

Tides of History and Jurisprudential Gulfs: Native Title Proof and the Noongar Western Australia Claim

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Recent native title litigation in Australia, over the important Noongar claim to areas in the south west of the country, highlight some persistent difficulties and troubling trends in Australian native title law. The Federal Court trial and appeal decisions (of 2006 and 2008 respectively) provide telling confirmation that the Australian approach to proof of native title entitlement is a mix of foundational ambiguity, theoretical complexity, moral controversy and practical uncertainty. This article

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traces the development of the relevant principles in Australian law, up to and including the dissonant Noongar decisions, and advances some potential doctrinal clarifications. It also seeks to underline the risk that prolonged litigation in this field can be an expensive and unhelpful distraction from meaningful progress.

I Introduction

In comparative law terms, the Aboriginal title (or “native title”) doctrine in Australia has had a short and troubled history. Since its sudden and spectacular emergence in the 1992 Australian High Court decision of *Mabo v. Queensland (No2)*,¹ the doctrine has provoked unprecedented social and political panic, prompted hurried enactment of vast and unwieldy federal legislation (and amendments to it) and is now threatening to settle and sink in a mire of legal technicality that many would suggest ultimately hinders rather than facilitates negotiated advances. The latest significant turn in the journey, one that again shook loose many of the deeply set difficulties, came in the recent litigation of the Noongar claim to areas in Western Australia.

The controversial first instance decision in *Bennell v. Western Australia*² concerned one distinct portion of a broader “single Noongar application” relating to land and waters in the southern part of Western Australia. The matter specifically in issue here was what is termed in this article as the question of “proof”: essentially, whether the Noongar claimants had been and sufficiently remained a traditionally connected community for the purposes of a native title claim. Justice Wilcox at first instance answered in the affirmative. The Full Federal Court in the 2008 appeal decision of *Bodney v. Bennell*³ cast significant doubt across this conclusion, setting aside Wilcox J.’s decision and returning the matter for reconsideration.

The Noongar claimants were, in a sense, thereby returned to the start of a long and difficult process. They have been asked to begin again in proving (or negotiating the acceptance of) their successful passage through the “tide of history”—a metaphor for settlement-induced loss of tradition and connection that was (as will be seen) famously coined and controversially applied in earlier Australian decisions. This result was obviously a significant blow for the indigenous community in the south west of Western Australia. And these decisions also have a broader significance. They demonstrate, in the depth

1 (1992) 175 CLR 1.

2 [2006] FCA 1243.

3 [2008] FCAFC 63.

of their disagreement and their ultimate result, some of the abstraction and unresolved confusion in the Australian approach to native title.⁴

The difficulties in this field of Australian law are many and varied. On the arguments advanced in this article, the central problem is the growing dominance of detail. From an initial position (in *Mabo (No2)*) of considerable ambiguity on the exact nature of the native title interest and the prerequisites for its survival, an overly particular (“microscoping”) methodology has gradually crystallized (albeit not without dissent). This has been most obvious, and perhaps originated, in the context of native title “content”: Australian law has failed to coherently accommodate the possibility of comprehensive native title interests in the nature of ownership—instead insistently returning to conceptualizing entitlement as a “list of traditional activities.”⁵ Correlatively, the courts have tended to approach proof with too keen a search for continuity in specific traditional practices, concepts and values—cultural intricacies that are necessarily sensitive to the bombardment of Western influence. This microscoping approach is conceptually problematic, expensive and culturally intrusive. Taken to its extreme, it imposes a serious historically based confinement of native title content, and in the context of proof converts the logical condition of non-abandonment into a “survival of lifestyle” requirement.

As will be seen, when these questions of basic methodology came squarely before the High Court in the 2002 decisions of *Ward*⁶ and *Yorta Yorta*,⁷ little practical guidance was offered (particularly on the issue of proof). However, the quite complicated and restrictive theorizing in these cases added new complexity to the existing uncertainty. The subsequent lower court jurisprudence has been somewhat directionless on these issues. This was the unfortunate context for the consideration of the important Noongar claim in Western Australia.

This article traces the development of principles relating to native title proof in Australian law, and then examines the recent decisions relating to the Noongar claim. These latest developments demonstrate the persistent confusion and troubling trends in Australian native title law, and provide a backdrop against which we can attempt to identify some potentially useful doctrinal clarifications.⁸

4 As at the time of publication, the Noongar claim is proceeding by way of negotiation—in accordance with a signed Heads of Agreement committing the major parties to a two-year period of discussion toward a settlement package.

5 Cf. however, the developments in *Griffiths v. Northern Territory* [2007] FCAFC 178; yet query whether a broad reading of the order in this unusual case is consistent with the High Court’s intimations in *Western Australia v. Ward* (2002) 213 CLR 1.

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

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

8 The rich body of comparative jurisprudence is referred to briefly in various places, and while

II The Australian History

Inherent indigenous rights to land were not squarely pursued in the Australian courts until the 1960s. Occasional judicial comment on such matters in earlier years was terse and dismissive,⁹ no doubt largely a product of the long-dominant negative political and public opinion in Australia that had sustained an almost complete avoidance of the policy of “acquisition by purchase” found elsewhere in the British territories.¹⁰ The courts rationalized their resistance to any recognition of indigenous rights, in legal terms, by reference to the tidy precept of absolute Crown ownership and the colonial presumption that Australia had been “practically unoccupied” at the time of settlement.

When the issue of indigenous land entitlements finally came directly before the Australian courts, the latent Australian position temporarily crystallized into positive principle. In the Northern Territory Supreme Court decision of *Milirrpum*,¹¹ Blackburn J. delivered a lengthy and meticulously reasoned rejection of a northern Aboriginal claim. Hindsight reveals some significant problems in His Honour’s exposition of basic principle¹²—most particularly in his heavy reliance on artificial juristic distinctions between conquest, cession and settlement;¹³ his reliance upon an outdated absolutist understanding of Crown ownership of territory;¹⁴ and his failure to distinguish (particularly in interpreting the comparative precedent) between the existence of “native title” on the one hand, and its enforceability, liability to extinguishment and compensability on the other.¹⁵

detailed discussion of that case law is beyond the scope of this article, cross-references to fuller comparative studies are provided.

- 9 See for example *Attorney-General v. Brown* (1847) 1 Legge 312; 2 SCR (NSW) App 30 at 324-339; *Cooper v. Stuart* (1889) 14 App Cas 286; *Williams v. Attorney-General (NSW)* (1913) 16 CLR 404 per Isaacs J. at 439; and see generally *Milirrpum v. Nabalco Pty Ltd* (1971) 17 FLR 141; Richard H. Bartlett, *Native Title in Australia*, 2d ed. (Butterworths, Sydney, 2004) at 1ff.
- 10 See, e.g., *Mabo v. Queensland (No 2)* (1992) 175 CLR 1 per Deane and Gaudron JJ at 105. A famous exception was “Batman’s treaty,” but this action was officially interpreted as trespass on Crown lands rather than as a purchase of Aboriginal lands: *Milirrpum v. Nabalco Pty Ltd* (1971) 17 FLR 141 at 257.
- 11 *Milirrpum v. Nabalco Pty Ltd* (1971) 17 FLR 141.
- 12 Note particularly the conclusion that the doctrine of communal native title “does not form, and never has formed, part of the law of any part of Australia”: at 244-245.
- 13 (1971) 17 FLR 141 esp. at 202-203, 242-244, 249 (Blackburn J. clung to the distinctions despite his awareness of their origins in misunderstanding of indigenous societies, and despite his acknowledgment of the difficulties and uncertainties that had long attended their application). For a valuable overview of the distinctions, see Lisa Strelein, “From Mabo to Yorta Yorta: Native Title Law in Australia” (2005) 19 Washington University Journal of Law and Policy 225.
- 14 See particularly at 245-247, 252. Contrast the formative cases from other jurisdictions—e.g., *St Catherine’s Milling and Lumber Company v. R* (1888) 14 App Cas 46; *R v. Symonds* (1847) NZPCC 387; *Johnson v. McIntosh*, 21 US 543, 8 Wheat 543 (1823).
- 15 Blackburn J. also appeared to unjustifiably emphasize contextual differences in his consideration of the other jurisdictions (e.g., statutory provisions and the *Royal Proclamation* in North America—see at 231, 237-242, 251-252, 254, 262).

In assessing this early judgment of Blackburn J., it should be noted that in comparative law terms the timing of this first assertion of indigenous land entitlements in Australia was unfortunate.¹⁶ Most importantly, the *Milirrpum* decision came just before the critical *Calder*¹⁷ decision, in which the Canadian Supreme Court reversed restrictive lower court decisions that had been heavily relied upon by Blackburn J. in *Milirrpum*.¹⁸ More broadly, but also worthy of mention, the *Milirrpum* decision came prior to the resolution of a long-standing confusion in the New Zealand law (not dissimilar to Blackburn J.'s own failure to differentiate between existence and extinguishment),¹⁹ and in the lingering aftermath of a US Supreme Court declaration that "Indian title" was not compensable—in a case which unsurprisingly lacked the expansive and generous tone of the earlier and later US jurisprudence.²⁰

Despite the weight of the *Milirrpum* defeat—and partly because of that defeat—in the succeeding years the legal and political landscape in Australia changed significantly, in line with the growing international attention to indigenous issues.²¹ Domestic reforms in Australia included the passage of anti-discrimination legislation and specific "land rights" Acts, the establishment of a governmentally linked indigenous peak body and a Council for Aboriginal Reconciliation, and the production of major reports on the recognition of customary law and Aboriginal deaths in custody. In the same era, the Australian High Court assumed, in addition to its traditional formalistic functions, a growing role in the protection of civil and cultural rights.²² Thus, the time was right for a re-agitation of the indigenous lands question.

16 For detailed analysis of the comparative history from the perspective of the Australian experience, see Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (Federation Press, NSW, 2008), Parts I and II [Young, *Trouble with Tradition*].

17 *Calder v. Attorney-General of British Columbia* (1973) 34 DLR (3d) 145.

18 See *Milirrpum v. Nabalco Pty Ltd* (1971) 17 FLR 141 at 223.

19 This confusion emerged in the *Wi Parata* line of cases (esp. *Wi Parata v. Bishop of Wellington* (1877) 3 NZJur (NS)SC 72), and persisted through such decisions as *Re Ninety-Mile Beach* [1963] NZLR 461, and only began to be clarified in *Te Weehi v. Regional Fisheries Officer* [1986] 1 NZLR 680.

20 *Tee-Hit-Ton Indians v. United States*, 348 US 272, 75 S Ct 313 (1954).

21 See generally Noel Pearson, "Eddie Mabo Human Rights Lecture", James Cook University of North Queensland, 17 May 1995, in John Wilson, Jane Thomson and Anthony McMahon, eds., *The Australian Welfare State: Key Documents and Themes* (Macmillan Education Australia, Melbourne, 1996) at 143; Garth Nettheim, "'The Consent of the Natives': Mabo and Indigenous Political Rights" (1993) 15 Sydney Law Review 223 at 224.

22 See, e.g., *Onus v. Alcoa of Australia Ltd* (1981) 149 CLR 27; *R v. Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170; *Koowarta v. Bjelke-Petersen* (1982) 153 CLR 168; *Commonwealth v. Tasmania* (1983) 158 CLR 1; *Gerhardy v. Brown* (1985) 159 CLR 70; *Kioa v. West* (1985) 159 CLR 550; *Davis v. Commonwealth* (1988) 166 CLR 79; *Street v. Queensland Bar Association* (1989) 168 CLR 461. And see in 1992 (the year of the *Mabo (No 2)* decision itself): *Nationwide News Pty Ltd v. Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v. Commonwealth (No 2)* (1992) 177 CLR 106; *Chu Kheng Lim v. Minister for Immigration Local Government and Ethnic Affairs* (1992) 176 CLR 1; *Dietrich v. R* (1992) 177 CLR 292.

In the *Mabo (No 1)* decision of 1988,²³ a preliminary legal stoush (fight) in the watershed Australian litigation, the High Court identified in the federal anti-discrimination legislation²⁴ a framework for the protection of native title, should it ultimately be found to exist. More importantly, in *Mabo (No 2)*²⁵ a majority of the court determined that the common law of Australia does recognize a form of native title, thereby unpicking the old adherence to the notion of absolute Crown ownership and the accompanying understanding that Australia was “practically unoccupied” at the time of colonization.²⁶ The court held that upon the acquisition of sovereignty the Crown acquired a radical title over the relevant territory, with native title surviving as a burden upon that radical title.²⁷

The *Mabo (No2)* decision is regarded by many as the most significant case in Australian legal history. This was the sudden and very late arrival of a doctrine that reshaped significant tenets of both public and private law in Australia. Australia’s legal and political ill-preparedness, together with a specific concern over the effect of existing anti-discrimination legislation upon government activities that may have infringed native title, provoked immediate and intensive negotiation, and ultimately a comprehensive federal legislative response.²⁸ The *Native Title Act 1993* (Cth) provided for the validation of government activities that might be challenged under the anti-discrimination legislation, established an intricate claims mediation and determination process and laid down a regime for the regulation of future acts that might affect Aboriginal interests.

In the years immediately following the *Mabo (No2)* decision and the enactment of the *Native Title Act 1993* (Cth), the High Court’s attention was directed to politically pressing questions of extinguishment and the interrela-

23 *Mabo v. Queensland* (1988) 166 CLR 186.

24 *Racial Discrimination Act 1975* (Cth).

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

26 See Brennan J. (with whom Mason C.J. and McHugh J. agreed) at 29-54, 57-58, 63, Deane and Gaudron J.J. at 102-109, Toohey J. at 181-182, 184. For readers well versed in old imperial and common law principle, the Court considered that the actual acquisition of sovereignty over Australia could not be challenged and the “settled” classification of Australia (contrast “conquered” or “ceded”) was not disturbed—the adjustment of legal principle came in respect of the precise effect of this legal history and colonial characterization on Aboriginal land entitlements. See Brennan J. at 26, 31-33, 37-39, Deane and Gaudron J.J. at 77-78, 80-82, 95, 102, Toohey J. at 180, 182, 183, 206, see also Dawson J. at 121, 138-139. Brennan J.’s explanation was that “[the] preferable rule equates the Indigenous inhabitants of a settled colony with the inhabitants of a conquered colony *in respect of their rights and interests in land*” (at 57, emphasis added).

27 See, e.g., Brennan J. at 43-44, 48, 57, Deane and Gaudron J.J. at 81, 86, 99, 100, 109, 110, 116, Toohey J. at 180, 182. The majority rejected the line of precedent that suggested some governmental act of recognition was needed for such Aboriginal interests to be enforceable: see e.g., Brennan J. at 55-57, Toohey J. at 183-184.

28 See generally the discussion in Garth Nettheim, “‘The Consent of the Natives’: *Mabo* and Indigenous Political Rights” (1993) 15 Sydney Law Review 223 at 226-267.

tionship of indigenous and non-indigenous rights, namely: the precise effect of pastoral leases,²⁹ freehold grants³⁰ and statutory vesting provisions³¹ on native title; and the legitimacy of offshore claims and their potential interaction with established non-indigenous common law rights.³² This High Court development of basic principle was interspersed with incremental judicial exploration of the federal Act,³³ the enactment of complementary State and Territory legislation (as contemplated by the federal regime),³⁴ and controversial amendment of the federal Act itself—most notably in 1998 via further validation of government activities,³⁵ some codification of the effect of past government dealings and a rebalancing of respective interests under the future act regime.

Despite the controversy surrounding these developments, the notion of post-colonial legal co-existence was not spectacularly new.³⁶ Australia's closest legal neighbours, of course, have a long history of acknowledgment and exploration of indigenous land entitlements, with reported judicial recognition dating back to at least 1823 in the US,³⁷ 1847 in New Zealand³⁸ and 1888 in Canada.³⁹ Viewed in this broader comparative context, the controversial turn taken in *Mabo (No 2)* was in fact a “relatively modest development,” one that brought Australia “cautiously into line” with the other jurisdictions.⁴⁰

III Native Title Proof: *Mabo to Yorta Yorta*

Prior to its immersion in complicated questions of extinguishment from the mid-1990s, the High Court did in its original formulation of principle lay down some basic propositions about the nature of native title and the prerequi-

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

30 *Fejo v. Northern Territory* (1998) 195 CLR 96.

31 *Yanner v. Eaton* (1999) 201 CLR 351.

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

33 Both incidentally in the High Court cases (see e.g., *Yanner v. Eaton* (1999) 201 CLR 351 and *Commonwealth v. Yarmirr* (2001) 184 ALR 113) and in numerous lower court decisions.

34 See, e.g., *Native Title (New South Wales) Act 1994* (NSW); *Native Title (Queensland) Act 1993* (Qld); *Native Title (State Provisions) Act 1999* (WA); *Land Titles Validation Act 1994* (Vic).

35 Most particularly the validation of various grants of new interests made since the introduction of the *Native Title Act* (with its prospective protection of subsisting native title). The validity of these new grants depended upon presumptions about the extinguishing effect of historical dealings (e.g., pastoral lease grants) that were proven to be ill founded by *Wik Peoples v. Queensland* (1996) 187 CLR 1.

36 See e.g., Justice Robert French, paper delivered at *Wik—National Conference on the High Court's Judgment—The Way Forward* (7 Feb 1997, Brisbane, Qld) at 66.

37 *Johnson v. M'Intosh*, 21 US 543, 8 Wheat 543 (1823).

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

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

40 Garth Nettheim, “The International Context for Native Title” (November 1993) *Impact* 14 at 15; cf. Garth Nettheim, “The Consent of the Natives: *Mabo* and Indigenous Political Rights” (1993) 15 *Sydney Law Review* 233 at 224–225.

sites for its survival (the two are often loosely termed “content” and “proof”). The latter issue is the critical one for the purposes of this article. The leading and most enduring judgment from the *Mabo (No2)* decision was that of Brennan J.⁴¹ Certain popular passages from that judgment laid the foundations for the contemporary Australian approach.

In the course of confirming the fundamental point that a mere change in sovereignty does not extinguish native title to land, Brennan J. noted:

[The] term “native title” conveniently describes the interests and rights of Indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the Indigenous inhabitants.⁴²

And later, when considering the “nature and incidents” of native title, His Honour used similar terminology:

Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the Indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs. The ascertainment may present a problem of considerable difficulty ...⁴³

Then, in the course of a detailed discussion of the general inalienability of native title interests, His Honour said:

Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence. The common law can, by reference to the traditional laws and customs of an Indigenous people, identify and protect the native rights and interests to which they give rise. However, when the tide of history has washed away any real acknowledgment of traditional law and any 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. Australian law can protect the interests of members of an Indigenous clan or group, whether communally or individually, only in conformity with the traditional laws and customs of the people to whom the clan or group belongs and only where members of the clan or group acknowledge those laws and observe those customs (so far as it is practicable to do so).⁴⁴

Brennan J. ultimately returned to these notions again in a tightly constructed and often-quoted summary:

41 Mason C.J. and McHugh J. agreed with the judgment of Brennan J. (at 15). Separate judgments were delivered by Deane and Gaudron J.J. (jointly) and by Toohey J., and Dawson J. dissented.

42 *Mabo v. Queensland (No 2)* (1992) 175 CLR 1 at 57.

43 *Ibid.* at 58.

44 *Ibid.* at 59-60.

6. Native title to particular land (whether classified by the common law as proprietary, usufructuary or otherwise), its incidents and the persons entitled thereto are ascertained according to the laws and customs of the Indigenous people who, by those laws and customs, have a connection with the land. It is immaterial that the laws and customs have undergone some change since the Crown acquired sovereignty provided the general nature of the connection between the Indigenous people and the land remains ...

7. Native title to an area of land which a clan or group is entitled to enjoy under the laws and customs of an Indigenous people is extinguished if the clan or group, by ceasing to acknowledge those laws, and (so far as practicable) observe those customs, loses its connection with the land or on the death of the last of the members of the group or clan.

8. Native title over any parcel of land can be surrendered to the Crown voluntarily by all those clans or groups who, by the traditional laws and customs of the Indigenous people, have a relevant connection with the land but the rights and privileges conferred by native title are otherwise inalienable to persons who are not members of the Indigenous people to whom alienation is permitted by the traditional laws and customs.⁴⁵

There is a conspicuous emphasis in these passages on the survival of ‘traditional laws and customs’ and traditional “connection.” However, on close examination His Honour’s exact meaning (and the meaning of the decision as a whole in this respect) was unclear. How close and specific is the examination of “tradition”? How much and what type of change and interruption is accommodated? Drawing from the decision a strict requirement of constancy and continuity in very specific laws and customs would be inconsistent with the actual result in the case (the recognition of subsisting title in the hands of a historically affiliated, strongly land-connected but quite adapted community). And an exacting requirement of this type was in fact explicitly rejected by Toohey J.⁴⁶ and doubted by Deane and Gaudron J.J.⁴⁷ A strict requirement might arguably be attributed to the popular passages quoted above from the judgment of Brennan J., but His Honour’s approach was ambiguous given the ameliorating terminology employed in many places (for example, the references to practicability), the shifting emphasis in his various statements of the relevant principles and his failure to attempt any concerted application of a strict requirement to the facts. It must also be remembered that the *Mabo* claim, relating to small remote islands in the Torres Strait north of the Australian mainland, was in many respects atypical. How should this requirement of maintenance of tradition be applied on the mainland, where the history of

45 *Ibid.* at 70.

46 *Ibid.* at 192.

47 *Ibid.* at 110.

cross-cultural interaction and indeed the pattern of indigenous land use are markedly different?

For all its complicated twists and turns, the *Native Title Act 1993* (Cth), enacted in the aftermath of the *Mabo (No2)* decision, offered little guidance on these difficult questions. Section 223 contains a statutory definition of “native title”:

223(1) The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognised by the common law of Australia.

(2) Without limiting subsection (1), “rights and interests” in that section includes hunting, gathering, or fishing, rights and interests.⁴⁸

This centrally relevant provision, brief in its terms, obviously adopts terminology from Brennan J.’s judgment without addressing the uncertainty identified above. And the succeeding High Court cases, for some time focused on issues of extinguishment,⁴⁹ did little to clarify the basic matters of the exact nature of native title and the prerequisites for its survival. Nevertheless, it must be noted that there was during this period some undiscerning perpetuation of an exacting “tradition”-focused approach, which emerged from persistently selective references to passages from *Mabo (No 2)*, the priorities and strategies of the parties and the manner in which issues were coming before the courts.⁵⁰

The attention of the High Court finally turned back to the fundamental questions of proof and content in 2002. Two critically important and mutually reinforcing decisions were handed down in that year. The decision in *Ward*⁵¹ concerned a substantial claim to lands in the East Kimberley region of northern Australia, in relation to which various questions concerning the content of the native title interest, the nature of extinguishment and the effect of particular government dealings were taken to the High Court. More important

48 The text of these provisions was unchanged by the substantial 1998 amendments (mentioned above)—although there were additions to the later subsections of s. 223 which are not relevant for present purposes.

49 *Wik Peoples v. Queensland* (1996) 187 CLR 1; *Fejo v. Northern Territory* (1998) 195 CLR 96; *Yanner v. Eaton* (1999) 201 CLR 351; and see also *Commonwealth v. Yarmirr* (2001) 184 ALR 113.

50 For close examination, see Young, *Trouble with Tradition*, Part IV.

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

for present purposes and for issues of proof was the *Yorta Yorta* decision.⁵² This case produced some important shifts in conceptual emphasis in the High Court's development of the Australian native title doctrine.

The *Yorta Yorta* claim covered land and waters in the early settled and now intensively used Murray River area, an area that joins New South Wales and Victoria in south-eastern Australia. Accordingly, the claim squarely raised the unresolved question: what was the impact, for native title purposes, of prolonged Western disruption of and influence upon an indigenous community?⁵³

The trial judge in *Yorta Yorta*, Olney J.,⁵⁴ attempted to identify the land-related "traditional laws and customs" of the original community.⁵⁵ He then identified a period (beginning in the mid-1860s) in respect of which he said there was insufficient evidence of continued observance of traditional lifestyle, recognition and protection of territories, or acknowledgment and observance of the relevant traditional laws and customs. His Honour cited evidence of pastoral expansion in the area, dislocation and reduction of the indigenous population,⁵⁶ and an 1881 Aboriginal "petition" to the Governor for a grant of land which pointed to the "precariousness" of their means of subsistence and their desire for "settling down to more orderly habits of industry."⁵⁷ Olney J. considered it clear that by 1881 the claimant group's ancestors were "no longer in possession" of their lands and had ceased to observe the traditional laws and customs which could have provided a basis for the present claim. He added that dispossession had continued through to the present⁵⁸ and said that "no group or individual has been shown to occupy any part of the land in the sense that the original inhabitants can be said to have occupied it ...".⁵⁹

Ultimately, Olney J. rejected the claim in the following terms:

The evidence does not support a finding that the descendants of the original inhabitants of the claimed land have occupied the land in the relevant sense since

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

53 The *Yorta Yorta* community had in many respects been more dramatically affected by the history of white settlement than previous claimants that had come before the High Court. See in this context *Members of Yorta Yorta Aboriginal Community v. Victoria* (2002) 214 CLR 422 per Gleeson C.J., Gummow and Hayne J.J. at [14]-[15].

54 See *Members of Yorta Yorta Aboriginal Community v. Victoria* [1998] FCA 1606. See further analysis in Young, *Trouble with Tradition*.

55 He relied particularly upon the writings of an early squatter who had resided in the area in the 1840s: see particularly [1998] FCA 1606 at [105]-[117].

56 At [118], and see also at [37]-[49].

57 See particularly at [119]-[121]. For a broad examination of judges' use of "history" in the native title context, see Alexander Reilly "How *Mabo* Helps us Forget" (2006) 16 *Macquarie Law Journal* 25 (e.g., at 27).

58 It was noted in this context that although many of the claimant group resided within the claim area, many did not (at [121]). See also, as to the presence of claimants in the area, Black C.J. in *Yorta Yorta* (2001, FFCt) at 267.

59 [1998] FCA 1606 at [121].

1788 nor that they have continued to observe and acknowledge, throughout that period, the traditional laws and customs in relation to land of their forebears. The facts in this case lead inevitably to the conclusion that before the end of the 19th century the ancestors through whom the claimants claim title had ceased to occupy their traditional lands in accordance with their traditional laws and customs. The tide of history has indeed washed away any real acknowledgement of their traditional laws and any real observance of their traditional customs. The foundation of the claim to native title in relation to the land previously occupied by those ancestors having disappeared, the native title rights and interests previously enjoyed are not capable of revival.⁶⁰

This conclusion as to the circumstances in the 19th century was obviously enough to determine the matter. However, Olney J. also commented on the evidence before him relating to the contemporary practices of the claimant community, including their attempts at preservation of mounds, middens and scar trees (the visible signs of earlier Aboriginal use of the area), the contemporary conservation of food resources, the reburial of returned remains, and involvement in timber and water conservation activities. He considered these to be non-traditional, or at best revivalist, rather than “traditional.”⁶¹

In the first appeal by the Yorta Yorta people, a majority of the Full Federal Court identified possible errors in Olney J.’s approach, particularly as to the degree of correlation needed between past and present “laws and customs” and whether present occupation “in the sense” of the original occupation was necessary.⁶² However, their Honours felt that unless it was successfully challenged, Olney J.’s central finding (that is, that the appellants’ ancestors had at some point ceased any real acknowledgment and observance of traditional laws and customs and ceased to exist as a traditional indigenous community) was fatal to the claim.⁶³ In the Full Court majority’s view, the trial findings indicated that “the continuity of community acknowledgement and observance of laws and customs providing a connection with the claimed lands and waters necessary to establish native title, whether or not such laws and customs had evolved and changed over time, had not been demonstrated.”⁶⁴ It was held that there was “more than adequate evidence” to support the finding that there was a period during which the relevant community lost its character as a traditional community.⁶⁵

60 *Ibid.* at [129].

61 *Ibid.* at [122]-[125].

62 *Members of Yorta Yorta Aboriginal Community v. Victoria* (2001) 110 FCR 244 per Branson and Katz J.J.

63 *Ibid.* at 291-292. Compare the submissions of the respondents, discussed in the judgment of Black C.J. at 249.

64 *Ibid.* at 292.

65 *Ibid.* at 293. Beyond the evidence already mentioned above, it was noted that members of the community had themselves conceded a loss (at least for a period) of traditional laws, customs

When the matter proceeded to the High Court,⁶⁶ Gleeson C.J., Gummow and Hayne J.J. in their leading judgment⁶⁷ pursued a new emphasis on the idea that there had been a specific “intersection” of traditional laws and customs and the common law. The source of native title rights and interests, it was said, was a “normative” Aboriginal “system,”⁶⁸ which was unable to validly create new rights, duties or interests after the settlers’ acquisition of sovereignty.⁶⁹ Accordingly, the only native rights or interests which will be recognized after sovereignty are those that find their origin in pre-sovereignty law and custom.⁷⁰ Section 223(1) of the *Native Title Act 1993* (Cth), it was said, should be read in this light:⁷¹ the term “traditional” in s. 223(1)(a) and (b) refers not only to generational transmission, but also conveys an understanding of the age of the “traditions”—only the normative rules of pre-sovereignty indigenous societies are “traditional” laws and customs.⁷²

Most importantly for present purposes, their Honours proceeded to identify a requirement (partly based on the wording of s. 223(1)) that the normative system under which the rights and interests are possessed (that is, the traditional laws and customs) must be a system that has had a “continuous existence and vitality” since sovereignty.⁷³ They explained that otherwise the rights and interests owing their existence to the system will have ceased to exist, and any revived adherence to the former system will not “reconstitute” the traditional laws and customs out of which rights and interests must “spring.”⁷⁴ Their Honours emphasized in this context the close connection between “laws and customs” and the “society” that they “arise out of,”⁷⁵ noting that:

and culture and a discontinuity of community, and that anthropological evidence led on behalf of the States involved had indicated that the traditional laws and customs had substantially vanished (at 293-294).

66 *Members of Yorta Yorta Aboriginal Community v. Victoria* (2002) 214 CLR 422. See the further analysis in Young, *Trouble with Tradition*.

67 McHugh and Callinan J.J. delivered separate judgments (concurring in the result); Gaudron and Kirby J.J. jointly dissented.

68 *Ibid.* at [37]-[42], [46]-[47].

69 *Ibid.* at [43].

70 *Ibid.* at [44], *cf.* [55].

71 *Ibid.* at [45].

72 *Ibid.* at [46], see also [79], [86]. *Cf.* Callinan J. at [191].

73 *Ibid.* at [47]. For a detailed analysis of some of the possible technical implications of this approach (particularly for claim formulation), see Daniel Lavery, “A Greater Sense of Tradition: The Implications of the Normative System Principles in *Yorta Yorta* for Native Title Determination Applications” (2003) 10 Murdoch University Electronic Journal of Law.

74 *Ibid.* at [47], *cf.* at [51], [54], [87]. Note that their Honours attached questions about continuity of acknowledgment and observance of traditional law and custom to the terms of para. (a) of s. 223(1), criticizing the lower Full Federal Court majority’s attempt to locate such questions in para. (c) of that section.

75 *Ibid.* at [49], *cf.* at [55]. The Full Federal Court below had itself spoken of a continuity of identifiable community requirement (in addition to the more usual emphasis upon the survival of “traditional laws and customs” and “connection”): see e.g., *Members of Yorta Yorta Aboriginal*

... if the society out of which the body of laws and customs arises ceases to exist as a group which acknowledges and observes [them] ... , those laws and customs cease to have continued existence and vitality. Their content may be known but if there is no society which acknowledges and observes them, it ceases to be useful, even meaningful, to speak of them as a body of laws and customs acknowledged and observed, or productive of existing rights or interests ...⁷⁶

As to the possibility of revival, their Honours added:⁷⁷

When the society whose laws or customs existed at sovereignty ceases to exist, the rights and interests in land to which these laws and customs gave rise, cease to exist. If the content of the former laws and customs is later adopted by some new society, those laws and customs will then owe their new life to that other, later, society and they are the laws acknowledged by, and customs observed by, *that later society* ... The rights and interests in land to which the re-adopted laws and customs give rise are rights and interests which are not rooted in pre-sovereignty traditional law and custom but in the laws and customs of the new society.⁷⁸

The High Court's intricate and in some respects unsatisfying reasoning here added new complexity to an already difficult area.⁷⁹ And ultimately little new guidance was offered on the difficult questions raised earlier in this article. How close and specific is the examination of "tradition"? How much and what type of change and interruption is accommodated? Gleeson C.J., Gummow and Hayne J.J. acknowledged the particular problems of proof that arose where current laws and customs had been adapted in response to European impact, and they noted in this respect that difficult questions of fact and degree may emerge in assessing the significance of change or adaptation. But they said no "bright line test" could be offered.⁸⁰ Ultimately their Honours suggested that "some" change and adaptation in traditional law and custom, or "some" interruption in the enjoyment or exercise of rights and interests, will

Community v. Victoria (2001) 110 FCR 244 at 275. (Note however that Gleeson C.J., Gummow and Hayne J.J. in the High Court turned the attention for these purposes from para. (c) of ss. 223(1) to para. (a) of that provision: at [12].)

76 *Ibid.* at [50], *cf.* [89].

77 *Ibid.* at [53], *cf.* at [87], [89]. *Cf.* also in this regard *Gale v. Minister for Land & Water Conservation for the State of New South Wales* [2004] FCA 374 (esp. at [44], [117], [119]).

78 Their Honours also offered a more theoretical explanation of the point: "In so far as it is useful to analyse the problem in the jurisprudential terms of the legal positivist, the relevant rule of recognition of a traditional law or custom is a rule of recognition found in the social structures of the relevant Indigenous society as those structures existed at sovereignty. It is not some later created rule of recognition rooted in the social structures of a society, even an Indigenous society, if those structures were structures newly created after, or even because of, the change in sovereignty. So much necessarily follows as a consequence of the assertion of sovereignty and it finds reflection in the definition of native title and its reference to possession of rights and interests under traditional law and custom": at [54]. *Cf.* at [88].

79 For a more detailed critique, see e.g., Young, *Trouble with Tradition*, at 324ff.

80 *Members of Yorta Yorta Aboriginal Community v. Victoria* (2002) 214 CLR 422, at [82].

“not necessarily be fatal.”⁸¹ Yet their final explanation was, predictably by this point, brief and circular. On the question of change or adaptation:

The relevant criterion to be applied in deciding the significance of change to, or adaptation of, traditional law or custom is readily stated (though its application to particular facts may well be difficult). The key question is 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 asserted are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant peoples when that expression is understood in the sense earlier identified?⁸²

The issue of “interruption,” which was the critical issue in the scenario before the court, was thought to be more difficult. Significantly, their Honours did note that evidence of the non-exercise of rights and interests did not necessarily answer the relevant statutory questions—which referred to “possession” of rights and interests (not their “exercise”) and to the existence of a “connection” to the land or waters.⁸³ However, their Honours then returned to the notion that the rights and interests asserted must be possessed under traditional laws and customs, and that the connection must be one by their traditional laws and customs.⁸⁴ Ultimately, they settled on the proposition that for the laws and customs observed now to be properly described as “traditional,” their acknowledgment and observance must have continued “substantially uninterrupted since sovereignty.”⁸⁵ Otherwise, the judges explained with reference to their earlier reasoning, they would not be transmitted laws and customs regulating the rights and interests of succeeding generations of the society, but rather would be laws and customs originating in the common acceptance or agreement of a new society that it would adopt laws and customs similar or identical to those of an earlier, different society.⁸⁶

81 *Ibid.* at [83].

82 *Ibid.* at [83]. The “sense earlier identified” apparently refers to the earlier explanation (at [46]–[47]) that “traditional” here means not only generationally transmitted, but also originating pre-sovereignty and (in conjunction with the terms “acknowledged” and “observed”) of continuous existence. See also at [79]. And *cf.* another earlier (similarly awkward) explanation: “[I]t will be necessary to inquire 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”: at [56].

83 *Ibid.* at [84]. Their Honours retained some of the independent emphasis on maintenance of “connection” that had been seen in the High Court decision in *Western Australia v. Ward* (2002) 213 CLR 1—e.g., here at [84] and *cf.* at [85] (where they refer to the relevance of both continuity of “possession” and continuity of “connection”). The question of whether such a dual inquiry is appropriate is discussed further below in the context of the Western Australian developments.

84 *Ibid.* at [86].

85 Compare Callinan J. at [195].

86 *Members of Yorta Yorta Aboriginal Community v. Victoria* (2002) 214 CLR 422, at [87]. *Cf.* the explanation at [88].

When Gleeson C.J., Gummow and Hayne J.J. finally returned in conclusion to the findings of the trial judge, their Honours explained them (and dispensed with the appeal) in the following terms:

These findings were findings about *interruption* in observance of traditional law and custom not about the content of or changes in that law or custom. They were findings rejecting one of the key elements of the case which the claimants sought to make at trial, namely, that they continued to observe laws and customs which they, and their ancestors, had continuously observed since sovereignty. More fundamentally than that, they were findings that the society which had once observed traditional laws and customs had ceased to do so and, by ceasing to do so, no longer constituted the society out of which the traditional laws and customs sprang.⁸⁷

In these final conclusions the judges distanced themselves from the “difficult” questions of change and still did not state exactly what it is that must remain uninterrupted (although this was no doubt partly a product of the apparent understanding that the discontinuity here was complete).⁸⁸ The general view is that the *Yorta Yorta* decision pulled the Australian doctrine more deliberately toward a strict approach to proof—an exacting and quite specific “tradition”-focus arguably being implicit in the methodology and terminology employed, particularly in the leading judgment of Gleeson C.J., Gummow and Hayne J.J. However, in practical terms, there had been little substantive progress.

The *Yorta Yorta* decision (together with the accompanying decision in *Ward*) has failed to produce clarity and consistency in the succeeding lower court cases. Some of these subsequent cases have embraced the new emphasis and apparent strictness of the High Court precedent,⁸⁹ on occasion even finding additional knots in the doctrine.⁹⁰ Other decisions have found some flexibility in the abstractly reasoned and uncertain standards laid down above.⁹¹ As regards the Western Australian Noongar claim, the trial decision⁹² lay

87 (2002) 214 CLR 422 at [95]-[96]. See also McHugh J. at [138] (in a short judgment, His Honour apparently also considered these findings to be determinative).

88 In addition to the High Court comments here, see the discussion above of the findings and opinions of the lower courts.

89 See, e.g., *Daniel v. Western Australia* [2003] FCA 666; *Risk v. Northern Territory* [2006] FCA 404.

90 Perhaps most notably, consider the apparent elevation of the *Yorta Yorta* decision’s brief reference to generational transmission (of laws and customs) to the status of an independent, prescriptive requirement: *Risk v. Northern Territory* [2006] FCA 404 at [673], [677], [678], [700] ff—and particularly [723]ff, [821]-[825], [828], [830]-[831] (although *cf.* [727]). An appeal court rejected a challenge to this aspect of trial judge’s reasoning: *Risk v. Northern Territory* [2007] FCAFC 46 at [105]ff.

91 See, e.g., *Neowarra v. Western Australia* (2003) 205 ALR 145; *Rubibi Community v. Western Australia (No 5)* [2005] FCA 1025 (*Rubibi (No 5)*); *De Rose v. South Australia* [2003] FCAFC 286; *Lardil Peoples v. Queensland* [2004] FCA 298.

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

at the liberal end of the spectrum—but the appeal decision of April 2008⁹³ scrambled some way back.

IV Justice Wilcox in *Bennell*: Finding Space in the Strict Methodology

As noted at the outset of this article, the controversial trial decision in *Bennell v. Western Australia*⁹⁴ concerned one distinct portion of a broader “single Noongar application” which in its entirety covered some 186,000 square kilometres of land and adjoining waters in the southern part of Western Australia. The separated smaller portion, brought on for advanced consideration in conjunction with smaller overlapping claims in that area (“the Bodney claims”⁹⁵), included the Perth region—Perth being the capital city of Western Australia. The question of proof was specifically at issue here: whether the Noongar claimants had been and remained a “community” (or “society”) for native title purposes, had sufficiently continued to acknowledge and observe traditional laws and customs and had maintained a sufficient traditional connection with the relevant area.

Justice Wilcox at first instance upheld the Noongar claim to this area, except in respect of the offshore and islands. His Honour found that subject to questions of extinguishment, native title rights and interests in the relevant area were held by a single Noongar society, and concluded en route that the contemporary community acknowledged and observed laws and customs that were a recognizable adaptation of pre-settlement laws and customs.⁹⁶ The Full Federal Court in *Bodney v. Bennell*⁹⁷ set aside Wilcox J.’s decision and returned the matter for reconsideration. The litigation was ultimately therefore little more than an expensive distraction from the prospect of meaningful negotiated advances in Western Australia. The experience of this claim in the courts highlights the worrying confusion that still attends this centrally important Australian legal doctrine.

Justice Wilcox in the trial decision accepted the basic framework of the more exacting approach to proof (as reconceptualized by *Yorta Yorta*) and its microscoped inquiry into cultural continuity.⁹⁸ Interestingly, His Honour particularly focused on the *Yorta Yorta*-bred survival of “society” component of the inquiry.⁹⁹ However, in the face of considerable community change in

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

94 [2006] FCA 1243.

95 The Bodney claims relating to this smaller area were dismissed at first instance, and the relevant appeals were also dismissed. The focus in this article is the main group claim.

96 See in broad terms [2006] FCA 1243, initial summary statement.

97 [2008] FCAFC 63.

98 For discussion of a broader, fundamentally alternative view see Young, *Trouble with Tradition*.

99 See particularly the comments at [601], [759].

the relevant area (and the loss of many traditional practices),¹⁰⁰ Wilcox J. tempered the strict approach to proof in a variety of ways:¹⁰¹

- he approached the notion of “society” with some considered flexibility and caution;¹⁰²
- he expressly acknowledged the necessity of (and accommodated) community change in a variety of contexts;¹⁰³
- he expressly accommodated some difference and dissent within the claim group, that is, difference in individual practices and beliefs, some disregard of the “rules” and even some rejection of the “society”;¹⁰⁴
- he apparently distinguished the inquiry into continuation of a “society” from a general search for unchanged laws and customs,¹⁰⁵ indicating at various points that what was required was continued acknowledgment of “some” traditional laws and customs;¹⁰⁶
- he emphasized a “communal/*inter se*” distinction in dealing with the community’s laws and customs,¹⁰⁷ with the implication that his microscoped inquiry into *inter se* rules was not a central concern in assess-

100 See particularly at [83], [599], [791] and [806]. Note however that Wilcox J. distinguished the *Yorta Yorta* circumstances—on the basis that here no “cataclysmic event” had happened that “totally removed” the community from their country: at [599].

101 See Young, *Trouble with Tradition*, at 417.

102 Note in particular Wilcox J.’s acknowledgment that the society may be defined differently for different purposes (the relevant society here being that whose laws and customs governed the rights and interests in question) (at [424]-425); that members of the society need not necessarily know each other and live together (at [437]); and that the “society” itself may not be the actual native title holding group: e.g., at [77]-[78] (see further discussion of this point below).

103 See for example [773]ff and [785] (*inter se* rules); at [729] and [787] (permission methods); at [758] (funeral practices); and at [784]ff (movement). See also in this regard *Neowarra v. Western Australia* (2003) 205 ALR 145 at [285], [310], [337]-[339], [340]-[341], [764]; *Sampi v. Western Australia* [2005] FCA 777 e.g., at [743]ff, [866], [1050]; *Harrington-Smith on behalf of the Wongatha People v. Western Australia (No 9)* [2007] FCA 31 at [332]; *Rubibi Community v. Western Australia (No 5)* [2005] FCA 1025 e.g., at [25], [90], [109], [122], [131], [136], [368]; *Jango v. Northern Territory* [2006] FCA 318 at [504]; and *Griffiths v. Northern Territory* [2006] FCA 903 at [501], [638]ff.

104 See e.g., [601], [753]ff, [779], [787]. See also [764]ff (flexibility in *inter se* rules permitted) and [779]ff (lack of clear articulation of rules accommodated). Cf. *Neowarra v. Western Australia* (2003) 205 ALR 145 at [176]-[177], [184], [191], [243], [260], [269], [271]—and the related points at [210], [222], [228], [249], [260], [310], [339], [344]-[346]. See also in this regard *Jango v. Northern Territory* [2006] FCA 318 e.g., at [364] (but cf. [405]ff, [449]); *Risk v. Northern Territory* [2006] FCA 404 at [624] (but cf. [793]); *Harrington-Smith on behalf of the Wongatha People v. Western Australia (No 9)* [2007] FCA 31 at [100] (but cf. [110], [956]ff).

105 His Honour considered that the relevance of changes in laws and customs to an inquiry into continuity of society depended upon factors such as the importance of the relevant laws and customs and whether the change was externally induced: see [776].

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

107 See particularly at [61]ff, [78], [794]-[795]. See the further discussion of the communal/*inter se* distinction below.

ing the survival of the native title interest, but rather just one tool in applying the survival of “society” and existence of “normative system” requirements;¹⁰⁸ and

- he clearly adopted, upon turning to the actual survival of native title interests, a compartmental approach to proof—in essence requiring only continuity in the law and custom underpinning the surviving native title rights.¹⁰⁹

It is important to mention at this juncture, when assessing Wilcox J.’s apparent liberality in applying the relevant principles, that this was a claim (and a case) that cast no doubt upon the effects of the many prior government grants and actions that had comprehensively extinguished native title over much of the area in issue. The lands and waters subject to such extinguishment were expressly excluded from the claim—and accordingly all freehold and much leasehold land was omitted from the application. To put it in the terms of the popular but clearly erroneous response to native title claims in Australia, no one’s backyard was at stake.

V The Full Court in *Bennell*: Error Found on (at least) Two Counts

When the Noongar claim proceeded on appeal in *Bodney v. Bennell*,¹¹⁰ the Full Federal Court (comprised of Finn, Sundberg and Mansfield J.J.) pulled the foundations from beneath Wilcox J.’s findings. The appeal court was prepared to assume, without deciding, that Wilcox J.’s initial conclusion that there existed a single Noongar society (occupying the southwest) at settlement was correct.¹¹¹ However, their Honours proceeded to comment on a number of components of Wilcox J.’s approach, finding specific error in two respects. It was held that Wilcox J. had failed to properly address two matters to which the relevant provisions of the *Native Title Act 1993* (Cth)¹¹² (as interpreted in the High Court decisions) drew attention.

First, it was concluded that Wilcox J. had failed to properly assess whether there had been continuous acknowledgment and observance of the traditional laws and customs by the Noongar society from sovereignty until recent times. It was suggested that Wilcox J. had conducted an inquiry into continuity of society largely divorced from inquiry into continuity of the pre-sovereignty normative system, an approach that they said “may mask unacceptable change with the consequence that the current rights and interests are no longer those

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

109 See particularly at [800].

110 [2008] FCAFC 63.

111 *Ibid.* at [43].

112 See s. 223.

that existed at sovereignty, and thus not traditional.”¹¹³ There appeared to be several sub-parts to this criticism of the primary judge’s approach. It was suggested at various points that:

- in significant contexts Wilcox J. had paid insufficient attention to whether *each generation* of the society continued to observe the relevant laws and customs from sovereignty to the present;¹¹⁴
- in important instances Wilcox J. had failed to clearly consider whether post-sovereignty phenomena (such as the *boodja*—the area accessible to a particular individual) were acceptable adaptations of pre-sovereignty ones;¹¹⁵ and
- Wilcox J. erroneously relied upon the *reasons* for particular change (namely specific Western interference) in mitigation of that change—the Full Court said this was impermissible under the *Yorta Yorta* precedent.¹¹⁶

Apart from the question as to the relevance of the reasons for change, upon which opinion is clearly divided in the recent Australian jurisprudence,¹¹⁷ it appears that the difference between the primary judge and the appeal court may have been more one of degree than of framework. It is not clear that Wilcox J. did adopt the truncated “society”-only version of the inquiry (see the explanation of his methodology above). And the charge of inattention to generational continuity and the acceptability of adaptation was perhaps really just a discomfort with Wilcox J.’s evidential inferences and deliberate receptivity to specific change.

Digging beneath the *Yorta Yorta*-bred abstractions of “society” and “system,” the true difficulty here would seem to lie in the intractably problematic nature of the assessment of “change,” an exercise which (as noted above) has tormented the Australian native title jurisprudence from its earliest days.¹¹⁸ The Full Court in this case acknowledged at various points that some change to traditional laws and customs is not fatal, and added at one point (despite ambiguity on this in the High Court decisions) that even change to the native

113 [2008] FCAFC 63 at [74].

114 *Ibid.* at [73], [77]. Note also in this respect the Full Court’s criticism of Wilcox J.’s disregard of expert evidence relating to the period between sovereignty and the present: esp. at [95].

115 *Ibid.* at [79]-[80], [82], [83].

116 *Ibid.* at [81], [82], [96]ff.

117 In apparent support of Wilcox J.’s approach, see e.g., *Neowarra v. Western Australia* (2003) 205 ALR 145 at [249], [319], [321]-[322], [764], and particularly at [309]-[310], [373]-[374] (account taken of the impracticability of enforcing permission rules); cf. also at [350], [353] (in the context of “connection”). See also *Rubibi Community v. Western Australia (No 5)* [2005] FCA 1025 at [96], [147], [183], [241]; *Harrington-Smith on behalf of the Wongatha People v. Western Australia (No 9)* [2007] FCA 31 at [967]. As to the notion of “practicability” more generally, see the judgment of Brennan J. in the original decision in *Mabo v. Queensland (No 2)* (1992) 175 CLR 1.

118 For a detailed analysis, see Young, *Trouble with Tradition*, esp. 368ff.

title rights and interests themselves can in some instances be permissible (at least where no greater burden is imposed on the sovereign title).¹¹⁹ However, the assessment required here is an extraordinarily difficult one—legally, morally and evidentially.

The difficult questions attending the courts' struggle with this aspect of the native title doctrine run deep. How much and what type of change and interruption can be accommodated? Can change really be legally and objectively tracked? And what evidential inferences should be drawn? Can organic community change ever logically be disallowable? More importantly, the courts are not in most cases working in a context of moderate and voluntary change, but rather in a context of prolonged, significant and unavoidable Western-induced adaptation—that is, adaptation absolutely necessitated by the changing availability of territory and resources, and by enormous disruption of social structures and culture. The scope for uncertainty and disagreement is exacerbated by the irony of this legal exercise, which rests upon an assessment not of Aboriginal history, but of Western impact,¹²⁰ and entails a consequent legal distribution of rights that by any moral standard would seem to be unjustly doubly punitive for the most disrupted indigenous communities.

Much of the legal, moral and evidential difficulty here would seem to be avoidable via a “de-particularization” (or de-microscoping) of the Australian methodology. As the legal lens recedes, specific cultural change becomes less visible and less relevant. In terms of proof, this would mean that the legal prerequisites for the establishment of subsisting native title can be anchored in broader notions of community survival and non-abandonment. Perhaps this is what Wilcox J. was trying to achieve within the constraints of the precedents before him.

The Full Court in the *Bodney v. Bennell* appeal decision, despite its general objection to Wilcox J.'s flexible approach, does hint at one specific methodological correction that can help to de-microscope the Australian methodology and hence mitigate the difficulties of assessing change. As noted above, their Honours suggested, in responding to argument about whether “new” rights can develop post-sovereignty, that perhaps the “true position” is that “what cannot be created after sovereignty are rights that impose a greater burden on the Crown's radical title.”¹²¹ Their Honours' accompanying examples, combined with their comments elsewhere,¹²² indicate that they are

119 [2008] FCAFC 63 at [74], [119]-[120]. *Cf. Rubibi Community v. Western Australia (No 5)* [2005] FCA 1025 at [266].

120 See *Ward v. Western Australia* (1998) 159 ALR 483 per Lee J at 514; *cf. Western Australia v. Ward* (2000) 99 FCR 316 per Beaumont and von Doussa J.J. at 353.

121 [2008] FCAFC 63 at [121].

122 E.g., at [147], [154].

here acknowledging (although less explicitly¹²³ and more cautiously¹²⁴ than the primary judge) a critical but often-neglected distinction: the distinction between the communal (or external) native title interest and the specific *inter se* (or internal) distribution of that interest within the community. The latter is logically of little concern to the Western legal system, and hence cultural continuity in that regard should be less important. Armed with a proper recognition of this distinction, which has been pressed by prominent commentators¹²⁵ and touched upon but incompletely explored in earlier Australian cases,¹²⁶ the Australian courts might begin to approach the evidence in these difficult cases with structured circumspection rather than unguided pedantry.

An equally important methodological correction, which would further help to de-microscope the Australian methodology, would be a clear differentiation of native “title” from native “rights.” This distinction has been central to the contemporary Canadian jurisprudence,¹²⁷ is implicit in the New Zealand cases¹²⁸ and is visible in related contexts in the United States.¹²⁹ It is certainly not a complete answer to all of the difficulties in the Australian law, as Canadian experience has demonstrated.¹³⁰ Yet the distinction is not unnecessary duplication, as suggested by some Australian observers of the Canadian developments. For Australia, a country whose native title doctrine has failed to proceed coherently beyond specific “rights,” a clear adoption of the “rights” vs. “title” distinction would be an important preliminary conceptual clarification. Apart from the distinction’s obvious importance as regards the content of native title, it would help with the difficulties of proof addressed

123 Cf. *Bennell v. Western Australia* [2006] FCA 1243 e.g., at [78], [794]-[795].

124 See [2008] FCAFC 63 at [153].

125 See e.g., 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; Noel Pearson, “Land is Susceptible of Ownership” in Peter Cane, ed., *Centenary Essays for the High Court of Australia* (Butterworths, Sydney, 2004).

126 See e.g., *Ward v. Western Australia* (1998) 159 ALR 483 at 508, 514, 529, 542; *Commonwealth v. Yarmirr* (1999) 101 FCR 171 at 248-249; *Sampi v. Western Australia* [2005] FCA 777 at [954], [955], [983], [1053], [1069]; *Yanner v. Eaton* (1999) 201 CLR 351 at 383-384.

127 See e.g., *R v. Sparrow* (1990) 70 DLR (4th) 385; *R v. Van der Peet* (1996) 137 DLR (4th) 289; *Delgamuukw v. British Columbia* (1997) 153 DLR (4th) 193.

128 See *Te Weehi v. Regional Fisheries Officer* [1986] 1 NZLR 680; *McRitchie v. Taranaki Fish and Game Council* [1999] 2 NZLR 139 per Thomas J.; and the more recent decision in *Attorney-General v. Ngati Apa* [2003] 3 NZLR 643. For stronger recognition of the rights vs. title distinction in earlier New Zealand jurisprudence, see e.g., *Kauwaeranga Judgment* (Native Land Court, 3 Dec 1870)—published in (1984) 14 *Victoria University of Wellington Law Review* 227; *Re The Ninety-Mile Beach* [1963] NZLR 461; *Tamihana Korokai v. Solicitor-General* (1912) 32 NZLR 321.

129 See particularly the US Treaty-reserved rights cases, examined in Young, *Trouble with Tradition*, at 117ff.

130 See for example the difficult questions considered in the case of “title” in the recent decision of *Tsilhqot’in Nation v. British Columbia* 2007 BCSC 1700; [2008] 1 CNLR 112. And as regards “rights,” see for example *R v. Sappier; R v. Gray* (2006) 274 DLR (4th) 75.

in this article—leaving room for the courts to attach continuity inquiries (in the case of title claims appropriately framed as such) to broader traditional assertions of ownership or custodianship rather than to specific traditional practices and principles. Unfortunately the rights vs. title distinction remains under-explored in Australia, and indeed was buried somewhat by the tone of discussion in the High Court’s *Ward* decision.

The second major error that the Full Court in *Bodney v. Bennell* identified in the primary judge’s reasoning related to the assessment of the claimants’ “connection” pursuant to s. 223(1)(b) of the *Native Title Act 1993* (Cth). It was concluded that Wilcox J. had erroneously assumed that the establishment of a connection with the larger Noongar claim area meant there was necessarily a connection with the smaller separated portion (it being a part of the larger area). The approach of Wilcox J., viewed in the mathematical abstract, is unobjectionable. So again the objection of the Full Court would seem to be not so much to framework, but to the lack of rigour and specificity in the primary judge’s approach, this time in his assessment of the claimants’ connection with the relevant area (and indeed the area of the broader claim¹³¹). Their Honours queried, as a sub-issue in this context, whether Wilcox J. had properly considered whether the native title was in fact owned by the community as a whole¹³² (and indeed whether native title is “ordinarily” communal as widely thought¹³³), however this was not a matter specifically pursued in the appeals.¹³⁴

131 See [2008] FCAFC 63 at [170], [181].

132 *Ibid.* at [153].

133 *Ibid.* at [158].

134 As to the difficulty of identifying ultimate Aboriginal land-holding units (in the face of (e.g.) complex interlocking systems of resource use or entitlement, overlapping or conflicting claims, or the devolution of broad rights and responsibilities to sub-groups), see e.g., *Wik Peoples v. Queensland* (1996) 187 CLR 1 at 183; *Yanner v. Eaton* (1999) 201 CLR 351 at 372-373; *Gale v. Minister for Land and Water Conservation (NSW)* [2004] FCA 374 at [51]ff; *Lardil Peoples v. Queensland* [2004] FCA 298 at [140]; *Ward v. Western Australia* (1998) 159 ALR 483 per Lee J. at 528-529, 533, 541-543. And see generally in this context *Western Australia v. Ward* (2000) 99 FCR 316 per Beaumont and von Doussa J.J.; *De Rose v. South Australia* [2003] FCAFC 286; *De Rose v. South Australia (No 2)* [2005] FCAFC 110; *Rubibi Community v. Western Australia (No 5)* [2005] FCA 1025; *Rubibi Community v. Western Australia (No 6)* [2006] FCA 82; *Jango v. Northern Territory* [2006] FCA 318; *Daniel v. Western Australia* [2003] FCA 666 (e.g., at [319], [355], [508]); *Alyawarr; Kayetye, Warumungu, Wakay Native Title Claim Group v. Northern Territory* [2004] FCA 472 (esp. at 129ff); *Northern Territory v. Alyawarr, Kayetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [95]ff; *Griffiths v. Northern Territory* [2006] FCA 903; *Risk v. Northern Territory* [2007] FCAFC 46; *Harrington-Smith on behalf of the Wongatha People v. Western Australia (No 9)* [2007] FCA 31 esp. at [536]ff, [1138] (emphasis upon identifying the level of grouping to which the rights and interests directly attach, and correlatively any necessary “memberships”); and particularly *Gumana v. Northern Territory* [2007] FCAFC 23 at [141]ff; *Neowarra v. Western Australia* (2003) 205 ALR 145 (esp. at [120], [311], [358], [384]ff). See also the unusual situation in *Worimi v. Minister for Lands (NSW)* [2006] FCA 1770 (*Worimi* (2006, FCt)). For a detailed discussion of these issues, and the underlying debates between “collectivist” and “atomist” anthropologists, see Daniel Lavery,

The Full Court particularly emphasized in this context that the inquiry into “connection” should not be fused or confused with the inquiry into the existence of rights and interests under s. 223(1)(a), although it was conceded that both are sourced in traditional laws and customs and that in some cases the same evidence will be used to identify each.¹³⁵ The judges seemed to draw from this procedural distinction some support for their insistence on geographical (and sub-communal) particularity in the connection inquiry,¹³⁶ which framed the most telling criticism of the primary judge on the issue of connection:

... if those persons whom the laws and customs connect to a particular part of the claim area have not continued to observe without substantial interruption the laws and customs in relation to their country, they cannot succeed in a claim for native title rights and interests even if it be shown ... that other Noongar peoples have continued to acknowledge and observe the traditional laws and customs of the Noongar ...¹³⁷

On one reading, the Full Court is breaking into internal or *inter se* community matters in this conclusion. The problems of logic in such an approach are betrayed by the reference to the fact that in such a situation “they” (the particular persons) cannot succeed in a claim for native title—but of course it is not “they” that have claimed; it is the community. The broader difficulties of an inattention to the communal/*inter se* distinction were touched upon above. These theoretical problems aside, the essence of the Full Court’s conclusion appears to be that the primary judge did not properly assess whether any communal native title in the hands of the Noongar community truly survived in relation to this area.

Whether the primary judge’s supposed digression on the matter of connection was a difference in framework or simply a difference in flexibility of application, there are clearly conflicting views in the case law as to whether a rigorous independent “connection” test should be applied on top of the identification of traditionally sourced rights and interests.¹³⁸ The problem here perhaps arises from the fact that beyond the possible implications of the structure

“A Greater Sense of Tradition: The Implications of the Normative System Principles in *Yorta Yorta* for Native Title Determination Applications” (2003) 10 Murdoch University Electronic Journal of Law.

135 [2008] FCAFC 63 at [165].

136 *Ibid.* at [167], [178], [179].

137 *Ibid.* at [186].

138 In apparent support of a more liberal approach, see *De Rose v. South Australia* [2003] FCAFC 286 particularly at [305]ff, and *cf.* also counsel’s arguments (e.g., at [180]). See also *De Rose v. South Australia (No 2)* [2005] FCAFC 110 at [109]ff; *Sampi v. Western Australia* [2005] FCA 777 at [1075]-[1079]; *Rubibi Community v. Western Australia (No 5)* [2005] FCA 1025 at [376]; *Rubibi Community v. Western Australia (No 6)* [2006] FCA 82 at [95]; *Northern Territory v. Alyawarr; Kayetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [88]ff.

of s. 223(1), it is difficult to understand why it is necessary for claimants to establish a connection beyond that inherent in the establishment of surviving traditionally sourced rights and interests in the relevant area. The risk of an insistence upon independent inquiries is, as apparently accepted by the Full Court,¹³⁹ that the inquiry into cultural continuity drifts off into anthropological observations that may really have little relevance to any native title rights and interests—in the process no doubt obstructing any attempts to de-particularize the court's examination of the relevant community. And this approach risks complete disregard (because of the “tradition” focus in this context also) of the strength of a community's *current* connection with an area. All this necessarily multiplies (without clear justification) the Australian doctrinal difficulties, and compounds the institutional denigration (again without justification) of contemporary indigenous priorities and initiatives.

VI Conclusion

The result of the appeal in *Bodney v. Bennell*, as noted earlier, was that the case was remitted to the lower court for the matter to be re-examined (possibly with this area reunited with the broader Noongar southwest claim).¹⁴⁰ As emphasized throughout this article, the abrupt fate of this important claim and the dissonance in the reasoning of the two decisions, particularly when viewed against the earlier Australian precedents, indicate that significant confusion still attends the Australian native title doctrine. The doctrine in its present form is an awkward mix of foundational ambiguity, theoretical complexity, moral controversy and practical uncertainty. The task facing lower court judges is therefore a formidable one, and they are perhaps inevitably led in this climate to inconsistent and controversial conclusions.

On the arguments in this article, many of the problems would dissipate with a concerted de-particularization of the prevailing Australian methodology. This would entail a proper acknowledgment of the potentially comprehensive nature of the native title interest,¹⁴¹ and correlatively, a de-microscoping of the approach to cultural continuity. The legal, evidential and moral difficulties involved in the assessment of cultural change would be greatly reduced if specific cultural change were removed in this manner (in appropriate cases)

139 [2008] FCAFC 63 at [169]. The Full Court was careful not to return to the redundant proposition that “physical presence” is necessary for maintenance of connection, but their Honours did insist on it being demonstrated that the claimants asserted the “reality” of their connection to land or waters, clearly hinting at the potential importance of physical presence or at least evidence of attempts to overcome the absence of physical presence (at [171]ff, [178]).

140 [2008] FCAFC 63 at [211]. As at the time of publication, the Noongar claim is proceeding by way of negotiation—in accordance with a signed Heads of Agreement committing the major parties to a two-year period of discussion toward a settlement package.

141 *Cf.* the possible conceptual progress made in *Griffiths v. Northern Territory* [2007] FCAFC 178.

from the purview of the courts. Questions as to the type and degree of change permissible, and issues of causation and evidential complexity would fade into a broader, simpler, more logical and more principled inquiry into whether the community's traditionally based assertion of and commitment to its interest, as properly defined, had survived.

It has been argued in this article that the Canadian rights vs. title distinction, and the anthropologically obvious communal vs. *inter se* distinction, have the potential to significantly assist in this doctrinal clarification. However, it must also be noted that the correction became somewhat harder to achieve following the *Ward* and *Yorta Yorta* theorizing of 2002. The convolution in the Australian doctrine has threatened to become self-reinforcing. The mindset of strict particularity as regards the core notion of "traditional laws and customs" can too easily permeate, and therefore be propped up by, the newer abstract inquiries into "society" and "system" and a stubbornly retained independent "connection" inquiry. It is hoped that these questionable aspects of the Australian thinking do not inhibit broader progress.

Wilcox J.'s primary decision in *Bennell v. Western Australia*, an attempt to steer toward a more principled approach within the apparent confines of the current, confused law, was met with considerable public support in Western Australia. It was in some respects legally cavalier—at least when tested against the stricter thinking that has threaded its way through much of the Australian jurisprudence. This was perhaps an attempt by a retiring eminent Australian judge to resketch the bigger picture in the impossible detail of contemporary Australian native title.¹⁴² Unfortunately, the appeal result illustrates that the Noongar claimants and the Australian doctrine are still very much lost in the detail.

Stepping back for a moment from this discussion of legal principle, the Noongar experience illustrates how conventional litigation can be an expensive and unhelpful distraction from meaningful progress on indigenous rights. The costs and delays of a native title system that frequently draws parties to litigation weigh heavily on all stakeholders in Australia. Moreover, in a clinical adversarial context, the questions are asked and answered in unnatural isolation from the social, historical and political context that makes them so vitally important. The multifarious impacts of the "tide of history" on indigenous Australians are not easily understood and assessed, let alone ameliorated, from the vantage point of dry, distant and exacting legal principle.

142 Cf. the analogy in Sky Mykyta, "Losing Sight of the Big Picture" (2005) 36 *Ottawa Law Review* 93.