

The Legal Status of Aboriginal Spiritual Beliefs

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Abstract

What should be the legal status of Aboriginal spiritual belief, for example, rights and obligations under Aboriginal spiritual beliefs to access land to conduct traditional ceremony. Conventional common law property rights do not ordinarily extend to protection of spiritual beliefs. The article contends, however, that where common law and statutory law recognizes a system of native title, the content of native title is to be found not in the traditional principles of the common law but in the relevant native title traditions and customs. Spiritual elements, including rights and obligations to access sacred sites for traditional ceremony may be an integral component of native title. The issue is illustrated by analysis and rejection of the Commonwealth's argument in a High Court case.

Keywords: Aboriginal spiritual beliefs; Property rights; Legal status; Law

The Legal Status of Aboriginal Spiritual Beliefs

This article explores the legal status, if any, of Aboriginal spiritual belief, including the legal status of Aboriginal claims to access land to conduct traditional ceremony. Even the suggestion that a spiritual belief may have some legal status may surprise some. Conventional common law property rights do not ordinarily include rights relating to spiritual beliefs. It will be contended that Aboriginal spiritual beliefs involve close Aboriginal connection with traditional land including, according to Aboriginal custom and tradition, rights and obligations to conduct ceremony on sacred sites. Australian law, both Australian common law and Australian statutory law, recognizes native title. Where Australian common law recognizes a system of native title, the content of relevant native title rights is to be found not in the traditional principles of common law but in the relevant native title traditions and customs, which may relevantly include rights (and obligations) to access land for traditional ceremony.

The legal issue arose in a recent constitutional case, in the High Court of Australia, in which, so it seems to me, the case put on behalf of the Australian Government, that the rights claimed did not constitute property rights, appears to have been at odds with the Australian Government's professed commitment to human rights and to the rights of indigenous people. The Australian Government failed to address, so it seems to me, the unique character of traditional native title rights.

These propositions may seem unusual. A claim to access land to conduct a religious ceremony is probably not a claim to a property right under traditional Australian common law. Why should a claim by indigenous people to access a sacred site to conduct ceremony be viewed differently. The answer, I contend, requires an understanding that, while native title is recognized by the common law, it owes its origins to and derives its content from indigenous traditions and customs. It is to those traditions and customs that one must turn to understand the nature and content of native title rights.

The case before the High Court of Australia was *Wurridjal vs. The Commonwealth* [1], a constitutional challenge, brought by Reggie Wurridjal and Joy Garbin, senior members of the Dhukurrdji clan, to provisions of Australian legislation establishing what has become known as the Northern Territory Intervention. This controversial legislation was a response to reports of child sexual abuse of Aboriginal children, graphically described in a report to the Northern Territory Government entitled *Ampe Akelyernemane Meke Mekarle-Little*

Children are Sacred [2]. The Australian Government introduced so-called emergency legislation, relying on the 'territories power' (Australian Constitution, s 122) and the 'race power' (Australian Constitution, s 51(xxvi)), to amongst provide for five year leases in favour of the Commonwealth on Aboriginal land. The alleged purpose of these statutory leases was to enable the Commonwealth to repair houses and infrastructure. The Aboriginal plaintiffs, traditional owners of Maningrida land, in a constitutional challenge in the High Court of Australia, claimed that provisions of the legislation amounted to an unlawful acquisition, without payment of 'just terms' [3], of their traditional rights, including their right to participate in ceremony including on identified sacred sites.

The Australian Government demurred to the plaintiffs' claim. Demurrer is a technical legal procedure by which a party contends that, even if the facts alleged are established, the claims are not good in law. There were two major grounds for the demurrer. Both grounds raised human rights considerations:

(1) That the just terms requirement in section 51(xxxi) of the Australian Constitution did not apply to the Northern Territory.

(2) That the property relied upon by the Aboriginal plaintiffs, including the right to conduct ceremony on sacred sites, did not constitute property for the purposes of s 51(xxxi) of the Australian Constitution.

This article will deal only with the second ground, namely, the legal nature of the right to participate in ceremony on sacred sites.

The Australian Government's Second Argument: The Aboriginal Rights Claimed were not Property Within s 51(xxxi)

The rights asserted by the plaintiffs were somewhat different from conventional property rights commonly recognized by traditional

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Australian property law. That is no reason not to recognize and respect those rights as property rights. The purpose of the Northern Territory's Land Rights legislation [4] and the subsequent recognition by the High Court of Australia of native title under the common law [5] were to give recognition, in the Australian legal system, to a system of traditional ownership not previously recognised. There is extensive authority that the guarantee effected by s 51(xxxi) of the Australian Constitution is to be given a wide meaning [6], extending to protection against acquisition other than on just terms of 'every species of valuable right and interest, including... choses in action' [7]. Property may be seen as a 'bundle of rights' [8], and has been held to extend to 'intangible property rights' and 'innominate and anomalous interests' [9].

Why would the Government argue that the traditional rights claimed by the Aboriginal plaintiffs in relation to their land, whether rights granted by statute under the Northern Territory's Land Rights legislation or common law native title rights, did not fall within this well-established wide meaning given to property? Those rights are in some respects novel, but they are clearly valuable rights. Are they intrinsically different from, say, choses in action or rights of profit or use in land recognised as constituting property rights? Why would the Government maintain that they were not property rights? Why would the Government argue that the diminution of those rights by nonconsensual statutory leases under the Northern Territory Intervention legislation did not give rise to an acquisition? Again, the considerations that led to the Government's arguments are not known.

The remainder of this article will focus on considerations that, in the writer's view, should have guided the Government. It is appropriate to note that at the commencement of oral argument in the Wurrildjal case Professor Kim Rubenstein and this writer made an unsuccessful application for leave to make submissions, as amici, relating to international law instruments and authorities which, the amici submitted, would assist the Court in determining the legal nature of the rights claimed by the plaintiffs [10].

So how should the question, whether the rights claimed by the Aboriginal plaintiffs constituted property for the purposes of s 51 (xxxix), be viewed? What are the relevant legal principles? What public policy considerations should guide public responses to such claims?

The Maningrida land was Aboriginal land under the Aboriginal Land Rights (Northern Territory) Act 1976. Under that Act, the plaintiffs enjoyed legally protected rights and interests relating to the land itself, to spiritual associations with the land and to their traditional activities on and in relation to the land. They also claimed traditional native title rights which they asserted were recognised by the common law. It is beyond dispute that Indigenous rights in relation to land are valuable legal rights that enjoy the same protection as other property rights [11]. These rights include the spiritual, cultural and social connection with the land, including the right to conduct religious or cultural activities. Surely these should not be treated differently from other property interests simply because the characteristics may be different from other more conventional property interests.

Australian Native Title Law Principles

Native title was not recognised in Australian law until the Australian High Court's landmark decision in *Mabo v Queensland (No 2)* [12]. Drawing on extensive legal authority, including the International Court of Justice in its Advisory Opinion on Western Sahara [13], the High Court rejected the doctrine of terra nullius, in favour of the common law doctrine of aboriginal title. Key elements of a lengthy and complex decision included the fundamental principle that native title

was derived from traditional custom but was recognised and protected by the common law.

Native title has its origins in and is given its content by the traditional customs observed by the Indigenous 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 [14].

The common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native rights and interests to which they give rise [15].

...native title, being recognized by the common law (though not as a common law tenure), may be protected by such legal or equitable remedies as are appropriate to the particular rights and interests established by the evidence, whether proprietary or personal and usufructuary in nature and whether possessed by a community, a group or an individual [16].

The source of native title was the traditional connection to or occupation of the land. The nature and content of native title was determined by the character of the connection or occupation under traditional laws or customs. The *Mabo* decision recognised the unique nature of native title, including spiritual elements of indigenous traditions and the unique nature of the relationship to and interest in land held by indigenous people. Later decisions have confirmed that native title rights have their origin in indigenous law and custom and native title has its source and derives its content from a body of law outside the common law. Native title rights may include activities that may be conducted on or in relation to land. Those rights have been referred to as a bundle of rights. Thus in a later case, *Fejo*, the High Court held

The rights of native title are rights and interests that relate to the use of the land by the holders of the native title. For present purposes let it be assumed that those rights may encompass a right to hunt, to gather or to fish, a right to conduct ceremonies on the land, a right to maintain the land in a particular state or other like rights and interests. They are rights that are inconsistent with the rights of a holder of an estate in fee simple [17] (emphasis added).

Clearly the right to conduct ceremonies on land may be a component of native title rights. In recognising rights of this nature, the High Court has recognised the spiritual and non-physical elements of the traditional customs and traditions of indigenous people. These spiritual elements are an integral component of their native title rights. Such rights are not components of conventional common law title. In recognising native title the law must recognise and respect the perspective of a different legal system. The content of a system of native title is inherently different from the content of conventional common law title. It follows that an analysis that seeks to assess native title rights by reference to traditional common law principles is a fundamentally flawed. Native title is recognised by the common law but is not itself an institution of the common law. Rather, it is necessary to look to Aboriginal custom to determine the content and the character of a native title right. The High Court has recognised that 'Aboriginal ownership is primarily a spiritual affair' [18] and that a number of Aboriginals or Aboriginal groups may have a spiritual responsibility for the same land [19]. And 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 [20]. This concept, traditional rights having a connection with land, is given force in the statutory definition of native title in the Native Title Act 1993:

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

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

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

(c) the rights and interests are recognised by the common law of Australia [21].

In a later case, the High Court accepted that ‘...respecting access to sites where artworks on rock are located, or ceremonies are performed, the traditional laws and customs which are manifested at these sites answer the requirement of connection with the land found in par (b) of the definition in s 223(1) of the NTA’ [22]. The Court went on to explain that the statutory definition ‘requires first an identification of the content of traditional laws and customs and, secondly, the characterisation of the effect of those laws and customs as constituting a “connection” of the peoples with the land or waters in question [23].’ Where the relevant Aboriginal custom or tradition includes the right to conduct ceremony on land, that right is clearly a legal relationship or ‘connection’ with respect to the land [24]. Establishment of the right to conduct ceremony involves a factual inquiry and cogent evidence.

Subsequent native title decisions support this approach. For example, in *Delaney on behalf of the Quandamooka People v State of Queensland* [25], Dowsett J held that the native title rights and interests of the Quandamooka people included ‘the right to conduct ceremonies’ [26]. Clearly the Court considered the right to conduct ceremonies to be a legal right.

From the point of view of Aboriginal people, there can be no doubt that ceremony is an attribute of spiritual connection with land and of traditional ownership. Indeed, there is a two way relationship between ceremony and ownership, reflecting the spiritual bond between people and the land. The conduct of ceremony is itself an assertion of ownership. It is also one of the obligations of ownership.

The Commonwealth’s submission in *Wurridjal*, that the right to conduct ceremony on sacred sites, if established, did not give rise to a property right, constitutes a flawed analysis. It appears to be based on a blinkered view of property, drawing only on common law concepts of property rights, without regard to the very different content of native title.

Perhaps this is where the Government’s analysis went wrong.

Wurridjal is not an isolated example. The issue arises again and again. In relation to a proposed nuclear waste dump at Manuwangu or Muckaty in the Northern Territory, land described by a Government Minister as ‘in the middle of nowhere’ [27], one writer has poignantly observed ‘It can be difficult for non-indigenous people to understand the Aboriginal spiritual connection with landscape, or to comprehend the deep suffering of those who are unable to defend their traditional country from the ravages of industry’ [28]. In this example it seems the Government Minister failed even to address the customs and beliefs of the Aboriginal people. To ignore the traditional roles of Aboriginal people as custodians of their land and to ignore their spiritual connection to their land is to ignore the reality of their rights

and interests in land. Those rights and interests are clearly valuable to them and demanding of proper legal recognition.

An issue not raised in the *Wurridjal* proceedings, and apparently also not raised in the *Manuwangu* or *Muckaty* dispute, is whether laws impeding access to sacred sites for the performance of traditional ceremony would be contrary to the provisions of s 116 of the Australian Constitution, preventing the Commonwealth from making any law ‘for prohibiting the free exercise of any religion’. Authority on the scope of the s 116 prohibition is limited, but it may be noted, first, that in the *Scientology Case* [29]. *Murphy J* would have extended s 116 to indigenous religions [30], secondly that the prohibition does not extend to executive or administrative action [31] and, thirdly, that it seems that in light of *Kruger*, where the High Court rejected the claim that the removal of Aboriginal children from their parents breached their right to the free exercise of their religion, s 116 does not invalidate laws that have only an indirect effect on the free exercise of religion.

International Law Principles and Authorities

To the extent that the issue may have been seen as new or unsettled in Australian law, international law principles, authorities and jurisprudence clearly support the view that the rights of indigenous peoples to pursue their religious spiritual and cultural practices are important legal rights properly recognised as constituting property for the purposes of s 51(xxxi) of the Australian Constitution. Examples include Articles 7, 17 and 18 of the Universal Declaration of Human Rights, recognising the right to own property, the right to religious observance and equality before the law without discrimination. Later international human rights instruments identify more specifically the rights of indigenous peoples to practice their religion and culture and the legal nature of that right.

Aboriginal culture is of course amongst the oldest, possibly the oldest, of all continuing living cultures in the world. A fundamental aspect of that culture is the human connection to land or country, including responsibility to protect sites of spiritual significance.

The International Covenant on Civil and Political Rights is one of the core international human rights instruments. Article 27 and the Human Rights Committee’s commentary on the article are directly relevant to the legal nature of the rights the Plaintiffs claimed in *Wurridjal* and the question whether these rights constitute property for the purposes of s 51(xxxi) of the Australian Constitution. Article 27 provides that ethnic, religious or linguistic minorities are not to be denied the right to enjoy their own culture or to practise their own religion. The Human Rights Committee, in its comments on Article 27, has explained that, although the article is expressed in negative terms, the article recognises a ‘right’ and requires that it shall not be denied. Culture protected by the article may include a particular way of life associated with the use of land [32]. The earlier Article 18 guarantees the right to practice one’s religion or belief, subject only to limitations necessary to protect public safety and order. The Human Rights Committee has explained that this extends to ritual and ceremonial acts [33].

Article 30 of the United Nations Convention on the Rights of the Child is in similar terms, providing that a child belonging to an ethnic, religious or linguistic minority ‘or who is indigenous shall not be denied the right to enjoy his or her own culture, to profess and practise his or her own religion’.

Article 2 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities provides

that 'Persons belonging to national or ethnic, religious and linguistic minorities...have the right to enjoy their own culture, to profess and practice their own religion...'

The United Nations Declaration on the Rights of Indigenous Peoples is an important statement of international opinion concerning the rights of indigenous peoples to maintain their spiritual connection with land. Article 8 provides that indigenous people have the right not to be subject to destruction of their culture. The article goes on to provide that states must provide effective remedies. Article 11 provides that indigenous people have the right to practice their cultural traditions and customs including the right to maintain historical sites and ceremonies. Article 12 similarly provides that they have the right to practise their spiritual traditions and to have access to their religious and cultural sites. Article 25 provides that indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned lands. Cumulatively these important provisions provide a strong basis for the view that access to traditional lands to conduct ceremonies is a legal right. These provisions have obvious continuing practical application to the proposed nuclear waste dump at Manuwangku/Muckaty in the Northern Territory. Traditional Aboriginal owners have consistently spoken of their ongoing spiritual and cultural connection to the proposed nuclear waste dump site and expressed deep concern about land access for future generations [34].

On 5 March 2008, Australia made the following statement In the Human Rights Council

... Australia recognises the importance of the Declaration for Indigenous peoples globally [35].

The earlier Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief [36] also contains relevant provisions.

Article 1

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. ...

The Human Rights Committee has elaborated on the freedom to manifest religion in its General Comment 22 that:

4. The freedom to manifest religion or belief may be exercised "either individually or in community with others and in public or private". The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts..... The observance and practice of religion or belief may include not only ceremonial acts but also such customs as participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group [37].

In 2005, the Commission on Human Rights urged States [38]:

To exert the utmost efforts, in accordance with their national legislation and in conformity with international human rights law, to ensure that religious places, sites, shrines and religious expressions are fully respected and protected and to take additional measures in cases where they are vulnerable to desecration or destruction;

To ensure, in particular, the right of all persons to worship or assemble in connection with a religion or belief and to establish and maintain places for these purposes [39]...

International Jurisprudence

In a series of cases the Human Rights Committee has attached substantial legal weight to the obligations under article 27 of the ICCPR.

Sandra Lovelace v Canada [40] concerned a member of a Canadian indigenous minority, the Maliseet Indians, who married a non-Indian and thereby lost her status as a Maliseet Indian including the right to live on the land allotted to the band and the cultural benefits of living in the Indian community. The Committee found this interference with her right to culture gave rise to a breach by Canada of Article 27.

Ivan Kitok vs. Sweden [41] concerned an ethnic Sami who complained he had lost the right to membership of the Sami community and to reindeer husbandry as a result of Swedish legislation providing that Sami who engaged in any other profession for three years lost their Sami status. The purpose of the legislation was to restrict the number of reindeer breeders in order to protect the Sami community (the pasture area for reindeer was limited. Kitok lost on the facts. The Committee's interpretation of Article 27 is nevertheless significant.

The regulation of an economic activity is normally a matter for the State alone. However, where that activity is an essential element in the culture of an ethnic community, its application to an individual may fall under article 27 [42].

Chief Bernard Omniyak and the Lubicon Band vs. Canada [43] concerned a complaint by the leader of the Lubicon Cree Indian Band that its land had been expropriated for commercial interests, destroying the aboriginal way of life. The Human Rights Committee found that Canada violated Article 27 by allowing exploitation of natural resources (oil and gas drilling, a pulp mill and logging) where this would destroy the traditional life of the Lubicon Lake Group. The Committee said

... the rights protected by article 27, include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong [44].'

Lansman vs. Finland [45] was a complaint by Lansman and forty seven other Sami that quarrying and transport of stone interfered with traditional reindeer herding activities in violation of Article 27 and that the site of the quarry was a sacred place of the old Sami religion. The complaint failed on the facts: the Human Rights Committee found the quarrying did not affect the reindeer herding significantly; the effect on the sacred place was not substantial; accordingly, there had been no infringement of Article 27. Nevertheless the Committee's interpretation of Article 27 is significant:

9.2 it is undisputed that the authors are members of a minority within the meaning of article 27 and as such have the right to enjoy their own culture; it is further undisputed that reindeer husbandry is an essential element of their culture.

9.4 A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27. Article 27 requires that a member of a minority shall not be denied his right to enjoy his culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under article 27.

9.8 ... if mining activities in the Angeli area were to be approved on a large scale and significantly expanded by those companies to which exploitation permits have been issued, then this may constitute a violation of the authors' rights under article 27, in particular of their right to enjoy their own culture [46].

In the second Lansman case [47], Lansman and three other Sami reindeer herders complained that logging, construction of roads and future mining to be conducted within the winter pasturelands of the local herdsmen's cooperative and in the vicinity of the Angeli village would amount to a denial of their right to enjoy their culture in breach of Article 27. The Committee found that 'it is unable to conclude that the activities carried out as well as approved constitute a denial of the authors' right to enjoy their own culture [48]'. The Committee stated:

10.3 Article 27 requires that a member of a minority shall not be denied the right to enjoy his culture. Measures whose impact amounts to a denial of the right are incompatible with the obligations under article 27 [49]. ...

10.7 The Committee considers that if logging plans were to be approved on a scale larger than that already agreed to for future years in the area in question or if it could be shown that the effects of logging already planned were more serious than can be foreseen at present, then it may have to be considered whether it would constitute a violation of the authors' right to enjoy their own culture within the meaning of article 27. ... though different activities in themselves may not constitute a violation of this article, such activities, taken together, may erode the rights of Sami people to enjoy their own culture [50].

Thus a cumulative effect of actions taken by the State Party may be sufficient to constitute a violation of Article 27.

In *Francis Hopu and Teapoatiu Bessert vs. France* [51] two ethnic Polynesians and inhabitants of Tahiti, French Polynesia, complained that the construction of a luxury hotel would destroy their traditional burial grounds, where members of their family are said to be buried. Because France had made a reservation to Article 27, the complainants based their claim on the right to enjoy private and family life protected under Articles 17 and 23 of the ICCPR.

The Human Rights Committee said 10.3. The authors claim that the construction of the hotel complex on the contested site would destroy their ancestral burial grounds, which represent an important place in their history, culture and life, and would arbitrarily interfere with their privacy and their family lives, in violation of articles 17 and 23. They also claim that members of their family are buried on the site. The Committee observes that the objectives of the Covenant require that the term "family" be given a broad interpretation so as to include all those comprising the family as understood in the society in question. It follows that cultural traditions should be taken into account when defining the term "family" in a specific situation. It transpires from the authors' claims that they consider the relationship to their ancestors to be an essential element of their identity and to play an important role in their family life.... The Committee therefore concludes that the construction of a hotel complex on the authors' ancestral burial grounds did interfere with their right to family and privacy.

11. The Human Rights Committee... is of the view that the facts before it disclose violations of articles 17, paragraph 1, and 23, paragraph 1, of the Covenant [52].

In its concluding observations on its consideration of the report submitted by Ecuador under article 40 of the ICCPR the Human Rights Committee observed

19. The Committee expresses concern at the impact of oil extraction on the enjoyment by members of indigenous groups of their rights under article 27 of the Covenant. In this connection, the Committee is concerned that, despite the legislation enacted to allow indigenous communities to enjoy the full use of their traditional lands in a communal way, there remain obstacles to the full enjoyment of the rights protected under article 27 of the Covenant [53].

The Committee on the Elimination of Racial Discrimination (CERD) has also made important observations on the protection of indigenous rights over ancestral land. In the Committee's concluding observation on the Country report submitted by Argentina pursuant to Article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Committee noted 'the inadequate protection in practice of indigenous peoples' ownership and possession of ancestral lands and the consequential impairment of indigenous peoples' ability to practise their religious beliefs [54].' CERD urged Argentina to adopt measures to safeguard indigenous rights over ancestral lands, especially sacred sites, and compensate indigenous peoples for land deprivation; ensure access to justice, as well as recognize effectively the legal personality of indigenous peoples and their communities in their traditional way of life, and respect the special importance for the culture and spiritual values of indigenous peoples of their relationship with the land [55].

International Rapporteurs

Rapporteurs for international committees have emphasised the special relationship of indigenous people to their land.

For example, Special Rapporteur, Mrs. Erica-Irene A. Daes wrote that the concept of indigenous peoples' relationship with their lands, territories and resources is inseparable from their cultural and spiritual values, survival and vitality [56].

Special Rapporteur Jose R. Martinez Cobo wrote

It is essential to know and understand the deeply spiritual special relationship between indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions and culture.

For such peoples, the land is not merely a possession and a means of production. Their entire relationship between the spiritual life of indigenous peoples and Mother Earth, and their land, has a great many deep-seated implications. Their land is not a commodity which can be acquired, but a material element to be enjoyed freely.

In 2002 the Special Rapporteur on Indigenous Rights stated in a report on a country visit to Argentina:

The process of returning land to indigenous people, as the touchstone of their identity, is thus a precondition for providing access to holy sites and burial grounds and hence for legitimate religious or spiritual activities.

Conclusion

The legal status of Aboriginal spiritual beliefs needs to be analysed according to the traditional laws and customs of the Aboriginal people. The common law recognises native title. The content of native title is to be found in those traditional laws and customs. Spiritual elements including the right and the obligation to conduct ceremonies on sacred sites may be an integral component of native title rights. The Commonwealth's argument in *Wurridjal* was fundamentally flawed. Instead of examining whether access to sacred sites to conduct ceremony

constituted property under common law, the Commonwealth should have investigated the nature of the right (and obligation) to access sacred sites to conduct ceremony under Aboriginal tradition.

References

1. (2009) HCA 2.
2. More formally, Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (2007).
3. Section 51(xxxi) enables the Commonwealth Parliament to legislate for the acquisition of property 'on just terms'.
4. Aboriginal Land Rights (Northern Territory) Act 1976.
5. Mabo v Queensland (No 2) (1992) 175 CLR 1.
6. Telstra Corporation Limited v The Commonwealth (2008) HCA 7 [43].
7. Loc cit [49].
8. Loc cit [43].
9. Bank of New South Wales v Commonwealth (1948) 76 CLR 1, 349
10. Commonwealth v Yarmirr (2001) 208 CLR 1, 49.
11. (1992) 175 CLR 1.
12. (62) (1975) ICJR
13. (1992) 175 CLR 1, [64].
14. Ibid [66].
15. Ibid [68].
16. Fejo v Northern Territory (1998) 195 CLR 6 [47].
17. Yanner v Eaton (1999) 201 CLR 351 [37].
18. Ibid 170
19. Loc cit [38].
20. Native Title Act 1993, s 223
21. Western Australia v Ward (2002) 213 CLR 1, [59]
22. Loc cit 64.
23. Cf, Yanner v Eaton (1999) 201 CLR 351, [17]
24. (2011) FCA 74
25. Loc cit [3].
26. Church of the New Faith v Commissioner of Pay-Roll Tax (Vic) (1983) 154 CLR 120.
27. Ibid 151.
28. Kruger v Commonwealth (1997)
29. General Comment No 23: The rights of Minorities
30. General Comment No 22 : The Right to Freedom of Thought, Conscience and Religion
31. Judith C (2013) Manuwangku, Under the Nuclear Cloud
32. http://www.foreignminister.gov.au/releases/2008/fa-s046_08.html
33. General Assembly resolution 36/55 of 25 November 1981.
34. U.N. Doc. CCPR/C/21/Rev.1/Add.4 (1993),Para. 4.
35. The Commission on Human Rights, Elimination of all forms of intolerance and of discrimination based on religion or belief, Human Rights Resolution 2005/40
36. Ibid, Articles 4 (b) and 4(d).
37. Communication No. 24/1977: Canada. 30/07/81
38. Kitok v Sweden Communication No. 197/1985, Official Records of the Human Rights Committee 1987-88
39. Ibid Para 9.2
40. Bernard O (1995) Chief of the Lubicon Lake Band v Canada, Communication No. 167/1984
41. Ibid Para 32.2
42. United Nations Human Rights Committee, Report of the Human Rights Committee, Communication No 511/1992
43. Loc cit.
44. Lansman v Finland, Communication no. 671/1995, U.N. Doc. CCPR/C/58/D/671/1995.
45. Ibid Para 10.5
46. Ibid Para 10.3
47. Ibid Para 10.7
48. Communication No 549/1993: France. 29/12/97. CCPR/C/60/D/549/1993/Rev.1.
49. Loc cit.
50. Concluding Observations of the Human Rights Committee
51. Committee on the Elimination of Racial Discrimination
52. Ibid 175
53. Indigenous Peoples and Their Relationship to Land
54. Study of the Problem of Discrimination Against Indigenous Populations
55. E/CN.4/2002/73/Add.1.
56. Ibid Paras 112-113 and 150.

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