

# BEYOND SYMBOLISM: ABORIGINAL SOVEREIGNTY AND NATIVE TITLE

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## I. INTRODUCTION

In *Members of the Yorta Yorta Aboriginal Community v Victoria*<sup>1</sup> and *Western Australia v Ward*,<sup>2</sup> the High Court clarified the concept of native title by reference to the statutory version enacted by the *Native Title Act 1993* (Cth) ('NTA'). The first part of this paper will outline the High Court's interpretation in both these cases of the definition of native title in the NTA. In relation to *Yorta Yorta*, the focus will be on the Court's interpretation of 'traditional' as it relates to the nature of the laws and customs of the Aboriginal peoples or Torres Strait Islanders in section 223(1) of the NTA. In relation to *Ward*, the focus will be on the apparent adoption of a 'bundle of rights' approach to the content of native title.

The focus of their treatment in this paper will be to illuminate the High Court's understanding of the acquisition of British sovereignty and its impact on native title recognition. Indeed, as the discussion of the case law will reveal, the emphasis that the Court has placed on the acquisition of sovereignty has placed further limitations on native title recognition and, thus, further undermined the protection afforded to native title under Australian law. The second part of the paper will outline how, in principle, the recognition of Aboriginal sovereignty could overcome the impact that this emphasis has had in these cases.

## II. THE CONCEPT OF NATIVE TITLE IN *WARD* AND *YORTA YORTA*

### A. *The High Court in Yorta Yorta*

According to section 223(1) of the NTA, 'native title' is defined as

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
- (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.

Of greatest significance for the final resolution of the issues in *Yorta Yorta* was the joint majority judgment of Gleeson CJ, Gummow and Hayne JJ, which focused on the meaning of the word 'traditional' in section 223(1)(a) as it relates to 'the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders'. In the lower courts the *Yorta Yorta* Community's claim over their traditional lands (which lie across the border of New South Wales and Victoria) had failed because they had failed to prove their continued observation and acknowledgement of the ancestral laws and customs that demonstrated their connection to their lands. It was accepted that the Aboriginal community inhabiting the area had experienced great change during European settlement through colonial expansion onto their lands and the operation

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1 (2002) 214 CLR 422 ('*Yorta Yorta*').

2 (2002) 213 CLR 1 ('*Ward*').

of colonial policies and practices on members of the community. At the heart of the claimants' case was the question of the group's 'adaptation and change'<sup>3</sup> in response to these external forces. Their argument was that their 'society, whose laws and customs had adapted and changed over time, continued to exist and ... continued to occupy the claim area, or large parts of it, from before European settlement to the date of the claim'.<sup>4</sup>

According to the claimants, the reference to traditional laws and customs in section 223(1) should be interpreted in the present tense so that they relate to 'traditional laws currently acknowledged and currently observed'.<sup>5</sup> Ultimately, this formulation was rejected by the High Court majority.

For the purposes of interpreting 'traditional' as it relates to the traditional laws and customs referred to in the *NTA*, the joint majority judgment took as its starting point the understanding that 'the origins of the content' of these traditional laws and customs 'are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. It is only those normative rules that are "traditional" laws and customs'.<sup>6</sup> Moreover, their Honours found that the *NTA* requires 'that the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty'.<sup>7</sup> The continued existence of this 'body of norms'<sup>8</sup> depended on an inquiry into whether the society of the claimant group had continued to acknowledge and observe those laws and customs. According to the joint judgment, 'laws and customs and the society which acknowledges and observes them are inextricably interlinked',<sup>9</sup> so that if the society ceases to acknowledge and observe its laws and customs, it follows that the society (and its laws and customs) have ceased to exist.<sup>10</sup> In the context of native title, the change of sovereignty meant, however, that 'the only native title rights or interests in relation to land or waters which the new sovereign order recognised were those that existed at the time of change in sovereignty. Although *those* rights survived the change in sovereignty, if *new* rights or interests were to arise, those new rights and interests must find their roots in the legal order of the new sovereign power'.<sup>11</sup> Thus, a native title determination requires us to conduct an inquiry

about the relationship between the laws and customs now acknowledged and observed, and those that were acknowledged and observed before sovereignty, and to do so by considering whether the laws and customs can be said to be the laws and customs of the society whose laws and customs are properly described as traditional laws and customs.<sup>12</sup>

However, the joint judgment did concede that 'some change to, or adaptation of, traditional law or custom or some interruption of enjoyment or exercise of native title rights or interests in the period between the Crown asserting sovereignty and the present will not *necessarily* be fatal to a native title claim'.<sup>13</sup> How much adaptation or interruption would be acceptable was not entirely clear.<sup>14</sup> On the issue of adaptation, the joint judgment found it was a 'question' of whether

the law and custom can still be seen to be traditional law and traditional custom. Is the change or adaptation of such a kind that it can no longer be said that the rights or interests

3 *Yorta Yorta* (2002) 214 CLR 422, 449.

4 *Ibid.*

5 *Ibid.* 424.

6 *Ibid.* 444.

7 *Ibid.*

8 *Ibid.* 445.

9 *Ibid.* 447.

10 *Ibid.* 446.

11 *Ibid.* 447.

12 *Ibid.*

13 *Ibid.* 454. See also 443.

14 For a more recent exposition of this formulation in *Yorta Yorta*, see especially, *Bodney v Bennell* (2008) 167 FCR 84, See also *Western Australia v Sebastian* (2008) 248 ALR 61.

asserted are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant peoples ...?<sup>15</sup>

On the issue of interruption, the joint judgment was of the view that a claimant group must establish that ‘acknowledgment and observance of those laws and customs must have continued *substantially uninterrupted* since sovereignty’.<sup>16</sup> This was a necessary requirement as

the rights and interests which are said now to be possessed must nonetheless be rights and interests possessed under the traditional laws acknowledged and the traditional customs observed by the peoples in question. Further, the connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs. ... Were that not so, the laws and customs acknowledged and observed *now* could not properly be described as the *traditional* laws and customs of the peoples concerned.<sup>17</sup>

Ultimately, the claim in *Yorta Yorta* failed as it was held that the claimants ‘had ceased to occupy [their] lands in accordance with traditional laws and customs and there was no evidence that they continued to acknowledge and observe those laws and customs’.<sup>18</sup>

### B. The High Court in Ward

The native title claim in *Ward* was in relation to the region known as the East Kimberley and covered lands and waters in northern parts of Western Australia (the Miriuwung and Gajerrong claim) and adjacent lands in the Northern Territory (the Ningarmara claim). Due to the existence of competing rights and interests over the claimed land,<sup>19</sup> the issue of whether native title rights and interests could be subject to partial extinguishment, and the general principles applicable to the issue of extinguishment, were crucial in this case.<sup>20</sup> However, in order to determine those issues, it was first necessary to consider what exactly might be subject to extinguishment; that is, the nature of native title as defined by the *NTA*. It is on this issue that the following discussion will focus.

On this issue, the Miriuwung and Gajerrong claimants adopted the ‘occupation approach’ that Lee J had applied at first instance,<sup>21</sup> and rejected the ‘bundle of rights’ approach subsequently taken by the majority of the Full Federal Court.<sup>22</sup> According to a ‘bundle of rights’ approach, native title rights and interests are severable from each other. As thus understood, native title as a ‘bundle of rights’ is susceptible to partial extinguishment. However, as a title based on occupation, it is not.

In fact, Lee J (applying the decision of the Supreme Court of Canada in *Delgamuukw v Queen (in right of British Columbia)*<sup>23</sup> had treated native title as a communal ‘right to land’ and had found in relation to the circumstances of this case that ‘the right ... to “speak for” that land, in particular to “speak for” its use ... justified the finding that there was possession, occupation, use and enjoyment of the traditional homelands of the applicant group’.<sup>24</sup> In this way, the claimants posited native title as analogous to a title in fee simple

15 *Yorta Yorta* (2002) 214 CLR 455.

16 Ibid 456. Notably, in *De Rose v South Australia* (2003) 133 FCR 325 (*‘De Rose’*), Wilcox, Sackville and Merkel JJ [at 418] confirmed the Full Federal Court’s view taken in *Ward v Western Australia* (2000) 99 FCR 316 (*‘Ward’*) ‘that a spiritual connection and the performance of responsibility for land can be maintained even where Aboriginal people have been hunted off the land or it has become impracticable for them to visit. The Full Court said that physical presence is not essential in circumstances where it is no longer practicable or access to traditional lands is prevented or restricted by European settlers’. Their Honours further noted that this approach was not dissented from in the High Court on appeal in *Ward* (2002) 213 CLR 1. See also *Daniel v State of Western Australia* [2003] FCA 666, [421-422] (Nicholson J) (*‘Daniel’*).

17 *Yorta Yorta* (2002) 214 CLR 422, 456.

18 Ibid 423.

19 *Ward* (2002) 213 CLR 1, 2. See also *Wilson v Anderson* (2002) 213 CLR 401.

20 *Ward* (2002) 213 CLR 1, 60.

21 *Ward v Western Australia* (1998) 159 ALR 483 (*‘Ward’*).

22 *Ward v Western Australia* (2000) 99 FCR 316 (*‘Ward’*).

23 [1997] 3 SCR 1010 (*‘Delgamuukw’*).

24 *Ward* (2002) 213 CLR 1, 11.

— as proprietary in nature.<sup>25</sup> It followed from this characterisation of native title that ‘there cannot be partial extinguishment of native title’.<sup>26</sup> Native title could only be extinguished by a grant of fee simple.<sup>27</sup>

The High Court, however, rejected this conceptualisation of native title. In their joint majority judgment, Gleeson CJ, Gaudron, Gummow and Hayne JJ stressed the requirement under section 223(1) of the *NTA* that the relevant native title rights and interests are only those ‘in relation to land or waters’: they are the ‘rights and interests which are “possessed under the traditional laws acknowledged, and the traditional customs observed”, by the relevant peoples’ and who ‘by those traditional laws and customs ... “have a connection with” the land or waters in question’.<sup>28</sup> In this way, they limited native title rights and interests to those arising out of the traditional laws and customs that demonstrated the claimant group’s connection to their lands and waters.

Moreover, according to the joint judgment, the change in sovereignty meant that the right to speak to country — ‘the right to be asked for permission to use or have access to the land — was inevitably confined, if not excluded’.<sup>29</sup> The change in sovereignty meant that new rights to control access to land were created. The rights of traditional occupiers to control access to the land may have been affected, but the joint judgment opined that ‘because native title is more than the right to be asked for permission to use or have access (important though that right undoubtedly is) there are other rights and interests which must be considered, including rights and interests in the use of the land’.<sup>30</sup>

Overall, the joint judgment preferred the ‘bundle of rights’ approach to the occupation approach.<sup>31</sup> It follows from a ‘bundle of rights’ approach to the content of native title that native title rights and interests can be subject to partial extinguishment.<sup>32</sup> In fact, the joint judgment found that certain provisions of the *NTA* ‘mandate entire and partial extinguishment’.<sup>33</sup> On this basis, they opined that it was not appropriate to view native title rights and interests as ‘a single set of rights relating to land that is analogous to a fee simple’.<sup>34</sup> To do so ‘assumes, rather than demonstrates, the nature of the rights and interests that are possessed under traditional law and custom’.<sup>35</sup>

Their Honours, however, did not seem to rule out altogether claims for rights of control over traditional lands arising from the right to speak for country. However, in terms of the ‘bundle of rights’ approach, such a right could only be one among many of the rights that comprise native title. In fact, a determination under section 225(b) of the *NTA* is required to state ‘the nature and extent of the native title rights and interests in relation to the determination area’; and for anything less than ‘a right, as against the whole world, to possession, occupation, use and enjoyment of land or waters’, their Honours opined that ‘it will seldom be appropriate, or sufficient, to express the nature and extent of the relevant native title rights and interests by using those terms’.<sup>36</sup> When no such right of exclusive possession exists as native title, ‘it will be preferable to express the rights by reference to the activities that may be conducted, as of right, on or in relation to the land or waters’.<sup>37</sup> Furthermore, the majority’s construction in *Ward* of the connection which Indigenous peoples have with the land — ‘country’ — as essentially spiritual led them to question

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25 Ibid 12.

26 Ibid 11.

27 Ibid 12.

28 Ibid 66.

29 Ibid 94.

30 Ibid.

31 Ibid 95.

32 Ibid 89.

33 Ibid 63.

34 Ibid 91.

35 Ibid 92.

36 Ibid 82. But see, eg, *Neowarra v Western Australia* [2004] FCA 1092 and *Sampi v Western Australia (No 2)* (2005) 224 ALR 358.

37 *Ward* (2002) 213 CLR 1, 83.

whether native title could ever amount to the same entitlements as under the common law.<sup>38</sup>

Adopting the ‘bundle of rights’ approach, the joint majority judgment confined its enquiry to those rights and interests of the claimant group that might demonstrate their connection to the claimed area. In this regard, the Court, agreeing with the Full Court majority, rejected the proposition that control of traditional cultural knowledge was a native title right: the ‘recognition’ of this right would extend beyond denial or control of access to land held under native title.<sup>39</sup> According to the joint judgment, a connection must be made between the rights and interests claimed and the land in question. That connection was missing in relation to these rights. Such rights might involve, for example, the restraint of visual or auditory reproductions of what was to be found there or took place there, and this would fall outside the definition of native title rights and interests in the *NTA*.<sup>40</sup>

Furthermore (and foreshadowing the joint judgment’s approach in *Yorta Yorta*), the right to use the resources on the land was limited to a right to use the traditional resources of the land.<sup>41</sup> Thus it was held that no native title right or interest in minerals was established.<sup>42</sup> Moreover, the bundle of rights approach to native title supported the application of the ‘inconsistency of rights’ test for extinguishment. As applied to various parts of the claimed land, the joint judgment found that the claimants’ rights to control access and make decisions about these areas had been extinguished, although that did not necessarily extinguish all aspects of native title.<sup>43</sup> Notably, such a dissection of the claimants’ rights would not have been possible if the occupation approach had been adopted.<sup>44</sup>

### III. THE CASE FOR LEGAL RECOGNITION OF ABORIGINAL SOVEREIGNTY

From the foregoing, the effects of the change in sovereignty are clear. As the joint majority judgment in *Yorta Yorta* put it:

the assertion of sovereignty by the British Crown necessarily entailed ... that there could thereafter be no parallel law-making system in the territory over which it asserted sovereignty. To hold otherwise would be to deny the acquisition of sovereignty and ... that is not permissible.<sup>45</sup>

In the absence of a parallel Aboriginal law-making system, the emphasis on the change in sovereignty has put drastic limits on the recognition of native title. In particular, the effect of the decision in *Yorta Yorta* has been to limit successful native title claims to those where claimants can demonstrate that the rights and interests in relation to their lands and waters were in existence at the time of the acquisition of sovereignty and that the laws and customs under which they currently acknowledge and observe these rights and interests have remained ‘substantially uninterrupted’ since that time. Only those laws and customs are ‘traditional’ for the purposes of the *NTA*. The result has been particularly unfortunate for Indigenous claimant groups as it could lead to their being subjected to discrimination: the drawing of distinctions between them (and worse still the risk that their societies may be deemed no longer to exist, as was the case in *Yorta Yorta*)<sup>46</sup> according to how well they

38 Ibid 65, 93.

39 Ibid 84.

40 Ibid 84.

41 See also *Commonwealth v Yarmirr* (2001) 208 CLR 1 (‘*Croker Island*’).

42 *Ward* (2002) 213 CLR 1, 185-6. Even if they had established traditional rights to these resources, the provisions in the *Mining Act 1904* (WA) and the *Petroleum Act 1936* (WA) had extinguished those rights, at least in relation to the claim over parts of Western Australia).

43 Ibid 190-8 in relation to the pastoral lease in the NT; 138 in respect of the reservation of land for public purposes; 157-70 in respect of mining leases.

44 *Ward* (1998) 159 ALR 483, 508-10 (Lee J); *Ward* (2000) 99 FCR 316, 516 (North J).

45 *Yorta Yorta* (2002) 214 CLR 422, 443-4.

46 Ibid 459. Cf *Bodney v Bennell* (2008) 167 FCR 84, where the Full Federal Court clarified the High Court’s formulation in *Yorta Yorta*. In their Honours’ view [at 103]: ‘It is not the society per se that produces rights and interests. Proof of the continuity of a society does not necessarily establish that the rights and interests which are the

prove that the laws and customs they currently acknowledge and observe in relation to their lands and waters are ‘traditional’ as understood by the High Court. It is a particularly problematic formulation in its failure to accommodate change that may have occurred within Indigenous communities since the acquisition of sovereignty. This is an especially difficult problem when that change has been wrought upon Indigenous peoples against their will as a consequence of colonisation practices and policies.<sup>47</sup> Indeed, in *Bodney v Bennell*,<sup>48</sup> Finn, Sundberg and Mansfield JJ in the Full Federal Court criticised Wilcox J, at first instance,<sup>49</sup> for trying to accommodate the effects of colonisation too much in favour of the claimants. The Full Court found that recognition of these effects had been accommodated by the High Court’s own formulation in *Yorta Yorta* that ‘acknowledgement and observance must have continued substantially uninterrupted’. According to the Full Court, ‘European settlement is what justifies the expression “substantially uninterrupted” rather than “uninterrupted”’. It explains why it is that the common law will recognise traditional laws and customs that are not exactly the same as they were at settlement’.<sup>50</sup> But that was as far as the Full Court would go to accommodate the effects of white settlement. The Full Court found that:

if ... there has been a substantial interruption, it is not to be mitigated by reference to white settlement. The continuity enquiry does not involve consideration of *why* acknowledgment and observance stopped. If this were not the case, a great many Aboriginal societies would be entitled to claim native title rights even though their current laws and customs are in no meaningful way traditional. *Yorta Yorta* ... would have been decided differently ...<sup>51</sup>

The effects of the decision in *Ward* have been no less devastating. Native title recognition has been limited by the ‘bundle of rights’ approach adopted by the Court in that case. On this approach, native title does not have the same status or protection as a fee simple title to the land; and the adoption of the bundle of rights approach rather than an occupation approach also militates against any claim to exclusive use and occupation of the land as understood by the common law. The bundle of rights approach requires a court to examine each and every right claimed. This leads to a greater likelihood of findings of partial extinguishment<sup>52</sup> — since, once native title rights and interests are separated from each other, they can be extinguished one by one. Moreover, no new rights will be recognised that were not in existence at the time of sovereignty, and those rights that can be

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product of the society’s normative system are those that existed at sovereignty, because those laws and customs may change and adapt. Change and adaptation will not necessarily be fatal. So long as the changed or adapted laws and customs continue to sustain the same rights and interests that existed at sovereignty, they will remain traditional. An enquiry into continuity of society, divorced from an inquiry into continuity of the pre-sovereignty normative system, 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’.

47 Whether the formulation reflects geographical divisions (north v south or rural v urban) or is simply the product of history remains to be seen. See Alexander Reilly, ‘How *Mabo* Helps Us Forget’ (2006) 6 *Macquarie Law Journal* 25; Zoey Irvin, ‘Wilcox J and Olney J: A Comparative Analysis of Historical Assumptions in the *Yorta Yorta* and *Single Noongar* Decisions’ (2006-07) 6(24) *Indigenous Law Bulletin* 24. More recently, this issue arose in *Risk v Northern Territory of Australia* [2006] FCA 404; aff’d (2007) 240 ALR 75. In that case, Mansfield J affirmed the High Court’s decision in *Yorta Yorta*. In his summary of his reasons for this decision, Mansfield J noted (at para 12) some of the effects of colonisation on the claimant group. These effects led him to conclude (at para 13) that ‘the current Larrakia society, with its laws and customs, has not carried forward the traditional laws and customs of the Larrakia people so as to support the conclusion that those traditional laws and customs have had a continued existence and vitality since sovereignty’. Cf *Bennell v Western Australia* (2006) 153 FCR 120 where Wilcox J found that the Noongar people held native title over the claim area. Justice Wilcox [at 265-6] distinguished the facts in that case to the facts in *Yorta Yorta*, noting that ‘unlike the *Yorta Yorta* people ... the south-west community did not suffer a cataclysmic event that totally removed them from their traditional country. Families were pushed around, and broken up ... [h]owever, people continued to identify with their Aboriginal heritage’. See also *De Rose* 133 FCR 325, 418 and *Daniel* [2003] FCA 666, [421-422]. Cf Lamer CJ in *Delgamuukw v Queen in right of British Columbia* [1997] 3 SCR 1010, 1103, where he comments: ‘To impose the requirement of continuity too strictly would risk “... perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect” aboriginal rights to land’.

48 (2008) 167 FCR 84.

49 *Bennell v Western Australia* (2006) 153 FCR 120.

50 *Bodney v Bennell* (2008) 167 FCR 84, 109.

51 *Ibid.*

52 For an examination of the attendant problems inherent in the bundle of rights approach to native title, see Lisa Strelein, ‘Conceptualising Native Title’ (2001) 23 *Sydney Law Review* 95, 103-104.

recognised are only those that demonstrate the claimants' continuing connection to their lands. Also, as the Full Federal Court in *Bodney v Bennell* made clear, the evidentiary standards required to be satisfied by native title claimants in order to prove continuing connection to their lands and waters are far from easy:

[T]he laws and customs which provide the required connection are "traditional" laws and customs. For this reason, their acknowledgment and observance must have continued "substantially uninterrupted" from the time of sovereignty ... and the connection itself must have been "substantially maintained" since that time. [references omitted]<sup>53</sup>

It would appear from the case law that the only meaningful concession that has been made to accommodate the effects of colonisation on the ability of native title claimants to maintain their connection to their lands is that, in certain limited circumstances, the courts have not required continuing physical presence on the land.<sup>54</sup> However, this concession has often depended on the characterisation of the connection that Indigenous peoples have to land as 'spiritual': a characterisation that was applied in *Ward* to preclude analogies being made between native title rights and interests and common law proprietary interests.

For native title claimants, the decisions in *Yorta Yorta* and *Ward* have been a devastating blow signalling that there still has not been an end to the history of their dispossession and discrimination, as had appeared to be the promise underlying all the majority judgments in *Mabo v Queensland (No 2)*.<sup>55</sup> When *Mabo* was decided, it was heralded as a turning point towards reconciliation between Indigenous and non-Indigenous peoples in Australia. As former Prime Minister of Australia Paul Keating, put it:

*Mabo* is an historic decision. We can make it an historic turning point, the basis of a new relationship between indigenous and non-Aboriginal Australians. The message should be that there is nothing to fear or to lose in the recognition of historical truth, or the extension of social justice, or the deepening of Australian social democracy to include indigenous Australians. There is everything to gain.<sup>56</sup>

Similarly, at the time that the *NTA* was enacted, Paul Keating identified 'twin goals ... to do justice to the *Mabo* decision in protecting native title and to ensure workable, certain land management'.<sup>57</sup> Justices Gaudron and Kirby in dissent in *Yorta Yorta* also stressed the protection afforded to native title within the *NTA* itself. In fact, they disagreed with the majority's interpretation of the *NTA*, insisting that it did not fully appreciate the intention of Parliament to acknowledge a history of dispossession and give protection to native title rights and interests:

So much was impliedly recognised in the Preamble to the Act which 'sets out considerations taken into account by the Parliament', including that Aboriginal people and Torres Strait Islanders had been 'progressively dispossessed of their lands'.<sup>58</sup>

Evidently, as the case law reveals, we still have a long way to go in this area. The results in *Ward* and *Yorta Yorta* both show that protecting native title is not the same as preventing dispossession. In fact, the joint majority judgment in *Ward* made it clear that '[t]he assertion of sovereignty marked the imposition of a new source of authority over the land'<sup>59</sup> to the exclusion of the authority of native title claimants over their traditional lands when such rights conflict. It would seem from these decisions that the High Court's focus on accommodating the rights of the new sovereign has undermined the protection that

<sup>53</sup> *Bodney v Bennell* (2008) 167 FCR 84, 128.

<sup>54</sup> *Ibid* 129-30. The Full Court in *Bodney v Bennell* provides a summary of the case law on this point.

<sup>55</sup> (1992) 175 CLR 1 ('*Mabo*').

<sup>56</sup> Paul Keating, 'The Redfern Park Speech' in Michelle Grattan (ed), *Essays on Australian Reconciliation* (2000) 60, 62.

<sup>57</sup> Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 16 November 1993, 2877-8 (Paul Keating, Prime Minister).

<sup>58</sup> *Yorta Yorta* (2002) 214 CLR 422, 463.

<sup>59</sup> *Ward* (2002) 213 CLR 1, 94.

could have been afforded to native title under Australian law. Thus, the history of dispossession is being repeated.

Following *Yorta Yorta* and *Ward*, the High Court was criticised for abandoning what has been described as ‘the time-honoured methodology of the common law’ in its approach to native title in these cases.<sup>60</sup> There were calls for the *NTA* to be amended so that it would more clearly reflect the occupation approach to native title in the common law.<sup>61</sup> In particular, it has been argued that the occupation approach to native title as developed at common law (in Australia and especially in Canada) would have produced a more just outcome for the claimants in these cases.<sup>62</sup> According to the occupation approach, native title is construed as a right to land — as akin to a proprietary interest to land. As was stated in *Delgamuukw* in relation to what is known as Aboriginal title in Canada:

Aboriginal title is a right to land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need to be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. Those activities do not constitute the right per se; rather, they are parasitic on the underlying title.<sup>63</sup>

In *Ward*, Lee J at first instance (and North J in dissent in the Full Federal Court) took the occupation approach to native title by which recognition of the claimants’ native title remained intact. Ultimately, this approach was of more benefit to the claimants in that case and, arguably, more in line with the claimants’ own understanding of their relationship to their traditional lands whereby the land itself would be the focal point of any enquiry into native title.<sup>64</sup>

Whether the common law requirements for proving native title could overcome the interpretation given to the word ‘traditional’ in the definition of native title in the *NTA* by the joint judgment in *Yorta Yorta* is more contentious. It is to be remembered that at first instance in *Yorta Yorta*,<sup>65</sup> Olney J seemed to have accepted the occupation approach at common law and relied on a common law formulation of the level of proof required to establish the requisite connection between the claimants and their traditional lands. Among the matters that he identified as requiring proof in a native title claim was ‘that the traditional connexion with the land ... has been substantially maintained since the time sovereignty was asserted’.<sup>66</sup> For Olney J, this was a requirement that had derived from the separate judgments of Brennan J — in his now (in)famous ‘tide of history’ passage<sup>67</sup> — and Toohey J<sup>68</sup> in *Mabo*, as well as from overseas authorities.<sup>69</sup> However, the concept of occupation as Olney J employed it did not help the *Yorta Yorta* claimants, particularly because ‘occupancy’ was to be determined both at the time of settlement and at the time of the claim, with a need to demonstrate substantial continuity between them.<sup>70</sup> Ultimately, the High Court majority, approaching the question as one of statutory construction, reached the same result as Olney J had reached at common law. They agreed with Olney

60 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.

61 *Ibid* 10, 14.

62 *Ibid* 12.

63 *Delgamuukw* [1997] 3 SCR 1010, 1016. This view was affirmed by Lee J in *Ward v Western Australia* (1998) 159 ALR 483, 508 (*‘Ward’*) and North J in dissent in *Ward v Western Australia* (2000) 99 FCR 316 (*‘Ward’*).

64 *Ward* (2000) 99 FCR 316, 515 (North J).

65 *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 (19 December 1998) (*‘Yorta Yorta’*).

66 *Ibid* [4].

67 *Mabo* (1992) 175 CLR 1, 59-60.

68 *Ibid* 192.

69 *United States v Santa Fe Pacific Railroad Co* 314 US 339 (1941). See also *Delgamuukw* [1997] 3 SCR 1010, 1098, where Lamer CJ adopted the *Mabo* requirement that there must be ‘substantial maintenance of the connection between the people and land’, and although he conceded that the nature of the occupation may have changed, he stressed that ‘as long as a substantial connection between the people and land is maintained’ a claim could succeed. Cf *Mabo* (1992) 175 CLR 1, 61 (Brennan J), 110 (Deane and Gaudron JJ), 192 (Toohey J).

70 *Yorta Yorta* [1998] FCA 1606 [121].



J's conclusion that because 'the forebears of the claimants had ceased to occupy their lands in accordance with traditional laws and customs', the application must fail.<sup>71</sup>

The weakening of the concept of native title in *Yorta Yorta* and *Ward* (pursuant to the *NTA* and, in the case of *Yorta Yorta*, the common law as well) demonstrates that a more far-reaching solution is required. Considering the emphasis that the High Court has given to the acquisition of British sovereignty as legitimising the limitations on native title recognition in both *Yorta Yorta* and *Ward*, it may be that such an emphasis can only be matched by revitalising the law-making systems of Aboriginal communities through formal legal recognition of Aboriginal sovereignty.

The High Court's reluctance to engage with the issue of Aboriginal sovereignty in *Mabo* strongly suggests that it is not the appropriate forum in which to pursue such recognition. However, if such a process of recognition is pursued by the state, whether through a treaty or through formal amendment to the Constitution or even through legislation, the terms of recognition would need to address the very limitations that the High Court's approach to native title has created, and in ways that would achieve change to that approach. Fundamentally, the High Court's approach has been inadequate to properly accommodate the changes that have occurred among Aboriginal communities since the arrival of the British. According to the logic in *Yorta Yorta*, that is when the Aboriginal law-making system came to an end. No new rights to land may be claimed under the native title regime and recognition of those that may be claimed is limited by stringent standards of proof relating to the laws and customs of claimant groups and maintaining continuity to lands. Restoring a measure of sovereignty to Indigenous peoples would restore their capacity to make and change their own laws. In the context of native title law, that would mean that it would suffice that the society of the claimant group has continued to acknowledge and observe laws and customs that demonstrate their connection to the claimed area. The focus of the enquiry would be on laws and customs that are currently acknowledged and observed, not on those that existed at the time of the acquisition of British sovereignty. Moreover, adaptations alterations, modifications or extensions made in accordance with the shared values or customs and practices of the claimant group could also be accepted as proof of their continuing connection with their traditional lands.<sup>72</sup>

Recognition of Aboriginal sovereignty would also mean that the Court could no longer maintain the conceptualisation of native title as a bundle of rights. As the Aboriginal and Torres Strait Islander Social Justice Commissioner, William Jonas, has noted:

The construction of native title as a bundle of rights and interests, confirmed in the *Miriuwung Gajerrong [Ward]* decision . . . reflects the failure of the common law and the [*NTA*] to recognise Indigenous people as a people with a system of laws based on a profound relationship to land. Native title as a bundle of separate and unrelated rights with no uniting foundation is a construction which epitomises the disintegration of a culture when its law-making capacity, that is its sovereignty, is neatly extracted from it.<sup>73</sup>

By contrast, the recognition of Aboriginal sovereignty would provide the unifying factor required to restore Indigenous peoples' relationships to their lands, and thereby their title to their lands, in a similar manner to the way that Aboriginal title is understood in Canadian law. Restoring sovereignty to Indigenous peoples would restore their ultimate authority — their right to speak for country — over their lands.

<sup>71</sup> *Yorta Yorta* (2002) 214 CLR 422, 458.

<sup>72</sup> This was, in fact, the formulation adopted by Gaudron and Kirby JJ in dissent in *Yorta Yorta* (2002) 214 CLR 422, 464. In their view [at 465], there was also scope for change within the social organisation of a claimant group to 'disperse and regroup' and upon regrouping, continue to acknowledge traditional laws and customs. See also Ben Golder, 'Law, History, Colonialism: An Orientalist Reading of Australian Native Title Law' (2004) 9 *Deakin Law Review* 41, 53-55, 58.

<sup>73</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2002*, Parl Paper No 41 (2003) 27.

The limitations that have been placed on native title recognition may be understood in legal terms as being the legal consequences of the acquisition of British sovereignty of the Australian territories. It was established in *Mabo* that at the time of the acquisition of sovereignty the English feudal tenure system came into operation. The radical title to all the land was vested in the Crown and native title was found to exist as a burden on that title. But if native title is to be construed as a burden, the more recent cases have made it the least burdensome kind with its scope and content basically confined to what it was at the time of the acquisition of sovereignty. Does it necessarily need to be so?

It is to be remembered that law does not operate in a vacuum and that the limitations on native title recognition also reflect the dominant social and political forces at work in this area. These forces were obviously at play during the time the *NTA* was debated in 1993, and later when amendments to that Act were debated in 1998. They are also obvious in the extensive resources that are poured into defending native title claims by public and private bodies alike, leaving some to wonder who are the real beneficiaries of the regime.

Native title may exist as a burden on the radical title of the Crown, but it has been well established within Australian law that native title is not a common law right: it has its origins in the laws and customs of the Indigenous inhabitants. In the absence of any legal system of their own to protect their native title rights and interests, Indigenous peoples are left to depend on non-Indigenous institutions for protection. If these institutions have placed native title in a subordinate position to other proprietary titles, this may just be a reflection of the subordinate place of Indigenous peoples in Australian society. It may be that the attempt in *Mabo* to overcome the subordination of Indigenous peoples at least in the area of property law was doomed to fail. But it was not a complete failure.

Importantly, the decision in *Mabo* illustrates how values play a vital function in judicial decision-making: in order to bring the Australian common law into conformity with contemporary values, Brennan J rejected the doctrine of terra nullius as forming any part of Australian law. In rejecting that doctrine, Brennan J found that native title recognition was of more benefit than detriment to the Australian legal system and the skeleton of principle from which it derives. A similar approach may need to be adopted in order to achieve the legal recognition of Aboriginal sovereignty. First, there needs to be awareness raised about the legal impediments facing Indigenous peoples in their claims for native title; secondly, there needs to be renewed commitment to address the discrimination, and the resulting dispossession, being experienced within the system; and, thirdly, there needs to be understanding that the recognition of native title for those Indigenous communities who have survived colonisation and have continued to maintain their connection to their lands and waters through the laws and customs they currently acknowledge and observe, will not dismantle the Australian legal system, but could be beneficial for the entire nation — at least in the creation of a just Australian nation.

Calls for the recognition of Aboriginal sovereignty and the implementation of the policy of self-determination in relation to issues affecting Indigenous peoples have been high on the agenda of Indigenous activists in Australia.<sup>74</sup> No doubt, any movement towards

74 See generally, Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (2003) 86-102. The aspirations of Indigenous peoples have been expressed in a number of documents including: Northern and Central Land Councils, 'The Baranga Statement' (1988) 29 *Land Rights News* 26; and the 'Eva Valley Statement', *Aboriginal Law Bulletin* <<http://www.austlii.edu.au/au/journals/AboriginalLB/1993/28.html>> at 3 December 2008. See also Patrick Dodson, 'Until the Chains are Broken' in Michelle Grattan (ed), *Essays on Australian Reconciliation* (2000) 264; Geoff Clark, 'Not Much Progress' in Michelle Grattan (ed), *Essays on Australian Reconciliation* (2000) 233; Noel Pearson, 'Aboriginal Disadvantage' in Michelle Grattan (ed), *Essays on Australian Reconciliation* (2000) 170; and Galarwuy Yunupingu, 'What the Aboriginal People Want' extracted in Bain Attwood and Andrew Markus (eds), *The Struggle for Aboriginal Rights: A Documentary History* (1999) 314. Of course, there has not always been agreement among Indigenous peoples as to what avenues should be taken to achieve these aspirations. See Michael Mansell, 'Treaty Proposal' (1989) 2(37) *Aboriginal Law Bulletin* 4, and Michael Mansell, 'Tomorrow: The Big Picture' in *The Future of Australia's Dreaming* (1992). See also Kevin Gilbert, 'Aboriginal Sovereignty: Justice, the Law and Land. A draft written in consultation with Aboriginal Members of the Sovereign Aboriginal Coalition at Alice Springs on 19-21 June 1987', extracted in Bain Attwood and Andrew Markus (eds), *The Struggle for Aboriginal Rights: A Documentary History* (1999) 310, 312-3. Cf Noel Pearson, 'Reconciliation: To Be Or Not To Be —

such change would need to be guided by Indigenous leaders, especially in conceptualising the scope and content that recognition of sovereignty would require, as well as establishing the organisational structures needed to accommodate such recognition. Of immediate concern in the legal context, the recognition of Aboriginal sovereignty would require the resolution of competing rights that may arise in a plural system of laws in ways that would achieve just outcomes for Indigenous peoples — the just resolution of competing rights over the land being just one example.

At present, however, such change is not on the horizon. Indeed, the former Howard government stifled this movement when it rejected recommendations to implement a treaty<sup>75</sup> and adopted the neoliberal policy of practical reconciliation instead. The government's position at the time was that 'a legally enforceable instrument, as between sovereign states would be divisive, would undermine the concept of a single Australian nation'.<sup>76</sup> Of course, such an attitude masks the deep divisions that exist in Australia that are known all too well to Indigenous peoples:

It is an historical fact that from the very inception of British colonisation, the indigenous people of this country have been treated as a separate society. However, when we project this fact in our aim of achieving sovereignty and of our struggle for compensation for dispossession and for economic independence that will allow us to run our own affairs, people say 'You can't do that — it's divisive'.<sup>77</sup>

As long as these divisions remain, the status quo will continue. But if the momentum in the movement towards legal recognition of Indigenous peoples' rights, self-determination and sovereignty has been put on hold in recent years, the purpose of this paper is to contribute to the enlivening of these issues in public debate and to show that there is a practical need for formal recognition of Aboriginal sovereignty in Australia, if indeed these divisions are to be overcome. So far as native title law is concerned, the desired effect would be to change the way that the High Court has conceptualised native title in *Yorta Yorta* and *Ward* as limited by the 'change in sovereignty' that took place at the time of 'settlement'. In many respects, the effect would be consistent with common law developments in the area of native title. In particular, the effect would be consistent with the 'occupation' approach, treating native title as akin to a proprietary right, as it has developed at common law. Such recognition, as was evident in the discussion of the *Yorta Yorta* litigation above, might also help to clarify certain aspects of the common law approach.

#### IV. CONCLUSION

The recognition of Aboriginal sovereignty could have far-reaching effects. The discussion in this paper has been confined to the effects such recognition could have on the High Court's approach to native title in *Yorta Yorta* and *Ward*. Such recognition may not be able to overcome past dispossession. However, if properly implemented, it could ensure that native title is properly protected now and into the future. Ultimately, the issue becomes one of history — the end of a history of dispossession.

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Nationhood, Self-Determination or Self-Government within the Australian Nation' (1993) 3(61) *Aboriginal Law Bulletin* 14.

<sup>75</sup> Council for Aboriginal Reconciliation, *Reconciliation: Australia's Challenge* (2002).

<sup>76</sup> Commonwealth of Australia, *Commonwealth Government Response to the Council for Aboriginal Reconciliation Final Report — Reconciliation: Australia's Challenge* the Government (2002) 19.

<sup>77</sup> Paul Behrendt, 'Aboriginal Sovereignty, Australian Republic: A Catalogue of Questions and Answers' in Irene Moores (ed), *The Voices of Aboriginal Australia: Past, Present, Future* (1995) 398, 399.

