason to ignore the distinction between rights based on descent or other forms of connection and those based on permissions.

Holders of contingent rights often have them by a standing permission or customary licence rather than by specific permissions. A customary licence to make use of neighbouring countries usually obtains between owners of them so long as they remain on reasonable terms, or so long as a country is not ‘closed’ due to a death or ceremonies, or some other factor is not adduced. Lauriston Sharp’s description of the situation on the lower Mitchell River in Cape York Peninsula in 1933 probably applies widely in Aboriginal Australia:

The right of exclusive use of the land, which is distinguished from ownership [by patrilineal clans], is extended to the children of clan women and to members of clans associated in the same patrilineal line. The right of exclusion is exercised only in exceptional cases, in which there is an actual or pretended drain on the resources of the land, indicating that one of the chief functions of clan ownership is the apportionment and conservation of natural resources. The natives state that a clan may even forbid a man crossing clan territory to get from one of his own clan territories to another, but no example of such extreme clan action could be cited. People gather and hunt, ordinarily, in whatever country they will. Thus there is practically a standing permission which opens a clan’s countries to all, but this permission may be withdrawn by the clan for those who are persona non grata.55

Nancy Williams has written more about the question of territorial permissions than any other anthropologist of Aboriginal Australia.56 I will not attempt to summarise her work here but will draw a few salient points from it and from my own knowledge of the subject, based on reading and field work.

Firstly, people do seek permission to enter or use each others’ countries in many instances, but they may not always or even normally do so in the form of an overt request. A proposed visit to someone else’s area may be informally mentioned as an intention rather than put in

55 Sharp (1934:23), I am not sure how widespread is the practice of assigning exclusionary powers to persons other than members of patrilineal clans, however. In some places one’s powers in relation to mother’s country may be more circumscribed than this.

the form of a request, and to see if there might be any objections. People will not normally attempt to seek such permission if relationships with the owners are so bad that they could expect a refusal. In any case, it can be after the visit that things are ‘squared’ with the owners in what amounts to a debriefing session, sometimes in the form of the recounting of aspects of the visit, or the making of observations on how the country is faring, or the sharing of game or other products taken from the country. An unusually distant visit through countries of people not well known to the visitor would normally have required far more elaborate or formal permission seeking and perhaps formal gift-giving for rights of transit, for example to visit a quarry or pituri stand or to conduct a revenge expedition. Hosts, however, also have obligations to guests, and there is a tendency for reciprocity and balance, rather than an asymmetry between privileged permission-giver and importuning permission-requester, to be the preferred tone of interactions on the subject of intervisitation.

**The right to exclude**

If there is an Aboriginal customary-legal concept relatable to the Australian legal notion of ‘occupation’ it is first and foremost a proprietary relationship with a country, not something closely based upon patterns of physical residence. It is consonant with this that the emphasis of Aboriginal assertions of rights to exclude others in relation to country are first and foremost rights to exclude others from misappropriating country, or its symbols, or the identity which grows out of it. Although there is a right to exclude physically, and the notion of trespass is well developed, the exclusionary right is one that is often qualified in complex ways.

For example, one has little right, under classical Aboriginal principles, to exclude, say, a man’s parents-in-law from coming onto the land of the man their daughter has married. Indeed, under classical laws the young husband typically was obliged to feed his parents-in-law, either by staying with them and hunting for them in the area where they lived, or, if they visited him where he was living, hunting on his own range area and feeding them all the same. If at some stage he and his wife were living on his own estate (ie. his owned clan country, for example, as opposed to his land-use range, which would always be vastly larger) then his in-laws, or indeed his wife, could not normally be sent away from it purely on the grounds that it was his country and not theirs.

So while the man could assert rightfully that his possession or occupation-as-of-right of his own country was itself exclusive of his in-laws, it does not follow that he could tell them to leave his land whenever he liked. In fact there was a general understanding that people of the same general area with cross-cutting kin ties, could - when there was no particular serious dispute occurring - make use of at least the common and renewable resources of each others’ countries as they moved about. As countries in the richer areas may be crossed in as little as an hour’s walking, one can see how it would have been ridiculously inconvenient to have to track down an authoritative member of the group owning each estate every time people wanted, or needed, to shift camp. For a start, not many of these authorities would have been found on their own estates for more than a part of the year, as many estates are seasonally unattractive because of mosquitoes, exposure to cold sea breezes and so on.

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57 Eg. Hiatt (1962); Peterson and Long (1986:63); Kolig (1978:77).
58 Some coastal estates have also been documented which are literally uninhabitable for part of each year due to inundation. For north-central Arnhem Land see Hiatt (1962:282), and for western Cape York Peninsula see von Sturmer (1978).
Evidence of Aboriginal acts of physical exclusion will thus of necessity be comparatively rare.

Compared with rights of physical exclusion, under Aboriginal customary law one has a far less limited power, and culturally a very much more important power, to exclude others from the exercise of rights which are at the core of customary entitlements and which might be described as core native title rights in a legal context. These core rights have far greater historical durability and continuity than rights to classical forms of land use, such as foraging, which are sanctioned by custom but subject to sometimes rapid transformations.

Core exclusive rights typically include, but are not necessarily limited to:

- the right to state ‘proper’ (customary-lawful) proprietary claims over land,
- the right to speak for, on behalf of, or with unconstrained authority about the country and its content as cultural property (i.e. to represent it, in both senses),
- the right to transmit proprietary rights in country to one’s descendants, such that those receiving the rights may in turn pass them on to others such as their own descendants
- the right to be asked for permission to access the country by non-owners who lack existing access rights,
- the right to be asked about granting any serious country-changing interest (such as, in present conditions, the right of non-owners to build a Club Med complex),
- certain ceremonial rights in sites,
- the threefold right to hold, assert and concretely exercise the fullest level of responsibility for the welfare of the country, for example to burn off country as of untrammelled right, in some places to ritually activate increase centres for desired species, or in recent times to authorise dealing with noxious weeds or feral animals.

This domain of rights and powers, not that of concrete residence, is the key location of the exclusionary aspects of Aboriginal customary law concerning country. If concrete residence were a major focus of exclusionary rights under Aboriginal tradition, then one would expect territorial boundaries to have been both much more precisely defined and much more obviously defended than in fact they have been.59

In remote areas local traditional owners may have been initially reluctant to host too many people from elsewhere at the time when missions or settlements were being set up on their estates, but after a time, perhaps when it all seemed such a fait accompli, these resentments did not surface easily or they may actually have withered away, the town area becoming essentially a non-Aboriginal domain for many purposes. But traditional ownership of a township site is not usually forgotten, and can be vigorously reasserted - in some cases resulting in a deal in which the ‘historical people’ who live in the township are to be granted explicitly and in writing a long term right to reside. It is thus possible for long-term residence of non-owners to be recognised by customary owners and for this arrangement to be codified under a native title determination.

I do not suggest that there is always a single, fixed domain of exclusionary rights. Some ‘exclusive rights’ may be nested such that group A’s exclude those of group B but at a higher or geographically wider level the rights and interests of groups A and B may combine to exclude those of groups M, N and O. This is determined by context.

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59 The areas in which boundaries are fairly precise are largely restricted to the richest ecological zones, but even so are not as precise as those of cadastral maps (Sutton 1995b). There is no record of the deliberate visual marking of country boundaries in classical cultures of Aboriginal Australia as far as I am aware.
What are rights?

Rights are more than the mere capacity to act, or the ability to control. As we have seen above, not all rights holders in Aboriginal tradition have the physical or mental capacity to enact their inchoate rights in country but they nevertheless remain identified as members of land holding groups. Furthermore, there are times when people have the power to act to use or occupy or control land in a way regarded by their peers as unlawful, or at least as being outside the bounds of acceptability. It would be stretching the language to describe such powers as rights. If a right is a power, it is only a power to act in accordance with a system of values and principles acceptable to a particular society or group. This can raise problems of proof for rights about which consensus is lacking.

The Macquarie Dictionary says a right is, among other things:

- a just claim or title, whether legal, prescriptive or moral
- that which is due to anyone by just claim

The Western cultural orientation of such definitions is revealed mainly in the use of the appeal to a notion of the ‘just’. An Aboriginal approach to such a definition would be more likely in terms of the authorisation of such claims on grounds of ancestral precedent words and practice and the stated knowledge of contemporary elders regarding the traditional Law or customary dispute resolution procedures concerned.

Individual and collective rights

Examples of individual connections to and interests in sites or countries include:

- birthplace (of self, of a parent, sometimes of one’s own child)
- conception place
- burial place of parent
- initiation site
- personal Dreaming tree
- place or area of main habitation
- etc

Some of these may give rise to proprietary claims over the country concerned, while others do not. This is a matter of local law and traditions. In the southern Western Desert birthplace is a major pathway to rights, not merely in the birthplace, but in the wider country to which the birthplace or a nearby Dreaming track belongs. In some regions a personal relationship, especially a spiritual one, may give a person the right to be consulted about a place or a country, or to be compensated for damage to it, but not to assert it is their own. In

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61 The identification of trees with ancestral beings and mythic figures and their individual human descendants (or manifestations) has long been reported for the Northern Arrernte area (e.g. Pink 1933:186) and the neighbouring Western Arrernte (e.g. Strehlow 1947:68). This is a practice also found in the north-central Northern Territory (see e.g. Merlan (1982) and Sutton et al (1983) for the Roper-Elliott region). Trees under which Wik babies’ afterbirth was buried have sacred associations for these particular individuals throughout their lives, but I know of only one case where such an individual tree-mediated connection gave rise to a claim on a Wik estate, and that was in the context of attempted (and failed) succession to an untenanted estate (my own field work).
the Western Desert a personal spiritual connection to a place may by contrast be a dominant form of proprietary relationship to the country concerned, even though the shared, hence communal, nature of such interests is recognised.

Some individual non-proprietary connections and interests may over time be convertible into proprietary ones, especially during cases of succession to untenanted estates. Some individual connections and interests may over time be convertible into group interests, for example those individual conception cases which lead to descent group claims, as in the Arrernte area.

There has been an argument put forward by Daniel Vachon and Sandra Pannell that needs to be given consideration. It suggested basically that native title research should focus on the individual’s relationship to communal title, rather than on any particular kind of mediation of that relationship via locally defined collectivities such as clans or tribes. I cannot see how dealing with both can be avoided, given the way in which most native title claimants will put their assertions of entitlement during their evidence. An anthropological account would normally be expected to offer an analysis of the way claimants conceive of and describe the sets of persons who hold interests in country, among other things. In most regions this discourse will tend to be dominated by reference to various kinds of groups.

‘Economic’ rights

In classical Aboriginal traditions, use of the material resources of the country is not neatly separable into an ‘economic’ domain. I once asked a senior Mudbura man if a certain kind of seed was edible (it was a Currajong). His answer was: ‘Yes! Old People [ancestors] used to live on Dreaming!’ This species was, as it turned out, a major matrilineal social totem in the region. But it was also very much a major food prior to the arrival of wheaten flour. In similar vein, a number of claimant witnesses in land claims over the years have given hunting and gathering of bush tucker as their first answer to questions from counsel as to how they ‘look after’ and ‘care for’ the country under claim. This may arise from the fact that custodial actions such as burning off undergrowth, talking to ancestral spirits near campsites, cleaning out fouled wells or checking recent tracks near sacred sites were typically part and parcel of days spent foraging on the move, but it can also derive from a perception that to live off the land is to exchange substance with it. People will sometimes say that eating bush tucker from their own country makes them feel well, fresh and happy. The country is in such ways looking after its own, reciprocally.

Traditions of conception Dreamings often involve the expectant mother consuming a particular species of animal or plant, or the father successfully hunting a particular species, or people observing an animal behaving out of character. The spirit of the species then animates the foetus and links the identity of the future child with the location of the special event. These are cases of ‘economic activity’ which are themselves inseparable from the maintenance or creation of spiritual connections to country, connections from which certain rights flow. But where most conceptions are now taking place in and around townships, the potential for the link between conception and place to play a role in the assignment of rights in a variety of countries has declined. With the decline of a decentralised bush economy there has also correspondingly been a decline in the role of birthplace as conferring rights in country. This has not necessarily meant a decline in the possession of rights in country, as descent principles and other factors such as knowledge and long residence may rise in importance when conception and birthplace decline as bases for assigning rights. Some might argue that descent is a less religious form of connection than conception or birth near a certain kind of Dreaming site, but it depends on the facts of the case.

From an analytical point of view it is possible to identify ‘economic’ as opposed to other kinds of rights, but as we have just seen it can be the case that economic rights shade into ritual ones, for example. Economic use rights might nevertheless be broadly broken up into:

- culling of renewable resources (plants, animals, firewood, water etc.)
- extraction of non-renewable resources (stone, ochres, clays etc.)
- exchange of products of the country (often highly ritualised)
- maintenance of species (both ritual and pragmatic means recorded)
- application of knowledge of species properties (eg. medicinal, technological)

It is important to distinguish such economic use rights from economic decision-making rights. Although present-day economic decision-making about Aboriginal land may have considerable continuities with the pre-colonial past, many of the decisions with which people are faced today are on a very different scale compared with those of the past. It is one thing to decide to burn off a grass plain, but it is another thing to decide to lease the grass plain for the car-park of a Club Med complex which will bring in 2000 strangers as a body of new residents.

Under modern conditions, economic decisions can lead to the rapid recasting of the local or even regional political, cultural and racial mix. If, 150 years ago, only five people had any real say in when and how a particular grass plain might be burned off, it is unlikely that a similar group of five senior people would today bear the burden of deciding about establishing a new Club Med complex on the same grass plain. The scale of the event would make it necessary to exercise a ‘right’ of new dimensions and one which would have new kinds of consequences, even though it is a ‘right’ built on old foundations. It should be no surprise that financial, bureaucratic and political decision-making involving unprecedented issues and their repercussions has put a strain on the notion of the ‘exercising of traditional rights’ among Aboriginal people. There can be conceptual difficulties in defining what constitutes a ‘right to consent’ when ‘informed consent’ may require those with traditional authority to grapple with matters they do not claim to understand.

**Hunting, fishing, gathering?**

When trying to explore the nature of contemporary rights asserted by native title claimants it is useful to look at the principles revealed in some of the older, better recorded ways rights in country have been exercised. Part of the value of looking at hunting, fishing and food gathering lies in what they reveal of these principles.

For example, hunting and foraging with tradition-oriented people in the bush often impresses on one the extent to which economic use rights are hedged about with what appear to an outsider as a massive complex of restrictions and obligations.63

In the 1970s senior Wik people would say, for example, that flying fox carcasses, after a meal, should be left lined up neatly on a sheet of bark, with respect, not merely thrown into the fire or the bush. Such an obligation matched the way newly killed species were often spoken to in tones of compassion and unavoidable regret by hunters, and it formed an integrated part of the whole process of foraging properly and as of right. Salt water stingray

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63 Restrictions of this kind are often called taboos. Jon Altman, in his study carried out in north-central Arnhem Land, usefully distinguishes between ‘producer taboos, consumer taboos, and miscellaneous taboos’ (1987:176).
flesh could be washed only with salt water, not with fresh. For freshwater turtles to escape from a capsized 44-gallon drum and head for nearby salt water, as happened on one occasion, was regarded as a potential disaster to be headed off by a collective sprint to intercept them. Only senior men were supposed to drink water from baler shells, at least in earlier times. Wells were to be closed in again with sand after use, otherwise one courted the possibility of lethal thunderstorms. Wells dug out near sacred sites by unauthorised visitors, even those who had an ordinary right of passage through the same country, were considered the causes of illness or threatening electrical storms. At one off-shore place of importance north of Archer River, it was permitted to spear fish, but only if the man held a baler shell on his head and stood on one leg at the same time. At a certain lagoon, where people caught long-necked turtles, the normal words for turtles could not be used in speech and they had to be referred to by a term based on the word for baler shell, an oblique reference to the carapace of the unmentionable turtle.

In Wik classical traditions, as in so many others, there are numerous other restrictions on who can consume which species at which maturation stages. There are restrictions on the gender, age and health status of persons permitted to eat certain foods or go to certain places or to dig certain ground. There are restrictions on fishing at a certain place or extracting water from a certain well after dark, and certain camping areas or whole clan estates may be ‘closed’ due to recent deaths. In the 1970s these closures were normally for a year. One could bathe in most streams, lagoons and lakes but the use of soap in any natural water body was, and I believe still is, strictly prohibited. To move about the bush with people who had been socialised in it was, for this visiting anthropologist, to be in a constant state of apprehension about making mistakes, going to the wrong places, and doing prohibited things. At that time, no one, Aboriginal or otherwise, was simply free to roam the Wik lands unsupervised or out of communication with relevant landowners. Once radio communications to outstations arrived, advance notice of visits, using the radio schedule, became at least for a time de rigeur, assuming the older role of smoke-fires lit by approaching visitors.

These examples of specific restrictions on rights, some of them rather baroque to an outsider’s view, could be readily added to in vast quantities from the same region and from many others. The point here is that an ‘economic right’, like even the most unquestioned tenure right, is never a completely untrammelled right. To forage as of right is also to forage ‘properly’. Such rights carry responsibilities with them. To forage ‘properly’ is to carry out only what one has the right to do, something which arises from one’s standing in relationship to the country and its owners. Foraging ‘properly’ is also partly a matter of how it is done, where it is done, at what time it is done, who is doing it, and with whom. It is arguable, therefore, that when modern rural or urban Aboriginal people define ‘proper’ foraging as requiring a conservation ethic they are doing nothing very new at the level of basic principles, even if conservation in the modern global sense was not a classical Aboriginal value. What certainly is a classical Aboriginal value is an emphasis on

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64 I am not sure whether a reverse rule applied to the freshwater stingrays. These salt water/freshwater taboos are clearly related to the major social, cultural and political distinction between coastal and inland people which is common right around Aboriginal Australia.

65 Cf.: ‘There are innumerable activities that are forbidden unconditionally or conditionally, or can be carried out only with some form of permission [under Australian freehold]. Is the ‘owner’ free to dispose of, or refuse to part with, the land as he or she chooses? By no means in all circumstances, either during his or her life or after death by will’ (Wootten 1995:111).

66 The conservation of supplies of particular species at particular locations was certainly important if for no other reason than the avoidance of shortages, in the pre-conservationist era, and there is a range of evidence on the question of how much this occurred as a matter of deliberate action and how much was embedded in a religious framework of restrictions, some of which I have assembled in Sutton (forthcoming).
'looking after', 'caring for' and 'growing up' the country which continues to inform the attitudes of many. To refer to one’s country as an object of emotional attachment, as 'poor-bugger', as something one ‘worries for’, is similarly a classical value. Such continuing values have been the basis of different forms of the exercise of care and protection over time. Those who assert an obligation to care for the country they claim thereby assert a right, the right to act as primary custodians. That they now do so in new outward forms is hardly surprising.

I think it can be argued that there is a common basic hierarchy of restrictions on using the resources of Aboriginal country. Those resources which were most desired, which were immobile and thus a permanent feature of an estate, and especially those which were non-renewable, attracted the greatest restrictions.

In the Wik region, certain natural resources were more or less freely available to be taken and used by those who were traversing or living on the countries of others legitimately. These would include the basic necessities of life such as firewood, shade, water from unrestricted sites, the indispensable and multi-functional paperbark, most fish and game animals, and many vegetable food sources such as fruit and lilies. But the taking of certain items was subject to more a more exclusive approach than the taking of others, as was the burning of certain sections of country.

The more exclusive attitude was held towards certain immobile resources of a precious or thinly distributed kind, such as the more important ground tubers, pandanus trees whose fronds were used by women for string-making, stands of hibiscus used for spear-handles, stands of large bamboo, and mangrove oysters. A similar attitude was held towards the ochre sources. There are no stone quarries within the study region for which I have good information, and indeed there is no stone at all on the Wik coast, but in other regions it is notable that non-renewable and immobile valued resources generally tend to stand high on the list of things to which access is restricted. Site restrictions are thus sometimes dependent, at least in part, on the character of the resources of the site.

One aspect of the extracting of non-renewable resources that is probably relevant here, and which is true also of yam digging and well digging, is that of the breaking of the ground.

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67 There is quite a lot of literature on Aboriginal burning rights and practices. See for example Hallam (1975), Latz (1995:29-43), Rose (ed.) (1995), Langton (1998) and further references therein. In the Wik region there was in general less restriction on clearing up a forest area with fire so as to make it more habitable prior to camping, than there was on the firing of grass plains rich in game such as small mammals and reptiles. The latter were organised and collective events which could involve neighbours invited to partake of plenty, whereas any small camping group, at the appropriate season, would normally burn off country as it moved about. One qualification to this is that restricted sites, and estates closed due to a death, could be subject to prohibitions on burning except by those in particular authority.

68 There are no narcotics or similar drugs naturally occurring in the region but if there had been, one would expect the attitude to them to also have been very restrictive, as it was in the Lake Eyre Basin (Watson 1983).

69 On rights in minerals as an ‘incident of native title’ see Myers (et al 1997).

70 These, such as knife and axe blanks, along with certain kinds of artefacts or forms of adornment (including shell) and much desired drugs such as pituri, also tended to be among the major trade items. Spear handles, especially bamboo ones, are a major trade item between coastal and inland Australia; although renewable, they do not usually occur in anything other than small isolated stands. On classical Aboriginal trade in Australia see eg. McCarthy (1939), Thomson (1949), Micha (1970).
Breaking the surface of the ground is, in the Wik region at least, always potentially more dangerous and hedged with restrictions than other forms of exploitation.\footnote{Marking the country in a durable form also seems to me to be something highly restricted in classical Aboriginal practice. Given the length of Aboriginal occupation of the Australian continent, the quantity of parietal art is not at all vast and the proportion of it that has been attributed specifically to non-religious activities is minute. Given the very restrictive attitude towards permanent engraving, painting and stone arranging it is to be expected that those with less than core rights or less than solid religious authority would have been under very severe taboos preventing the leaving of durable traces on the country.}

Those resources and sites subject to the greatest restrictions of access are those most subject to concentrations of authority within groups, and thus those most likely to attract descriptions which portray them as subject to the personal rights or wishes of one or more senior custodians. This is the case even though the underlying title of the country concerned remains communal.\footnote{The few ethnographic records of Aboriginal Australia which suggest explicitly that country could be privately owned by individuals might perhaps be explained away by this analysis. I intend to address this issue in more detail elsewhere.}

Coexistent rights: the case of pastoralism

Both Aboriginal and European tenure systems separately embrace the sharing of rights and interests over the same parcel of land or waters, and its products, by more than one entity.\footnote{On the co-existence of interests held in common country or sites by Aboriginal groups, see eg. Sutton (1995b:49-60) for an overview.}

In this section I make a brief excursion to look at the conditions under which the legal rights of pastoral lessees and the customary rights of Aboriginal people in the country of their pastoral leases have tended to co-exist.

Where Aboriginal people were not physically removed from their homelands by colonising interests, they were generally better able to preserve their traditional connection to their lands than other groups who were early centralised on mission stations or in towns far away. The geographically decentralised pattern of pastoral development, combined with the need to muster large areas of land on the stations by horseback each year, and long periods spent as shepherds guarding flocks of sheep against wild dogs, meant that opportunities for station-based Aboriginal people to learn and remain in touch with the cultural traditions of even remote parts of their countries were comparatively plentiful.\footnote{For many groups this close contact with their countries was more or less abruptly cut off by the requirement that Aboriginal stock workers be paid the same as others, a situation which came into reality at different times in different places and which finally was enforced in the Northern Territory as of 1 December 1968 (Stevens 1974:205). While this was a progressive decision in terms of equal rights, for many people it was also the catalyst for their movement to wholesale dependency on welfare, their centralisation in townships where they came to live among people with whom they had traditional conflicts, their suddenly increased physical alienation from at least parts of their countries, and their movement to greater proximity to alcohol outlets. Over much of remote Australia this shift took place in the decade 1965-1975. For many families the shift to equal wages, unaccompanied by counter-measures, can only be described as a social engineering disaster.}

So also were their opportunities for maintaining economic relationships with these homelands – often a matter of necessity as well as of choice. Station-based Aboriginal people, part-time during work seasons and often full-time during layoff periods such as the summer or wet season, continued to hunt and gather wild food, drink from waterholes and soakages, and extract natural resources for medicinal and technological purposes. Given the
monotony and scarcity of the food and other resources provided to them by many pastoralists, these supplementary and replacement sources of the necessities of life effectively constituted a subsidy for the pastoralists’ activities. It is well remembered among older people that the north Australian wet season layoff period, when Aboriginal employees conducted initiations and other ceremonies and travelled from area to area visiting their relations, as in fact large numbers still do, was at that time one in which the people relied mainly on bush tucker and did not receive regular rations from their seasonal employers. That is, the viability of the granted leases was in some measure enhanced by, if not dependent on, the maintenance of Aboriginal foraging. And foraging ‘properly’ in Aboriginal customary law is something that ultimately rests on the system of rights and interests in land that ‘native title’, as a legal concept, attempts to reflect. The maintenance of traditional rights in coexistence with pastoral occupation often enjoyed several generations of continuity.

One could not say this quite so confidently if there were no evidence of territorial stability among station-based Aboriginal people, particularly during the earlier phase of pastoral expansion. But the evidence for such stability is widespread, and in many remote regions it has largely been maintained, especially up to the completion of the spread of equal wages in the late 1960s. For example, a map of the Northern Territory showing the physical location of primary affiliates of particular Aboriginal languages as of 1972 was published by E.P. Milliken in 1976. A comparison of this map with information on the location of traditional countries associated with those same languages shows comprehensively the significant degree to which station-based people in that part of Australia kept to bases within or near to their own traditional areas long after pastoral occupation occurred. But much more detailed evidence along the same lines, for specific stations, has been repeatedly given before Aboriginal land claim tribunals in the Northern Territory and Queensland over the last two decades.

This stability of associations between Aboriginal groups and pastoral stations in or close to their traditional countries dates from the period usually known as ‘letting-in’. Ever since Elkin’s useful if rather dated synthesis of 1951, the following basic phases have been recognised in the history of relationships between local Aborigines and incoming colonists, especially pastoralists:

1. There was an initial period during which Aboriginal people were curious about the newcomers but did not often attempt to drive them off their land in an organised way. Both sides usually sought some means of coexistence. Conflict over the use of waterholes, spearing of stock, or relations with women, for example, eventually occurred in many cases and violence could erupt. In Queensland the Protector of Aborigines, who was widely experienced in the field, reported to Parliament in 1901 that

   Another contentious matter which must be approached with great care is the right of the aboriginals to hunt and fish on the watercourses. It is their right, and it is their

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75This not to suggest they were completely immobilised. Visits to relatives alone would require people to travel some distance from their own homeland areas, but as the classical Aboriginal marriage preference system, certainly in the monsoon belt, aimed for geographically close marriages, the distances would not have been great until recently. Riddett (1990:83) points out that, in the Victoria River District from 1900 to the 1940s, Aboriginal people moved in and out of the pastoral industry when it suited them and moved from station to station more or less as it suited them. This type of mobility, especially in the early period of colonisation, was dependent on the ability of people to live off the land, at least while in transit but also for longer periods when not working.
only means of existence when in their natural state. ... To deprive them of this right means wiping them out or driving them into the smaller townships ... 76

2. A third alternative, and in fact one largely reached in pastoral areas, was for the original inhabitants and newcomers to reach some arrangement by which resources were shared. The pastoralists themselves were a resource.77

3. For a time, sometimes for a decade or more, ‘wild’ or ‘bush’ Aborigines were kept away from, or kept away from, the pastoral homesteads, and sporadic violence out on the runs continued, while a proportion of Aborigines were employed on the stations, thus giving rise to a major distinction between those still mainly dependent on the bush for survival and those more heavily dependent on station rations and payment in kind. Many ‘bush’ Aborigines would maintain a furtive and touchy relationship with their relatives in the station ‘black’s camp’ at this time, eg. visiting by night to obtain meat.78 Thus there was, on many pastoral leases, a period of uneasy coexistence not only between Aborigines and non-Aborigines, but between sets of Aborigines, and also between the two economic modes, pastoralism and foraging, the mutual dependency of which was sometimes most notable.

4. When the pastoralists considered the ‘bush blacks’ sufficiently settled down or untroublesome to be allowed to reside near the homestead and take part in the station economy, they would ‘let them in’.79 This was not only in order to end hostilities, but also because the pastoralists had an economic incentive: they often needed the labour, even if only seasonally.80

5. A period of mutual adaptation and some equilibrium then usually followed, often for some generations. This phase has been called by some scholars one of ‘accommodation’.81 The tendency of Aboriginal people to try to remain close to their traditional areas continued to be supported by the decentralisation of pastoral activities. The resulting access to the bush and bush resources continued to support the maintenance of Aboriginal knowledge of country and of foraging skills. This was a period in which traditional continuities and gradual changes were intermingled.82 The economy of stations was not purely pastoral, but a mixed economy of pastoralism and foraging.83

I do not pursue Elkin’s paradigm or its relatives any further in this context.

77 The mutual dependency of small farmers and Aboriginal people seems to have been quite extreme in the Daly River area prior to World War II, and particular farmers and farms became subject to competitive claims by Aboriginal people who sought to control access to them (Stanner 1938). It is not stretching things to say that in this kind of situation, among the Aboriginal rights being asserted were those over people as resource providers.
78 Eg. Reynolds (1981:169); similar statements abound in the pastoral historical literature.
81 Eg. Reynolds (1981:169); Reynolds (ed) (1972:Chapter3); Trigger (1992: Chapter 10, ‘Coercion, resistance and accommodation in colonial social relations’).
83 For example, the Koolpinyah station diaries (NT) give the ‘distinct impression of two economies and cultures meeting at the point of labour and commodity exchange...’ (McGrath 1987:158).
The pastoralists, out of all the colonists, offered the form of colonisation most compatible with the maintenance of traditional Aboriginal connections to land. Intensive farming of small plots, town life and even seasonal maritime work could be less conducive to this kind of continuity. Pastoralism was more like the hunting life than agriculture or town occupations, as it involved tracking and capturing animals across large areas of bush, it provided opportunities for meeting the obligations of remote site custodianship, it involved semi-nomadic seasonal shifts both at mustering times and layoffs, it was within the stock camps frequently an economy of kind rather than cash, and it offered access to a wide range of bush resources, the latter being at least a part-time necessity.

Furthermore, there was often no direct philosophical assault on Aboriginal cultural traditions under pastoralism, as there was under the Christian missions with their typical enforcement of bans on ceremonies and the use of Aboriginal languages, and their widespread practice of forcible separation of children from parents using locked dormitories. The pastoralists by and large were not there to change Aborigines ideologically, or to get them to abandon their bush knowledge and skills. Local geographical knowledge was a field in which pastoralists could not, at least initially, compete with the original inhabitants. Knowledge of the land’s waters and other resources, of its vegetation associations and physiography, and of the mythological and spiritual landscape, were constitutive or substantive aspects of local systems of law and custom to do with rights in land and waters.

Far from being extinguished by the coming of the first lessees, such knowledge was offered an additional role, and its continuity became an asset to lessees just as much as a prize bull could be. They had no interest in extinguishing it. The persistent coexistence of customary rights and leasehold in many areas was not, in this sense, an accident. Pastoralists who recognised and accepted the rights of their Aboriginal co-residents to make use of natural resources on the countries of their leases, and to pursue their religious interests in those countries, in a sense were exercising a customary or de facto recognition of the persistence of a pre-existing (sub)set of Indigenous rights, whether or not their leases contained reservations in favour of those rights.

Kinds of incidents, kinds of bundles

In Mabo 2 there was some apparent contradiction between the desire to avoid codification and the desire to indicate what the incidents of native title might consist of:

Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous

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84 Diving and other work in the lugger trades was seasonal and for the first decades allowed many to return to their bush homes during the off season, but many also were taken far from home by sea, and a significant number did not return, given the rigours of the life. On the other hand, in a region where Aboriginal countries were and are very small, as in the Bloomfield rainforest region of Cape York Peninsula, the coming of small-scale tin-miners could be incorporated into local Aboriginal practice and actually helped the survival of close traditional associations with the lands on which the mines, scattered as they were rather than centralised, were located (Anderson 1983).

85 McGrath (1987:158) writes of the Top End pastoral stations: ‘While travelling around the station at various tasks, Aborigines maximised any opportunity to ‘look after’ specific sites for which they had individual or group responsibility.’
inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.\textsuperscript{86}

The incidents of a particular native title relating to inheritance, the transmission or acquisition of rights and interests on death or marriage, the transfer of rights and interests in land and the grouping of persons to possess rights and interests in land are matters to be determined by the laws and customs of the indigenous inhabitants, provided those laws and customs are not so repugnant to natural justice, equity and good conscience that judicial sanctions under the new regime must be withheld.\textsuperscript{87}

Justice Brennan here suggests that incidents might fall into at least three domains, without specifying what form they might take:

- the transmission or acquisition of rights and interests
- the transfer of rights and interests
- the grouping of persons who possess rights and interests

But the emphasis by Brennan J on the acquisition of interests in country as a result of death or marriage is the reverse of the standard picture: one does not, generally speaking, acquire membership of the primary communal title-holding group in this way at all, but rather through coming into being, as the descendant of certain people or by being conceived or born at a certain place, by being ceremonially incorporated into a country group, and so on. Here, however, I want to concentrate on the relationship between this kind of ‘incident’ - what might be called ‘deep incidents’, although I prefer the term core rights (see above) - and the bundle of specific rights to use country in certain concrete ways, the ‘surface incidents’ that I have referred to above as ‘contingent rights’.

Toohey J used the term ‘abstract bundle of rights’ and ‘group of rights’ to refer to what was definitive of title in a native title context

“This possession’ is notoriously difficult to define (78) but for present purposes it may be said to be a conclusion of law defining the nature and status of a particular relationship of control by a person over land. “Title” is, in the present case, the abstract bundle of rights associated with that relationship of possession. Significantly, it is also used to describe the group of rights which result from possession but which survive its loss; this includes the right to possession.\textsuperscript{88}

This might be read as suggesting that incidents of title, if they also are ‘bundles of rights’, must be a different kind of right from the ‘abstract bundles of rights’ that make up native titles. If so, what is the difference? Is it a contrast between ‘abstract rights’ and ‘concrete rights’? If this contrast is accepted, it may tempt one into thinking of the ‘abstract rights’ at the heart of a native title as ultimate issue matters, proof of which might involve claimant and expert evidence concerning ‘concrete rights’. This analysis could provide applicants with some significant problems in introducing evidence that went directly to the heart of their proprietary system. For example, it may lead a judge to consider statements about the proprietary system, or even mere proprietary statements, to be addressing the ultimate issue and thus to be inadmissible except, perhaps, in the form of expert opinion. But this analysis would be obstructive, in my view. It is not fruitful to try to understand the nature of concrete use rights in the absence of the claimants’ own evidence as to the dependency of such rights on a system of proprietary relationships.

\textsuperscript{86} Mabo v. Queensland (No. 2) (1992) CLR 175 at 58 per Brennan J.
\textsuperscript{87} Brennan J CLR 175 p61.
\textsuperscript{88} Toohey J CLR 175 p207.
The dependency of usufructuary incidents on a system of proprietary relationships

Hal Wootten writes:

The argument that native title is no more than a bundle of usufructuary rights simply ignores the special character of the communal title of the highest level group in exclusive possession of land. … To describe Aboriginal rights in land without reference to the system of native custom to which they belong would be … misleading, and would be likely to lead in the long run to dealing with those rights not only as if they were frozen in their current form, but as though they were similar sounding rights under the general Australian law. Every determination of rights and interests under native title should, as part of the description of the rights and interests, refer to the system of customary law under which they exist and which defines them, and under which they may evolve. …

In Mabo 2 there was some discussion of this matter but it tended to focus on the fact that individual rights to use country were different from a communal proprietary title - individual rights were usufructuary and personal rights. The use of the term ‘usufructuary’ implies, as I understand it, the right to use something that does not belong to one, as in the case of a *profit à prendre*. Brennan J, however, made it clear, and I believe this is culturally appropriate in Aboriginal Australia generally, that usufructuary rights were a dependent category - they were grounded in communal title:

Where a proprietary title capable of recognition by the common law is found to have been possessed by a community in occupation of a territory, there is no reason why that title should not be recognized as a burden on the Crown's radical title when the Crown acquires sovereignty over that territory. The fact that individual members of the community, like the individual plaintiff Aborigines in Milirrpum {40}, enjoy only usufructuary rights that are not proprietary in nature is no impediment to the recognition of a proprietary community title. Indeed, it is not possible to admit traditional usufructuary rights without admitting a traditional proprietary community title. There may be difficulties of proof of boundaries or of membership of the community or of representatives of the community which was in exclusive possession, but those difficulties afford no reason for denying the existence of a proprietary community title capable of recognition by the common law. That being so, there is no impediment to the recognition of individual non-proprietary rights that are derived from the community’s laws and customs and are dependent on the community title. A fortiori, there can be no impediment to the recognition of individual proprietary rights.

However, I understand this and related passages to be making no distinction between different kinds of individual non-proprietary rights. There is no way one can make a list of all people with the right to hunt, fish, gather and sing on a certain piece of land and thus arrive at the definition of ‘the group’ that is the beneficial holder of the proprietary title. Such a method would imply that the profoundly important distinction indigenous people currently make between ‘traditional owners’ and ‘historical people’ was simply to be

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90 Brennan J CLR 175 pp51-52. Emphasis added.
ignored in the process of making determinations of native title. Such a method would be unsustainable in practice, in my view.

It may be that the judgement in Mabo 2 is saying, or at least implying, that individual non-proprietary rights are, or may be, something other than and different from 'incidents of native title'. What the implication raises, in particular, is the proposition that individual non-proprietary rights may be enacted and manifested in exactly the same physical form as those that derive from a proprietary right, but should not be defined as 'incidents of native title', and that those that do derive from a proprietary right should be. Non-proprietary rights, such as the right of those descended from immigrant groups to fish in the river or sea close to the settlement where they live, may still be customary indigenous rights (in the form of a standing licence), but this would not make them definable as native title rights or incidents of those rights, on this argument.

But if those who hold only such contingent rights for an area are excluded totally from determinations of native title over that area, they may justifiably fear that they could lose the security and predictability of their present situations. Many people in this situation may seek recognition during the native title process. In the case of the Hopevale Determination, after establishing that native title rights and interests existed and noting that members of thirteen clans with estates in the determination area held those rights and interests, the Determination then set out the rights in some detail. This was followed by a special section called ‘Recognition of other Aboriginal People’s Rights’, part of which reads:

16. The native title holders recognise:

16.2 the rights of Aboriginal historical residents of the dogit [Deed of Grant in Trust] land to travel over, hunt, camp, fish and gather on the native title land in accordance with the traditional laws and customs of each of the native title holders.

As cases unfold, the way determinations or regional agreements recognise the legitimate interests of those who do not hold native title rights will put the legal-administrative system to considerable test.

**Conclusion**

The usefulness of distinctions such as the one I have proposed be made between core and contingent rights, and between the sets of people who have either contingent rights only or both core and contingent rights, should not blind us to their complexities and difficulties. Like several of the other kinds of rights discussed above, this pair probably suffers from the oversimplifying effects of dualism, or the tendency to want to break things down into contrasting pairs. Yet in so many cases it seems that such a distinction, or one very like it, is a part of Aboriginal customary systems of land tenure and land use.

There will be times and places where such a distinction may be somewhat weakly established as a matter of customary practice. In some regions, the Western Desert in particular, this may be a situation of long standing. In some other regions, those where older traditions have received the greatest impact from non-Aboriginal society, the core/contingent distinction may have been eroded or it may be the focus of disputation as to its validity as a principle. On the other hand, in New South Wales it is reported that, in spite of a state land council system based on current residence rather than traditional connections, many

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91 QG 174 of 1997, Schedule – Determination of Native Title, Part G.
Aboriginal people continue to privilege the most ancient or ‘way back’ connections in disputes about control of land or heritage issues. But the NSW legislation imposes legal structures in which there is a failure to distinguish ‘traditional owners’ from ‘historical people’, and thus technically amalgamates those who hold only contingent rights with those who hold both core and contingent rights. Nicolas Peterson said, of residence-based models of land rights, that ‘it needs to be recognised that [they are] an interference in the traditional system since [they are] likely to result in advantaging those with weaker interests by equating them with the strongest if litigation takes place’. Some people may seek to use existing contingent rights as a springboard for the attainment of core rights, at least in terms of bureaucratic recognition.

In spite of the complexities that may arise, the core/contingent distinction is one that ought at least to be taken into consideration in the making and processing of native title claims. There is much ethnographic evidence to suggest it is a common feature of Aboriginal land relationships, but of course its applicability to any case is a matter for local testing and demonstration. To ignore it, where it applies, would be to court a native title determination which offered support to those who hold marginal interests in the country but who have ambitions to attain a dominant status in controlling its resources. It is also to court negative reactions from those who fear that their privileged core relationship to their country may be downgraded or displaced by the homogenising of all kinds of rights-holders in a determination, or in a prescribed body corporate, which sets up a single recognised set of ‘native title holders’ without internal distinctions.

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