The Great Re-Freezing?
Requirements for Establishing Native Title in Post-Yorta Yorta Jurisprudence

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I hereby certify that the work embodied in this thesis is the result of original research and has not been submitted for a higher degree to any other University or Institution.

(Signed): …R L Mackay……………………………
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# Table of Contents

ABSTRACT .............................................................................................................. i

BACKGROUND ........................................................................................................ 1

  Common Law Aboriginal Title ................................................................. 2
  *Milirrpum* ........................................................................................................ 5
  *Mabo* ............................................................................................................... 7
  *Native Title Act 1993* ................................................................................... 15
  *Wik and the Native Title Amendment Act 1998* ........................................... 18
  *Ward and Wilson v Anderson* ....................................................................... 20

*YORTA YORTA* .................................................................................................. 23

  Case History ..................................................................................................... 24
    First Instance .................................................................................................. 24
    Full Federal Court .......................................................................................... 27
    High Court ...................................................................................................... 29

Legislative Interpretation ....................................................................................... 32

  Interpretation of ‘Traditional’ .......................................................................... 32
  Rejection of Common Law .............................................................................. 34

A Normative System .............................................................................................. 37

  Requirement of a Normative System ............................................................... 37
  Definition of ‘Normative System’ .................................................................... 38

Continuity ............................................................................................................... 42

  Requirement of Continuity ............................................................................. 42
  Interruption to Continuity ............................................................................... 49
  Evolution of Law and Custom ......................................................................... 51
  Relationship of Current Connection to Continuity ....................................... 57

Treatment of Evidence .......................................................................................... 61

  Law and History .............................................................................................. 61
  Non-Legal Perspectives .................................................................................... 68
  Indigenous Perspectives ................................................................................. 71
  Treatment of Evidence at First Instance ....................................................... 73
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>High Court’s Assessment of the Treatment of Evidence at First Instance</td>
<td>85</td>
</tr>
<tr>
<td><strong>NATIVE TITLE CASES POST-YORTA YORTA</strong></td>
<td>87</td>
</tr>
<tr>
<td>Selected Cases 2002-2006</td>
<td>88</td>
</tr>
<tr>
<td>De Rose</td>
<td>88</td>
</tr>
<tr>
<td>Daniel</td>
<td>94</td>
</tr>
<tr>
<td>Sampi</td>
<td>97</td>
</tr>
<tr>
<td>Alyawarr</td>
<td>100</td>
</tr>
<tr>
<td>Rubibi</td>
<td>104</td>
</tr>
<tr>
<td>Jango</td>
<td>107</td>
</tr>
<tr>
<td>Larrakia</td>
<td>111</td>
</tr>
<tr>
<td>Case History</td>
<td>111</td>
</tr>
<tr>
<td>Legislative Interpretation</td>
<td>113</td>
</tr>
<tr>
<td>A Normative System</td>
<td>113</td>
</tr>
<tr>
<td>Continuity</td>
<td>114</td>
</tr>
<tr>
<td>Treatment of Evidence</td>
<td>118</td>
</tr>
<tr>
<td>Leave To Appeal</td>
<td>121</td>
</tr>
<tr>
<td>Single Noongar</td>
<td>124</td>
</tr>
<tr>
<td>Case History</td>
<td>124</td>
</tr>
<tr>
<td>Legislative Interpretation</td>
<td>125</td>
</tr>
<tr>
<td>A Normative System</td>
<td>125</td>
</tr>
<tr>
<td>Continuity</td>
<td>128</td>
</tr>
<tr>
<td>Treatment of Evidence</td>
<td>132</td>
</tr>
<tr>
<td>Appeal to the Full Federal Court</td>
<td>137</td>
</tr>
<tr>
<td><strong>FINAL COMMENT</strong></td>
<td>138</td>
</tr>
<tr>
<td>Requirement of Continuity of Connection</td>
<td>141</td>
</tr>
<tr>
<td>Analysis of Evidence</td>
<td>145</td>
</tr>
<tr>
<td>Conclusion</td>
<td>148</td>
</tr>
<tr>
<td><strong>REFERENCE LIST</strong></td>
<td>150</td>
</tr>
</tbody>
</table>
Abstract

In *Yorta Yorta*, it was expressly found that native title law could not support a ‘frozen in time’ approach. It was held that the rights making up native title could not be considered static and archaic instruments, but must be given reign to adapt. However, the question must be asked whether, in its examination of the requirements of native title, *Yorta Yorta* has in the same breath re-introduced the ‘frozen in time’ approach, albeit in a different form. Specifically, it is a question of whether the continuity of connection requirement means that the evolution of rights is frozen and claimants are burdened with the task of proving they relate to land in exactly the same manner as their ancestors did, over 200 years ago.

That is the question which this thesis attempts to answer. It will do so by examining in detail not only the requirement of continuity of connection as espoused in *Yorta Yorta*, but the evidentiary analysis which was performed under that requirement. It is the nature of this analysis in which the effect of continuity of connection on the nature of native title rights is revealed.

This thesis will also examine the effect of *Yorta Yorta* on subsequent cases, particularly how subsequent Courts have interpreted the continuity of connection requirement and how it has affected the questions of proof they felt the claimants were required to answer. Particularly highlighted will be the cases of *Larrakia* and *Single Noongar*, two cases which have brought about starkly different outcomes for the claimants.
The approach taken will be to discuss whether the requirements of native title in *Yorta Yorta* have produced a native title system which equitably and in justice recognises traditional owners’ rights to land in modern times, or whether they consign native title to being an historical relic, of little utility in reflecting the modern-day relationships of traditional owners to their land. In other words, was *Yorta Yorta* ‘the great re-freezing’?
Background – A Brief History of Native Title Requirements Prior to Yorta Yorta
Common Law Aboriginal Title

Before examining Australian law relating to interests in land existing prior to the acquisition of Sovereignty, it is essential to turn to the manner in which international jurisprudence deals with these interests. Whilst it is recognised that Australian jurisprudence is by no means bound by or subservient to any international legal concepts, it is important to note the similarities and differences domestic native title law shares with an international jurisprudence that has developed over the course of centuries. Indeed *Mabo v Queensland (No 2)*, the decision giving birth to native title in Australia, was not only influenced by international perspectives but explicitly relied upon international case law in its reasoning. This highlights native title as an area of domestic law that intrinsically exists within a wider international jurisprudential context as a matter of great judicial and social import.

The name given to interests in land which pre-date the establishment of power by the incoming civilisation is ‘common law Aboriginal title’, which in Australia is known as ‘native title’. According to international jurisprudence (but not Australian law), this title amounts to an estate in fee simple, held either singly or collectively, which gives an absolute title to land. International principles require it to be proven by exclusive occupation at the time of acquisition of sovereignty and require that proprietary rights be held in accordance with the common law of the colony which applies from that point  

1 (1992) 175 CLR 1 (*Mabo*).
2 Theoretically there would also be real property rights possessed by the traditional occupants of the land. However in practice such rights are virtually impossible to retrospectively prove, particularly in Australia, where Indigenous land-holdings have been so overwhelmed by European interference that it has become virtually impossible to determine the exact details of any proprietary rights under customary law. Thus recognition of common law Aboriginal title is the only feasible avenue for traditional owners to pursue. See Kent McNeil, *Common Law Aboriginal Title* (1989), 241.
on.³ This is of course an extremely brief generalised statement and the particulars of proof vary from jurisdiction to jurisdiction. Australian jurisprudence in particular deviates significantly from these principles, as will be shown in this thesis.

One of the issues integral to any discussion of common law Aboriginal title is the effect of Crown acquisition on pre-existing interests in land. On this issue there has emerged through case law two distinct theories, referred to by McNeil as the ‘doctrine of recognition’ and the ‘doctrine of continuity’.⁴ The former of these rules that

\[\text{[t]he only legal enforceable rights they [the holders of pre-existing land rights] could have as against their new sovereign were those, and only those, which that new sovereign, by agreement, express or implied, or by legislation, chose to confer upon them.}\]

In contrast, the doctrine of continuity prefers an approach in which

\[\text{it is to be presumed, in the absence of express confiscation or of subsequent expropriator legislation, that the conqueror has respected [pre-existing land rights] and forborne to diminish or modify them.}\]

In *Oyekan v Adele*,⁷ the court attempted to reconcile these fundamentally irreconcilable doctrines and, in doing so, heavily favoured the doctrine of continuity by declaring that

\[\text{[i]n inquiring…what rights are to be recognised, there is one guiding principle. It is this: the courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected.}\]

However even the doctrine of continuity cannot protect common law Aboriginal title at the time of annexation in conquered or ceded territories, since there has always existed a

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³ Ibid 241-2.
⁴ Ibid 162.
⁵ *Secretary of State for India v Bai Rajbai* (1915) LR 42 IA 229, 237.
⁶ *Re Southern Rhodesia* [1919] AC 211, 233.
⁷ [1957] 2 All ER 785.
⁸ Ibid 788.
wide discretion on the part of the Crown to seize land as an act of State in the
acquisition of sovereignty, against which there is no common law remedy.\(^9\) In a settled
colony this wide discretion does not exist since the very act of land seizure would imply
that the land was conquered or ceded rather than settled, and thus the colony has been
misclassified.\(^10\) In either case, once annexation has been achieved the Crown is bound to
act in accordance with the principles of the law in its dealings with proprietary interests:

Following annexation…if the Crown had not expropriated the private title of the indigenous
inhabitants, it could not do so subsequently except under the authority of legislation. This is
because the Indigenous peoples would have become British citizens and entitled to the protection
of the imported common law which had now become the law of the land. Any seizure of land
against the indigenes at some time following annexation would have amounted to the
commission of an unlawful act of State on the part of the Crown against its own citizens. This
was prohibited by the law and the Crown had no such authority to expropriate land except with
legislative authority. This statement of law concerning acts of State in this context is
uncontroversial.\(^11\)

Australia stands out as an exception to this internationally fixed rule, with the interests
in land of the original inhabitants of this country overlooked and trampled upon for over
200 years.

\(^9\) See especially *Cook v Sprigg* [1889] AC 572, 578.

\(^10\) *Cooper v Stuart* (1889) 14 App Cas. 286, 291. The more recent *Administration of Papua v Deara Guba*
(1972-3) 130 CLR 353 seems to contradict this at 436 by allowing unfettered seizure in the course of
acquisition of settlement, however this appears to be a stand-alone decision. In any case, it highlights the
continued consignment of colony classification to the legal scrap-heap as a concept of little legal bearing
in the modern jurisprudence. Regrettably, this does not take into account the massive social and cultural
impact the recognition (or non-recognition) of pre-colonial society and culture has for a nation of
dispossessed people.

\(^11\) 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*’ (Paper presented at
occupants become British subjects upon sovereignty and thus have access to the protection of the British
common law that was to apply in the colony stretches back to *Campbell v Hall* (1774) Loft 655.
By the time of the ‘discovery’\(^\text{12}\) of Australia in 1770, British policy was to settle inhabited lands only with the consent of the inhabitants. However Captain Cook and his party deemed Australia to be, for all intents and purposes, uninhabited, meaning Governor Phillip’s instructions were to settle the new land, with no reference to any indigenous inhabitants that may be present.\(^\text{13}\) Thus began both the misclassification of Australia as a previously uninhabited colony and the creation of the erroneous doctrine of terra nullius, both of which perpetuated the denigration of Indigenous Australia for centuries to come.

The ruling that Australia was a royal demesne, with all interests in land acquired by the Crown immediately upon settlement, remained an unchallenged and apparently self-evident cornerstone of the Australian common law for over two centuries.\(^\text{14}\) This was based on the apparently unassailable belief that Australia, prior to Sovereignty, ‘consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law’.\(^\text{15}\) It was not until 1971 that this belief was challenged in a court of law.\(^\text{16}\)

By this time, the courts could no longer plead ignorance of the facts:

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\(^{12}\) Highlighting the latent prejudice that has existed throughout Australian history, the term ‘discovery’ is historically used to describe Captain Cook’s landing, despite the fact that Indigenous Australians had occupied the country for 40,000 to 70,000 years prior. Various other terms now used, more or less appropriately, are ‘settled’, ‘colonised’ and ‘invaded’, to name just a few.

\(^{13}\) Kevin Williams, ‘Native Title in the Australian Context: Historical Denial and Legal Recognition’ in Bruce Bennett and Gerhard Leitner (eds) *Australia Centre Series Volume 4, Australian Studies: A Topic for Tertiary Education?* (2000) 122, 123.

\(^{14}\) See especially *Attorney-General v Brown* (1847) 1 Legge 312, *Williams v Attorney-General (NSW)* (1913) 16 CLR 404 and *Randwick Corporation v Rutledge* (1959) 102 CLR 54. It must be noted that these cases did not involve native title claims but, in ruling on other land rights disputes, approved the proposition that the Crown automatically acquired all ownership rights upon Sovereignty.

\(^{15}\) *Cooper v Stuart* (1889) 14 App Cas 286. Again, this case did not directly concern a claim for native title.

\(^{16}\) *Milirrpum v Nabarlo Pty Ltd* (1971) 17 FLR 141 (‘*Milirrpum*’). As Reilly and Genovese note, Indigenous Australians have since European settlement believed in their traditional rights to land, but
The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called a government of laws, and not of men, it is that shown in the evidence before me.17

However in a stunning display of legal pragmatism over of considerations of justice, Blackburn J ruled that the classification of a colony is a question of law not fact and that it was ‘beyond the power of this Court to decide otherwise than that New South Wales came into the category of a settled or occupied colony’.18 Thus his Honour found that the doctrine of terra nullius must remain upheld, with the common law incapable of recognising pre-settlement interests in land.

*Milirpum* represents the first attempt to have these rights legally recognised (see Alex Reilly and Ann Genovese, ‘Claiming The Past: Historical Understanding in Australian Native Title Jurisprudence’ (2004) 3 The Indigenous Law Journal at the University of Toronto Faculty of Law 19, 22).

18 Ibid 244.
Mabo

In 1982, the Meriam people of the Murray Islands launched an action against the government to claim rights of use and enjoyment over their traditional lands, continuously occupied by the Meriam people since sovereignty. In 1985, the Queensland Government attempted to curtail the claim by enacting the *Queensland Coast Islands Declaratory Act*¹⁹ which purported to assert that, upon the annexation of Queensland, coastal islands became vested in the Crown, freed from any pre-existing rights or interests in those lands.²⁰ The State then amended their defence to the claim to rely on the provisions of that Act, to which the claimants requested the High Court consider a demurrer to that amended defence. The demurrer was considered in *Mabo v Queensland*.²¹

The claimants argued that the Act was invalid on a number of grounds, including that it was inconsistent with the *Racial Discrimination Act*²² and thus invalidated by *s 109* of the *Australian Constitution*.²³ The majority agreed with this argument, finding that the Act discriminated against the Indigenous inhabitants of the Murray Islands by limiting their rights to ownership and inheritance of property in comparison to other racial groups.²⁴ Although the decision did not rule explicitly on the existence of Indigenous rights to land in Australia, it was significant in that it ruled that, if such rights existed, they were guaranteed equality under law and could not be impaired by legislation.²⁵

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¹⁹ 1985 (Qld).
²⁰ See especially *Queensland Coast Islands Declaratory Act 1985* (Qld) *s 3*.
²² *1975* (Cth) (‘RDA’).
²³ See Richard Cullen, ‘Note: Mabo v Queensland’ (1990) 20(1) *University of Western Australia Law Review* 190.
The substantive hearing reached the High Court in 1992, in the form of *Mabo v Queensland (No 2).* The government opposed the claim on three grounds; that by the mechanism of acquisition all lands immediately became patrimony of the Crown, that the Crown prerogative to act in the course of acquisition of sovereignty was exercised so as to extinguish any other land rights and that only those rights acknowledged by the Crown at the time of acquisition of sovereignty could survive that acquisition. The court determined that two important questions had to be answered; do pre-existing rights in land need recognition to survive and, if so, are those rights recognisable under Australian law? Brennan J held that the Australian common law must fully recognise the existence of the property rights of the original inhabitants of the country in order to retain its vitality as a modern body of common law:

> If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today’s world that the common law should neither be nor be seen to be frozen in an age of racial discrimination. The fiction by which the rights and interests and Indigenous inhabitants were treated as non-existent was justified by a policy which has no place in the contemporary law of this country.

In doing so, the court was required to restate the constitutional powers of the Crown so as to create room for native title recognition.

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26 (1992) 175 CLR 1 (‘Mabo’).
28 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 41-2. In terms of international law, Australia lagged far behind its common law counterparts in recognition of the land rights of its original inhabitants; Canada in 1763 (rights recognised by the Royal Proclamation of 1763, enshrined in the *Canadian Constitution* s 35 and recognised by the common law in *Calder v Attorney-General of British Columbia* (1973) 34 DLR (3d) 145), New Zealand in 1840 (the Treaty of Waitangi signed in 1840 and rights recognised by the common law in *R v Symonds* [1847] NZPCC 387) and the US in 1823 (*Johnson v McIntosh* (1823) 21 US 240).
Once the High Court decided that native title existed in Australia, it needed to define the nature and content of native title. To begin, the Court defined 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.\(^{30}\)

Since the interests and rights comprising native title are granted by traditional laws and customs, ‘[t]he nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs’.\(^{31}\) Thus it was impossible for the court to create an all-encompassing definition of native title, since it intrinsically varied from case to case and must be determined by reference to the traditional laws and customs held in each case.

It was also ruled that native title did not conform to traditional European notions of proprietary rights, for the law needed to ‘recognise the inappropriateness of forcing the native title to conform to traditional common law concepts and to accept it as \textit{sui generis} or unique’.\(^{32}\) This reflected the existence of native title not as a construct of the common law, but as a set of pre-existing rights and interests in land recognised and protected by the common law.\(^{33}\)

\(^{30}\) \textit{Mabo v Queensland (No 2)} (1992) 175 CLR 1, 57-8.  
\(^{31}\) Ibid 70. See also ibid 110, 187.  
\(^{32}\) Ibid 89. The non-conformity of common law aboriginal title to Anglo-European notions of proprietary rights is a cornerstone of international jurisprudence dating back to \textit{Amodu Tijani v Secretary Southern Nigeria} (1921) 2 AC 39. It ensures that the law does not perpetuate the practice of racial discrimination between different societies based upon varying social and legal perspectives on the relationship between land and its owners. 
\(^{33}\) Ibid 58, 61.
As for the requirements of proof in regards to native title, the court cited with approval the basic tenements outlined by the Canadian Federal Court in *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development*:\textsuperscript{34}

1. That they [the claimants] and their ancestors were members of an organized society.

2. That the organized society occupied the specific territory over which they assert the aboriginal title.

3. That the occupation was to the exclusion of other organized societies.

4. That the occupation was an established fact at the time sovereignty was asserted by England.\textsuperscript{35}

Such occupation at the time of sovereignty must have been meaningful and not simply coincidental or transitory.\textsuperscript{36} However the Australian High Court also added a further requirement; the requirement of traditionality.

Toohey J mirrored existing international jurisprudence by requiring that ‘[s]o long as occupation by a traditional society is established now and at the time of annexation, traditional rights exist’.\textsuperscript{37} The other members of the court disagreed:

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 [sic] 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

\textsuperscript{34} [1980] 1 FC 518.
\textsuperscript{35} Ibid 557-8, cited in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 192.
\textsuperscript{36} *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 190.
\textsuperscript{37} Ibid 192.
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.  

The limiter ‘as far as practicable’ served to allow for some evolution of the rights and customs observed over time:

The traditional law or custom is not, however, frozen as at the moment of establishment of a Colony. Provided any changes do not diminish or extinguish the relationship between a particular tribe or other group and particular land, subsequent developments or variations do not extinguish the title in relation to that land.

The concept was not given much consideration in the *Mabo* decision, in comparison with the consideration offered to other aspects regarding proof of native title. What was clearly noted was that there must be some link between the society of the past and the society of the present, however the boundaries of that link (and thus what would constitute a loss of requisite connection to the land) were unclear.

Since the High Court had done away with the false notion that the Crown acquired title to all lands upon the assertion of Sovereignty, they had the unenviable task of

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38 Ibid 43.
39 Ibid 110.
40 See especially Tehan, above n 29, 533-535. This requirement of link between the current society and the pre-sovereignty society has become known as the ‘doctrine of continuity’ (not to be confused with the international use of that term as described above at page 3) and has become a major element of native title jurisprudence in Australia, as will be critically examined throughout this thesis. What is immediately apparent, especially in the judgment of Brennan J, is that the Australian law will refuse to acknowledge native title where there has been a substantial break in connection with the land. This refusal to recognise native title operates even if the break in connection has not come about from the fault of the claimants or their descendants, but from Anglo-European incursion including, as occurs in many cases, that of the Australian law itself, namely the operation of the various ‘protection acts’ previously in place throughout Australian jurisdictions (*Aboriginal Protection Act 1869* (Vic), *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qld), *Aborigines Act 1911* (SA), *Aborigines Protection Act 1886* (WA), *Aborigines Protection Act 1909* (NSW) and *Northern Territory Aboriginals Act 1910* (SA)).
reconciling this with over 200 years of Crown dealings with land proceeding on the assumption that such an acquisition had taken place. The situation was summarised by Brennan J:

To treat the dispossession of Australian Aborigines as the working of the Crown’s acquisition of ownership of all land on first settlement is contrary to history. Aborigines were dispossessed of their land parcel by parcel, to make way for expanding colonial settlement.41

Despite recognising the rights of Indigenous people to their land, the High Court, in order to preserve the current land tenure system, ruled that any Crown grant of an estate in fee simple extinguished native title.42 The rationale for this was that, since native title was not sourced in the Crown and thus did not enjoy the protection of it, it was to be extinguished to the extent of any inconsistency with Crown interests or Crown granted interests.43 Such extinguishment was made only when there was a ‘clear and plain’ intention on the part of the Crown to do so.44 Such an intention was implied in the granting of an estate in fee simple,45 the reservation of land for purposes contrary to native title46 and the appropriation of land for the creation of public utilities.47

The above principles have become known as the ‘doctrine of extinguishment’ and have placed native title at the mercy of all other interests in land, to be extinguished in the event of inconsistency. The High Court justified the fragility of native title as a necessary result of the history of widespread dispossession of the Indigenous

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42 Ibid 69, 110.
43 Further to this, it was ruled that extinguishment after the commencement of the Racial Discrimination Act 1975 (Cth) attracts compensation and other remedies relevant to the improper extinguishment of proprietary interests (Ibid 64, 111, 193).
44 Ibid 64, 195.
46 Ibid 68.
47 Ibid.
population. This justification does not hold up as a matter of legal principle and the subordination of native title interests to the prerogative of the Crown does not rest easy with the acknowledged source of native title in pre-existing traditional law. Furthermore the Australian doctrine of extinguishment is not supported by the international jurisprudence which the judgment purported to rely on, since a finding that native title can be extinguished by an inconsistent grant actually runs counter to fundamental international common law principles. The doctrine of extinguishment represents the triumph of pragmatism and preservation of the status quo over the just recognition and treatment of native title that was the stated rationale behind the Mabo decision.

At the time of its handing down, Mabo was lauded as great leap forward for the Australian common law. However, in retrospect, the decision merely brought Australia into (or at least someone near to) the 20th Century in respect of its recognition of Indigenous rights to land. By the time the High Court heard the case, it could no longer, as a matter of law or ethics, continue the racially discriminatory policy of denying the existence of native title. This recognition was not only long overdue, but at its heart represented not a great recognition and reparation of past wrongs, but a heavily imbalanced compromise where ‘the whitefellas get to keep everything they have accumulated, [and] the blackfellas should now belatedly be entitled to whatever is left

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48 Ibid 112.
over’; a pragmatic compromise to reconcile over 200 years of gross dispossession and non-recognition.

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51 Pearson, above n 11, 2.
Native Title Act 1993

In the wake of the Mabo decision, there were some aspects of the newly created Australian native title jurisprudence that needed clarification. These included the effect of the RDA on dealings with land, the mechanism for dealing with future claims and the question of compensation for extinguished native title. The Keating government decided that the best way to deal with these outstanding issues would be to legislate on the matter, since leaving it to natural evolution in the courts would constitute a very long and difficult negotiation…in which concepts such as self-government over native title lands, constitutional protection of native title and the granting of substantial economic and other benefits would come into play as part of the “grand bargain”. It is not therefore a practicable approach for dealing with immediate land management issues.

However this reasoning is brought into question by the many other law jurisdictions in which the equivalent law has developed quite soundly through the processes of the courtroom. As it turned out, the evolution of the Native Title Act was most certainly a ‘very long and difficult negotiation’, consisting of several deadlocks and stalled negotiations. It was only an eleventh hour show of good faith and compromise by Indigenous parties that allowed the act to even reach the halls of parliament, in which it had to endure the longest debate in the Senate’s history before it became law.

The main features of the NTA were listed as the protection and recognition of native title, the validation of past acts that may have been invalidated by the prior existence of

52 See discussion in Butt et al, above n 27, 95.
53 Interdepartmental Committee of Officials, Commonwealth of Australia, Mabo: The High Court Decision on Native Title (1993), [33].
55 1993 (Cth) (‘NTA’).
56 For a detailed overview of the passage of the Native Title Act 1993 (Cth) see Williams, above n 13, 129-38.
native title, the creation of a practicable and fair system to deal with future acts affecting native title and the creation of the National Native Title Tribunal (a specialised body to deal with native title claims in conjunction with the Federal Court). The legislation was presented as a necessary compromise between certainty of title and commercial interests, and the rights of traditional Indigenous owners. At the heart of this compromise was a conflict between human rights concerns and real estate concerns, which all too often, as was the case in this instance, highlights the power of money over the rights of a minority group. In this case, largely for the sake of certainty of commercial interests, any past acts extinguishing native title were validated up to January 1994, legitimising over two centuries of dispossession and the accompanying loss of culture and identity. For those who had lost their traditional lands through acts of the Crown prior to 1975 there was no recourse to law for compensation, while those who had native title extinguished after 1975 could turn to the provisions of the RDA and were entitled to compensation. This was scant provision for the immeasurable and irreparable effect that the confiscation of land has had on a culture where land and identity are inextricably linked. It is indicative of the way in which the NTA treats native title in the same manner as traditional European land interests, failing to take into

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57 Commonwealth, *Parliamentary Debates*, House of Representatives, 16 November 1993, 2878 (Paul Keating, Prime Minister) cited in Tehan, above n 29, 542. The sections of the *Native Title Act 1993* (Cth) which are most pertinent to these main features are s 11 (protection of native title), s 223 (definition of native title), ss 14-17 (validation of past acts and provisions for compensation payable for extinguishment of native title by that validation), ss 61-74 (the creation of the National Native Title Tribunal and its rules of governance) and ss 25-44 (provisions for the right of native title holders to negotiate over future dealings with land in which native title is held).

58 Ibid 2880.

59 See discussion in Williams, above n 13, 129.

60 *Native Title Act 1993* (Cth) Pt 2, Div 2.

61 *Native Title Act 1993* (Cth) s 17.
account the vagaries and idiosyncrasies of the relationship between Indigenous Australians and their land.\(^\text{62}\)

\(^{62}\) See further Bartlett, above n 25, 34-5.
**Wik and the Native Title Amendment Act 1998**

Two critical native title developments post-NTA were Wik Peoples v Queensland\(^63\) and the Native Title Amendment Act.\(^{64}\) Although they did not directly impact the requirements for establishing native title, they will be examined in brief to provide a background for the cases that followed.

The Wik High Court majority found that Mabo made it clear that for extinguishment to occur there must be a clear and plain intention on the part of the Crown to do so.\(^65\) Specifically, it was found that the granting of a pastoral lease in land did not extinguish native title in that land, since the grant did not confer exclusive possession.\(^66\) In practical terms, Wik achieved little for traditional owners; it ruled that a specific type of lease, in specific circumstances, did not extinguish native title. Indeed the status of native title as the least protected form of land interests in Australia was perpetuated, since it was clearly stated that the rights of the pastoralists would prevail over the rights of native title holders in the event of any conflict between the two.\(^67\) However what was represented by the High Court majority’s acceptance that extinguishment requires specific intention, was a broader triumph of judicial flexibility over stark pragmatism.\(^68\)

However, in the face of an Australia which had been recently confronted with the Pauline Hanson phenomenon and the coming to power of the Coalition on a populist

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\(^{63}\) (1996) 187 CLR 1 (‘Wik’).
\(^{64}\) 1998 (Cth).
\(^{65}\) Wik Peoples v Queensland (1996) CLR 1, 123, 155, 243.
\(^{66}\) Ibid 121-2, 219-220.
\(^{67}\) Ibid 132, 250.
\(^{68}\) See Bartlett, above n 25, 45.
agenda which played on the ‘perception on the part of “mainstream” Australia that Indigenous Australians received special benefits’, such an approach was not to last. The final *Native Title Amendment Act* was an implementation of the Coalition Government’s Ten Point Plan, subject to some concessions made in order to gain the necessary support of the independent Senator Brian Harradine. The legislation cut a swathe through the gains made by the proponents of native title, confirming that a large quantity of specific previous dealings in land extinguished native title, removing the right to negotiate in favour of the mere right of notice for a variety of future acts and increasing the threshold requirements for the registration of a native title claim, to name just the major provisions. No less a body than the United Nations has decried the *Native Title Amendment Act*, believing it to contravene the human rights of a dispossessed nation by creating ‘legal certainty for governments and third parties at the expense of native title’. By its alteration of the future acts regime and the inclusion of a class of ‘intermediate acts’, the *Native Title Amendment Act* has effected a ‘substantial, complex and specific disapplication of the protection of the Racial Discrimination Act 1975 (Cth)*. Whilst *Wik* may have been one step forward towards adequate recognition of Indigenous rights to land, the *Native Title Amendment Act* was most certainly two steps back from that goal.

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70 *Native Title Amendment Act 1998* (Cth) ss 23A-23IA.
71 *Native Title Amendment Act 1998* (Cth) ss 24GA-36A.
72 *Native Title Amendment Act 1998* (Cth) s 190B.
73 *Committee Decision on Australia, Committee On The Elimination Of Racial Discrimination* (54th Session) UN Doc A/54/18 (1999).
74 Bartlett, above n 25, 55.
Ward and Wilson v Anderson

It was against this background that, in 2002, three critical native title decisions were handed down; Western Australia v Ward,75 Wilson v Anderson76 and Members of the Yorta Yorta Aboriginal Community v Victoria.77

In August 2002, the High Court decision of Ward represented not only the first contested native title application over mainland Australia, but also the first chance for significant judicial examination and review of the amended NTA. What the case also marked was the first appearance of a native title claim before the new-look Gleeson High Court. In no uncertain terms, the court made it clear that it was in the legislation that the native title law was to be found:

it must be emphasised that it is to the terms of the NTA that primary regards must be had, and not the decisions in Mabo [No 2] or Wik. The only present relevance of those decisions is for whatever light they cast on the NTA.78

Thus control of native title had been completely taken from the more dynamic auspices of the common law (which in itself is fundamentally unequipped to adequately recognise it) to that static body of laws, legislation. It has reduced what was recognised in Mabo as a right in land necessary for the law to retain its efficacy as a system of equality, to a mere legislative provision.79

75 (2002) 213 CLR 1 (‘Ward’).
77 (2002) 214 CLR 422 (‘Yorta Yorta’).
78 Western Australia v Ward (2002) 213 CLR 1, 19.
79 Tehan, above n 29, 557-560.
Ward also added to the native title jurisprudence a ‘bundle of rights’ approach in regards to the identification of native title. In that approach all of the rights and interests which make up the native title claimed must be identified singly. As Bartlett details, this ‘not only stifled any larger claim to a more global or comprehensive right [but] it also has the effect of severely restricting evolution of native title rights and interests’. By requiring particularisation of rights, the High Court harked back to the ‘frozen in time’ approach decried in Mabo, since each single right constituting the native title currently held must be shown to correspond with each single right constituting the native title held prior to sovereignty.

What the decision of Ward represented was the reduction of native title into ‘little more than a barren statutory right’. Although it did not expressly define the ‘connection’ to land necessary under s 223(1) of the NTA, the decision in Ward represented a move towards a more strict interpretation of the requirement of that connection. Thus the foundation was laid for the requisite connection to be defined in a manner more in keeping with the ‘frozen in time’ approach.

Wilson v Anderson, in which the High Court was asked to rule on whether grazing leases in the Western Lands Division of New South Wales extinguished native title, was a decision which continued this departure from the ideals of the protection of native title as espoused in the earlier native title jurisprudence. The combined judgment of

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80 Western Australia v Ward (2002) 213 CLR 1, 68-9 and 121.
81 Ibid 189.
83 See Mabo v Queensland (No 2) [1992] 175 CLR 1, 110.
84 Tehan, above n 29, 557.
Gaudron, Gummow and Hayne JJ, as well as the judgment of Kirby J, affirmed the *Wik* ruling that an extinguishing act must exhibit a clear and plain intention to extinguish native title. Callinan J (with whom McHugh J agreed) revived the dissenting opinion in *Wik* that such a requirement had no place in Australian law. Gleeson CJ sat somewhere between these two extremes, preferring a convoluted ‘inconsistency of incidents’ test. What is surprising about the judgment, and indicative of the shift toward a less comprehensive recognition of those Indigenous rights and interests surviving the acquisition of Sovereignty, is that, with the exception of Kirby J’s dissenting judgment, it was held that the grazing leases did extinguish any native title that existed in those areas the subject of the leases.

Thus, even for Gaudron, Gummow and Hayne JJ who affirmed the requirements of *Wik*, it was held that grazing leases in NSW displayed an extinguishing nature which the very comparable pastoral leases of Queensland did not. Such was the transformation of the attitudes of the High Court’s attitudes towards native title between 1996 and 2002. It was in this legal environment, one much less receptive to the continued protection of native title in the face of Anglo-Australian colonisation, that the examination of the requirements for establishing native title was held in the third of 2002’s triumvirate of cases; *Yorta Yorta*.

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85 *Wilson v Anderson* (2002) 190 ALR 313 [61], [139]-[143].
86 Ibid [194].
87 Ibid [6].
88 Ibid [3], [116]-[117], [205].
Yorta Yorta
Case History

First Instance

The Yorta Yorta native title claim was one of the first to be lodged under the Native Title Act\(^1\) and underwent nine months of unfruitful mediation after being accepted by the National Native Title Tribunal.\(^2\) The Tribunal referred the claim to the Federal Court and the proceedings commenced on 8 October 1996, being the first to reach trial under the operation of the NTA.

The Yorta Yorta claim area was situated along the Murray River, including lands in both New South Wales and Victoria. As such, the claim is not analogous to the majority of other native title claims, particularly those instigated in the early post-NTA years, due to both the historic and economic value of the land to non-Indigenous parties and the relatively heavy Anglo-Australian settlement in the area.\(^3\) As such, the case was a chance for Australia, and indeed the world, to see whether the NTA would prove to truly recognise the rights of Indigenous Australians to their traditional lands in ‘settled Australia’.

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\(^1\) Native Title Act 1993 (Cth) (‘NTA’).
\(^2\) The mediation involved over 400 parties, including government agencies, graziers, loggers and bushwalkers among others. It has been postulated that a major factor behind the rapid breakdown of these negotiations was the native title backlash in Australia at the time, fuelled by parties in both the media and political spheres. See Kirsten Anker, ‘Law in the Present Tense: Tradition and Cultural Continuity in Members of the Yorta Yorta Aboriginal Community v Victoria’ (2004) 28(1) Melbourne University Law Review 1, 4.
Justice Olney’s Federal Court decision was handed down on 18 December 1998. The decision was framed around four questions that his Honour believed must be answered in the positive to result in a positive determination:

- Are the current claimants descended from the traditional owners at sovereignty?
- Can the laws and customs practiced by the traditional owners at sovereignty be defined and, if so, what are they?
- Has the traditional connection of the claimants to their land been substantially continued from their ancestors unbroken through to the present day?
- Are the rights and interests arising from the traditional laws and customs recognisable by the common law?

Ultimately Olney J found that the third of these questions could not be answered in the positive:

> 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 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.

Thus the critical disentitling factor for the Yorta Yorta claimants was, according to the Olney J, that they had not fulfilled a requirement of continuity of connection. Justice Olney believed that this requirement flowed from the ‘tide of history’ metaphor as expressed by Brennan J in *Mabo v Queensland (No 2)*:

> 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

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4 As summarised in Anker, above n 2, 5. Summarised from *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606.

5 *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606, [129].

6 *Mabo v Queensland (No 2)* [1992] 175 CLR 1 (‘Mabo’).
connexion [sic] with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence... 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.⁷

A critique of this continuity of connection requirement will constitute a significant element of this thesis. As for the ‘tide of history’ metaphor itself, it seems to depict Indigenous Australia as a culture which will inevitably be swept aside by that apparently most dominant of cultures, Anglo-Australia. Surely such a metaphor should have no place being perpetuated in the laws of a democratic country, much less be the base upon which a new requirement for proof of native title is founded.

Questions of the necessity and appropriateness of the doctrine of continuity aside, Olney J’s assessment of the Yorta Yorta people’s fulfilling of that requirement is also worthy of criticism. In making conclusions regarding the laws and customs of the traditional Yorta Yorta society, his Honour used the writings of Edward Curr in the 19th Century as the main evidentiary source.⁸ Not only does this highlight the excessively strict approach employed by Olney J in enforcing the continuity of connection requirement, but his Honour’s preferential treatment of that source in evidentiary evaluation highlights the historiographical failings of the judgment. Similarly, Olney J’s placing of great weight on the 1881 petition of the Yorta Yorta people requesting that their traditional lands be returned to them⁹ highlights his Honour’s lack of understanding of

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⁷ Ibid 59-60, quoted in Members of the Yorta Yorta Aboriginal Community v Victoria [1998] FCA 1606, [3].
⁸ Members of the Yorta Yorta Aboriginal Community v Victoria [1998] FCA 1606, [106].
⁹ Ibid [121].
the issues surrounding historical evidence and his Honour’s refusal to fairly assess the oral testimony of the claimants. Such issues will be discussed further at length below.

The claimants appealed to the Full Federal Court, with their main point of contention being that Olney J had employed a ‘frozen in time’ approach in his Honour’s methodology and his Honour’s application of a continuity of connection requirement.10

**Full Federal Court**

The Full Federal Court dismissed the appeal of the Yorta Yorta on 8 February 2001, Black CJ dissenting from the majority of Branson and Katz JJ. In broad terms, the thrust of the decision was that the *NTA did* incorporate from the common law a requirement of continuity of connection, by virtue of s 223(1)(c):11

> It seems to us, [that] para 223(1)(c) incorporates into the statutory definition of native title the requirement that, in the case of a claimed communal title, the holders of the native title are members of an identifiable community "the members of whom are identified by one another as members of that community living under its laws and customs" and that that community has continuously since the acquisition of sovereignty by the Crown been an identifiable community the members of which, under its traditional laws observed and traditional customs practised, possessed interests in the relevant land.12

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10 See Henriss-Andersen, above n 3, 334.
11 Section 223(1)(c) of the *Native Title Act 1993* (Cth) states that native title rights and interests must be ‘recognised by the common law of Australia’.
12 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2001) 110 FCR 244, [108]. This construction of s 223(1)(c) was in direct conflict with the majority of the Full Federal Court in *Commonwealth v Yarrimur* (1999) 101 FCR 471 (indeed it concurs with the minority judgment of Mekel J in that case). It was later held by the High Court in *Commonwealth v Yarrimur* (2001) 184 ALR 113, that s 223(1)(c) was concerned only with the consistency and compatibility of traditional law and custom with the common law. The attitude of the Yorta Yorta High Court to this issue will be discussed below.
Having affirmed the existence of the requirement of continuity of connection, the majority attended to the appellant’s claim that Olney J had adopted a ‘frozen in time’ approach.

Denunciation of the ‘frozen in time’ approach was absolute, with their Honours citing both the language of the NTA itself and the approach previously adopted in the common law.\(^{13}\) However both Black CJ and the majority were of the opinion that Olney J had not adopted this approach and had contemplated, in theory, the possibility of adaptation of laws and customs.\(^{14}\) This does not mean, however, that the majority and the dissenting judgment shared the same views regarding the manner in which Olney J considered the evidence.

Chief Justice Black in dissent found that, although Olney J was not so strict regarding the allowable evolution of native title so as to invoke a ‘frozen in time’ approach, his Honour did adopt a meaning of ‘traditional’ in s 223(1)(a) of the NTA which too severely limited the extent to which laws and customs may evolve over time.\(^{15}\) In conjunction with this, the dissenting judgment also criticised Olney J’s over-reliance on the writings of Curr and the 1881 petition, coming to the conclusion that ‘there were very important aspects of the evidence that should have been, but were not, dealt with’.\(^{16}\)

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\(^{14}\) Ibid [67] and [176].

\(^{15}\) Ibid [68].

\(^{16}\) Ibid [86].
The majority held that Olney J had committed no error in the consideration of evidence and believed

there was more than adequate evidence before his Honour to support his Honour's finding that there was a period of time between 1788 and the date of the appellants' claim during which the relevant indigenous community lost its character as a traditional community.\(^\text{17}\)

The majority also preferred the approach taken in *Western Australia v Ward*\(^\text{18}\) over that espoused in *Mabo*, finding that ‘the claimants will carry the ultimate or legal burden of establishing that their title has not been extinguished’.\(^\text{19}\)

The claimants appealed the decision to the High Court on the grounds that Olney J’s approach, even if did not amount to a ‘frozen in time’ approach, was incorrect. They argued that, rather than looking at pre-Sovereignty laws and customs and tracing their passage over time, the correct approach, since the *NTA* is written in present tense, is to proceed with an assessment of whether current laws and customs can be aptly described as ‘traditional’.\(^\text{20}\)

**High Court**

On 12 December 2002 the High Court handed down its decision in *Members of the Yorta Yorta Aboriginal Community v Victoria*,\(^\text{21}\) upholding the ruling of the Full Federal Court and refusing to set aside the initial decision of Olney J. The lead judgment was that of Gleeson CJ, Gummow and Hayne JJ, with separate judgments in concurrence from McHugh and Callinan JJ and a dissenting judgment from Gaudron and Kirby JJ.

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17 Ibid [194].  
18 (2002) 213 CLR 1 (*Ward*).  
19 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2001) 110 FCR 244, [159].  
20 Henriss-Andersen, above n 3, 334.  
21 (2002) 214 CLR 422 (*Yorta Yorta*).
These judgments will be examined at length below, but it is useful to briefly describe each judgment before beginning further examination.

To put it simply, the lead judgment states that s 223(1)(a) of the *NTA* provides us with three requirements a native title claim must fulfil to be successful:\(^{22}\)

- The native title must consist of identifiable rights and interests in the land which arise from traditional laws and customs;
- To be considered traditional, laws and customs must be rooted in a normative society that existed prior to the acquisition of Sovereignty in the area by the Crown; and
- The existence of that normative society must have continued since the acquisition of sovereignty.

In relation to the ‘traditional’ nature of laws and customs, the majority was prepared to acknowledge that there were acceptable levels of adaptation of law and custom over time.\(^{23}\) Although they upheld the Full Federal Court’s view that there was a requirement of continuity of connection, their Honours believed that it arose from the ‘tradition’ requirement of s 223(1)(a) of the *NTA* and not from an incorporation of the common law under s 223(1)(c), as was asserted by the Full Federal Court.\(^{24}\)

Callinan J’s judgment is, for the most part, in agreement with the lead judgment. It primarily consists of a discussion of the evidentiary findings of Olney J and ‘is

\(^{22}\) As summarised in Karin Costenoble, ‘Defining Native Title: What is a Normative System?’ (2003) 6(3) Native Title News 30, 30.

\(^{23}\) See *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [44].

\(^{24}\) See *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [42].
expressed as a defence of them.25 The major point of difference between Callinan J and
the rest of the majority is that his Honour calls into question the ability of laws and
customs to change and evolve over time26 and levels particular criticism at the
application of that concept in *Yanner v Eaton*.27

McHugh J agreed with the majority, although his Honour noted that their ruling in
regards to s 223(1)(c) of the *NTA* did not accord to Parliament’s intentions when
framing the legislation. However, since that interpretation of the legislation had already
been made in *Commonwealth v Yarmirr*,28 his Honour held that the ruling must stand.29

Gaudron and Kirby JJ agreed with the majority that native title rights and interests must
have their source in pre-Sovereignty traditional law and custom, but they saw no reason
for there to be a requirement of continuity of connection. All that the *NTA* requires,
argued Kirby and Gaudron JJ, is that the laws and customs by which the claimants have
a connection to the claimed land are sourced in the laws and customs of the normative
society that existed prior to the acquisition of Sovereignty.30 This dissenting opinion
seems, at least to this author, to be a well-reasoned and appropriate interpretation of the
*NTA*, particularly in comparison to the majority judgment, a view shared by other
commentators.31

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30 See especially Ibid [124].
**Legislative Interpretation**

**Interpretation of ‘Traditional’**

In the High Court, the claimants argued that, in light of *Yarmirr v Commonwealth*, it is to the *NTA* that the fullest regard must be paid in native title cases and noted that s 223(1) is positively constructed in the present tense. All members of the High Court agreed on this point. However the majority did not look favourably upon the conclusions which the claimants drew from this proposition.

The claimants postulated that, since the definition of native title is constructed entirely in the present tense, questions of the existence of native title must turn entirely on an assessment of the content of the laws and customs currently observed. The majority disagreed and held that the word ‘traditional’ in s 223(1)(a) of the *NTA* conveys a meaning transcending its usage in normal English:

> A traditional law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice. But in the context of the *Native Title Act*, "traditional" carries with it two other elements in its meaning. First, it conveys an understanding of the age of the traditions: the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. It is only those normative rules that are "traditional" laws and customs. Secondly, and no less importantly, the reference to rights or interests in land or waters being possessed under traditional laws acknowledged and traditional customs observed by the peoples concerned, requires that the...
normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty.\textsuperscript{34} Thus it is essential, for native title to be proven, to be able to trace observance of law and custom from the time of acquisition of sovereignty to the present day. This requirement, the continuity of connection requirement, will be discussed at much further length below.

Like the majority, Gaudron and Kirby JJ believed the use of the word ‘tradition’ implied a link with the past. However they preferred a more measured approach under which it was interpreted in a manner more in keeping with its usage in everyday English.\textsuperscript{35} Thus the concept of continuity of connection is a matter that bears directly on the question whether present day beliefs and practices can be said to constitute acknowledgement of traditional laws and observance of traditional customs…\textsuperscript{36} but is not an independent requirement of native title law.

The majority judgment suffers from being both too broad in its application of judicial interpretation in some respects, and too limited in other respects. The willingness of the majority to create an entire separate requirement based on that one word ‘traditional’ is a significant leap of judicial interpretation. It is an interpretation in which it is accepted as self-evident that the word ‘traditional’ is equivalent to the phrase ‘in existence

\textsuperscript{34} Ibid \[46]-[47].
\textsuperscript{35} Ibid \[112].
\textsuperscript{36} Ibid \[111].
continuously since the acquisition of Sovereignty’. Surely such a construction merits more contemplation than the blithe acceptance it received in the majority judgment.\(^{37}\)

The construction of s 223(1) of the \textit{NTA} by the High Court is also conspicuous by its refusal to consider the broader concept of the Act as a whole. The \textit{NTA} was an attempt to create positive outcomes for Indigenous Australians by recognising their pre-existing rights to land, rather than an attempt to create and define a new form of land tenure.\(^{38}\) Instead, the majority take the imperious approach of taking the terms of s 223(1) out of context and interpreting them individually. This has the effect of elevating terms intended to be simply means by which pre-existing rights could be recognised, to ‘ends in themselves’:\(^{39}\) ultimate instruments of the definition of native title.

\textbf{Rejection of Common Law}

All members of the High Court followed the direction of the majority that ‘[n]ative title is not a creature of the common law…[it] is what is defined and described in s 223(1) of the \textit{Native Title Act}'.\(^{40}\) Even McHugh J, who expressed serious doubts about the logic of that view, had to concede that, under precedent, the settled law was that the \textit{NTA} is the only source for the rules determining the content of native title.\(^{41}\)


\(^{38}\) See the objects listed at s 3(a) of the \textit{Native Title Act 1993} (Cth).

\(^{39}\) Anker, above n 2, 4.

\(^{40}\) \textit{Members of the Yorta Yorta Aboriginal Community v Victoria} (2002) 214 CLR 422, [75].

\(^{41}\) Ibid [128].
This runs counter to the intention of Parliament in enacting the legislation. The McHugh J judgment details this:

Senator Evans told the Senate in 1993: "We are not attempting to define with precision the extent and incidence of native title. That will be a matter still for case by case determination through tribunal processes and so on. The crucial element of the common law is the fact that native title as such, as a proprietary right capable of being recognised and enjoyed, and excluding other competing forms of proprietary claim, is recognised as part of the common law of the country". Similarly, Senator Minchin told the Senate in 1997: "I repeat that our Act preserves the fact of common law; who holds native title, what it consists of, is entirely a matter for the courts of Australia. It is a common law right."\(^{42}\)

This evidence opposes directly the statement of the majority that ‘[n]ative title is not a creature of the common law’.\(^{43}\) Although it is not binding on the High Court, the House of Lords decision \(\text{Bank of England v Vagliano Bros}^{44}\) is very specific on this issue:

I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used…\(^{45}\)

\(^{42}\) Ibid [129]-[130], quoting Commonwealth, \(\text{Parliamentary Debates}\), Senate, 16 December 1993, 5097 (Senator Gareth Evans, Chair of the Joint Native Title Committee) and Commonwealth, \(\text{Parliamentary Debates}\), Senate, 2 December 1997, 10171 (Senator Nick Minchin, Special Minister for State) respectively.

\(^{43}\) Ibid [75].

\(^{44}\) [1891] AC 107.

\(^{45}\) Ibid 144-5.
Thus it would appear that, on a strictly jurisprudential basis, the approach taken by the High Court in refusing to incorporate the common law was correct.

This approach has also been widely attacked for its failings in both logical reasoning and non-adherence to the principles of fairness. Pearson not only attacks it as being ignorant of over 200 years of established common law aboriginal title precedent, but questions the validity of allowing the NTA to define native title in a way departing from the common law under the ‘just terms’ provisions s 51(xxxi) of the Constitution.

Poynton and Hepburn both note that, since Mabo has defined native title as a divergent and sui generis form of title, any attempt to codify it within an Anglo-European system is fundamentally flawed. Put simply, it sits uncomfortably with the principles of justice that the High Court can place complete emphasis upon one on term within the NTA, ignoring the stated aims of the Act, the common law upon which it was based and the legal framework surrounding it.

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47 Ibid 13. Section 18 of the Native Title Act 1993 (Cth) does have a ‘just terms’ provision, however, as Pearson notes, it prima facie covers only past acts of the Crown.
49 It is important to note that an interpretation of s 223(1) of the NTA which borrowed more heavily from the common law (especially Mabo v Queensland (No 2) [1992] 175 CLR 1), would not necessarily have found that continuity of connection was not a prerequisite for establishing native title. Indeed much of the majority statement in this regard mirrors the Mabo v Queensland (No 2) [1992] 175 CLR 1 judgment. See especially Maureen Tehan, ‘A Hope Disillusioned, An Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the Native Title Act’ (2003) 27(2) Melbourne University Law Review 523, 562-3. However even if this were so, the point is still made that the approach of viewing the terms of the Native Title Act 1993 (Cth) as the discrete and complete source of the definition of native title ignores political and judicial context.
A Normative System

Requirement of a Normative System

Viewing native title as the result of the intersection of two legal systems, the majority hold it as self-evident that the rights and interests in land comprising native title must be rooted in pre-Sovereignty and cannot have been created by the superseding power. Following on from this, it was held that the pre-Sovereignty society in which those rights and interests have their roots must be of a normative nature:

When it is recognised that the subject matter of the inquiry is rights and interests (in fact rights and interests in relation to land or waters) it is clear that the laws or customs in which those rights or interests find their origins must be laws or customs having a normative content and deriving, therefore, from a body of norms or normative system - the body of norms or normative system that existed before sovereignty.

There is no attempt to further justify this proposition. This constitutes a significant failing of the judgment, since it is by the definition of ‘traditional laws and customs’ that the entire construction of native title is framed. Thus the requirement of normativity imposed upon those laws and customs bears heavy on that construction. Being of such critical importance, it is incongruous that the construction of the term ‘traditional laws and customs’ as incorporating a requirement of normativity is not explained and justified in a more detailed manner.

50 An unwieldy approach that will be further critiqued below.
51 Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422, [37].
52 Ibid [38].
In their judgments in agreement, Callinan and McHugh JJ do not mention any requirement of normativity. This is hardly surprising given the highly specific nature of their judgments.\textsuperscript{53} Justices Gaudron and Kirby also do not weigh heavily into the debate, merely remarking that all that is necessary is that the ‘laws and customs…should have their origins in the past’.\textsuperscript{54} In addition, they later note that ‘a society must be sufficiently organised and cohesive to sustain beliefs and practices having normative influence’.\textsuperscript{55} The reason Gaudron and Kirby JJ do not entertain any further discussion on the matter is their belief that an examination of the claimant group structure and history is not directly relevant to the question of whether a claimant has proven native title, as will be discussed below.

**Definition of ‘Normative System’**

The term ‘normative system’ is not one often used in a legal context and there was previously no well-established legal definition. In non-legal fields, there are a variety of different interpretations of the term; as an elucidation of the ideal rather than the actual (philosophy), as a norm that should be followed to minimise risk and increase profit (economics) or as a set of cultural definitions of desirable behaviour (anthropology).\textsuperscript{56}

The majority cite renowned legal philosopher John Austin, who defined a normative system as ‘a body of commands or general orders backed by threats which are issued by

\textsuperscript{53} As discussed above.

\textsuperscript{54} *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [113].

\textsuperscript{55} Ibid [116].

\textsuperscript{56} See Costenoble, above n 22, 31.
a sovereign or subordinate in obedience to the sovereign’. 57 However this definition is recognised as being of no utility in native title, since Indigenous Australian societies generally do not accord to Anglo-European norms. 58 The majority further envisage the question as possibly the quest to find a ‘rule of recognition which would distinguish between law on the one hand, and moral obligation or mere habitual behaviour on the other’. 59 Such a rule of recognition would seem to be a necessity where the normativity of a pre-Sovereignty societal system is a pre-requisite in proving native title, since ‘[w]ithout that quality, there may be observable patterns of behaviour but not rights or interests in relation to land or waters’. 60

The majority however, found that none of these definitions were definitively correct:

What is important for present purposes, however, is not the jurisprudential questions that we have identified. It is important to recognise that the rights and interests concerned originate in a normative system… 61

Therefore it is absolutely necessary for claimants to prove that their rights and interests are generated from a system that must be normative in nature, but there is no strict definition of that term and no methodology given to ascertain whether a system is normative in nature. All that we are given to guide us is a vague notion that there is a distinction between a normative society which generates specific and binding laws and customs, and some other sort of community in which behaviour accords only to

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57 Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422, [41].
58 Ibid [40].
59 Ibid [41].
60 Ibid [42].
61 Ibid [43].
observable patterns of behaviour. As Anker notes, had the theory of HLA Hart been examined in detail,62 a test could have been built upon his theory that

the difference between legal behaviour and mere habit lies in the internal sense obligation felt by those subject to the normative rules…[i]t is the participant’s perspective that is fundamental to the character of law.63

However the legacy of *Yorta Yorta* is the requirement of a normative system, with no means of testing the appropriateness of fixing a given society with that moniker.

There is also some discrepancy in the majority judgment about how the normative system itself and the laws and customs generated by it are linked. There is no doubt for the majority that laws and customs are ‘inextricably interlinked’64 to their normative system, but what exactly are the mechanics of that linkage? First their Honours state that ‘it is clear that the laws or customs…must be laws or customs having a normative content and deriving, therefore, from a body of norms or normative system’.65 Yet one paragraph later, it is ‘evident that a reference to "traditional laws acknowledged, and the traditional customs observed" is, in fact, a reference to a body of norms or normative system’!66 Thus we have a situation where laws and customs must simultaneously have normative content, must be derived from a normative system and must constitute that normative system from which they are derived.67 Such an apparent contradiction serves only to further muddy the already murky waters through which post-*Yorta Yorta* courts must navigate to ascertain the normativity of the society attempting to prove native title.

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62 Hart’s theories on normativity are mentioned briefly at ibid [41] but not returned to analytically.
63 Anker, above n 2, 16.
64 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [55].
65 Ibid [38].
66 Ibid [39].
67 As summarised in Costenoble, above n 22, 33.
Unclear as it is, that assessment of normativity is strictly required by the law as espoused in *Yorta Yorta*.
**Continuity**

**Requirement of Continuity**

It was in its interpretation of s 223(1) of the *NTA* that the *Yorta Yorta* High Court left its greatest legacy. Section 223(1) of the *NTA* reads as follows:

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.

As has been noted, the majority found that the word ‘traditional’ as employed in the *NTA* had a definition that exceeded its usage in everyday English. In particular they found that it carried with it a requirement of continuity in which:

the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty. If that normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist.\(^{68}\)

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\(^{68}\) Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422, [47]. For a discussion of the concept of a normative system see above.
Although the doctrine of continuity had been hinted at previously, this proposition broke new ground in Australian native title and represents, to this writer at least, a more tenuous exercise in statutory interpretation. The Yorta Yorta High Court justify it by accepting the submission of the claimants that “traditional” is a word apt to refer to a means of transmission of law or custom, and extrapolating this to assert that a ‘traditional law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice’. Since the majority accepted the assertion of renowned legal theorist Professor Julius Stone that ‘laws and customs do not exist in a vacuum’ and are ‘socially derivative and non-autonomous’, they found that for the requirement of traditionality to be fulfilled (that is for the continued generational transference of law and custom) there must have been continuity in the existence of the society within which those laws and customs passed.

Although the majority held that it was a strict requirement that the society maintain its existence throughout time since the assertion of European sovereignty, ‘it is recognised that the laws or customs now said to be acknowledged and observed are laws and customs that have been adapted in response to European settlement’. In this recognition, the majority allow for the laws and customs themselves to adapt over time yet still remain within the limits of traditionality. The level of this adaptation constitutes

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69 See Mabo v Queensland (No 2) (1992) 175 CLR 1, 43 and further discussion above.
70 The closest Australian native title had come to any definitive requirement of a linkage between past and present was the assertion that ‘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’ (Mabo v Queensland (No 2) (1992) 175 CLR 1, 43), given without any indicia of when that ‘tide of history’ has indeed severed the linkage. See further discussion above.
71 Similarly, it is described in Seidel, above n 25, 3 as ‘statutory interpretation with no regard to the context, consideration of detrimental implications for the less powerful players and key international human rights standards’.
72 Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422, [46].
73 Ibid [49].
74 Ibid [82].
a separate issue in itself to be examined at length below, but it is important to note that
it is the only restriction on absolute continuity of law and custom the majority were
prepared to make to reflect the effect of over 200 years of dispossession and dislocation
by Australia.

Gaudron and Kirby JJ commence an examination of the requirements of s 223(1) of the
NTA in a remarkably similar manner as the majority, agreeing that ‘traditional’
ordinarily signifies intergenerational transference and coming to the conclusion that

[w]hat is necessary for laws and customs to be identified as traditional is that they should have
their origins in the past and, to the extent that they differ from past practices, the differences
should constitute adaptations, alterations, modifications or extensions made in accordance with
the shared values or the customs and practices of the people who acknowledge and observe those
laws and customs.

However where the majority decided that continuity of society was in itself a necessary
requirement to fulfil s 223(1), the minority ruled that ‘continuity of community is…a
matter which bears directly on the question whether laws and customs are properly
described as traditional’. Thus the burden is not on the claimant to prove continuity of
connection as an independent requirement, but the

relevant issue under ss 223(1)(a) and (b) of the Act is simply whether the Yorta Yorta people
now acknowledge and observe traditional laws and customs by which they have a connection
with the land and waters claimed by them.

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75 Ibid [112].
76 Ibid [114].
77 Ibid [116].
78 Ibid [124].
The difference in the reasoning between the minority and the majority is twofold. Firstly, the minority do not accept that the use of the word ‘tradition’ in s 223(1) directly requires that a connection be maintained since Sovereignty:

There is nothing in that paragraph or any other part of the definition of “native title” or “native title rights and interests” which [dictates] that “traditional connexion [sic] with the land...[be] substantially maintained”.

Their Honours go on to postulate that the error Olney J made by requiring continuity of connection may have come about by virtue of the appellant’s assuming the responsibility of proving such continuity. Whatever the reason for the error, the minority noted that since proof of continuity is not required by s 223(1), any attempt to prove it represents a voluntary undertaking going towards, but not being in itself necessary for, proving the traditional nature of current law and customs.

In addition, the minority also found that the requirement for continuity of connection as espoused by the majority failed on theoretical grounds. For the minority, the reliance on the contention of Professor Stone’s that law and custom are inextricably linked to the existence of a normative society does not allow for the fact that individuals may, on the dispersal of a community, continue to acknowledge traditional laws and observe traditional customs so that, on regrouping, it may be that it can then be said that the community continues to acknowledge traditional laws and observe traditional practices. Just like the Europeans who uprooted themselves to settle in Australia but continued to be governed by Anglo-European standards of morals and conduct, so did Gaudron and

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79 Ibid [123].
80 Ibid.
81 Ibid [118].
82 The ability of the English common law system to continue when transported overseas, albeit in modified form, has been long recognised. As Lord Denning put it in *Nyali v Attorney General* [1956] 1 QB 1, 37: 'Just as the English oak, so with the English common law. You cannot transplant it to the
Kirby JJ contemplate the possibility of Indigenous Australian societies to be uprooted and later reformed, whilst continuing to observe the same system of traditional law and custom. In any case, the manner in which Olney J had decided that there had been a cessation of the society (by reference primarily to historical documents and other such evidence) failed to take into account the very manner by which a society is defined:

the question whether a community has ceased to exist is not one that is to be answered solely by reference to external indicia or the observations of those who are not or were not members of that community. The question whether there is or is not continuity is primarily a question of whether, throughout the period in issue, there have been persons who have identified themselves and each other as members of the community in question.83

Particularly in the absence of a fixed definition of what a normative society is,84 the true indicia of a society are internal recognition and self-regulation. For Gaudron and Kirby JJ it was this aspect of normativity which precluded the possibility of a strict requirement of continuity, a requirement which, according to their Honours, was not specifically necessitated by s 223(1) of the NTA.

The minority judgment highlights inconsistencies within the position of the majority in regards to the continuity of connection requirement, inconsistencies that are highlighted further when the position is analysed in more depth. As has been discussed above, the majority decried the ‘frozen in time’ approach, found that only those rights and interests existing prior to sovereignty may be validly held and ruled that the society in question must have been normative in nature and had a continued existence. However by denying

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83 Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422, [117].
84 See discussion on the requirement of normativity above.
the society the ability to create new laws, the majority perpetuate the ‘frozen in time’
approach by denying adaptability in the form of creating new laws to respond to the
passing of over 200 years. This denies the very nature of that normative system which
created those laws. As Anker details, the majority in *Yorta Yorta* requires that the
traditional laws and customs are

> preserved in some kind of colonial formaldehyde since 1788 (albeit with the possibility that the
> mode of practice might have changed), because the ability to breathe ongoing life into them is
> excluded by the idea of state sovereignty. Despite their reassurances to the contrary, the majority
> seems to adopt a ‘frozen in time’ approach.85

Paradoxically, the majority demand that the society be jurisgenic in nature such that it
can create binding laws prior to sovereignty, but to suddenly lose this innate
characteristic of its normativity at the time of sovereignty, whilst still maintaining a
‘continuous existence and vitality’.86 This is an untenable situation. Put bluntly, ‘[l]egal
systems simply do not work that way’.87

The majority do not entertain any serious discussion as to the mechanics of just how a
society simply ceases to be. A society is a ‘fluid, adapting and changing entity’,88 which
has significant capacity to adapt and be transformed as the generations pass. Thus the
cessation of a society must surely be a cataclysmic event, one in which all traces of the
society have disappeared. The Yorta Yorta society, although suffering the massive
effects of dispossession and removal from their lands, have not been totally obliterated
in this manner, as evidenced prima facie by the existence of a group of Yorta Yorta

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85 Anker, above n 2, 19.
86 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [47].
87 Sean Brennan, Brenda Gunn and George Williams, “‘Sovereignty’ and its Relevance to Treaty-Making
88 Seidel, above n 25, 3.
people, descended from the Yorta Yorta at sovereignty,89 fighting for their rights to land to be acknowledged. However the majority blithely accepted Olney J’s declaration that the society had ceased sometime between the present day and sovereignty, without any serious discussion of how that counter-intuitive assertion had been reached. In this manner, the majority turn Mabo’s ‘tide of history’90 into a ‘tsunami’91 sweeping aside all traces of pre-existing societies, regardless of any indications to the contrary.

In the international context, the continuity of connection requirement is a uniquely Australian construct. It is accepted principle in most equivalent foreign jurisdictions that the acquiring state give full respect to existing rights in and relationships to land.92 The continuity of law and custom thus should be ‘relevant only to the demonstration of the continuance of the society and to regulate relationships between members of the society’.93 Far from requiring claimants to prove continuity from sovereignty to the present day, international law tells us that ‘[o]nce Aboriginal title is established it is presumed to continue until the contrary is proven’.94 Thus the requirement of continuity of connection represents not only a paradoxical and radical exercise in statutory interpretation, but also a marked departure from international jurisprudence.

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89 In Members of the Yorta Yorta Aboriginal Community v Victoria [1998] FCA 1606 [104] Olney J found that a number (but not all) of the members of the claimant group were descended from the identified Yorta Yorta members at sovereignty. This was accepted by the majority of the High Court in Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422 at [22].
90 Mabo v Queensland (No 2) (1992) 175 CLR 1, 43. See above.
91 Poynton, above n 31, 264.
92 See discussion on international principles relating to common law aboriginal title above.
94 Calder v Attorney-General of British Columbia (1973) 34 DLR (3d) 145, 208. See also Amodu Tijani v Secretary Southern Nigeria (1921) 2 AC 399, 401.
**Interruption to Continuity**

Once the *Yorta Yorta* High Court had established that that the claimants must demonstrate that continuity of connection since sovereignty had been ‘substantially uninterrupted’, it might be expected that it embark upon an examination of what test is to be applied to determine continuity. In other words, an answer to the question of when a society has been so disrupted as to constitute an interruption to continuity. The majority decline to do this, instead giving cursory comment on the reason for the inclusion of the qualification ‘substantially uninterrupted’, followed by a re-affirmation of the strictness of the continuity requirement, effectively nullifying that qualification:

It is a qualification that must be made to recognise that European settlement has had the most profound effects on Aboriginal societies and that it is, therefore, inevitable that the structures and practices of those societies, and their members, will have undergone great change since European settlement. Nonetheless, because what must be identified is possession of rights and interests under traditional laws and customs, it is necessary to demonstrate that the normative system out of which the claimed rights and interests arise is the normative system of the society which came under a new sovereign order when the British Crown asserted sovereignty, not a normative system rooted in some other, different, society. To that end it must be shown that the society, under whose laws and customs the native title rights and interests are said to be possessed, has continued to exist throughout that period as a body united by its acknowledgment and observance of the laws and customs.  

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95 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [87].
96 Ibid [89].
This effectively reduces the term ‘substantially maintained’ to allowing for, in certain cases, inferences to be drawn as to continuity where there is no evidence to the contrary.97

Following this, the majority go on to explain why the term ‘interruption’ has been chosen rather than ‘abandonment’:

"Abandonment” might be understood as suggesting that there has been some conscious decision to abandon the old ways, or to give up rights and interests in relation to the land or waters…[b]ut the inquiry about continuity of acknowledgment and observance does not require consideration of why, if acknowledgment and observance stopped, that happened. That is, continuity of acknowledgment and observance is a condition for establishing native title. If it is not demonstrated that that condition was met, examining why that is so is important only to the extent that the presence or absence of reasons might influence the fact-finder's decision about whether there was such an interruption.98

Examined in isolation, this assertion that the intention behind the abandonment of traditional rights in land is irrelevant is startling for its lack of reference to either the NTA or any existing common law precedent, relying only on the self-assertion that the continuity requirement is a strict requirement. This is even more concerning when viewed in light of established international jurisprudence, which dictates that common law aboriginal title only expires (as opposed to being extinguished) when there is a clear intention to on the part of the traditional owners to do so.99 Specifically it has been found in the US that being forced onto reservations or failing to resist European

98 Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422, [90].
encroachment are not in themselves grounds for expiry of traditional title. Both of these examples are events akin to events leading to Olney J’s conclusion that there had been an interruption of the enjoyment of native title by the Yorta Yorta people. However, the High Court preferred to adhere to its own pragmatic principles and uphold that conclusion, rather than draw on established international precedents.

**Evolution of Law and Custom**

As noted above, the *Yorta Yorta* High Court judgment does not fully contemplate the ability of laws and customs to adapt over time yet still retain their requisite traditionality. Recognition of this ability was a cornerstone of the *Mabo* decision, and was highlighted in later cases, especially *Yanner v Eaton*. In the latter case, it was found that traditional rights to hunting and fishing could be carried out in modern fashion. In particular it was found that fishing from a modern motorised boat was an acceptable adaptation of the right to fish as carried out prior to sovereignty. This finding was specifically criticised by Callinan J in *Yorta Yorta* who

might have questioned whether the use of a motor boat powered by mined and processed liquid fuel, and a steel tomahawk, remained in accordance with a traditional law or custom.

It was this difference of opinion which caused his Honour to comment that the ability of laws and customs to adapt ‘may raise difficult questions’.

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100 United States v Santa Fe Pacific Railroad Co (1941) 314 US 339, 356 and Seminole Indians v United States (1964) 13 Ind Cl Comm 326, 362-3 respectively.
101 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 92 and 110.
103 Ibid 381-2.
104 Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422, [187].
105 Ibid.
In the joint judgment of the majority it is agreed that ‘difficult questions of fact and degree may emerge’\textsuperscript{106} They elaborate as follows:

It is not possible to offer any single bright line test for deciding what inferences may be drawn or when they may be drawn [from any apparent adaptation of law and custom], any more than it is possible to offer such a test for deciding what changes or adaptations are significant…What is clear, however, is that demonstrating some change to, or adaptation of, traditional law or custom or some interruption of enjoyment or exercise of native title rights or interests in the period between the Crown asserting sovereignty and the present will not \textit{necessarily} be fatal to a native title claim. Yet both change, and interruption in exercise, may, in a particular case, take on considerable significance in deciding the issues presented by an application for determination of native title. 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?\textsuperscript{107}

Although this position is in itself relatively uncontroversial, it serves in the context of the decision as a whole to make the law regarding allowable levels of evolution much more narrow in its approach.

This was due to the importance which the majority placed upon the Crown’s assertion of sovereignty as the most important moment in the relationship between Indigenous and non-Indigenous legal systems. It was considered axiomatic that

the assertion of sovereignty by the British Crown necessarily entailed was that there could thereafter be no parallel law-making system in the territory over which it asserted

\textsuperscript{106} Ibid [82].
\textsuperscript{107} Ibid [82]-[83].
Because there could be no parallel law-making system after the assertion of sovereignty it also follows that the only rights or interests in relation to land or waters, originating otherwise than in the new sovereign order, which will be recognised after the assertion of that new sovereignty are those that find their origin in pre-sovereignty law and custom.108

This creates a point in time (the assertion of sovereignty) from which rights and interests in land can only diminish. Therefore, although the majority allowed for the adaptation of laws and customs to undefined acceptable levels, the rights and interests to land were fixed at the time of sovereignty. This not only necessarily limits the level to which laws and customs are able to adapt, but, since each law and custom must be clearly and separately defined,109 means that each adaptation of a law or custom dissociates that law or custom from its fixed natal right, meaning that it is no longer rooted in a pre-Sovereignty Indigenous society.110

The minority judgment displays not only a less pragmatic and more judicial approach to the adaptation of traditional law and custom, but one in which their Honours ‘have captured more accurately the post-colonial motives that originally drove the recognition of indigenous rights to land’.111 Allowable evolution of law and custom is discussed by the minority as follows:

In the face of the acknowledged history of dispossession, it must be accepted that laws and customs may properly be described as "traditional" for the purposes of s 223(1) of the Act, notwithstanding that they do not correspond exactly with the laws and customs acknowledged

108 Ibid [44].
109 As discussed above, this requirement comes from Western Australia v Ward (2002) 213 CLR 1. For further discussion on this ‘bundle of rights’ approach and how it limits evolution see Bartlett, above n 93, 98-99.
110 See further discussion in Alex Reilly and Ann Genovese, ‘Claiming The Past: Historical Understanding in Australian Native Title Jurisprudence’ (2004) 3 The Indigenous Law Journal at the University of Toronto Faculty of Law 19, 29-31.
111 Anker, above n 2, 4.
and observed prior to European settlement. What is necessary for laws and customs to be identified as traditional is that they should have their origins in the past and, to the extent that they differ from past practices, the differences should constitute adaptations, alterations, modifications or extensions made in accordance with the shared values or the customs and practices of the people who acknowledge and observe those laws and customs.\footnote{112}{Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422, [113]-[114].}

Thus the relevant question, although similar to that asked by the majority, is positively assumptive rather than negatively assumptive. In other words, where the majority ask ‘is the law and custom still traditional after such adaptation has taken place?’, the minority ask ‘is the adaptation made in keeping with the nature of the society from which the law or custom is borne?’. This approach reflects more accurately the reasoning that, since laws and customs are tied to the society in which they exist,\footnote{113}{This is a cornerstone of the decision of the majority. See above and Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422 [49].} and a society must adapt to changing circumstances over time, surely laws and customs must adapt in similar fashion.\footnote{114}{See further discussion in Brennan et al, above n 87, 349.}

The difference between the two approaches is highlighted by the discussion of the adaptation of reburial practices in the minority judgment. At first instance Olney J found that the reburial of the remains of Yorta Yorta ancestors which had been removed from their original resting places did not constitute a traditional customary practice, on the grounds that such reburials would not have been made prior to sovereignty.\footnote{115}{Members of the Yorta Yorta Aboriginal Community v The State of Victoria [1998] FCA 1606 at [124].}

Applying their interpretation, the minority judges on appeal questioned the validity of this finding, opining that

\[his\] Honour did not consider whether the reburial practices had their origins in the past in that, for example, they had evolved out of earlier practices or constituted an adaptation of earlier laws...
or customs, with the consequence that they had a sufficient degree of continuity with the past that they could properly be described as traditional for the purposes of s 223(1)(a) of the Act.116

For the minority, the fact that reburials did not take place prior to sovereignty was irrelevant, since there had been no exhumation of bodies to necessitate their reburial. What was relevant was whether those reburial practices were conducted in accordance with the general body of laws and customs of the traditional society.

The majority’s acceptance of this and other conclusions of Olney J regarding the adaptation of law and custom is an incongruous aspect of the majority judgment, especially in comparison to the approach taken by the minority. As detailed above, Olney J found the requirement of continuity came from pre-existing common law principles (especially those ensconced in Mabo) whereas the Yorta Yorta High Court majority found it in the words of the NTA. Although they arrive at the same result, this difference means the processes are constructed of a different set of inquiries. One is predominantly an assessment of the evolution of a bundle of rights and interests whilst the other is a vague assessment of the continued existence of normative system. Thus the majority judgment ends with

a significant leap of faith in allowing Justice Olney’s assessment of the facts elicited for the purpose of one inquiry to form the basis for confidently drawing the same conclusion based on the very different inquiry set out in the final appeal.117

The attitude of the Yorta Yorta High Court toward the evolution of laws and customs in native title acts to perpetuate the ‘frozen in time’ approach which it so vehemently decried. Although they allow for evolution to take place, the majority frame the test of

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116 Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422, [115].
traditionality in a manner which severely hampers the ability of laws and customs to adapt over time and remain within the sphere of traditionality. Rather than recognise the existence of Indigenous societies on the face of great adversity, Australian jurisprudence now fixes the content of native title rights as they were at sovereignty and thus ‘turns them into relics of a functioning legal system’.

The Yorta Yorta people could not fairly be expected to prove that they lived in exactly the same manner as their ancestors of over 200 years ago, nor did they attempt to. At trial, the claimants freely admitted to the influence of Christianity and environmentalism on their attitudes towards spirituality, land management and self-regulation, but asserted that they owed their very existence as a society to the society of their ancestors in existence prior to the acquisition of Sovereignty. However the Australian native title law espoused in *Yorta Yorta* asks much more of native title claimants, as expressed by Yorta Yorta woman Monica Morgan reflecting upon her experiences over the course of the trial:

> The judge’s determination, of course, applied at the end of the day a test that nobody can satisfy in any part of the world: that you had to be exactly the same as your ancestors [of] 200 and more years ago. That is an absolute fallacy. You can’t do that. There is no way that anybody on earth is going to be able to do that.

Not only is this a manifestly oppressive requirement to thrust upon native title claimants, but it is also racially discriminatory, since it prevents Indigenous societies

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118 Reilly and Genovese, above n 110, 35.
from adapting and retaining their rights to land in the same manner as Anglo-European societies. As Mundine puts it:

we've been the only race of people in the world whose culture [apparently] doesn’t change, it doesn’t move, it doesn’t shake, it doesn’t jump up and down…Look at Captain Cook, he didn’t come out here on the ‘Endeavour’ with hip-hop music and all the other stuff that was going on, but we say to the English people, they’re English people. I reckon the same rules should apply to…the recognition of Aboriginal culture as a growing, changing, developing culture.121

It is indeed a blight on Australian jurisprudence that Indigenous societies have had their ability to adapt in the face of time, an ability rightly retained by all other Australian societies, nobbled by the pragmatism of the Court.

**Relationship of Current Connection to Continuity**

There is relatively little attention paid to how the current relationship between the claimants of their land is linked the continuity of that relationship since the acquisition of sovereignty. A major reason for this is the lack of discourse in Australian law on the question of what the term ‘native title’ actually means. In other words, what is it that has continued through the acquisition of sovereignty? Considering that native title has always been considered *sui generis* and different in substance to Anglo-European notions of proprietary rights,122 it is surprising that this question has been given little attention. Since *Mabo* dictated that native title consists of specific and unique rights and interests in land,123 it has been accepted without consideration that it is these rights and interests which must have continued.

122 *Mabo v Queensland (No 2)* [1992] 175 CLR 1, 89. See above.
123 Ibid 57-8.
However such a blithe acceptance does not constitute a proper inspection of the *Mabo* decision. Toohey J in *Mabo* said that ‘[i]t is presence amounting to occupancy which is the foundation of the title which attracts protection, and it is that which must be proved to establish title’. Following on from this, native title is actually a title in itself under the power of the laws and customs generated by the rights and interests of the Indigenous society, not merely a collection of those rights and interests. Under such a treatment, native title is a title constituting the recognition by the common law of the fact of occupation of land by an indigenous community under authority of and in accordance with their traditional laws and customs. This recognition is essentially a *conclusion of law* based upon the *fact of occupation of land* under traditional law and custom.

Such an approach was followed in the Canadian case *Delgamuukw v British Columbia* and is indicative of the greater respect afforded to pre-existing Indigenous rights to land in Canadian law, and indeed in the law of most other common law countries. Viewing the composition of native title in this alternate manner would surely affect the manner in which the requirement of continuity is constructed. It is a failing of not only *Yorta Yorta*, but also the cases preceding it, that the composition of native title has been considered a fait accompli. However it is in *Yorta Yorta* alone that this failing has caused a severe restriction on the ability of Indigenous societies to adapt, by its strict continuity of connection requirement.

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124 Ibid 186. It is important to note that Toohey J is not installing occupation of land as a requisite requirement for proving *current* native title, but for proving the existence of native title at the acquisition of sovereignty.

125 Pearson, above n 46, 23.

126 (1997) 153 DLR 192, [145].
What is said in *Yorta Yorta* about the relationship between the laws and customs acknowledged currently and those acknowledged prior to the acquisition of sovereignty, is that it is this relationship that is the primary focus of any inquiry as to the existence of native title. It is made quite apparent that

[i]t would be wrong to confine the inquiry for connection between claimants and the land or waters concerned to an inquiry about the connection said to be demonstrated by the laws and customs which are shown now to be acknowledged and observed by the peoples concerned.128

What is necessary is that the transmission of law and customs be shown to have continued from sovereignty to the present day, and that present day laws and customs reflect this by their similarity to those of the pre-Sovereignty ancestors of the claimant group.129 The simplicity of this requirement is burdened by the strict requirement that the connection be maintained, that adaptation be allowed only under strict circumstances and that each law and custom be particularised, all of which combine to make the task of the claimant very onerous indeed.

Although they too ascribe without question to the conceptualisation of native title as a collection of rights and interests, the minority’s refusal to incorporate a strict continuity of connection requirement means they have a different view of the relationship between the current relationship of claimants to their land and that of their ancestors. They believe that the words of s 223(1) of the *NTA* require only that the laws and customs have their origins in the past and that any differences between the two groups be self-adaptations.130 This takes full account of the fact that s 223(1) of the *NTA* speaks in the present tense and thus dictates that the relationship between past and present should be

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127 Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422, [56].
128 Ibid.
129 Ibid [44].
130 Ibid [114].
viewed from the perspective of the people who currently practice the laws and customs. Thus the much harder to specifically demonstrate pre-Sovereignty society remains ‘an undefined source of traditional laws and customs’, \(^{131}\) not needing to be specifically determined.

The minority judgment also posits the society as the central point for its analysis of the relationship. A requisite society is similarly an integral element of the majority’s elucidation of the requirements of native title. \(^{132}\) Thus, as De Soyza postulates, the most important element of proof for a society, once its has proved it’s self-unification in following shared law and custom, is its ability to link itself to the pre-Sovereignty society. The other requirements should follow naturally. \(^{133}\) The minority position reflects this. The majority position does not, despite the fact it is the majority whom assert more strongly the importance of the society in its native title definition. For the majority, the relationship between the current society and the pre-Sovereignty society is of less importance than the traceable continuation of itemised rights and interests in land, subject to a strict requirement of continuity and limited ability to adapt.

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\(^{131}\) Anker, above n 2, 23.

\(^{132}\) See especially *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [38].

\(^{133}\) Anne De Soyza, ‘The Implications of *Bennell v Western Australia* for the High Court Decision of *Yorta Yorta v Victoria*’ (2006) 7(11) Native Title News 202, 203.
Treatment of Evidence

Law and History

There exists throughout the Yorta Yorta decisions a belief that the requirement of traditionality is a requirement that can be definitively proven one way or another. This is evidenced especially in the judgment of Branson and Katz JJ in the Full Federal Court:

We are...unable to accept the submission...that the test of whether a law or custom is traditional is a subjective test. That is, that the crucial question is whether those who currently acknowledge a law or observe a custom regard their practice of so doing as traditional. The adoption of a purely subjective test for the identification of traditional laws and customs would, it seems to us, leave considerable scope for the rewriting, perhaps unintentionally, of history.134

All the other members of the judiciary involved in the Yorta Yorta decisions ascribe to this, with the exception of Black CJ. His Honour believed that divining the answer involved a necessarily subjective test, lest the Court fall into error by failing to appreciate the intricacies of the past:

Special attention needs to be given to the essential nature of the subject matter of inquiry. The inquiry, when it is said that native title expired in colonial times, is not an inquiry about a single historical event concerning which the written record may be a very good guide...but something entirely more complicated and likely to involve a consideration of events over a lengthy period.135

This approach fully appreciates the vagaries involved with investigating the past. Its subjective nature allows for extrinsic influencing factors to be considered when assessing the historical record.

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134 Members of the Yorta Yorta Aboriginal Community v Victoria (2001) 110 FCR 244, [60].
135 Ibid
However the approach ultimately accepted by the High Court, which reflected the reasoning of Branson and Katz JJ, relies on three assumptions:  

- The past is determinable;
- The past is discernible from the present; and
- There is a written history testifying accurately as to this past.

The first two assumptions are necessary elements of our legal system, since the end product of a trial is a statement of the past which authorises the judgment made. However the third assumption represents a belief that there is an historical written body of work which depicts with precision a finite and measurable entity known as ‘the past’.

Putting aside for a moment the assertion of the existence of an unchallengeable written account of the past, it can be seen that the metahistory of the *Yorta Yorta* decision is that the past is knowable in its entirety. History is treated as a roadmap to the past, which lies awaiting our discovery. In requiring claimants to prove the character of native title rights and interests, *Yorta Yorta* presumes they can exist outside of this past and can be defined and adopted in the same fashion today as in the past. This refutes contemporary historiographical schools of thought which view history as an entirely flexible, subjective and fluid entity, which can never accord completely with the actual past. Reilly and Genovese explain further:

> The past…is a foreign country. We do not live there. We do not know, and can never know, the full range of happenings, or, more importantly, what they mean. In fact, the point is that the past only matters because we look backwards from the present and ask questions of it: we put meaning into the past by looking for signs and causes of things we must deal with and

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136 As summarised in Reilly and Genovese, above n 110, 32-33.
137 This questionable proposition is discussed at length below. Particularly, a critique is given of the writings of squatter Edward Curr, which was the chief evidentiary source relied upon by Olney J at first instance.
experience now; we frame questions that make the past viable in discrete ways; we look for causes to explain the contemporary. It is this process of what we do that makes the past into an altogether different creature: and that is history.\textsuperscript{138}

It might be argued that the process of law can never fully comprehend the separation of ‘history’ and ‘the past’. However this should not mask the fact that in requiring that the native title rights and interests of pre-Sovereignty be specifically defined and supplanted into the present day, \textit{Yorta Yorta} undermines the very essence of the historiographical methods with which the claimants must achieve this ask. It attempts to determine the past objectively, largely without regard to contextual concerns.

The law does intrinsically have great difficulty with conceptions of the past. This is because the attitudes of the law when dealing with evidence rest on three fundamental propositions:\textsuperscript{139}

\begin{itemize}
  \item There is a core of truth in the evidence;
  \item Proper legal methods will uncover this core of truth, at least in most instances;
  \item This core of truth will be recognised once uncovered.
\end{itemize}

For an analysis of historical textual evidence, which naturally forms a significant aspect of every native title case and was paramount in \textit{Yorta Yorta}, these propositions simply do not hold true.

For the first proposition, it cannot be assumed that each text carries the truth within it.

In the examination of a witness, which is the type of examination the law has built itself

\textsuperscript{138} Reilly and Genovese, above n 110, 33.
\textsuperscript{139} As summarised in Deborah Bird Rose, ‘Reflections on the Use of Historical Evidence in the \textit{Yorta Yorta} Case’ in Mandy Paul and Geoffrey Gray (eds), \textit{Through a Smoky Mirror: History and Native Title} (2002) 1, 35, 35-6.
upon, it is known that the witnesses have encountered the truth. Their testimony therefore is either truth, or, if they commit perjury, untruth. For textual evidence this does not hold true. Indeed there may be truth in the text. However, there may also be untruth, although the side asserting it as untruth does not have the benefit of a cross-examination to uncover inconsistencies in the evidence provided. The text may be true for the person writing but not be true in terms of the actual situation, or it may relate to a different truth than that which is asserted. The existence of truth in a text is entirely dependant on the genre of that text and the purpose for which it was made. This is a very different situation to that of oral testimony, where we know that the witness has witnessed the actual events of the past to which they are testifying.

As for the utility of proper legal methods, it is palpably clear that such adversarial methods cannot uncover the truth, if it exists, in textual evidence. Unlike, say, a criminal inquiry, an inquiry into the existence of native title rights and interests does not have a result flowing naturally from Aristotelian logic. In a criminal inquiry we have the choice between two options: beyond a reasonable doubt the accused committed the crime, or that there is at least a reasonable doubt that the accused did not commit the crime. The truth is determined by applying logic to find the chain of events which most minimises contradictions and to accept that as the truth. This type of logical reasoning does not apply to the examinations of textual evidence.

Reading a text to divine truth is a skill that does not sit in the domain of the law. It is a learned skill. It is not an adversarial skill. The facts which the law seeks do not sit

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140 Ibid 38.
141 See ibid 36-7.
separate of context in an objective sphere, waiting to be pulled from the page. The truth of a text, if indeed there is truth in the text, sits buried among the influences of genre, perspective, purpose and pre-conception, to name just a few. It’s uncovering is a matter of textual methodology, not of the law.

Even if the truth was always discoverable by legal methods, it is by no means a given that the law will recognise them. Recognition of fact in law works by asking us to recognise that version of past events which is the least contradictory. To put it another way, that version of events which appeals most to our common sense. But common sense is not a universal entity. As our law appeals to the rationality of the ‘reasonable person’, it does not receive a completely egalitarian response. The outlook produced is one skewed towards the male sex, the middle class, an Anglo-Australian ethnicity and, most importantly, a modern set of cultural values. If the common sense of the past does not conform to the common sense of today, how can commonsensical methodology be expected to see the truth of something written with that different rationality? Only by using a textual methodology can we recognise the truth when we find it.

Such a textual methodology should have been incorporated into the decision-making process in Yorta Yorta. However it was only Black CJ of all the judges involved who recognised this. A departure from the normal methodology of the courtroom is justified not only by reason of its inadequacy as outlined above. Native title is

142 Ibid 38.
143 Ibid 36.
144 Members of the Yorta Yorta Aboriginal Community v Victoria (2001) 110 FCR 244, [51]-[61].
recognised to be a sui generis interest in land, unique in the Australian law.\textsuperscript{145} If it is so unique, surely the adoption of a unique analytical methodology is justified.

Without the adoption of an appropriate textual method, the native title litigation process in \textit{Yorta Yorta} represented a collision between the adversarial examination of the law and the scholarship of expert evidence. It is a ‘collision’ rather than a ‘combination’ because ‘[a]ll too often these collisions failed to honour the integrity of scholarship or the integrity of the system of justice that underwrote the whole process’.\textsuperscript{146} This is because the process of an opposed native title claim represents at its heart a battle between two historiographies: that which asserts the continuity of the claimants’ rights and interests in land and that which asserts such continuity does not exist.\textsuperscript{147} However in this battle, the dicta of \textit{Yorta Yorta} denies the essential nature of those historiographies as understood and as developed by expert witnesses. This reduces the role of experts to that of experts within an empiricist framework that has been handicapped, maybe permanently, by the idea of history employed in the \textit{Yorta Yorta} decisions. Historians need to use their expertise as interpreters of the relationship between the past and the present to unpack the methods and assumptions in the law’s understandings of the past and its use of the past to resolve present rights. If historians do not contribute to the claims process in this way, they will continue to become trapped in a process which is underpinned by a historiography that is foreign to them (one that insists the past and history are interchangeable, one that privileges one genre of historical evidence only).\textsuperscript{148}

\textsuperscript{145} \textit{Mabo v Queensland (No 2)} [1992] 175 CLR 1, 89. See above.
\textsuperscript{146} Rose, above n 139, 35.
\textsuperscript{148} Reilly and Genovese, above n 110, 41-42.
By refusing to allow an analysis of evidence, especially textual evidence, in a manner akin to those who are experienced and especially skilled in doing so, *Yorta Yorta* has reduced experts into mere finders of evidence. The analysis of that evidence is to be carried out only by the poorly suited adversarial methodology of the courtroom.

One consequence of this is that the judiciary cannot approach the past from the same passive perspective as experts. Their extrapolations of evidence are thus more susceptible to the reflexive and subconscious influence of their preconceptions. One such preconception that may be brought into an analysis of native title cases is that of the ‘settled South’. This preconception prejudicially influences the treatment of evidence directly and indirectly. Most obviously it may lurk in the back of the mind of the member of the judiciary performing the evidentiary analysis. This very well may have influenced Olney J’s assumption that the lack of any evidence as to the nature of traditional law and custom in the historical documentary record pointed to the non-existence of the practice of these laws and customs.149 When there is a preconception of the ‘settled South’ on the part of the judiciary, the burden of proof thrust upon the claimant is heavy indeed.

Such a burden means that those parties opposing native title do not need to prove that the title has been lost, they merely need to prevent the claimants from asserting its continued existence. They can do this by throwing so much doubt upon historical evidence that it is destabilised to the extent that it can no longer be relied upon by the claimants. Such a cascading destabilisation hampers the ability of the claimants to

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149 *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606, [118].
appropriately present a text, since in the adversarial context any submission by the claimants as to the untruth of a particular aspect of that evidence can be used by the opposing parties to return to the default position of the ‘settled South’. 150

The *Yorta Yorta* approach to evidence and the relationship between history and the past is one which posits members of the judiciary as better interpreters of historical evidence than the experts relied on by both parties. The legacy of *Yorta Yorta* is a native title law in which ‘a century of scholarship risks being overthrown, apparently in the name of objectivity’.151

**Non-Legal Perspectives**

The role of historians is of course absolutely integral in the native title process. At litigation, historians act as advocates for their versions of history as revealed by the sources they uncover. This accords with the adversarial nature of the law. However, for historians

> [t]he very act of reading a document in order to “reveal” the past necessitates, from the purview of trained historians, a correlative act of interpretation and a theoretical perspective on how that interpretation can be justified.152

This role of historians as extrapolators of history into a theoretical link between the past and present, which is after all what is required by the continuity of connection requirement, does not fit into the adversarial process of native title litigation. This

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150 See Rose, above n 139, 46.
151 Ibid 47.
152 Reilly and Genovese, above n 110, 25.
essentially prevents historians from being allowed to present their body of work in its entirety before the Court.

As noted above, the proper reading of an historical document is a learned, unnatural skill. The methodology of textual analysis will be examined at length below in specific relation to Olney J’s reliance on Curr’s writings, but it is sufficient to outline three important questions that must be asked:

- For what purpose or purposes was the test written?
- What conventions did the text necessarily conform to?
- What are the common ‘tropes’ (terms or ideas which carry a figurative definition) featured in the text?

Our picture of the past is entirely dependent on the methodology employed to answer these questions and the perspective from which we view the effect of these influences. However Yorta Yorta represents an attempt to investigate the past simply by taking historical texts at face value, a process which ‘bolster[s] decisions that are decidedly ahistorical in conception and conclusion’.

The evidence of anthropological experts is equally as important in the native title process. It is a role that is significantly marginalised in Yorta Yorta. It is the anthropologist who takes evidence directly from claimants, evidence which forms the basis of reports on the current practice and content of law and custom. Although it is of

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153 As summarised in Rose, above n 139, 37.
154 Reilly and Genovese, above n 110, 41.
155 Anthropological evidence is given little regard in Members of the Yorta Yorta Aboriginal Community v Victoria [1998] FCA 1606, deferred to only as a list of sources pointing to the history of the area (at [26]-[49]) and as proof of ancestry (at [50]-[60] and [71]-[109]). It is explicitly noted that disputed anthropological interpretation of evidence is not to be ascertained by an analysis of those interpretations, but by the interpretation of the Court alone (at [62]).
course the claimants themselves who can testify directly as to this, the anthropologists role is necessary since the laws and customs by which a people live are generally not self-conceptualised and need to be divined by external expertise. It is important in this role that anthropologists, as well as their own specialised knowledge, have extensive knowledge of s 223 of the NTA in order to glean the correct and most apposite evidence as to law and customs from their research.

Anthropology, as acknowledged by the law, is a field in which a high level of interpretation is required by the experts involved. Both anthropologists and lawyers, as well as members of the judiciary, realise that this higher level of interpretation in the process by which expert opinion is produced leaves anthropological evidence subject to accusations of bias. It therefore becomes essential that anthropologist note in great detail the process by which they have reached their conclusions, exposing the evidence from which each stage of research has proceeded.

The process of generating an expert opinion as to the existence of traditional law and custom also requires a close relationship between the claimants and the anthropologists. Such a relationship conflicts with legal conceptions of the role of an expert, since ‘part of their [the anthropologists’] relationship with the claimant group may be one of advocacy’. However, such a relationship can actually enhance the quality of that evidence since it is offers a more fully analysed opinion than the ‘desktop or academic

156 See John Basten, ‘Beyond Yorta Yorta: Recent Developments in Native Title Law’ (Paper presented at the Representative Bodies Conference, Alice Springs, 4 June 2003), 4-5.
157 Farrell, Rita, “‘Hot Tubbing’ Anthropological Evidence in Native Title Mediations’ (Research Paper, National Native Title Tribunal, 2007), 2-3.
quality of an opinion where this close relationship is absent. Such a view of the Court is one which reflects the appropriate supra-judicial attitudes of experts to the evidence required by the *NTA* and which pays proper regard to the relationship between history and the past. It is a view absent from the pragmatic approach adopted in *Yorta Yorta*.

**Indigenous Perspectives**

The adversarial system of evidentiary presentation is one which highlights and exacerbates the social differences between Indigenous and Anglo-European societal systems. Many claimants find the process of giving evidence, and the trial in general, an ‘alien and frightening experience’. A major reason for this is the inability of the law to recognise and take account of Indigenous perspectives on concepts such as ownership, community and usage of language. This inability can manifest itself in a direct manner, such as the inability of the Court to appreciate certain vagaries of language employed amongst particular Indigenous communities, especially when evidence is given in regards to the relationship between the witness and their traditional lands.

This confronting nature of the Courtroom process can also discourage claimants from revealing their evidence in full. From her experiences during the course of the *Yorta Yorta* claim, Morgan warns that claimants

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159 *Neowarra v State of Western Australia* [2003] FCA 1402, [120].
160 Morgan and Muir, above n 120, 3.
161 Ibid 3-4. Muir believes there is a need for the use of interpreters in the Court, especially those with knowledge of the hand gestures and other embellishments to language commonly used by Indigenous witnesses.
will be very selective about what they give up, because you give up enough to be able to say who you are as a people. There has to be something left for us. You can not give all, and you can not expect the people to give all, because so much has been given away already.162

This concept of knowledge of the past a part of identity is one which is not only unacknowledged in the legal process in which native title claims must exist, but one which limits the evidence which is available to the Court. This was especially evident in Yorta Yorta given the emphasis placed upon written historical records over the oral evidence of the claimants.

The fundamental differences between the perspectives of the claimants and the rigidity of the Court also affects the ability of the claimants to testify as to their relationship to land. Muir highlights the irreconcilability of these perspectives when she details her experiences during the course of the Yorta Yorta trial when being questioned of her self-recognition as a Yorta Yorta woman:

not only am I a Yorta Yorta person, but I also have connections with the Wadi Wadi people and the Ngarrindjeri people, and this aspect is really complex for people to come up against. In court they’ll say, ‘Well, hang on. You’re saying you’re Yorta Yorta, but then when you go to your mother’s country, Ngarrindjeri, you say you’re Ngarrindjeri. So what are you? Which country are you talking for?’ 163

More tellingly, the Yorta Yorta Court could not reconcile itself with the claimants’ perspectives on history and the past. As detailed above, the Yorta Yorta Court held an antiquarian view of the past as a lifeless and measurable entity. This is completely foreign to the attitudes of most claimants, since ‘for most Indigenous peoples…[the]

162 Ibid 7.
idea of themselves and their past is interchangeable.\textsuperscript{164} For claimants to supplant their evidence of the history of observance of law and custom, based on their own conceptions of history as an evolving and ever-present medium, into the native title framework where history is a fixed concept, is an obviously problematical task. It forces claimants to ‘translate Indigenous relationships with land into a language associated with a completely different normative system’.\textsuperscript{165} \textit{Yorta Yorta} serves as a reminder of the difficulties faced by Indigenous claimants giving evidence within the native title scheme. Additionally, by confirming an antiquarian view of history and requiring strictness of continuity of connection, it significantly exacerbates these problems, further alienating claimants from the native title process.

**Treatment of Evidence at First Instance**

Olney J’s basic methodology was to attempt to create a chronological record of the relationship between the Yorta Yorta people and their traditional lands, from the acquisition of sovereignty to the present day. His Honour did this by taking ‘snapshots’ from the evidence and pasting them onto a figurative timeline, which were used to trace the continuity of laws and customs over time. Although Olney J was bound by both \textit{Mabo}\textsuperscript{166} and \textit{Yanner v Eaton}\textsuperscript{167} to accept that laws and customs may adapt over time, his Honour adopted this methodology as a ‘background mantra’ and ‘lacked a sufficiently complex appreciation of how this adaptation occurs’.\textsuperscript{168} This approach meant that Olney J did not directly look for correlation between current practices and

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\textsuperscript{164} Reilly and Genovese, above n 110, 21.  
\textsuperscript{165} Ibid, 38.  
\textsuperscript{166} \textit{Mabo v Queensland (No 2)} [1992] 175 CLR 1, 110.  
\textsuperscript{167} (1999) 166 ALR 258, 277.  
\textsuperscript{168} Anker, above n 2, 25.
those laws and customs practiced prior to the acquisition of sovereignty. Given that such a correlation is the very subject of the requirements to prove native title, this is somewhat counter-intuitive.

The inability of Olney J to fully comprehend the adaptation of law and custom is highlighted in his Honour’s discourse on some of the current sacred sites of the Yorta Yorta people. These include middens, oven mounds and trees which bear the scars of canoe-making. His Honour noted that, at the time of sovereignty, there was no evidence to suggest that these sites had anything other than practical value. Thus the current practice of considering these sites sacred and actively preserving them was not any form of a traditional custom.  

This is a fundamental misunderstanding of the manner in which customs evolve over time. As Anker puts it:

> In time, objects that cluttered the kitchens of our great grandparents become prized ornaments on sale in antique stores, and in space, the practices of diasporic communities develop and articulate their culture in way that are not necessary in their homeland where their identity as a member of that community is taken for granted.

It is such evolution which Olney J’s chronological methodology, despite its overtures to the contrary, does not adequately appreciate.

In creating the theoretical timeline, Olney J considered the oral testimony of the claimants to be of secondary quality compared to the written record:

oral testimony of the witnesses from the claimant group is a further source of evidence but being based upon oral tradition passed down through many generations extending over a period in

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169 Members of the Yorta Yorta Aboriginal Community v Victoria [1998] FCA 1606, [122].
170 Anker, above n 2, 25.
excess of two hundred years, less weight should be accorded to it than the information recorded by Curr.  

Such an approach is one which imposes an immeasurably difficult obstacle to a society where the only internal history is an oral record. Such a view essentially prevents evidence from an oral history, no matter how rich and uniform, from being considered when there is any evidence to the contrary. It was especially onerous in this regard for the Yorta Yorta people, since members of the community with expert skills preferred to speak as members of the community espousing this oral history, rather than as experts in their relevant fields.

Olney J’s preferential treatment of the written record over the oral record contradicts historical perspectives on the relative value of the two forms of evidence. For historians, preferential treatment of the written record ‘creates problems, particularly where Indigenous or frontier histories are concerned, as the documentary record…is notoriously biased and unreliable’. As for oral history,

[the point that most historians who work in Indigenous history make…is that oral history need not be accepted uncritically, but it should be taken seriously, provided it is interpreted as arising from a social relationship and is understood in the context within which it is given.  

As with many other aspects of the Yorta Yorta decision, the denial of the efficacy of oral history represents a marked departure from international jurisprudence. For example, Canadian jurisprudence acknowledges the fact that ‘Aboriginal rights are truly sui generis, and demand a unique approach to the treatment of evidence which accords

172 See Morgan and Muir, above n 120, 8.
173 Reilly and Genovese, above n 110, 40.
174 Ibid.
due weight to the perspective of Aboriginal people’. For these reasons, commentators such as Poynton find it baffling that those whose duty is to deliver justice should ignore problems of language comprehension in the representation by non-indigenous scribes of situations arising within a culture where knowledge was passed down from generation to generation through the medium of oral tradition.

It is a failing of the Australian jurisprudence espoused in *Yorta Yorta*, as exemplified by Olney J’s virtual discarding of the utility of claimant oral evidence, to accord the respect to oral history that overseas jurisprudence and historical academia does, especially when the written word is considered absolute proof, without proper recourse to contextual interpretation.

What Olney J relied on most in historical examination were two pieces of written evidence; the written observations of settler Edward Curr and an 1881 petition of the Yorta Yorta people. For Olney J, the writings of Curr were the best source for divining the content of the laws and customs of the Yorta Yorta people in the 1840’s, which his Honour regarded as appropriately approximate to those laws and customs observed by the Yorta Yorta prior to the acquisition of Sovereignty. His Honour then used the petition as a means, which his Honour considered the best means, of determining whether the observance of these laws and customs had continued through the latter part of the 17th century. His Honour held that the evidence from these sources was

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176 Poynton, above n 31, 256.
177 Members of the Yorta Yorta Aboriginal Community v Victoria [1998] FCA 1606, [106].
178 Ibid [121].
sufficient to overrule that oral evidence of the claimants which contradicted this evidence.

The two critical pieces of evidence examined by Olney J as to the content of observed laws and customs in the 1840’s were *Recollections of Squatting in Victoria: Then Called the Port Phillip District (From 1841 to 1851)* and *The Australian Race: Its Origin, Languages, Customs, Place of Landing in Australia, and the Routes by Which it Spread Itself Over the Continent* written by Curr and published in 1883 and 1886 respectively.\(^{179}\) Curr was in the area by virtue of his father sending him to take charge of a newly-acquired sheep station in 1841. Finding himself ill suited and indisposed to take up the duties asked of him, Curr passed his time by observing the Indigenous inhabitants of the area. Years later, he recorded these experiences to form the basis for his two works.\(^{180}\)

The very form of these works throws immediate doubt on their utility as sources of fact; they are set out as memoirs rather than as a historically accurate account of past events.\(^{181}\) Similarly, they were accounts written by a man with no training in anthropology, history, geography or any other relevant field that would gift him with an appropriate methodology for substantive information gathering. Therefore his synthesis of information must have been influenced by the processes adopted by other unnamed persons.\(^{182}\) The lack of a given methodology also implies that, since there were almost forty years between the observations made and the publication of the works, that Curr

\(^{179}\) Ibid [33]

\(^{180}\) See Rose, above n 139, 39.

\(^{181}\) See Anker, above n 2.

\(^{182}\) See Rose, above n 139, 39.
wrote primarily from memory, an approach which of course has a negative impact on the accuracy of the facts described.\textsuperscript{183} Thus the practices would almost certainly have been ‘creatively embellished, misremembered, misconstrued or simply unobserved by Curr’\textsuperscript{184} in his descriptions.

However these considerations were not factored into Olney J’s judgment. His Honour considered that Curr’s works were the best source of evidence as to the content of law and custom

because Curr enjoyed four relevant advantages, nothing to gain from his accounts, a large measure of corroboration by a subsequent petition to which reference will be made, a degree of rapport with the indigenous people in the region, and a last opportunity to observe an Aboriginal society before it disintegrated.\textsuperscript{185}

This assertion of a ‘degree of rapport’ supposedly experienced by Curr in relation to the Yorta Yorta is questionable, given his position as a member of the settler society which was dispossessing the Yorta Yorta from their traditional lands.\textsuperscript{186} Further, this assertion that Curr had a ‘last opportunity’ to observe the Yorta Yorta living in a traditional manner exposes the underlying assumption of both Olney J and Curr that the traditional lifestyle of the Yorta Yorta was on an inescapable road to extinction. Such an assumption throws into serious doubt both the content of the text itself and the conclusions drawn under that assumption.

\textsuperscript{183} Ibid.
\textsuperscript{184} Anker, above n 2, 8.
\textsuperscript{185} As summarised by Callinan J in Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422, [155]. See Members of the Yorta Yorta Aboriginal Community v Victoria [1998] FCA 1606, [106].
\textsuperscript{186} See Rose, above n 139, 39.
Olney J’s contention that Curr had nothing to gain from his accounts is also far from incontestable. Although Curr’s writings may appear on the face of them to be purely altruistic, there is a subtle self-interest in the motivations behind the production of texts written in this manner and for this purpose. Rose elaborates:

The Victorian gentleman writes about the native. Or does he? The best evidence suggests that he writes about himself under the guise of writing about the native, and further, that he attempts to provide a justifying ideology for colonisation, played out against the colonised…Recollections of a Squatter is more about Curr’s construction of himself as a Victorian gentleman of taste and sensibility than it is about Yorta Yorta people. In the Australian context we need also to consider that this is a crucial genre for colonial gentlemen. They are forever in jeopardy of being classed with the natives (termed ‘going native’), so they elaborate themselves from the status of colonials by positioning themselves within British bourgeois culture. Thus, they are writing about themselves first and foremost…

Such self-justificatory and self-aggrandising motives surely colour the value of the information to be adduced from Curr’s writings.

Being of this dispossessor/dispossessee genre, Curr’s writings contain numerous ‘tropes’ (repeated arbitrary thematic elements or ideas, common to texts in a genre). These tropes may be offensive and bigoted in nature and are of limited historical or even literary merit. However they are important to note for the effect they have on the content found in the text. Rose identifies the following tropes in the writings, which can be found in the texts of most ‘gentlemanly’ colonisers whom are in the process of dispossessing traditional owners, wherever in the world they may be:

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188 Ibid 39-44.
• The laziness of the traditional owners, in contrast with the industrious virtue of capitalism;
• The short-sightedness and wastefulness of the traditional owners, in contrast with the foresight and planning of the European gentleman;
• The instinctive nature of the traditional owners, whereby the acquired knowledge of generations is dismissed as biological impulse;
• The superstitious nature of the traditional owners, whereby local practices are subjected to European rationality and considered nonsensical;
• The lack of religious beliefs among the traditional owners, with all rituals dismissed as mere habit, highlighting the improvement Christianity would make;
• The patriarchal nature of the society of the traditional owners, whereby the despotism of the male family member is attested to despite specific observations to the contrary, in contrast with the supposed tempering of male privilege in ‘gentlemanly’ practice;
• The eternal femininity of female traditional owners, by which Curr marginalises Yorta Yorta women into reflections of the ‘universal woman’, thereby not noting their proper roles in Yorta Yorta society;
• The brutality of the traditional owners, contrasted with the gentlemanliness of the colonisers (despite the well-known barbarities perpetuated in the colonisation of Australia); and
• The lack of a system of government in the society of the traditional owners society, contrasted with the order of Anglo-European life.
These tropes obviously affect not only the presentation of Curr’s observations in his writings but determined which elements of Yorta Yorta society he chose to depict in his writings.

However it is clear that Olney J did not consider these tropes in divining the laws and customs of the Yorta Yorta society of the 1840’s. One particular example of this is evident in Olney J’s discussion of the burial practices observed by the Yorta Yorta people. In particular his Honour found that since modern burial practices no longer accord in manner to those mentioned in Curr’s writings, they are no longer traditional in nature.\textsuperscript{189} In Curr’s writings, the rituals followed by the Yorta Yorta in laying their deceased to rest are described as devoid of spiritual or religious meaning behind them, which can be readily attributed to the common trope of the godlessness of traditional owners.\textsuperscript{190} Thus Olney J did not consider whether the current practices of the Yorta Yorta, although altered, constituted by their maintenance of the spiritual significance behind the rituals a fundamental continuation of the traditional burial practices. Instead, Olney J takes the fact that Curr asserted there was no deeper meaning involved as absolute fact, regardless of his lack of any expertise in making that assertion, or of any motives that may have been behind this assertion.

As noted above, the inability of Olney J to fully comprehend the manner by which laws and customs evolve over time is highlighted by his Honour’s finding that the Yorta Yorta people’s current maintenance and protection of sacred sites did not constitute a continued traditional custom. That ruling also highlights the flaws in Olney J’s

\textsuperscript{189} Members of the Yorta Yorta Aboriginal Community v Victoria [1998] FCA 1606, [124].

\textsuperscript{190} Ibid [116].
examination of Curr’s writings without regard to contextual concerns. The trope of the
godless traditional owner present in Curr’s writing means that he would not only neglect
to examine the spiritual meaning behind practices, but that possibly he would choose
not to mention those practices (such as protection of sacred sites) that strongly indicated
a spiritual element in Yorta Yorta lifestyle. However Olney J found that the lack of
any mention of sacred site protection in Curr’s writings was absolute proof that the
Yorta Yorta people did not observe such practices in the 1840’s.

As further noted above, Curr emphasised and coloured his observations to highlight the
supposed wastefulness and lack of foresight of the Yorta Yorta people. In ignorance of
this, Olney J accepts it as fact that the common practice of the Yorta Yorta was to
neither conserve resources nor to limit wastage of resources, especially in relation to
food. His Honour negatively contrasted this with the conservationist attitudes and
actions of the claimants currently. His Honour did this without regard to factors, left
unmentioned and unexplored by Curr, that may very well have influenced the actions of
the Yorta Yorta people in the 1840’s. One such factor may have been the fact that they
lived in a time of relative plenty, where environmentalism need not be considered in the
relationship between the traditional owners and their lands. Thus the conservationism of
the claimants could very well be considered a continuation of this relationship, being
the result of changed environmental circumstances and knowledge. However, for
Olney J, the writings of Curr were fact; a fact which was incontrovertible and which
described a law and custom which had no deeper meaning than its immediate utility,

191 See Rose, above n 139, 44.
192 Members of the Yorta Yorta Aboriginal Community v Victoria [1998] FCA 1606, [122].
193 Members of the Yorta Yorta Aboriginal Community v Victoria [1998] FCA 1606, [115].
194 Ibid [123]-[125].
195 See Rose, above n 139, 44.
and which thus needed to be reproduced to the letter in the present day to provide evidence of continuity.

Olney J also used as a main basis for the conclusion of non-continuity an 1881 petition signed by a number of Indigenous persons, some of whom appeared as named apical ancestors of the claimants. That petition was a request to the Governor of New South Wales that they be given grants in land in an area constituting at least part of their traditional lands. Unsurprisingly, this petition had been worded not by the signatories themselves, but by local settler Daniel Matthews, who himself had been instrumental in the dispossession of the traditional inhabitants of the area. The section of the petition critical to Olney J’s decision reads as follows:

all the land within our tribal boundaries has been taken possession of by the Government and white settlers; our hunting grounds are used for sheep pasturage and the game reduced and in many places exterminated, rendering our means of subsistence extremely precarious, and often reducing us and our wives and children to beggary.

For Olney J, the significance of this statement was obvious:

It is clear that by 1881 those through whom the claimant group now seeks to establish native title were no longer in possession of their tribal lands and had, by force of the circumstances in which they found themselves, ceased to observe those laws and customs based on tradition which might otherwise have provided a basis for the present native title claim…

This stark interpretation is questionable on many grounds. For one, it is somewhat trite that Olney J takes at complete face value a settler’s second-hand assertion that ‘all the

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196 The petition is reproduced in Members of the Yorta Yorta Aboriginal Community v Victoria [1998] FCA 1606, [119].
197 Ibid [121].
198 Ibid [119].
199 Ibid [121].
lands within our tribal boundaries has been taken possession of’, without considering whether this was truly a statement of the traditional owners themselves, or whether they had signed the petition without a proper understanding of the exact statements made within it. Further, Olney J’s assessment of the petition involved even less consideration of contextual concerns than did his Honour’s examination of Curr’s writings. Surely the contemplation of the petition as ‘a strategy of resistance against colonisation demonstrating a desire by the Yorta Yorta community’s ancestors to maintain the connection to their traditional lands’200 warrants serious consideration, especially in light of their ‘long history of putting in complaints and petitions and all types of things to the authorities’.201

By refusing to substantially appreciate oral evidence, and by accepting the written historical record as absolute fact without significant regard to contextual methods, Olney J’s methodology of evidentiary assessment is fundamentally inadequate and results in an unsatisfactory final analysis.

**High Court’s Assessment of the Treatment of Evidence at First Instance**

If Olney J’s methodology in assessing evidence is concerning, then the decision of the High Court not to overturn it is overwhelmingly disappointing. What the High Court judgment constituted, particularly the majority joint judgment, was an attempt to ‘set in

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200 Anker, above n 2, 8.
201 Morgan and Muir, above n 120, 9.
place broad principles’, rather than substantively address the merit of the claim. The
majority held that it was the trial judge whom held the ultimate responsibility as arbiter
of fact and it was not the place of the High Court to overturn this. In addition, the
very extensive nature of the evidence adduced at trial was considered substantial proof
that the evidentiary examination required had been carried out in full:

His Honour was confronted with more than 11,600 pages of transcript. In excess of 201 persons
gave evidence before him. It would have been neither possible nor helpful for him to refer to all
of the evidence upon which any of the parties relied. Correctly, sufficiently and orthodoxy his
Honour referred to such of the evidence as was relevant or necessary for his decision.

This decision is one which overlooks the numerous contextual deficiencies inherent in
Olney J’s assessment of evidence, as detailed above.

In coming to this conclusion, the Court does give some consideration to the contention
of the claimants that Olney J had automatically privileged written historical evidence
over evidence oral in nature. However the Court found that

[the conclusion the primary judge reached did not begin from the impermissible premise that
written evidence about a subject is inherently better or more reliable than oral testimony on the
same subject.]

Such an assertion is startling indeed. To begin with, it ignores the fact that Olney J
consigned the oral testimony of the witnesses as relevant only to the practices of current
times and refused to consider any oral evidence which refuted the observations noted in
Curr’s works. Thus oral testimony is only given a secondary role as evidence,
marginalised to the point of extinction as historical evidence. What is even more incredulous is that the High Court seems to completely ignore Olney J’s direct statements as to the relative utility of oral and written evidence, which were discussed above but are worthy of further reproduction:

oral testimony of the witnesses from the claimant group is a further source of evidence but being based upon oral tradition passed down through many generations extending over a period in excess of two hundred years, less weight should be accorded to it than the information recorded by Curr.

If this does not constitute a ‘premise that written evidence about a subject is inherently better or more reliable than oral testimony’, then one wonders whatever in the world possibly does! When combined with the fact of the differently constituted requirements of native title proposed by Olney J, as distinct from those confirmed by the High Court, the trial judge’s refusal to sufficiently consider oral proof was surely adequate grounds for the High Court to overturn his Honour’s findings of fact.

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206 See further Seidel, above n 25, 4.
207 Members of the Yorta Yorta Aboriginal Community v Victoria [1998] FCA 1606, [62].
208 As discussed above, Olney J believed the requirement of continuity flowed from the common law not from the language of s 223(1) of the Native Title Act 1993 (Cth).
Native Title Cases Post-Yorta

Yorta
Selected Cases 2002-2006

The two cases which are most pertinent considering the effect of Members of the Yorta Yorta Aboriginal Community v Victoria\(^1\) on native title jurisprudence are Risk v Northern Territory\(^2\) and Bennell v Western Australia\(^3\). These cases are critical to the understanding of the current treatment of the Yorta Yorta decision not only because they are the most recent decisions on the issue of continuity, but because they highlight two very different outcomes in judgments which both purport to adhere to the principles of Yorta Yorta. Before commencing an analysis of Larrakia and Single Noongar, it is necessary to look at the treatment of Yorta Yorta in the years prior to these decisions. The cases below have been selected for brief consideration to provide a snapshot of the treatment of Yorta Yorta in Australian jurisprudence across the whole period 2002-2006. The cases below were selected to provide examples of how the Court has considered all the issues related to continuity which were raised in Yorta Yorta, as well as certain issues which were not directly touched upon in the Yorta Yorta judgment but which arose in further examination of the application of the continuity of connection doctrine.

De Rose

The De Rose series of cases were bracketed around the Yorta Yorta decision, with the first instance decision\(^4\) heard prior to it and the appeal\(^5\) and the remitted decision of the Full Federal Court\(^6\) heard after Yorta Yorta had been handed down. They constitute an

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\(^1\) (2002) 214 CLR 422 (‘Yorta Yorta’).
\(^2\) [2006] FCA 404, (‘Larrakia’).
\(^3\) (2006) FCA 1243 (‘Single Noongar’).
\(^4\) De Rose v South Australia [2002] FCA 1342.
\(^5\) De Rose v South Australia (2003) 133 FCR 325.
\(^6\) De Rose v South Australia (No. 2) (2005) 145 FCR 290(‘De Rose 2’).
important analysis of the effect of a claimant community’s prolonged physical dislocation from their traditional lands where a non-physical connection to that land has been maintained, particularly in consideration of Yorta Yorta’s assertion of the continuity of connection requirement. De Rose 2 especially provides an interesting counterpoint to Yorta Yorta in its finding that such a dislocation did not constitute an interruption to the connection of the claimants to their land.

DECISION AT FIRST INSTANCE

The De Rose claim was somewhat unusual for a native title claim. For one, connection was proven on an individual rather than a group basis, with the result that the trial judge O’Loughlin J’s inquiry focussed on the existence and maintenance of this individual connection.7 The claimants also chose to limit their claim to the area known as De Rose Hill. Justice O’Loughlin recognised it was the prerogative of the claimants to claim land constituting only part of their traditional lands, but focussed heavily on the connection of the claimants to that area only, without fully regarding the wider system of law and custom existing in the relationship of the claimants to their traditional lands.8

His Honour was especially critical of the fact that the relationship of the claimants to the claim area was one dominated by the carrying out of ‘European style work practices’.9 Displaying what Strelein describes as ‘a peculiar romantic fascination with ‘tribalism’ and refusal to accept aspects of economic and political life as part of ‘Aboriginal

7 De Rose v South Australia [2002] FCA 1342, [206].
9 De Rose v South Australia [2002] FCA 1342, [901].
life’’, O’Loughlin J was extremely dismissive of the claimants’ assertion that their lifestyle was traditional in nature. For example, his Honour believed

> there is always the possibility that usage of a supermarket might be one of several indicia, which, when added together, might lead to the conclusion that such developments could be part of a number of instances of ‘modernisation’ that would, collectively, break with traditional laws and customs.\(^\text{11}\)

His Honour also believed that the practice of taking into account employment and education considerations in dealings with land also indicated non-continuity with the past.\(^\text{12}\) Such comments show the inability of O’Loughlin J, like the Yorta Yorta High Court, to properly comprehend the manner in which laws and customs evolve over time.

The most important factor in O’Loughlin J’s rejection of the native title claim over De Rose Hill was the lack of a physical presence in the area from 1978 onwards. Although his Honour acknowledged that continued physical occupation was not a necessary element of native title,\(^\text{13}\) O’Loughlin J considered that it was of extreme importance to note that ‘[s]ave for some occasional hunting trips, not one witness…has attended to any religious, cultural or traditional ceremony or duty on De Rose Hill in almost twenty years’\(^\text{14}\). Such a failing to enter the land for these purposes, ‘surreptitiously if necessary’,\(^\text{15}\) was considered a break in traditional connection with the land, despite the extreme violence and intimidation suffered by those claimants whom attempted it.\(^\text{16}\)

Such a decision not only appears to contradict the principle that a failure to exercise a

\(^{10}\) Strelein, above n 8, 95.
\(^{11}\) De Rose v South Australia [2002] FCA 1342, [500].
\(^{12}\) Ibid [681].
\(^{13}\) Ibid [377], citing Western Australia v Ward (2002) 213 CLR 1 (‘Ward’), [64].
\(^{14}\) Ibid [106].
\(^{15}\) Ibid.
\(^{16}\) Ibid [436].
right does not constitute an abandonment of that right, but represents a startling display of pragmatism in not allowing the claimants to exercise self-preservation in the carrying out of their responsibilities as custodians of the land.

DECISION OF THE FULL FEDERAL COURT

The Full Federal Court ruled that O’Loughlin J had placed too much emphasis on the claimants’ lack of physical presence in the claim area. It was found that any strict requirement of physical connection could not be sourced in the Native Title Act:

It would read too much into s 223(1)(a) to require the claimants to show a continuing physical connection to the land. ‘Connection’ is dealt with in s 223(1)(b) and...is not directed to how Aboriginal peoples use or occupy land or water. It is directed to whether the peoples have a connection to land or water by the traditional laws acknowledged and the traditional customs observed by them. It is possible for Aboriginal peoples to acknowledge and observe traditional laws and customs throughout periods during which, for one reason or another, they have not maintained a physical connection with the claim area.

Of course a lack of physical connection may be one of several indicia pointing to an expiry of abandonment traditional practices, the relative weight of which will be different in different cases. According to the Court, O’Loughlin J had considered it not as an indicator but as a disentitling failure in itself.

Likewise, the Court believed O’Loughlin J had overstated the significance of the failure of the claimants to carry out those traditional obligations which required physical

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17 Western Australia v Ward (2002) 213 CLR 1, 85-6.
18 See further Strelein, above n 8, 96.
19 De Rose v South Australia (2003) 133 FCR 325, [315-316].
20 Native Title Act 1993 (Cth) (“NTA”).
21 De Rose v South Australia (No. 2) (2005) 145 FCR 290, [62].
22 Ibid.
presence on the claim area. Such a failure could be indicative of a failure to maintain a traditional connection with the land, but did not in itself automatically defeat a native title claim:

Obviously enough, evidence that a native title claimant community or group has faithfully performed its obligations under traditional laws and customs would provide powerful support for its claim to possess native title rights and interests (assuming that the other requirements of s 223(1) are met). But evidence that members of the community or group have not faithfully met their responsibilities…will not necessarily be fatal to their claim. It must always be a matter of fact and degree…

Considering that the pastoralist in charge of De Rose Hill Station ‘did not hesitate to intimidate them with firearms, was a strict disciplinarian and would not hesitate to physically assault people when he thought it appropriate’, the Court found O’Loughlin J’s decision that the claimants did not have sufficient grounds on which to fear retribution for entering De Rose Hill Station ‘somewhat surprising’. Given this well-founded fear, the Court found that the failure of the claimants to perform their traditional duties at De Rose Hill did not constitute a significant indication as to the expiry of observance of traditional law and custom in totality.

In regards to the continuity of connection requirement as espoused in Yorta Yorta, the Full Federal Court noted that O’Loughlin J had found that there has been a continuity of the normative system. In regard to the continuity of observance of laws and customs the Court unsurprisingly quotes the following passage from Yorta Yorta:

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23 De Rose v South Australia (2003) 133 FCR 325, [315-316].
24 De Rose v South Australia (No. 2) (2005) 145 FCR 290, [64].
25 Ibid [74].
26 Ibid [75].
27 Ibid [90].
account must no doubt be taken of the fact that both pars (a) and (b) of the [NTA s 223] definition of native title are cast in the present tense. The questions thus presented are about present possession of rights or interests and present connection of claimants with the land or waters. That is not to say, however, that the continuity of the chain of possession and the continuity of the connection is irrelevant.28

Surprisingly, however, the Court quoted this passage at the exclusion of the Yorta Yorta assertion that ‘acknowledgment and observance of...laws and customs must have continued substantially uninterrupted since sovereignty’.29 In doing this, the De Rose 2 Federal Court appear to have circumvented the strict requirement of continuity of connection.

The Court did not directly speak as to the observations of O’Loughlin J regarding the incompatibility of modern concerns with traditional land management, but their decision that traditional laws and customs have been maintained implies that they favoured a more dynamic approach as to the evolution of law and custom.30 In their positive determination the Court expressly overruled the over-reliance placed by O’Loughlin J on physical occupation of the claim area and the performance of obligations under law and custom, by tempering the strictness of the continuity of connection doctrine espoused in Yorta Yorta. In doing so, they indirectly set aside the interpretation of evidence at first instance, a task which the Yorta Yorta High Court did not consider open to them.31 De Rose 2 shows that, after the pragmatism of Yorta Yorta,

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28 Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422, [85], quoted at ibid [59].
29 Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422, [87].
31 See Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422, [63] and discussion above.
native title can, in the hands of a sympathetic Court, be a recognitive tool better suited to the practicalities of land management in the modern world.

**Daniel**

*Daniel v Western Australia*[^32] is one of a lengthy series of decisions regarding native title claims over the West Pilbara region of Western Australia. *Daniel*, like the other decisions, consists of lengthy discussions on extinguishment and claim group composition, but for present purposes it is only the examination of continuity requirements in *Daniel* that will be considered.

Nicholson J’s judgment commenced with an approval of the proposition in *Yorta Yorta* that ‘traditional’ in s 223(1) of the *NTA* implies intergenerational transference[^33]. His Honour further noted that this had been expanded in *Yorta Yorta* into two separate requirements of continuity; continuity of the normative system and continuity of observance of law and custom[^34]. Nicholson J found that the claimants had fulfilled these requirements[^35]. However it is apparent from the language employed by Nicholson J in concluding this that his Honour’s considerations of the issue was much less pragmatic than the considerations of the *Yorta Yorta* Court:

> The reality and the sense of the connection [of both claimant groups to their country] appears from the evidence as enduring despite the influences which European settlement has brought to both peoples. In the case of each of them, it would appear to be that these impacts have brought them towards the cusp of the moment when their connection to each of their lands through their

[^32]: [2003] FCA 666 (‘*Daniel*’).
[^34]: Ibid [137]-[139], citing *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [87]-[89].
[^35]: Ibid [421].
traditional law and custom could be washed away by the tide of history. From the evidence I do not consider that time has yet arrived.36

Nicholson J goes on to state that Daniel was distinguishable from Yorta Yorta on the facts, although his Honour does not go into any detail on this point.37 However the true distinguishing factor is the different approaches to assessing the continuity of connection to land. Daniel represents a more sagacious approach which emphasises and celebrates the continuance of the non-physical connections to land referred to in Ward,38 rather than the pragmatic assertion of colonial dispossession preferred in Yorta Yorta.

However in its dissemination of specific rights and interests, Nicholson J unfortunately did take a pragmatic approach. His Honour affirmed both Ward and Yorta Yorta in requiring that the rights and interests generating these laws and customs must be based in a pre-Sovereignty normative system39 and must be clearly and separately defined.40 In determining these rights and interests, Nicholson J took an incongruous approach in deciding that some rights and interests existed only over certain areas of the claim area.41 His Honour’s evidence for making such assertions came from the evidence concerning the current practices of the claimants, not the claimed rights as they existed at sovereignty, which sits at odds with the acknowledged requirement that the rights be based in a pre-Sovereignty normative society.

36 Ibid.
37 All that is said is that ‘[t]he evidence given on behalf of each of the peoples stands in very significant contrast to that given in respect of the Yorta Yorta peoples’; ibid.
38 Ibid [422], citing Western Australia v Ward (2002) 213 CLR, 32.
41 Ibid [433]-[500].
In its detailing of the laws and customs which flow from these rights and interests, *Daniel* shows that, even when a more measured approach is taken to the requirement of strict continuity, there is an inescapable element of the ‘frozen in rights’ approach in post-*Yorta Yorta* native title. Nicholson J noted that *Yorta Yorta* allowed for the evolution of law and custom, but this was subject of course to the requirement that continuity of observance has been maintained. Under these guidelines, Nicholson J produced a series of rights which the claimants held under native title, being non-exclusive rights to engage in ritual and ceremony, to camp and build shelters, to hunt and forage, to fish, to collect for traditional medicinal purposes, to take flora and fauna generally, to take ochre, to use water, to light fires and to protect and care for sites of significance. The static nature of such rights is immediately apparent and many of them are obviously unsuited to reflecting the nature of the relationship between claimants and land in modern times.

The North American approach, which does not require the listing of rights, avoids this failing. Traditional title is seen as a right to ‘use and occupation of the land held pursuant to that title for a variety of purposes’, limited only by a requirement that such use and occupation not be inconsistent with the relationship between the claimants and their traditional lands. By contrast, *Daniel* provides the astounding judgment that the right to build shelters extends only to the building of traditional shelters, and not any modernised form of dwelling:

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42 Ibid [139], citing *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [83].
44 Ibid [1163].
45 *Delgamuukw v British Columbia* (1997) 153 DLR 192, [117].
46 Ibid [128].
The applicants camp from time to time and for that purpose build shelters (including boughsheds, mias (may as) and humpies) and live there. I do not consider the evidence establishes the activity extends to building houses other than shelters.47

This highlights the fact that, even when the strict requirement of continuity is met, a further legacy of *Yorta Yorta* is a native title which is archaic in nature and does not reflect the true nature of modern traditional ownership.

**Sampi**

*Sampi v Western Australia*48 dealt with a claimant application over areas in the West Kimberely, which had been adjourned pending the *Ward* and *Yorta Yorta* decisions. After the adjournment, the claimants put on more evidence, oral and written, which was considered in conjunction with the transcripts from previous proceedings.49

French J believed the elements of the requirement of continuity were best espoused in *Yorta Yorta* and thus that

> the relevant inquiry in relation to native title rights and interests under s 223 requires consideration of the relationship between traditional laws and customs now acknowledged and observed and those which were acknowledged and observed before sovereignty. It must be shown that the society under whose laws and customs the native title rights and interests are said to be possessed has continued to exist from sovereignty to the present date ‘... as a body united by its acknowledgment and observance of the laws and customs’.

Although it quotes directly from *Yorta Yorta*, this passage highlights a subtle difference between the inquiry conducted in *Sampi* and that of Olney J, as approved by the High

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47 Daniel v Western Australia [2003] FCA 666, [260].
48 [2005] FCA 777 (‘Sampi’).
49 Ibid [24].
50 Ibid [963], citing *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 [89].
Court in *Yorta Yorta*. For French J, the integral inquiry was to examine current laws and customs and to see if they are sourced in pre-Sovereignty. Under this inquiry, it is not necessary to trace the existence of the society over time, and the observance of law and custom, as was the manner of Olney J’s inquiry at first instance in *Yorta Yorta*. As is highlighted by some of French J’s conclusions discussed below, this allows for a more apposite appreciation of the adaptability of law and custom.

The evidence put on by both parties was extensive and varied in nature and included the oral evidence of the claimants, historical evidence, linguistic evidence, archaeological evidence and anthropological evidence. All of the evidence was given more than ample consideration by French J,\(^51\) which contrasts with the imbalanced approach to evidence of Olney J in *Yorta Yorta*.\(^52\) In particular, French J looked favourably upon historical evidence of the establishment of the Sunday Island mission\(^53\) and of the history of the contemporary bodies the Bardi Council and Bardi Association.\(^54\) For French J, the records associated with these institutions indicated strongly the continued attachment of the claimants to their lands:

> The people of the claim area have a strong continuing sense of association with traditional lands within that area which continued well into the 20\(^{th}\) century as indicated by the history of Sunday Island and the Sunday Island mission…The strong sense of association continued until the present time as reflected in the activities of the Bardi Council and the Bardi Association.\(^55\)

\(^51\) French J’s considerations of evidence are to be found in *Sampi v Western Australia* [2005] FCA 777 at [48]-[641] (oral evidence of claimants), [642]-[718] (historical evidence), [719]-[759] (archaeological evidence), [760]-[782] (linguistic evidence) and [806]-[937] (anthropological evidence).

\(^52\) See discussion above regarding Olney J’s preferential treatment of historical evidence, especially over the oral evidence of claimants.

\(^53\) *Sampi v Western Australia* [2005] FCA 777 [680]-[686] and [718].

\(^54\) Ibid [714]-[715] and [718].

\(^55\) Ibid [718].
Such conclusions focus not on the differences these histories might show in the manner in which the claimants exhibited their relationship, but on their confirmation of that relationship itself. This contrasts markedly with the conclusions adduced by Olney J from the 1881 petition exhibited in *Yorta Yorta*.\(^{56}\)

This difference in evidentiary analysis occurs by reason of French J’s more holistic approach, whereby it is the continuation of relationship to land as a whole which must be ascertained, rather than searching for specific evidence as to continuance of particular laws and customs:

> The relevant community must be a community which at the time of colonisation observed a body of laws and customs that continue in existence today. The continuity of the society and its laws and customs is subject to the qualification already observed allowing for the evolution of both providing that the essential continuity is maintained.\(^{57}\)

Such an approach requiring that ‘the essential continuity is maintained’ also allowed for French J to appreciate the adaptation of the composition of the native title-holding group. Noting that the question of what constitutes a ‘society’ for the purposes of s 223(1) of is ‘no easy matter’,\(^{58}\) his Honour believed that the claimants saw themselves as one people, despite an anthropological distinction between the Bardi and the Jawi peoples.\(^{59}\) At sovereignty, his Honour inferred from the evidence that at Sovereignty the Bardi and Jawi groups represented two different societies, holding rights to land in different areas, and that it was the Bardi group whom held native title in the area.\(^{60}\)

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\(^{56}\) See discussion above and *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606, [121].

\(^{57}\) *Sampi v Western Australia* [2005] FCA 777, [1042].

\(^{58}\) Ibid.

\(^{59}\) Ibid [1017].

\(^{60}\) Ibid [146].
However, his Honour found that the current native title holding group had evolved so as to be the native title claim group as defined in the amended application. This includes Jawi people who, in my opinion, form part of the contemporary Bardi society. Their inclusion in that society has not destroyed its continuity with the original Bardi society that existed at the time of colonisation of Western Australia…The Bardi society includes Jawi people who have intermarried with Bardi people and the descendants of people who are the products of Bardi and Jawi marriages. It will include people who are recognised as part of the Bardi community by adoption or otherwise in accordance with its traditional laws and customs.61

Such an appreciation of the adaptation of tradition law and custom in Sampi implies that adherence to Yorta Yorta’s continuity of connection doctrine does not necessarily require the antiquarian approach adopted by Olney J in that case.

**Alyawarr**

The *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group*62 decision was an appeal from a Mansfield J determination that composite native title existed in an area South-East of Tennant Creek in the Northern Territory. At first instance, Mansfield J noted the Yorta Yorta requirements of continuity of both the existence of a normative society originating prior to the acquisition of sovereignty, and of observance of law and custom since that time.63 His Honour found that the claimant group had fulfilled that requirement.64 Although analysis of evidence was not as detailed as in Yorta Yorta because the Northern Territory recognised the existence of the

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61 Ibid [1048].
62 [2005] FCAFC 135 (‘Alyawarr’).
64 Ibid [111]-[128].
claimant group in the area for a long period time, it is of note that Mansfield J seemed to temper the strictness of continuity requirement by making reference to inferences that could be made as to continuity:

the expert evidence demonstrates that parts of the claim area have been occupied for a considerable time in the past, and that it is a reasonable inference that the present communities are descended from the Aboriginal or original inhabitants of the region in the sense that there is a ‘substantial degree of ancestral connection’ between the community now in place and the original community.65

This approach is in stark contrast to the approach in Yorta Yorta, where an absence of evidence generally amounted to an inference that native title had ceased.66

*Mansfield J also noted that presence on the land, a major indicator of continuity, need not be uniform and constant to constitute a substantial maintenance of connection with that land:*

It is likely that Aboriginal presence upon, and occupation and use of, the claim area has not been uniform at or since first contact…as it has been influenced no doubt by seasonal factors such as the availability of water and other resources, ceremonial obligations, and more recently the presence or absence of Europeans and other factors.67

This again contrasts with the strict attitudes of the Court in Yorta Yorta as to what constitutes a substantial maintenance of connection to land over time. This different approach was, however, influenced by the fact that the Northern Territory did not fundamentally oppose the assertion of continuity of connection (nor did they appeal on those grounds). Due to the fact that continuity of connection was not a direct issue of contention between the parties, it is difficult to assess whether Alyawarr was

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65 Ibid [112].
66 See discussion above.
differentiated from *Yorta Yorta* on the facts or whether the continuity of connection requirement was formed in a different manner.

The Northern Territory did, however, appeal as to the content of the rights and interests made in that determination, as well as to the composition of the group holding native title in what was a composite native title claim. In regards to the latter, their Honours found that the requirement as espoused in *Yorta Yorta* that there be a normative society did not mean that the claimant group need accord to some technical definition of the term:

The relevant ordinary meaning of society is ‘a body of people forming a community or living under the same government’ – Shorter Oxford English Dictionary. It does not require arcane construction. It is not a word which appears in the NT Act. It is a conceptual tool for use in its application. It does not introduce, into the judgments required by the NT Act, technical, jurisprudential or social scientific criteria for the classification of groups or aggregations of people as ‘societies’…The determinations which may be made under s 225 cover a range of possibilities which depend upon the nature of the society…

Such a liberal interpretation of the term, despite the heavy definition it was loaded with in *Yorta Yorta*, is an approach which accurately reflects the *sui generis* nature of native title.

The decision made as to the appeal on the content of determined rights and interests again highlights the problems in having to define such content separately and conclusively, subject to a strict continuity requirement. The Court upheld the right of

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68 The determined rights and interests are listed by Mansfield J at ibid [328].
69 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [38]. See discussion above.
70 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 (‘Alyawarr’) [78]-[79].
the claimants to teach the spiritual physical attributes of places of importance as an integral right in that land. There was also concern from the Northern Territory that the right of the claimants to live in the land would interfere with the rights of other parties in that land. The Court found that such concern was unfounded, as inconsistencies in certain areas of the land would, under the doctrine of extinguishment, lead to partial or whole extinguishment of inconsistent native title rights in that area. The Court further upheld the contested rights to share resources (but removed the right to trade them on ground that it was not borne out in the evidence) and the right to protect sites of significance (but removed the right to control access to that land on grounds that a native title right cannot be exclusory in nature).

However the Court upheld the appeal to the right to control access to land on the grounds that it cannot exist where there is no right to exclusive occupation. Further the Court removed the right to control disclosure of spiritual information, the right to determine membership of the claimant group and the right to be recognised as traditional owners. Even though they were obviously part of the rules relating to claimant’s relationship with the land, these rights were removed on the grounds that they could not be properly described as rights in land. Despite its positive determination of native title, Alyawarr demonstrated that requiring a particularised description of rights and interests not only inhibits the ability of native title to adapt to modern

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71 Ibid [135].
72 Ibid [131].
73 Ibid [157].
74 Ibid [140].
75 Ibid [148]-[150].
76 Ibid [162]-[164].
77 Ibid [165].
78 Ibid [166]-[168].
circumstance, but does not enable the law to properly appreciate the *sui generis* nature of native title.\(^7\) Not only are these juristic deficiencies, but they have a very real effect by increasing court time and party costs in having to detail a determination down to each asserted right, with each of those rights able to be appealed. Again the Australian approach does not bear well by comparison with the North American approach of describing traditional title as a true title in land, not simply a collection of rights to land.\(^8\)

**Rubibi**

*Rubibi Community (No 5) v Western Australia*\(^8\) was an interim decision made regarding competing and overlapping claims of the Yawaru group and the Walam Yawaru group in the West Kimberley region. The main focal point for this decision was a determination of which group held native title rights in the area and the means by which those rights were held (communally or as a group).\(^8\) Such a determination involved an assessment as to the continuity of the groups’ connection to land, which Merkel J framed as a decision as to

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\(^7\) The characterisation of native title as a collection of rights and interests was introduced in *Mabo* in recognition of the fact that it’s characterisation in the manner of an Anglo-European proprietary interest would not reflect the *sui generis* nature of native title (see discussion above and *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 57-8, 70, 110, 187. However the characterisation of native title in this manner, as adopted consistently since *Mabo*, also fails to appreciate native title’s *sui generis* nature since those rights and interests, as they need to be proven within our modern legal system, must be identified in an Anglo-European terms.


\(^8\) [2005] FCA 1025 (‘Rubibi’).

\(^8\) Ibid [30].
whether the Yawuru community is a recognisable body of persons united in and by traditional laws and customs which, since sovereignty, have constituted the normative system under which the native title rights and interests in issue are being claimed…

This statement was reached by an assessment largely of the *De Rose* decisions and their interpretations of *Yorta Yorta*, rather than *Yorta Yorta* itself. This explains why Merkel J does not frame the assessment of the continued observance of law and custom as a strict continuity of connection requirement. In this less strict assessment, Merkel J was quite open to the possibility that the claimants need not be necessarily biologically linked to members of the pre-Sovereignty society.

In assessing the evidence available, Merkel J cited with approval the assertion of the majority in *Yorta Yorta* that it is an ‘impermissible premise that written evidence about a subject is inherently better or more reliable than oral history on the same subject’. Ironically, this approval means that *Rubibi* represents a much better appreciation of oral evidence than *Yorta Yorta*, since that principle was approved but not practically applied in *Yorta Yorta*.

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83 Ibid.
84 See ibid [19]-[27].
85 Ibid [22].
86 Ibid [36], citing *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [63].
87 The High Court’s refusal in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 to set aside the initial decision of Olney J, which did not pay equal regard to oral evidence, is discussed above.
After assessing the evidence, Merkel J found that it supported a finding that observance of law and custom had continued since sovereignty:

My findings concerning the role in the Yawuru community of the traditional laws and customs relating to *rai* (see [90]), the Yawuru language (see [96]), ‘skin’, kinship and *malinyanu* laws and customs (see [109]), traditional stories (see [122]), name traditions (see [131]), hunting and bush foods (see [136]), ‘looking after country’ and ‘speaking for country’ (see [153]), ‘increase sites’ (see [159]) and permission requirements (see [173]), when considered cumulatively, demonstrate that the present Yawuru community still acknowledges and observes the traditional laws and customs which, since sovereignty, have constituted the normative system under which the native title rights and interests in issue are being claimed.88

Rather than tracing the observance of law and custom over time, this shows that Merkel J preferred an approach whereby the currently observed laws and customs were examined to see if they were based in pre-sovereignty; an analysis more akin to the minority approach in *Yorta Yorta* than the majority. For Merkel J, proof of generational transferrance of and substantially uninterrupted observance of law and custom flowed from the proof that laws and customs are based in pre-Sovereignty.89

Merkel J also made comment on the evolution of law and custom over time. Laws and customs may adapt over time, provided

the changes are of a kind that would fall within ‘the contingency provisions’…Those provisions are premised on the undoubted fact that traditional laws and customs are not fixed and

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88 See *Rubibi Community (No 5) v Western Australia* [2005] FCA 1025, [367].
89 Ibid [369]. This accords with the previously discussed approach postulated by De Soyza; see Anne De Soyza, ‘The Implications of *Bennell v Western Australia* for the High Court Decision of *Yorta Yorta v Victoria*’ (2006) 7(11) *Native Title News* 202, 203.
unchanging. Rather, they evolve over time in response to new or changing social and economic exigencies to which all societies adapt as their social and historical contexts change.\(^9^0\)

This concept of ‘contingency provisions’ is borrowed from anthropological evidence presented to the Court,\(^9^1\) and represents an appreciation that the adaptation of law and custom is regulated by the internal rules of that society. This contrasts with the approach adopted by the High Court in \textit{Yorta Yorta}.\(^9^2\) It allowed Merkel J to find that whatever the precise structure and traditional definition of the Yawuru people at sovereignty might have been, a change from a community similar to a patrifileal clan-based community at or before sovereignty to a cognatic or ambilineal based community is a change of a kind that was contemplated under the ‘contingency provisions’ of those traditional laws and customs.\(^9^3\)

Such a finding highlights the difference between the analytical methods of \textit{Yorta Yorta} and \textit{Rubibi}, with the latter decision’s less strict continuity requirement more accurately reflecting the reality of a traditional society’s passage over time.

\textbf{Jango}

\textit{Jango v Northern Territory}\(^9^4\) represents the first compensation application made under s 61(1) of the \textit{NTA}. Sackville J found that there were two questions to answer in any compensation application.\(^9^5\) Firstly, did native title exist prior to the extinguishing act

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\(^{90}\) \textit{Rubibi Community (No 5) v Western Australia} [2005] FCA 1025 [368].

\(^{91}\) Ibid [264]-[266] and [289]-[291].


\(^{93}\) \textit{Rubibi Community (No 5) v Western Australia} [2005] FCA 1025, [363].

\(^{94}\) [2006] FCA 318 (‘\textit{Jango}’).

\(^{95}\) As summarised in Tina Jowett and Kevin Williams ‘\textit{Jango}: Payment of Compensation for the Extinguishment of Native Title’ (2007) 3(8) \textit{Land, Rights, Laws: Issues of Native Title} 1.
purporting to give rise to the compensation? Secondly, from what date does the compensation accrue? The first of these is identical to the question posed in a native title application, albeit that the time at which the inquiry is performed is not the present but 1976, the time at which the extinguishing acts commenced. The second question is not relevant for the purposes of this thesis.

The respondents questioned the contention of the claim group that they held native title rights as the Western Desert Bloc, arguing that this was too broad a level of recognition. Sackville J rejected this argument, finding that the Western Desert Bloc was an appropriate native title-holding group, ‘in the sense of a society whose members acknowledge and observe a body of laws and customs’. The fact that there were traditional names for sub-groups of this Bloc, but not for the Western Desert Bloc as a whole, was of no consequence. His Honour further found that this society had existed uninterrupted since sovereignty, distinguishing it factually from Yorta Yorta. However his Honour noted strongly that this was not equivalent to a finding that the continuity of requirement had been met in full:

I emphasise that the conclusion I have reached does not determine the separate question of whether the applicants have shown that the members of the compensation claim group acknowledged and observed the laws and customs relating to native title rights and interests pleaded in the Points of Claim. Nor does it determine whether the pleaded laws and customs are

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96 The question of the quantum of compensation would, if required, be decided upon at a different trial.  
97 Jango v Northern Territory [2006] FCA 318, [574].  
98 Ibid [253].  
99 Ibid [352].  
100 Ibid [348].  
101 Ibid [364]-[365].
the traditional laws and customs of the Western Desert bloc. These issues require separate consideration…\(^{102}\)

Thus, for Sackville J, continuity of observance of laws and customs was a necessary requirement in itself. In relation to this requirement, his Honour was critical of the discrepancies between the evidence adduced at trial and the evidence presented directly by the claimants themselves:

the lack of correspondence between the evidence of the indigenous witnesses and the applicants’ formulation of the laws and customs does little to advance the applicants’ claims that members of the compensation claim group acknowledge and observe a particular body of laws and customs relating to rights and interests in land and that those laws and customs can be regarded as ‘traditional’…\(^{103}\)

This was despite the fact that ‘the evidence of the indigenous witnesses, taken overall, provides some support for specific aspects of the pleaded case’.\(^{104}\) What was particularly damning was the fact that

the evidence of virtually none of the senior Aboriginal witnesses supports the distinction between “conditions” and “additional factors” underpinning the applicants’ pleaded case.\(^{105}\)

Such an approach fails to appreciate the difficulty faced by claimants attempting to conceptualise the rules by which they live, often not consciously appreciated, in anthropological terms.

His Honour also critically viewed the inconsistencies of evidence between claimants, believing it

\(^{102}\) Ibid [366].
\(^{103}\) Ibid [408].
\(^{104}\) Ibid [406].
\(^{105}\) Ibid [446].
reflects such a variety of opinions, practices and assertions that it cannot be taken as establishing that the indigenous witnesses or members of the compensation claim group observed and acknowledged at the relevant times laws and customs of the Western Desert bloc as pleaded…

Thus Sackville J came to the conclusion that, although the claimant society had a continued existence over time since sovereignty, there had not been continued observance of laws and customs. His Honour entertains a brief discussion on the allowable evolution of laws and customs, although it was not a critical element of his Honour’s reasoning since his Honour had already found that continuity requirements has not been met. His Honour found generally that it could not be said that current laws and customs of the claimants constituted adaptations of traditional laws and customs. Particularly, the changing of custodianship for particular areas from being passed on patrilineally to being handed down on wider kinship principles was found to fall outside the bounds of natural evolution. Such an assertion contrasts strongly with the considerations of the Court in Rubibi regarding the discarding of strict patrilineral descent rules. More generally, Jango represents a much stricter interpretation of the continuity of requirement doctrine than, say, Sampi or Rubibi, requiring continuity of both the native title-holding society and continuity of that society’s observance of traditional law and custom.

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106 Ibid [449].
107 Ibid [451].
108 Ibid [453].
109 Ibid [501].
110 Ibid.
111 See Rubibi Community (No 5) v Western Australia [2005] FCA 1025, [363] and discussion above.
**Larrakia**

**Case History**

*Larrakia* was a determination made regarding a native title claim to an area consisting of 214 separate parcels of land, including Darwin and surrounds. It was a consolidated proceeding of 19 applications by three separate applicants (the Larrakia applicants, the Quall applicants and the withdrawn Roman applicants), and the determination related specifically to the metropolitan portion of the claim area. The major respondents contented that there were no established rights and interests in the area and that, even if they were established, they were not exclusive in nature as put forward by the claimants.\(^{112}\)

Mansfield J noted that, flowing on from *Yorta Yorta*, there is a continuity requirement arising out of s 223(1) of the *NTA*.\(^{113}\) His Honour found there were three questions which required answering in a native title determination:\(^{114}\)

- Are the claimants a society, in the normative sense of being united by observance of traditional law and custom?
- Are the laws and customs presently observed those observed by the society prior to the acquisition of Sovereignty?
- Has that society continued to exist throughout the intervening period, continuously acknowledging the traditional laws and customs?

\(^{112}\) From summary in Gordon Kennedy, ‘Larrakia Claims to Darwin/Palmerston’ (2006) 7(9) *Native Title News* 164, 164.

\(^{113}\) *Larrakia v Northern Territory* [2006] FCA 404, [55].

\(^{114}\) Ibid [97].
His Honour found that there had not been continuity of Larrakia society from pre-Sovereignty to the present day and that the current Larrakia society was not borne out of a requisite pre-Sovereignty society. Thus the determination made was that native title did not exist in the area.

The Larrakia applicants appealed on the grounds that Mansfield J had failed to correctly appreciate the oral evidence of the claimants, that his Honour had misapplied Yorta Yorta and that previous findings of the Aboriginal Land Commissioner should have been adopted. The Quall applicants appealed on the grounds that Mansfield J had misunderstood and failed to deal with their contention at trial that the appropriate level of recognition was as a wider Indigenous society across a larger area, not a Larrakia sub-group thereof. For present purposes it is unnecessary to go into the Quall applicants’ submissions at length as they do not go to the heart of the requirements for the establishment of native title. It is noted that their Honours believed the submissions were not valid, since Mansfield J had fully discharged any necessary duties in the consideration of the claim of the Quall applicants.

The joint judgment of French, Finn and Sundberg JJ also dismissed the appeal of the Larrakia applicants. Their Honours also held that Mansfield J had framed the appropriate test in respect of the continuity requirements of s 223(1) as espoused by the Yorta Yorta High Court. They also believed his Honour had fully discharged the responsibilities for evidentiary analysis, paying adequate attention to the oral evidence

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115 These conclusions will be discussed further below.

116 These assertions will be discussed further below.

117 Risk v Northern Territory [2007] FCAFC 46, [115].

118 Ibid [178].

119 Ibid [98].
of the claimants\textsuperscript{120} and previous findings of the Aboriginal Land Commissioner.\textsuperscript{121} The deliberations of their Honours will be examined at length below.

**Legislative Interpretation**

Mansfield J noted that an inquiry of native title turns expressly on the requirements of s 223(1) of the *NTA*. Even though those requirements might have been borne out of the law espoused in *Mabo v Queensland (No 2)*,\textsuperscript{122} his Honour affirmed that it is to the terms of the *NTA* that foremost attention must be paid.\textsuperscript{123} His Honour interpreted the s 223(1) term ‘traditional’ in accordance with *Yorta Yorta* as incorporating a continuity of connection requirement.\textsuperscript{124} This legislative interpretation was not contested on appeal.

**A Normative System**

Mansfield J believed it was evident from s 223(1) of the *NTA* that the rights and interests constituting native title must ‘derive from traditional laws and customs forming a body of norms that existed before sovereignty’.\textsuperscript{125} Drawing on *Yorta Yorta*, his Honour found that for a body of norms to exist, there must have been a parent normative system:

\textsuperscript{120} Ibid [72].
\textsuperscript{121} Ibid [114].
\textsuperscript{122} [1992] 175 CLR 1 (‘*Mabo’*).
\textsuperscript{124} *Risk v Northern Territory* [2006] FCA 404, [44], citing *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [46]-[47].
\textsuperscript{125} Ibid [54], citing *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [38]-[40] and [43]-[45].
Laws and customs do not exist in a vacuum – they ‘arise out of and, in important respects, go to define a particular society’… In this context, ‘society’ is to be ‘understood as a body of persons united in and by its acknowledgment and observance of a body of laws and customs’.  

Thus it was necessary to prove that, at the acquisition of Sovereignty, there existed a society of Aboriginal persons having traditional laws and customs under a normative system under which those laws and customs gave rise to rights and interests in the land and waters comprising the claim area possessed by members of that society.  

For Mansfield J, an inference as to the existence of a Larrakia society prior to the acquisition of sovereignty could be readily drawn:  

The longstanding existence of the Larrakia language in the area tends to negate the suggestion that the Larrakia people were recent arrivals (i.e. mid to late 19th Century arrivals) in the Darwin area after some other society had been dominant in that area. There is no other real evidence to suggest that at 1825 some other society was the dominant society in the Darwin region and had then been displaced by the Larrakia people…  

At appeal, their Honours affirmed this reasoning.  

**Continuity**  

Mansfield J found that the requirement of traditionality found in s 223(1) of the NTA, as interpreted in *Yorta Yorta* carried with it a requirement of continuity. Such a requirement was twofold, imposing ‘a requirement of continuity on both the Aboriginal society and also on the acknowledgment and observance of the traditional laws and customs’. This requirement of continuity was not absolute. Firstly, the observance of  

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126 Ibid [56], quoting from *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [49].  
127 Ibid [230].  
128 Ibid [237].  
129 *Risk v Northern Territory* [2007] FCAFC 46, [88].  
law and custom must have been ‘substantially maintained’ since sovereignty. 131
Secondly, adaptation of laws and customs over time does not necessarily mean that
those laws and customs are no longer traditional in nature. 132

Such an approach contrasts with the approach taken in cases such as Sampi and Rubibi.
In those cases, the doctrine of continuity related only to the continuity of the requisite
normative system. Continued observance of law and custom was relevant only to the
extent that it gave an indication as to the continuity of the normative system. 133
However the Larrakia approach adheres to a view more akin to that espoused in Jango,
whereby continuity of observance of law and custom constitutes a separate requirement
in itself. 134

It was ostensibly the requirement of continuity of society that, according to Mansfield J,
was not met in Larrakia. However, that failing was expressed in words relating more to
a lack of continued observance of law and custom:

A combination of circumstances has, in various ways, interrupted or disturbed the presence of
the Larrakia people in the Darwin area during several decades of the 20th Century in a way that
has affected their continued observance of, and enjoyment of, the traditional laws and customs of
the Larrakia people that existed at sovereignty. 135

Such a failing was found to defeat the applicants claim on the grounds that the
interruption meant that the laws and customs were not traditional, since they were

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131 Ibid [58], citing Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422, [87].
132 Ibid [57], citing Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422, [83].
133 See Sampi v Western Australia [2005] FCA 777, [963] and Rubibi Community (No 5) v Western Australia [2005] FCA 1025, [30]. See also discussion above.
134 Jango v Northern Territory [2006] FCA 318, [366]. See also discussion above.
135 Risk v Northern Territory [2006] FCA 404, [812].
founded not in a pre-Sovereignty society, but one which was formed sometime in the 20th Century.136

At appeal, the Larrakia claimants submitted that Mansfield J had failed to correctly apply the Yorta Yorta assessment of the requirements of s 223(1) of the NTA. Firstly, they submitted that Mansfield J had erred by adopting what they called a ‘book-end approach’.137 Such an approach simply compares the laws and customs observed currently to those observed prior to sovereignty, without adequately appreciating the ability of those laws and customs to adapt over time. Their Honours agreed that the adoption of such a ‘book-end’ approach would be erroneous, not only because it does not give proper appreciation of the ability of laws and customs to adapt, but because it does not examine the question of whether there has been a cessation of law and custom for a period of time, which had been later revived.138 However it was held that Mansfield J had not followed this approach since

[his Honour’s findings that Larrakia did not maintain the acknowledgement of their traditional laws and observance of their traditional customs are based upon evidence, particularly from older members of the Larrakia group, that practices they had engaged in during the first half of the twentieth century did not last into the second half.139

Thus it was found that his Honour had properly appreciated the ability of laws and customs to adapt over time.

The second ground of appeal for the claimants was that Mansfield J had imposed a requirement of continuity of possession upon the claimants, which has no basis in either

136 Ibid [839].
137 Risk v Northern Territory [2007] FCAFC 46, [77].
138 Ibid [82].
139 Ibid [83].
the NTA or in Yorta Yorta. Particularly, they argued that his Honour’s assertion that interruption to continuity had occurred was based solely on the observation that ‘[a] combination of circumstances has, in various ways, interrupted or disturbed the presence of the Larrakia people in the Darwin area’. Their Honours disagreed:

Read in totality, it is clear that his Honour’s conclusion on interruption was not based on the dislocation of the claimants from Darwin, or their failure to continue to exercise many of their native title rights. Rather he recognised that these were both evidence and symptoms of a more fundamental discontinuity in the traditional laws acknowledged and customs observed…A claimant group that has been dispossessed of much of its traditional lands and thereby precluded from exercising many of its traditional rights will obviously have great difficulty in showing that its rights and customs are the same as those exercised at sovereignty. This is, in effect, what has happened to Larrakia in this case. It is not that the dispossession and failure to exercise rights has, *ipso facto*, caused the appellants to have lost their traditional native title, but rather that these things have led to the interruption in their possession of traditional rights and observance of traditional customs.

Thus it was found that Mansfield J’s observations of loss of physical connection were used not as final proof that the continuity requirements had not been met, but as a key indication that they had not been met.

In their final submission on the non-adherence of Larrakia to the principles of Yorta Yorta, the Larrakia applicants noted the following statement of Mansfield J:

The firm impression I have is that the evidence does not reveal the passing on of knowledge of the traditional laws and customs from generation to generation in accordance with those laws and customs during much of the 20th Century.

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140 Ibid [100].
141 *Risk v Northern Territory* [2006] FCA 404, [812].
142 *Risk v Northern Territory* [2007] FCAFC 46, [104].
143 *Risk v Northern Territory* [2006] FCA 404, [823].
It was submitted that his Honour elevated the importance of continued intergenerational transference to being an integral requirement of the doctrine of continuity, on which his Honour’s decision turned. This submission was rejected by the Court, noting that Mansfield J’s conclusions as to continuity were based largely on the finding that there had been a cessation of the Larakia society. In any case, their Honours were quite prepared to accept that intergenerational transference could constitute a traditional custom, the discontinuance of which was further evidence of the break-down in observance of law and custom.

**Treatment of Evidence**

Mansfield J divided the historical and oral evidence up into three periods as suggested by the respondents; 1825 to 1910, 1910 to World War II and World War II to 1970. It was in this middle period that Mansfield J found that the body of observed norms had ceased:

> A combination of circumstances has, in various ways, interrupted or disturbed the presence of the Larrakia people in the Darwin area during several decades of the 20th Century in a way that has affected their continued observance of, and enjoyment of, the traditional laws and customs of the Larrakia people that existed at sovereignty. A significant circumstance has simply been the development of Darwin into a substantial community, following European settlement. As the evidence shows, that process has involved many other Aboriginal people than the Larrakia.

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144 *Risk v Northern Territory* [2007] FCAFC 46, [105].
145 Ibid [106].
146 Ibid [107].
147 *Risk v Northern Territory* [2006] FCA 404, [95]
people moving into the Darwin area. The other circumstances… are the consequence of natural or external events. Some are the consequence of governmental policy.\textsuperscript{148}

Such an approach is akin to the historical timeline approach of Olney J at first instance in \textit{Yorta Yorta}, and carries with it the same historiographical failings.\textsuperscript{149}

The Larrakia applicants appealed in relation to this evidentiary analysis. Their chief contention was that Mansfield J had not properly addressed the large body of oral evidence presented.\textsuperscript{150} It was stressed that the contention was not that Mansfield J’s conclusion that there had been a cessation in Larrakia society had been incorrect per se, but that his Honour had not fully performed the requisite evidentiary analysis.\textsuperscript{151} The claimants believed that there was oral evidence pertaining to the period of time between 1910 and the advent of World War II which pointed strongly to the existence of the Larrakia as a group observing traditional law and custom.\textsuperscript{152}

The Larrakia claimants drew attention especially to the evidence of one witness who had lived through that era, ‘presumably…as a good example of the primary judge’s failure to refer to the life story of an older witness during the interruption period’.\textsuperscript{153} However their Honours found that his Honour sufficiently regarded the evidence of that witness and, indeed, the evidence from all the witnesses called to attest to the observance of law and custom in that era, most of them on multiple occasions.\textsuperscript{154} Thus the drawing of attention to the manner in which Mansfield J assessed the oral evidence

\textsuperscript{148} Ibid [812].
\textsuperscript{149} As described above
\textsuperscript{150} \textit{Risk v Northern Territory} [2007] FCAFC 46, [104].
\textsuperscript{151} Ibid [57].
\textsuperscript{152} Ibid [29]-[31].
\textsuperscript{153} Ibid [36].
\textsuperscript{154} Ibid [39].
'in no way establishes the contention in support of which it was advanced'. Their Honours go onto a discussion of the relative weight attached to oral evidence when compared with other types of evidence.

Had the claimants made their argument in this regard less of a process-type complaint and instead one which challenged the assumptions which Mansfield J had reached regarding continuity, they may have been more successful. The oral evidence as to the current laws and customs is extensive and covers many fields. The evidence also points strongly to a correspondence between traditional laws and customs and those currently observed, as Mansfield J notes: ‘[it] is not to say that some of the evidence (but not all of it) reveals a correspondence between current and traditional laws and customs’. However it was pragmatically asserted that the fact observance had ceased for a period time was sufficient to disentitle the traditional nature of these laws and customs. Mansfield J also looked negatively upon the fact that ‘certain beliefs now regarded as fundamental…are derived only from the Kenbi Claim hearings’, overlooking the possibility of the Kenbi Land Claim representing a modern expression of the claimants’ traditional assertion to their traditional lands, or being a modern evolution of traditional methods of knowledge transference.

155 Ibid [38].
156 Ibid [39]-[72].
157 The extensive nature of that evidence is detailed in Risk v Northern Territory [2006] FCA 404, [527]-[793].
158 Ibid [820].
159 Ibid [822].
160 This holds a similarity with Olney J’s pragmatic view of the 1881 petition in Members of the Yorta Yorta Aboriginal Community v Victoria [1998] FCA 1606, [119]-[121], where its potential as an attempt to assert rights to land within an altered societal environment was not considered. There is a strong contrast between this and the approach taken in Sampi v Western Australia [2005] FCA 777 where modern institutions were considered reflective of the continued connection to land in modern times (at [718]). See discussion above.
The Larrakia claimants also believed that Mansfield J erred by not adopting the findings of the Aboriginal Land Commissioner in the Kenbi Land Claim, made under the *Aboriginal Land Rights (Northern Territory) Act*.\(^{161}\) His Honour, although accepting transcripts of the Claim as evidence,\(^{162}\) had rejected this submission at trial on the grounds that there is ‘no precise correspondence between the proof requirements under the NT Act and those for a claim under the ALR Act’.\(^{163}\) On appeal, their Honours was found that these considerations were ‘apposite and relevant’.\(^{164}\) noting that the strong presumption of the correctness of discretionary decisions at trial should only be overturned when there is a clear indication of error.\(^{165}\)

### Leave to Appeal

The Larrakia applicants requested special leave to appeal the decision in the High Court. The grounds of appeal were similar to those of the appeal to the Full Federal Court. Firstly, they submitted that the Full Federal Court affirmed Mansfield J’s inappropriate ‘book-end approach’, which did not fully appreciate whether the laws and customs were traditional by virtue of being sourced in laws and customs observed prior to Sovereignty.\(^{166}\)

Secondly, the applicants believed that

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\(^{161}\) 1976 (Cth).
\(^{162}\) *Risk v Northern Territory* [2006] FCA 404, [434].
\(^{163}\) Ibid [437].
\(^{164}\) *Risk v Northern Territory* [2007] FCAFC 46, [114].
\(^{165}\) Ibid [113], citing *Australian Coal and Shale Employees’ Federation v Commonwealth* (1953) 94 CLR 621, 627.
\(^{166}\) Transcript of proceedings, *Risk v Northern Territory* (High Court of Australia, Kirby, Hayne and Crennan JJ, 31 August 2007), 11.
[w]hat he [Mansfield J] did not do though was to properly analyse the lay evidence chronologically to say how he could come to the conclusion that during the lives of very significant people in the Larrakia community… Larrakia laws and customs dwindled to the point of extinguishment, or sufficient interruption so that they could be seen as no longer traditional. That is a finding which, if it were to be made, ought be measured up against the considerable body of lay evidence.¹⁶⁷

The applicants further identified a ‘golden thread’ that had existed through the era 1910 to World War II, as attested to by the comments of Mansfield J that there had been some preservation of social structure and identified Larrakia elders.¹⁶⁸ Such a ‘golden thread’ seems to point to the continued existence of a Larrakia normative society, particularly in light of oral evidence asserting this continuity. This represented an attempt to apply the more holistic approach adopted in Sampi and Rubibi.¹⁶⁹

However the High Court did not allow leave to appeal, stating that they were not persuaded that it is arguable that the trial judge applied wrong principles. The applicant’s contentions about errors in fact finding at first instance were examined comprehensively in the Full Court.¹⁷⁰

This refusal strikes similarities with the refusal of the Yorta Yorta High Court to overturn the decision of Olney J, however in Larrakia the asserted loss of connection occurred over a much shorter period of time. Therefore it would appear that the Court has committed itself to only allowing appeals (at least to the High Court) on very

¹⁶⁷ Ibid 5-6. It is not made explicit as to what ‘lay evidence’ refers, however it appears to be a reference to the evidence of the claimants themselves, as distinct from expert evidence or documentary evidence.
¹⁶⁹ See discussion above relating to Sampi v Western Australia [2005] FCA 777, [1042] and Rubibi Community v Western Australia (No. 5) [2005] FCA 1025, [383].
¹⁷⁰ Transcript of proceedings, Risk v Northern Territory (High Court of Australia, Kirby, Hayne and Crennan JJ, 31 August 2007), 32. Justice Kirby dissented and would have allowed the appeal, however does not make any substantive comments as to his reasons for dissenting.
strictly legal grounds, and that interpretations of evidence can only be challenged if they are premised on a misunderstanding of the law.
Single Noongar

Case History

*Single Noongar* was a determination of a separate question under Order 29 Rule 2 of the *Federal Court Rules*.\(^{171}\) The Single Noongar claim was a consolidation of numerous claims in the South-West of Western Australia, covering in whole over 194,000 square kilometres.\(^{172}\) This consolidation of claims caused delay in the proceedings as originally planned, which concerned the respondents, who believed a quick resolution was in the public interest. On the submission of the respondents, the separate question procedure was adopted to determine whether, putting the matter of extinguishment aside, native title existed in the area of the claim encompassing metropolitan Perth and surrounds.\(^{173}\)

In summary, there were three questions put to Wilcox J.\(^{174}\)

- Does native title exist in the Perth Metropolitan area?
- Is the native title held by the Noongar people as described in the claim?
- What are the nature of the rights and interests held under any native title found?

The first two questions were answered in the affirmative, with the rights and interests found being eight separate rights and interests directed to the use and enjoyment of land, similar to those of other positive determinations.\(^{175}\) For present purposes, it is Wilcox J’s deliberations on the first question that are relevant.

\(^{171}\) *1979* (Cth).


\(^{174}\) Summarised from *Bennell v Western Australia* (2006) FCA 1243, [83].

\(^{175}\) Ibid [878]. These rights and interests are the right to access and live on the area, the right to conserve and use the natural resources of the area, the right to maintain and protect sites of significance, the right to carry out economic activities on the area, such as hunting, fishing and food-gathering, the right to
Legislative Interpretation

Wilcox J noted that *Yarmirr*, *Ward* and *Yorta Yorta* all make it quite clear that it is in s 223(1) of the *NTA*, and only in the *NTA*, that the requirements of native title may be found.\(^{176}\) Thus his Honour found there were three requirements to be fulfilled:\(^{177}\)

- The rights and interests must have their source in the traditional laws and customs of the pre-Sovereignty society from which they are generated;
- The rights and interests held under those traditional laws and customs must have a connection with land and waters claimed; and
- Those rights and interests must be capable of recognition by the common law.

A Normative System

Questions as to the appropriateness of designating the Noongar people as the native title-holding group formed an important as aspect of the *Single Noongar* decision. This was because the State contested very strongly that the Noongar people were not a group discrete from neighbouring Indigenous groups, despite the existence of shared law and custom amongst the Noongar people.\(^{178}\) Wilcox J commences the examination of the issue by noting that *Yorta Yorta* specifically tells us that in the search for the native


\(^{177}\) Summarised from ibid [59].

\(^{178}\) Ibid [409].
title-holding normative system, one should be careful to avoid applying Eurocentric notions of normativity and society to non-European communities.\footnote{179}{Ibid [60], citing Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422, [40].}

On the submission of the claimants, the critical factor in the existence of a normative society throughout the claim area was the existence of shared laws and customs.\footnote{180}{Ibid [66].} The respondents submitted that there were further elements required to prove the existence of a society capable of generating laws and customs, particularly a requirement that members within the group know and acknowledge the other members of the group.\footnote{181}{Ibid [436].} In resolving the argument, Wilcox J noted that, ‘[d]espite my invitation to them to do so, counsel [for the respondents] did not cite any authority for that submission’.\footnote{182}{Ibid [437].} His Honour further noted that in Yorta Yorta, Gleeson CJ, Gummow and Hayne JJ seem to have regarded common acknowledgement and observance of a body of laws and customs as a sufficient unifying factor:

Certainly, as is graphically illustrated by De Rose, it is not necessary that the ‘society’ constitute a community, in the sense of all its members knowing each other and living together. If that element was required, it would constitute an additional hurdle, for native title applicants, which would be almost impossible for most of them to surmount. The task of showing the existence of a common normative system some 200 years ago is difficult enough; it would be even harder to show the extent of the mutual knowledge and acknowledgment of those who then lived under that normative system, bearing in mind the non-existence of Aboriginal writings at that time.\footnote{183}{Ibid.}
Thus Wilcox J believed that the evidentiary analysis to be performed was an assessment of the evidence available in terms of whether it pointed to a shared system of laws and customs across the group.\footnote{184}{Ibid [438].}

The existence or otherwise of a common and distinct language across the group warranted much discourse by all parties.\footnote{185}{Ibid [191]-[280].} The evidence was found to point overwhelmingly to the conclusion that there existed in the claim area one language, spoken by Indigenous persons with an affinity to the area.\footnote{186}{Ibid [274], citing Neowarra v Western Australia [2003] FCA 1402, [393].} Justice Wilcox accepted the submissions of the respondents that the existence of a shared language amongst a group of people was not absolute proof that those people constituted a society.\footnote{187}{Ibid [273].} However his Honour found that

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\text{evidence about language in the claim area provides significant, although not decisive, support for the Applicants’ claim that, in 1829, there existed a single community throughout the claim area.}\footnote{188}{Ibid [280].}
\]

Justice Wilcox found that there were several indicia, in addition to the linguistic similarities, which pointed to the existence of the community of Noongar people as a requisite normative system, including:\footnote{189}{As summarised in ibid [452].}

- The explicit assessment of expert anthropologists to this effect;
- The non-practice of circumcision in the area, as distinct from immediately neighbouring groups;
• The practice of kangaroo-skinning in the area, as distinct from immediately neighbouring groups;

• Evidence of extensive and unique interaction between sub-groups; and

• The absence of substantial normative differences through out the group, other than possible (but not definitively proven) differences in descent rules.

His Honour further found that the only coherent argument refuting these was that the Noongar group did not consider them socially significant. However this was of limited utility since it had already been asserted that there existed no strict requirement of mutual recognition within the group. Therefore Wilcox J found that the evidence supported a conclusion that the Noongar community was the appropriate level of recognition.

Continuity

Now that his Honour had established the existence of a Noongar normative system at sovereignty, which observed traditional law and custom, Wilcox J had to determine whether the current Noongar group observed these traditional laws and customs. His Honour believed this test involves consideration, not only of the situation now, but of the question whether there has been continuity of acknowledgement and observance from the date of settlement until now. Such a requirement is not that all of the claimants consistently acknowledged and observed all of the laws and customs, ‘but whether the community or group, as a whole, has sufficiently acknowledged and observed the relevant traditional laws and

190 Ibid [453]. See also discussion above.
191 Ibid [454].
192 Ibid [83].
customs’. However it must be shown that there has been a continuity of community such that the society cannot be described as borne out a newly constituted normative system, with observance of law and custom sparked by a recent revival of interest in them.

Tying these principles together, Wilcox J’s final statement of the continuity requirement reads as follows:

Before upholding a native title claim, the Court must be satisfied, on the balance of probabilities, of continuity of acknowledgment and observance, by the relevant community, from the date of sovereignty until the present time. Of course, there can never be direct evidence covering such a long time. However, inferences may be drawn, from evidence led at trial, concerning the situation in earlier times.

His Honour noted that evidence as to differences between laws and customs observed prior to Sovereignty and those observed currently may be an indication as to non-continuity of observance. However his Honour also noted the discussions of the High Court in *Yorta Yorta* regarding the inevitably significant effects of European settlement on traditional practices, which his Honour found particularly true for these claimants who had been profoundly personally affected by factors such as forced expulsion from traditional country.

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193 Ibid [706], citing *De Rose v South Australia (No. 2)* (2005) 145 FCR 290, [58].
194 Ibid [457], citing *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 and *Risk v Northern Territory* [2006] FCA 404 as examples of where current observance of laws and customs were found to be based on such a revival of interest.
196 Ibid [776].
197 Ibid [774], citing *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [89].
198 Ibid [774]-[775].
Therefore Wilcox J believed that many changes in law and custom in fact constituted an adaptation of law and custom under changed circumstances, in accordance with the general rules of the normative society. His Honour found that the changes to law and custom, which the respondents had raised as grounds to defeat the claim, were in fact acceptable adaptations to law and custom. For instance, the discarding of a strict patrilineal system of descent, in favour of a mixed system, was not an abandonment of traditional custom but an adaptation of the descent rules which was ‘inevitable, if the Noongar community was to survive the vicissitudes inflicted upon it by European colonisation and social practices’.\(^\text{199}\) Similarly, Wilcox J found that the fact that the Noongar people no longer viewed being born on country as a prerequisite to attaining rights was also an adaptation of traditional law since his Honour found it natural for the community to respond by regarding birth upon country as not essential to recognition of the person’s entitlement to rights over that country; but only provided the person was prepared to commit to an association with that country by living upon it, at least for substantial periods of time…\(^\text{200}\)

His Honour noted that, even though a number of traditional laws and customs had been modified, and further that a number of traditional laws and customs such as burial practices were no longer followed,\(^\text{201}\) the practices observed currently by the Noongar people had retained their innate character as traditional customs and laws, since they reflected spiritual beliefs and land relationships unique to the Noongar community.\(^\text{202}\)

To appreciate this ability of laws and customs to adapt, Wilcox J decided that in determining whether the requirement of continuity has been fulfilled ‘one should look

\(^{199}\) Ibid [777].
\(^{200}\) Ibid [778].
\(^{201}\) Ibid [758].
\(^{202}\) Ibid [791].
for evidence of the continuity of the society, rather than require unchanged laws and customs’. Such an approach quite clearly avoids the ‘book-end’ error identified by their Honours in the Full Federal Court appeal of *Larrakia*. Nevertheless, this approach contrasts in totality with the approach taken in *Larrakia* and *Yorta Yorta* of tracing the specific observance of laws and customs over time.

Ultimately, Wilcox J found that there was evidence as to continuity of observance of law and custom:

> There is no doubt that enormous forces have assailed Noongar society since 1829, making it impossible for many of the traditional laws and customs to be maintained. However, when I come back to the test stated in *Yorta Yorta*, and ask myself whether the normative system revealed by the evidence is ‘the normative system of the society which came under a new sovereign order’ in 1829, or ‘a normative system rooted in some other, different society’, there can only be one answer. The current normative system is that of the Noongar society that existed in 1829, and which continues to be a body united, amongst other ways, by its acknowledgement and observance of some of its traditional laws and customs’. It is a normative system much affected by European settlement; but it is not a normative system of a new, different society.

As De Soyza points out, there are marked similarities of fact between *Yorta Yorta* and *Single Noongar*, in that they both relate to claimant groups where ‘people had been expelled from their traditional land and their families had been broken up to such extent that people were “mixed up” about their connections to land’.

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203 Ibid [776].
204 See *Risk v Northern Territory* [2007] FCAFC 46, [77] and discussion above.
205 *Bennell v Western Australia* (2006) FCA 1243, [791].
206 De Soyza, above n 89, 204, quoting *Bennell v Western Australia* (2006) FCA 1243, [633].
different conclusion, *Single Noongar* had not followed the law as laid down in *Yorta Yorta*.207

However the *Yorta Yorta* principles were explicitly and repeatedly referred to by Wilcox J in *Single Noongar*. The difference in the considerations of the Court in the two cases was not a matter of jurisprudence, but demonstrate that the *Yorta Yorta* principles are elastic enough to produce different outcomes depending on the particular analysis performed at trial. Wilcox J believed that, since there were no grounds to support a finding that native title did not exist, an inference could and should be drawn as to the existence of native title.208 Such a perspective allowed for a different finding in *Single Noongar*, whilst still adhering to the basic principles of *Yorta Yorta*.

**Treatment of Evidence**

Native title determinations are highly fact-specific by their nature, and the consideration of evidence will always involve ‘difficult questions of fact and degree’.209 As with most native title determinations, *Single Noongar* involved the consideration of the expert evidence of historians, archaeologists, linguists and anthropologists, in light of the evidence given by 29 Aboriginal witnesses.210

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207 In SBS Television, ‘Up For Grabs’, *Insight*, 31 October 2006 <http://news.sbs.com.au/insight/trans.php?transid=989> at 23 November 2006, Attorney-General Phillip Ruddock stated: ‘the question that we think should have been addressed following the *Yorta Yorta* principles was had that level of connection been established? We don’t believe it has been’. In the same episode, Deputy Premier of Western Australia Eric Ripper agreed: ‘our view is that in this particular case the judge didn’t apply the *Yorta Yorta* principles…and that affects our ability to negotiate all the other native title claims across the State’.

208 See further De Soyza, above n 89, 204.

209 Hughston, above n 173, 2, citing *De Rose v South Australia (No 2)* (2005) 145 FCR 290, [58] and *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [82].

In preparation for the giving of oral evidence, the claimants filed a Statement of Cultural and Customary Concerns under pt 78 r 4 of the Federal Court Rules.211 The Statement outlined those aspects of Noongar culture which might affect the content and presentation of evidence delivered in oral examination, including differential distribution of knowledge, the reluctance of younger witnesses to speak in front of elders, reluctance to speak in front of other family groups, shyness speaking language, reluctance to discuss spirituality, reluctance to discuss the deceased and reluctance to name those who have broken traditional law.212 Taking these matters into account, Wilcox J looked very favourably upon the evidence of the claimants, largely accepting as fact the facets of Noongar society and history to which they attested. 213

Justice Wilcox refused to draw an inference of non-connection from the reluctance of witnesses in some instances to articulate on this connection, bearing in mind the noted reluctance of witnesses to speak regarding issues of spirituality.214 His Honour also refused to look negatively upon non-critical inconsistencies amongst the witnesses, noting that to do so would not only be manifestly oppressive but would ignore the differential distribution of knowledge amongst the Noongar people.215 For a final example, his Honour believed that the fact there were only 29 witnesses did not have a negative impact on the claimants’ contentions, but represented the best method of presentation of evidence since ‘what is important is not the number of witnesses but the

211 1979 (Cth).
213 Bennell v Western Australia (2006) FCA 1243, [596]-[601].
214 Ibid [779].
215 Ibid [753]-[755].
nature and quality of their evidence’. Not only did these considerations enable Wilcox J to best apply the requisite legal principles to the evidence of witnesses, but enabled the claimants to assert their rights to land without exposing those elements of their connection to land which they felt would be destroyed if revealed.

In examining the state of affairs in the early 19th Century, Wilcox J held that the best evidence was the writings of settlers as disclosed and discussed by historians, supported where possible by claimant evidence as to any relevant oral histories. His Honour cautions against accepting the written historical record at face value, opining that

it is necessary to be cautious about accepting the accounts of lay writers – that is, anthropologically untrained writers - of what they had been told by Aboriginal informants. Particularly in the first years of settlement, when Aboriginal people spoke little English, language problems must have imposed significant limitations upon accurate communication of complex information and ideas.

However, due to the absence of any other evidence, Wilcox J regarded these accounts necessarily useful as indicia of the facts as they were, especially when there was concurrence between authors.

There was also significant discussion on the question of historians as expert witnesses. The historians called forth on behalf of the claimants not only presented historical evidence to the Court, but actively presented opinions as to what could be ascertained

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216 Ibid [750].
218 Bennell v Western Australia (2006) FCA 1243, [85]-[88].
219 Ibid [107].
220 Ibid [110].
by an interpretive analysis of that evidence.\footnote{Ibid [89].} The respondents objected to this, believing they were opinions which did not fall under the grounds of opinion evidence under s 79 of the \textit{Evidence Act}.\footnote{1995 (Cth).} However Wilcox J rejected this submission, finding that historiographical examination of evidence constituted an opinion that was based on specialised knowledge.\footnote{See Jowett, above n 213, 4-5.} The body of historical evidence accompanied by historiographical analysis presented by the claimants formed a major reason for Wilcox J’s decision that there had been a continuity of society since Sovereignty, as opposed to the cessation that had occurred in \textit{Yorta Yorta}:

…European settlement had a profound effect upon the Aboriginal people of south-west Western Australia. However, as Dr Host [historian for the claimants] pointed out, the culture of those people persisted. Unlike the Yorta Yorta people, for example, the south-west community did not suffer a cataclysmic event that totally removed them from their traditional country. Families were pushed around, and broken up by removal of children and other events. However, people continued to identify with their Aboriginal heritage.\footnote{\textit{Bennell v Western Australia} (2006) FCA 1243, [599].}

It can be seen that Wilcox J found that \textit{Single Noongar} could be distinguished on the facts from \textit{Yorta Yorta}, thus leading to a different ruling. For example, it was noted that the evidence presented in \textit{Single Noongar} was of such detail so as to be unique in a native title claim:

The present case is unusual in regard to the number of surviving writings in which European visitors and settlers recorded observations, before and soon after the time of settlement, of Aboriginal society and practices within the relevant geographical area. There are also writings
based upon information provided by Aborigines who were alive at, or born shortly after, the time of settlement.225

However a difference which, if not more critical than the evidentiary differences between *Single Noongar* and *Yorta Yorta*, was at least equally influential upon the outcome of the *Single Noongar* claim, was the manner in which that evidence was approached by the Court. In the first instance decision in *Yorta Yorta*, Olney J focused upon that evidence pointing to a loss of connection with the claim area. In contrast, the analysis of the *Single Noongar* judgment above shows that Wilcox J focused upon that evidence with an emphasis on continuity of connection with the claim.

Irvin postulates that these differences were based on the historiographies brought to each ruling: ‘[t]he outcome is different because the historical evidence tendered in court is interpreted according to the judge’s understanding of history’.226 Particularly, it would appear that Wilcox J’s analysis of evidence did not suffer the influence of a ‘settled South’ methodology that perhaps pervaded the analysis performed by Olney J in the first instance *Yorta Yorta* decision.227 Therefore, although *Single Noongar* is explicitly differentiated from *Yorta Yorta* on the facts, there is evidence that the difference between the outcomes is not based just on the evidence presented but on the way that evidence was approached by the Court.

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225 Ibid [85].
227 See above for a discussion of the ‘settled South’ presumption and evidence of it’s influence on Olney J’s judgement.
Appeal to the Full Federal Court

Both the State and Federal Governments have launched appeals to *Single Noongar*, on the grounds that it does not adequately assess the claim according to the requirements of the *NTA*, as examined in *Yorta Yorta*. Particularly, they allege Wilcox J incorrectly applied the law in finding there had been continuity of the Noongar group since Sovereignty and also in finding that the Noongar group had the requisite connection to the claim. Bearing in mind the political nature of native title, it is unsurprising that the appeal was made for reasons more political than legal in nature.\(^\text{228}\)

The appeal was heard before the Full Federal Court in April 2007 and, at the time of writing, judgment is still pending. Perhaps the last word on the utility of such an appeal is best left to Wilcox J’s closing remarks in *Single Noongar*:

> In my opinion, it would be desirable for all parties carefully to review these reasons for decision and consider their desirable future action. This is litigation, and litigation is normally adversarial. However, this litigation is not a private squabble about money. It is litigation that deals with matters of great importance to the indigenous people of south-west Western Australia and, indeed, to all Western Australians. This litigation has significant implications for what has recently been called ‘reconciliation’ between indigenous and non-indigenous Australians. It ought not be conducted like a game, where one side must triumph over the other.\(^\text{229}\)

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\(^\text{228}\) A major reason behind the appeal is the concern that the decision threatens other forms of title in the Perth Metropolitan area: ‘I hear the assertion that there won’t be a problem...But can I give a guarantee that open spaces that are part and parcel of greater Perth today will not be the subject of a native title claim that is successful? I can’t do that’ (then Attorney-General Phillip Ruddock, SBS Television, above n 207). Given that native title is extinguished in all areas where other interests exist (excluding some pastoral leases), such a statement smacks more of scare-mongering than it does a genuine ground of complaint. As Pearson puts it: ‘The Federal Court decision will not result in one square centimetre of land held by the whitefellas being lost. In fact the Noongar specifically did not claim any freehold or leasehold land, which everybody knows extinguishes native title, or indeed any other tenure that extinguishes native title. Back yards were safe after *Mabo*. They are still safe after *Noongar*’ (Noel Pearson, ‘A Mighty Moral Victory’, *The Weekend Australian*, 23-24 September 2006, 20).

\(^\text{229}\) *Bennell v Western Australia* (2006) FCA 1243, [952].
Final Comment
It is no easy question to consider what the effect has been, and perhaps more importantly what the effect will be, of the decision of *Members of the Yorta Yorta Aboriginal Community v Victoria*\(^1\) on the requirements for Indigenous groups attempting to prove native title. Proof of this is the great proliferation of commentary generated by *Yorta Yorta*. It has been described as a decision which ‘stands out because it sought to provide the jurisprudential foundation for native in a way that moved on from, rather than restated, the arguments in *Mabo*’.\(^2\) Pearson sees *Yorta Yorta* as fundamentally altering the state of native title within the Australian law, as disentitling as the doctrine of extinguishment:

> the High Court delivered its judgment in *Yorta Yorta* in December 2002 and put the lie to my interpretation of the meaning of native title. The three principles of native title law are not that the white fellas get to keep all that they have accumulated, that the blackfellas get what is left over and they share some larger categories of land titles with the granted titles prevailing over the native title. Rather the three principles of native title are that the white fellas do not only get to keep all that they have accumulated, but the blacks only get a fraction of what is left over and only get to share a coexisting and subservient title where they are able to surmount the most unreasonable and unyielding barriers of proof – and indeed only where they prove that they meet white Australia’s cultural and legal prejudices about what constitutes ‘real Aborigines’.\(^3\)

Poynton goes further, seeing *Yorta Yorta* as ‘reminiscent of...*Milirrpum v Nabalco*’. The little gains made by indigenous people as a result of *Mabo* have, by one stroke of judicial fiat, been blown away’.\(^4\)

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\(^1\) (2002) 214 CLR 422 (‘*Yorta Yorta*’).
However other commentators believe that *Yorta Yorta* represents no great alteration of native title law. They note that much of what is said echoes and clarifies propositions that originate in *Mabo (No 2)*. For claimants and others the High Court’s clarification provides some measures of certainty as to the tests that must be applied.\(^5\)

Basten believes that the hype surrounding the *Yorta Yorta* decision was much overstated, since the questions it answered were already settled and it merely highlighted the already known fact that determinations always depend on the facts at hand.\(^6\)

Of course, the most appropriate method of determining the legal consequences of *Yorta Yorta* is to move away from the emotive and supra-judicial aspect of the above commentary, and focus expressly on the reasoning in *Yorta Yorta* and how it has been interpreted in subsequent cases.\(^7\)

What, then, is the legal legacy of *Yorta Yorta*? One of the requirements imposed is that the community which held interests in the area at the time of sovereignty must have

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\(^5\) Waters, John, ‘*Members of the Yorta Yorta Community v Victoria*’ (2003) 6(1) *Native Title News* 6, 10. See also Costenoble, Karin, ‘Defining Native Title: What is a Normative System?’ (2003) 6(3) *Native Title News* 30, 30.


\(^7\) Having said that, it must be remembered that the effects of *Yorta Yorta* have been felt, and will continue to be felt, outside the courtroom. As has been noted a number of times above, the concept of ownership of traditional lands is not a purely legal construct for Indigenous communities, it is inherently tied to issues of identity, community and spirituality. Therefore the construction of native title in the Courtroom affects claimants and traditional owners supra-judicially in regards to these and other matters. The construction of native title also affects the likelihood of success of a native title claim, which in turn affects the relative position of traditional owners when negotiations instruments such as Indigenous Land Use Agreements, Future Acts Agreements etc. However, given the nature of this thesis, it is only the legal ramifications of *Yorta Yorta* which will be examined.
been normative in nature. However this normative nature was not strictly defined in *Yorta Yorta*. The lack of a direct ruling has enabled subsequent decisions to find that notion of normativity need not accord to any Eurocentric notions, recognising the *sui generis* nature of native title. Thus native title has been granted upon a number of different types of claimant communities, at different levels of recognition. As discussed above, this was demonstrated in the *Sampi v Western Australia*\(^8\) where questions of the nature of the composite community were tempered by an acknowledgement that internal regulation is the most important factor, not impositions of external concepts of normativity.

However what was, of course, the most significant contribution of *Yorta Yorta* to native title law was its introduction of a strict continuity of connection requirement. This requirement, and its interpretation in subsequent cases, consists of two elements: the requirement itself and the evidentiary analysis that must be performed under it.

**Requirement of Continuity of Connection**

*Yorta Yorta* is quite clear in positing the *NTA* as the source of native title law, rather than the preceding common law. In interpreting the native title requirements of the *NTA*, the *Yorta Yorta* High Court construes the word ‘tradition’ in s 223(1) as being of such weight that it does not simply mean that the laws are based in pre-Sovereignty, but that they have been transmitted by intergenerational transference consistently since then. Thus was borne the continuity of connection doctrine, in which the group asserting

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\(^8\) [2005] FCA 777 (‘*Sampi*’).
native title must have ‘substantially maintained’ its connection to the claimed land since Sovereignty.

Such a decision is incongruous on two grounds. Firstly, it departs significantly from established international jurisprudence, leading Australia onto what Pearson calls a ‘sonderweg’; a peculiar path that leads astray.9 There is no equivalent of the continuity of connection requirement in any international common law aboriginal title. This is somewhat unsurprising however, since, as detailed above, Australia has always lagged behind the rest of the world in the appropriate recognition of traditional rights in land.

The second incongruity lies in the justification for the requirement itself. Despite the divided commentary as noted above, it is clear to this writer that the continuity of connection requirement was a new construct in native title law. Although there are signs and hints of it in earlier cases, Yorta Yorta is the first time we see it concretely and definitively expressed. In its initial expression, the continuity of connection requirement is framed in the words of Mabo itself, drawing from the ‘tide of history’ metaphor. This is despite the fact that Yorta Yorta confirms the NTA as the only source of native title. Such an incongruity could potentially lead to future High Court’s abandoning the requirement as a matter of law, preferring the approach of the minority in Yorta Yorta which is more reflective of Indigenous experience in the face of institutionalised and widespread dispossession. Such thought is of course only pure speculation and, on the part of this writer, hope. Suffice to say that, for the present and foreseeable future, the

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Courts have been handed a new requirement to apply in native title determinations; the continuity of connection requirement.

What, then, does the continuity of connection requirement specifically require? From Yorta Yorta it would seem there are two elements that need to be proven. Firstly, it is necessarily required that the society which holds native title must have had a continued existence and relationship to their lands throughout time since the acquisition of Sovereignty. Secondly, it must be proven that there has been continued observance of traditional law and custom throughout this period. Such a dichotomy of approach was affirmed in De Rose v South Australia [No. 2][10] and other subsequent decisions. However, as discussed above, it was found in both Sampi v Western Australia[11] and Rubibi Community v Western Australia (No. 5)[12] that the requirement extended only to demanding continuity of society. In those cases, continuity of observance of law and custom constituted only indicia of whether the requisite continuity had existed. Ultimately, this divergent view is incorrect as a matter of law, given the precedent of Yorta Yorta. Risk v Northern Territory[13] and Bennell v Western Australia[14] confirm that requirement of continuity requires both continuity of the normative system and continuity of observance of law and customs.

However this is not to say that the views of Larrakia and Single Noongar are identical on continuity of connection. In Larrakia it was required that the traditional laws and customs be detailed specifically and shown to exist throughout history. Such an

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[13] [2006] FCA 404 (‘Larrakia’).
[14] [2006] FCA 1243 (‘Single Noongar’).
approach follows from the ‘bundle of rights’ approach in Western Australia v Ward\textsuperscript{15} demanding that the rights and interests be specifically and separately defined. Single Noongar adopted a more holistic approach. Although noting observance of traditional law and custom was a specific requirement, continuity of connection was examined as to connection to the land as whole, rather than requiring specific evidence of observance of specific laws and customs. This approach properly avoided the ‘frozen in time’ approach so vehemently decried in Yorta Yorta, by allowing for laws and customs to adapt but still be indicative of the overall connection to land. Such an approach remains within the bounds of the precedent of Yorta Yorta, but does not fall into the approach of Larrakia and Yorta Yorta where the ability of laws and customs to adapt has been nobbled severely by requiring independent adherence to them over a long period of time.

There is also the issue of which party carries the burden of proof in establishing continuity. Yorta Yorta is not specific on the matter but, since it draws inference as to non-continuity from a lack of evidence, it implies that the burden is on the claimants. Larrakia is similar in this regard. In Single Noongar however, a lack of evidence was taken as in inference that continuity had not ceased, effectively thrusting the burden on the respondents to prove that here had not been continuity. Thus, as it stands after Yorta Yorta, the burden of proof depends on the inferences the Court is willing to draw in each case.

\textsuperscript{15} (2002) 213 CLR 1 (‘Ward’).
Analysis of Evidence

Yorta Yorta, Larrakia and Single Noongar all follow the same basic principle of the continuity of connection requirement. However, where Single Noongar resulted in a positive determination, Yorta Yorta and Larrakia resulted in negative determinations. This is especially surprising given the similar nature of the Larrakia and the Single Noongar claims. That is not to say that the facts of Larrakia and Single Noongar are identical. However they both comprise claims over heavily settled capital cities, where there had generally been an assumption that native title could no longer exist. Thus, given similar facts and broadly equivalent applications of the continuity of connection requirement, it is pertinent to study the evidentiary analyses undertaken to determine where the points of difference lie.

The attitudes of the bench to different types of evidence are notably divergent, as detailed extensively above. In Yorta Yorta and Larrakia, it was believed that historical written evidence was the best source for ascertaining the past, relegating the oral evidence of the claimants to a secondary role in providing proof only as to the current acknowledgement of laws and customs. The Court placed itself as arbiters of fact according to an ill-suited Aristotelian methodology, with the role of expert historians reduced to discoverers of historical evidence. Thus historiographical analysis is performed not by those with proper training, but by those without an understanding of textual concerns and whom are more susceptible in subconsciously bringing their own historiography into evidentiary examination. This means that the effects of genre, purpose and common tropes are not properly taken into account in the analysis of the written text.
In *Single Noongar*, his Honour expressly allowed the historiographical contentions of expert historians to be taken into account. In doing so, it was recognised that written historical evidence has its own flaws and is not necessarily of better quality than an oral history. Thus the evidentiary analysis performed in *Single Noongar* is one which fully accepts the relative merits of different types of evidence, realising that the past and history are not automatically interchangeable concepts. This non-correspondence is especially true of Australian history, since it is written predominately by the Anglo-European settlers and represents their often self-justificatory and self-aggrandising interests. It also represents an acceptance that, due to the *sui generis* nature of native title, it is internal self-recognition and self-assessment that is integral to any examination of the content of native title over time.

Assessments of particular types of evidence aside, there is a more fundamental difference in the evidentiary analyses performed in *Larrakia* and *Single Noongar*. *Larrakia* mirrored *Yorta Yorta* by requiring that a timeline be created, using the evidence available, to trace the observance of law and custom over time. If there has been a cessation of this observance, then the current observance of law and custom is not based in pre-Sovereignty but arises out a new, non-traditional system of observance. Such an approach thrusts the burden of proof upon the claimants, where a lack of evidence of observance will generally lead to an inference of non-continuity.

In *Single Noongar* however, the approach was markedly different. The laws and customs currently observed are compared with those in existence prior to sovereignty.
Any differences between them are examined to see if they can be aptly described as adaptations of those laws and customs, in the face of the changing environment with which the traditional society is faced. Thus the burden is on the respondents to prove that there has been a cessation of the observance of law and custom. Such an approach does not, as the respondents have suggested on appeal, fail to appreciate the continuity of connection requirement as espoused in *Yorta Yorta*. It fully requires that observance of law and custom be substantially maintained over time, as is required by the High Court’s interpretation of s 223(1) of the *NTA*. It simply posits the examination of the requirement on the laws and currently observed, which reflects the present tense of s 223(1).

By removing the requirement to trace laws and customs over time, the *Single Noongar* approach also allows for a better appreciation of laws and customs to adapt over time, since it seeks to actively determine whether current laws and customs are ‘traditional’ in nature, rather than require the charting the path of an unchanged set of laws and customs over 200 years. Most tellingly, it is an approach which actively seeks to recognise the existence of Indigenous society and rights to land, and seeks to prevent adding to the already onerous burden thrust upon potential claimants.

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16 The stricter approach also raises the unnerving possibility that successful claimant societies may, as they naturally adapt in the future, be forced to re-prove their claim to native title in the Courts to determine if the society is still sufficiently ‘traditional’ (see Simon Young, *The Trouble With Tradition: Native Title and Cultural Change* (2008)).
**Conclusion**

So what is the legacy of *Yorta Yorta*? In decrying the ‘frozen in time’ approach, does it replace it with a doctrine which re-freezes the possibility of rights to evolve? Does the advent of a strict continuity of connection requirement confine native title to being an archaic right in land, unsuited to describing modern relationships to land and only proven with great difficulty by a vibrant modern community?

Certainly, *Yorta Yorta* confirms that Australian native title sits alone in international jurisprudence. The North American approach where indigenous title is recognised as a true title and given protection as such by the law is in stark contract to the Australian approach with the Australian approach where indigenous title to land is defined as a bundle of rights and interests subservient to all other forms of title in land. The continuity of connection requirement adds, to the detriment of Australian jurisprudence, to this contrast.

The cases since *Yorta Yorta*, as described in thesis have proven that the effect of the greatest legacy of *Yorta Yorta*, the continuity of connection requirement, is not entirely clear. Some cases, lead by *Larrakia*, have ruled that the continuity of connection requirement is strict and requires continuity of a normative system and of observance of law and custom to be definitively proven over a long time according to Anglo-European standards. Other cases, headed by *Single Noongar*, have found that the continuity requirement is one which is to be proven on the balance of probabilities and that the current claimant society and currently observed laws and customs are to be tested within
their own history to determine if they are ‘traditional’, and thus whether the continuity of connection requirement is met.

Ultimately, the legacy of *Yorta Yorta* rests in the hands of the Court in each case. By approaching the requirement with an appreciation of historiographical methods of evidentiary analysis and a willingness to prove traditionality by comparison of pre-Sovereignty laws and customs to those currently practiced, a Court may achieve a determination reflective of the history of Indigenous survival. By adhering to rigid evidentiary analyses and creating a timeline in which positive proof of continuous connection over an extended period of time must be shown, a Court may achieve a pragmatic determination which submits claimants to a testing and unrelenting trial of proof.

*Yorta Yorta* gave the law the requirement of continuity of connection. It is up to the Courts to decide whether or not it freezes native title jurisprudence.
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