

Day 2 Session 4: The intersection of a legal definition of native title rights holder and the practice of authority to exercise rights

Kevin Murphy (Cape York Land Council) *At the intersection of the legal definition of native title rights holder and the practice of authority to exercise rights*

Panel Discussants: Luis Lopez (North Queensland Land Council) and Tony Redmond (consultant)

Native title claim group descriptions, and the descriptions of native title holding groups in determinations of the Federal Court are commonly defined by reference to a list of ancestor names. There is some variation in form, with some groups defined merely as the descendants of the named ancestors, often - but not always - explicitly stated to include people adopted into the group.

Other group descriptions involve qualifications on inclusion, such as that the group members must self-identify as, and be accepted by, the group-at-large as members, often with reference to a language-named-tribal identity. This common practice has evidently developed with endorsement of State respondent parties since most determinations in Queensland have been made by consent.

Group descriptions of this latter form outline cognatic stocks, so the number of groups that an individual is included in, can potentially double in each generation from the named apical ancestors. Further, these group descriptions say nothing about authority within the group.

During this discussion the panel will explore the intersection of legally determined native title holding group descriptions, with the social processes involved in exercising authority to make decisions about land.

This includes consideration of mechanisms for exclusion, such as where it may be insisted that everyone should choose one country of primary affiliation.

Does such an insistence have normative force, and how does it interact with the administrative requirements of prescribed bodies corporate? It also includes consideration of the social dynamics involved in the inclusion or otherwise of people who are discovering their ancestral connections to country after several generations of removal.

Key discussion points included:

- Native Title determinations must clarify who the rights holders are
- Social complexity can be lost in group descriptions where named ancestors (i.e., a descent model) are given as the only basis, while there also needs to be some flexibility
- Differing types of rights are not always recognised as Native Title rights
- Disputes that arise during Native Title determinations often continue into the post-determination phase and PBCs can struggle to deal with these issues
- The structure and politics of PBCs, and their role in determining their membership, can also be a source of tension
- Complaints about exclusion from membership are likely to arise and may lead to costly trials/court hearings if unresolved
- Disputes within PBCs about governance and decision-making over discrete areas within the determination will continue to emerge
- The dynamics surrounding 'returnees' (people who are discovering their ancestral connections to country after several generations of removal) are discussed
- The inclusion of 'returnees' is usually contingent on their life history and the protocols they adopt when returning, and in the long term, a performative dimension of connection. An individual's rights and interests must be substantiated, and this

usually must be done with acceptance by the 'jural public'. Usually, this acceptance must be done socially and is not only a recognition of one's descent connection.

- Representative bodies may be able to provide advice to 'returnees.'