Land, Rights, Laws: Issues of Native Title

Native Title Research Unit
Australian Institute of Aboriginal and Torres Strait Islander Studies

Contributing to the understanding of crucial issues of concern to native title parties

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Abstract

In this paper John Basten focuses on the nature and extent of recognition of native title in Australia. Despite the title, it is not limited to a discussion of the recent High Court decision in Yorta Yorta Aboriginal Community v Victoria.[1] *Indeed, it posits that Yorta Yorta involves no major departure from settled principle. Rather, the point of principle Yorta Yorta establishes (or confirms) must be viewed within the factual confines of the case. However, the case was concerned with the operation of s.223 of the Native Title Act, a matter also considered in Commonwealth v Yarmirr*[2] *and, more broadly in Western Australia v Ward.*[3] *The operation of this section, and its relationship to the judgments in Mabo [No 2]* [4] *are considered. The second topic addressed concerns the principles governing extinguishment. On key issues the Court has confirmed a policy approach which, although evident in Mabo [No. 2], is unnecessarily restrictive, and to such an extent that it was partially reversed by the Parliament in 1998. Thirdly, the paper seeks to provide some limited perspective on where we have come from, with some suggestions as to the form of future initiatives and directions.*

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BEYOND YORTA YORTA

(BASED ON A PAPER PREPARED FOR THE AIATSIS NATIVE TITLE CONFERENCE ALICE SPRINGS – JUNE 2003)

John Basten QC

A. CONNECTION

1. The Myths of Mabo

The decision of the High Court in *Yorta Yorta*[5] was delivered on 12 December 2002. The fact that the Yorta Yorta People had been granted special leave to appeal from the decision of the Full Court of the Federal Court understandably gave rise to a level of expectation that their claim might be considered further. Failing that, even the more sanguine watchers hoped that aspects of the judgment of the trial judge, which had been substantially upheld on appeal, and which appeared to set a high bar for establishing native title claims, might be revisited. The majority judgment in the High Court dismissed the appeal, but did reformulate the relevant principles. However, the reformulation did not lower the bar and may, on one view, have raised it.

That result, in combination with the decision of the Court handed down some four months earlier in *Western Australia v Ward*[6] has been portrayed as a betrayal of the principles underpinning *Mabo v Queensland [No. 2]*.[7] Amongst the most articulate critics has been the highly respected and legally-trained Indigenous leader, Noel Pearson. Pearson's criticisms of the two decisions,[8] may be encapsulated in two related propositions: the first is that the High Court has misconstrued the definition of native title in s.223(1) of the *Native Title Act* 1993 (Cth). The second is that, properly understood, s.223 encapsulates the common law principles as articulated in *Mabo [No. 2]*, but the Court has disavowed those common law principles.

Non-discriminatory recognition

In order to understand the substance behind this criticism it is necessary to summarise Pearson's view of the common law, after *Mabo [No. 2]*. The first principle asserted is that the common law recognition of native title must be understood to be non-discriminatory. Under general law principles, he argues, the occupier of land with no documentary evidence of title, could establish a possessory title, equivalent to a freehold estate, by establishing lengthy occupation.[9] The common law recognition of native title, however, now imposes an additional requirement by requiring proof of entitlement under traditional laws and customs that existed at the time of acquisition of sovereignty by the British Crown over the relevant part of Australia.

Pearson wishes to pursue this argument based on non-discrimination for two principal reasons. First, he argues that possession carries with it a right of occupation, not a bundle of rights and interests to be identified by reference to idiosyncratic traditional laws and customs. Adoption of the latter approach invites judicial evisceration of native title from the moment of initial recognition. It identifies native title as something less than a right to control access to land and use of its resources, good against the whole world. Secondly, the bundle of rights approach sets a formidable (and inappropriate) evidential burden on Indigenous claimants, who must articulate their laws and customs in a manner which will allow translation into rights capable of judicial enforcement. As the Hon Hal Wootten has pointed out, and as the High Court appears to accept, this is a difficult, if not unrealistic, task.[10]

It is necessary to consider each of these issues, but first it should be noted that the complaint is properly directed as much at *Mabo* itself, as at later decisions.

The moral justification for Pearson's principled position is undeniable: the legal justification is shaky. First, *Mabo [No. 2]* did not apply a broad principle of non-discrimination; on the contrary, the majority accepted that native title could be extinguished by an inconsistent grant by the Crown. That is contrary to the general law principle that the Crown cannot extinguish one title by granting another inconsistent title over the same land.[11] Rather, the latter will be invalid.

Possessory title

Secondly, *Mabo* did not establish a right to a common law possessory title. The plaintiffs in *Mabo* put their claim for native title in four ways, as summarised in the Commonwealth Law Reports:[12]

> *"First, under the rubric of traditional native title which is a burden on the Crown's radical title and is extinguishable by plain legislative provisions. Second, title can be recognised as a result of local legal custom which is sufficiently certain and long-standing. The third basis is by the presumption of lost grant. The fourth is the presumption of title founded on possession."*[13]

Brennan J (with whom Mason CJ and McHugh J agreed) held that having accepted the first approach, it was not necessary to consider the second or the third, which his Honour appears to have treated as incorporating the fourth.[14] However, he made clear that non-consideration did not necessarily imply support, noting that there were "substantial difficulties" in the way of accepting the alternative arguments. Deane and Gaudron JJ did not address the alternative arguments. Toohey J noted:[15]

> *"Possession is a conclusion of English law, a law alien to indigenous inhabitants before annexation. Therefore, before annexation the Meriam people would not have been in possession. Occupation on the other hand is a question of fact. … But it may be presumed, in the absence of circumstances which show possession is in another, that the occupier of land is also in possession. As we have seen, the Crown could not show it had possession of occupied land after annexation."*

Toohey J accepted that the Meriam People possessed their lands and also concluded that they "may have acquired a possessory title on annexation". His Honour continued:[16]

> *"However, as I have said, the consequences here are no more beneficial for the plaintiffs and, the argument having been put as an alternative, it is unnecessary to reach a firm conclusion. In any event, it is unlikely that a firm conclusion could be reached since some matters, the creation of the reserve for example, were not fully explored."*

It must be accepted, therefore, that *Mabo* was not based upon common law principles relating to possessory title.

This last comment by Toohey J gives rise to a further question, namely why, if possessory title is not an alternative approach with the imprimatur of *Mabo [No. 2]*, ten years later, it is still called in aid as the basis for a solution to the problems facing native title holders? In what respect may it be "more beneficial" (contrary to the view expressed by Toohey J) than the approach which was adopted in *Mabo*?

The answer appears to have two limbs. First, the existence of a possessory title seems to draw attention away from the existence of a traditional society, as a necessary condition for holding land pursuant to traditional laws and customs. In this respect, it is seen as an antidote to the perceived poison of *Yorta Yorta.* Secondly, because it is understood to give a 'title', it avoids the need to consider whether native title is properly understood as a "bundle of rights". The two limbs are, of course, inter-related.

Pearson argues that *Mabo [No. 2]* articulated two important principles, which form the cornerstones of a compromise of conflicting land claims. The first principle was the validity of titles granted over two centuries of settlement. Pearson continued:[17]

> *"The second principle of native title law articulated by the Court is very simple also. It proposed that all of those lands that remained after 204 years, unalienated, was the legal right of the traditional owners."*

At one level, this can be dismissed as a mere rhetorical flourish. The real question to be addressed, 200 years after first European settlement, is what it means to speak of "traditional owners". Are not they people who claim under a system of traditional law and custom, which, although it may well have been modified over the centuries, is identifiable as a set of laws and customs under which, at the time of acquisition of British sovereignty, particular communities could be identified as holding particular lands? *Yorta Yorta* affirmed that that is the correct approach, in relation to a claim under the *Native Title Act* and that, implicit in that approach, is the existence of an identifiable society which applies a normative system described as traditional laws and customs.[18] Nor was that approach radically different from the approach adopted in *Mabo [No. 2]*. In *Mabo*, Brennan J stated:

> *"The common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native title rights and interests to which they give rise. However, when the tide of history has washed away any real acknowledgment of traditional law and real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition. … Once traditional native title expires, the Crown's radical title expands to a full beneficial title, for then there is no other proprietor than the Crown."*

In *Yorta Yorta*, the leading judgment preferred the more neutral term "expiry", rather than "abandonment", to identify this principle.[19] This point has significance for two reasons: the first is that the approach of the leading judgment in *Yorta Yorta* does not involve a radical departure from *Mabo [No. 2]*. Further, and importantly for present purposes, it is apparent that the judges in the majority in *Mabo [No. 2]* did not think that questions of expiry or abandonment could be avoided by speaking of a possessory title, rather than the common law native title which they espoused. That conclusion would appear to be right in principle: it remains necessary for those who can assert current occupation to establish a title by descent from the traditional owners at the time of acquisition of British sovereignty.[20]

But there is another level at which Pearson's criticism bites, he criticizes adoption of the criterion of a traditional society as a demand that, to claim traditional lands, Aboriginal people must "meet white

Australia's cultural and legal prejudices about what constitutes 'real Aborigines'."[21] Thus, he identifies the real finding of *Yorta Yorta* as the conclusion that "the Yorta Yorta peoples were not sufficiently Aboriginal". In terms of the legal test, this may involve a complaint that too little is allowed by way of modification or adaptation before interruption, expiry or abandonment is identified.[22] At another level, this complaint raises a more profound question about the ambivalence of the common law towards Indigenous sovereignty. There is a tension between the acceptance that the common law remedies are available to protect rights and interests in land held under traditional law, and the assertion that there is no room for a parallel system of Indigenous governance. This is a large topic, which is beyond the scope of this paper, but there is at least a danger that the Court has failed to articulate a coherent approach. That is because, so it is said, the common law does not protect traditional laws and customs, but only rights in relation to land which arise under them.[23] As the Court held in *Yorta Yorta*, native title can only continue to be recognised where the Indigenous people continue to "acknowledge" and "observe" traditional laws and customs. In other words, they must acknowledge that which the general law does not acknowledge, and observe that which the general law will not enforce, except to the extent that it is reflected in rights in relation to land.[24]

The second argument in favour of acknowledging a "title" is that it avoids the invidious process of treating native title as a bundle of rights. In this respect, Pearson has persuasive support from Wootten in a paper presented to the Annual Conference of the Supreme Court of NSW in 1994.[25] Wootten, speaking shortly after the lengthy political negotiations which resulted in the enactment of the *Native Title Act*, had concerns in relation to the way in which native title was conceptualised in the Act.[26] The concerns arose from the identification of native title in s.223(1) by reference to "rights and interests", taken in combination with the obligation placed on a court making a determination of native title to identify such "rights and interests" as the court "considers to be of importance".[27] This statutory language, he argued, tended to have three effects: first, rather than accepting that native title was generally a "communal" title, it might invite the court to look at the internal arrangements between individuals or sub-groups. Secondly, such an emphasis tended to encourage the view that native title was to be identified by a description of land use activities. Thus, Wootten argued:[28]

> *"To assume that the traditional system could define rights and interests only in terms of actual use is in effect a covert re-introduction of the expanded doctrine of* terra nullius*, which saw Aborigines as present, but without an ordered social system capable of yielding recognisable rights. Indeed some of the discussion is reminiscent of the colonial view that Aboriginals had no more connection with the land they inhabited than the birds and animals that passed over it. Anthropological study has long demonstrated how absurdly wrong that was."*

Thirdly, focus on traditional use of land carries the inference that native title holders do not have a right to expand their usage, which would be inherent if their title were seen as a form of ownership. As Wootten noted:[29]

> *"Surely it is reasonable, where there is no express limitation or concurrent title shown, to assume that prima facie the occupiers of an area have a right to do anything lawful on it, whether the occasion or capacity to do it has hitherto arisen or not."*

He concluded, after analysing the judgments of the Court, which resulted in the Meriam people having a communal title conferring exclusive possession on them as a community:[30]

> *"It does appear that there are strong arguments for rejecting the view which ties the content of native title to the actual uses of land at some point in the past, and for concluding that communal title will normally be protected by the courts as equivalent to full beneficial ownership, subject only to the special rights of the Crown."*[31]

The fact that this reasoning has been unsuccessful does not undermine the validity of the arguments. As noted below, *Ward* has confirmed the propriety, if not the essentiality, of identifying rights to carry out activities, as a description of native title which does not carry a right of exclusive possession.

2. Practical Consequences

Some ten years later, it is possible to assess the extent to which Wootten's concerns have been realised. In relation to communal title, the courts have generally avoided the exercise of identifying internal division of rights between members of a community. It is now broadly understood that such an exercise lacks utility. Ongoing processes of change in the identity and seniority of members of a particular community will be reflected in changing structures of authority and power.[32] A determination which sought to identify individual rights at a particular point in time would quickly become inaccurate.

The urge to identify rights by reference to activities remains of substantial concern. In practical terms it tends to blur the clear distinction in principle between activities, which may take place in the exercise or enjoyment of a particular right, and the right itself.[33] As the majority in *Yanner v Eaton*[34] said of the concept of "property", it does not refer to a thing, but describes a legal relationship with a thing.

> *"It refers to a degree of power that is recognised in law as power permissibly exercised over the thing. The concept of 'property' may be elusive. Usually it is treated as a 'bundle of rights'.*[35] *But even this may have its limits as an analytical tool or accurate description …."*

However, it is doubtful whether that understanding has proved critical for the analysis of native title. A focus on activities revealed in the evidence of claimants places an evident constraint on the identification of rights.

Reference to a "bundle of rights", as an analytical tool is neutral. To the extent that it permits the continuation of a reduced native title, where there has been partial extinguishment, for example by the grant of a pastoral lease not conferring a right of exclusive possession, it is beneficial for native title holders. As a descriptive mechanism it is open to manipulation. In an oral tradition, which does not describe the relationship of a people with their land in terms of individual rights, it lends support to a view that native title must be proved by reference to activities carried out on or in relation to land. That in turn leads to a conception of native title which is frozen in the past: if people lacked the technology to exploit minerals or ground water, they cannot have a traditional "right" to, or "interest" in such things.

Not only does that conception limit the value of the title, it may impose limits on what can be done with land, without forfeiting or surrendering native title.[36] There is also a view that the greater the adoption of modern technology and life-styles (including education, welfare and health services) the

greater the chance that a court will find that traditional laws and customs have been abandoned, and that native title has been lost.

The concept of a "title" has also been seen as a useful starting point for considering extinguishment. Thus, if one starts with a presumptive exclusive title and subtracts rights which are inconsistent with other interests, one is likely to come out with a stronger native title than if one constructs a bundle, stick by stick. However, in practice it is doubtful whether the difference is necessarily significant. The first exercise of Executive power will destroy the right to exclusive control, which is the keystone of a "title". Thereafter the exercise of identifying rights must involve a focussed and careful assessment of the constituent elements which permit use and enjoyment of land.

3. The *Native Title Act*

A discussion as to whether the recent judgments of the High Court depart from the principles established by *Mabo [No. 2]* must also take into account the relevance of *Mabo* to the Court's reasoning. In relation to claims brought under the *Native Title Act* it was inevitable that the Court would focus on the statutory provisions, and particularly the definition in s.223. As noted above, Pearson's second concern is that s.223 was intended to reflect the common law, as articulated in *Mabo*, but that the majority in the High Court have not so treated it. This in itself might not matter much, the complaint is that the Court has adopted a "narrower" approach, especially in *Ward*, and thus abandoned the "historic compromise" articulated in *Mabo* in 1992.

For the reasons noted above, it is hard to avoid the conclusion that the "narrow approach" was inherent in *Mabo* itself. One case which could have come to a different result was *Fejo v Northern Territory*,[37] discussed further below.[38] It considered whether an historic grant of freehold, over land never physically occupied by the grantee and long since revested in the Crown, necessarily extinguished all native title, when the prior Indigenous owners had maintained their connection with the land under traditional laws and customs during the subsistence of the grant and thereafter. The argument for the claimants was that nothing in *Mabo [No. 2]* foreclosed this possibility. The High Court unanimously rejected that argument. In the course of the hearing, McHugh J said:

> *"You are trying to argue this case from the point of view of concepts without paying any attention to what the Court said in* Mabo. *What you have got to take into consideration, at least as far as I am concerned, is this, that* Mabo *was a development of the law, and in developing the law the Court takes into account what expectations may be defeated. So far as I was concerned, my view was that native title would apply basically to only unalienated Crown land. If, for example, I thought it was going to apply to freehold, to leaseholds, I am by no means convinced that I would have not joined Justice Dawson, and it may well be that that was also the view of other members of the Court."*

And his Honour had joined Dawson J (and Brennan CJ) in dissent in *Wik*. What is surprising is that Pearson argues that McHugh J got it right in *Ward* in concluding that s.223 was intended to encapsulate the common law, and not some "narrow" view of native title.

Four comments are apposite in this context. First, McHugh J's criticism in *Ward* of the "narrow" view of the majority was not directed to s.223(1) as a whole, but to par (c), which referred to rights and interests "recognised" by the common law. But the narrowness was actually directed to the

limits of recognition. One of the concerns of the claimants, in both *Yarmirr* and *Ward*, was that a broad and ill-defined limitation could flow from Brennan J's colourful reference in *Mabo* to the need to avoid fracturing the skeleton of the common law.[39] What principles were skeletal for this purpose? If non-recognition could be limited to the examples of customs repugnant to our concept of law such as tanistry (an uncertain custom founded on violence) and inconsistency with basic principles of the law taken as a whole, the restrictive effect of par (c) was "narrow", and the result beneficial to native title holders.

Secondly, the scope of s.223 is not "narrow"; it refers to rights and interests "in relation to" land, thus avoiding any need to conceptualise rights as, for example, proprietary.

Thirdly, the concept of "connection" in s.223(1)(b) is broad and undefined. It is a clear and deliberate departure from the restrictive definition of "traditional Aboriginal owners" in the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth).

Fourthly, Pearson's proposed solution is to restrict the statutory definition to par (c) alone. But this will not help his cause unless 'rights and interests' are construed to refer to a right of occupation amounting to possession. For reasons noted above, that approach is not to be found in *Mabo [No. 2]*: but more importantly, who would it benefit? Not the Meriam People, who already have an exclusive title; nor the Wik and Wik-Way Peoples and Torres Strait Islanders generally, who have exclusive titles to part or all of their lands. Nor would it benefit any Aboriginal people who share their land with others, mainly pastoralists. It would only benefit those who are in "occupation" of Crown land not subject to current tenures. Yet these people will get the benefit of s. 47B of the *Native Title Act*, so that historic tenures can be disregarded, and an exclusive title may be recognised.

A separate issue concerns s.225(b) of the Act, which requires a court making a determination of native title to state, "the nature and extent of the native title rights and interests in relation to the determination area". This language involves a departure from the 1993 Act, which required the court to identify those rights which are considered "of importance".

In *Mabo [No. 2]*, the Court had made an order that the Meriam people were entitled "as against the whole world to possession, occupation, use and enjoyment" being the equivalent of a freehold title. Whether the Court gave consideration to the possibility of lesser "titles" in other circumstances seems doubtful.[40] By the time *Wik* was decided, two of the majority in *Mabo* had left the Court[41] and two joined the minority.[42] The finding in *Wik*, that the grant of a pastoral lease did not necessarily extinguish all native title rights, gave rise to the need to deal with coexisting interests, which were not jointly held, but neither of which could involve exclusive possession. How are native title rights to be identified in such a determination? How is conflict between coexisting rights to be resolved?

The Full Court of the Federal Court in *Ward* maintained the terminology of "a right to possess, occupy, use and enjoy the land".[43] In addition, their Honours accepted "a right to make decisions about the use and enjoyment of the land". Each of those rights was stated to be "not exclusive of the rights and interests of others", which, in the event of inconsistency would prevail.[44] Further, the Court envisaged that conflict between the enjoyment of rights would be resolved, so far as possible, by the principle of "reasonable user", which would constrain, presumably, even the exercise of the prevailing non-native title right.[45]

The High Court baulked at this solution, but did not formulate an alternative determination.[46] However, their Honours commented:[47]

> "*Where … native title rights and interests that are found to exist do not amount to a right, as against the whole world, to possession, occupation, use and enjoyment of lands or waters, 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."*

Their Honours also doubted that without a right of exclusive possession there was "any right to control access to land or make binding decisions about the use to which it is put".[48] Their Honours continued:

> "*To use those expressions in such a case is apt to mislead. Rather, as the form of the Ward claimants' statement of alleged rights might suggest, 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*."

As the Court further accepted, none of this cast doubt on the form of the order made in *Mabo*. Thus, their Honours held:[49]

> *"It may be accepted that … 'a core concept of traditional law and custom [is] the right to be asked permission and to 'speak for country' '. It is the rights under traditional law and custom to be asked permission and to 'speak for country' that are expressed in common law terms as a right to possess, occupy, use and enjoy land to the exclusion of all others. The expression of these rights and interests in these terms reflects not only the content of a right to be asked permission about how and by whom country may be used, but also the common law's concern to identify property relationships between peoples and places or things as rights of control over access to, and exploitation of, the place or thing."*

In the following paragraphs, their Honours addressed the use of those words in a context which must be taken to have involved a non-exclusive title, where the native title holders did not have a right to control access to the land. Their Honours were critical of a dismemberment of the composite expression, but were particularly concerned about the use of the term "possession" in a non-exclusive context. It does not follow, however, that there can be no proper reference to occupation, use and enjoyment of land, although those words operate at a level of generality, and leaves open the question — does the Act require a more specific identification of the rights and interests?

The answer to this question involves three considerations. The first concerns the language of s.225(b) which does not require that rights and interests be "specified" but merely that the Court determine "the nature and extent of the rights and interests". This might be thought consistent with a level of greater rather than lesser generality. Secondly, to seek to specify the kinds of use which can be made of lands or waters with a greater, rather than lesser, degree of precision is to increase the risk of inadvertent omission and to increase the risk of a rigid and inflexible statement of rights which may not readily accommodate legitimate changes in land use. Thirdly, a higher degree of specificity will not necessarily assist in resolving the potential for conflict with other rights and interests. Nor should that be treated as a high priority. That is because a determination of native title is not equivalent to a precise finding that "X owns blackacre". Although it has that character in part, it also

involves in part the character of a treatise on traditional law and custom, equivalent to a text on Land Law under the general law. However, it is neither possible nor desirable to identify the complexity of traditional law and custom in a determination under s.225. To undertake that exercise would be to flout a basic principle of judicial method under the common law, which is to resolve disputes in an actual and not a hypothetical context. Thus, judges are wary, and rightly so, of stating broad principles extending beyond the limits of the controversy before them. An application for a determination of native title does not involve the quelling of a controversy of that kind.

It follows that the comments by the leading judgement of the High Court in *Ward* should be treated with caution, on the understanding that they are directed to the specific orders there under consideration. They give guidance but provide no hard and fast rule for the formulation of appropriate non-exclusive determinations.[50]

It should also be noted that no real consideration was given to the concept of decision-making in relation to land held under a non-exclusive title. Absent a right to control access, that power will be diminished, but not non-existent. This may be understood by reference to the "future act" regime in Part 2, Div 3 of the *Native Title Act*. First, any act may be done on land subject to native title with the consent of the native title holders by way of an Indigenous Land Use Agreement.[51] An agreement entails a decision-making process, which may involve an exercise of traditional law and custom.[52] Secondly, an act may fall within one of a number of specified categories,[53] some of which require consultation with or comment by the native title holders. Thirdly, other acts may be done if they could be done in relation to freehold.[54] Finally, acts not falling within the fore-going categories cannot validly affect native title,[55] which demonstrates the potential significance of traditional decision-making leading to agreements.

Further, recognition of rights in relation to land, possessed under traditional law and custom, inevitably attracts the need to continue to observe traditional law and hence to make decisions with respect to traditional usage.

4. Physical presence and occupation

It is important to note that the joint judgment *Yorta Yorta* did not require any form of uninterrupted physical presence on land.[56] That was not the factual issue at stake in *Yorta Yorta*, although it was an issue in *Western Australia v Ward*[57] Thus in *Ward*, the Court had said:

> *"In its terms s.223(1)(b) is not directed to how Aboriginal peoples use or occupy land or waters. Section 223(1)(b) requires consideration of whether, by the traditional laws acknowledged and the traditional customs observed by the peoples concerned, they have a 'connection' with the land or waters. That is, it requires first an identification of the content of traditional laws and customs and, secondly, the characterisation of the effect of those laws and customs as constituting a 'connection' of the peoples with the land or waters in question. … But the absence of evidence of some recent use of the land or waters does not, of itself, require the conclusion that there can be no relevant connection."*

There is nothing in *Yorta Yorta* to suggest that the Court was adopting a novel or different position. In addition one should note that in *Yorta Yorta*, the High Court warned of the dangers in speaking of "abandonment" of "the old ways".[58] That is because *"the inquiry about continuity of*

acknowledgment or observance does not require consideration of why, if acknowledgment and observance stopped, that happened." The reason is only relevant in so far as it might influence the conclusion as to whether there was a relevant cessation.

In this context, the decision of the primary judge in *De Rose Hill* is relevant, although at the time of writing, the appeal has been heard and judgment is reserved. The focus of the dispute in the appeal in *De Rose Hill* did not raise the same issues as *Yorta Yorta*: the claimants in *De Rose Hill* were part of the Western Desert society; the men were all initiated; all but three of the claimants required interpreters; they sang songs for places on the land; they applied, during the hearing, their laws about avoidance relationships and restricted evidence.

The problem lay with their failure to 'look after' sites on the pastoral lease, especially (but not solely) after the last group left the station in the late 1970's. One of the real difficulties with the case lies in identifying the conceptual bases on which the judge dismissed the claim.

- One problem was that his Honour set himself up to judge, witness by witness, whether each was *nguraritja* for the land. Contrary to the unequivocal evidence of the claimants, he found that none was. That suggested one of three things: first, all the claimants were lying – he made no such finding; secondly, they did not know their own laws and customs – which appears inherently implausible; or thirdly, his Honour did not apply their traditional laws and customs.

- A second possible error lay in his Honour's view that the connection with the land through traditional laws and customs, giving rights and imposing responsibilities, could be abandoned in relation to a particular area within the boundaries of a pastoral lease. Although his Honour expressly stated that physical presence, unbroken from sovereignty, was not required, he appears to have placed a heavy and arguably inappropriate premium on it.

- Thirdly, what he should have done, but did not do, was to inquire how breach of obligations in relation to sites was treated under traditional laws and customs – did it mean loss of *nguraritja* status or not?

The separate challenge mounted by the Respondents (supporting the conclusion that there was no native title) was to the effect that the group which claimed native title today were not the descendants of the group which held the land at sovereignty – a point on which the trial judge found for the claimants, accepting that the various dialectal groups in question were all part of the broader Western Desert society. Only this separate challenge invoked aspects of *Yorta Yorta.*

5. Secondary rights

In most traditional land tenure systems in Australia there is a local land-holding group (or even an individual) who 'speaks for country'. But there are others who have rights to use the lands for particular purposes, including occupation, foraging and participation in ceremonies. In the anthropological literature, and in land claim reports in the Territory, the latter are frequently identified as 'secondary' rights. They are expressly catered for by ss.11(4) and 71 of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth), quite separately from the primary concept of "traditional Aboriginal owners".

It is apparent that the broad definition in s.223 of the *Native Title Act* is apt to cover both sets of rights. It is arguable that a determination may need to identify both primary and secondary rights

holders and identify the rights separately. In practice, this does not happen. However, the issue of principle was identified by Olney J in *Hayes v Northern Territory*[59] with express reference to the different scheme of the *Land Rights Act.* Any attempt at a precise listing of rights and interests risks failure to achieve completeness, whilst losing flexibility for the future. In *Ward,* on remittal, an attempt was made by the Northern Territory claimants and the Attorney for the Northern Territory to identify a secondary class of native title holders in accordance with this principle. However, the need to identify or describe native title holders with some specificity, for the purposes of s.225(a) of the Act, appears to require a comprehensive description which will be difficult if not impossible to achieve. Some persons who do not qualify in terms of the standard criteria such as patrilineal descent, or place of conception, may obtain ritual authority in a particular community for reasons which cannot be readily identified and codified in advance. Indeed, as with the identification of the nature and extent of the rights, any attempt to provide a "definition" which will encompass all native title holders in a manner sufficient to operate for a reasonable period into the future, is subject to the same dangers of omission and petrification. It would be preferable if secondary rights could be dealt with by statutory amendment, along the lines which have been successful in the NT *Land Rights Act*.

One additional reason for ignoring fine grain distinctions of this kind is to reduce the cost of litigation so far as practicable. A second reason, sometimes advanced, is to reduce the risk of internal disputation and present a unified front among claimants. But in relation to this last reason, it should be noted that evidence of conflicting claims does not necessarily demonstrate a system in decline. At least where there is unity as to the normative criteria, disputation can demonstrate the vitality of the traditional system. One must be careful not to assume that a healthy traditional society is apolitical and without internal disputation.

6. Evidence

Practical considerations remain: in particular, how should the case for claimants be prepared and presented in order to establish the existence of native title? There are two short answers: first, lawyers and anthropologists must each have a clear and correct understanding of the relevant legal principles. Secondly, they must work together co-operatively.[60]

Given the need to establish a traditional society, with its own normative system of laws and customs, dating back to the acquisition of British sovereignty, it may seem remiss not to speak also of historians. But they have a subsidiary role for present purposes, for three reasons. First, the historical material (other than that prepared by early anthropologists) rarely provides significant insights into Aboriginal law and customs.[61] Their ability to give historical depth to current claims is therefore limited. Secondly, historians do not interview current claimants and so cannot readily place the claimants in their historical context. Thirdly, whether they have relevant expertise to give expert opinion evidence requires careful consideration on a case-by-case basis.[62]

To return to the first proposition noted above, if lawyers and anthropologists do not understand the key principles for which the *Native Title Act,* and particularly s.223 provides, they will collect evidence directed to answering the wrong questions. Clear and legally accurate instructions must be given by lawyers.

The second proposition, concerning the need for co-operation, would seem trite to an experienced trial lawyer, but few work in this field. Many lawyers baulk at the thought that initial "statements" are

taken from claimants by anthropologists without legal training. Reports are then prepared without legal input, which will inevitably be scrutinized by opponents and the Court.

One response of lawyers is to seek to avoid using anthropologists, but that is not a sensible option. A competent anthropologist has training, experience, skills and knowledge that lawyers will not have, unless they have worked with the people concerned and are familiar with the ethnographic literature. Nor is it sensible to leave claimants to "speak for themselves". Aboriginal people tend to live their laws and customs; not self-consciously conceptualise them. Someone needs to address this task.

Anthropologists are not, therefore, a disposable luxury, but an essential source of assistance. But just as a competent anthropologist would not prepare a report on, say, the Pintupi people, without reading all that has been recorded about their ways, so he or she should know that those who come after will do the same to any new notes or records of interviews prepared for the native title claim.

Ultimately, it is the claimants' evidence which will be critical. Their evidence will usually be reduced to a "statement" prepared by a lawyer. The lawyer cannot undertake that exercise without access to all the notes and records available from known anthropological research. A claimant who tells an anthropologist one thing, and a lawyer another, will be damaged as a witness unless the discrepancy has been identified and explained.

Similarly, if the anthropologist explains a normative system, based on propositions a, b, c and d, but no witness gives evidence of 'c', the view of the expert, in so far as it depends on 'c' will be of little use.

B. EXTINGUISHMENT

Issues of extinguishment have been widely canvassed since *Wik* and it is proposed here to address only one aspect of extinguishment: that is the principle developed under the general law that an extinguishing interest, such as the grant of a freehold estate, will permanently extinguish native title rights without the possibility of revival. That means that where a freehold estate was surrendered shortly after it was granted, nothing having been done on the land, and where continuity of connection through traditional law and custom remains unaffected, the native title rights and interests will no longer be recognised by the common law.

That conclusion, which was established in *Mabo [No. 2]* and affirmed in *Fejo v Northern Territory*,[63] is a product of judicial policy-making which did little to further pragmatic objectives of certainty or fairness.

Yet even *Fejo* appeared to allow room for a different result in special circumstances. The joint judgment stated:[64]

> *"Subject to whatever qualifications may be imposed by statute or the common law, or by reservation or grant, the holder of an estate in fee simple may use the land as he or she sees fit and may exclude any and everyone from access to the land. It follows that, as there was no reservation or qualification on the grant that was made … in 1882, that grant was wholly inconsistent with the existence thereafter of any right of native title."*

The concept of a qualification or reservation appeared to allow for possible exceptions. One possibility was that the vesting of an estate in fee simple in trustees for public use might not be treated as extinguishing all native title rights. However, in *Ward* the High Court rejected that argument in relation to parks and reserves in Western Australia.[65] Again, legal logic did not compel a particular result, it was a judgement which could have gone the other way. The result was disappointing for the native title claimants, but again its roots may be perceived in *Mabo [No. 2]*.[66]

Of the result in *Fejo* one can say that its policy base was so fragile that it was reversed by the Government in 1998 through the insertion of s.47B into the *Native Title Act*. In relation to *Ward*, it may be noted that the past act regime in the 1993 *Native Title Act* excluded Crown-to-Crown freehold grants from its designation of extinguishing acts. It is difficult to see why land held by trustees for public purposes could not have been subject to similar treatment. National parks in different jurisdictions will have different extinguishing effects depending on the legal mechanism adopted for their creation. No practical justification exists for such differential treatment of native title.

C. AN ASSESSMENT OF PROGRESS

The average Aboriginal life-span is so much shorter than the over-all Australian average (itself a matter of deep concern in human rights terms) that Aboriginal peoples could be forgiven for feeling frustration at the rate of progress achieved so far in establishing a secure base of traditional lands. But it is important not to lose sight of the fact that there has been progress.

The seminal case of *Milirrpum*[67] was fought (and lost) in 1971. Five years later Arnhem Land was Aboriginal freehold under the *Aboriginal Land Rights (Northern Territory) Act* 1976. That Act has led to some 40% of the Territory being returned to Aboriginal ownership.

In a further 5 years, 10% of South Australia had been returned under the *Pitjantjatjara Land Rights Act* 1981 (SA) and its exclusive regime was upheld in *Gerhardy v Brown*.[68]

Sometimes success comes in unexpected ways through sheer perseverance. In *Japanangka* in 1984,[69] the Central Land Council acting for traditional Aboriginal owners lost an attempt to claim the Devil's Marbles Reserve under the *Land Rights Act* because the land had been vested in a Territory corporation. An attempt to reopen that conclusion in 1998 was narrowly lost by the refusal of an application for special leave in relation to a repeat claim. But the underlying principle, challenged by the Northern Land Council for Cecil Ningarmara and others in *Ward*, has now been upheld; a result which has, together with an opportune change in government, led to the potential for a new era of Aboriginal involvement in parks and reserves in the Territory.

In another context, significant resources and perseverance have been devoted to alternative right-to-negotiate regimes. Many Aboriginal groups saw these schemes as an abdication of federal responsibility and a watering down of hard fought for standards. Some States and the Territory sought to defend their alternative schemes, largely for ideological reasons. But ultimately pragmatism has prevailed and the statutory provisions are likely to prove irrelevant, in the absence of consensual arrangements between governments and representative bodies.

While the broad principles established by the *Native Title Act* and the general law are becoming settled, a number of subsidiary issues, including the operation of ss.47A and 47B in relation to public works, remain uncertain.

In addition, there are on-going problems with the proper approach to identification of native title rights in a determination. The Commonwealth has involved itself at the level of the finest detail in settling some consent determinations. It has been particularly concerned with underground water (a State or Territory issue), the concept of traditional trade and, at different times, a raft of related issues. It appears to have focussed on particular cases with a view to establishing a national 'protocol'. Obviously, native title holders should be engaged in any process leading to a national 'protocol', but one must question whether it could not be done more transparently, quickly and cost-effectively in open court.

Finally, there are a number of unresolved issues in relation to sea-country and in relation to compensation claims.[70]

These areas of ongoing dispute should not be forgotten, but neither should they submerge recognition of other problem areas. As many have learned through practical experience, the statutory regime of prescribed bodies corporate to hold or manage native title is ill-conceived and unfunded. This requires a co-ordinated national focus on procedural provisions in the *Native Title Act*, the appropriateness of structures available under the *Aboriginal Councils and Associations Act* 1976 (Cth), and the development of a institutional framework for funding, which will be needed on an initial and on-going basis.

Similarly, the acquisition of land, whether by claim or purchase, creates new demands for land management skills and for allocation of necessary resources. These needs arise partly from successful native title claims, partly from claims under State and Territory statutory schemes and partly from purchases by the Indigenous Land Corporation. The promise of a secure Indigenous land base will be lost unless far greater resources and attention are devoted urgently to land management issues.

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[1] (2003) 77 ALJR 356.
[2] (2001-2002) 208 CLR 1, [9]-[16] and [37]-[39].
[3] (2002) 76 ALJR 1098, at [62]-[64].
[4] (1992) 175 CLR 1.
[5] Supra, note 1.
[6] (2002) 76 ALJR 1098 (8 August 2002).
[7] Supra, note 2.
[8] Articulated in the Sir Ninian Stephen Annual Lecture delivered at the University of Newcastle Law School on 17 March 2003, "The High Court's Abandonment of 'The Time-honoured Methodology of the Common Law' in its Interpretation of Native title in *Miriuwung Gajerrong* and *Yorta Yorta*"; and in "Where we've come from and where we're at with the opportunity that is Koiki Mabo's Legacy to Australia", Mabo Lecture, Native Title Representative Bodies Conference, Alice Springs, 3 June 2003.
[9] In this he follows Canadian authority: McNeil, K. *Common Law Aboriginal Title* (Clarendon, 1989) and *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 192 at [145].
[10] Wootten J H "Mabo – Issues and Challenges" (1994) 1 TJR 303; *Ward*, 76 ALJR 1098 at [14].
[11] 175 CLR 1 at 64.2 (Brennan J).
[12] 175 CLR 1 at 8.1.
[13] For the last, the decision of the High Court in *Minister for Army v Dalziel* (1944) 68 CLR 261 was cited as authority.
[14] 175 CLR 1 at 57.6.

[15] Ibid at 212-213.
[16] Ibid at 214.1.
[17] Sir Ninian Stephen Lecture, p.4.7.
[18] (2003) 77 ALJR 356 at [87].
[19] Ibid at [91].
[20] There is a further, practical, issue concerning the nature of "occupation", sufficient to give rise to a possessory title, which need not be addressed here.
[21] Sir Ninian Stephen Lecture, at 7.3.
[22] See *Yorta Yorta* at [78] and [83].
[23] Pearson seeks to make a related point in the Sir Ninian Stephen lecture at pp.21.5.
[24] This result is reflected in the express refusal of the Court to recognise a free-standing native title right to safeguard cultural knowledge on which traditional law and custom depends for its vitality, if not it existence: see *Western Australia v Ward* 77 ALJR 1098 at
[25] Wootten J H "Mabo – Issues and Challenges" (1994) 1 TJR 303: Wootten gives a similar analysis to a paper published by the Australian Conservation Foundation, Woenne-Green S, Johnston R, Sultan R and Wallis A, "Competing Interests - Aboriginal Participation in National Parks and Conservation Reserves in Australia: A Review. Which contained a special chapter "The Mabo Decision and National Parks", at 306.
[26] (1994) 1 TJR 330-340.
[27] Following the *Native Title Amendment Act* 1998, the court is required to identify "the nature and extent of the native title rights and interests": s.225(b).
[28] 1 TJR at 333.3.
[29] Ibid at 333.7.
[30] Ibid at 338.4.
[31] To the extent that there might have been leasehold or other titles granted, Wootten also argued that the creation of such interests did not necessarily extinguish the underlying native title, any more than the creation of a mining lease or other leasehold interest in freehold land, extinguished the underlying freehold title.
[32] See *Hayes v Northern Territory* (1997) 97 FCR 32 at [160]–[161].
[33] See, eg, *Native Title Act* s.211.
[34] (1999) 201 CLR 351 at 366 [17]; and see *Yarmirr*, 208 CLR 1, at [13].
[35] See, eg, *Minister for Army v Dalziel* (1944) 68 CLR 261 at 285, per Rich J. [Footnote In original.]
[36] Where development is proposed which requires finance, exchange of native title for a grant may be a requirement imposed by a financier demanding security for a loan.
[37] (1998) 195 CLR 96.
[38] In Part B.
[39] 175 CLR at 43; and see *Yarmirr* 208 CLR 1 at [97].
[40] See comment of McHugh J in argument in *Fejo*, quoted above.
[41] Mason CJ and Deane J.
[42] Brennan J (now Brennan CJ) and McHugh J.
[43] See Determination, par 5, 99 FCR at 543.
[44] Ibid, pars 5(b), 8 and 9.
[45] See 99 FCR 316 at [312]-[315].
[46] 77 ALJR 1098 at [48] – [53].
[47] Ibid at [51].
[48] Ibid at [52].
[49] Ibid at [88].
[50] Further guidance will be provided by the forthcoming of the decision of the Full Court of the Federal Court in relation to the Northern Territory determination area in the remitted proceedings in *Ward*.
[51] NTA, Pt 2, Div 3, sub-divs B-E.
[52] NTA, s.251A.
[53] Sub-divs F-L.
[54] Sub-div M.
[55] NTA, s.24DA.
[56] Callinan J was alone in adopting the contrary view: at [186].
[57] (2002) 76 ALJR 1098 at [62]-[64].
[58] Ibid at [90].
[59] (1999) 97 FCR 32, at [27], [29] and [34]-[38].
[60] See *Harrington-Smith on behalf of the Wongatha People v Western Australia (No. 7)* [2003] FCA 893 (20 August 2003) (Lindgren J) at [19] and [27].
[61] The *Yorta Yorta* claim was a significant except to this generalization.

[62] *Harrington-Smith* (supra) at [40].
[63] (1998) 195 CLR 96.
[64] At [47].
[65] (2002) 76 ALJR 1098, at [213]-[214], [224], [235]-[244] and [258].
[66] 175 CLR 1, at 66.8.
[67] *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.
[68] (1985) 159 CLR 70.
[69] (1984) 158 CLR 395.
[70] Some of the former may be addressed in *Lardil & Ors v Qld*, presently reserved; the latter may be considered in the Yulara compensation claim, *Jango v Northern Territory*, the hearing of which is due to commence in October 2003.

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