Special Topic Forum: Individual Spirituality and the Law

Cultural and Spiritual Loss in Native Title

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Aboriginal and Torres Strait Islander Peoples have an inextricable connection to the lands and waters of their ancestors. First Nations' spirituality in this sense can be described as a symbiotic relationship that has existed since time immemorial. This connection to lands and waters is one that gives life to the identities of Aboriginal and Torres Strait Islander Peoples and their nations. The impacts of colonisation; the policy periods of termination, protection, assimilation, and integration; and the ways in which Aboriginal and Torres Strait Islander Peoples have been controlled and marginalised in society have impacted greatly upon the continuity and vitality of that connection to lands and waters. The very essence of the spiritual nature of the connection has been diminished, and in some instances, largely decimated, due to the work of non-Indigenous actors. This harm and loss through the native title system is capable of being recognised and compensated for, albeit, in limited ways.

Native Title is a term legally defined by reference to the content of the traditional laws and customs of an Aboriginal or Torres Strait Islander People, specifically those relating to lands and waters, which gives rights and interests in those lands and waters. At its core, this definition can be described as the legal recognition of Indigenous systems to law and governance that are protected and can be exercised under the traditional western system of law. This recognition first occurred through the High Court decision in *Mabo v Queensland [No 2]*[1] and subsequently legislated through the *Native Title Act 1993* (Cth).

This enshrinement in statute created the legal infrastructure that gives rise to the native title regime we operate in today. Through the Act, there are several primary mechanisms created to facilitate applications for recognition (native title determinations) and applications for compensation (native title compensation applications). I oversimplify the complexity of the system to be able to fast track to the discussion at the heart of these two limbs of recognition and compensation. The former seeks to recognise and validate the continuity of the identity, laws, customs, and traditions of a People; the latter seeks to identify the harm to those aspects and compensate what can be legally compensated. This context is important to understand the kinds of evidence that are required to prove the recognition of native title, and consequently, to prove the amount of loss and harm suffered by determined native title holders.

Following the handing down of the first litigated compensation decision in *Northern Territory v Griffiths* ('*Timber Creek*'),[2] there was an eager anticipation in the native title sector that there would be a renewed wave of native title applications: a Phase Two, where already determined native title holders would be able to seek compensation for the acts of the Crown that have caused an extinguishment, diminution, or impact upon the exercise and enjoyment of their native title. This turns on whether there is evidence of the act which has impacted native title and evidence of the loss and harm suffered by the native title holders in respect of such acts. Since the *Timber Creek* decision, there has been limited progress on the development of the

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[1] (1992) 175 CLR 1.
[2] *Northern Territory v Griffiths* (2019) 26 CLR 1.

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compensation jurisprudence, with the most recent decision of *Yunupingu v Commonwwealth*[3] further exploring the scope of acts that are compensable at the hands of the Commonwealth. However, many other matters have deviated away from a litigated outcome, and many have progressed towards mediations and negotiations to settle the litigation by agreement.

The evidentiary requirements in compensation applications are that of the loss, harm, and impacts that historical and contemporary actors have had on their culture and spirituality. This requires Aboriginal and Torres Strait Islander witnesses to directly confront and relive traumas. The evidence of the harm is in the form of the loss of cultural knowledge, showing the lack of depth that has been retained, loss of language, loss of knowledge of song lines, loss of the ability to protect and be on country, to share and transmit such knowledge to future and successive generations, and the loss and impacts on the practice and knowledge of rituals and ceremonies. The sharing of such intimate loss and tragedy, after being required to prove identity with such knowledge, is a difficult, drawn out, and traumatic process to navigate. It places the essence of one's identity under the scrutiny of non-Indigenous actors who may not have a true appreciation and understanding of the cultural and spiritual elements they are required to engage with through legal and anthropological lenses.

Questioning the very matters that make a People's identity so personal and unique, and then interrogating every aspect of that identity to determine if they know enough to justify recognition, places individuals in a difficult situation. Then, for compensation applications, such Peoples must also have suffered and lost enough to be capable of being compensated for such loss. But for those who have lost and suffered even more, to the point where the first hurdle of recognition is no longer a possibility, there is simply no result other than a determination that there has been *no* continuity of law, custom, traditions, knowledge, or semblance of an identity the law is able to recognise in the contemporary sense. It is a sad outcome for Australia, and a moment that should be mourned for the validation of the acts of the colonisers, to the complete dismantling of a People's identity.

While there are positive outcomes through the native title system, there are many outcomes that are not. Our national identity is enhanced and enriched by honouring and respecting the oldest continuing culture in the world and by recognising the unique spiritual connection to lands and waters that Aboriginal and Torres Strait Islander Peoples have. It is my hope that through the goodwill of the Australian people, there are reasonable and sensible approaches for those engaged in native title to reach agreement where possible, to safeguard this unique aspect of our national identity, and to safely handle and manage the cultural and spiritual knowledge of those Aboriginal and Torres Strait Islander Peoples engaged in the native title system.

[3] *Yunupingu v Commonwealth* [2023] FCAFC 75.