CULTURAL TIMELESSNESS AND COLONIAL TETHERS: AUSTRALIAN NATIVE TITLE IN HISTORICAL AND COMPARATIVE PERSPECTIVE

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In a discussion of the early US colonial history, de Tocqueville wrote that the Americans achieved the erosion of the 'Indian' race 'tranquilly, legally, philanthropically, without shedding blood, and without violating a single great principle of morality in the eyes of the world'. It was impossible, he said, to 'destroy men with more respect for the laws of humanity'.[1]

Australian native title jurisprudence appears to be teetering on the brink of a de Tocqueville-flavoured disaster. Citing cultural courtesy and legal precision, the Australian courts have in a number of cases descended into a pre-occupation with 'traditional laws and customs' in their handling of native title proof and content – an approach that would seem to be precedentially, technically and socio-politically flawed.

The Australian approach has long been trailed by critical commentary,[2] and indeed some notable expressions of judicial unease.[3] The purpose of this article is to draw the light once again, in the current climate of political change, to the apparent error in the prevailing Australian thinking and its unfolding consequences. This short study seeks to articulate the difficulties in a new and succinct way, and against a backdrop of relevant legal principle from the United States, Canada and New Zealand. It seeks to corner some of the historical preconceptions and intellectual traditions that may have contributed to the Australian methodology. And it seeks to demonstrate (with the help of this broader context) that, while the 'tradition' focus may be well ingrained in the Australian legal psyche, this is one instance in which the law must not be permitted to 'hide in shadows of its own making'.[4]

I Native Title: A Legal Challenge

Western courts have long been challenged by legally and morally difficult questions in the context of Indigenous land rights. The 15 year old native title doctrine in Australia has already produced a large body of complex and controversial case law. For some time the important Australian cases focused, in the alleyways of a panicked and very detailed legislative response to the sudden recognition of this new interest,[5] upon commercially and politically pressing questions about extinguishment and the interrelationship of Indigenous and non-Indigenous rights.[6] However, in more recent years the predominant difficulties have arisen in the context of attempts to actually define the native title interest and identify the exact prerequisites for its survival. In this regard, running through the early Australian jurisprudence[7] were the makings of a restrictive 'tradition'-focused methodology, and this has taken clearer shape in the more recent High Court cases.[8] This methodology will be explored and explained further below. For present purposes, it essentially means that native title is penned in by the notion of tradition (ie, generally restricted to itemised historical uses) and is dependent for its survival upon the maintenance of that tradition. This approach builds into the doctrine an unjustifiable attenuation of the Aboriginal interest it was designed to protect, and an inherent intolerance of Indigenous change.

The pursuit of legal respect for Indigenous histories and cultures, a work-in-progress in all post-colonial countries, is an unarguably valuable undertaking. However, long experience demonstrates well that the law's patterns and projects must be carefully examined for abstractions and solicitous errors. Is it

appropriate for fundamental Indigenous rights to be tightly and meticulously constrained by the notion of tradition? This is a question that dips deeply into our basic understandings of cultural identity and the relationship between colonisers and Indigenous peoples.

II The Comparative Context

A survey of the law in the US, Canada and New Zealand is enlightening on questions as to the nature of the native title interest (termed here 'content') and the prerequisites for its survival ('proof'). The doctrines in these countries have been assiduously refined over the course of some 180 years, and have in truth always remained reasonably distinct from the treaty history that is often cited by Australian courts in their broad opposition to comparative work in this field.[9]

In the US, an interest in the nature of native title was recognised in the famous (and famously controversial) decision of *Johnson v M'Intosh*[10] – on the back of established European policy and practice in North America.[11] The doctrine came sharply into focus again in the US from the 1930s, with the establishment of compensation processes (particularly the Indian Claims Commission)[12] that revisited historical dealings in and takings of 'Indian' lands (including 'Indian title' lands). These compensatory mechanisms operated through to the 1970s.[13] The Indian title principles also remained significant in respect of 'live' claims in areas with no significant treaty history (eg, Alaska)[14], and indeed have re-emerged in recent decades in the context of challenges to historical acquisitions of Native American lands in the eastern States.[15]

In Canada, whose history is better known to comparative common law jurists, there was early judicial recognition of a species of native title in the late 1880s.[16] However, clear confirmation of its common law existence came only in the important 1973 decision of *Calder v Attorney-General of British Columbia*.[17] In that decision, and *Guerin v R*[18] of 1984, the Supreme Court explored issues of extinguishment and the Canadian Government's obligations in its dealings with surrendered lands. However, lower Canadian courts had by the late 1970s begun a preliminary formulation of principles relating to content and, particularly, proof.[19] There was a burst of judicial activity in Canada in the 1990s, much debated in later commentary, that explored the recognition of 'aboriginal rights' in s 35 of the new *Constitution Act, 1982*.[20] The Supreme Court examined, in this new context, both specific rights-type claims (initially in respect of fisheries prosecutions)[21] and more holistic Aboriginal title claims.[22] The framework laid down in these cases continues to be determinedly explored by the Canadian courts, with an important Supreme Court refinement of the specific rights principles coming in 2006.[23]

In New Zealand, direct judicial consideration of common law native title has been inhibited to some extent by various specific initiatives – most particularly the historic channelling of claims into a statutory conversion regime (from the 1860s),[24] the more recent diversion of such claims to the quasi-judicial Waitangi Tribunal processes (from the 1970s),[25] and the general settlement of Maori commercial fishery claims in the Sealord's Deal of 1992.[26] However, there was clear judicial recognition of a common law interest as early as 1847.[27] And despite a long period of confusion over the enforceability of the interest,[28] and then an initial contemporary judicial focus upon the Treaty of Waitangi,[29] the common law doctrine of 'customary title' re-emerged clearly in the early 1990s[30] and has been incrementally explored and developed since.[31]

Importantly, in these key comparative jurisdictions the notion of tradition has played a strikingly minor role in the context of Indigenous title.[32] On the critical issue of content, a 'full title' conceptualisation of the interest (and hence a conspicuous disinterest in tradition-sourced limitations) has been ever present, but is particularly evident in the US,[33] early New Zealand[34] and contemporary Canadian[35] jurisprudence. Correspondingly, in this long transnational legal history there has been little clear suggestion anywhere that the survival of the Aboriginal title interest is somehow conditioned upon the general survival of specific traditional laws and customs.[36]

There has been controversy in Canada,[37] not dissimilar to that which has attended the tradition preoccupation in Australia, around the Canadian courts' development of the specific 'rights' doctrine and delimitation of the content of such rights in the context of changing cultural circumstances.[38] However, the target in Canada is a far smaller one – the title vs rights distinction is firmly entrenched in that jurisdiction, and in the case of specific rights (where there is no original territorial exclusivity to provide definitional assistance) at least some reference to the nature of historical uses in the definition of the contemporary interest is logically defensible. There has also been some controversy surrounding the Canadian 'irreconcilable uses' limitation. Whilst this (incompletely explored) restriction[39] does apply to Aboriginal title, it targets

uses that would be in conflict with tradition rather than non-traditional uses *per se* – and hence it is a significantly lesser restriction than that built into the tradition-based apparatus of the Australian doctrine.

There is convergent elemental reasoning in the overseas case law that has precluded the formation of a more restrictive tradition-focused approach to native title (as distinct from specific rights – although the distinction is only explicit in Canada). Courts in the US, New Zealand and Canada have adopted a self-evidently broad conceptualisation of the title interest and a substructural focus on the establishment and survival of the interest itself rather than some pre-existing 'system' or lifestyle.[40] There are some ostensible anomalies to be found in the overseas cases, particularly in what might appear to be occasional attempts by lower courts to confine the content of the Indigenous interest by reference to historical uses.[41] However, these have been discredited and/or are explicable by reference to the specific context (and on occasions the incomplete recognition of that context by the relevant court).[42]

III The Machinery of 'Tradition'

The contention here is that the Australian pre-occupation with tradition manifests itself in (or perhaps is the product of) two excesses in the application of this country's otherwise unobjectionable 'laws and customs' methodology:[43]

1. over-specificity in the definition of the interest by reference to 'traditional law and custom'; and
2. over-particularity in the application of the requirement that there must be constancy and continuity in 'traditional law and custom' for the interest to survive.

A separate but contributing excess is found in the periodic adoption (to varying extents) of an overly strict approach to the very notion of law and custom. In broad terms, this additional constriction involves an assertion that only *some* of the activity of original Aboriginal existence qualifies for recognition under the native title doctrine: the notion of law and custom is read with a legalistic rigour such that only practices that were identifiable with and located within a system of rules attract recognition.[44] It is logical and appropriate to exclude from recognition under the native title doctrine presence or use that was merely random or accidental. However, a strict application of this 'system of rules' approach is clearly untenable. In the early but notable case of *Dillon v Davies*,[45] for example, the indication was that establishing the existence of a culturally important traditional practice handed down through generations would be insufficient without evidence of traditional regulation and restriction of that practice.

While the purpose here is not to explore the technical and precedential difficulties attending these aspects of the Australian doctrine, their legal fragility must be briefly noted. The seminal decision of *Mabo (No 2)*[46] was conspicuously ambiguous, inconsistent and divided on the critical issues at play here,[47] and its legal and factual context has too often been neglected in subsequent interpretation of the case.[48] Following *Mabo (No 2)* there was continuing equivocation on these matters in the formative case law and in key statutory provisions,[49] but strong impetus for a perpetuation of the restrictive thinking was provided by the persistently selective quoting of *Mabo (No 2)*, the priorities and strategies of the parties themselves, and the manner in which issues were coming before the courts.[50]

Ultimately, there was an attempt by the High Court to theoretically prop up the methodological excesses in the more recent *Ward*[51] and *Yorta Yorta*[52] decisions. In *Ward*, a reinforcement of the overly specific approach to the definition of the interest came particularly via a discounting of notions of Indigenous control over territory, a reductionist emphasis on the statutory phrase 'rights and interests', and reference to the often cited difference of native title from general titles. In the *Yorta Yorta* decision, a reinforcement of the overly particular approach to the requirement of cultural constancy and continuity came via a new emphasis on the intersection of 'systems' and on the necessary survival of the Indigenous 'society'. This late theorising appears to be problematic in many respects, does not squarely address the critical questions, and has failed to prompt any consistency in the later lower court jurisprudence. More liberal approaches, sometimes quite clearly articulated, have been pursued at various times in lower court judgments and dissents,[53] but these appear to have not yet offered a coherent, viable alternative.

IV Voices from the Past

As noted above, there was initially a ring of terminological inertia and legal accident in the Australian tradition restrictions, and then more recently they were propped up with somewhat strained modern legal rationalisations.[54]

However, there are also strong historical undercurrents in the pattern of legal development in Australia. Some of these are unsurprising, perhaps natural and inevitable. For example, it is clear that the tradition methodology is conveniently consistent in important respects with the earlier-forged statutory land rights methodology[55] and with the long history of general statutory protection for Aboriginal 'subsistence' or 'traditional' usages. Yet some of the undercurrents are historical preconceptions and intellectual traditions that run deeper and are more deserving of exposure and analysis.

At the gentler end of the critique, it might be noted that the courts are working in the shadow of a western intellectual tradition that has long pressed a historicalised and stylised view of Indigenous culture and that has more recently committed itself to the preservation of such culture.[56] It is perhaps in part these forces that have driven an emphasis in the Australian native title doctrine upon the Indigenous past, and indeed an emphasis upon the spiritual side of Indigenous relationships with land, with consequent neglect of the self-evidently important and inherently adaptive economic side of those relationships.[57] Yet this later skewed perspective may in fact have still deeper and more pragmatic historical roots – specifically, in the fact that the colonising population in Australia has experienced little of the cross-cultural economic cooperation found in the colonial histories of other countries, and therefore perhaps now unwittingly resists the attribution of an economic personality to the Indigenous population.[58]

Beyond these issues, it is difficult to avoid the stronger criticism that the intellectual baggage of colonialism continues to play a part in this aspect of the Australian doctrine.[59] Over-specificity in the definition of the native title interest, and the correlative disinclination to attribute any significance to the broader fact of occupation, gives new life to the old insistence that Indigenous culture and land use was 'backward'. The supposed backwardness of Indigenous populations was originally used in justification of their dispossession[60] or the non-recognition[61] of their interests. Now this perception appears to take the form of a presumption that Aboriginal societies were incapable of holistic utilisation and management of lands and that their occupation (even when exclusive) was necessarily less complete or less legitimate than that of other cultures.[62] In strict precedential terms, this presumption may be viewed as a remnant of the long discredited 'scale of social organisation' approach to Indigenous rights,[63] as it apparently rests upon the same bias towards western-type land use and social organisation.

It becomes evident then that the Australian methodology, in its resistance to the idea of Aboriginal ownership, works some revival of the theoretically redundant notion that Australia was *terra nullius* – land belonging to no one.[64] And it might be said, given the explicit rejection in this native title doctrine of contemporary Aboriginality, that however far Australia has progressed in dispelling the fantasy that Indigenous peoples were not here, it is certainly yet to properly acknowledge that they are here now.[65]

The third excess in the Australian methodology – a restrictive view on what can constitute law and custom (or the 'system of rules' approach) – would seem to be even more clearly a remnant of the redundant 'scale of social organisation' approach to Indigenous rights. There is in this emphasis upon strict rules a return to the search for 'settled inhabitants' and 'settled law'; that is, for western forms of regulation and prescription.[66] It smacks of a renewed scepticism about the significance and sincerity of Aboriginal land relationships, and risks a revival of the discredited 'absence of law' perception of Indigenous society in Australia. This is an even more surprising addition to a doctrine that began with a High Court treatise on the errors of jurisprudential discrimination.[67]

V The Consequences of the 'Tradition' Focus

The consequences of this restrictive historicalisation of Australian native title are very significant. In a jurisdiction with little other common law acknowledgement of the prior existence of Aboriginal societies, the principles of native title provide the basic legal interface between the Indigenous and non-Indigenous communities. Even in countries where the law has developed other guiding principles for the ongoing post-colonial relationship (eg, via recognition of a residual Indigenous sovereignty or fiduciary type obligations),[68] native title doctrine remains foundationally important. In Australia it is absolutely critical.

Over-specificity in the definition of the native title interest – the pursuit of a historicalised and piecemeal definition of entitlements – builds unnecessary distinctions and complexity into Australian property law, must inevitably contribute to the continued dismantling of Indigenous relationships with land,[69] and by disallowing contemporary

uses will hinder the participation of Aboriginal communities in the general economy.[70]

Over-particularity in the search for cultural constancy and continuity sets up an unnecessary legal differentiation of Aboriginal communities based upon an uncertain test of western influence,[71] rejects the claims of Aboriginal peoples most severely affected by European settlement,[72] and tends to institutionally denigrate attempts at cultural revival. Such over-particularity is inconsistent with continuing external pressures on Aboriginal communities to adapt and participate,[73] and invades the internal Aboriginal society without due regard for the likelihood of disruption and misapprehension.[74] Moreover, it interferes with the natural processes of change in Indigenous cultures and, with sad and unacceptable irony, makes a loss of 'tradition' both a product and a cause of dispossession.[75] One Indigenous commentator cautioned some time ago that this approach was suffocating for Aboriginal peoples.[76]

In their combined operation, the Australian excesses entrench a stubborn opening premise that little native title now exists[77] and a reductionist view of that which does. This methodology would seem to ensure the continued diminishment of native title interests and is likely to aid their future extinguishment. It introduces unnecessary uncertainty and evidential complexity into native title processes,[78] imposes something of a sunset clause on the very concept of native title and, most disturbingly, leaves open the prospect that existing native title determinations may potentially be re-opened at some point in the future adaptation of successful claimant communities.[79]

The 180 years worth of overseas case law on Indigenous title holds some important lessons for Australia. This jurisprudence, beneath its contextual complications, reveals that a more principled approach is possible – an approach based it seems upon a greater respect for the pre-colonisation existence of Aboriginal societies and the relationships of those societies with land. The overseas history also reveals that in contemplating such legal problems Australia must be mindful of its complicity in the vacillations of legal and social theory across all jurisdictions – vacillations between assimilation and separation, between 'civilisation' and protection of the 'primitive', between idealism and pragmatism, and between racism and romanticism.[80] The Australian tradition restrictions sit somewhere on the scale of constant over-correction, and it is likely that in time this will be regretfully acknowledged. It is to be hoped that during the wait for such acknowledgment the doctrine does not atrophy to the point where there is little worth saving.

One practical difficulty with the prevailing Australian methodology stands out from the others. In a climate of acute concern over the economic and social problems faced by Indigenous communities in Australia, one must view with extreme suspicion a legal doctrine that places inherent Aboriginal rights and economic adaptation in a position of antagonistic opposition. This is a doctrine that appears to have lost its way in the paternalism, unilateralism and misunderstanding of earlier times. It is a doctrine that remains tethered to an old colonialism that viewed the Indigenous peoples of Australia as more in the nature of curious menageries than functioning cultures.[81]

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1 Alexis de Tocqueville, *Democracy in America* (Henry Reeve trans, Phillips Bradley ed, first published 1835 and 1840, revised ed, 1945 ed) vol 1, 355 [trans of: *De la démocratie en Amérique*]. See generally Eric Kades, 'The Dark Side of Efficiency: *Johnson v M'Intosh* and the Expropriation of American Indian Lands' (2000) 148(4) *University of Pennsylvania Law Review* 1065, 1068–70.

2 See, eg, 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* (1993) 35; Noel Pearson, '204 Years of Invisible Title' in M A Stephenson and Suri Ratnapala (eds), *Mabo, a Judicial Revolution: The Aboriginal Land Rights Decision and its Impact on Australian Law* (1993) 75; Hal Wootten, '*Mabo* – Issues and Challenges' (1994) 1(4) *Judicial Review* 303; 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* (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(2) *Flinders Journal of Law Reform* 137; 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* (2000) 60; Kent McNeil, 'The Relevance of Traditional Laws and Customs to the Existence and Content of Native Title at Common Law' in Kent McNeil, *Emerging Justice?* (2001) 416; Lisa Strelein, 'Conceptualising Native Title' (2001) 23(1) *Sydney Law Review* 95; Daniel Lavery, 'A Greater Sense of Tradition: The Implications of the Normative System Principles in *Yorta Yorta* for Native Title Determination Applications' (2003) 10(4) *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; Kirsten Anker, 'Law in the Present Tense' (2004) 28 *Melbourne University Law Review* 1.

3 See especially *Ward v Western Australia* (1998) 159 ALR 483; *Western Australia v Ward* (2002) 213 CLR 1, 241ff (Kirby J) ('*Ward*'); *Members of the Yorta Yorta Aboriginal Community v Victoria* (2001) 110 FCR 244, 247ff (Black CJ); and *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 459ff (Gaudron and Kirby JJ) ('*Yorta Yorta*'). See also (for signs of more liberal thinking) *Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples v Queensland* [2004] FCA 298; *Neowarra v Western Australia* (2003) 134 FCR 208; *Rubibi Community v Western Australia (No 5)* [2005] FCA 1025; *Gumana v Northern Territory* (2005) 141 FCR 457; *De Rose v South Australia* (2003) 133 FCR 325; *Bennell v Western Australia* (2006) 153 FCR 120 (but see now *Bodney v Bennell* (2008) 167 FCR 84).

4 This phrase is paraphrased from Patrick Macklem, 'What's Law Got to Do with it? The Protection of Aboriginal Title in Canada' (1997) 35(1) *Osgoode Hall Law Journal* 125, 137.

5 This sudden recognition occurred of course in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ('*Mabo (No 2)*').

6 See, eg, *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595; *Wik Peoples v Queensland* (1996) 187 CLR 1 ('*Wik*'); *Fejo v Northern Territory* (1998) 195 CLR 96 ('*Fejo*'); *Yanner v Eaton* (1999) 201 CLR 351 ('*Yanner*'); *Commonwealth v Yarmirr* (2001) 208 CLR 1.

7 In addition to the overtones of the *Mabo (No 2)* decision itself, see especially *Western Australia v Commonwealth* (1995) 183 CLR 373; *Wik* (1996) 187 CLR 1; *Fejo* (1998) 195 CLR 96; *Yanner* (1999) 201 CLR 351.

8 *Ward* (2002) 213 CLR 1; *Yorta Yorta* (2002) 214 CLR 422.

9 See, eg, *Mabo (No 2)* (1992) 175 CLR 1, 131, 137 (Dawson J); *Yanner* (1999) 201 CLR 351, 402 (Callinan J); *Wik* (1996) 187 CLR 1, 125–6 (Toohey J); *Fejo* (1998) 195 CLR 96, 130 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), 148–9 (Kirby J); *Ward* (2002) 213 CLR 1, 273 (Callinan J).

10 21 US (8 Wheat) 543 (1823).

11 See also *Cherokee Nation v Georgia*, 30 US (5 Pet) 1 (1831); *Worcester v Georgia*, 31 US (6 Pet) 515 (1832).

12 See the *Indian Claims Commission Act of 1946*, 25 USC §§ 70 et seq, 28 USC § 1505.

13 See generally David H Getches, Charles F Wilkinson and Robert A Williams, *Cases and Materials on Federal Indian Law* (3rd ed, 1993) 311ff; Richard H Bartlett, *Native Title in Australia* (2nd ed, 2004) 573, 705.

14 See now the *Alaska Native Claims Settlement Act of 1971*, 43 USC §§ 1601–29h(2000). For a general discussion of the Alaskan history, see *United States v Atlantic Richfield Co*, 435 F Supp 1009 (D Alaska, 1977) 1014ff.

15 That is, acquisitions alleged to have been in breach of the early non-intercourse legislation: eg, *Oneida Indian Nation of New York State v County of Oneida*, 414 US 661 (1974); *County of Oneida v Oneida Indian Nation of New York State*, 470 US 226 (1985); *Joint Tribal Council of the Passamaquoddy Tribe v Morton*, 528 F 2d 370 (1975); *Narragansett Tribe of Indians v Southern Rhode Island Land Development Corporation*, 418 F Supp 798 (1976).

16 *St Catharines Milling and Lumber Company v R* (1887) 13 SCR 577; *St Catherine's Milling and Lumber Company v R* (1888) 14 App Cas 46 (PC).

17 *Calder v British Columbia (Attorney General)* [1973] SCR 313.

18 *Guerin v R* (1984) [1984] 2 SCR 335.

19 See especially *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1979) 107 DLR (3d) 513.

20 *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11.

21 See especially *R v Van der Peet* [1996] 2 SCR 507. See also *R v Gladstone* [1996] 2 SCR 723; *R v NTC Smokehouse Ltd* (1996) 137 DLR (4th) 528 (SCC).

22 *Delgamuukw v British Columbia* [1997] 3 SCR 1010. See more recently *Tsilhqot'in Nation v British Columbia* [2008] 1 CNLR 112.

23 *R v Sappier* [2006] 2 SCR 686. Note particularly (at [35] per Bastarache J) the Court's rejection of an argument that a practice undertaken merely for 'survival' purposes could not satisfy the test for the identification of Aboriginal rights (the 'integral to distinctive culture' test formulated in the *Van der Peet* decision: [1996] 2 SCR 507, 549 (Lamer CJC)). See also the Court's determination in *Sappier* to accommodate 'evolution' even in this narrower specific rights context: at [48] per Bastarache J.

24 See the *Native Lands Act 1862* (NZ) and the *Native Lands Act 1865* (NZ).

25 *Treaty of Waitangi Act 1975* (NZ).

26 See the detailed discussion in *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301.

27 *R v Symonds* (1847) NZPCC 387.

28 See originally *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72.

29 See, eg, *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513; *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553.

30 See, eg, *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20.

31 See especially *Attorney-General v Ngati Apa* [2003] 3 NZLR 643. Note also in this regard the *Foreshore and Seabed Act 2004* (NZ).

32 There is a detailed examination of the comparative position on these issues in Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (2008), pt II.

33 See particularly *Johnson v M'Intosh*, 21 US (8 Wheat) 543 (1823); *Mitchel v United States*, 34 US (9 Pet) 711 (1835); *United States v Shoshone Tribe of Indians of the Wind River Reservation in Wyoming*, 304 US 111 (1937); *Otoe and Missouria Tribe of Indians v United States*, 131 F Supp 265 (Ct Cl, 1955); *United States v Seminole Indians of the State of Florida and the Seminole Nation of Oklahoma*, 180 Ct Cl 375 (1967).

34 See especially *R v Symonds* (1847) NZPCC 387; *Kapua v Haimona* [1913] AC 761. More recently, see *Attorney-General v Ngati Apa* [2003] 3 NZLR 643. Note also the logical implication of the freehold 'conversion' operations of the New Zealand Land Court regime of the late 1800s/early 1900s – namely that the original Maori common law interest was worthy of straight conversion to a form of freehold.

35 See especially *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

36 The attention in places to continuity of use and occupation (in the US doctrine and – ambiguously – in the contemporary Canadian cases), and possibly to the survival of a 'society' (see *Attorney-General for Ontario v Bear Island Foundation* (1984) 15 DLR (4th) 321 ('*Bear Island*'), falls well short of a general cultural continuity and constancy requirement of the type found in the Australian jurisprudence.

37 See, eg, Russel Lawrence Barsh and James Youngblood Henderson, 'The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand' (1997) 42 *McGill Law Journal* 993; Bradford W Morse, 'Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R v Pamajewon*' (1997) 42 *McGill Law Journal* 1011; Leonard I Rotman, '"My Hovercraft is Full of Eels": Smoking out the Message in *R v Marshall*' (2000) 63 *Saskatchewan Law Review* 617; John Borrows, 'Frozen Rights in Canada: Constitutional Interpretation and the Trickster' (1998) 22 *American Indian Law Review* 37.

38 For some of the earlier cases on this area, see *R v Van der Peet* [1996] 2 SCR 507 (particularly the formulation of the 'integral to distinctive culture' test: at 549 per Lamer CJC); *R v NTC Smokehouse Ltd* (1996) 137 DLR (4th) 528 (SCC); *R v Gladstone* [1996] 2 SCR 723. For recent Supreme Court application of the principles, see *R v Powley* [2003] 2 SCR 207 (re Métis rights) and *R v Sappier* [2006] 2 SCR 686. For lower court examples, see, eg, *R v Mongrain* [1998] 4 CNLR 218 (QC); *R v Seward* [1999] 3 CNLR 299 (BCCA); *R v Bernard* [2000] 3 CNLR 184 (NBPC); *R v Nelson* [2000] 2 CNLR 222 (MCA); *R v Haines* [2003] 1 CNLR 191 (BCPC); *R v Pariseau* [2003] 2 CNLR 260 (QCA); *R v Francis* [2003] 3 CNLR 268 (NSPC); *Treaty Eight First Nations v Canada (Attorney-General)* [2003] 4 CNLR 349 (FCC); *R v Shipman* [2004] 2 CNLR 288 (OCA); *Wasauksing First Nation v Wasausink Lands Inc* [2004] 2 CNLR 355 (OCA); *R v Gray* [2004] 4 CNLR 201 (NBCA); *R v Sappier* [2004] 4 CNLR 252 (NBCA); *R v Charlie* [2005] 2 CNLR 316 (BCPC); *R v Lavigne* [2005] 3 CNLR 176 (NBPC); *R v Billy* [2006] 2 CNLR 123 (BCPC); *Samson Indian Nation and Band v Canada* [2006] 1 CNLR 100 (FCC); *Drew v Newfoundland and Labrador (Minister of Government Services and Lands)* [2007] 1 CNLR 34 (NCA).

39 This restriction seeks to exclude uses which are irreconcilable with the nature of the original attachment to land. See especially *Delgamuukw v British Columbia* [1997] 3 SCR 1010, 1080–1 (Lamer CJC).

40 See Young, above n 32, 201ff.

41 See, eg, *Idaho v Coffee,* 556 P 2d 1185 (1976) ('*Coffee*'); *Bear Island* (1984) 15 DLR (4th) 321. Cf *McRitchie v Taranaki Fish and Game Council* [1999] 2 NZLR 139 ('*McRitchie*'). Note that the *Bear Island* decision also carries overtones of a tradition-type restriction as regards proof.

42 Note the specific rights-type context of the *Coffee* and *McRitchie* cases – a context which justifies some historical particularity in defining the interest. Note also the narrow acceptance of the *Bear Island* decision in the Supreme Court appeal: see *Bear Island Foundation v Attorney-General for Ontario* [1991] 2 SCR 570. More generally, the intimations of restrictiveness in such cases are inconsistent with the far more significant decisions discussed above in respect of each jurisdiction.

43 See eg, Young, above n 32, 208. For discussion of the error in assuming that some partial extinguishment necessitates specificity in the definition of the interest, see Young, above n 32, 435.

44 See, eg, *Mason v Tritton* (1994) 34 NSWLR 572; *Dillon v Davies* (1998) 8 Tas R 229.

45 (1998) 8 Tas R 229.

46 *Mabo (No 2)* (1992) 175 CLR 1.

47 Beyond the terminology in the often-quoted passages of

Brennan J, the narrow approach to content (the first excess) really finds only limited backing – most particularly in the dissenting judge Dawson J's passing reference to (now overruled) Canadian decisions. Moreover, the actual result in the case and various comments by the majority judges indicate that they all acknowledged the possible existence of a comprehensive title interest. The second excess is also negated to some extent by the result (a recognition of subsisting title in the hands of a quite adapted community), and indeed appeared to be explicitly rejected by Toohey J and doubted by Deane and Gaudron JJ. Brennan J's approach on this matter was itself ambiguous given the ameliorating terminology employed, the shifting emphasis in his various statements of the relevant principles, and the absence of any concerted application of a strict requirement to the facts.

48 For example, the correction of the existing Australian and Privy Council case law in various ways invited attention to the specifics of the Meriam people's laws and customs. Furthermore, the context of the claim was atypical in important respects, and encouraged a focus in tone and inquiry on the identification and definition of inter se rights within the territory and hence on particular, sub-communal laws and customs.

49 See especially *Western Australia v Commonwealth* (1995) 183 CLR 373; *Wik* (1996) 187 CLR 1; *Fejo* (1998) 195 CLR 96; *Yanner* (1999) 201 CLR 351; *Native Title Act 1993* (Cth), s 223.

50 Note for example the early focus in the higher court decisions upon more northerly, less disrupted communities; the frequent inclination of the claimants themselves to particularise their interests and/or emphasise the constancy and continuity of their laws and customs (seemingly in attempts to avoid conclusions of extinguishment); and the early prominence of specific rights-type cases (most notably *Yanner* (1999) 201 CLR 351), which logically do require some particularity in the investigation of the interest. See further Young, above n 32, ch 11.

51 *Ward* (2002) 213 CLR 1.

52 *Yorta Yorta* (2002) 214 CLR 422.

53 See, eg, *Ward v Western Australia* (1998) 159 ALR 483; *Ward* (2002) 213 CLR 1, 241ff (Kirby J); *Members of the Yorta Yorta Aboriginal Community v Victoria* (2001) 110 FCR 244, 247ff (Black CJ); and *Yorta Yorta* 214 CLR 422, 459ff (Gaudron and Kirby JJ). More recently, see, eg, *Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples v Queensland* [2004] FCA 298; *Neowarra v Western Australia* (2003) 205 ALR 145; *Rubibi Community v Western Australia (No 5)* [2005] FCA 1025; *Gumana v Northern Territory* (2005) 141 FCR 457; *De Rose v South Australia* (2003) 133 FCR 325; *Bennell v Western Australia* (2006) 230 ALR 603 (but see now *Bodney v Bennell* [2008] FCAFC 63).

54 See the discussion above of *Ward* (2002) 213 CLR 1 and *Yorta Yorta* 214 CLR 422.

55 See especially the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). See also Hal Wootten, 'The End of Dispossession? Anthropologists and Lawyers in the Native Title Process' in Julie Finlayson and Diane Smith (eds), *The Native Title Era: Emerging Issues for Research, Policy and Practice* (1995) 101, 109 <http://www.anu.edu.au/caepr/Publications/mono/RM10j_Wootten.pdf> at 30 July 2008; Bartlett, *Native Title in Australia*, above n 13, 112; Lavery, above n 2. Cf *Ward v Western Australia* (1998) 159 ALR 483, 528ff, 533, 541–3 (Lee J), and the works referred to by Lee J there.

56 See Young, above n 32, 1.

57 See, eg, *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 167 (cf 270–1) (Blackburn J); *Western Australia v Ward* (2000) 99 FCR 316, 348–9 (Beaumont and von Doussa JJ); *Ward* (2002) 213 CLR 1, 64–5 (Gleeson CJ, Gaudron, Gummow and Hayne JJ), 247, 249 (Kirby J); *De Rose v South Australia* [2002] FCA 1342, [568] (O'Loughlin J) (*contra De Rose v South Australia* [2003] FCAFC 286, 398 (Wilcox, Sackville and Merkel JJ)); *Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples v Queensland* [2004] FCA 298, [173] (Cooper J). Cf the discussion in Bartlett, *Native Title in Australia*, above n 13, 111–12; McNeil, 'The Relevance of Traditional Law and Customs to the Existence and Content of Native Title at Common Law', above n 2, 429, 443ff.

58 Cf McNamara and Grattan, above n 2, 146.

59 See Jeremy Webber, 'The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo*' (1995) 17 *Sydney Law Review* 5, 13. Cf the 'measure of property' argument put to the court in *Johnson v M'Intosh*, 21 US (8 Wheat) 543 (1823). See further Young, above n 32, ch 13.

60 See especially the early US cases: notably *Johnson v M'Intosh*, 21 US (8 Wheat) 543 (1823).

61 See, eg, the discussion of the old justifications for the classification of certain inhabited lands as *terra nullius*: *Mabo (No 2)* (1992) 175 CLR 1, 32–3 (Brennan J); cf *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 200.

62 See further Bartlett, *Native Title in Australia*, above n 13, 216.

63 The 'scale' methodology was most clearly articulated in *Re Southern Rhodesia* [1919] AC 211. As to the redundancy of this approach, see generally McNeil, 'The Relevance of Traditional Law and Customs to the Existence and Content of Native Title at Common Law', above n 2, 460 note 221. See also Pearson, '204 Years of Invisible Title', above n 2, 76ff, 81.

64 Cf Wootten, '*Mabo* – Issues and Challenges', above n 2, 333.

65 See Noel Pearson, 'Eddie Mabo Human Rights Lecture' (Speech delivered at James Cook University, North Queensland, 17 May 1995) in John Wilson, Jane Thomson and Anthony McMahon

(eds), *The Australian Welfare State: Key Documents and Themes* (1996) 147.

66 Cf the arguments in McNeil, 'The Relevance of Traditional Law and Customs to the Existence and Content of Native Title at Common Law', above n 2, 460ff. See also *Ward v Western Australia* (1998) 159 ALR 483, 504 (Lee J). See further Young, above n 32, 365ff.

67 That is, *Mabo (No 2)* (1992) 175 CLR 1.

68 See the examination of the relevant countries' legal histories in Young, above n 32, pt I.

69 Note particularly in this respect the joint majority's express discounting of 'duties' and 'obligations' in *Ward* (2002) 213 CLR 1, 65 (Gleeson CJ, Gaudron, Gummow and Hayne JJ). Cf also in this context Myers, Piper and Rumley, above n 2, 232, 234.

70 Cf Kiri Chanwai and Benjamin Richardson, 'Re-working Indigenous Customary Rights? The Case of Introduced Species' (1998) 1(2) *New Zealand Journal of Environmental Law* 157; Michael A Burnett, 'The Dilemma of Commercial Fishing Rights of Indigenous Peoples: A Comparative Study of the Common Law Nations' (1996) 19 *Suffolk Transnational Law Review* 389, 392. See generally Young, above n 32, 351ff.

71 Cf the comments in Michael Dodson, 'Indigenous Culture and Native Title' (1996) 21(1) *Alternative Law Journal* 2, 5.

72 Cf the comments in Bartlett, 'An Obsession with Traditional Laws and Customs', above n 2.

73 See *Bissett v Mineral Deposits (Operations) Pty Ltd* (2001) 166 FLR 46, 76–7 (J Sosso); *Risk v Northern Territory* [2006] FCA 404, [87] (Dowsett J); *Jango v Northern Territory* (2006) 152 FCR 150, 217 (Sackville J); Kent McNeil, 'The Meaning of Aboriginal Title' in Michael Asch (ed), *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (1997) 135, 151–2; Brian Slattery, 'Understanding Aboriginal Rights' (1987) 66 *Canadian Bar Review* 727, 746.

74 Compare this with the Land Court experience in New Zealand: see, eg, Bryan D Gilling, 'Engine of Destruction? An Introduction to the History of the Maori Land Court' (1994) 24(2) *Victoria University of Wellington Law Review* 115, 128. See also the comments in Kent McNeil, 'The Post-*Delgamuukw* Nature and Content of Aboriginal Title' in Kent McNeil, *Emerging Justice?* (2001) 102, 108; Michael Dodson, 'Indigenous Culture and Native Title', above n 71, 2; Webber, 'Beyond Regret', above n 2, 73, 85. See also the comments in the recent Australian decisions of *Gumana v Northern Territory* (2005) 141 FCR 457, 495ff, and *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] FCA 31, [299].

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

76 Michael Dodson, 'The Wentworth Lecture: The End in the Beginning: Re(de)finding Aboriginality' (1994) 1 *Australian Aboriginal Studies* 2, 4. See generally Young, above n 32, 358ff.

77 Lavery, above n 2, [5].

78 Cf, eg, Wootten, '*Mabo* – Issues and Challenges', above n 2, 338; *Rubibi Community v Western Australia (No 7)* [2006] FCA 459, [163]ff (Merkel J).

79 For apparent acknowledgement of this possibility, see *Ward* (2002) 213 CLR 1, 71–2 (Gleeson CJ, Gaudron, Gummow and Hayne JJ). See also Graeme Neate, 'Turning Back the Tide? Issues in the Legal Recognition of Continuity and Change in Traditional Law and Customs' (Paper presented at the Native Title Conference 2002: Outcomes and Possibilities, Geraldton, Western Australia, 3 September 2002) 54ff; Lavery, above n 2, [23]. See generally Young, above n 32, 368ff.

80 See generally Burnett, above n 70, 402; Getches, Wilkinson and Williams, above n 13, 31, 737; Kent McNeil, 'Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty' in Kent McNeil, *Emerging Justice?* (2001) 58; Noel Pearson, 'Eddie Mabo Human Rights Lecture', above n 65, 144; Jennifer Nielsen, 'Images of the "Aboriginal": Echoes from the Past' (1998) 11 *Australian Feminist Law Journal* 83; Webber, 'The Jurisprudence of Regret', above n 59, 9, 14. See also Young, above n 32, 445.

81 See the reference to the 'menagerie theory' of Indian title in Felix Cohen, 'Original Indian Title' (1947) 32 *Minnesota Law Review* 28 at 58: '[It is] the theory that Indians are less than human and that their relation to their lands is not the human relation of ownership but rather something similar to the relation that animals bear to the areas in which they may be temporarily confined.' See also Young, above n 32, 10.