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Conceiving of Tradition: Dynamics of Judicial Interpretation and Explanation in Native Title Law

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Introduction

The concept of 'tradition' lies at the heart of judicial decision-making within the common and statutory law of native title in Australia, the United States, Canada and New Zealand. Throughout the colonised common law world, traditionality – the property of being traditional – serves as a necessary condition for the legal recognition and protection of indigenous relationships to land. Notwithstanding its importance to native title processes, the concept, as interpreted and used by the courts in those jurisdictions, is relatively but significantly indeterminate in its reference. It is not entirely clear what 'tradition' actually means in the legal context. Or, at least, it is not *clear enough* for the purposes of adequately evaluating the justifiability of judicial decisions made on the basis of that concept. The vagueness of the legal concept of 'tradition' presents what is, ultimately, a political problem – namely, that judges are engaged in an authoritative process of reasoning which, by virtue of the vagueness of a key concept employed in that process, is not properly accountable to those persons actually or potentially affected by it. The use of the concept of 'tradition' by the various courts is inconsistent with a judicial and public commitment within those jurisdictions to the rule of law.

In this essay, I want to explore the meaning which authoritative courts in Australia have ascribed to the concept of 'tradition' within the statutory law of native title and the effect which that meaning has had there on judicial reasoning about traditionality. I then want to explore the extent to which such reasoning has been – indeed, can be – rendered publicly accountable by the judiciary. The main concern of this essay is not so much the use of vague concepts within the law or the exercise of judicial discretion in response to such concepts, as the failure of the judiciary to publicly

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