

Selling Your Family: Why customary title is incomparable to Western conceptions of property value.

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Abstract

The notion of property is fundamentally different between modern culture and customary people. In practice modernity posits property as a set of material rights that are notionally comparable to other material values. Customary people perceive property only partially in these terms and place greater emphasis on origins and obligations of property within an understanding of community that is alien to modern culture.

If property is recognised to both consist of material and non-material values, then it cannot be adequately valued in commercial terms alone. The Australian experience in assessing compensation for the extinguishment of customary title has less than satisfactory with few resolutions and many of those negotiated in secret. Conclusions from this experience provide insights into the nature of the dilemma of rendering customary interests in land into modern commercial terms.

The recognition of the metaphysical foundation of the respective systems of property goes some distance towards understanding the difficulties involved in the valuation of customary interests. The solution probably lies outside the attempt to transfer ownership when the more defensible need is use.

Keywords: property theory, customary title, valuation methodology

Small (2003) proposed a schema for understanding property between cultures by suggesting that property institutions in all cultures were artefacts of legal systems that were in turn derived from culture and ethics. Culture and ethics were argued to rest on the culture's dominant anthropology and this was grounded ultimately on the culture's dominant theory of existence. The purpose of this paper is to explore the application of this cultural theory of property to the question of compensation and valuation. This paper will begin with the application of the theory to modern Western property and its valuation, and then attempt the same to customary property. From this contrast, implications for valuation and compensation will be developed.

Western cultural foundations and property value

Johnson (1995) outlined the extent to which Modern Western thought depends upon an entirely materialist theory of existence. Despite disagreeing with some of the conclusions that have been adopted by contemporary Western culture, Johnson demonstrated the way that theories in physics and cosmology like the "Big Bang" are necessary to the support of our culture and ethics. If the material world was wholly generated by spontaneous material causes, then the understanding of the human person as an entirely material, and ultimately self-interested person follows as a necessary conclusion. Indeed, any understanding of humanity that tries to argue beyond the material realm can be shown to be indefensible within the methodology of

Modern thought. This explains the methodological premises of all the Modern social sciences. Most have taken their current forms since the Enlightenment and generally pay little deference to motivations such as charity, unless these are ultimately linked in some way to self-interest. David Hume (1975) articulated this ultimately self-centred approach to social thought in his moral sentiment theory. Hume argued that there was no basis to ethics beyond the sentiments, or affective inclinations, of moral actors. In positing this ethical system, Hume eliminated the necessity of all human social obligations, save those that the individual felt inclined to adopt through sentiments of attraction or disapprobation.

Applying Hume's social thought to economics and property, notions of justice become irrelevant and licit commercial behaviour reduces to that which is acceptable to the parties involved. Adam Smith was greatly influenced by Hume and his little read *Theory of Moral Sentiments* (Smith 1971) is essentially a restatement of Hume's position that can be seen to provide the ethical foundation to the *Wealth of Nations*. Under this ethical paradigm, Reeve (1986) demonstrated that Smith's theory of property was no more than that institution of possession that was upheld by state sanction. Enlightenment England in Smith's time adopted a property institution that was stripped of any obligation to the community - a position that ran counter to the earlier traditions of Europe such as articulated by Aquinas (1981, p.1471, II-II, Q66).

Much of Smith and Hume's position on ethics, especially as applied to property and commerce survives in present Western practice, but its radical individualism has been tempered. John Stuart Mill's (d.1873) ethical system of utilitarianism exists on an entirely material anthropology and despite claiming to achieve a social optimum, does so by summing entirely individual aims (Mill 1978). Applied to property and commerce, Mill's utilitarianism reduces all values to material quantities that the economic actor is assumed be able to equate through utility equivalences. Money, being the economic measure of utility, therefore becomes the measure of all values possible to humans.

Economic thought is entirely consistent with this approach, adopting its own peculiar anthropology, *homo economicus* (economic man). Economics posits humans as entirely material, self-interested and rational. John Stuart Mill adopted this anthropology and imbedded it into his utilitarian ethics and political economy (Mill 1965; Mill 1978). If the human person is material and self-interested, then it follows that the object of property is to order distribution of the material benefits of property amongst individuals who are naturally inclined to pursue the maximum personal utility from the resources available. Nothing further is either necessary or possible within this approach and personal ethics within it is argued from the promise of greater personal utility from the fair treatment of others. When Mill considered human action, he had no place or need for normative ethics or spirituality and human sentiments such as altruism and charity were irrelevant. Utilitarianism, as the ethical foundation to modern economics, is indifferent to social relationships such as family bonds or philanthropy, except where these are subjectively satisfying to the moral actor.

The valuation of property implicitly reflects these fundamentals. All formal values in Western modernity are expressed in material terms. These ultimately reduce to monetary values within the assumptions of utilitarianism. *Homo economicus* has the ability to understand the utility of material goods and rank them using money equivalents. The only exception to this is the elusive head of compensation for

solatium, which remains as a reluctant deference to personal sentiment within the otherwise clinical business of statutory compensation. While humans may subjectively enjoy a view, or prize a site of family significance, it is only able to be expressed socially when quantified in material, dollar, terms. In most circumstances, property has value because of its highest and best material use. This use is necessarily material and most fundamentally expressed as the capacity of property to attract rent. Individual rights comprising the bundle of rights that compose property titles each have value according to this material/commercial approach.

Sheehan and Small (2002) have noted that customary title has necessitated the assuaging of notions of rent and market value, and have shown that that broad relationship is different for customary peoples. Classical economists describe this relationship as the rent and price, however from a property theory perspective it is more accurately described as a causal link between the market value of property and the rental to be paid to gain access to that property.

There has been some testing undertaken of the relationship of the causal link between rent and market value by Small and Oluwoye (1999), and more recently in respect of auction and tender behaviour by Small (2002). The results in that literature strongly confirm the view that in a perfect market, rents are the driver for market value (prices).

Property in Classical Economics

Adam Smith (d.1790) treated land property extensively and concluded that land behaved monopolistically. That is to say, despite a multiplicity of vendors and purchasers, the property market can behave as a perfect market. This monopolistic argument can be traced to the underlying land asset (pure factor land) which has no cost of production. Smith also provided an important insight when he showed that every improvement of any kind in the community was ultimately absorbed into land rent (Smith 1910, 228). Smith's conclusion explained why there is appreciation of land values in growing communities. The fact that property values are grounded in this manner is little appreciated by the broad real estate investing public.

Adam Smith insisted that rents gather up these improvements, and the prices of the assets (or market value of property) do not. The reason being is that rent is the root of market value, and arguably the value of assets such as land is merely a conversion from rent. Fundamentally, rents are capitalized into capital, even though in a developed market capital value may be used to estimate rent. This is especially evident in property booms where capital values leave their rent-determined fundamentals only to return to them during the bust phase that is sometimes insightfully referred to as the market *correction* phase. Ricardo developed Smith's argument somewhat further in his law of rent, and it is generally noted by economists that Ricardo's work is remembered in this area for his focus on rent and not price, because price (market value) mechanistically follows rent (Fusfeld 1999, 37-55).

Such mechanistic explanations however do not hold true for customary title and the following sections of this paper explain how customary notions of property can be ascribed worth under the aegis of property theory and broadened concepts of existing anglo-Australian property and valuation law and practice.

Customary Culture and Property

Customary people do not view land as individual property, but rather as a part of a ethical/spiritual/legal matrix of rights, obligations and community relationships. Ezigbalike (1994) is representative of authors who have described the way that customary people tend to identify their relationship with the land with their

spirituality. Other authors have shown this to be a widespread characteristic of diverse customary cultures (Coulanges 1890/1927; Boyd 1995; Rakai 1995; Small 1997). Rather than basing land title merely on conventional institutions of possession, customary peoples tend to relate it to beliefs regarding origins. A common theme that runs through many customary cultures is the belief in some supernatural process, usually in the form of a supernatural being (or beings) that creates the world and the people.

As natural owners, these creative beings transmit the land to the people as part of a broad spectrum of relationships with them that includes customs, laws and cultural beliefs. In some cases the land is pure gift, as in the Murray Islands. In others it is hereditary, as in Tonga. In a few, the same generative event produced both the land and the people, creating a family bond making the land almost a brother to the people. In others the people were created out of the land, making it almost literally their mother.

In all cases the people are defined culturally by the genesis event as well as being given the land personally and corporatively from its natural owner, or linked to it by family bonds. Part of the cultural definition of the people is their system of laws and customs. Custom is therefore intimately linked to property and a betrayal of custom or property implies rejection of ties to the tribe. A common theme in customary law is the inalienability of the tribe's lands

While few Western people may believe in Malo the octopus, or the Rainbow Serpent, the logical implications for land rights that follow from these beliefs must be respected as forming a far stronger claim on land title for those who do. Customary people generally hold similar concepts of their corporate identity and its implications. The people, or tribe, is usually understood by them to be composed of all members: past, present and future, and land rights belong equally to all of them. This means that the currently living members of the tribe represent only a tiny portion of the total membership, all of whom have equal rights to the tribe's property. Since sale to foreigners can only compensate the tribe's people currently living, any alienation necessarily means disadvantaging most members of the tribe. It means disenfranchising ancestors and progeny of cultural and material rights without compensation commensurate with their loss.

The history of compensation for the dispossession of customary peoples is a melancholy one, and prior to the decision in *Mabo & Ors. v Queensland (No 2)* (1992) 175 CLR 1 Indigenous customary title was not recognised under anglo-Australian law. Since 1992 the issue of compensation for the extinguishment or impairment of customary title has been proscribed to only those incidents of title which are rooted in land within the legal construct known as native title. It is important to recognise that native title is an artefact of anglo-Australian property law that does not necessarily equate to customary title as understood by indigenous Australians.

Aspects of customary title especially those that are sourced in metaphysics¹ are given only perfunctory recognition, and indeed attempts at valuation of these incidents has been not only vulgar, but arguably profane. The historic predilection of property and valuation law and practice for physical determinism has revealed the shortcomings of

¹ Metaphysics refers here to its classical meaning as the study of what is fit to be, or less formally the study of the nature and implication of various modes of being.

these disciplines when conceiving compensation for customary title. Since 1992, sporadic claims for compensation have been filed with Australian Courts, and it is open to conclude that the reluctance of these two disciplines to garner a meaningful understanding of customary title has soberly exercised the minds of potential claimants. A search of the records of the Federal Court of Australia and the National Native Title Tribunal reveal the following claims for compensation that have been lodged formally:

Figure 1: - Native Title Compensation Applications

Date Filed	Applicant	Fed Court File No.	Tribunal File No.	Area (sq km)	Location	State/Territory	Status
21/02/94	Yorta Yorta Clans	VG6001/98	VPA94/1	23470.639	Murray River	Vic/NSW	Active
24/03/94	Wik Peoples	QG6213/98	QPA94/1	27426.929	Cape York	Qld	Finalised/Withdrawn
09/03/95	Larrakia Compensation	DG6009/98	DPA95/1	1.708	Palmerston	NT	Active
20/11/95	Supplejack Station	DG6001/98	DPA95/2	3834.988	Supplejack Station	NT	Discontinued
09/05/96	Birri Gubba People		QPA96/1	0.220	Mackay	Qld	Finalised/Withdrawn
05/09/96	Djungan People	QG6215/98	QPA96/2	10.227	Dimbulah	Qld	Active
06/12/96	Cullen Bay/				Cullen Bay/		
	Bayview Haven	DG6016/98	DPA96/1	1.279	Bayview Haven Darwin	NT	
18/12/96	Pearl Connelly	QG6216/98	QPA96/3	24.868	Ernest Heny Mine	Qld	Active
12/06/97	Johnny Jango	G6023/98	DPA97/1	103.319	Yulara	NT	Active
08/10/97	Muthi Muthi People #2	NG6164/98	NPA97/1	17839.993	Balranald	NSW	Active
09/10/97	Barkandji						
	(Paakantyi) People#9	NG6165/98	NPA97/2	130353.768	South West NSW	NSW	Active
13/10/97	Barandji						
	(Paakantyi) People#10	NG6166/98	NPA97/3	0.521	Dareton	NSW	Active
13/10/97	Barkandji						Finalised/Full Approved
	(Paakantyi) People#11	NG6167/98	NPA97/4	146.789	Lake Victoria	NSW	Determination - 16 Feb 04
16/10/97	Barkandji						
	(Paakantyi) People#12	NG6168/98	NPA97/5	217.915	Nr Wentworth	NSW	Active
10/11/97	Muthi Muthi People#3	G6172/98	NPC97/1	42.519	Balranald	NSW	Active
10/11/97	Barkandji Compensation #5	NG6173/98	NPC97/2	N/A	Nr Pooncarie	NSW	Finalised/Discontinued
24/11/97	Barkandji Compensation #7	NG6174/98	NPC97/3	N/A	Wentworth		Discontinued
24/11/97	Barkandji						
	(Paakantyi) People#13	NG6169/98	NPA97/6	0.592	West of Lake Mungo	NSW	Active
05/12/97	Barkandji						
	(Paakantyi) People#14	NG6171/98	NPA97/8	26272.878	Wentworth	NSW	Active
05/12/97	Muthi Muthi People#4	NG170/98	NPA97/7	21699.208	Balranald	NSW	Active
17/04/98	Yirra Bandoo 1	DG6038/98	DPA98/1	1.279	Cullen Bay/Bayview Haven	NT	Active
14/05/98	Dangalaba 12	DG6039/98	DPA98/2	1.279	Cullen Bay/Bayview Haven	NT	Active
08/07/98	Yuibera People	QG6228/98	QPA98/1	0.220	Mackay	Qld	Active
08/07/98	Stephen Seiver	NG6179/98	NPE98/1	N/A	Hunter Valley	NSW	Finalised/Discontinued
08/07/98	Stephen Seiver	NG6178/98	NPD98/1	N/A	Warringah	NSW	Finalised/Discontinued
08/07/98	Stephen Seiver	NG6177/98	NPC98/1	N/A	Hunter Valley	NSW	Finalised/Discontinued
08/07/98	Stephen Seiver	NG6175/98	NPA98/1	N/A	Hunter Valley	NSW	Finalised/Discontinued
08/07/98	Stephen Seiver	NG6176/98	NPB98/1	N/A	Hunter Valley	NSW	Finalised/Discontinued
13/08/98	Bodney Family	WG6289/98	WPA98/1	1.349	Birdswood Island, Perth	WA	Active
29/09/98	Bodney 2	WG6290/98	WPA98/2	4.052	Kings Park, Perth	WA	Active
29/09/98	Bodney 3	WG6291/98	WPA98/3	7.025	Rebold Parks	WA	Active
31/08/99	Molong People	N6014/99	NPA99/1	N/A	Central West	NSW	Finalised/Discontinued

Source - Constructed from National Native Title Tribunal, and Geo-Spatial Unit of Tribunal, 30 September 2004.

These 32 claims for compensation total 251,463.66 square kilometres representing a miniscule 0.00327% of the total 7,682 million square kilometres comprising the Australian continent. It will be noted that five of the claims listed above appear to cover the same area of land, however this is not unexpected given that customary title can be *inter alia* an expression of the filial relationship between individuals. Furthermore, there is a whole raft of compensation claims which are ancillary to native title claims, a notable example being *Ward v Western Australia (1998) 159 ALR 483* which fostered subsequent related compensation claims by the *Miriuwung Gajerrong* peoples of the East Kimberley region of Western Australia. There are also unreported claims for compensation between customary peoples and Government for compulsory acquisition arising from specific public works in many parts of Australia.

Furthermore, it is notable that customary peoples both in Australia, New Zealand, Canada and elsewhere have entered into confidential negotiations for compensation when dealing with

proponents for natural resources exploitation within Indigenous lands.² Some of these agreements have been registered as Indigenous Land Use Agreements (ILUAs) with the National Native Title Tribunal, under amendments made in 1998 to the *Native Title Act 1993* (Cth.), however in almost all ILUAs compensation details remain confidential. Importantly, the Acting Aboriginal and Torres Strait Islander Social Justice Commissioner noted in 1998 that in the agreement process:

...such negotiations will take place with a fundamental imbalance of bargaining power. With the non-native title interest having already been validated, some parties may approach such negotiations as a matter of benevolence or favour, rather than motivated by a real need to resolve the issues. A failure to resolve the issues will simply transfer the matter to the Federal Court for determination, where it is more likely that the Court will not order non-monetary forms of compensation (particularly if such compensation imposes obligations on unwilling third parties). (Acting Aboriginal & Torres Strait Islander Social Justice Commissioner 1998)

Implications for Valuation

The relationship between customary people and the land, regardless of their genesis beliefs, is always primarily non-material and non-commercial. While it is a convenient aside that the tribe's land provides the raw materials for their material welfare, it is not central to their title. Often, customary people are not concerned about exclusive occupancy, despite being fiercely jealous of having the land recognised as their property. This means that the alienation of rights pertaining to land cannot be evaluated using material/commercial equivalencies.

If the transfer of land rights away from customary people is to be compensated, either by a fair price in the market, or just terms of compensation for public acquisition, the value of the interest alienated must be matched in metaphysically equivalent terms. This means in terms of metaphysical category and accidental quantity. Metaphysical categories are not an issue for Western commerce, so long as the assumptions of material utilitarianism are adopted. Ackrill (1997) is amongst recent authors who have revived interest metaphysical categories as first articulated by Aristotle. The notion of the categories is that they are sets of fundamentally different entities in existence. Since they are fundamentally different, they cannot be directly compared or equated. The experiences of sight and sound are categorically distinct and comparisons between the two are merely poetic. Within the notion of value, as broadly understood, lie many distinct metaphysical categories. For example, the value of eyesight is incomparable to the value of love.

In social relationships it is often necessary to undertake exchanges between categories, but this is not the same as establishing equivalence. If a person is willing to be blinded for the love of another, we cannot conclude that eyesight is equivalent to love. In the case of compensation for the loss of external material things, our culture relies on the assumption that everything that is desirable is reducible to a materially conceived estimate of utility, and these may be translated into money terms. Meikle

² For example see *Alice Springs News* (1996) "Deal on sacred trees: Goods, services, cash – custodians negotiate" (February 26) 1.

(1995) is amongst the philosophers and economists who are currently critical of this position, despite it remaining as the formal foundation of economics. He cited authors who demonstrated its failures, but concluded that it remained as a necessary basis for the modern discipline. This is not to say that in some cases commercial utility cannot be understood and compensated—a property investor who loses a rental stream through the loss of a property right, can be compensated with reasonable precision using a category of wealth equivalent to the one lost. This is the area where valuers are on solid ground. Rather, there exists a class of situations where commercial equivalence is problematic, but it is not adequately understood by our culture.

Compensation for the loss of a limb, or an eye are common instances where the commercial equivalence is less straightforward. At one level, arms and legs are merely instruments for the support and productive activity for the organism and the loss of their function may be replaced at a known cost. On this level, body parts can be valued reliably. However, few would argue that the loss of an arm is not more than the loss of the wages that could be earned using that arm. Its loss represents the loss of social confidence and possibilities, more esoterically it means the loss of part of one's humanity and self image. These do not have commercial equivalences, though their value to the person may be considerably greater. The incomparability of these types of values is evident in the fact that a market in arms, legs or kidneys is inconceivable within our culture where a vendor would willingly surrender these things for commercial reward. There may be people in the world who would willingly pay a king's ransom for a kidney, but the possibility of live donors selling their kidneys, even for the prices obtained in compensation cases, is unconscionable. If fair market value is legally accepted to require willing but not eager buyers and sellers, it is evident that there cannot be a fair market value where willing but not eager vendors are humanly impossible.

The betrayal of one's country, or one's kin, represents a case that is more explicit. Judas's thirty pieces of silver could never be augmented to the point where history would judge his actions to be merely commercial. Nor would it be likely that a greater sum would ever reverse his self-condemnation—had he obtained 300 silver pieces he probably would have been no less likely to suicide. Traitors are courted by a country's enemies but then usually despised and mistrusted by their new masters. It is no accident that a person who has no social conscience in business is often described by the common idiom as one who would "sell his own grandmother." This expression conveys our lingering tendency to uphold the dignity of women, especially mothers, as valued beyond surrender in a world where everything is said to have its price. Like the traitor, such a person is to be mistrusted and subject to the severest social sanctions. They have abrogated an aspect of their humanity and are typically considered unfit to be a wholly reliable member of society. Kant was commenting on this type of behaviour when he concluded:

"...a human being regarded as a person... is exalted above any price; for as a person he is not to be valued merely as a means to the ends of others or even his own ends, but as an end in himself, that is, he possesses a dignity (an absolute inner worth) by which he exacts respect for himself from all other rational beings in the world." (Kant 1993, 434-5)

A person who would sell his own grandmother is one who treats persons about him as objects to be used for his own self-interest. He makes an unacceptable exchange between two distinct categories of value. Kant was making an ethical argument and it

demonstrates the ethical dimension to some aspects of pricing. There are some categories of value that are not considered appropriate for commercial equivalence. For customary people, their connection to their land

Implications for land affected by customary title.

The recognition since 1992 of “new” and not so “new” property rights such as native title, water and biota have raised hitherto unexplored and even unknown concepts of value, and have struck at the very heart of traditional valuation practice. Definition, fixity and certainty are hallmarks of land and mineral property rights, and are fundamental characteristics of a property right. Just how these “new” rights are transformed into legal property rights remains problematic.

This is not to say that these “new” rights do not have worth, for some such as water and biota have already been recognised as having immense value in the market place irrespective of whether or not they are legal property rights. Their value derives from their use value for human production and use.

Other rights such as customary title present issues of due diligence if public funds are to be expended in the payment of compensation arising from compulsory expropriation. There is a need for greater certainty as to the rights and interests asserted by traditional owners, if due diligence tests are to be met. They derive only indirectly from use value, but more immediately from the fact that the use values required are owned by a separate community that is reluctant to alienate them.

An insight into the reluctance of customary communities to alienate their property rights can be gleaned from an examination of the psychological power of custom and tradition.

While exploring the psychological dimension of human values Peter O’Connor (2000) found important psychological insights in Celtic traditional practices that persist as important non-material values in our own culture. He noted that in the popular song entitled *Green Fields of France* by the Irish singing group the Fureys lamenting the death in 1916 in the Great War of a nineteen year old Irish soldier Willie McBride, when addressing his gravestone they ask “*did they beat the drum slowly?*” This reference to giving respect to those who have recently died and about to be interred, is based upon the Celtic tradition that the ritual commemorating the death of an individual must not be hurried.

O’Connor believes that:

...[a]ncient mythology is invaluable for understanding the issues, feelings and conflicts we’ve repressed either as individuals or a culture – death, the transitory nature of life, the sacredness of the land. Myth is in fact the distilled essence of human experience expressed in metaphor, which survives much better in the oral tradition. Without the restrictions of the written word, myths can free the imagination from the modern preoccupation with evidence.
(O’Connor 2001)

This Celtic tradition appears strikingly analogous to the deep spirituality that customary peoples have with the land (Yunupingu 1996). Indeed, within Australian native title, one of the “new” property rights introduces spiritual and cultural attachment as one incident of the “bundle of rights” that may be asserted by traditional owners of a specific native title. Not surprisingly, the valuation of such an incident is disconcerting for the valuation profession, and as Myers notes:

[s]ome authors advocate that indigenous people have a spiritual or sentimental attachment to the land, unlike non-native westerners, and therefore, spiritual values cannot be ignored when valuing native lands for compensation purposes. Some authors further expand the cultural and spiritual aspects of customary lands. (Myers 2002, 1)

Myers reflects the fact that there is considerable controversy within the property profession regarding the existence and significance of the spiritual and sentimental attachment to land held by indigenous. For those who reject their influence in the treatment of land property the customary interest easily reduces to a set of use rights that are identifiable and quantifiable in material terms – money. For those authors who recognise the force of the metaphysical foundation of customary relationship with land Myers correctly recognises:

[v]aluing customary land has been described as ‘a special field of real property appraisal that frustrates many of those who accept such assignments. (Myers 2002, 4)

The identification of previously unknown concepts in “new” property rights such as native title has led to a view that such property rights must be placed within the existing tenurial pyramid, the general framework of land law of common law countries such as Australia. There is an understandable need for comfortable incremental development of valuation case law and practice to accommodate these “new” property rights, however this should not undermine professional integrity.

It is an easy mistake to seek quick answers within existing property and valuation law and practice, rather than to accept that recognition of customary interests in land forces recognition of a dimension of property that has been largely forgotten by modernity. If customary title is understood to be fundamentally different to Western property, some conclusions regarding the value of customary title may be reached.

Most important is that while customary land may have a discernable rental value, it may not necessarily capitalise into a fair market price for alienation. This is because customary people see their relationship to the land as more than a commercial interest, even if they traditionally rely on their land for material support. In this respect customary land is more like a body part than a conventional external discretionary possession. Part of a body part’s value may be expressed in terms of material utility, such as pianist’s fingers, but it has been argued that there is also a separate category of value for which a fair market value cannot be established.

This separate aspect of customary title comes from the foundations of indigenous culture and is opaque to Western minds, at least while they are applying Western commercial and legal paradigms to the question. The non-commercial aspect of customary title does not necessarily pertain to particular use rights as understood by Western valuers, but rather with the more fundamental conception of ownership *qua* ownership.

Figure 2: The nature of ownership and use rights to property

	Particular Rights	Commercial Value	Comments
Use rights	<ul style="list-style-type: none"> ➤ Exclusive occupation ➤ Right to develop ➤ Right to extract raw materials 	<ul style="list-style-type: none"> ➤ yes ➤ yes ➤ yes 	
Ownership Rights	<ul style="list-style-type: none"> ➤ Right to rent and royalties ➤ Rights to capital gain ➤ Right to Alienate or retain ➤ Right to bequeath ➤ Recognised as true owner ➤ Right to veto land uses 	<ul style="list-style-type: none"> ➤ yes ➤ yes ➤ yes ➤ No ➤ No ➤ No 	<p>None for the owner</p> <p>Only negative for user</p>

Property value in the Western understanding is made up almost exclusively of use rights as illustrated by the emphasis on “highest and best use” when considering land value. All use rights can be reduced to either a rental for occupying land without damaging it, or royalties in payment for what is extracted from the land when it is changed through use. Since these payments accrue to the owner they are the foundation of the property’s commercial value in sale. In figure 2 a selection of key rights of use and ownership are listed with their significance for commercial value. Generally, the commercial value of land property, largely contained within the first three ownership rights, can be seen to derive from the ultimate right of the owner to use. Each component of the bundle of rights that is freehold ownership may be analysed in this way. The non-commercial rights are critical in the customary title debate because they are fundamental to customary people, yet formally valueless to Western people.

The “new” property rights have raised issues of the appropriateness of established valuation practice, which has its origin in a lengthy heritage of centuries of case law throughout the common law world. Indeed, other professions such as town planning are also struggling to understand how to interact with some property rights, such as native title. There is a misconception that these “new” rights can be understood, influenced and even regulated in a manner similar to land and mineral property rights.

Myers (2004) is representative of recent authors who have attempted to interpret customary interests in terms of the Western paradigm. By attempting to interpret the value of customary land using a Western cultural perspective under the guise of Western legal and property thought, several fundamental misunderstandings result. Although methodologically the analysis of cases of valuation of customary title land is sound from the perspective of understanding the current practices regarding compensation value, this does little to address the more fundamental question of whether these decisions represent an adequate respect for the cultural costs to the customary land owners or a resolution of the intercultural tensions created over land title. For two centuries there was relatively consistent legal treatment of Australian aboriginal claims for compensation for their land under the Western conclusion of *terra nullius*, but analysing these legal facts does little to addressing the underlying

intercultural problem that was finally recognised to some degree in the Mabo case. In particular, Myers highlights the following methodological problems:

- 1) The interpretation of customary interests in land as a set of use rights misses the fundamental issue in the customary understanding of title.
- 2) The valuation of customary interests on the basis of use rights ignores the fundamental and categorically distinct cultural value of land to indigenous people that is impossible to render equivalence in commercial terms.
- 3) The use of Western judgements of value creates the illusion of methodological integrity whilst compounding the historical errors in the intercultural misunderstanding for customary culture. It does a violence to the customary people's understanding of their relationship to the land.
- 4) The reduction of customary title to a set of use rights ignores Western antecedents concerning non-commercial values in Western culture, especially those that have survived into the present.

This approach equates customary title to somewhat more familiar anglo-Australian tenurial interests that may be less than freehold title. The approach compensates indigenous people for the material value of their relationship with land while totally ignoring the fundamental cultural understanding that gave rise to the relationship in the first place.

Conclusion

Customary title is rooted in the notion held by customary people regarding their origin and the origin of their land. If their beliefs are respected, then their relationship to their land follows deductively. If a dominant value of anglo-Australian culture is tolerance and respect for the beliefs and practices of various cultures, then it must accept customary title based on the methodological premises of the customary peoples themselves.

By contrast, Western property title is methodologically weak, based only on state sanctioned possession and the contentious claim that the anglo-Australian property institution is economically superior. The former argument exemplifies the fallacy of common practice, while the latter relies on the dubious ethical claim that the end justifies the means.

Valuation of customary interests by equating them to a set of material use rights and assessing their market value is flawed because it dilutes the customary understanding of people's relationship to the land to the Western position. In so doing it either ignores the very basis of customary title, or attempts to place commercial value on a relationship metaphysically incompatible with physical determinist valuation. In this respect valuation of customary interests is analogous to forcing indigenes to price and alienate something that is as precious and as necessary to their self-identity as their own kin. It is no surprise that those who accept compensation on these grounds are extremely self-conscious of making public their acts which are arguably equivalent to cultural treason.

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