LOST IN TRANSLATION: THE WELLESLEY SEA CLAIM AND THE GAP BETWEEN INDIGENOUS SEA CULTURES AND NATIVE TITLE RECOGNITION[1]

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Introduction

On 23 March 2004 Justice Cooper of the Federal Court delivered his judgment in *Lardil Peoples v State of Queensland*[2] ('the Wellesley Sea Claim'). That judgment recognised that the Lardil, Yangkaal, Gangalidda and Kaiadilt peoples[3] held native title to the land and waters below high water mark in their respective sea country around the Wellesley Islands and the mainland coast in the southern Gulf of Carpentaria.[4]

The rights that were recognised by the Court were limited to rights of access for the purposes allowed by and under their traditional laws and customs, rights to fish, hunt and gather living and plant resources, and the right to access the land and waters below high water mark 'for the purposes allowed under traditional laws and customs for religious and spiritual purposes'.

The decision in the Wellesley Sea Claim does not make any significant developments in the law on the recognition of native title. It does however highlight the deficiencies in *Commonwealth of Australia v Yarmirr* (2001) 208 CLR 1 ('*Yarmirr'*) and the injustice that it perpetuates for Aboriginal people.

The Applicants' Laws and Customs and the Recognition of Native Title Interests

In his judgment Justice Cooper made a number of important findings

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[1] This article was written in March 2005, but has been included in this edition as much of the text is still relevant.

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[2] *Lardil Peoples v State of Queensland* [2004] FCA 298 per Cooper J.

[3] For further reading about these communities see Roughsey, D., *Moon and Rainbow: The Autobiography of an Aboriginal*, (1971), pp.63-69; Memmott, P., and Trigger, D., 'Marine Tenure in the Wellesley Islands Region, Gulf of Carpentaria' in Peterson, N and Rigsby, B. (ed.), Customary Marine Tenure in Australia, *Oceania Monograph 48*, University of Sydney, (1998), pp.109-124; and McKnight, D., *Peoples, Countries, and the Rainbow Serpent: Systems of Classification among the Lardil of Mornington Island*, Oxford University Press, (1999).

[4] The applicant communities in the proceedings were the Lardil, Kaiadilt, Yangkaal and Gangalidda peoples. The Lardil People have traditionally inhabited Mornington Island and nearby Sydney and Wallaby Island. The Yangkaal people inhabited Forsyth Island and Denham Island. The Kaiadilt people inhabited Bentinck and Sweers Islands. The Gangalidda people have traditionally lived on the mainland coast between the Albert River near Burketown and Massacre Inlet in the west.

about the content of the applicants' laws and customs.

(a) Ownership

Justice Cooper recognised that under their own laws and customs each of the applicant Aboriginal communities owned their traditional country and that they made no distinction between land and sea in that regard:

> I am satisfied from what I have heard from the indigenous witnesses that their concept of 'ownership' of the seas, the sea bed, the subsoil and the sea resources is not one based on common law concepts of property; it is a concept born out of the connection of the peoples to each of the elements through their spirituality. The seas, seabeds, the subsoil beneath the seabed are important because they are the elements in which the creatures and spirits to which they are bound live. They are the elements necessary to support the resources of the sea upon which the peoples rely for their sustenance and in respect of which they owe obligations to husband and protect because of the kinship ties between them. There is no evidence that the peoples used the seabeds or the subsoil or used the seawater itself for any worldly purpose. However, the sea grasses are critical for the dugong and the spawning of prawns and the clean waters are necessary for the fishery. Further, the spirits of deceased ancestors reside in the waters of the seas, the spirits and creatures of the Dreaming traverse the Dreaming paths in the seas and mystical creatures, including the Rainbow Serpent, live beneath the sea bed in the world below.(at para 147)

Justice Cooper however held that because of the High Court's decision in *Yarmirr*, this ownership could not be recognised under the *Native Title Act* 1993 (Cth) ('NTA').

(b) A System of Land and Sea Tenure

Justice Cooper found that the legal systems that operate within each of the applicant Aboriginal communities are complex (para 75). He accepted that each of them had systems by which members were affiliated to particular estates. In relation to the Lardil people he noted that rights and interests in those estates 'were distributed in a way determined by a normative set of rules and customs' (para 105). Similar conclusions were made in relation to the other applicant Aboriginal communities.[5]

(c) Permission, Control and An Entitlement to a Share of Resources

The requirement to ask permission of the estate owners to enter on to country or to take resources of the country is a core element of the laws and customs of the Lardil, Yangkaal, Gangalidda and Kaiadilt people.

In the Wellesley Sea Claim, Justice Cooper accepted that the laws and customs of each of the applicant Aboriginal communities included systems of permission and rights to control access to, and use of, land, sea and the

[5] *Lardil Peoples v State of Queensland* [2004] FCA 298 per Cooper J at paras 116, 124-125 and 138.

resources contained therein. He noted:

> The right to be asked is the touchstone of the applicants' concept of 'ownership' and underlines that the identifiable right with respect to the land and waters in the area claimed under the traditional laws acknowledged and customs observed was the right to control access and conduct. (at para 152)

His Honour also accepted the evidence of the applicants that under their own laws and customs the owners of estates were entitled to a share of the resources taken from their country (at para 113). Again, because of the reasoning of the High Court in *Yarmirr*, Justice Cooper held such a right could not be recognised under the *Native Title Act 1993* (Cth).

(d) The Area In Which Native Title Existed

Justice Cooper accepted the evidence of each of the applicant Aboriginal communities that their sea country extended 'as far as the eye can see'.[6] The practicalities of such a boundary to the applicant Aboriginal communities is obvious. However, in terms of a native title determination where the area the subject of the determination needs to be fixed, a boundary described in this way causes considerable difficulties. How far a person can see to the horizon depends on a range of factors including how tall the person is, how good their eye sight is, how clear the atmosphere is, how calm the water is, and the height of the land upon which they are looking out to sea.

Justice Cooper (at para 128) considered that the extent of sea country was determined by people standing on the frontal sand dunes and some headlands. Justice Cooper nominated a height of 4 metres to represent this. On this basis he determined that native title would be recognised to a distance of 5nm (9.8kms) for most of the claim area (para 231). The distance ranges from 2.7nm to 5nm on parts of the mainland coast. There were also a number of small islands that were not inhabited by the applicants but were visited from time to time. In relation to these areas, Justice Cooper indicated that native title existed for half a nautical mile around those islands.

Justice Cooper conceded that this approach was to some extent arbitrary (para 232). Not surprisingly, there are some anomalies that arise as a result. By limiting the areas around the outer islands, and by assuming that the highest part of land a person would look out to sea was 4 metres, there are areas in between the main inhabited areas and the outer islands which, while within visual range, are nonetheless the subject of orders that native title does not exist. Areas which had to be traversed in order to get to those islands are not even the subject of a native title right of access. These gaps in country do not exist in the applicants' own perception of the extent of their sea country.

(e) Hunting, Fishing and Gathering

[6] *Lardil Peoples v State of Queensland* [2004] FCA 298 per Cooper J paras 112-113, and 125.

Justice Cooper determined that each of the applicant Aboriginal communities held native title that included the right of access for the purpose of hunting, fishing and gathering living and natural resources in accordance with their traditional laws and customs.

Throughout the judgment there is reference to the applicants limiting their traditional hunting and fishing to the 'adjacent waters' to the coast. The 'adjacent waters' are not defined in the judgment and must be understood in light of the Orders that were ultimately made to include all the area where native title was held to exist.

Justice Cooper also makes reference to 'deep waters' in discussing areas where the applicant Aboriginal communities did not habitually hunt and fish. The issue is academic because the Orders of Justice Cooper do not make a distinction between shallow and deep water. The rights to hunt, fish and gather are recognised throughout the area where native title was found to exist.

In any event, what constitutes 'deep waters' is not defined in the judgment. The waters in the claim area contained extensive reefs and sandbars many of which are located a considerable distance off shore. There is no steady gradient from shallow to deep, rather there are regions of both throughout the claim area. The Appel Channel and Investigator Road are two deep and narrow channels of water between islands. They are two of the most frequented areas for fishing by Lardil and Kaiadilt people. There are many other deep channels between reefs and sandbars that were not suggested by any witness to not be within their country. In explaining his decision to recognise rights to a distance of 5nm Justice Cooper noted that the majority of those areas involved depths ranging from 5m to 15m and more (para 231). Whether these areas may be regarded as shallow or deep water is a matter of individual perception. For these reasons it is difficult to discern what his Honour was referring to in his reference to 'deep waters'.

From the applicants' perspective, the Orders recognizing rights to hunt, fish and gather throughout the area where native title was held to exist, including in areas that were not used for hunting, fishing and gathering as frequently as other parts of that area, are appropriate. Firstly, they maintain that they did in fact hunt and fish in deeper waters as well as shallow waters. Secondly, Justice Cooper accepted that deep waters were part of the traditional country of the applicant Aboriginal communities.[7] Despite making reference to where Aboriginal people 'habitually' hunted, fished and gathered, that such activities be 'habitual' should not be a precondition to the recognition of native title. The important issue is whether the applicant Aboriginal communities have a right under their own laws and customs to hunt and fish in those areas if they want to. This approach is consistent with that in *Lord Advocate v Lord Lovatt* (1880) 5 App Cas 273 per Lord O'Hagan at 289 where, in relation to an individual's claim to a customary right to fish in part of a river, Lord O'Hagan stated that 'I would be slow to hold that if he fished certain parts regularly and others only occasionally, or not at all, he had failed to establish a right to fish in

[7] *Lardil Peoples v State of Queensland* [2004] FCA 298 per Cooper J at para 115.

the whole.'

Furthermore, the Courts have frequently indicated that native title is not frozen in time. Not allowing people to exercise traditional rights in the more inaccessible parts of their country when forced to do so under the pressures of increased non-Aboriginal use of their sea country would have precisely that effect. This is not least because, as Justice Cooper (at para 203) noted, with the 'availability of powered boats, particularly aluminium dinghies with outboard motors, access to sea country for fishing and hunting is now more readily available than in times past.'

(f) The Right of Access

Justice Cooper also recognised a general right of access 'in accordance with and for the purposes allowed by and under traditional laws and customs of the applicant communities'. Worded in this way, the Orders appear to recognise more general rights and activities not specifically identified in the other Orders. It may include, for example, traversing sea country to check on different areas as part of the process of looking after country.

The Limits of Recognition Under the *Native Title Act*

In considering the applicants' claim Justice Cooper was bound by the High Court's decision in *Yarmirr*. Despite making findings that the applicant Aboriginal communities owned their sea country under their own laws and customs, Justice Cooper held that such interests could not be recognised by the Australian legal system because they conferred exclusive interests on Aboriginal people.

As a consequence core elements of the applicants' relationship to their sea country receive no recognition under the NTA. This gap between the laws and customs of the Lardil, Kaiadilt, Yangkaal and Gangalidda peoples and the recognition of those rights in the Australian legal system is a matter of ongoing injustice for those peoples.

In the writer's view however, this result is a product of inappropriate approaches to determining inconsistency between native title and other interests and the difficulty Australian courts have in translating Aboriginal laws and customs into native title rights and interests.

(a) Deficiencies in the Legal Recognition of Indigenous Sea Cultures

The Wellesley Sea Claim illustrates the deficiencies in the reasoning in *Yarmirr* which has imposed on Aboriginal people a more restrictive approach for recognising their interests in the sea than that which the common law has historically applied in other circumstances. This has arisen because of the inappropriate manner in which native title interests are characterised and their inconsistency with other interests determined.

In *Yarmirr*, the Court held that the test for recognition where the public

rights of fishing, navigation and innocent passage exist is one of 'inconsistency'.[8] In *State of Western Australia v Ward* (2002) 191 ALR 1 (*'Ward')* a majority of the High Court noted that determining the nature and extent of the inconsistency between native title rights and interests and other rights and interests necessarily gives rise to a need to pay '…close attention to the statement of "the relationship" between the native title rights and interests[9] and the "other interests" relating to the determination area'(emphasis added).[10] However, it is apparent from *Yarmirr* and the Wellesley Sea Claim that this is not the approach being adopted by Australian Courts at least in relation to the recognition of rights in the sea.

Because the identification of 'native title rights and interests' is itself an artificial legal exercise, their characterisation can be as narrow or as broad as the Courts determine. For example, it would be entirely open to a Court to recognise a right to protect sea country from activities carried out by those not exercising the public right to fish as a right of navigation. That would be one way to give broader recognition to Aboriginal interests in the sea. In *Yarmirr* and the Wellesley Sea Claim Aboriginal laws and customs have instead been translated into the broadly termed generalisations of 'a right to control' or 'an exclusive right'. In being reduced to such a simplistic characterisation such rights are set up to fail the test of inconsistency.

In the Wellesley Sea Claim the applicants sought to formulate rights and interests in a manner that, while not impinging upon the public rights to fish and navigation, nonetheless recognised the rights of the applicants to control other types of interference with their sea country. Justice Cooper rejected these also on the basis that they still maintained elements of control of access that were impermissible following *Yarmirr*.[11]

This approach to characterising rights and interests and determining their inconsistency can be contrasted with that adopted by Justice Mansfield in *Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory of Australia ('Alyawarr & Ors')* in assessing the inconsistency between native title interests and pastoral leases. He observed:

> It is obvious that rights under pastoral leases and statutory rights of entry for explicit purposes meant that native title holders would not have been able to prevent persons from entering the land in the exercise of those rights. On the other hand, the rights granted to the pastoral lessees were not rights granted to all persons, and pastoral lessees were obliged to exercise their rights for the purpose of the lease. The preserved rights are those to a pastoral lessee permitting access by the lessee or persons to whom the lessee permitted to enter, and reserved or statutory rights for reserved purposes such as stock routes. I do not consider that it is inconsistent with such rights that the native title right to control access to the land should survive to exclude persons who might wish to enter the land to do things unrelated to the

[8] *Commonwealth v Yarmirr* (2001) 208 CLR 1 at paras 40, 42 and 76.

[9] It is against 'native title rights and interests' not Aboriginal laws and customs that inconsistency is assessed.

[10] *State of Western Australia v Ward* (2002) 191 ALR per Gleeson CJ, Gaudron, Gummow and Hayne JJ at paras 53 and 78.

[11] *Lardil Peoples v State of Queensland* [2004] FCA 298 per Cooper J at paras 188-189.

> pastoral lease or without some other reserved or statutory rights.[12]

He went on to note that:

> Once the lease came to an end, the Aboriginal native title holders would have whatever rights survived to control access to the claim area. Their right would have been extinguished to the extent that it was exclusive for the reason already given, and to the extent that it might otherwise have been exercisable in relation to the previous pastoral lessee and the lessee's authorised entrants. But it does not follow, in my view, that the right of a definable group of persons under the lease to access the claim area is inconsistent with (and so extinguishes) the non-exclusive native title right to control access to the claim area in respect of persons outside that definable group of persons.[13]

Such an approach has to be correct otherwise Aboriginal people do not even have a right to control the activities of a trespasser.

Justice Mansfield gave effect to those observations through the recognition of native title rights which included …

> …the right to make decisions about the use and enjoyment of the land and waters and the subsistence and other traditional resources thereof, by people other than those exercising a right conferred by or arising under a law of the Northern Territory or the Commonwealth in relation to the use of the land and waters.

Although Justice Mansfield's approach to inconsistency was in the context of a discussion of extinguishment rather than prohibitions on recognition, *Ward* assumes that the test for inconsistency in both cases is the same test. [14] There is no reason why such an approach should not be adopted in characterising and recognising Indigenous interests in sea country. The only rights that should be considered to be inconsistent with a greater recognition of Aboriginal rights and interests in the sea are the public rights of fishing and navigation. Both are limited rights.

The right of navigation is merely a right of way,[15] for the purpose of navigation and matters ancillary thereto.[16] The public right of navigation includes the rights, in the ordinary course of navigation to anchor and remain at anchor for a convenient time,[17] and to use public moorings and temporary

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[12] *Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory of Australia* (2004) FCA 472 per Mansfield J at 270.

[13] *Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory of Australia* (2004) FCA 472 per Mansfield J at 271.

[14] *State of Western Australia v Ward* (2002) 191 ALR 1 per Gleeson CJ, Gaudron, Gummow and Hayne JJ at para 388.

[15] In *Orr Ewing v Colquhoun* (1877) 2 App. Cas. 839 Lord Hatherley said (at 846): 'Now it appears to me that there are two totally distinct and different things; the one is the right of property, and the other is the right of navigation. The right of navigation is simply a right of way, …' See also Lord Blackburn at p.854.

[16] *Lord Fitzhardinge v Purcell* [1908] 2 Ch 139 per Parker J at p.166.

[17] See for example *Denaby v Cadeby Main Colliery Ltd v Anson* [1911] 1 KB 171 per Fletcher-Moulten J at p.199.

moorings in the ordinary course of navigation.[18] It does not include the right to fix permanent structures including moorings on land (including land owned by the Crown) without the permission of the owner.[19] The right of navigation does not require free access to each and every part of the territorial sea.[20] Nor does it entitle a person to occupy a particular area of water otherwise than in the ordinary course of navigation.[21] Similarly, the public right to fish may be a broad right but it is not an unlimited right. The public right to fish is not a proprietary right and is freely amenable to abrogation or modification by statute.[22] The public right to fish does not extend to the hunting or gathering of living resources other than fish. [23] Nor does it extend to a right to interfere with the soil.[24] In such circumstances it is difficult to see how either right can lead to an absolute prohibition on the recognition of the right of Aboriginal people to control and manage their sea country including against those not exercising the public right to fish and the right of navigation.

The reasons given for not recognising native title rights and interests to control activities unrelated to these limited rights in *Yarmirr* and the Wellesley Sea Claim remain unsatisfactory. It is only by the broad characterisation of rights that such possibilities are denied. The result does not sit well with the manner in which the common law considers inconsistency between public rights and fishing and navigation and other interests. The common law has always recognised rights of way and easements without the need to deny the existence of an underlying title. It has also recognised titles to land subject to the rights of fishing and navigation, including in tidal waters regardless of the fact that it meant that the underlying title was not in a strict sense exclusive. In *Lord Advocate v Young* (1887) 12 App Cas 544 at 553 Lord Watson assumed that the public right to fish and navigation existed which necessarily impaired the exclusive title. He nonetheless found that a title based on possession existed. He stated:

> In estimating the character and extent of his possession it must always be kept in view

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[18] *Marshall v Ulleswater Steam Navigation Company* (1871) LR 7 QB 166 per Blackburn J at 172; *Fowley Marine (Emsworth) Ltd v Gaffin* [1967] 2 QB 808 per Megaw J at pp.821-823.

[19] *Crown Estate Commissioners v Fairlie Yacht Slip Ltd* [1979] SC 156 at 176 and 186; *Denaby & Cadeby Main Collaries Ltd v Anson* [1911] 1 KB 171 per Blackburn J at 201-202; *Marshall v Ulleswater Steam Navigation Company* (1871) LR 7 QB 166 at 172; and *Fowley Marine (Emsworth) Ltd v Gaffin* [1967] 2 QB 808 per Megaw J at pp.821-823.

[20] *Commonwealth v Yarmirr (2001)* 184 ALR 113 at para 96. See also *Foster v Warblington Urban Council* [1906] 1 KB 648 per Fletcher Moulton LJ at pp. 683-684.

[21] *Denaby v Cadeby Main Colliery Ltd v Anson* [1911] 1 KB 171 per Fletcher-Moulton J at pp.199-200.

[22] *Attorney-General for British Columbia v Attorney-General for Canada* [1914] AC 153 at 170; 172; *Attorney-General of Canada v Attorney-General of Quebec* [1921] 1 AC 413, at 421; 422; 427; *Harper v Minister for Sea Fisheries*, at 330.

[23] See *Lord Fitzhardinge v Purcell* [1908] 2 Ch 139, per Lord Parker at 165-166 (in that case wild ducks). See also *Howell v Stawell* (1833) Alc & Nap 348 at 355; *Brew v Haren* (1877) IR Vol XL 198; *Mahony v Neenan* [1966] IR 559.

[24] See for example *Attorney-General v Emerson* [1891] AC 649 (HL) at 171 and *Marshall v Ulleswater Steam Navigation Company* (1871) LR 7 QB 166 per Blackburn J at 172.

> that possession of the foreshore, in its natural state, can never be, in the strict sense of the term, exclusive. The proprietor can not exclude the public from it at any time; and it is practically impossible to prevent occasional encroachments on his right, because the cost of preventative measures would be altogether disproportionate to the value of the subject.[25]

Neither the existence of the public rights nor the acknowledgment that it was impossible to prevent encroachments were cause not to recognise the title based on possession, which would have been enforceable against those not lawfully exercising those public rights.[26] Such rights of ownership have been enforced on many occasions to maintain actions in trespass against those accessing lands other than for purposes of exercising the public rights to fish and navigate. For example:

- In *Mace v Philcox* (1864) 15 CB (NS) 600 at 614 the owner of the foreshore was able to maintain an action in trespass against people traversing their foreshore for the purpose of bathing notwithstanding that the public rights to navigate and fish existed in the area.
- In *Howe v Stawell* (1833) Alc & Nap 348 the plaintiff maintained an action in trespass against the defendant who 'with servants, and labourers, carts, and horses' trampled on his close which was on the foreshore and were 'taking, and gathering large quantities of oar-weed and other seaweed, and converting and disposing thereof'. The existence of the public right to fish and the right of navigation did not destroy the plaintiff's title so as to defeat the action.
- In *Brew v Haren* (1877) 11 IR 198 an action for trespass and trover was successfully asserted for the wrongful taking of ungathered drifted seaweed on the plaintiff's land notwithstanding the existence of the right of navigation.[27]

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[25] In *Forster v Warblington Urban Council* [1906] 1 KB 648 per Fletcher Moulton LJ at pp.683-684 observed:

> It must not be forgotten that, where the foreshore has been granted to an individual, it is property just as much as the land in terra firma. His rights over it are indeed subject to the rights of navigation of all the King's subjects, and subject also to their rights of fishing, but that does not prevent his having great powers of modifying that foreshore for his own purposes. For example, he can build walls and quays, and he can do that which is quite the strongest assertion of absolute ownership, namely, he can reclaim, and thus entirely exclude the public from it.

[26] See also *Llandudno Urban District Council v Woods* [1899] 2 Ch 705 at 709; *Calmady v Rowe* (1848) 6 CB 861.

[27] Similarly, in *Alfred F Beckett Ltd & Anor v Lyons & Ors* [1967] 1 Ch 449 Harman LJ observed at 473:

> I do not think it necessary to consider whether the coal when it lands on the beach or lies in pools above low water mark is or is not the property of the owners of the foreshore. All I think we need say is that as owners or possessors of the foreshore they have the right to reduce it into possession, whereas the defendants have no such right, because they have no right to go onto the foreshore for that purpose. It is as if a man who had a right of way over his neighbour's close should use his right of passage to shoot his neighbour's pheasants.

- The existence of the public right to fish and the right of navigation did not prevent Earl Cowper from an injunction restraining the taking of rocks from within the limits of the Manor notwithstanding that the Manor and the area from which the stones extended 'along the sea side, and into the sea; as far as a buoy as big as a barrel can be seen'.[28]
- In *Blundell v Catterall* (1821) 5 B & Al 268, a case where an exclusive fishery was vested in the manor, the existence of the right of navigation was not such to destroy the title held by the manor in the foreshore and that title was good to maintain an action in trespass against those entering the foreshore 'with feet walking, and with the feet of horses, and with the wheels of bathing machines, carts, and other carriages, passing over, tearing up, damaging the sand, gravel, and soil of the said close.'

In each one of these examples either or both the public right to fish and the right to navigate were held to exist. It did not destroy the underlying title or other rights associated with that title. They were enforceable against trespassers who were not exercising the public right to fish or the right of navigation.[29] In *Yarmirr*, only Justice Kirby advocated that a similar approach be adopted in relation to native title rights and interests.[30] Because the rest of the Court did not agree, Aboriginal people can look to these cases and see the difference in the manner that their own interests are recognised and protected and know that they have been treated unfairly.

It is unsatisfactory that the law of native title fails to recognise native title rights and interests in circumstances where similar rights and interests arising from other forms of title are recognised and enforced under the common law. It is a matter that demands reconsideration.

(b) Converting the Spiritual into the Legal

A further contributing factor to the limited recognition of Aboriginal interests in their sea country is the manner in which the spiritual connection of Aboriginal people is given meaning under the NTA.

In the *Advisory Opinion on Western Sahara* [1975] ICJR, a case cited approvingly in *Mabo [No:2]*,[31] the Vice President of the International Court of Justice, Judge Ammoun (at pp.85-86), noted that people should not be deprived

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[28] *Cowper (Earl) v Baker* (1810) 17 Ves 129, 50

[29] It can also be noted that the common law of England has always recognised exclusive fisheries even though such fisheries could not be created after Magna Carta: see for example *Malcolmson v O'Dea* (1863) 10 HCL 593; *Loose v Castleton* (1978) 41 P&CR; and *Neill v Duke of Devonshire* (1992) 8 App. Cas 135. Following *Ward* and *Yarmirr* it is clear that Aboriginal people cannot have their exclusive fishing rights recognised even though they have existed since time immemorial. This is another source of grievance for Aboriginal people.

[30] *Commonwealth of Australia v Yarmirr* (2001) 208 CLR 1 per Kirby J at paras 285-291.

[31] *Mabo v State of Queensland [No:2]* (1992) 175 CLR 1 per Brennan J at pp.40-41.

of their property merely because it is derived from different relationships to land than those familiar to the western legal tradition. Consistent with this approach the High Court, in recognising the unique nature of Aboriginal interests in land, has noted that those relationships are 'primarily a spiritual affair'[32] and has rejected the approach of Justice Blackburn in *Milirrpum v Nabalco* (1971) 17 FLR 141 which denied a recognition of Aboriginal property interests merely because they did not conform with western concepts of property.[33] In *Yanner v Eaton* the High Court noted that 'an important aspect of the socially constituted fact of native title rights and interests that is recognised by the common law is the spiritual, cultural and social connection with the land.'[34] Putting this legal theory into practice was always going to be a challenge for the Australian legal system. In *Ward* (at para 14) a majority of the High Court noted that:

> The difficulty of expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests is evident. Yet that is required by the NTA. The spiritual or religious is translated into the legal. This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and obligations which go with them.

This is a direction to translate the spiritual into the legal, not to fragment the relationship so the spiritual becomes irrelevant.

In the Wellesley Sea Claim, Justice Cooper recognised that by virtue of their spiritual relationships to country the applicants owned their country. However he had difficulty identifying the rights and interests to which this may give rise in circumstances where a recognition of ownership was impermissible. Justice Cooper noted:

> … when the unity of the relationship between indigenous people and the land and waters is fragmented, and the rights to control access to, and use of and activities in the land and waters are excluded, little may remain which is capable of being translated into rights and interests in relation to that land and waters capable of recognition and protected under the Act. What is left may amount to little more than non-exclusive rights to engage in specified activities in relation to the land and waters (at para175).[35]

In the result, Justice Cooper held that the only rights that could be recognised were limited to rights to hunt fish and gather and to access the land

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[32] *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 358; *Yanner v Eaton* [1998] 201 CLR 351 at paras 37 and 38; *State of Western Australia v Ward* (2002) 191 ALR 1 at para 14.

[33] *Mabo v State of Queensland [No:2]* (1992) 175 CLR 1 per Brennan J at pp.51-52, Toohey J at p.186

[34] *Yanner v Eaton* (1998) 201 CLR 351 at para 38.

[35] The difficulties posed for Aboriginal people through this process of fragmentation has been discussed in Behrendt, J., and Thompson, P., *The Recognition and Protection of Aboriginal Interests in NSW Rivers*, Healthy Rivers Commission, Occasional Paper 1008, November 2003, pp.23-28.

and waters for traditional purposes. He also gave some effect to the spiritual connection in areas within 5nm by recognising rights of access for spiritual and religious purposes. He also recognised rights to hunt, fish and gather in area which were not habitually used for that purpose, possibly in recognition that such areas formed part of their traditional country.[36]

On the other hand, Justice Cooper notes in a number of places that there are no rights and interests that flow from the religious and spiritual connection that the applicants had to the outer areas and in areas which were not accessible or indeterminable.[37] In such areas he made Orders that native title did not exist despite acknowledging the spiritual and religious significance of those areas to the applicants. Furthermore, the manner in which the area where native title exists was determined means that there are areas for which there is a factual finding that a spiritual connection may exist but which are now the subject of a determination that native title does not exist.

The sites located in an 'indeterminate' area from the shore are no less significant to the applicants than other areas. One such area off Sweers Island was described by Kaiadilt man, Pat Gabori as follows:

> Mawurru is way off in the east. When you fall into a trance they sing a special song to bring your soul back. They sing "dangkathaka rabanharra dangkathaka rabanharra, riiki ka mawurruwa riikni ka muwurru." People say when they die "I'll go on ahead to the east". That's the right thing to say. Other people gather around when they hear that, they grieve and cry. We put someone in the grave and sing the song to send them off to Mawurru. We also do a stomping dance. We stomp towards the grave from the west, and strike the two sides of the grave with a stick and say: "Go ahead, we'll follow later!" People are buried high up on the shoreline. They dance there around the grave. That helps the spirit go off to the east. Mawurr is the name of that place where they go. You only ever go east, just to the one place. People will cut their heads and wail. Later, people say to the spirit: "hurry off to the east now, to Mawurr, we've made your grave." Mawurr is way out to sea. It belongs to Kaiadilt. It is way over where the sun comes up. The sun tells dead people to go eastward, just as he comes up in the east again after setting in the west. "Get up, come and see the place. He'll look after you there". Aboriginal people go there, white people go there. Everyone cries and says "a good person is dead".[38]

Similarly, the sea between Rocky Island and Mornington Island is said to be the waters in which Yerrakerra the sea hawk resides. Those waters also form part of the Rat and Squid Story. Thuwathu the Rainbow Serpent is believed to reside in all of those waters.

In the Wellesley Sea Claim there was extensive evidence of the distress that is caused to the applicant Aboriginal communities through interference with, or inappropriate behaviour around sites of significance. The consequences that follow are attributable to various mythical beings, the Rainbow Serpent or ancestral spirits. In *Hayes v Northern Territory* (1999) 97 FCR 32, Justice Olney observed that 'any form of native title which did not recognise the need

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[36] *Lardil Peoples v State of Queensland* (2004) FCA 298 per Cooper J at para 231.
[37] Ibid at paras 115, 119, 125, and 139.
[38] Affidavit of Pat Gabori dated 17 August 1999 filed in the Wellesley Sea Claim, para 63.

to protect sacred and significant sites would debase the whole concept of recognition of traditional rights in relation to land' (at para 51). The observation is equally applicable to waters.

The result in the Wellesley Sea Claim is a product of the difficulty in articulating rights that might reflect the relationship that Aboriginal people have in areas like *Mawurru* or where there are places that, while inaccessible, nonetheless have cultural and spiritual significance to Aboriginal people. Even in areas that are accessible there is difficulty in identifying meaningful rights and interests to give effect to that relationship.

In attempting to articulate alternative rights and interests Aboriginal people have been put in a difficult position. In the first place they are, as Meyers has pointed out, required to provide expression for their interests in an alien system.[39] Applicants have attempted to formulate rights and interests to give meaning to Aboriginal interests in land but many of these formulations have proven unacceptable to the Court.

Not all the reasons provided for rejecting these formulations have been convincing. For example, some descriptions of rights and interests are opposed because it is said that it is not appropriate to use the elements of the composite phrase 'possession occupation use and enjoyment' in isolation to describe native title rights and interests.[40] However, if native title applicants can establish a right to 'occupy' an area or to 'enjoy' an area it is not a reasonable basis to refuse that right merely because it happens to be part of a composite phrase used in other contexts. The real issue is whether it is accurate to describe the rights and interests concerned by that term or whether it is an appropriate translation of Aboriginal laws and customs.

A further difficulty arises because while the High Court has directed that rights be 'translated' from the spiritual into the legal, the description of how this translation is to occur is used by respondents to argue for the limitation of native title rights and interests in contradictory ways. In *Yarmirr* it was noted that 'it is necessary to curb the tendency (perhaps inevitable and natural) to conduct an inquiry about the existence of native title rights and interests in the language of the common law property lawyer.'[41] In *Ward* the High Court noted that the difficulties associated with this task are 'not reduced by the inevitable tendency to think of rights and interests in relation to the land only in terms familiar to the common lawyer.'[42] However it was also noted in *Ward* that the 'relevant task' was to 'identify how rights and interests possessed under traditional law and custom can properly find expression in common law terms.'[43]

Not surprisingly, faced with numerous respondents intent on limiting the

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[39] Meyers, G, 'Different Sides of the Same Coin: A Comparative View of Indian Hunting and Fishing Rights in the United States and Canada', (1990), Vol.10, *UCLA Journal of Environmental Law and Policy* pp.67 –121 at p.84.
[40] *State of Western Australia v Ward* (2002) 191 ALR 1 at para 89.
[41] *Commonwealth of Australia v Yarmirr* (2001) 208 CLR 1at para 11.
[42] *State of Western Australia v Ward* (2002) 191 ALR 1 at para 14.
[43] Ibid at para 89.

recognition of native title rights and interests as much as possible, any formulation put forward by the applicants is attacked from both directions. If a characterisation of rights and interests has a common law meaning it is opposed for inappropriately using common law terms or because the common law preconditions to such a right have not been met. The latter is of course contrary to the Court direction to 'give meaning' to laws and customs through the use of common law terms. To apply common law tests before such terms can be used is to apply the reasoning of *Milirrpurn v Nabalco* which, as noted above, has been rejected.

When terms without a legal meaning are used they are opposed because they are 'uncertain'. The cliché of 'uncertainty' is thrown at every interest which respondent parties consider delivers too much to Indigenous people. For example, one means to recognise the spiritual connection with sea country is to recognise a right to 'enjoy' the area, or as the applicants put it in the Wellesley Sea Claim, a right to enjoy the amenity of the area. This emphasises an entitlement to enjoy the area as it is, including the less tangible characteristics of it. The State of Queensland opposed the recognition of the right to enjoy the amenity of the area because it was 'too vague' to be included in a determination.[44] This is despite the fact that the State of Queensland considers the concept of 'amenity' to be certain enough for it to be used in numerous pieces of state legislation.[45] The recognition of the right to enjoy the area was also opposed on the basis that it inappropriately uses a term that was part of a composite phrase. Justice Cooper refused to recognise a right to enjoy the amenity of the area on different grounds. In his judgment (at para 179) Justice Cooper referred to the claimed right as a right to 'control the amenity' but that is not how the applicants put their case. A right to enjoy the amenity of an area is a description of a right for a group of people to have their own enjoyment of the area in its current form.[46] It is not a right to control the activities of others any more than recognising a right to fish necessarily involves a right not to have that right interfered with by other people.

The applicants in the Wellesley Sea Claim will continue to be able to have standing over development affecting the amenity of the region under Queensland legislation to the same extent as other members of the public. However, the reasoning as to why a native title right simply to enjoy an area and its characteristics as a native title right or interest remains unsatisfactory.

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[44] First Respondent's Amended Response to the Applicant's Amended Submissions filed in Federal Court proceedings QG207/97 on 6 November 2002, para 212G.

[45] The word 'amenity' is used in s4.2.34 of the *Integrated Planning Act 1997* (Qld) as one of the matters to be taken into account in the appeal process. The 'amenity' of the area forms part of the definition in s.8 of the 'Environment' in the *Environmental Protection Act* 1994 (Qld). It is also used in s.252 of the *Land Act 1994* (Qld), Section.34(c) of the *Beach Protection Act 1968* (Qld) and Section 4, *Tweed River Entrance Sand By-Passing Project Agreement Act 1998* (Qld).

[46] See *Broad v Brisbane City Council and Baptist Union of Queensland* [1986] 2 Qd 317; *The Manbarra People v Great Barrier Reef Marine Park Authority and Anor* [2004] AATA 268 (15 March 2004) per Downes J at para 182; and *Fantasea Cruises Pty Ltd* v *Great Barrier Reef Marine Park Authority and Anor* [2000] AATA 824 paras 149 – 150.

As a result one means by which the Court could have given effect to the Lardil, Yangkaal, Kaiadilt and Gangalidda peoples' profound relationship to their sea country was not utilised. No other means to give effect to those interests were recognised in its place.

Concluding Comments

The decision in the Wellesley Sea Claim is a significant one for the Aboriginal communities in the southern Gulf of Carpentaria. The fact that they have been recognised as being organised societies living under traditional laws and customs will provide significant force to the recognition of their native title rights and interests in land. The recognition of their special relationship to the land and waters concerned will also bring increased pressure on all levels of Government to increase the involvement of the Gulf Aboriginal communities in decisions that may affect that special relationship.[47]

The fact that core parts of their traditional laws and customs have not received legal protection will be a source of on-going grievance for the applicant Aboriginal communities. Regardless of the non-recognition of those interests, they will remain a fundamental part of the daily lives of those communities. These laws and customs have, after all, continued to be acknowledged and observed notwithstanding their non-recognition by the Australian legal system over the last 200 years. To the extent that non-Indigenous people choose to ignore the laws and customs of the people who reside in the region their actions will be seen as discourteous and antagonistic.

It is of course open for Governments to add to the protection of the cultures of the applicant Aboriginal communities through other means. The applicants themselves will continue to use whatever laws and other methods they can lawfully pursue in order to build on the legal recognition and protection that the Federal Court has afforded. Such recognition should not be seen as controversial. The experience of many non-Aboriginal people who have visited the islands has shown that there is nothing to fear from providing that recognition and protection - on the contrary, it has invariably been reciprocated through friendship and generosity.

[47] *Onus v Alcoa* (1981) 149 CLR 27. The future act regime of the *Native Title Act* 1993 (Cth) will also be relevant in this regard.