

S 223 Native Title Act Workshop
Agreements, Treaties and Negotiated
Settlements (ATNS) Project

**Law and Custom - ‘Traditional’:
The Assembly of a Legal Microscope**

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Introduction

The timely convening of this collaborative examination of s 223 of the *Native Title Act 1993* (Cth) no doubt reflects the view now shared by many that Australian native title has become unacceptably mired in technicality, expense and confusion. It is dismaying to find more and more Indigenous Australians, and Australian lawyers generally, resigning themselves to the fact that the native title doctrine has proven incapable of providing principled answers to the most important of the post-colonial legal questions, and turning their attention and efforts elsewhere. Hopefully this project will help to identify a means by which we can extract Australian native title law and policy from its current confusion and pedantry –

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recover the broader picture and possibility from the difficulty and detail to which we have descended.

The sharp focus of the topics assigned for examination here suggests that we are in fact now locking in on the primary sources of the contemporary problems, which it seems do not lie in the crowded technical alleyways and disreputable political bargains of the current *Native Title Act 1993* (Cth), but rather in the very conceptual foundations of the Australian doctrine. These foundations were left largely untouched by the legislation, except for what is said in s 223 – the target of this project. When enacted this provision was on its surface a brief, simply-worded and precedentially-supported statutory definition of the newly discovered Indigenous entitlement. So what then is the source of the fundamental difficulties that now entangle the Australian law – difficulties that have become very much associated with the terms of s 223?

The explicit focus of the Australian native title doctrine is the identification and legal translation of Indigenous ‘laws and customs’ relating to land occupation and usage. There may still be scope to re-agitate the appropriateness of a ‘laws and customs’ focus, with reference to the North American legal heritage. However, the starting point for the analysis in this paper is that the ‘laws and customs’ framework, properly applied, can be sound in principle and practice. The notion of pre-existing ‘law and custom’ is logically antecedent to the idea of surviving rights, interests, title or property. And this ‘law and custom’ focus in the identification and definition of the surviving entitlement provides some legal orderliness and legitimacy to the process, begins with an appropriate acknowledgement of the Indigenous perspective, and may help to ensure accuracy and appropriate flexibility. Moreover, close comparative examination indicates that the ‘law and custom’ focus is implicit in much of the relevant Indigenous rights jurisprudence across the key comparative jurisdictions.² Indeed it would seem to indicate that indeed the Australian courts’ careful articulation of this emphasis is an important contribution to the post-‘scale of social organisation’³ conceptual development, and one that has helped to prompt clarification elsewhere.⁴

More to the point for the analysis in this paper, is it then the addition of the word ‘traditional’ to the notion of ‘laws and customs’ that leads the Australian doctrine

² For more detailed discussion, and in particular a reconciliation of the notion of ‘law and custom’ with the North American focus on ‘occupation’, see Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (Federation Press, NSW, 2008), pp 44ff.

³ Ie, the old taxonomical denigration of Indigenous culture made famous, legally, in *Re Southern Rhodesia* [1919] AC 211.

⁴ Most notably in Canada – see *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193. Cf also the new level of clarity on this point in *Alabama-Coushatta Tribe of Texas v United States*, 28 Fed Cl 95 (1993), and see also the New Zealand decision in *McRitchie v Taranaki Fish and Game Council* [1999] 2 NZLR 139.

to uncertainty, technicality, and results that are inconsistent and controversial? This is certainly a word that has dominated Australian native title law and policy – carving itself a central place in explanations of both the survival of the native title interest (proof) and its definition (content). Yet it is the contention in this paper that while the amorphous language of ‘tradition’ does pose problems, it need not necessarily consign us to the complexity and confusion that have afflicted the Australian doctrine. This is so even if it is accepted that the notion of ‘tradition’ is inextricably tied to pre-sovereignty circumstances and concepts of generational transmission⁵ – on the arguments here these matters are not the source of the malady.

It seems that the principal difficulties, admittedly encouraged by the overtones of the language, arise from the courts’ frequent adoption of an overly microscoping approach to the composite notion of ‘traditional laws and customs’ – which manifests itself in a tendency to over-specificity in the definition of the native title interest and (perhaps correlatively) over-particularity as regards the cultural continuity required for its survival. This imposes a serious historically-based confinement of native title content, and converts the logical condition of non-abandonment into an illogical ‘survival of lifestyle’ requirement. Even putting aside for the moment the broader implications of these constrictions, as a simple matter of legal practicality the inherent uncertainty and awkwardness in the idea of ‘tradition’⁶ (a notion on which the High Court has been able to provide only scant guidance⁷) are greatly exacerbated when the standard is pressed too closely to sophisticated and necessarily adaptive cultures.

The Australian courts appear to acknowledge the inevitability of change in Indigenous societies. There has been express reference to the reality and/or acceptability of such change in various decisions,⁸ and attempts to find some

⁵ See particularly *Members of Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (discussed below).

⁶ As one commentator has suggested, the notion of ‘tradition’ is native title’s ‘reasonable man’ test – involving a ‘legal category of indeterminate reference’: Paul Burke, ‘Law’s Anthropology’ in *Heritage and Native Title: Anthropological and Legal Perspectives*, proceedings of AAS and AIATSIS workshop (Australian National University, Canberra, Feb 1996) 215 at 216, quoting from the works of Julius Stone, particularly *Legal System and Lawyers’ Reasonings* (Maitland Publications, Sydney, 1964).

⁷ See particularly the discussion below of *Western Australia v Ward* (2002) 213 CLR 1; and *Members of Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

⁸ See eg *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 61, 70, 109-10, 192; *Ward v Western Australia* (1998) 159 ALR 483 at 502, 541; *Hayes v Northern Territory* (1999) 97 FCR 32 at 50; *Members of Yorta Yorta Aboriginal Community v Victoria* (2001) 110 FCR 244 at 276-7, 254; *Commonwealth v Yarmirr* (2001) 184 ALR 113 at 196-7, 201; *Members of Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at [31]; *Western Australia v Ward* (2002) 213 CLR 1 at [569]-[575]; *Gale v Minister for Land and Water Conservation (NSW)* [2004] FCA 374 at [73]-[74]; *Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory* [2004] FCA 472 at [111]; *Rubibi Community v Western Australia (No 5)* [2005] FCA 1025 at [368]; *Risk v Northern Territory* [2006] FCA 404 eg at [106]. For international examples, see *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193 at 249, 258; *Van der Peet v R* (1996) 137 DLR (4th) 289 at 350, 371; *R v Sappier; R v Gray* (2006) 274 DLR (4th) 75 at [46]-[49]; *In re General Adjudication of all Rights to use Water in Big Horn River System*, 753 P 2d 76

accommodation for it even within the strict methodology.⁹ However, this proffered flexibility has failed to mature into consistent and coherent principles. And as long as the inherently *inflexible* microscoped ‘tradition’-focus prevails, it will remain more rhetorical than real.

This paper will explore the notion of ‘tradition’ and the assembly of the doctrinal microscope in Australian native title law – examining the *Mabo* legacy, the terms of s 223 of the *Native Title Act 1993* (Cth), the development and theoretical ‘backfilling’ of the strict approach in the post-*Mabo* jurisprudence, and the resulting contemporary confusion and controversy. It will argue that there is a non-jarring solution at hand, one that organises the existing dissenting views¹⁰ into a viable alternative. This is, essentially, the de-particularisation of the Australian methodology - via proper respect for the possible existence of a comprehensive traditional title and acknowledgement that the varying minutiae of cultural practices may logically have little bearing on the survival of a continuously asserted traditional ‘ownership’ or ‘custodianship’ of territory. Under this approach the notion of ‘tradition’ can retain its central selection role, both terminologically and structurally, but the attendant legal and factual difficulties will be much reduced.

At the outset it might be emphasised that the process of remedying the Australian troubles will be a difficult one. A number of the well-chosen topics for this project on s 223 represent interlocking and mutually reinforcing problems in the Australian doctrine. The notion of ‘traditional laws and customs’ is enshrined in s 223 with attendant structural and conceptual ambiguity that invites a strict and pedantic approach to that notion. That strict approach in turn provokes and/or permeates the other inquiries (into ‘society’, ‘system’ and ‘connection’). And these other inquiries, so shaped, in turn provide theoretical justification for a specific examination of ‘traditional laws and customs’. The tools to begin unraveling this hazardous conceptual circle are close by - significant progress could be triggered by a proper exploration of the Canadian differentiation¹¹ of ‘rights’ and ‘title’, and by clear and consistent acknowledgement of the conceptual difference between inquiries into communal interests and inquiries into the inter se division of those interests.¹² These are the primary tools of de-particularisation, tools that can free communal title claims from the necessary specificity of considerations relevant to specific rights and inter se rights.

(1988) at 119; *Faulkner v Tauranga District Council* [1996] 1 NZLR 357 at 365-6; cf *United Nations Declaration on the Rights of Indigenous Peoples* (see A/RES/61/295), Arts 3, 4, 21, 23, 26, 31-32.

⁹ See the detailed discussion below.

¹⁰ These views, to the extent that they are reflected in judgments, are discussed in detail below.

¹¹ Note particularly *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193.

¹² Note the identification of the two distinctions (in various contexts) in the work of, eg, Noel Pearson, Kent McNeil, Richard Bartlett, Hal Wootten, Lisa Strelein and Gary Myers.

A number of prominent commentators¹³ and judges¹⁴ have pursued aspects of these problems, and possible solutions, through the Australian and contemporary Canadian legal history. Notable amongst them are the contributors to this project - particularly Noel Pearson, Lisa Strelein, Justice North and Kent McNeil. Richard Bartlett has also written extensively on the topic. The key problems are all on the agenda in this project. It has the potential to contribute significantly to the final theoretical dismantling of the tightly wound and unworkable Australian native title methodology.

¹³ See eg Noel Pearson, '204 Years of Invisible Title' in MA Stephenson and Suri Ratnapala (eds), *Mabo: A Judicial Revolution* (UQP, Brisbane, 1993) 75; Richard H Bartlett, 'The Source, Content and Proof of Native Title at Common Law' in Richard H Bartlett (ed), *Resource Development and Aboriginal Land Rights in Australia* (Centre for Commercial & Resources Law, UWA and Murdoch Uni, Perth, 1993) 35; Hal Wootten, 'Mabo - Issues and Challenges' (1994) 1 *Judicial Review* 303; Hal Wootten, 'The End of Dispossession? Anthropologists and Lawyers in the Native Title Process' in J Finlayson and D Smith, *Native Title: Emerging Issues for Research, Policy and Practice*, Research Monograph no 10 (Centre for Aboriginal Economic Policy Research, ANU, Canberra, 1995) 101; Hal Wootten, 'The Rights and Recognition of Indigenous People - Consequential Land Management Impacts on the Environment, and on the Recognition of Native Title' in Gary D Myers (ed), *Implementing the Native Title Act - First Steps; Small Steps* (National Native Title Tribunal, Perth, 1996) 60; Noel Pearson, 'The Concept of Native Title at Common Law' in Galarrwuy Yunupingu (ed), *Our Land is Our Life: Lands Rights - Past, Present and Future* (UQP, Brisbane, 1997) 150; Gary D Myers, Chloe M Piper and Hilary E Rumley, 'Asking the Minerals Question: Rights in Minerals as an Incident of Native Title' (1997) 2 *Australian Indigenous Law Reporter* 203; Luke McNamara and Scott Grattan, 'The Recognition of Indigenous Land Rights as "Native Title": Continuity and Transformation' (1999) 3 *Flinders Journal of Law Reform* 137; Scott Grattan and Luke McNamara, 'The Common Law Construct of Native Title: A "re-feudalisation" of Australian land law' (1999) 8 *Griffith Law Review* 50; Gary D Myers, 'Defining the Content of Native Title: The North American Experience with "Indian Sovereignty"' (1999) Issue 2 *Australian Environmental Law News* 20; Jeremy Webber, 'Beyond Regret: Mabo's Implications For Australian Constitutionalism' in Duncan Ivison, Paul Patton and Will Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* (CUP, Cambridge, 2000) 60; Noel Pearson, 'Principles of Communal Native Title' (2000) 5 *Indigenous Law Bulletin* 4; Kent McNeil, 'The Relevance of Traditional Law and Customs to the Existence and Content of Native Title at Common Law' in Kent McNeil, *Emerging Justice?* (Native Law Centre, Uni of Sask, Saskatoon, 2001) 416; Lisa Strelein, 'Conceptualising Native Title' (2001) 23 *Sydney Law Review* 95; Noel Pearson, 'The High Court's Abandonment of "The Time-Honoured Methodology of the Common Law" in its Interpretation of Native Title in *Mirriuwung Gajerrong* and *Yorta Yorta*' (2003) 7 *Newcastle Law Review* 1; Daniel Lavery, 'A Greater Sense of Tradition: The Implications of the Normative System Principles in *Yorta Yorta* for Native Title Determination Applications' (2003) 10 *Murdoch University Electronic Journal of Law*; Richard H Bartlett, 'An Obsession with Traditional Laws and Customs Creates Difficulty Establishing Native Title Claims in the South: *Yorta Yorta*' (2003) 31 *University of Western Australia Law Review* 35; Richard H Bartlett, 'Humpies not Houses or The Denial of Native Title: A Comparative Assessment of Australia's Museum Mentality' (2003) 10 *Australian Property Law Journal* 1; Noel Pearson, 'Land is Susceptible of Ownership' in Peter Cane (ed), *Centenary Essays for the High Court of Australia* (Butterworths, Sydney, 2004); Richard H Bartlett, *Native Title in Australia* (Butterworths, Sydney, 2004, 2nd ed) esp at 66-9, 74-82, 102, 122-6, 148-57, 208-25, 230-5, 599-600, 631, 647-8; Kirsten Anker, 'Law in the Present Tense' (2004) 28 *Melbourne University Law Review* 1; Sky Mykyta, 'Losing Sight of the Big Picture' (2005) 36 *Ottawa Law Review* 93; Lisa Strelein, *Compromised Jurisprudence* (Aboriginal Studies Press, Canberra, 2006); Annie Leeks, 'Realising the Right of Indigenous Peoples to Development through Common Law Recognition of Aboriginal Resource Rights' (2007) 13 *Australian Journal of Human Rights* 177; Lee Godden, 'The Invention of Tradition: Property Law as a Knowledge Space for the Appropriation of The South' (2007) 16 *Griffith Law Review* 375.

¹⁴ See eg the views of Lee J, North J, Kirby J, Black CJ, Wilcox J - discussed below.

The pre-Section 223 landscape: *Mabo (No2)*

The nuances and finer detail of the seminal *Mabo (No 2)*¹⁵ decision have been lost, to some extent, in 15 odd years of insistently selective quoting from particular pronouncements by Brennan J. This is a suitable occasion to recover some of the lost context, and re-assess the meaning of the *Mabo (No 2)* decision from the perspective of the tangled confusion in the contemporary Australian doctrine.

Brennan J's enduring comments in *Mabo (No 2)* (as later reflected in the wording of the *Native Title Act 1993* (Cth)) were laced with emphasis upon the source of native title in 'traditional laws acknowledged' and 'traditional customs observed' - and upon the importance of those traditional laws and customs to the definition of the interest and its survival.¹⁶ Yet not far below this familiar surface of the decision there was significant ambiguity, inconsistency and even majority division on the methodology and standards being laid down. The unsettled nature of these jurisprudential foundations was not immediately obvious, except to the more visionary Australian commentators and comparative academics,¹⁷ and was for some time largely buried under the rush for clarification on commercially and politically pressing questions about extinguishment and interaction of rights. Yet with a contemporary focus sharpened by experience and deep doctrinal confusion, we can now see that the hidden uncertainties in the *Mabo* treatise were major ones.

The very language of 'tradition', which has since dominated the Australian doctrine, was in itself ambiguous in *Mabo (No 2)*. It might first be noted that the word 'traditional' was used in varying ways throughout the decision, often without any intimation of qualitative cultural assessment. On many occasions it was simply an unimportant explanatory pointer in discussions of the relevant history (essentially meaning pre-sovereignty, pre-annexation or pre-existing).¹⁸ Elsewhere it was used simply as a synonym for 'Aboriginal', 'ancestral', 'historical' or 'long-held'¹⁹ - often with no apparent purpose beyond that of distinguishing the native title entitlements under consideration from general system property entitlements. Some examples can illustrate the significance of context here: the phrase 'traditional inhabitants' need not mean 'inhabitants living traditionally'; 'traditional rights' is quite distinct from 'rights to traditional uses'; and 'traditional lands' is not the same as 'lands used traditionally'. Most importantly however, as the mounting difficulties in the later cases clearly illustrate, even when a more

¹⁵ *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

¹⁶ See esp *Mabo v Queensland (No 2)* (1992) 175 CLR 1 per Brennan J at 57, 58, 59-60, 70.

¹⁷ See the earlier of the works cited in footnotes above.

¹⁸ See eg Deane and Gaudron JJ at 81, 85, 99, 100, 105, 106, 109, 115-16, Dawson J at 141. Cf Brennan J at 29, 39, 57, 58, 62, Toohey J at 178.

¹⁹ See eg Brennan J at 68, Mason CJ and McHugh J at 15, Deane and Gaudron JJ at 77, 81, 85, 86, 92, 93, 94, 100, 106, 109, 115, Dawson J at 141, Toohey J at 190, 192.

substantive meaning is attributed to the use of the word ‘traditional’ in particular parts of the *Mabo (No 2)* decision, the term in itself offers no clear qualitative or temporal standards and might in fact be understood to readily accommodate processes of change.²⁰

The expression ‘law and custom’ also carries ambiguity²¹ – particularly if it is accepted that the primary difficulty in the Australian doctrine resides in uncertainty over the level of particularity at which the claimants’ circumstances are to be assessed. Apart from some slight intimation of specificity in the frequent use of the plural version of the phrase (which can be otherwise explained), and in the very inclusion of the idea of ‘custom’ and its ‘observance’ (which can also be otherwise explained), the phrase ‘laws and customs’ in truth says little about the exact nature and particularity of the legal inquiry involved. Similar ambiguity resides in the terms ‘observe’ and ‘acknowledge’ (and ‘connection’ – also very present in Brennan J’s judgment). The uncertainty is exacerbated, particularly in Brennan J’s key passages, by the grouping together of communal and inter se interests and the lack of close attention to the possible distinction between ‘rights’ and ‘title’. Logically there might be quite different inquiries involved for each context, and although it must be conceded that such structural clarity has proven elusive in a number of jurisdictions,²² the overly generic language has proven to be particularly costly in Australia.

These basic terminological problems are significant, however the ambiguity in *Mabo (No 2)* in respect of the matters examined in this paper extends much further. Take first the issue of content. The notion that *Mabo (No 2)* stands for the proposition that the native title interest in Australia is necessarily defined by reference to specific historical laws, customs and practices is difficult to reconcile with some important aspects of the case:

- the result in the decision (a recognition of something apparently akin to un-delimited communal ownership);²³

²⁰ See eg Deane and Gaudron JJ at 110. And note in this context Graeme Neate, ‘Turning Back the Tide? Issues in the Legal Recognition of Continuity and Change in Traditional Law and Customs’, paper delivered at *Native Title Conference 2002 – Outcomes and Possibilities* (3 Sept 2002, Geraldton, WA) at 16ff; Bruce Rigsby, ‘Custom and Tradition: Innovation and Invention’ (2006) 6 *Macquarie Law Journal* 113.

²¹ Compare Richard H Bartlett, ‘The Source, Content and Proof of Native Title at Common Law’ in Richard H Bartlett (ed), *Resource Development and Aboriginal Land Rights in Australia* (The Centre for Commercial and Resources Law, UWA and Murdoch Uni, Perth, 1993) 35 at 41.

²² See further Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (Federation Press, NSW, 2008), Pt II.

²³ Brennan J at 76; Order of the Court at 217. Cf Deane and Gaudron JJ at 118-19, Toohey J at 216. See further the arguments in (eg) Kent McNeil, ‘Aboriginal Title and Aboriginal Rights: What’s the Connection?’ (1997) 36 *Alberta Law Review* 117 at 141, 142; Scott Grattan and Luke McNamara, ‘The Common Law Construct of Native Title: A “re-feudalisation” of Australian land law’ (1999) 8 *Griffith Law Review* 50 at 70. Cf Noel Pearson, ‘204 Years of Invisible Title’ in MA Stephenson and Suri Ratnapala (eds), *Mabo: A Judicial Revolution* (UQP, Brisbane, 1993) 75 at 82 (where the absence of the term ‘ownership’ in the court’s determination was considered to be a cause for concern).

- various indications that the majority judges all acknowledged, more generally, the possible existence of a comprehensive ‘title’ interest;²⁴ and
- the fact that there was very limited explicit backing for a strict and specific approach – really only in the *Baker Lake*-influenced comments of Toohey J²⁵ and in the dissenting judge Dawson J’s brief reference to other (now overruled) Canadian decisions.²⁶

On the topic of proof, *Mabo (No 2)*’s supposed support for the proposition that the survival of native title depends upon constancy and continuity in particularised historical laws, customs and practices is also questionable in light of various features of the case:

- the result (a recognition of subsisting title in the hands of a strongly land-connected and historically stable but quite adapted community);²⁷
- the express rejection of such a requirement by Toohey J²⁸ and the strong doubts expressed on the point by Deane and Gaudron JJ;²⁹ and
- the ambiguity underlying Brennan J’s own ostensible support for a strict approach, namely:
 - the ameliorating terminology he employed (at various points he required only that customs be observed ‘so far as practicable’, that the laws and customs acknowledged and observed be ‘based on’ the traditions of the group, and that the traditional connection be ‘substantially maintained’);³⁰
 - the shifting emphasis in his various statements of relevant principle (eg in places he noted the adaptive nature of ‘laws and customs’ and/or spoke in terms of a need just for survival of the ‘general nature’ of the connection);³¹
 - his disinterest in attempting any concerted application of a strict requirement to the facts of the case;³² and
 - the fact that his stronger intimations of a strict approach appeared to be chiefly an unnecessary attempt to garner theoretical support for the inalienability of native title.³³

²⁴ See eg Brennan J at 51-2, 60-1; Toohey J at 207, 214; Deane and Gaudron JJ at 88, 89, 92, 93.

²⁵ See Toohey J at 178-9, 184, 187-8. See also *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1979) 107 DLR (3d) 513 – a lower court Canadian decision carrying overtones of content confinement.

²⁶ Dawson J at 129, 132, 160, 169.

²⁷ See particularly the comments of Toohey J at 192; Dawson J at 157.

²⁸ See Toohey J at 192.

²⁹ See Deane and Gaudron JJ at 110.

³⁰ See eg Brennan J at 57, 58, 59-60, 61, 70.

³¹ See eg Brennan J at 61, 70.

³² See Brennan J at 60-1, 69.

³³ For detailed discussion of this point see Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (Federation Press, NSW, 2008), pp 261ff.

In addition to these immediate matters, there is much in the broader legal and factual context surrounding the *Mabo (No 2)* decision that is too rarely visited in contemporary legal analysis. The emphasis and terminology of the decision, to the extent that it some exacting focus on specific ‘tradition’, is best understood against its original setting. For example, the Court’s initial extrication of Australian law from the existing Australian and Privy Council precedent (to open the possibility of native title recognition) in various ways prompted attention to the specifics of the Meriam people’s ‘laws and customs’. Most notably, Brennan J’s starting point and major concern was to reject the ‘absence of law’ theory of pre-settlement Australia and the misclassification of Indigenous peoples in such territories as ‘low in the scale of social organisation’.³⁴ Also, the atypical context of the *Mabo* claim encouraged a focus in tone and inquiry on the clear inter se rights within the community (and hence on particular, sub-communal ‘laws and customs’).³⁵ And moreover, this case presented to the court a quite unique community history (of relatively uninterrupted small plot cultivation³⁶) against which a terminologically pedantic emphasis on ‘tradition’ would seem to be of little consequence. Initially the best of test cases (for obvious reasons), *Mabo (No 2)* in its application to the very different Australian mainland became an awkward precedent.

In summary, it is hard to defend a strict and specific ‘tradition’-focussed approach to native title on the basis of the original *Mabo (No 2)* decision. That decision, properly examined, contains only limited and ambiguous support for a strict methodology, and much of that support can be explained and rationalised by reference to the surrounding context. Unfortunately, whatever the true meaning of the decision, the language and emphasis of key passages in the judgments placed the ‘tradition’ preoccupation within easy reach of the hurriedly emerging Australian doctrine.

Section 223 – Statutory Enshrinement of Ambiguity

The *Native Title Act 1993* (Cth), passed some 18 months after the *Mabo (No 2)* decision, contains a statutory definition of ‘native title’ that is the central focus of this project. Sub-sections (1) and (2) are in the following terms:

223(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

³⁴ See eg Brennan J at 33, 37-38, 39ff, 45, 58.

³⁵ Note particularly on this point the arguments of Noel Pearson, and see further Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (Federation Press, NSW, 2008), pp 256ff.

³⁶ See Brennan J at 33, 37-8; Toohey J at 189;

- (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.
- (2) Without limiting subsection (1), 'rights and interests' in that section includes hunting, gathering, or fishing, rights and interests.

This provision has played an important role in the development and dominance of a specific 'tradition' focus in Australia – initially as a very visible and dangerously clipped translation of the common law principles, and ultimately it seems as an independent foundation for the strict approach. The precise way in which the section has been used by courts is explored further below. However, a number of immediate observations can be made about the terms of s 223 from the perspective of the arguments in this paper.

Clearly s 223 provides superficial support to the stricter 'tradition' focus, principally by perpetuating the ambiguity of certain passages from *Mabo (No 2)*.³⁷ The section adopts the awkward and uncertain language of 'tradition',³⁸ in a manner that suggests there is a need for a historically-referenced definition of the contemporary native title interest and a requirement of constancy (if not continuity) in relevant law and custom. Further, both sub-ss (1) and (2) intimate that there is need for specificity in the definition of the Aboriginal interests.³⁹ Perhaps most importantly however, s 223 groups communal and inter se entitlements together and fails to acknowledge any rights v title distinction⁴⁰ – thereby obscuring any possible differentiation between the various inquiries and drawing *communal title* claims into a framework that is phrased to accommodate the necessary particularity of investigations into individual and specific rights-type claims.

It is immediately obvious that the terms of s 223(1)(a) and (b) draw heavily upon particular statements from the judgment of Brennan J in *Mabo (No 2)*. On one view this could be read as a legislative preference for the approach of Brennan J⁴¹ (to the extent that the majority judgments contained differences).⁴² Whether or not that is an appropriate interpretation, the critical point is that the provision extracts Brennan J's comments from the broader legal and factual context⁴³ (briefly

³⁷ Compare the comments in *Commonwealth v Yarmirr* (1999) 101 FCR 171 per Beaumont and von Doussa JJ at 191.

³⁸ See also the emphasis in relevant parliamentary debates: Commonwealth, *Parliamentary Debates*, House of Representatives, 16 November 1993, at 2879.

³⁹ Compare also the early parts of s 225.

⁴⁰ Compare the comments in *Ward v Western Australia* (1998) 159 ALR 483 per Lee J at 505.

⁴¹ Compare *Members of the Yorta Yorta Aboriginal Community v Victoria* (2001) 110 FCR 244 per Branson and Katz JJ at 282-4.

⁴² Cf Lisa Strelein, *Compromised Jurisprudence* (Aboriginal Studies Press, Canberra, 2006) at 110.

⁴³ Compare the comments on the statutory use of the word 'connection' in *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [87].

explored above) that is vital to a full understanding of his Honour's judgment.⁴⁴ Viewed in this way, clearly s 223 is an over-simplification even of Brennan J's approach alone, and invites a hazardous neglect of the less-visited corners of the *Mabo (No 2)* decision.

At the end of the day however, and this is a point of considerable practical importance, the wording of s 223 does *not* necessarily entrench a strict and specific 'tradition' focus.⁴⁵ In the first place, s 223 actually says very little about the content of native title. It does not deny the possibility that the relevant 'traditional laws and customs' may have recognised and supported an exclusive and comprehensive relationship with the land,⁴⁶ and it does not necessarily confine the contemporary interest to a collection of specifically identified and proven historical uses.⁴⁷ Secondly, to the extent that the section requires some constancy (and perhaps continuity) of laws and customs, there is nothing that demands constancy and continuity of particularised laws and customs. The traditional principle needed to survive to support the claimed interest might still, in the case of a 'title' properly recognised, be a non-particular one – ie the traditionally-based assertion of ownership or custodianship – such that the requirement of continuity is a logically tailored version of the notion of non-abandonment.⁴⁸ It is true that a 'connection' by traditional laws and customs must apparently be maintained under the section, but why should this additional stipulation necessarily force a particularisation of the law and custom required to survive – particularly given that a mere 'spiritual' connection can apparently be sufficient connection?⁴⁹

This reading of s 223 goes some way towards reconciling the Australian statutory definition of native title with settled comparative methodology.⁵⁰ Furthermore, as the above examination of *Mabo (No 2)* hopefully helps to demonstrate, this reading of s 223 also provides a more accurate translation of that decision.

⁴⁴ Note also that a close reading of Brennan J's judgment reveals that in the crucial passages his Honour was possibly referring simply to the Aboriginal interest as at the time of acquisition of sovereignty (rather than as at the time of claim). This casts further doubt on the suitability of these passages for codification – particularly given the different emphasis adopted where his Honour turns to directly address contemporary claims.

⁴⁵ The one point on which this author would take issue with the clear text of s 223 is its suggestion that contemporary inter se rights within a community are determined by reference to 'traditional' laws and customs. For an argument that such rights should be ascertained by reference to a community's *contemporary* laws and customs, see Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (Federation Press, NSW, 2008), esp chap 15.

⁴⁶ Compare the comments in *Neowarra v Western Australia* (2003) 205 ALR 145, esp at [368], [382]-[383].

⁴⁷ Compare H Wootten, 'Mabo – Issues and Challenges' (1994) 1 *Judicial Review* 303 at 338.

⁴⁸ Cf Richard H Bartlett, 'An Obsession with Traditional Laws and Customs Creates Difficulty Establishing Native Title Claims in the South: Yorta Yorta' (2003) 31 *University of Western Australia Law Review* 35 at 41.

⁴⁹ See also the detailed analysis of the notion of 'connection' in Monika Ciolek, 'Exploring Connection: Judicial Interpretations of Section 223(1)(b) of the *Native Title Act 1993* (Cth)' (2006) 10 *Australian Indigenous Law Reporter* 14.

⁵⁰ Relevant comparative developments are analysed in Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (Federation Press, NSW, 2008), pt II (see particularly the summary in chap 7).

Viewed in that light, this broader interpretation becomes compelling – finding support in:

- the conventional understanding⁵¹ that s 223 was essentially an adoption of the common law concept of ‘native title’ (at least as regards proof and content),⁵²
- traditional legal presumptions regarding non-alteration of the common law⁵³ and non-interference with vested rights and interests (particularly property rights⁵⁴ and Aboriginal rights⁵⁵);
- the many statements emphasising the need for a liberal interpretation of the *Native Title Act*;⁵⁶
- principles as to the interpretation of statutes according to context and purpose;⁵⁷ and
- the calls by some judges for the resolution of legislative ambiguities by reference to fundamental principles of human rights (including non-discrimination).⁵⁸

⁵¹ See eg *Mason v Tritton* (1994) 34 NSWLR 572 per Priestley JA at 599-600; *Dillon v Davies* (1998) 8 Tas R 229 per Underwood J at 233, 236; *Western Australia v Commonwealth* (1995) 183 CLR 373 per joint majority at 452; *Ward v Western Australia* (1998) 159 ALR 483 per Lee J at 505; *Commonwealth v Yarmirr* (1999) 101 FCR 171 per Merkel J at 258ff (and the references cited there). See also the detailed discussion of this issue (albeit in a different context) in *Commonwealth v Yarmirr* (2001) 184 ALR 113 per McHugh J at 152-60 (particularly the emphasis upon Senate discussions); cf Kirby J at 179, 183-4, 196-7, 198; Callinan J at 206, 212. And see further *Western Australia v Ward* (2002) 213 CLR 1 per Callinan J at [629], [650] and cf Kirby J at [566]; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2001) 110 FCR 244 per Branson and Katz JJ at [113], [123] and Black CJ at [32]; and more recently *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 per Gleeson CJ, Gummow and Hayne JJ at [75], [76] (and Callinan J at [177]). Note the apparent circularity of reasoning in the comments of Gleeson CJ etc in *Yorta Yorta*, and particularly the assertion that there is no ‘body of common law’ defining native title rights and interests nor ‘common law elements for [their] establishment’ (cf Gaudron and Kirby JJ at [112] and Callinan J at [185], contrast McHugh J at [129]ff). The intention of Gleeson CJ etc here was apparently to emphasise that the focus of inquiry is ‘traditional law and custom’ and the Act, but these technical comments would appear not to have been intended to derogate from the assertion that the Act is designed to recognise and protect the *Mabo* conceptualisation of ‘native title’.

⁵² See eg *Commonwealth v Yarmirr* (2001) 184 ALR 113 per Kirby J at 179-80, 182, 183-4; *Commonwealth v Yarmirr* (1999) 101 FCR 171 per Merkel J at 266; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2001) 110 FCR 244 per Branson and Katz JJ at [123]. Cf the suggestion that there had in fact been a statutory relaxation of the common law principles as regards the point of inquiry: *Commonwealth v Yarmirr* (1999) 101 FCR 171 per Beaumont and von Doussa JJ.

⁵³ See eg *Wik Peoples v Queensland* (1996) 187 CLR 1 per Gaudron J at 151 (and cf Gummow J at 171), quoting from *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677 per Mason J. Cf however the comments in *Gumana v Northern Territory* [2007] FCAFC 23 at [96].

⁵⁴ See eg *Western Australia v Ward* (2002) 213 CLR 1 per Kirby J at [567].

⁵⁵ See eg *Western Australia v Commonwealth* (1995) 183 CLR 373 per joint majority at 433; *Wik Peoples v Queensland* (1996) 187 CLR 1 per Kirby J at 248 (quoting with apparent approval from Canadian precedent). See also *Commonwealth v Yarmirr* (2001) 184 ALR 113 per Kirby J at 187.

⁵⁶ See eg *Commonwealth v Yarmirr* (2001) 184 ALR 113 per McHugh J at 150-1; *Western Australia v Ward* (2002) 213 CLR 1 per Kirby J at [587].

⁵⁷ See eg *Western Australia v Ward* (2002) 213 CLR 1 per McHugh J at [480] (in the context of pastoral lease legislation).

⁵⁸ See eg *Western Australia v Ward* (2002) 213 CLR 1 per Kirby J at [566]-[567].

In the High Court's later forays into the field of native title, it became gradually more insistent that the statute is the main point of reference in these matters.⁵⁹ This appeared to be fueled by particular concerns, such as the need to extend native title under the statute beyond any geographical limits on the common law⁶⁰ and the rejection of lower court attempts at one point to apply pre-1998 amendment (and hence pre-confirmation regime) statutory law.⁶¹ However, the statutory focus has been extended it seems to the issues under examination in this paper (as will be explored further below).⁶²

Yet it is important to note in the context of this strengthening statutory focus that the *Native Title Act* itself lends weight to the argument for the broader interpretation of s 223 – for example in its express subjugation (at least in the case of ambiguity) to the *Racial Discrimination Act 1975* (Cth)⁶³ and in the relevantly broad terms of s 225 (which explains what is required in a native title 'determination'). In any event, the court's insistence on careful attention to the terms of s 223 does not resolve the patent ambiguity in the provision, nor erase the important jurisprudential background.⁶⁴ Even the very statute-focused joint majority in the *Ward* decision acknowledged that account may be taken of cases such as *Mabo (No 2)* and *Wik* when considering the meaning and effect of the *Native Title Act*.⁶⁵

Armed with a fuller and more properly contextualised understanding of *Mabo (No 2)* (and hence an awareness of the over-simplicity of s 223), the argument for a broader reading of s 223 becomes difficult to ignore. If the provision can bear only the strict and specific 'tradition'-focused meaning, it begins to look like an

⁵⁹ See eg *Commonwealth v Yarmirr* (2001) 184 ALR 113 per joint judgment at 119, 122, Kirby J at 179-80, 182, 183-4, Callinan J at 206; *Western Australia v Ward* (2002) 213 CLR 1 per joint majority at [1]-[2], [4], [16], [468]; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 per Gleeson CJ, Gummow and Hayne JJ at [9], [70], [75], cf [76], and cf Gaudron and Kirby JJ at [112], Callinan J at [177].

⁶⁰ See *Commonwealth v Yarmirr* (2001) 184 ALR 113.

⁶¹ See *Western Australia v Ward* (2002) 213 CLR 1 eg at [26].

⁶² See eg *Western Australia v Ward* (2002) 213 CLR 1 per joint majority at [14]; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 per Gleeson CJ, Gummow and Hayne JJ at [31], [32], cf [40]. See further below.

⁶³ The relevant provision, s 7 of the *Native Title Act*, was substantially diluted in 1998. Yet s 7(2)(b) in the new version still provides: 'to construe this Act, and thereby to determine its operation, ambiguous terms should be construed consistently with the *Racial Discrimination Act 1975* if that construction would remove the ambiguity'.

⁶⁴ Cf the comments in *Commonwealth v Yarmirr* (1999) 101 FCR 171 per Beaumont and von Doussa JJ at 191.

⁶⁵ *Western Australia v Ward* (2002) 213 CLR 1 at [16], [25]. Cf *De Rose v South Australia* (2003) 133 FCR 325 at [158]; *De Rose v South Australia (No 2)* [2005] FCAFC 110; *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [92]; *Griffiths v Northern Territory* [2006] FCA 903 at [517], [531], [594].

artificial parallel version of these fundamental Indigenous rights⁶⁶ (or perhaps even a serious accidental restraint upon them).

The Formative Post-*Mabo* Cases

As noted earlier, after *Mabo (No 2)* issues of extinguishment were the immediate focus of native title litigation in Australia. There was for some time only isolated attention to the more fundamental issues under examination here, and there was no direct consideration of these matters by the High Court until its decisions in *Ward*⁶⁷ and *Yorta Yorta*.⁶⁸ However, the development of a strict and specific ‘tradition’ emphasis did proceed, quietly, in the formative decisions.

Certainly the language of ‘tradition’ dominated the promulgation of the *Mabo* doctrine. As seen above it was seized upon in the drafting of the *Native Title Act*, and it wound its way insistently through the arguments⁶⁹ and judgments⁷⁰ in the post-*Mabo (No 2)* case law. As in *Mabo (No 2)* itself, many of the references to ‘tradition’ were innocuous, however this general undiscerning emphasis inevitably encouraged the stricter thinking.

The development of the tight ‘tradition’-focus was also encouraged by the continuing selective treatment of *Mabo (No 2)* in the later cases (prompted in part by the selectivity of the *Native Title Act* provisions), by other aspects of the tone

⁶⁶ Compare the comments in *Commonwealth v Yarmirr* (2001) 184 ALR 113 per McHugh J at 160-1. As to the potentially ongoing role of the general courts in recognising and protecting native title, see *Western Australia v Ward* (2002) 213 CLR 1 per joint majority at [21].

⁶⁷ *Western Australia v Ward* (2002) 213 CLR 1.

⁶⁸ *Members of Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

⁶⁹ See eg *Western Australia v Commonwealth* (1995) 183 CLR 373 at 415; *Mason v Tritton* (1994) 34 NSWLR 572 at 585, 595-6, 601; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 6-10, 12, 13, 19, 20, 24, 33, 45, 53, 55, 60, 101, 102; *Derschaw v Sutton* (1997) 17 WAR 419 at 438, 439; *Fejo v Northern Territory* (1998) 195 CLR 96 at 98, 100-1, 102, 113-14; *Wilkes v Johnsen* (1999) 21 WAR 269 at 283; *Commonwealth v Yarmirr* (2001) 184 ALR 113 at 140, 144; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at [17]ff.

⁷⁰ For examples of the many relevant passages, see *Western Australia v Commonwealth* (1995) 183 CLR 373 per joint majority at 418, 437, 438, 480; *Wik Peoples v Queensland* (1996) 187 CLR 1 per Brennan CJ at 71, 72, 84, 87, 88, 91, 98, Toohey J at 120, Gaudron J at 140, 154, 166, Gummow J at 176, 183, Kirby J at 213-14, 216, 217, 218, 237, 245, 246 (and note particularly Toohey and Kirby JJ’s general preference for the phrase ‘traditional title’: at 101, 205); *Fejo v Northern Territory* (1998) 195 CLR 96 per joint majority at 114, 126, 128, 130, Kirby J at 148, 153; *Yanner v Eaton* (1999) 201 CLR 351 per joint majority at 361-2, 371, 372-3, Gummow J at 381-5, 396, Callinan J at 401, 402-3, 407, 408-10. See also *Commonwealth v Yarmirr* (2001) 184 ALR 113 per joint majority at 117, 121, 128, 130, 138, 143, McHugh J at 146, 147, 154, 160, 166, 167, 170, 171, 174, 177, Kirby J at 185, 191, 192, 193, 195, 196-7, 199, 201, 203, 205, Callinan J at 205; *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 per Olney J at [121], [129]; *Western Australia v Ward* (2000) 99 FCR 316 per Beaumont and von Doussa JJ at 382; and ultimately *Western Australia v Ward* (2002) 213 CLR 1 per joint majority at [17]ff, [47], [53], [64], [82], [85]ff, [111], [192], [194], [219], [220], [383], [388], [468], Kirby J at [570], [574]-[575], Callinan J at [638], [968]; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 per Gleeson CJ, Gummow and Hayne JJ at [31], [33], [35], [37], [39]-[42], [44]ff, [75], [76], Gaudron and Kirby JJ at [105].

and terminology of the courts, and by the pattern of litigation and strategies of the parties.⁷¹ There was, for some time at least, an element of accident in the development of the Australian constrictions – and certainly little close consideration of the methodological options. Clearer critical thinking was no doubt further discouraged by the legal orderliness and superficial cultural relativity of a strictly-drawn ‘traditional laws and customs’ framework, and indeed by the convenience of the stricter reading for a society struggling with the awkwardly late arrival of the *Mabo* doctrine and its ‘second wave’ in *Wik*.⁷²

Encouragements and discouragements aside, the ostensible advance of the stricter thinking came in various forms. At a practical level, the specific ‘tradition’-focused mindset on content was nudged along by important lower court determinations which carefully itemised historically-based activities in the description of subsisting interests (or excluded non-historical ones),⁷³ generically qualified the rights and interests listed (eg ‘in accordance with and subject to ... traditional laws and customs’),⁷⁴ and/or expressly confined the recognised right to use and enjoy resources to ‘traditional’ resources.⁷⁵

On a more theoretical level, the strict approach was at least implicitly supported in the keen adoption of terms such as ‘usufructuary’ and ‘sui generis’ in descriptions of the Aboriginal interest, in continuing reference to its variability and difference from common law interests, and in the emerging prominent use of the ‘bundle of rights’ analogy. In many instances the relevant comments can be explained and/or rationalised without damage to the possibility of a comprehensive native title interest, however there were on occasion more explicit statements in apparent support of the strict ‘tradition’-focused confinement of content (notably, comments by Toohey J in *Wik*,⁷⁶ Gummow J in *Yanner*⁷⁷ and lower court judges in *Yarmirr*⁷⁸). These statements were expressed in general terms, and provided significant fuel for the narrowing of Australian principle, but what they in fact

⁷¹ For a more detailed analysis, see Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (Federation Press, NSW, 2008), chap 11 and [12.1].

⁷² *Wik Peoples v Queensland* (1996) 187 CLR 1.

⁷³ See eg *Yarmirr v Northern Territory* (1998) 82 FCR 533 per Olney J at 601-2. Cf also the more recent decisions in *De Rose v South Australia* [2002] FCA 1342 per O’Loughlin J (eg at [922]); *Daniel v Western Australia* [2003] FCA 666; *Lardil Peoples v Queensland* [2004] FCA 298 (eg at [194]ff) and *Sampi v Western Australia* [2005] FCA 777 (eg at [10]).

⁷⁴ See the trial determination in *Yarmirr v Northern Territory* (1998) 82 FCR 533; cf *Western Australia v Ward* (2000) 99 FCR 316 per Beaumont and von Doussa JJ at 372, 373 (discussed below). And cf *De Rose v South Australia* [2002] FCA 1342 per O’Loughlin J at [922]; *Daniel v Western Australia* [2003] FCA 666; *Daniel v Western Australia* [2005] FCA 536; *Lardil Peoples v Queensland* [2004] FCA 298 at [194]ff; *Gumana v Northern Territory (No 2)* [2005] FCA 1425; *Sampi v Western Australia (No 3)* [2005] FCA 1716.

⁷⁵ See eg *Western Australia v Ward* (2000) 99 FCR 316 per Beaumont and von Doussa JJ at 449-55, 542-3, 483.

⁷⁶ *Wik Peoples v Queensland* (1996) 187 CLR 1 at 126.

⁷⁷ *Yanner v Eaton* (1999) 201 CLR 351 at 384.

⁷⁸ *Yarmirr v Northern Territory* (1998) 82 FCR 533 at 576-7 per Olney J; *Commonwealth v Yarmirr* (1999) 101 FCR 171 at 226 per Beaumont and von Doussa JJ.

illustrate is the troublesome absence of a clear title v rights distinction in the Australian jurisprudence (in the latter context a particularisation of traditional laws and customs *is* necessary and appropriate).⁷⁹

There were, on the other hand, glimpses of more liberal thinking on content spread through the formative cases. These came in various forms - eg: ongoing acknowledgement of the possibility of a full 'title' (particularly in the strong lower court judgments of Lee J and North J in *Ward*);⁸⁰ momentary retreat from the insistent 'point of sovereignty' focus (with some correlative softening of the notion of 'tradition');⁸¹ and renewed attention to the critical concept of exclusivity.⁸² Ultimately, perhaps prompted by this new focus on exclusivity, Kirby J in the *Yarmirr* High Court decision began to assemble a coherent opposition to the strict thinking – emphasising the economics of Indigenous land use, the fragility of specifically-defined rights, the inevitability and desirability of cultural 'evolution', and the injustice of historicalising the Aboriginal interest (at least where original exclusivity is established).⁸³

In terms of proof, and the development of a strict tradition-focussed approach to continuity, prominent statements in *Fejo*⁸⁴ (later adopted in *Yarmirr*⁸⁵) emphasised the need for survival of traditional laws and customs in broad terms. However, the formative cases also produced more explicit support for a particularised approach. There were (once again) specific-rights bred comments phrased with undiscerning generality,⁸⁶ an early ambiguous High Court hint that claimants must remain 'living in a traditional society',⁸⁷ and a preview of the emerging emphasis on the survival of the Aboriginal 'system'⁸⁸ (with its implications of particularity).

⁷⁹ Toohey J's critical comment was actually a quote from the Canadian decision of *Van der Peet v R* (1996) 137 DLR (4th) 289 (clearly a specific rights-type scenario), the *Yanner* decision (the context for Gummow J's comment) was itself clearly a specific rights-type case, and it must be remembered that in the *Yarmirr* litigation the courts had rejected (rightly or wrongly) the claims to original exclusivity over the relevant areas – a finding that would justify the handling of the matter as a species of specific rights claim.

⁸⁰ *Western Australia v Commonwealth* (1995) 183 CLR 373 eg at 450; *Yanner v Eaton* (1999) 201 CLR 351 at 372-3; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 126-7 per Toohey J, at 169 per Gummow J; *Ward v Western Australia* (1998) 159 ALR 483 at 505ff per Lee J; *Western Australia v Ward* (2000) 99 FCR 316 at 346, 372-4 per Beaumont and von Doussa JJ, at 515, 526ff per North J.

⁸¹ *Commonwealth v Yarmirr* (1999) 101 FCR 171 per Beaumont and von Doussa JJ. Their Honours suggested that the particular date of sovereignty was not critical, and interpreted the notion of 'tradition' as 'the handing down of statements, beliefs, legends, customs etc from generation to generation, especially by word of mouth or practice': at 194. However note their ultimate substituted emphasis upon the 'point of contact': eg at 194-5.

⁸² *Commonwealth v Yarmirr* (2001) 184 ALR 113.

⁸³ *Commonwealth v Yarmirr* (2001) 184 ALR 113 per Kirby J esp at 186, 196-7, 205.

⁸⁴ *Fejo v Northern Territory* (1998) 195 CLR 96 at 128.

⁸⁵ *Commonwealth v Yarmirr* (2001) 184 ALR 113 at 120-1.

⁸⁶ See eg *Mason v Tritton* (1994) 34 NSWLR 572 esp at 598 per Priestley JA.

⁸⁷ *Western Australia v Commonwealth* (1995) 183 CLR 373 at 452 (later quoted by Brennan CJ in *Wik Peoples v Queensland* (1996) 187 CLR 1 at 92). Cf *Wik* (1996, HCt) per Kirby J at 233, 248; *Commonwealth v Yarmirr* (2001) 184 ALR 113 per Kirby J at 205.

⁸⁸ *Commonwealth v Yarmirr* (2001) 184 ALR 113 at 128.

Olney J in the *Yorta Yorta* trial decision⁸⁹ demonstrated the significance of the crystallising restrictiveness (and some of the attending evidential dangers) when he traced the long struggle of the *Yorta Yorta* people with a tone of particularity and declared that the ‘tide of history’ had ‘washed away’ any real acknowledgement and observance of their traditional laws and customs.⁹⁰ And O’Loughlin J in *De Rose*,⁹¹ despite showing signs of flexibility on certain matters,⁹² crafted the strictest application of the overly particular approach to proof yet seen – with the aid of the *Yorta Yorta* lower court precedents, an emphasis upon the duality of the s 223(1) requirements,⁹³ and an inattention to the general judicial de-emphasis on contemporary physical presence.⁹⁴

However, in the case of proof also, more liberal thinking shadowed the strict. Confirmation of the potential sufficiency of a mere ‘spiritual connection’ itself goes some way towards contradicting a strict and particular approach to continuity. Yet there were more directly relevant signs of liberality in the formative cases – such as: support for what might be termed a ‘compartmental’ approach to proof (requiring constancy and continuity of only the *relevant* laws and customs);⁹⁵ some revival of Brennan J’s ameliorating terminology from *Mabo (No 2)*;⁹⁶ actual attempted accommodation of change or interruption (particularly where it was western-induced);⁹⁷ calls for evidential caution;⁹⁸ cogitation (as noted above) on the point of sovereignty focus;⁹⁹ and (very importantly for the arguments in this paper) support for a more generalised connection focus.¹⁰⁰

⁸⁹ *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606.

⁹⁰ Esp at [129]. The Full Federal Court in the appeal expressed some concern about Olney J’s focus, however the majority did find the discontinuity here to be sufficient to defeat the claim: *Members of the Yorta Yorta Aboriginal Community v Victoria* (2001) 110 FCR 244 per Branson and Katz JJ.

⁹¹ *De Rose v South Australia* [2002] FCA 1342.

⁹² Ie receptivity to migratory movements (see eg at [316], [345]-[346], [372], [376]; contrast *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] FCA 31 at [301]ff, [520]ff, [704], [1167]), and changes in the traditional law and custom governing individual responsibilities and entitlements (eg at [89], [102]).

⁹³ Eg *De Rose v South Australia* [2002] FCA 1342 at [561]. This point is discussed further below.

⁹⁴ Notwithstanding his express reference to the important preceding statements: see eg at [567]-[569].

⁹⁵ *Mason v Tritton* (1994) 34 NSWLR 572 at 601 per Priestley JA, at 584 per Kirby P. Cf *Derschaw v Sutton* (1997) 17 WAR 419 per Franklyn J at 423ff; *Commonwealth v Yarmirr* (1999) 101 FCR 171 per Merkel J at 256.

⁹⁶ *Wilkes v Johnsen* (1999) 21 WAR 269 at 286; *Ward v Western Australia* (1998) 159 ALR 483 eg at 501-2 per Lee J; *Western Australia v Ward* (2000) 99 FCR 316 at 378, 381, 384-7, 421 per Beaumont and von Doussa JJ; *Commonwealth v Yarmirr* (1999) 101 FCR 171 per Merkel J.

⁹⁷ *Ward v Western Australia* (1998) 159 ALR 483 per Lee J eg at 501-2, 514-6, 535-6, 539-41. Cf *Rubibi Community v Western Australia* (2001) 112 FCR 409 per Merkel J at 441-2; *Commonwealth v Yarmirr* (1999) 101 FCR 171 per Merkel J esp at 249, 254, 255-6, 258-9; *Commonwealth v Yarmirr* (2001) 184 ALR 113 per Kirby J at 197.

⁹⁸ Eg *Members of Yorta Yorta Aboriginal Community v Victoria* (2001) 110 FCR 244 per Black CJ.

⁹⁹ *Commonwealth v Yarmirr* (1999) 101 FCR 171 per Beaumont and von Doussa JJ.

¹⁰⁰ *Wilkes v Johnsen* (1999) 21 WAR 269 per Wheeler J; *Commonwealth v Yarmirr* (1999) 101 FCR 171 per Merkel J; *Commonwealth v Yarmirr* (2001) 184 ALR 113 per Kirby J at 201-2.

The most prominent challenge to the strict thinking during this period came in Black CJ's dissent from the Full Federal Court's upholding of the trial result in *Yorta Yorta*.¹⁰¹ His Honour was insistent upon the need to accommodate change,¹⁰² and adopted a liberal interpretation of the concept of 'tradition' in the statutory criteria. He emphasised that while the relevant 'tradition' for the purposes of s 223 must at least have its 'roots' in the law and customs that provided the foundation for the native title as at the acquisition of sovereignty, it was wrong to see 'traditional' as, of its nature, a concept concerned with what is 'dead, frozen or otherwise incapable of change'.¹⁰³

The *Ward* and *Yorta Yorta* decisions

Whilst the issues under examination in this paper were touched upon at various points in the formative High Court jurisprudence, they only arose clearly and specifically before that Court in the *Ward*¹⁰⁴ and *Yorta Yorta*¹⁰⁵ decisions of 2002. While these decisions were not definitive on the relevant matters, the judgments were in various ways very important to the ongoing development of the strict 'tradition'-focus.

The *Ward* decision, concerning a large and important claim in the East Kimberley region, is principally significant on the question of content. The existence of native title and its definition were not the main focus of the appeal to the High Court, however there was important comment on the latter issue. The joint majority judges¹⁰⁶ expressed respect for the Aboriginal perspective and the multi-dimensional nature of native title,¹⁰⁷ however in the detail of their decision they appear to have reinforced (in a number of ways) the overly-specific 'tradition'-focussed approach to content. The reasoning offered in support of this approach here came in various forms (in part reminiscent of comments in earlier decisions and in part essentially new):

- the judges downplay the significance of the right to be asked for 'permission' and the right to 'speak for' country, and in so doing apparently resist any attribution of real significance to them as possible markers of a comprehensive interest;¹⁰⁸

¹⁰¹ *Members of Yorta Yorta Aboriginal Community v Victoria* (2001) 110 FCR 244.

¹⁰² Esp at 254-5.

¹⁰³ At 256.

¹⁰⁴ *Western Australia v Ward* (2002) 213 CLR 1.

¹⁰⁵ *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

¹⁰⁶ Gleeson CJ, Gaudron, Gummow and Hayne JJ.

¹⁰⁷ *Western Australia v Ward* (2002) 213 CLR 1 eg at [14], [90], [91], [95]. See also *Lardil Peoples v Queensland* [2004] FCA 298 at [71].

¹⁰⁸ See esp at [14], [90], cf Callinan J at [821].

- they similarly downplay the acknowledgement and broad translation of such traditional notions by the general law (as a right to possess, occupy, use and enjoy land to the exclusion of all others) – and hence appear to sideline important indications that both the common law and the *Native Title Act* contemplate the possible existence of a comprehensive, exclusive Aboriginal entitlement;¹⁰⁹
- they support the ‘fragmented’ view of the Aboriginal land relationship via a new emphasis on the statutory phrase ‘rights and interests’ (and a correlative dismissal of ‘duties and obligations’) in the translation process;¹¹⁰ and
- they support their approach with references to the often-cited ‘difference’ of native title from general common law interests.¹¹¹

From a full reading of the judgment, it appears that the joint majority felt that particularisation of native title content was important to the workings of partial extinguishment (and more specifically that it was important to differentiate and distance the specific incidents of native title from any fragile rights of control).¹¹² However, this assumes that the notion of partial extinguishment depends upon a particularised original definition of the interest.¹¹³ And moreover, the effect of this overly-specific reasoning on content obviously runs deeper than the facilitation of extinguishment theories.

Armed with their apparent preference for definitional specificity, the joint majority criticised the suggestion by the claimants’ counsel that native title will often be a communal title which is ‘practically equivalent to full ownership’,¹¹⁴ and directed a similar comment to the dissenting Full Federal Court judge (North J) in addressing his alternative approach to extinguishment.¹¹⁵ They also criticised the primary judge in *Ward* (Lee J) for his lack of specificity in identifying the native title entitlements in question¹¹⁶ and his apparent attempt to derive a communal

¹⁰⁹ See esp at [89], [94]. Cf *Lardil Peoples v Queensland* [2004] FCA 298 at [169]ff.

¹¹⁰ See esp at [14]. Compare the approach of Beaumont and von Doussa JJ in the Full Federal Court (*Western Australia v Ward* (2000) 99 FCR 316), but contrast the tenor of Lee J’s judgment at first instance (*Ward v Western Australia* (1998) 159 ALR 483). See also *Lardil Peoples v Queensland* [2004] FCA 298 at [173]. For further analysis of this new reasoning, see Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (Federation Press, NSW, 2008), pp 300ff. And cf the pre-*Ward* comments in Jeremy Webber, ‘Beyond Regret: Mabo’s Implications For Australian Constitutionalism’ in Duncan Ivison, Paul Patton and Will Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press, Cambridge, 2000) 60 at 65-6.

¹¹¹ See esp at [14], [83]-[84], [89], [90], [95].

¹¹² See eg at [91], [95].

¹¹³ See further Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (Federation Press, NSW, 2008), 380.

¹¹⁴ At [83]-[84].

¹¹⁵ At [82], cf Callinan J at [627]. See also *Western Australia v Ward* (2000) 99 FCR 316 eg at 489 per North J.

¹¹⁶ At [86]. See also at [195], [308], [309], [341], [425], [448].

native title essentially from ‘occupation’ of the area at sovereignty.¹¹⁷ Perhaps most significantly, the joint majority judges dismissed the possibility of mineral entitlements on the basis (even aside from questions of extinguishment) that there had been no traditional Aboriginal law, custom or use relating to such substances.¹¹⁸ This brief holding (on an important question) appears to be a simple illustrative extension of the judges’ preference for a strict and specific tradition-focused approach to native title content.

By the time of the High Court decision in *Ward*, Kirby J’s opposition to the strict view of content had firmed, and was presenting a cohesive alternative to the apparent strictness of the majority. His Honour noted that the object of the *Native Title Act* was ‘the recognition of “native title”, rather than the provision of a list of activities permitted on, or in relation to, areas of land or waters’. Building upon the dissent of North J in the Full Federal Court below, Kirby J emphasised the need for the law to accommodate change and development in traditional laws and customs, and recognise the possibility of ‘new aspects’ of tradition rights and interests developing. And he considered, on the basis of principles of equality, that where a community’s native title is established as conferring possession, occupation, use and enjoyment of the land and waters to the exclusion of others, there must be a presumption that such right carries with it the use and enjoyment of minerals and like resources (without the need for a separate inquiry regarding the identity of those resources).¹¹⁹ These are highly significant comments from the perspective of the arguments in this paper.¹²⁰

Ward was followed quickly by the High Court decision in *Yorta Yorta*.¹²¹ This claim related to the early-settled and now intensively used Murray River area, and squarely raised for examination the circumstances of a claimant community that had been subjected to prolonged western influence and disruption. From the perspective of this paper, the *Yorta Yorta* decision was to prove what *Ward* was to content.

In *Yorta Yorta*, Gleeson CJ, Gummow and Hayne JJ emphasised the idea of an ‘intersection’ between traditional law and custom and the common law – and the importance of identifying exactly what traditional law and custom so intersects. They explained that the source of native title rights and interests was a ‘normative’ Aboriginal ‘system’,¹²² which was unable to validly create new rights, duties or interests after the acquisition of sovereignty.¹²³ It was said therefore that the only

¹¹⁷ At [93]. Cf *Gale v Minister for Land and Water Conservation (NSW)* [2004] FCA 374 at [120].

¹¹⁸ At [382], [385], [461], [468]. Cf Callinan J at [637]ff.

¹¹⁹ *Western Australia v Ward* (2002) 213 CLR 1 at [569]-[575].

¹²⁰ For further analysis of Kirby J’s approach, see Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (Federation Press, NSW, 2008), pp 396ff.

¹²¹ *Members of Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

¹²² At [37]-[42], [46]-[47].

¹²³ At [43].

rights or interests (not sourced in the new sovereign order) that will now be recognised are those that find their origin in pre-sovereignty law and custom.¹²⁴ Section 223(1), their Honours felt, should be construed in this light. They considered that as there was general acceptance that the Act does not create new rights and interests but rather refers to rights and interests with an origin in pre-sovereignty law and custom,¹²⁵ the term ‘traditional’ in s 223(1)(a) and (b) must be read as referring not only to generational transmission but also as conveying an understanding of the age of the ‘traditions’: only the normative rules of pre-sovereignty Indigenous societies are ‘traditional’ laws and customs.¹²⁶

This rationalisation has obvious significance on the issue of content. This is an emphatic re-confirmation of the ‘point of sovereignty’ approach,¹²⁷ and this and various other comments¹²⁸ indicate that their Honours did not intend to accommodate any post-sovereignty emergence or accretion of rights via change in law and custom.¹²⁹ However, the contention in this paper that it is not the point of sovereignty approach (even in such emphatic terms) but rather over-specificity that is the source of the difficulty as regards content. And viewed from that perspective, the main significance of these comments from *Yorta Yorta* lies in the implicit support for over-specificity found in the juxtaposition of notions of ‘tradition’, ‘normativity’ and ‘system’.¹³⁰

More importantly for the issue of proof, their Honours went on to identify (with reference to s 223) a requirement that the normative system under which the rights and interests are possessed (the traditional laws and customs) must be a system that has had a ‘continuous existence and vitality’ since sovereignty¹³¹ - otherwise the rights and interests owing their existence to it will have ceased to exist, and revived adherence to the former system will not ‘reconstitute’ the traditional laws and customs out of which rights and interests must ‘spring’ under the definition of native title.¹³² In explaining this position, their Honours emphasised that laws and customs ‘do not exist in a vacuum’, and pointed to the close connection between ‘law and custom’ and the ‘society’ that they ‘arise out of and, in important respects, go to define’.¹³³ Accordingly, survival of the ‘society’ is necessary,¹³⁴

¹²⁴ At [44], cf [55].

¹²⁵ At [45].

¹²⁶ At [46], see also [79], [86]. Cf Callinan J at [191].

¹²⁷ Which was in danger of foundering in Australia since *Yarmirr’s* retreat from the ‘burden on sovereign title’ conceptualisation of native title: see further Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (Federation Press, NSW, 2008), 308.

¹²⁸ See eg at [43], [44], [79], [86].

¹²⁹ Compare Callinan J at [183], [191], [192]. See also *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] FCA 31 at [95].

¹³⁰ Compare (to a lesser extent) Gaudron and Kirby JJ at [118].

¹³¹ At [47].

¹³² At [47], cf at [51], [54], [87].

¹³³ At [49], cf at [55]. Their Honours were to some extent taking their lead from the Full Federal Court: the majority there had spoken of s 223(1)(c) incorporating a continuity of identifiable

and later re-adoption of the content of former laws and customs by some new society makes them laws and customs of that new post-sovereignty society – and hence they can not support recognisable native title rights and interests.¹³⁵

This new thinking in *Yorta Yorta* does not expressly affirm the specific tradition-focused approach to proof.¹³⁶ However, it does provide significant terminological and conceptual support for that stricter thinking. This comes particularly in the emphasis on the necessary survival of a normative ‘system’ (which implies detail and completeness) and in the introduction and apparently strict interpretation of the notion of ‘society’. Indeed, the relevant passages could be viewed as proffering a new theoretical justification for the strict approach - particularly when combined with the *Ward* joint majority’s emphasis on the duality of the requirements in s 223(1) paras (a) (rights and interests possessed under traditional laws and customs) and (b) (connection by those laws and customs)).¹³⁷ Yet it would seem that there are difficulties in the *Yorta Yorta* reasoning; immediate ones (eg in the juxtaposition of confirming nullification of the Aboriginal system *and* insisting on its continued ‘existence and vitality’)¹³⁸ and more complex ones (eg in the interposition and interpretation of the notion of ‘society’).¹³⁹

Not surprisingly, given this difficult conceptual base, Gleeson CJ, Gummow and Hayne JJ responded tentatively to specific questions about change and interruption.¹⁴⁰ It was suggested that ‘some’ change and adaptation in traditional law and custom, or ‘some’ interruption in the enjoyment or exercise of rights and interests, will ‘not necessarily be fatal’ (but that both together might ‘take on considerable significance’).¹⁴¹ Yet the guidance offered on these matters appeared to be thin, seeming to just restate the question (‘what is ‘traditional?’) in the case

community requirement: eg *Members of the Yorta Yorta Aboriginal Community v Victoria* (2001) 110 FCR 244 at 275. Note however that Gleeson CJ, Gummow and Hayne JJ considered that the questions in issue turned more upon a proper understanding of para (a) than on para (c): at [12].

¹³⁴ At [50], cf [89].

¹³⁵ Esp at [53], [54], cf [87], [89]. Cf also in this regard *Gale* (2004, FCT) (esp at [44], [117], [119]).

¹³⁶ Compare however Callinan J at [193], [195].

¹³⁷ *Western Australia v Ward* (2002) 213 CLR 1 at [18], [32].

¹³⁸ See also in this context Richard H Bartlett, ‘An Obsession with Traditional Laws and Customs Creates Difficulty Establishing Native Title Claims in the South: *Yorta Yorta*’ (2003) 31 *University of Western Australia Law Review* 35 at 38ff; Daniel Lavery, ‘A Greater Sense of Tradition: The Implications of the Normative System Principles in *Yorta Yorta* for Native Title Determination Applications’ (2003) 10 *Murdoch University Electronic Journal of Law* at 24; Lisa Strelein, *Compromised Jurisprudence* (Aboriginal Studies Press, Canberra, 2006) at 128-9.

¹³⁹ Compare in this regard *Sampi v Western Australia* [2005] FCA 777 at [969], [979], [1042]; *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [78]. And note the apparently flexible application of the requirement in *Jango v Northern Territory* [2006] FCA 318 esp at [343]ff. Cf also *Risk v Northern Territory* [2006] FCA 404 esp at [230]ff, [802]ff; *Bennell v Western Australia* (2006) 230 ALR 603 (generally). For further discussion of the reasoning in *Yorta Yorta*, see Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (Federation Press, NSW, 2008), pp 324ff.

¹⁴⁰ *Members of Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at [78]ff.

¹⁴¹ At [83].

of ‘change’ and re-insert the term ‘substantially’ in the case of interruption (has acknowledgement and observance of laws and customs continued ‘substantially uninterrupted’?).¹⁴² The contention in this paper is that it is the over-particularisation of ‘tradition’ that produces such awkwardness on these critical issues, and that renders the Australian doctrine largely incapable of accommodating change and interruption in a logical manner.

Justice Kirby’s strong dissent in *Ward* (principally on questions of content) had implications also for proof, most particularly via its insistence on the need to accommodate change.¹⁴³ However, the dissent of Gaudron and Kirby JJ in *Yorta Yorta* addressed the matter of proof more directly. Their Honours argued that the term ‘traditional’ does not necessarily signify rigid adherence to past practices, rather it ordinarily signifies ‘handed down from generation to generation’ (often by word of mouth).¹⁴⁴ They suggested that particularly in light of the impact of European settlement and the ensuing impracticability of many traditional practices (which was acknowledged in the Preamble to the Act), laws and customs may properly be described as ‘traditional’ for the purposes of s 223(1) notwithstanding that they do not correspond exactly with the laws and customs acknowledged and observed prior to European settlement.¹⁴⁵

Gaudron and Kirby JJ suggested, then, that for laws and customs to be identified as ‘traditional’ they should have their ‘origins’ in the past and any differences from past practices should constitute ‘adaptations, alterations, modifications or extensions made in accordance with the shared values or the customs and practices of the people who acknowledge and observe those laws and customs’.¹⁴⁶ This logic, a notable advance on other judicial attempts to explain how change might be measured and judged, obviously stops short of the weightier methodological correction argued for in this paper – namely a conceptual restructure entailing an acknowledgement that the specific incidents of the traditional Aboriginal lifestyle might logically be quite irrelevant to the survival or otherwise of a native ‘title’ properly so called (as distinguished from specific rights-type entitlements). It should also be added, however, that Gaudron and Kirby JJ adopted a more flexible, variable and self-identifying notion of ‘society’ (or ‘community’) than the joint majority judges (the existence of which they apparently saw as a necessary

¹⁴² Esp at [83]ff.

¹⁴³ *Western Australia v Ward* (2002) 213 CLR 1 esp at [574].

¹⁴⁴ *Members of Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at [114].

¹⁴⁵ At [115].

¹⁴⁶ At [116] (cf *Members of the Yorta Yorta Aboriginal Community v Victoria* (2001) 110 FCR 244 per Branson and Katz JJ at 278). Note in this regard the arguments in Richard H Bartlett, ‘An Obsession with Traditional Laws and Customs Creates Difficulty Establishing Native Title Claims in the South: Yorta Yorta’ (2003) 31 *University of Western Australia Law Review* 35 at 43-4. And cf also the explanation of Lambert JA’s approach in *Delgamuukw v British Columbia* (1993) 104 DLR (4th) 470 in Kent McNeil, ‘Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty’ in Kent McNeil, *Emerging Justice?* (Native Law Centre, University of Saskatchewan, Saskatoon, 2001) 58 at 64 note 44.

foundation for laws and customs and their adaptation).¹⁴⁷ This is a point of some significance given the conceptual peril attending the new ‘survival of society’ emphasis if it is applied with reference to an overly static notion of ‘society’.

Ironically, the joint majority in *Yorta Yorta* (and indeed Callinan J in his separate and otherwise quite exacting reasoning) touched upon another potentially liberalising line of logic that has also surfaced briefly in other cases. There was reference to the possibility that alteration, ‘development’ and/or interruption in traditional law and custom might be accommodated where it was contemplated by the traditional law and custom.¹⁴⁸ This is a potentially very significant angle for claimants, if all else fails, however it comes with problems: an implicit confirmation of the *unacceptability* of non-contemplated change and interruption (harsh given the realities of western impact); uncertainty and indeterminacy in application (what exactly must be contemplated?); and some disharmony with the *Yorta Yorta* majority’s insistence on the legal nullification of the ‘parallel law-making system’ at sovereignty.¹⁴⁹

The Contemporary Lower Court Response

The reasoning and determinations in the *Ward* and *Yorta Yorta* decisions have failed to produce consistency and coherency in the subsequent lower court cases, which was perhaps inevitable given the High Court’s apparent drift towards the problematically exacting and imprecise microscoping methodology. Some of the later decisions appear to have embraced the stricter thinking, occasionally even tightening it further (as regards one or both of proof and content).¹⁵⁰ On the other

¹⁴⁷ Esp at [113]ff.

¹⁴⁸ *Members of Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 per Gleeson CJ, Gummow and Hayne JJ at [44] (albeit possibly only in the context of transmission of interests); per Callinan J at [179]. Cf also *Wik Peoples v Queensland* (1996) 187 CLR 1 at 20-1, 60; *Neowarra v Western Australia* (2003) 205 ALR 145 at [353]; *De Rose v South Australia* (2003) 133 FCR 325 eg at [276]-[268], [280], [309]ff, [320], [328]; *De Rose v South Australia (No 2)* [2005] FCAFC 110 eg at [63]ff, [89]; *Daniel v Western Australia* [2003] FCA 666 at [381]ff, [502]; *Rubibi Community v Western Australia (No 5)* [2005] FCA 1025 esp at [25], [266], [363], [364], [368]; and *Jango v Northern Territory* [2006] FCA 318 esp at [193], [270], [334], [461], [464], [501]ff and most importantly at [504]. Cf also in this context the comments in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 per Brennan J and per Deane and Gaudron JJ on questions of internal variation in, and dealings in, Aboriginal interests.

¹⁴⁹ For further discussion, see Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (Federation Press, NSW, 2008), pp 412ff.

¹⁵⁰ In the case of content, see particularly the very restrictive decision in *Daniel v Western Australia* [2003] FCA 666; and compare also the prominent comments in *Sampi v Western Australia* [2005] FCA 777 esp at [10], [42], [44], [1054], [1069]-[1073], *Rubibi Community v Western Australia (No 6)* [2006] FCA 82 at [118]-[119], and *Rubibi Community v Western Australia (No 7)* [2006] FCA 459 at [8]-[12] (see more recently *Western Australia v Sebastian* [2008] FCAFC 65 – an appeal on specific issues not directly relevant here). Cf also *Gumana v Northern Territory* [2005] FCA 50 esp at [122]ff, [275]. In the case of proof, see again the *Daniel* decision, and also *Risk v Northern Territory* [2006] FCA 404 (note particularly the apparent elevation of the *Yorta Yorta* reference to generational transmission to the status of an independent, prescriptive requirement: at [673], [677], [678], [700]ff, [723]ff, [821]ff – a challenge to this aspect of the decision was rejected in *Risk v Northern*

hand, some of the lower court judges have found openings of sorts in the reasoning and standards laid down above.

In the case of content, signs of more flexible thinking include an apparent attempt to accommodate rights or interests *arising from* change or adaptation in laws and customs¹⁵¹ - which is notable, although not the type of structural correction argued for in this paper. More importantly for present purposes, there have been some close approaches to a proper acknowledgement of the possible existence of a comprehensive native title interest, albeit for the most part¹⁵² with last-minute distraction by the *Yarmirr* offshore limitations¹⁵³ and/or an absolutist approach to extinguishment of exclusivity (according to which the remnants of a partially extinguished title apparently lose the definitional assistance of the original exclusivity and fall out piñata style as specifically-defined rights).¹⁵⁴ In view of the repeating appearance of these last obstacles, it is worth noting that on at least one occasion there has been brief recognition that alternative views may be taken on the effects of extinguishment of 'exclusivity'.¹⁵⁵

In the case of proof, recent lower court attempts at some liberalisation of the framework laid down in *Yorta Yorta* have come in various forms:

- expressions of preference for a non-segmented approach to 'connection',¹⁵⁶ opposition to the need for a rigorous independent 'connection' test (on top of the traditional rights and interests inquiry),¹⁵⁷ and re-emphasis upon the absence of a continuing physical connection

Territory [2007] FCAFC 46 at [105]ff). For further analysis of these and other relevant cases, see Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (Federation Press, NSW, 2008), pp 310ff, 334ff.

¹⁵¹ *Rubibi Community v Western Australia (No 5)* [2005] FCA 1025 at [266].

¹⁵² Note the significant potential in a broad reading of the reasoning and order in *Griffiths v Northern Territory* [2007] FCAFC 178. Cf also in this context *Attorney-General of Northern Territory v Ward* [2003] FCAFC 283, particularly the implications of cl 9 of the determination and para I of the preamble to the order.

¹⁵³ *Lardil Peoples v Queensland* [2004] FCA 298 esp at [74]ff, [141]ff, [147], [152]-[153], [198] - but cf [173]ff and then see [164]ff, [172]ff and [180]ff.

¹⁵⁴ *Lardil Peoples v Queensland* [2004] FCA 298 (above); *Neowarra v Western Australia* (2003) 205 ALR 145 eg at [275], [289], [287], [305], [319], [367], [378], [379] - but then note [471]ff, [771]ff. See further Lisa Strelein, *Compromised Jurisprudence* (Aboriginal Studies Press, Canberra, 2006) eg at 119; Lisa Strelein, 'From Mabo to Yorta Yorta: Native Title Law in Australia' (2005) 19 *Washington University Journal of Law and Policy* 225 at 266 (particularly the author's reference to an 'exclusive possession-minus' methodology).

¹⁵⁵ *Gumana v Northern Territory* [2005] FCA 50 at [235]ff. Cf also in this regard the view of Kirby J in *Commonwealth v Yarmirr* (2001) 184 ALR 113 at 187, 192, 200-1.

¹⁵⁶ *De Rose v South Australia* [2003] FCAFC 286 eg at [74]-[75], [285], [305]ff. Cf *De Rose v South Australia (No 2)* [2005] FCAFC 110 esp at [45], [58].

¹⁵⁷ *De Rose v South Australia* [2003] FCAFC 286 esp at [305]ff, and cf also counsel's arguments (eg at [180]). See also *De Rose v South Australia (No 2)* [2005] FCAFC 110 at [109]ff; *Sampi v Western Australia* [2005] FCA 777 at [1075]-[1079]; *Rubibi Community v Western Australia (No 5)* [2005] FCA 1025 at [376]; *Rubibi Community v Western Australia (No 6)* [2006] FCA 82 at [95]; *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [88]ff; *Neowarra v Western Australia* (2003) 205 ALR 145 at [350]; *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] FCA 31 at [1880].

requirement¹⁵⁸ – all of which tend to dismantle possible rationalisations for an overly-particular tradition focus as regards proof;

- emphasis upon continuity in simple knowledge of and assertion of entitlement, boundaries and locations¹⁵⁹ (rather than maintenance of lifestyle and particular practices);
- rejection of any requirement of uniform observance and acknowledgement of laws and customs within the claim group;¹⁶⁰
- acknowledgment and taking account of European interference with, and the impracticalities of continuing, certain traditional practices;¹⁶¹ and
- positive accommodation of some actual change in practice (albeit for the most part in uncontroversial contexts).¹⁶²

The controversial first instance decision in *Bennell*¹⁶³ was an important addition to this Federal Court exploration of the boundaries of the strict thinking on proof. Interestingly, Wilcox J in this decision focused principally on the *Yorta Yorta*-bred survival of ‘society’ requirement - which illustrates the potential of this new emphasis to take on an important role in the inquiry. However, in the face of considerable community change in the relevant area (around the Perth region), and the loss of many traditional practices, his Honour tempered the particularised approach to proof in a range of ways. Once again there were explicit attempts to

¹⁵⁸ *De Rose v South Australia* [2003] FCAFC 286 at [347]ff, [357]ff. On the spiritual connection point, cf more recently *Griffiths v Northern Territory* [2006] FCA 903 at [645].

¹⁵⁹ See eg *Lardil Peoples v Queensland* [2004] FCA 298 at [199]ff, [202], [207]-[210] (but cf [212]ff, [226]); *Neowarra v Western Australia* (2003) 205 ALR 145 at [291], [350], [353], [372]-[474]. Cf *Gumana v Northern Territory* [2005] FCA 50 at [229]ff; *Rubibi Community v Western Australia (No 5)* [2005] FCA 1025 at [141]ff; *Sampi v Western Australia* [2005] FCA 777 eg at [718], [746], [862], [867], [1079]; *Rubibi Community v Western Australia (No 6)* [2006] FCA 82 at [79]; *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [92]. Contrast *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] FCA 31 eg at [328], [936].

¹⁶⁰ See eg *Neowarra v Western Australia* (2003) 205 ALR 145 eg at [176]-[177], [184], [191], [210], [222], [228], [249], [243], [260], [269], [271], [299], [310], [339], [344]-[346]. Cf also in this regard *Jango v Northern Territory* [2006] FCA 318 eg at [364] (but see also at [405]ff, [449]); *Risk v Northern Territory* [2006] FCA 404 at [624], but cf [793]; *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] FCA 31 at [100], but cf [110], [956]ff.

¹⁶¹ See eg *Neowarra v Western Australia* (2003) 205 ALR 145 eg at [249], [319], [321]-[322], [764], and particularly at [309]-[310], [373]-[374]. Cf also at [350], [353] (in the context of ‘connection’). See also *De Rose v South Australia* [2003] FCAFC 286 at [321]ff; *De Rose v South Australia (No 2)* [2005] FCAFC 110 at [101]; *Rubibi Community v Western Australia (No 5)* [2005] FCA 1025 at [96], [147], [183], [241]; *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] FCA 31 at [967].

¹⁶² See eg *Neowarra v Western Australia* (2003) 205 ALR 145 at [285], [310], [337]-[339], [340]-[341], [764]; *Sampi v Western Australia* [2005] FCA 777 eg at [743]ff, [866], [1050]; *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] FCA 31 at [332]; *Rubibi Community v Western Australia (No 5)* [2005] FCA 1025 eg at [25], [90], [109], [122], [131], [136], [368]; *Jango v Northern Territory* [2006] FCA 318 at [504]; *Griffiths v Northern Territory* [2006] FCA 903 at [501], [638]ff.

¹⁶³ *Bennell v Western Australia* [2006] FCA 1243.

accommodate community change in a variety of contexts,¹⁶⁴ but various other aspects of Wilcox J's reasoning also warrant mention:

- he expressly accommodated difference and dissent within the relevant group;¹⁶⁵
- he apparently distinguished the inquiry into continuation of a 'society' from a general search for unchanged laws and customs, indicating in his society inquiry that he was merely seeking continued acknowledgement of 'some' traditional laws and customs;¹⁶⁶
- he clearly emphasised the 'communal/inter se' distinction,¹⁶⁷ with the implication that his inquiry into inter se rules was only relevant to the survival of 'society' and existence of 'normative system' requirements;¹⁶⁸ and
- on turning to the actual survival of native title interests, he adopted what is termed here the 'compartmental' approach to proof, requiring only continuity in the law and custom underpinning the surviving native title rights.¹⁶⁹

In *Bodney v Bennell*,¹⁷⁰ however, the Full Federal Court commented on various aspects of Wilcox J's approach, finding specific error in two respects (with reference to the terms of s 223(1) of the *Native Title Act 1993* (Cth)). First, it was concluded that Wilcox J had failed to properly assess whether there had been continuous acknowledgement and observance of the traditional laws and customs by the Noongar society from sovereignty until recent times. In this regard, it was suggested that he had conducted an inquiry into continuity of society largely divorced from inquiry into continuity of the pre-sovereignty normative system, an approach that the Full Court said 'may mask unacceptable change with the consequence that the current rights and interests are no longer those that existed at sovereignty, and thus not traditional'.¹⁷¹ Secondly, the Full Court found error in Wilcox J's assessment of the claimants' 'connection', concluding that he had erroneously assumed that the establishment of a connection with the larger Noongar claim area meant there was necessarily a connection with the smaller separated portion to which this specific determination was directed. It would appear that these objections to the trial decision reflect not so much paradigm differences in approach, but rather just a dissatisfaction on the part of the Full Court with Wilcox J's evidential inferences, deliberate receptivity to change, and perceived lack of rigour in the relevant inquiries.

¹⁶⁴ See eg at [729], [758], [773]ff, [784]ff.

¹⁶⁵ See eg at [601], [753]ff, [764]ff, [779], [787].

¹⁶⁶ See eg at [776], [791]. Cf *Harrington-Smith on behalf of the Wongatha People v Western Australia* (No 9) [2007] FCA 31 at [962]ff.

¹⁶⁷ See particularly at [61]ff, [78], [794]-[795].

¹⁶⁸ See particularly at [601], [764]ff.

¹⁶⁹ See particularly at [800].

¹⁷⁰ *Bodney v Bennell* [2008] FCAFC 63.

¹⁷¹ At [74].

Detailed analysis of the appeal court's reasoning is beyond the scope of this paper,¹⁷² suffice to say that particularity was to some extent re-tightened and doubt was cast upon some of the liberalising tools employed by Wilcox J (identified above). Notably, it was said in passing that Wilcox J had erroneously relied upon the *reasons* for particular change (namely specific western interference) in mitigation of that change. This was thought to be impermissible under the *Yorta Yorta* precedent¹⁷³ - although, as the above examination suggests, opinion is apparently divided on this point in the recent Australian case law. It might also be noted that the Full Court emphasised that the inquiry into 'connection' should not be fused or confused with the inquiry into the existence of rights and interests under s 223(1)(a)¹⁷⁴ - once again a matter on which the recent cases are apparently divided.

Looking beyond the appeal decision in *Bodney v Bennell*, it is clear that the Federal Court judges have in recent years opened some significant cracks in the restrictive 'tradition'-focused approach to proof. Moreover, on the issue of content (where perhaps much of the predilection for particularity begins) there continues to be incremental conceptual progress - off the back of strong earlier dissents such as those by North J and Kirby J. Yet at this juncture it must be conceded that the High Court reasoning and tone in *Ward* and *Yorta Yorta* remains weighty in its practical and theoretical encouragement for the stricter and more specific tradition-focused methodology.

Conclusion... and a note on Consequences

A principled solution to the Australian difficulties can be found in the less-visited corners of the Australian case law, the unsorted lessons of the comparative law, and the persistent voices of commentary. On the particular arguments advanced in this paper, the beginnings of a solution - the 'de-particularisation' of the Australian methodology - lie in a proper recognition of the logical conceptual distinctions between 'rights' and 'title' and between 'communal' and 'inter se' interests. These distinctions allow a communal title claim to be freed from the specificity of specific rights and inter se type inquiries. A finding of exclusive occupation (under traditional law and custom) at sovereignty, together with substantial continuity in the relevant law and custom (in essence the traditionally-based assertion of 'ownership' or 'custodianship'¹⁷⁵), supports the recognition of a contemporary

¹⁷² For further analysis by this author, see 'One step forward and one step back: The Noongar southwest native title claim' (2008) 23(2) *Australian Property Law Bulletin* 14; 'Tides of History and Jurisprudential Gulfs: Native Title Proof and the Noongar Western Australia Claim' (2009) 8(1) *Indigenous Law Journal* (Toronto) - forthcoming.

¹⁷³ At [81], [82], [96]ff. Cf *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 per the joint majority esp at [90]-[91].

¹⁷⁴ At [165].

¹⁷⁵ Which may of course be evidenced in part by reference to specific historical and contemporary practices.

interest permitting a range of uses (subject to specific or complete extinguishment) and continuing exclusivity (subject to specific or general qualification).¹⁷⁶

Much of the analysis in this paper has proceeded in the legal abstract, at times descending to semantics. However it is very clear that these issues have enormous significance for Indigenous Australians, and for the viability of the native title doctrine as the new cornerstone of the post-colonial legal relationship in Australia. The consequences of an overly strict 'tradition' focus have been explored in legal and political commentary, and in some of the more progressive (usually dissenting) judgments, however it is appropriate to highlight the general nature of the problems here.¹⁷⁷

An overly-specific 'tradition'-focused approach to the definition of native title builds unnecessary complications and dissonance into Australian property law, inevitably fuels an ongoing dismantling of Indigenous relationships with land, and hinders the participation of Aboriginal communities in the general economy. An overly-particular 'tradition'-focused approach to proof (ie cultural continuity) sets up a hazy and subjective legal scaling of different Aboriginal communities based upon western observations of western interference, rejects the claims of those peoples most severely so affected, and tends to institutionally denigrate attempts at some cultural revival. It must necessarily be inconsistent with continuing external pressures on Indigenous communities to adapt and participate, and intrusively examines the internal Aboriginal society without due regard for the risks of disruption and miscomprehension. Perhaps most unsatisfactorily, it makes a loss of tradition both a product and a cause of dispossession.¹⁷⁸

The strict 'tradition' focus, in its whole operation, unpicks the enormous potential of this most important phase in Australian legal history. It constructs and secures an opening premise that little native title now exists, and a reductionist view of that which does. It terminologically and structurally obstructs any meaningful legal accommodation of change in Indigenous communities. It crowds determination and mediation processes with unnecessary uncertainty and evidential complexity. And it ensures that over time the whole concept of 'native title' is likely to be decreasingly relevant to the management of the post-colonial legal relationship in Australia.

¹⁷⁶ For a detailed explanation, see Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (Federation Press, NSW, 2008), chap 15 'Three-Point Plan' (and the references cited there).

¹⁷⁷ For a fuller collection and discussion of the problems that have been identified, see Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (Federation Press, NSW, 2008), chap 13 (and the references cited there).

¹⁷⁸ See eg Lisa Strelein, 'The Vagaries of Native Title: Partial Recognition of Aboriginal Law in the Alice Springs Native Title Case' (1999) 4(26) *Indigenous Law Bulletin* 13.

