Getting to native title — roles and important distinctions for anthropologists and advocates

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Introduction

While offering guidance on questions about the relevance and the form of a draft of his expert report, I was recently asked by an anthropologist: "When is a right not a right?" The question reminded me of several important issues that confront anthropologists and legal representatives engaged in native title claim processes.

These issues include:

- What instruction should be given to an anthropologist engaged to write an expert report on "connection" issues for a native title claim when it comes to the identification of rights and interests?
- What are rights and interests, as distinct from the overall relationship of people to country, from duties and responsibilities that might form part of that relationship, and from the religious or other identities underpinning that relationship?
- What are rights and interests, as distinct from the ways they may be exercised and as distinct from rules that govern that exercise?
- What are native title rights or interests, as distinct from any other kinds of rights or interests?
- What, in any event, are rights and interests?

The last question is readily disposed of for present purposes, without getting distracted by the obvious difficulties of the task. It is sufficient to understand a right as that aspect of a position in a relationship between a person and something (an object, territory or another person) which is supported by, and enforceable within, the applicable normative system. "Right" is not a word defined in the Native Title Act 1993 (Cth). However, because the word appears in the phrase "rights and interests" in the definition of native title in s 223(1), it is that composite expression, rather than the individual words, that warrants attention.

"Interest" is defined very broadly in s 253 of the Native Title Act as including at least a legal or equitable estate; or any other right, charge, power or privilege over, or in connection, with land or waters. Thus, the composite phrase is one of broad compass, but not so broad as to encompass every aspect of the relationship of a group of people to its country. It does not include duties or responsibilities and is not adequately understood by reference to bare activities. Importantly, by the qualification in s 223(1) and in s 253, it is only rights and interests "in relation to land or waters" that are "possessed under" traditional laws and customs that may be translated for recognition as native title.

Summary points

Approaching a native title claim requires a plan that will sustain the process through all stages; from research and expert report, to the formal inception and pleading of the claim, the development and presentation of the evidence, and all the way to the submissions that will be made at the close of the case. This is so even if the starting expectation is that the outcome will be a determination made with the consent of all parties. A consent determination can never be guaranteed and, in any event, is best achieved at any given point from the strength of a well-considered and informed position.

Developing and implementing a plan requires consideration of all aspects of the case and the anticipation of likely pitfalls along the way. Three only, of the myriad of matters requiring consideration, are considered here.

First, a preferred understanding is provided of the respective roles of researcher and advocate in identifying rights and interests possessed under traditional laws and customs as candidates for native title.

Second, some modelling is provided of a preferred path to the identification and framing of the traditional rights and interests for native title purposes. Both research and legal considerations are required. The research inquiry should start (and perhaps, end) with an appreciation and account of the laws and customs that together define the relationship between the relevant people and their country. A preferred account would include consideration of the relationship as an integrated whole, as well as in its various elements — including any religious or other underpinnings, and of any duties and responsibilities that are concomitant with the relationship.

The research should provide a sufficient basis upon which the advocate may identify a sustainable way in which case for native title may be put. Identifying the best way the case may be put involves identifying the nature and extent of the traditional rights and interests, and the traditional basis upon which those rights and interests are possessed. In this process, the advocate must distinguish between laws and customs which define the rights and interests themselves from:

- laws and customs which determine the way the rights and interests are held within the group
- the ways in which they may be exercised
- the traditional rules which may govern the exercise of the rights and interests
- laws and customs about duties and responsibilities

Third, framing the claimed native title rights. This aspect of the advocate's task goes beyond the identification of the traditional rights and interests and the application of the various distinctions just referred to — in two ways. Firstly, only those rights that are "in relation to land or waters" can be native title rights. Secondly, there is the requirement to "translate" the traditional rights themselves, using terms familiar to the language of Australian property law.

The roles of researchers and advocates

The job of an advocate is to put and present a case fairly, but in its best light. The job of an expert anthropologist is to identify facts and state properly based opinions relevant to the issues in the case while at all times remaining "independent", which is to say, agnostic about the consequence of their findings on possible outcomes of the case. Legally, the overriding duty of an expert whose report is intended to be evidence in the Federal Court is to the court, and that duty is to be impartial and independent of those by whom they are engaged.[1]

That is not to say that a researcher must be and remain an unfeeling automaton; merely that they must be able to demonstrate, if called upon, that any personal sympathies for a particular outcome in the case have not influenced the approach taken to the research tasks or the opinions arrived at. It is one thing to admit to a long and personal, even sympathetic, relationship with the claimants; it is another to be shown to have allowed a bias to have influenced the expert evidence. The researcher should avoid any activity or expression in a report that would provide a basis for a submission that they are an advocate for the claimants. It usually helps this cause to stick to the expression of careful opinions systematically arrived at and on a proper and fully disclosed basis. Anthropologists often experience the demands of expert witness report writing as requiring more rigour and constraints and less creative freedoms in that respect than the demands of academic writing.

Interactions between legal representatives and researchers involved in a claim should occur regularly, from the time the expert is engaged. The first interaction will likely be in the framing of terms of reference to be issued to the researcher. These are the instructions that define the research and report writing tasks. Ideally, draft terms of reference will be discussed with the researcher to ensure that they are within the expertise of the researcher and achievable in practice; and to ensure that the researcher has a clear understanding of what is required.

Some anthropologists may say that members of their profession have not always received best practice support from the legal profession in the expression of the terms of reference or otherwise during their report writing and appearance as a witness. I will confine the consideration of roles here to issues which concern that part of the research task relevant to the identification of traditional rights and interests under applicable laws and customs.

I have seen terms of reference that in effect merely direct the researcher to consider a given list of activities and to state an opinion as to whether the traditional rights are rights to undertake those activities. Such terms of reference may (incorrectly in my view) simply reproduce the list of "rights" stated in the original native title determination application (Form 1) and request an opinion as to whether those rights are the traditional rights of the group. A Form 1 list is not necessarily based on any significant research and does not necessarily reflect current best practice taking account of the current jurisprudence. Early native title claims were often lodged without significant or adequate research. A tendency to this approach was further entrenched in the aftermath of the reference in the *Western Australia v Ward*[2] (*Ward*) decision of the High Court to native title as a "bundle of rights". In my view, the use of that expression was effectively coopted by the opponents of claims and misunderstood by those representing applicants. I will return to this later, but foreshadow that I do not regard the approach as current best practice.

An expert so instructed may be excused for preparing a report that simply confirms that rights possessed by the relevant group are those itemised in the terms of reference. Such instructions do not encourage the kind of open-ended inquiry commensurate with the requirement of independence and impartiality. Nor is it conducive to arriving at the preferred starting point for the identification of traditional rights and interests or native title rights and interests, namely a good understanding of the whole of the relationship between people and country.

Similarly, listing what informants say are things that they and their ancestors have done in their country is not irrelevant to the identification of rights and interests in relation to land and waters, but it is not sufficient. Such a list cannot properly identify the full scope of the relationship between an Aboriginal or Torres Strait Islander group and their country, or serve adequately to identify the full extent of rights possessed. There may be things people have not done because there was no technological capacity for it, no immediate need for it, or no market to warrant it. There may be an absence of certain resources and there may be resources which are or were useless or not regarded as valuable at particular points in time. There may be seasonal or cultural inhibitions on the conduct of activities at certain places by certain persons at certain times or at all. Lists of activities may point to the existence of a right and may provide examples of its exercise or indicate that there may be rules about its exercise. However, such a list is inherently incapable of standing as an account of the relationship between people and country or as a sufficient basis for determining either the existence or the nature and extent of a right or interest. Further, activities may be done otherwise than as of right.

A piecemeal, activity-focused approach to rights and interests is simplistic on any view and apt to fundamentally devalue the potential benefit of the awaited and hard-won victory over the doctrine of *terra nullius*. It fails to acknowledge that native title at its best requires the rights and interests to be identified as an aspect of and reflective of the relationship of a group with its traditional country, rather than by reference to activities. Traditional rights and interests are ultimately best stated using words which capture as much of the relationship of people and country, as can properly be understood as rights and interests.

Any holistic account of the relationship of the rights holding group to their country will necessarily identify some aspects of the relationship (aspects of religious connection, duties, responsibilities and so on) which the advocate will discard in the process of identifying and framing the rights and interests themselves. Such aspects, however, will remain relevant to the considerations of the "connection" requirement of s 223(1)(b) of the Native Title Act.

Of particular significance in the task of identifying rights and interests is the identification of those

elements of the relationship of people to country that concern the use of country, the taking and use of its resources, and the controlling of access to and use of the country by others. In this context, it may be appropriate to consider whether the relationship invites any comparison, for example, with notions of "ownership" or at least some consideration of what it means for a group's members to regard a country as "*our* country".

Professor Sutton has identified the relationship between groups of Aboriginal people and their country from an anthropological perspective as inalienable and as one that is held communally, and has opined that rights flow from aspects of identity.[3] So much may be accepted. A researcher may usefully identify and flesh out such matters by reference to traditional laws and customs so as to facilitate the analysis necessary to the identification of the relevant rights and interests.

However, the categories of rights and kinds of rights considered by Professor Sutton in the same paper — "core", "contingent", "primary", "secondary" and so on — as it turns out, may not be well suited to the requirements of the Native Title Act, as now understood. Such categories are now largely overshadowed in the jurisprudence; by the distinctions between a "right itself" and the "manner of its exercise", and between a right in relation to land or waters and a right "in relation to a person".

For example, Professor Sutton's primary and secondary rights holders both may turn out to be members of a single rights holding group, but have acquired membership through different modes of descent. The difference may turn out to relate more to the exercise of the rights than to the possession of the rights themselves.

For example, if the connection of one is by descent from a person's mother and the other from a person's father, laws and customs may dictate that they each share in the right of the group to control access to country, but afford each a different status or role when it comes to making decisions in exercise of that right. Each may possess the right but their roles in its exercise may differ. Under laws and customs of that kind, Professor Sutton's secondary rights holders and "secondary rights" may not be a relevant analytical category for native title purposes. What particular members of the rights holding group may or may not do in the exercising of a right does not define the right itself or the relationship of a group to its country.

Professor Sutton's core and contingent categories, again, may not relevantly signify different kinds of rights. So far as core rights are those that arise from a fundamental proprietary relationship of a group to its country, they are likely to be native title rights. On the other hand, so far as a right arises apart from a relationship of that kind, it may not be a native title right because, for example, it is either dependent ultimately upon the permission of the rights holding group or upon the existence of a relationship with a member of that group.

In a recent decision of North J, his Honour said of the connection of a person by a conception event (*rayi*) to a place within the country of another group:

> The rayi connection holder therefore cannot engage in activity in the rayi event area without entering into this relationship of mutual respect with the rights holders by descent, and in that sense, any rayi derived rights are contingent upon the "core" rights of the rights holders by descent. Thus, rayi derived rights are rights in relation to persons, not land or waters.[4]

So far as a requirement of permission is concerned, any expectation that permission may be granted or not revoked says more about the manner in which the rights holders may exercise a right to control access than it is suggestive of the existence of a relationship between the permittee and the country of a group of which they are not a member. As North J put it, in the context of the *rayi* connection referred to above:

> … even though permission is not ordinarily denied, the very fact that permission must be sought is indicative of the rayi connection holder entering into a relationship with the rights holders by descent. That relationship is characterised by mutual respect. The rights holders by descent "wouldn't say no" to the rayi connection holder, but in the event of wrongful behaviour, the rayi connection holder may be excluded.[5]

Generally, so far as the condition for the existence of the right is the existence of a relationship with a member of the group (for example, a marriage or in-law relationship), the right is in relation to a person, not in relation to land and waters.[6] Thus, to classify something like the kind of *rayi* event relationship to a place considered by North J as involving a "contingent right" elides at least whether it is in relation to land and waters.

Identification of native title rights and interests and their extent must engage the terms of the Native Title Act, as it is currently understood.

Framing traditional rights and interests

In *Ward*, the Chief Justice and three other justices of the High Court in a joint judgment referred, in the area of rights possessed under traditional law and custom, to the employment of the metaphor of a bundle of rights.[7] In doing so, the plurality made clear not just the usefulness but also the limitations of the metaphor. Their Honours said of the metaphor:

> It draws attention first to the fact that there may be more than one right or interest and secondly to the fact that there may be several *kinds* of rights and interests in relation to land that exist under traditional law and custom.[8]

The plurality did not acknowledge the metaphor as a basis for any presumption that traditionally, rights are limited to the conduct of specific activities. Their Honours were at pains to make clear that native title is not necessarily "capable of full or accurate expression as rights to control what others may do on or with the land."[9]

Importantly, their Honours held that what the Native Title Act required was "expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests". They said:

> 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.[10]

So, the starting point of investigations about native title is the relationship between people and country. That is where the research effort is to be directed and,

perhaps, end. The rest — identifying nature and extent of traditional rights to be found within that relationship, and the further analysis necessary to identify the existence, nature and extent of native title rights — is generally an exercise of legal analysis and advocacy.

Further, the plurality in *Ward* did not declare that broadly framed rights can only be recognised as native title rights if they are "fragmented" into a list of specific activities that may be undertaken. Notwithstanding, many respondent parties have since argued that native title should be understood in that way. Too often that argument found some success, particularly in the negotiation of consent determinations. Rather, consistent with their view that native title is an expression of the relationship of people to country, the only "fragmentation" their Honours regarded as necessary was "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."[11]

Ward does not preclude the understanding of traditional or native title rights and interests or the demarcation of research and advocacy roles urged here; it supports it. The High Court determined in *Mabo v Queensland (No 2)*[12] that native title existed on Mer as a right of exclusive possession, the broadest of rights known to the common law. In *Ward*, the plurality did indicate that where native title rights and interests are found not to amount to a right of exclusive possession, "it will be preferable to express the rights by reference to the activities that may be conducted, as of right, on or in relation to the land or waters."[13]

Bearing mind that they had already said, as noted above, that native title rights and interests are to express the relationship of people and country in terms of rights and interests, and accepting that expressing native title as a right of exclusive possession is one way of doing that where the evidence and questions about extinguishment allow it; it cannot be argued that by reference to "activities", the plurality had in mind any particular degree of specificity for the framing of the rights and interests. Indeed, the High Court did not, in *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth*[14] (*Akiba*), comment adversely on the findings of Finn J as the trial judge[15] in terms of very broadly framed (non-exclusive) rights.

Bearing in mind that it is the relationship of a group of people to their country that is to be described in terms of the rights and interests, it is inevitable that the activities that the members may undertake as of right in their country must be very broadly framed; even where native title cannot legally (because of extinguishment) include the right to undertake the activity of controlling the access to and use of their country by others. Indeed, it would be remarkable if activities by which the description of such a relationship to a country did not include the activities of unconstrained access to and use of the country and its resources, as well activities involving control of the country against others.

Generally, the doing of an activity may indicate the presence of a right that may be exercised in a particular way, but reference to it will not sufficiently define the nature and extent of the right itself. A relationship to a country is not built on the myriad of activities people may undertake, but on the broad nature of their connection to it. Further, the presence or absence of an activity is not determinative respectively of the presence or absence of a right. Indeed, the absence of the activity of denying or revoking permission to access a country may merely indicate that one of the ways that a right to control access may be exercised is to decide not to enforce a requirement for permission in some circumstances.

In the native title context, a right in relation to land and waters must be framed such that it will express the relationship of the group to its country (or least an aspect of it). Laws and customs about duties and responsibilities, and other aspects of the relationship of the group to its country (for example, religious aspects) may include rules that govern the exercise of the rights; but for native title purposes, these are not laws and customs that define the rights and interests themselves. Rather, they are laws and customs about the way rights and interests may be exercised.

The distinction between a right itself and its exercise, and the importance of this distinction, has been recognised by the High Court in *Akiba* and in *Western Australia v Brown*.[16] In those cases, the distinction was made not in the context of the fragmentation of the traditional rights for the purpose of framing the relevant native title rights and interests, nor in the context of identifying the nature and extent of the rights and interests; but in the context of questions about extinguishment. The High Court in *Akiba* treated each of the (in that case, non-exclusive) native title rights found to exist, as monolithic for the purposes of extinguishment and thereby not amenable to partial extinguishment by reference to particular activities (in that case, the activity of commercial fishing) by which the more general right (in that case, to take for any purpose and use resources) may be exercised.

However, the concept of a "right itself", analytically, must be the same for determining whether the right exists as for whether it is extinguished. The relevant right is distinct from the various ways in which and the various activities by which it may be exercised and from the rules that govern or regulate that exercise. The right itself is necessarily larger than any example of its exercise and qualitatively different from restrictions that may limit or qualify its exercise in particular circumstances and from any other traditional rules which may govern its exercise.

Laws and customs that relate to people and their country may give rise not only to rights and interests but also to rules about the way they may be exercised. In a native title case, the two must not be confused. There may be rules which prohibit the exercise of the right by some members of the community in certain places or at certain times, but these do not qualify the right of the group, the right itself. Rules may apply to the exercise of the right to control access, such as those mentioned by North J and referred to above. There may be a law or custom that an adult individual member of a group may give permission to an outsider to visit the country or exploit its resources for personal use; whereas the decision of the rights holding group as a group may be to require to invite another group into the area, or to exploit large quantities of resources for communal or commercial purposes. Again, such rules are not to be understood as qualifying the right itself, but rather that they are about the exercise of the right.

Framing native title rights

Framing the native title rights is a job for the advocate, best undertaken based on an adequate research account of the relationship between the relevant people and country and of the normative system that sustains that relationship. It must take account of the legal requirements of the Native Title Act and apply the relevant jurisprudence. The task will involve an analysis of the research, a stripping away of elements of the relationship of people to country that do not define rights and interests in relation to land and waters (for example, elements which comprise duties and responsibilities, the spiritual connection and so on).[17] It requires the identification of the basis or bases for the possession of such rights and interests, the application of the distinctions discussed above (between a right itself, the manner of its exercise, and rules governing its exercise; and the distinction between the possession of rights and the way they are held amongst the members of the group).

Finally, the advocate must craft a description of the native title rights and interests that is both an adequate expression of the relationship of the claimants to their country, and an adequate translation of those rights.

Putting to one side any question of extinguishment, it must be regarded as unlikely that an integrated relationship of an Aboriginal or Torres Strait Islander group with its country would not include a general right of access and use, a general right to take and use resources, and a general right to control the access and use of others. However, each case is to be assessed on the available evidence by reference to the laws and customs comprising the traditional normative system of the claimants which define their relationship to their country.

Clearly, a right to control access to and use of country by persons who are not members of the rights holding group will sustain translation and recognition as a right of occupation, use and enjoyment as against the rest of the world. Clearly, the rights of access and use by a group to its country and the rights of the group to take and use the resources of its country, expressed to reflect the relationship between a group and its country, will be sustained by the translation expressed by Finn J in *Akiba on behalf of the Torres Strait Islanders of Regional Seas Claim Group v Queensland (No 2); sub nom Akiba v Queensland (No 3)*[18] (*Akiba No 2*) in his conclusion:

> I am satisfied that the group members of the respective individual island communities have the following traditional rights in their owned or their shared marine territories:
>
> (a) the rights to access, to remain in and to use those areas; and
>
> (b) the right to access resources and to take for any purpose resources in those areas.
>
> In exercising those rights, the group members are expected to respect their marine territories and what is in them.

Questions about so called "water rights" and "commercial rights" have been controversial in framing native title rights over recent decades. The controversy was always misplaced. It rested on a failure to appreciate that native title is about the expression of the relationship of a group of people and their country (and thus, that reference to particular resources and particular activities is unwarranted) and on failure to maintain the distinction between the right itself and the way in which it is exercised. That controversy should be regarded as ended by *Akiba No 2*, *Western Australia v Willis on behalf of the Pilki People*,[19] *BP (deceased) on behalf of the Birriliburu People v Western Australia*,[20] *Isaac (on behalf of the Rrumburriya Borroloola Claim Group) v Northern Territory; Roper (on behalf of the Rrumburriya Borroloola Group) v Northern Territory*,[21] *Murray (on behalf of the Yilka Native Title Claimants) v Western Australia (No 6)*,[22] and the determinations made in those cases.

A brief explanation illustrates these points. "Water" is to be distinguished from "waters" in native title jurisprudence. "Waters" is a term defined in s 253 of the Native Title Act to describe a particular kind of area by reference to its association with particular kinds of water. "Water", the liquid substance, is a particular resource which may be found on, in or under areas of land or waters. So far as water may be present within the area in which a group holds traditional rights, water, in all its forms, is just one among the totality of resources which may be the subject of the relationship of the group to its country and of the rights and interests possessed by the members of the group. Thus, ordinarily, there would no basis for singling out this particular resource, or for an argument that it was necessary to do so to properly capture the rights elemental to the relationship of the group to its country. Rather, the taking and use of water will be just an example of the way in which a right to take and use resources may be exercised.

Nor do extinguishment considerations warrant the treatment of water as respondents have contended in the course of this controversy. Following *Akiba*, even quite comprehensive regulation of water by common law and statute will not extinguish the right to take and use resources; though native title holders will be liable to comply with the regulatory regime. This is so whether the activities associated with the taking and use of water are done under a broad right to take and use resources, or under the even broader right of exclusive possession.

As to controversy over commercial rights, it is not incumbent on a native title applicant to claim rights framed in such a way as to facilitate extinguishment arguments. Rather, it is incumbent on an applicant to claim rights that properly reflect the relationship of the claimant group to its country. If the claimed right is to take resources for use for any purpose, then, regulation, or even prohibition or imposition of a universal licensing requirement for use of a particular resource for commercial purposes, or all resources for that matter, will regulate but not extinguish the right. There is literally no commercial right to extinguish where commercial activity is just one of the ways in which a right to take and use resources may be exercised.

It should be the aim of those framing claimed native title rights and interests to comprehend the completeness, and ensure the continuing integrity, of the relationship of people and country. Anything less will likely fall short of the best practice representation of native title claimants.

Conclusion

I have sought here to suggest a model for approaching some of the important research and pleading tasks of a native title claims process, taking advantage of recent developments in native title jurisprudence.[23] The contention is that the adoption of this approach, systematically and consistently, from the beginning of the claims process to incorporating it in an overall plan for a native title claim, will ensure that the end result will best reflect the traditional relationship of the people of the claim area with that area under their laws and customs, and that nothing will be left out that can properly be recognised as native title. The resulting native title will be its own best defence against future piecemeal extinguishment.

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Robert Blowes SC, Canberra, is a barrister with 35 years of full-time experience in representing Aboriginal people and Torres Strait Islanders in the preparation, litigation, negotiation and mediation of claims to have their traditional rights in land and waters recognised and protected in many regions of Australia.

Footnotes

1. Harmonised Expert Witness Code of Conduct, para 2 — annex A to the Expert Evidence Practice Note (GPN-EXPT) issued by the Chief Justice of the Federal Court on 25 October 2016:

   > An expert witness is not an advocate for a party and has a paramount duty, overriding any duty to the party to the proceedings or other person retaining the expert witness, to assist the Court impartially on matters relevant to the area of expertise of the witness.

2. *Western Australia v Ward* (2002) 213 CLR 1; 191 ALR 1; [2002] HCA 28; BC200204355 at [76] and [95].
3. P Sutton *Kinds of Rights in Country: Recognising Customary Rights as Incidents of Native Title* National Native Title Tribunal Occasional Papers Series No 2 (2001) 24 under the heading "Basic characteristics of Aboriginal country as property".
4. *Manado (on behalf of the Bindunbur Native Title Claim Group) v Western Australia* [2017] FCA 1367; BC201710225 at [498].
5. Above n 4, at [498].
6. *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth* (2013) 250 CLR 209; 300 ALR 1; [2013] HCA 33; BC201311628.
7. Above n 2, at [95]. The submissions made to the court in the case by some parties were replete with references to the metaphor, but there is little mention of it in the judgments.
8. Above n 2, at [95].
9. Above n 2, at [95].
10. Above n 2, at [14]. In *Yanner v Eaton* (1999) 201 CLR 351; 166 ALR 258; [1999] HCA 53; BC9906413 at [37], the plurality of Gleeson CJ, Gaudron, Kirby and Hayne JJ said that "native title rights and interests not only find their origin in Aboriginal law and custom, they reflect connection with the land." Their Honours went on to say at [38] that:

    > Native title rights and interests must be understood as what has been called "a perception of socially constituted fact" as well as "comprising various assortments of artificially defined jural right". 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.

11. Above n 2, at [14].
12. *Mabo v Queensland (No 2)* (1992) 175 CLR 1; 107 ALR 1; [1992] HCA 23; BC9202681.
13. Above n 2, at [52].
14. Above n 6.
15. *Akiba on behalf of the Torres Strait Islanders of Regional Seas Claim Group v Queensland (No 2); sub nom Akiba v Queensland (No 3)* (2010) 204 FCR 1; 270 ALR 564; [2010] FCA 643; BC201004525 at [540].
16. *Western Australia v Brown* (2014) 253 CLR 507; 306 ALR 168; [2014] HCA 8; BC201401345.
17. Note, importantly, that this does not in any sense destroy or extinguish any (non-native title) rights or interests, or undermine the other elements of connection. It means only that such matters are not given status as rights and interests in Australian law. For example, the "reciprocity-based rights" held not to be native title rights in *Akiba* nevertheless remain rights enforceable within the normative system of Torres Strait Islanders.
18. Above n 15, at [540].
19. *Western Australia v Willis on behalf of the Pilki People* (2015) 239 FCR 175; 329 ALR 562; [2015] FCAFC 186; BC201512483.
20. *BP (deceased) on behalf of the Birriliburu People v Western Australia* [2014] FCA 715; BC201405322.
21. *Isaac (on behalf of the Rrumburriya Borroloola Claim Group) v Northern Territory; Roper (on behalf of the Rrumburriya Borroloola Group) v Northern Territory* (2016) 339 ALR 98; [2016] FCA 776; BC201605567.
22. *Murray (on behalf of the Yilka Native Title Claimants) v Western Australia (No 6)* [2017] FCA 703; BC201704861.
23. A suggested precedent for terms of reference for anthropological research for a native title claim consistent with the views expressed here has been provided for inclusion in the Australian Institute of Aboriginal and Torres Strait Islander Studies' Native Title Precedents Database, available at https://ntpd.aiatsis.gov.au. The database is only accessible by subscribing native title representative bodies.