

What's needed to prove native title?

Finding flexibility within the law on connection

Nick Duff

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About the author

Nick Duff is a lawyer at the Goldfields Land and Sea Council. His current practice covers native title claims work and the design of governance structures for native title holders. He wrote this paper while working as a researcher and project manager within the Native Title Research Unit (NTRU) at the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS). His other work at AIATSIS included law reform submissions on native title and constitutional reform, legal research on the interaction between native title law and land management issues such as weeds and freshwater, and policy work on native title agreement making and governance.

Nick's involvement in the legal aspects of native title began in 2008, when he was associate to French J (as he then was) at the Federal Court of Australia. Nick also draws on an international relations and conflict resolution background in analysing the political and policy aspects of native title work, in particular self-determination, culture, intra-Indigenous conflict, governance norms and economic development.

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Introduction

Throughout Australia, native title claims are resolved primarily through negotiated consent determinations rather than contested litigation.¹ Decisions by governments to enter into consent determinations may be guided by a number of considerations, including justice and the recognition of rights, the intergovernmental commitment to ‘Closing the gap on Indigenous disadvantage’, the promotion of Indigenous economic development, and the promotion of respectful relationships between governments and Aboriginal and Torres Strait Islander peoples. There are also a number of reasons that governments may consider themselves obliged to scrutinise the substance of native title claims carefully: they may be concerned to ensure that the ‘right people for country’ are recognised, they may be concerned about the potential effects of native title on the economic benefits of mining and other development activity, or they may consider it legally improper to agree to a consent determination unless a set of ‘minimum’ legal requirements are met. This last consideration provides the main question for this discussion paper: what are the legal constraints on how flexible governments can be about the proof of native title?

This paper analyses the case law dealing with the proof of native title, beginning with the High Court’s decision in *Yorta Yorta*.² The primary objective is to locate the points of legal and evidentiary flexibility in order to present an accurate picture of the circumstances in which governments *may* properly enter into consent determinations. This should provide a guide for claimants and governments alike in distinguishing between situations where additional evidence is required to satisfy the minimum legal requirements for consent determinations and those where governments seek additional evidence as a matter of policy preference.

A secondary objective is to describe the state of the current law for *litigated* claims to show realistically the shadow that potential litigation casts on parties’ negotiations. Where previously controversial legal points have been resolved in litigation, parties can and should conduct their negotiations on that basis (except, of course, where the law allows them greater flexibility in the context of a consent negotiation).

This paper deals with the body of law as a whole, including first-instance decisions of the Federal Court and appeal decisions of the Full Court of the Federal Court. Contrary to the occasional suggestion otherwise, decisions of individual Federal Court judges are crucial to the accurate articulation of the law in this area. The *Yorta Yorta* case is the most recent High Court pronouncement on ‘connection’, and its impact has been felt deeply. Practitioners may therefore be tempted to think that it is the only case that matters and that any subsequent Federal Court cases that appear to be flexible on matters of evidence must be somehow

1 A consent determination is a decision made by a court that reflects an agreement made by the parties under the *Native Title Act 1993* (Cth) to recognise the existence of native title in a particular area. As of 31 January 2014, 206 out of the 271 native title determinations since 1992 have been made by consent: Native Title Research Unit (2014) *Native title determinations summary*, p. 2. Available at http://www.aiatsis.gov.au/_files/ntru/determinations_summary.pdf.

2 *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58. This starting point has been chosen because it is the most recent High Court authority on the relevant issues, and previous cases may be of limited use to the extent that they are inconsistent with that decision.

'inconsistent' with *Yorta Yorta*. This temptation should be resisted: since *Yorta Yorta* there have been very few applications for special leave to appeal to the High Court on issues relating to the proof of native title, and none have been granted.³ This means that judges on appeal, and parties deciding whether or not to appeal, have not seen fit to challenge the approaches taken in the cases discussed in this paper. In short, those cases are all 'good law' and must be regarded as applying, clarifying or refining the law as set out in *Yorta Yorta*.

Where there are tensions or inconsistencies between different lower court decisions, this paper identifies and analyses them to give an interpretation of the law that is most consistent with the legislation and binding or persuasive authorities. To the extent that this involves 'taking a position', it is done to identify instances of judicially supported flexibility on native title proof and so provide legal support for governmental decisions to enter into consent determinations. It is intended in a very general way to capture the 'spirit' of the principle that legislation intended to benefit people or to remedy wrongs against them should be interpreted favourably to them in cases of ambiguity.⁴ The *Native Title Act 1993* (Cth) is legislation for the benefit of Aboriginal and Torres Strait Islander peoples,⁵ and this paper is directed partly at identifying those beneficial interpretations and applications of the Act that judges have deemed appropriate.⁶

The paper explicitly avoids discussion of the theoretical and policy implications of the legal principles described. Other authors have produced excellent critical analyses of the problematic nature of this area of law from the perspectives of legal theory, anthropology and social justice.⁷ At the same time, the author's engagement with the minute details of

3 The only post-*Yorta Yorta* special leave applications the author could identify as relating to connection issues were *Quall v Northern Territory of Australia* [2008] HCATrans 127, *Risk v Northern Territory of Australia* [2007] HCATrans 472, and *Fuller v De Rose* [2006] HCATrans 49. Special leave to appeal was refused in all three.

4 See, for example, *Waugh v Kippen* [1986] HCA 12 per Gibbs CJ, Mason, Wilson and Dawson JJ at [11]; *IW v City of Perth* [1997] HCA 30 per Brennan CJ and McHugh J at 947.

5 The 'beneficial' purpose of the Native Title Act, as revealed by its Preamble, the 'objects' clause in s. 3 and the legislative history, has been noted by judges on a number of occasions. See, for example, *Sampi v Western Australia* [2005] FCA 777 at [969] per French J; *Smith on behalf of the Gnaala Karla Booja People v Western Australia* [2001] FCA 19 at [23] per French J; *Commonwealth v Yarmirr* [2001] HCA 56 at [249] per Kirby J; *Evans on behalf of the Koara People v Western Australia* [1997] FCA 741 per RD Nicholson J. See also *North Galanjanja Aboriginal Corporation & Waanyi People v Queensland* [1996] HCA 2 [24]–[25] per McHugh J.

6 Note that I am not here making a legal argument about the interpretation of any particular provision of the Native Title Act but instead justifying the analytical approach adopted in this paper. The point is to draw on the underlying logic of the interpretational principle and to apply it to my consideration of the case law as a whole.

7 See L Strelein (ed.), *Dialogue about land justice: papers from the National Native Title Conferences*, Aboriginal Studies Press, Canberra, 2010; L Strelein, *Compromised jurisprudence: native title cases since Mabo*, 2nd edn, Aboriginal Studies Press, Canberra, 2009; T Bauman (ed.), *Dilemmas in applied native title anthropology*, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2010; T Bauman & G McDonald (eds), *Unsettling anthropology: the demands of native title on worn concepts and changing lives*, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2011; DL Ritter, *Contesting native title: from controversy to consensus in the struggle over Indigenous land rights*, Allen & Unwin, Sydney, 2009; DL Ritter, 'The judgement of the

the prevailing legal framework ought not be read as an endorsement of that framework. The aim of this paper is not to interpret the case law in order to give a scholarly description of what ‘the law’ on native title connection actually is (should such a thing exist), nor to provide a critical appraisal of what the law *should be*. Instead, it is intended to demonstrate some of the diversity within the case law and identify instances where judicial pronouncements provide legal support for a more flexible approach to negotiating native title determinations.

What is necessary for a determination of native title?

The conceptual and legal basis of native title, as explained in *Mabo (No. 2)*,⁸ is the common law rule that where a new power asserts sovereignty over an already occupied territory the pre-existing land-related rights and interests that were held under the former legal system will continue to be respected by the new legal system unless they are expressly extinguished.⁹ Since 1993, the rights and interests of Aboriginal and Torres Strait Islander peoples have been recognised under the Native Title Act rather than under the common law, but the logic is the same: (some) rights and interests that existed under pre-colonial laws and customs survived the Crown’s assertion of sovereignty and can be enforced under the contemporary Australian legal system.¹⁰

Under the Native Title Act, the Federal Court can make a determination that native title does or does not exist in relation to the whole or a part of the area covered by the relevant application. It can do this either by the agreement of all parties¹¹ or after a trial.¹² In every case, the court’s determination must specify certain matters, including which people hold

world: the Yorta Yorta case and the “tide of history”, *Australian Historical Studies* 35: 106–21, 2004; S Young, *The trouble with tradition: native title and cultural change*, Federation Press, Sydney, 2008.

8 *Mabo v Queensland (No. 2)* [1992] HCA 23.

9 *Mabo v Queensland (No. 2)* [1992] HCA 23, per Brennan at [52]–[54], [59] and [63], and Deane and Gaudron at [10]. In this context, ‘extinguished’ means ‘lost forever’. Native title rights and interests will be ‘extinguished’ if a government makes laws that are inconsistent with their continued existence, or if another party is granted rights that are inconsistent with the native title rights: *Western Australia v Ward* [2002] HCA 28 at [78]; *Western Australia v Brown* [2014] HCA 8 at [33].

10 Courts have on occasion warned against a direct importation of common law notions into the interpretation of the Native Title Act; for example, *Western Australia v Ward* [2002] HCA 28 at [16] and *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at [32] and [70]. However, as was made clear in *Yorta Yorta* at [75], whereas it was previously a common law rule that resulted in the recognition of Indigenous legal rights and interests, after the passage of the Native Title Act it is that Act that now achieves that recognition. The High Court’s majority joint judgment stated: ‘The native title rights and interests which are the subject of the Act are those which existed at sovereignty, survived that fundamental change in legal regime, and now, by resort to the processes of the new legal order, can be enforced and protected’ (*Yorta Yorta* at [77]).

11 Native Title Act, ss. 87, 87A. Note the Act also allows determinations to be made where the application is ‘unopposed’. It deals with these separately from situations where the application is opposed but the parties ultimately come to an agreement: s. 86G, Native Title Act.

12 There is no explicit provision in the Native Title Act that says the court may or must make a positive determination if it is satisfied that the requirements of native title are established on the evidence. That proposition is implied by a combination of ss. 13, 61, 223 and 225.

the common or group rights that comprise the native title, and the nature and extent of the native title rights and interests.¹³

Native title is defined in s. 223 of the Native Title Act, which says:

- (1) The expression *native title* or *native title rights and interests* means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
 - (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
 - (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
 - (c) the rights and interests are recognised by the common law of Australia.

A determination of native title is a 'creature' of the Native Title Act rather than the common law,¹⁴ but the native title rights and interests themselves are not created by the Act; instead, they owe their existence to the laws and customs of Aboriginal and Torres Strait Islander peoples.¹⁵ A determination therefore recognises the existence of the rights and interests but does not create or grant rights and interests. Interpretation of s. 223 is therefore not merely a matter of statutory interpretation entirely internal to the Act; rather, it requires a consideration of the fundamental nature of native title as rights and interests that are recognised by the Australian legal system but derived from Indigenous systems of law and custom.¹⁶

The main body of this paper analyses those legal elements of the s. 223 definition of native title, as interpreted by the courts, that have come to be subsumed under the rubric of 'connection'. Connection in this context extends beyond the specific question of connection addressed in s. 223(1)(b) and encompasses the whole matter of proving native title rights and interests. It excludes matters such as extinguishment, the formulation of the claimed rights and interests, or the question of whether those rights and interests are capable of being recognised under the common law.

Before proceeding to the substantive analysis of the law on connection, it is useful to describe the role of these legal elements, and the evidence that may go towards establishing them, in consent determinations as opposed to litigation.

Legal requirements for consent determinations

Consent determinations are made under ss. 87 and 87A of the Native Title Act (the discussion here will focus on s. 87, since the provisions are similar). Section 87 provides that a court may make a determination of native title (among other orders) if:

13 Native Title Act, ss. 94A and 225.

14 *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at [32].

15 *ibid.* at [45], [75]–[77].

16 See *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at [79].

- three months have elapsed since the notification date of the application
- the parties have reached agreement on the terms of the proposed determination
- the agreed terms are written down, signed by the parties and filed in court
- the court is satisfied that an order in those terms would be within its power, and
- it appears to the court to be appropriate to do so.¹⁷

Looking at the fourth condition, there are a range of issues that may affect the court's power to make a consent determination. The Native Title Act specifies some of these: all of the matters listed in s. 225 must be addressed in the proposed determination;¹⁸ there must not be any existing determination in the claim area¹⁹ or any overlapping claim;²⁰ and the rights and interests set out in the proposed determination must be 'in relation to land or waters'.²¹ Another matter to be considered is whether the rights and interests can be recognised by the common law of Australia, as required by s. 223(1)(c).²² In deciding whether a determination would be within their power, courts have not generally found it necessary to look to the factual basis for the matters listed in s. 225 — it is a formal rather than substantive requirement.²³

In relation to the fifth condition, there are two distinct questions: what does the court need to be satisfied of in order to conclude that a determination is 'appropriate', and how far must the government respondent (usually the state or territory) go in satisfying itself that there is a proper basis for a determination? The short answer to both these questions is: the law does not require courts to conduct a mini-trial as to the merits of the applicants' case for native title; nor are government respondents expected to conduct their own trial by proxy. The government respondents, rather than the court, are entrusted with assessing the substantive adequacy of the claimants' case, and the law does not require them to assess the evidence with the same rigour a court would. These two questions are explained in more detail under the next two headings: 'When is a consent determination "appropriate"?' and "'Standard of evidence" for consent determinations'.

When is a consent determination 'appropriate'?

Courts have taken a range of different approaches to the question of when it is 'appropriate' to make a consent determination. As French CJ has remarked, 'appropriate' is 'an evaluative

17 Native Title Act, ss. 87(1) and (1A).

18 *ibid.*, s. 94A.

19 *ibid.*, ss. 13(1)(a), 68.

20 *ibid.*, s. 67(1).

21 *ibid.*, s. 223. See RS French, 'Native title: a constitutional shift?', JD Lecture Series, University of Melbourne Law School, 24 March 2009.

22 See, e.g., *Kearns on behalf of the Gunggari People #2 v Queensland* [2012] FCA 651; *Kngrwarrey on behalf of the members of the Irrkwal, Irrmarn, Ntewerrek, Aharreng, Arrty/Amatyerr and Areyn Landholding Groups v Northern Territory of Australia* [2011] FCA 428.

23 J Reeves, 'Consent determinations under the *Native Title Act 1993* (Cth)', presentation to the Law Society Northern Territory, Wednesday, 18 February 2009. Cf., e.g., *Rex on behalf of the Akwerlpe-Waake, Iliyarne, Lyentyawel Ilepparranem and Arrawatyen People v Northern Territory of Australia* [2010] FCA 911.

term and so has a somewhat elastic application'.²⁴ The diversity and detail of this range of opinion is the subject of a separate publication,²⁵ but for the purposes of this paper it is useful to make a few short points.

The court has a wide discretion to make consent determinations. This power must be exercised 'judicially', meaning not arbitrarily or capriciously, and in accordance with the subject matter, scope and purpose of the legislation.²⁶ A primary and overarching purpose of the Native Title Act is to facilitate the resolution of native title claims by agreement rather than litigation.²⁷ Across the board, then, judges recognise that it will be appropriate to make a consent determination without a full hearing and assessment of the evidence.²⁸ By the same token, however, judges acknowledge that the making of a native title determination is a serious matter that will bind not only the immediate parties but also the world at large.²⁹ This means that courts must not simply apply a rubber stamp to the parties' agreement; rather, they should be satisfied that there is some basis for the exercise of their jurisdiction and that the proposed determination is 'rooted in reality'.³⁰

Within these bounds, judges differ in how they approach the task of deciding whether a consent determination is appropriate. There are three distinct approaches. The clear mainstream of cases consider that the existence and procedural background of the

24 RS French, 'Native title: a constitutional shift?', JD Lecture Series, University of Melbourne Law School, 24 March 2009.

25 N Duff, *Rubber-stamp or mini-trial? Interpreting the court's role in native title consent determinations*, Land, Rights, Laws: Issues of Native Title, AIATSIS Research Publications, Canberra, forthcoming.

26 *Smith v Western Australia* (2000) 104 FCR 494 at [22]; *Munn for and on behalf of the Gunggari People v Queensland* [2001] FCA 1229 at [28]. These cases have been cited in dozens of subsequent consent determination judgments.

27 See, e.g., *Clarrie Smith v Western Australia* [2000] FCA 1249 at [22]–[24]; *Ward v Western Australia* [2006] FCA 1848 at [8]; *Hunter v Western Australia* [2012] FCA 690; *Hoolihan on behalf of the Gugu Badhun People #2 v Queensland* [2012] FCA 800; *Archer on behalf of the Djungan People #1 v Queensland* [2012] FCA 801 at [3]; *Trevor Close on behalf of the Githabul People v Minister for Lands* [2007] FCA 1847 at [6]; *Payi Payi on behalf of the Ngurrpa People v Western Australia* [2007] FCA 2113 at [6].

28 See, e.g., *Munn for and on behalf of the Gunggari People v Queensland* (2001) 115 FCR 109 at [30]; *Patch on behalf of the Birriburu People v Western Australia* [2008] FCA 944 at [13]; *Wik and Wik Way Native Title Claim Group v Queensland* [2009] FCA 789 at [16]; *Kuuku Ya'u People v Queensland* [2009] FCA 679 at [12].

29 *Deeral v Charlie* [1997] FCA 1408; *Smith v Western Australia* [2000] FCA 1249 at [26]; *Cox on behalf of the Yungngora People v Western Australia* [2007] FCA 588; *Wik and Wik Way Native Title Claim Group v Queensland* [2009] FCA 789 at [15]; *Rex on behalf of the Akwerlpe-Waake, Iliyarne, Lyentyawel Ileparranem and Arrawatyen People v Northern Territory of Australia* [2010] FCA 911; *Lennon on behalf of the Antakirinja Matu-Yankunytjatjara Native Title Claim Group v South Australia* [2011] FCA 474 at [4]; *Prior on behalf of the Juru (Cape Upstart) People v Queensland (No. 2)* [2011] FCA 819; *King on behalf of the Eringa Native Title Claim Group v South Australia* [2011] FCA 1386.

30 RS French, 'Native title: a constitutional shift?', JD Lecture Series, University of Melbourne Law School, 24 March 2009. See also *Clarrie Smith v Western Australia* [2000] FCA 1249 at [26]; *Cox on behalf of the Yungngora People v Western Australia* [2007] FCA 588 at [3]; *Prior on behalf of the Juru (Cape Upstart) People v Queensland (No. 2)* [2011] FCA 819 at [19].

agreement between the parties are the focus of the inquiry. As North J said in *Nangkiriny*:³¹

I rely primarily on the fact that the parties have freely agreed to the terms of the orders. The fact that there is evidence before the Court which justifies the order confirms the view that the agreement freely made is appropriate.

The most frequently cited statement of the law on ‘appropriateness’ is the following passage from Emmett J’s judgment in *Munn*:³²

...the Court must have regard to the question of whether or not the parties to the proceeding, namely, those who are likely to be affected by an order, have had independent and competent legal representation. That concern would include a consideration of the extent to which the State is a party, on the basis that the State, or at least a Minister of the State, appears in the capacity of *parens patriae* to look after the interests of the community generally. The mere fact that the State was a party may not be sufficient. The Court may need to be satisfied that the State has in fact taken a real interest in the proceeding in the interests of the community generally. That may involve the Court being satisfied that the State has given appropriate consideration to the evidence that has been adduced, or intended to be adduced, in order to reach the compromise that is proposed. The Court, in my view, needs to be satisfied at least that the State, through competent legal representation, is satisfied as to the cogency of the evidence upon which the applicants rely.

However, that is not to say that the Court would itself want to predict the State’s assessment of that evidence or to make findings in relation to those matters. On the other hand, in an appropriate case, the Court may well ask to be shown the evidence upon which the parties have based their decision to reach a compromise. Either way, I would not contemplate that, where the Court is being asked to make an order under s 87, any findings would be made on those matters. The Court would look at the evidence only for the purpose of satisfying itself that those parties who have agreed to compromise the matter, particularly the State on behalf of the community generally, are acting in good faith and rationally.

This passage and the cases which have applied it make clear that courts should be deeply interested in the process by which the parties reached their agreement, in particular the process by which the government respondent came to regard the claimants’ case as strong enough. Reeves J said in *Nelson*³³ that

...the central issue in an application for a consent determination under s 87 is whether there exists a free and informed agreement between the parties. In this respect, the process followed by the State party respondent, particularly how

31 *Nangkiriny v Western Australia* [2002] FCA 660 at [15], cited in some 30 subsequent consent determination judgments.

32 *Munn for and on behalf of the Gunggari People v Queensland* [2001] FCA 1229 at [29]–[30], cited in about 40 consent determination judgments.

33 *Nelson v Northern Territory of Australia* (2010) 190 FCR 344 at [14].

it goes about assessing the underlying evidence as to the existence of native title, is critical. Other critical factors, all directed to the processes that lead to the agreement and what was agreed, that have been previously identified by the Court include: whether the parties have independent and competent legal representation...whether the terms of the proposed order are unambiguous and clear...and whether the agreement has been preceded by a mediation process... [references omitted].

In the pursuance of this approach there have been cases in which judges make virtually *no* reference to the evidence or facts of the substantive native title claim, and instead limit their inquiry to procedural matters relating to the agreement.³⁴ More commonly, though, judges will refer to the facts and evidence to support their conclusions about the propriety of the agreement or as a way of 'telling the story' of the determination.³⁵

A second category of cases treats 'appropriateness' as a matter of *both* the circumstances of the agreement *and* an independent (albeit cursory) assessment of the evidence. This might be thought of as a 'hybrid' approach. While the 'mainstream' approach outlined above focuses on the agreement but may consider the evidence to determine whether the parties are acting rationally and in good faith, the second approach is concerned primarily with the factual basis for the claim but also considers the agreement as a factor weighing heavily in favour of a determination.³⁶ In most 'hybrid' cases, the relationship between the evidence, the agreement and the appropriateness of the determination is not explicitly stated. It is apparent from context, however, that the court considers that a sound agreement and an independent factual basis are both necessary conditions for a determination. In the *Nookanbah* determination, for example, French J said:³⁷

I have had the opportunity of examining the proposed orders, and subject to some minor variations, which have been made, I am satisfied that they are in accordance with the law. I have also had the opportunity of considering a comprehensive expert report by two experienced consultant anthropologists, Mr Michael Gallagher and Dr Kingsley Palmer. The conclusions reached in their report indicate that the applicants would satisfy the criteria for a determination of native title in the terms which they seek. ...

34 E.g. *Trevor Close on behalf of the Githabul People v Minister for Lands* [2007] FCA 1847 per Branson J; *Wilson v Northern Territory of Australia* [2009] FCA 800 per Reeves J; *Barunga v Western Australia* [2011] FCA 518 per Gilmour J; *Hunter v Western Australia* [2012] FCA 690 per North J; *Albert v Northern Territory of Australia* [2012] FCA 673 per Lander J; *Roberts on behalf of the Najig and the Guyanggan Nganawirdbird Groups v Northern Territory of Australia (No. 3)* [2012] FCA 255 per Finn J.

35 E.g. *Lovett on behalf of the Gunditjmarra People v Victoria* [2007] FCA 474; *Hayes on behalf of the Thalanyji People v Western Australia* [2008] FCA 1487.

36 E.g. *Kaurareg People v Queensland* [2001] FCA 657 per Drummond J; *Ngalpil v Western Australia* [2001] FCA 1140 per Carr J; *James on behalf of the Martu People v Western Australia* [2002] FCA 1208 per French J; *Mervyn, Young and West on behalf of the Peoples of the Ngaanyatjarra Lands v Western Australia* [2005] FCA 831 per Black CJ; *Patta Warumungu People v Northern Territory of Australia* [2007] FCA 1386 per Mansfield J; *Adnyamathanha No. 1 Native Title Claim Group v South Australia (No. 2)* [2009] FCA 359 per Mansfield J; *Prior on behalf of the Juru (Cape Upstart) People v Queensland (No. 2)* [2011] FCA 819 per Rares J.

37 *Cox on behalf of the Yungngora People v Western Australia* [2007] FCA 588 at [4], [12].

Having regard to the agreement of the parties, the form of the order proposed and the supporting material in the report prepared by the anthropologists, I regard it as appropriate that I should make the orders and the determination which are proposed.

The cases in this ‘hybrid’ category constitute a significant proportion of the overall number of consent determinations historically, but the approach is becoming less common as the ‘mainstream’ approach is increasingly adopted.

Finally, there are the cases that do not explicitly consider the process of agreement-making to be relevant to the appropriateness inquiry, other than to signal that the court is justified in applying a lower than normal standard to its assessment of the evidence. This might be considered the ‘hands-on’ approach, as the court sees itself as having the central role in assessing the evidence to determine the appropriateness of the determination, as opposed to relying primarily on the fact of agreement as supporting the determination. Often the judge’s conclusions about appropriateness are expressed exclusively in terms of the adequacy of the evidentiary material and make no reference to the agreement (other than in invoking the power under s. 87 in the first place).³⁸ The ‘hands-on’ approach is the one that was generally adopted in the earliest consent determinations and has continued to be associated with Queensland judges.³⁹

Across all three approaches — mainstream, hybrid and hands-on — courts in the vast majority of cases will receive a range of material on the government respondent’s processes of assessing connection evidence *and* on the substance of the claim. It is relatively rare for judges not to have had any exposure to the substance of a claim by the time a consent determination is sought, given the range of court processes that are likely to take place during the life of a native title claim, such as the taking of preservation evidence, the filing of affidavits, witness statements and agreed statements of facts. Even where they do not consider it strictly necessary, judges will often refer to the material they have been given, in acknowledgment of the work that has gone into producing the research, out of respect for the culture and history of the claimant group, and sometimes simply to reinforce the factual basis for the claim.⁴⁰

38 E.g. *Malachi on behalf of the Strathgordon Mob v Queensland* [2007] FCA 1084 per Greenwood J.

39 E.g. *Western Yalanji or “Sunset” peoples v Pedersen* [1998] FCA 1269 per Drummond J; *Masig People v Queensland* [2000] FCA 1067 per Drummond J; *Congoo v Queensland* [2001] FCA 868 per Hely J; *David on behalf of the Iama People and Tudulaig v Queensland* [2004] FCA 1576 per Cooper J; *Djabugay People v Queensland* [2004] FCA 1652 per Spender J; *Mundraby v Queensland* [2006] FCA 436.

40 E.g. *Kngwarrey on behalf of the members of the Irrkwal, Irrmarn, Ntewerrek, Aharreng, Arrty/ Amatyerr and Areyn Landholding Groups v Northern Territory of Australia* [2011] FCA 428 per Reeves J; *King on behalf of the Eringa Native Title Claim Group and the Eringa No. 2 Native Title Claim Group v South Australia* [2011] FCA 1387 per Keane CJ; *Kearns on behalf of the Gunggari People #2 v Queensland* [2012] FCA 651 per Reeves J; *Archer on behalf of the Djungan People #1 v Queensland* [2012] FCA 801 per Logan J.

'Standard of evidence' for consent determinations

Having established the role that the court and government respondents are expected to play in confirming the factual basis for a consent determination, the next question is: to what evidentiary standard must that factual basis be established? As will become evident from the cases cited below, the degree to which the state or territory is expected to test the evidence is significantly lower than what would be required of a court at trial. The court does not require the state or territory to show that the claimants have proved the elements in s. 223 to the standard of proof applicable to civil litigation.⁴¹ The government respondent's role in consent determinations is not an outsourcing of the judicial fact-finding function but rather involves a distinctly lower threshold of evidence. A majority joint judgment of the High Court⁴² observed that:

If it be practicable to resolve an application for determination of native title by negotiation and agreement rather than by the judicial determination of complex issues, the Court and the likely parties to the litigation are saved a great deal of time and resources. Perhaps more importantly, if the persons interested in the determination of those issues negotiate and reach an agreement, they are enabled thereby to establish an amicable relationship between neighbouring occupiers.

It is implicit in the first sentence that the legislation allows for parties to negotiate resolutions to complex issues of law and fact without determining them precisely as a court would.

In the Guditjmarra consent determination judgment, North J found that it was appropriate for the state to have assessed the applicant's material at the level of a 'reasonably arguable case'.⁴³ His Honour said that the court's power to 'approve agreements' under s. 87 was given in order to avoid lengthy hearings before the court, and that the Act does not intend to replace a court hearing with 'a trial, in effect, conducted by State parties'.⁴⁴ This means that 'something significantly less than the material necessary to justify a judicial determination is sufficient to satisfy a State party of a credible basis for an application'.⁴⁵ Further, in the Thalanyji consent determination North J observed that if a state party were to make excessive demands for information it would be acting in a manner inconsistent with the concept of agreement-making provided by the Native Title Act.⁴⁶ His Honour said:⁴⁷

41 The civil standard of proof, in this context, means that on all of the admissible evidence taken together it is more likely than not that the facts the applicant relies on to make their case are true. This is also called the 'balance of probabilities'. See *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361–362; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66 per Mason CJ, Brennan, Deane and Gaudron JJ at [2]. See also s 140 *Evidence Act 1995* (Cth).

42 *North Galanjanja Aboriginal Corporation v Queensland* [1996] HCA 2 at [26] per Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ.

43 *Lovett on behalf of the Guditjmarra People v Victoria (No. 5)* [2011] FCA 932 at [26].

44 *Lovett on behalf of the Guditjmarra People v Victoria (No. 5)* [2011] FCA 932 at [38]. See also *Kuuku Ya'u People v Queensland* [2009] FCA 679 at [12] per Greenwood J.

45 *ibid.*

46 *Hayes on behalf of the Thalanyji People v Western Australia* [2008] FCA 1487 at [30]. See also *Hunter v Western Australia* [2009] FCA 654 at [17]–[26].

47 *ibid.* at [22]–[23].

The way in which native title jurisprudence has developed provides a significant contextual factor which should influence a State respondent in specifying the extent to which applications should be investigated where orders under s. 87 are to be sought. In broad terms the learning relating to extinguishment has shown that successful applications will not interfere significantly with the rights and interests of respondent parties. To the extent that native title rights and interests are inconsistent with the rights of respondents, those latter rights will prevail: *Western Australia v Ward* (2002) 213 CLR 1; [2002] HCA 28.

This circumstance moderates the degree of verification required by a State respondent acting in the interests of citizens on questions such as the constitution of the relevant society at settlement, and the requirements of continuity in the acknowledgement of traditional laws and the observation of traditional customs. It is necessary to emphasise that, in the context of s 87, State respondents are not required, in effect, to conduct a trial of the application in order to satisfy the Court that it is appropriate to make the orders sought. Section 87 is designed to avoid that necessity and all the disadvantages which are involved in the conduct of litigation.

Other judges have endorsed this approach. Reeves J has articulated the relevant standard to which the government respondent ought to be satisfied as that of a 'credible' or 'arguable' basis.⁴⁸ Emmet J, Barker J and Gilmour J have on different occasions stated that the government respondent must simply be 'satisfied as to the cogency of the evidence on which the applicants rely'.⁴⁹ Other cases put the matter more broadly still, requiring only that the state or territory be satisfied that there is a 'proper basis'⁵⁰ for the determination or that the determination is 'justified in all the circumstances'.⁵¹

It should be stated that a large number of consent determinations do not contain any explicit statement of what is expected of states and territories in assessing connection material. But the judgments that do contain such a statement are all in concurrence with the principles outlined above. Further, as indicated earlier, there are some judges who do not consider that the basis for the government respondent's agreement (as opposed to the underlying evidence of native title itself) is particularly relevant, so it is unsurprising that these judges do not specify the degree to which governments are expected to assess the evidence. Even in those cases, however, it is clear that the judges are not themselves testing

48 *Kngwarrey on behalf of the members of the Irrkwal, Irrmarn, Ntewerrek, Aharreng, Arrty/Amatyerr and Areyn Landholding Groups v Northern Territory of Australia* [2011] FCA 428 at [15]; *Nelson v Northern Territory of Australia* [2010] FCA 1343 at [12]–[15]; *Ampetyane v Northern Territory of Australia* [2009] FCA 834 at [19].

49 *Munn v Queensland* [2001] FCA 1229 per Emmett J at [29]; *Thudgari People v Western Australia* [2009] FCA 1334 at [25] per Barker J; *Goonack v Western Australia* [2011] FCA 516 per Gilmour J at [26]; *Barunga v Western Australia* [2011] FCA 518 per Gilmour J at [25].

50 *Hunter v Western Australia* [2012] FCA 690 at [28] per North J.

51 E.g. *Simon v Northern Territory of Australia* [2011] FCA 575; *Roberts on behalf of the Najig and the Guyanggan Nganawirdbird Groups v Northern Territory of Australia* [2012] FCA 223; *Albert v Northern Territory of Australia* [2012] FCA 673; *Hoolihan on behalf of the Gugu Badhun People #2 v Queensland* [2012] FCA 800; *Archer on behalf of the Djungan People #1 v Queensland* [2012] FCA 801.

the evidence so much as surveying it to ensure that there is some factual basis to support the determination. Even for these more 'hands-on' judges, the fact that the parties have agreed on the determination reduces the extent to which the court is required to scrutinise the material — a *prima facie* case⁵² is generally held to be sufficient.⁵³

To summarise, consent determinations do not require any particular 'standard of proof' and certainly do not require government respondents to be satisfied on the balance of probabilities.⁵⁴ Indeed, it is somewhat misleading to use the term 'standard of proof' to describe the degree to which governments are expected to assess the evidence, because it suggests that they are required to take on a quasi-judicial role. The only relevant statutory requirement is that the determination be 'appropriate' in all the circumstances. In the unique context of the Native Title Act, this merely requires that there be a reasonably arguable or credible basis for the existence of native title.⁵⁵ This means that there is no legal impropriety in a government respondent agreeing to a consent determination where the evidence is significantly less comprehensive than it would be at a trial. As noted, some judges have suggested that it would be improper for a state or territory to impose such a high standard on applicants.

Concluding remarks on consent determinations

This paper has so far explained the legal requirements for making consent determinations, focusing on the 'appropriateness' test in ss. 87 and 87A of the Native Title Act. Clearly, government respondents have a central role in examining the material supporting consent determinations, although some judges regard the court as bearing the ultimate responsibility for ensuring the factual probity of the claim. Just as clearly, governments are not required to test claims to the same extent as a court would in contested litigation, and there are strong indications that setting the evidentiary bar too high would be improper in terms of the additional time and costs incurred and in light of the imperative to resolve native title claims by agreement. Governments no doubt consider it important to protect their interests (and the public interest) by carefully considering the merits of claims,⁵⁶ but this imperative does not mean governments must refuse to agree to a consent determination until they are convinced that the claimants would succeed at trial.⁵⁷

52 A case that is supported 'on the face of it' — that is, assuming that the supporting material is true and accurate without necessarily testing it against potentially contradictory assertions, does the applicant's case appear to be sufficiently supported at first blush?

53 E.g. *Wik and Wik Way Native Title Claim Group v Queensland* [2009] FCA 789 at [16]–[17]; *Kowanyama People v Queensland* [2009] FCA 1192 at [24]; *Kuuku Ya'u People v Queensland* [2009] FCA 679 at [12]. See also *Delaney on behalf of the Quandamooka People v Queensland* [2011] FCA 741; *Wonga on behalf of the Wanyurr Majay People v Queensland* [2011] FCA 1055.

54 Again, meaning that the facts relied on by the claimants are more likely to be true than to be false.

55 See previous references to *Lovett on behalf of the Gunditjmarra People v Victoria (No. 5)* [2011] FCA 932, *Nelson v Northern Territory of Australia* [2010] FCA 1343, and other cases that cite those cases.

56 Indeed, the courts have often indicated that they see the state or territory respondents as acting as the guardians of the public interest, under a duty to consider claims carefully. See, e.g., *Munn for and on behalf of the Gunggari People v Queensland* [2001] FCA 1229 at [29]–[30].

57 The theoretical tensions inherent in applying private law procedures (judgments by consent) to public law cases are discussed in J Reeves, 'Consent determinations under the *Native Title Act 1993*

This is not, however, to argue for a lax approach to connection. It is a matter of simple justice that native title determinations should be made only in favour of the traditional owners of each area of land, and this requires close attention to the oral and historical evidence about the geographic limits of traditional territories and estates. Just as importantly, the ongoing demands of governance and decision-making in relation to native title lands require a clear and shared understanding of how different groups and subgroups fit together. These two considerations highlight the paramount importance of identifying the ‘right people for country’. That involves the accurate description of claim groups and the accurate identification of the areas in which claim groups hold rights and interests. Careful examination of these matters by native title representative bodies, government respondents and (in litigated matters) the courts is clearly necessary to achieve the policy objectives of the Native Title Act.

As will be explained in the second part of this paper, however, identifying the right people for country is not the only aspect of proving native title under the Native Title Act. The Act is concerned not only with the content of Indigenous law but also with the Australian legal system’s *rules for recognising* Indigenous rights and interests. Particularly around the issue of the continuous observance and acknowledgment of traditional custom and law (see ‘Law and custom’, p. 18), the Australian legal system imposes technical requirements that may be irrelevant to questions of intra-Indigenous justice and, arguably, questions of justice in relation to the broader Australian society too. These technical requirements remain part of our law, and governments are not free to ignore them.⁵⁸ This does not mean, though, that governments negotiating consent determinations are required to embark on an exhaustive inquiry into such matters. The principles set out in the first part of this paper give sound legal support for government respondents to make inferences that are fairly open on the evidentiary material. And the making of such inferences is well supported by a number of important policy considerations. The capacity for native title to promote Indigenous economic development and reduce disadvantage is one such consideration. Another is the impact that native title negotiations have on broader relationships between government and Indigenous people — trust and cooperation in negotiations are more likely to foster constructive relationships in the future than is a focus on whether the claimants would be able to prove their case at trial. A third policy consideration in favour of making inferences is the sheer economic cost of gathering and assessing detailed connection material, particularly where multiple supplementary reports are required to address technical legal or factual issues. So once the question of ‘right people for country’ is satisfactorily answered, there is a strong policy argument in favour of a flexible approach to the proof of native title, and such an approach has a sound legal basis.

The legal elements of native title connection

This paper has thus far described the context in which the case law on connection is relevant to the question of whether a government respondent may agree to a consent determination. In short, government respondents are expected to give appropriate consideration to the

(Cth)’, presentation to the Law Society Northern Territory, Wednesday, 18 February 2009.

58 *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58, particularly at [44].

material supporting the claimants' case and to be satisfied that there is a credible basis or reasonably arguable case for the existence of the native title claimed. In determining this, they are expected to apply the legal definition of native title as set out in s. 223 and interpreted in the case law. The paper will now describe the legal constraints that this requirement imposes on parties and identify the points of legal and evidentiary flexibility within those constraints. That discussion will be structured by reference to four primary elements: law and custom, tradition, society and connection.

Law and custom

Indigenous law and custom are the touchstones for all of the legal elements of native title. The purpose of the Act is to recognise and protect the rights and interests held in relation to land and waters by Aboriginal and Torres Strait Islander peoples under their own law and custom.⁵⁹ Accordingly, law and custom determine:

- the content, scope and distribution of native title rights and interests
- who the holders of the rights and interests are
- whether, and the way in which, biological descent is relevant to the 'succession' of rights and interests from one generation to the next
- whether rights and interests are contingent on the performance of particular duties or ceremonies, or on physical presence in the land or waters
- whether, and which, people have a 'connection' to the land and waters, for the purpose of s. 223(1)(b), and what that connection consists of
- the answer to the 'society' question (see 'Society', pp. 33 to 45).

So law and custom is not simply the first element of proof. In an important sense it is *the controlling* element of proof: it provides the Indigenous legal framework by which other matters of proof must be judged. This section looks at five important points about law and custom:

1. currency of law and custom
2. normative content
3. acknowledgment and observance
4. relevance of laws and customs
5. evidence and inference.

The relevant law and custom is current law and custom

The relevant laws and customs are those that are *currently* acknowledged and observed by the claimants and can be characterised as 'traditional'.⁶⁰ (The term 'traditional' is explained in greater detail on pp. 24 to 33.)

59 Native Title Act, Preamble, s 3(a).

60 *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at [85], [174].

The need for normative content

In establishing native title rights and interests, there is no need to distinguish between *laws* on one hand and *customs* on the other, since s. 223(1)(a) refers to ‘laws and customs’ rather than ‘laws or customs’.⁶¹ This means there is no need to engage in ‘jurisprudential debate’ about what constitutes a law or what differentiates law from moral obligation.⁶²

The joint judgment in *Yorta Yorta*, drawing on the legal philosophy of Professor HLA Hart, made the point that laws and customs must be ‘rules having normative content’ and not merely ‘observable patterns of behaviour’.⁶³ Similarly, Lindgren J in *Wongatha* quoted Hart’s discussion of ‘rules’ requiring ‘a critical reflective attitude to certain patterns of behaviour as a common standard’. Such an attitude, Hart says, involves ‘criticism (including self-criticism), demands for conformity’ and the characteristic normative terminology of ‘ought’, ‘must’, ‘should’, ‘right’ and ‘wrong’.⁶⁴ The legislation does not use the word ‘rule’, but the joint judgment in *Yorta Yorta* introduced the notion of ‘normative content’ because it was seen as necessary to sustain rights and interests.

Subsequent case law has generally followed this approach to the ‘normative quality’ of laws and customs, although it is frequently dealt with quite perfunctorily and in many cases not mentioned at all.⁶⁵ For example, RD Nicholson J in *Daniel*⁶⁶ did not discuss in detail whether particular aspects of the asserted law and custom (such as that relating to hunting, camping et cetera) were normative or merely ‘patterns of behaviour’, though his Honour clearly identified the ‘normative content’ test from *Yorta Yorta*.⁶⁷ It appears from the judgment that his Honour had heard both anthropological evidence and lay evidence and had concluded that the relevant behaviours were normative. This approach was challenged on appeal but affirmed by the Full Court in *Moses*.⁶⁸

The ‘normative content’ question, then, does not require an exhaustive examination of evidence in every case (see ‘Matters of evidence’, pp. 23 to 24). It may be difficult to prove to the civil standard that particular activities or knowledge are normative in nature, but inferences may be drawn from the evidence in appropriate circumstances.⁶⁹

61 *ibid.* at [41]–[42].

62 *ibid.*

63 *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at [42].

64 *Harrington-Smith on behalf of the Wongatha People v Western Australia (No. 9)* [2007] FCA 31 at [996].

65 E.g. the notion of ‘normative content’ or ‘normative quality’ as opposed to ‘normative society’ was not mentioned at all in or on appeal in *Bennell v Western Australia* [2008] FCA 1633 or *Bodney v Bennell* [2008] FCAFC 63. It was not mentioned in *Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory of Australia* [2004] FCA 472 and only briefly, on appeal, in *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [75]–[76].

66 *Daniel v Western Australia* [2003] FCA 666.

67 *ibid.* at [139].

68 *Moses v Western Australia* [2007] FCAFC 78 at [329]–[330].

69 See *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v Queensland (No. 2)* [2010] FCA 643 at [172]; *Harrington-Smith on behalf of the Wongatha People v Western Australia (No. 9)* [2007] FCA 31 at [950]–[954]; *Sampi on behalf of the Bardi and Jawi People v Western Australia* [2010] FCAFC 26 at [77].

The case law establishes the following propositions about 'normative content':

- The absence of spiritual beliefs about rights and interests in relation to land does not mean that there is no relevant law or custom — that is, even if the traditional laws and customs of many Aboriginal groups regard relationships to land as 'primarily a spiritual affair',⁷⁰ that is not a legal requirement imposed by the Native Title Act.⁷¹
- Laws or customs do not require a system of enforcement or sanction in order to be normative.⁷²
- Law or custom may determine how particular activities are conducted — for example, the practice of adoption — even if it does not determine whether or not the activity is conducted in the first place.⁷³ For instance, in *Neowarra* Sundberg J said, 'There is no requirement that it be an invariable, mandatory or obligatory practice, so long as it is normative — rule based.'⁷⁴
- Evidence which does not directly prove particular laws and customs can still support an inference that such laws and customs exist or existed; for example, evidence of the existence of songs about the sea can (indirectly) show that there were rules about the use of the sea.⁷⁵
- Claimants need not be capable of articulating, by themselves, the explicit details of the normative system for the court to accept that there is such a normative system. Laws and customs may be acknowledged and observed without the persons involved being able to set out their content in an exhaustive or comprehensive way.⁷⁶
- There is no need for the articulation of the relevant laws and customs to be completely uniform, consistent or precise. As Sackville J stated in *Jango*, '...the mere fact that the rules or practices governing the asserted entitlements to rights and interest in land are formulated in vague and imprecise terms, at least by the standards of the common law, does not necessarily mean that these rules and practices lack "normative" content.'⁷⁷ Neither does the mere fact of disagreement among Aboriginal people about the content or scope of particular laws and customs mean that those laws and customs lack normative content. Idiosyncratic or minority views are not fatal, though they may raise factual questions for the court to resolve in defining the content or scope of a right or interest to be included in a determination.⁷⁸ As Sundberg J observed in *Neowarra*:

70 See, e.g., *Western Australia v Ward* [2000] FCA 191 at [104] and [242].

71 *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v Queensland* (No. 2) [2010] FCA 643 at [172].

72 *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at [41]–[42].

73 *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v Queensland* (No. 2) [2010] FCA 643 at [174].

74 *Neowarra v Western Australia* [2003] FCA 1402 at [269].

75 *Sampi on behalf of the Bardi and Jawi People v Western Australia* [2010] FCAFC 26 at [77].

76 *Harrington-Smith on behalf of the Wongatha People v Western Australia* (No. 9) [2007] FCA 31 at [998].

77 *Jango v Northern Territory of Australia* [2006] FCA 318 at [396].

78 *ibid.* at [396], [449].

I reject the submission that in order for something to qualify as a law or custom there must be a uniformity of practice in respect of the law or custom on the part of the Aboriginal people. Rather than presenting a ‘melange of confusion’, the evidence shows that witnesses used their own language to describe different aspects of Wanjina history, tradition and meaning. That the witnesses do not all say exactly the same thing is not a matter for surprise in a society in which different levels of knowledge about laws and customs exist in different parts of it, and different people are, as it were, custodians of special items of knowledge. It would have been suspicious if witnesses from different parts of such a large territory had given evidence in identical terms.⁷⁹

That said, if laws and customs are pleaded with a certain degree of specificity then inconsistent views, practices and opinions may lead a court to conclude that the evidence does not support the pleaded case.⁸⁰

What constitutes acknowledgment and observance?

The following propositions provide guidance about what is required to establish acknowledgment and observance:

- Knowledge about law and custom does not necessarily equate to acknowledgment — acknowledging a law requires recognising its status *as law*.⁸¹
- The relevant laws and customs are those acknowledged and observed by the claimant group themselves. The law will not recognise the rights or interests of a non-acknowledging/observing claimant group even if they are regarded by *other* Aboriginal or Torres Strait Islander people as possessing rights and interests.⁸²
- Acknowledgment or observance is to be assessed in relation to the claimant group *as a whole*. Variations in the extent of acknowledgment and observance of laws and customs, including the existence of claimant group members who have never observed or acknowledged the relevant laws and customs, will not be fatal to the claim. Whether or not a group can be said to observe and acknowledge law and custom is a question of fact and degree.⁸³
- Evidence that some members of the claimant group do not obey a particular law or custom does not necessarily constitute evidence that the law and custom is not part of their normative system. And the fact that non-members of the claimant group do not obey a rule (for example, non-Aboriginal people going to a forbidden place) certainly does not constitute evidence that the rule is not observed by the claimant group.⁸⁴ That said, wide noncompliance by members of the claimant group could constitute evidence

79 *Neowarra v Western Australia* [2003] FCA 1402 at [177].

80 *Jango v Northern Territory of Australia* [2006] FCA 318 at [449].

81 *Harrington-Smith on behalf of the Wongatha People v Western Australia (No. 9)* [2007] FCA 31 at [328], [935], [946].

82 *De Rose v South Australia (No. 2)* [2005] FCAFC 110 at [57].

83 *De Rose v South Australia (No. 2)* [2005] FCAFC 110 at [58].

84 *Neowarra v Western Australia* [2003] FCA 1402 at [310].

that the normative system no longer has 'existence and vitality'.⁸⁵ Put another way, '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' but 'evidence that members of the community or group have not faithfully met their responsibilities' will not necessarily be fatal to their claim. Again, it is a matter of fact and degree.⁸⁶

- In *De Rose (No. 2)*, the Full Court held that 's 223(1)(a) does not necessarily require claimants to establish that they have continuously discharged their responsibilities, under traditional laws and customs, to safeguard land or waters. Of course, the traditional laws and customs may provide that the holders of native title lose their rights and interests if they fail to discharge particular responsibilities. But s 223(1)(a) does not impose an independent requirement to that effect.'⁸⁷

Which laws and customs?

In some cases there have been questions about *which* laws and customs are relevant for the purposes of s. 223(1): only laws and customs about rights and interests in land or water, or the entirety of the laws and customs acknowledged and observed? The cases that follow demonstrate that the interconnected nature of many Aboriginal and Torres Strait Islander legal and customary systems makes such a distinction difficult or inappropriate, with the result that courts will consider evidence about a range of laws and customs that do not appear to relate directly to land use or ownership.

In *De Rose (No. 2)*, the respondents argued that the claimants had to establish they had acknowledged and observed the very laws and customs that gave rise to the rights and interests they were claiming in relation to the lands of the claim area. In the cultural context of that claim, this amounted to an argument that the claimants had to establish acknowledgment and observance of the exact rules relating to their status as *nguraritja* (individual customary owners).⁸⁸ The Full Court held that this submission was correct in that it may not satisfy s. 223(1)(a) merely to establish that members of the claimant group have acknowledged and observed traditional laws and customs unconnected with the possession of rights and interests in land or waters. However, the court went on to say: '...given the centrality of the relationship between Aboriginal people and their country, any dichotomy between traditional laws and customs connected with rights and interests possessed in land and waters and those that are unconnected with such rights and interests may be difficult to establish.'⁸⁹

Similarly, respondents in *Neowarra* argued that evidence relating to acknowledgment and observance of particular laws and customs was irrelevant to the inquiry posed by s. 223(1). They argued, for example, that initiation ceremonies were not 'in relation to land or waters'.

85 *Harrington-Smith on behalf of the Wongatha People v Western Australia (No. 9)* [2007] FCA 31 at [110].

86 *De Rose v South Australia (No. 2)* [2005] FCAFC 110 at [64]; *Harrington-Smith on behalf of the Wongatha People v Western Australia (No. 9)* [2007] FCA 31 at [100].

87 *De Rose v South Australia (No. 2)* [2005] FCAFC 110 at [63].

88 *ibid.* at [52].

89 *ibid.* at [60].

Sundberg J held that this mischaracterised the relevant inquiry. His Honour held that ‘it is not the laws and customs that must be in relation to land or waters, but the rights and interests in land or waters that are possessed under the laws and customs’ and accordingly it was possible for claimants to benefit from the proof of a body of laws and customs, including those that were not directly or solely related to land or water.⁹⁰

The Full Court in *Bodney v Bennell* dealt with a submission that the trial judge had erred in considering evidence that related to cultural aspects of social interactions rather than strictly to land and water. It held that the trial judge had erred in asking whether the society had survived as a community rather than whether the laws and customs relating to land had continued from sovereignty through to the present.⁹¹ In that case, evidence of continuing social links as a community was not sufficient to establish the relevant rights and interests. That is not to say, however, that evidence of acknowledgment and observance of traditional laws and customs other than those strictly related to land or waters would not be relevant to the question of the continued vitality of the normative system as a whole. For example, French J in *Sampi*⁹² dealt with the holistic nature of Bardi law and custom as follows:

Bardi law and custom as described...relies upon the belief that Bardi lands and waters and the cultural forms and practices which make up the body of their customary law were created and bequeathed upon their ancestors by supernatural beings...They set the boundaries of traditional territories, named sites and introduced songs, dances, designs and objects together with myths and rituals. They set up the basic rules regulating the social order. The sum total of these rules, customs and resources is comprehended by the term ‘Law’...

The Law so understood, in my opinion, embodied the fundamental principle that the Bardi people as a community hold the traditional territory which is defined by the Law and is to be used and enjoyed in accordance with its rules.

That view was not disturbed on appeal.

Matters of evidence

The following extracts from *Gumana* are a useful guide to the role that evidence and inference play in establishing native title under s. 223(1):

- ‘In order to determine the questions of fact in pars (a) and (b) it will usually be necessary to receive some evidence to establish the existence of traditions or customs which have “normative content”: see *De Rose* at 377–378.’⁹³
- ‘It will also usually be necessary to receive some evidence of the rules and principles of the alleged tradition or custom in order to identify the “existence and content” of native title: see *Ward FC* at 338 [58].’⁹⁴

90 *Neowarra v Western Australia* [2003] FCA 1402 at [229].

91 *Bodney v Bennell* [2008] FCAFC 63 at [73]–[74], [80].

92 *Sampi v Western Australia* [2005] FCA 777 at [1051]–[1055].

93 *Gumana v Northern Territory of Australia* [2005] FCA 50 at [147], referring to *De Rose v South Australia* [2003] FCAFC 286.

94 *Gumana v Northern Territory of Australia* [2005] FCA 50 at [147], referring to *Western Australia v*

- '*Unless it is otherwise agreed* [emphasis added] it will also be necessary to receive evidence of the alleged tradition or custom in order to establish the connection between the claimed law and the land or waters in question.'⁹⁵
- 'It may be necessary to inquire more generally into the rules and principles of traditional law *if there is some real evidentiary dispute* [emphasis added] as to whether or not such traditional laws or customs existed, or whether particular rights and interests were "possessed" under those laws and customs, or whether there was a relevant "connection". Nevertheless, the factual inquiry is not into the rules and principles of traditional law and custom as such, but into the specific questions of fact identified in s 223(1) of the [Native Title Act].'⁹⁶
- 'Where, as in this case, there are no significant factual disputes in relation to the relevant questions, it may not be necessary for the Court to inquire into the rules and principles of traditional law and custom beyond the extent necessary for the Court to answer those questions and to make any appropriate determinations.'⁹⁷

These quotes indicate that the court need not be concerned with the detail of the evidence about particular laws and customs if the parties can reach agreement about those matters.

Tradition

The previous section dealt with the requirement under s. 223(1)(a) that the claimants currently acknowledge and observe laws and customs. This section deals with the further requirement under s. 223(1)(a) that those current laws and customs be 'traditional'.

In interpreting the term 'traditional', the joint judgment in *Yorta Yorta* looked at the fundamental nature of native title as arising from the intersection of two normative systems (the relevant Aboriginal or Torres Strait Islander laws and customs, and the laws of Australia) and at the legal consequences of the Crown's assertion of sovereignty (namely that the courts could not recognise rights and interests created *after* the Crown's assertion of sovereignty under a parallel system of Indigenous law and custom).⁹⁸

Accordingly, the joint judgment interpreted the term 'traditional' to have three aspects:⁹⁹

- Means of transmission: the laws and customs are passed from generation to generation, usually by word of mouth and common practice.
- History:¹⁰⁰ the origins of the content of the contemporary laws and customs are to be

Ward [2000] FCA 191.

95 *Gumana v Northern Territory of Australia* [2005] FCA 50 at [147].

96 *ibid.* at [148].

97 *ibid.* at [149].

98 *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at [43]–[45].

99 *ibid.* at [46].

100 Although the joint judgment used the term 'the age of the traditions', I have used 'history' instead of 'age' in order to avoid the impression that particular traditions must have existed *in their current form* for a given period of time. If one imagines an axe whose handle and head have been replaced a number of times in the past, the question 'What is the age of the axe?' may lead to some confusion, whereas 'At what point in time does the axe have its origins?' yields a clearer answer. It is the latter inquiry that is relevant to the question of tradition in native title.

found in the normative rules of the societies that existed before the Crown's assertion of sovereignty.

- Continuity: the laws and customs under which the rights and interests are possessed constitute a normative system that has had a continuous existence and vitality since sovereignty.

Changes to pre-colonial law and custom

The interpretation of 'tradition' in *Yorta Yorta* does not require the contemporary laws and customs to be identical or even similar in content to the laws and customs that existed at the time sovereignty was asserted;¹⁰¹ rather, it requires that the later laws and customs have their *origins* in the earlier body of laws and customs.¹⁰² That distinction means that alterations, developments and even 'significant adaptations' to the pre-colonial laws and customs will not deprive contemporary laws and customs of their 'traditional' status.¹⁰³

What drives the interpretation of 'traditional' is the imperative to ensure that the Crown's sovereignty is not challenged by the purported recognition of new 'post-sovereignty' rights and interests. As the Full Court stated in *Bodney*: 'So long as the changed or adapted laws and customs continue to sustain the same rights and interests that existed at sovereignty, they will remain traditional.'¹⁰⁴ This has implications, as will be discussed shortly, for determining the significance of any particular change in law and custom.¹⁰⁵

Descent or filiation rules are one area in which changes in the content of law and custom have repeatedly come into issue. For example, where the evidence establishes that the pre-colonial society observed a system of patrilineal descent and the contemporary society a system of ambilineal or cognatic descent, should the court determine that the contemporary law and custom is traditional or not? The predominant position in the case law is that such changes are not so significant that they deprive the contemporary laws and customs of their 'traditional' status.

In *Griffiths*, the Full Court referred to this issue as a 'vexed question in native title law'.¹⁰⁶ It determined that it was not an appropriate occasion to consider the question, since the trial judge had found as a matter of fact that there had always been an element of cognation in

101 *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at [56], [83]. See *Risk v Northern Territory of Australia* [2007] FCAFC 46 at [82]: 'It will be insufficient merely to examine the laws and customs of the present day and compare them with those that existed at sovereignty. Such a 'book-end' approach has two significant dangers. First, it may lead to a conclusion that native title has continued throughout the period, when in fact the claimant group's customs and laws have been discontinued and later revived. Secondly, and more importantly for this appeal, if the laws and customs of the present day are not the same as at sovereignty, the book-end approach fails to ask the critical question whether the traditional laws and customs have ceased or whether they have merely been adapted.'

102 *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at [46]–[47]; *Risk v Northern Territory of Australia* [2007] FCAFC 46 at [72], [82], [83]; *Bodney v Bennell* [2008] FCAFC 63 at [120].

103 *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at [44].

104 *Bodney v Bennell* [2008] FCAFC 63 at [74].

105 *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at [44]; see also [83].

106 *Griffiths v Northern Territory of Australia* [2007] FCAFC 178 at [146].

the principle of descent observed by the claimants. In the words of the trial judge: 'rights to "country" in Timber Creek are and always have been based upon principles of descent. The shift to cognation is one of emphasis and degree. It is not a revolutionary change, giving rise to a new normative system.'¹⁰⁷

The situation was similar in *Bodney*. The trial judge had found that there was a general rule of patriliney at the time sovereignty was asserted but that the rule had always been subject to exceptions. Accordingly, while there had been increased reliance on the matrilineal path to descent, this did not represent a break with tradition. The Full Court found no error in this approach.¹⁰⁸

When the issue arose in *Sebastian*, the position was put more strongly. In an earlier decision, with which the Full Court on appeal found no error,¹⁰⁹ the trial judge had said that '...even if there was, originally, a patrilineal model, the evolution to an ambilineal model was part of a process of the community's evolution to its present traditional form, rather than the creation of a new community.'¹¹⁰

Later, in response to anthropological evidence that the 'classical' laws and customs had enough inherent flexibility to deal with new situations, the trial judge said (again with the approval of the Full Court):¹¹¹

...whatever the precise structure and traditional definition of the Yawuru people at sovereignty might have been, a change from a community similar to a patrilineal 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.¹¹²

It should be noted that the Full Court in *Bodney* dealt in some detail with the state's submission that any change in the distribution of rights from pre-colonial times would constitute an impermissible break with tradition, as it would amount to the creation of *new* rights contra *Yorta Yorta*. The court held that this paid insufficient attention to what was said in *Yorta Yorta* (particularly at [44]):

Clearly laws and customs can alter and develop after sovereignty, perhaps significantly, and still be traditional. The [passage from *Yorta Yorta* just mentioned] suggest[s] that rights and interests, which are the product of laws and customs which adapt or develop, may themselves change without losing recognition.

It may be that the true position is that what cannot be created after sovereignty are rights that impose a greater burden on the Crown's radical title [emphasis added]. For example, in this proceeding, the evidence demonstrated that the claimants had never fished in the sea. The Crown's radical title over the sea

107 *Griffiths v Northern Territory of Australia* [2006] FCA 903 at [501].

108 *Bodney v Bennell* [2008] FCAFC 63 at [98]–[116].

109 *Western Australia v Sebastian* [2008] FCAFC 65 at [122].

110 *Rubibi Community v Western Australia* [2001] FCA 607 at [142].

111 *Western Australia v Sebastian* [2008] FCAFC 65 at [122].

112 Per Merkel J in *Rubibi Community v Western Australia (No. 5)* [2005] FCA 1025 at [363].

was therefore not, at sovereignty, burdened by any native title rights to fish. If a practice of fishing in the sea had developed since sovereignty, no native title rights could attach to that practice since any such rights would constitute a greater burden on the radical title than existed at sovereignty. By definition such rights could not be traditional. On the other hand, where the Crown's radical title was burdened at sovereignty with a right to fish, a change in the number and identity of people whose rights so burden it does not necessarily mean that those current rights cannot be traditional.¹¹³

The court did not need to pursue the issue further because, as already explained, the state's preceding contention (namely that the pre-colonial society observed an exclusively patrilineal system of descent) had not been made out.¹¹⁴

This approach to the distribution of rights may also have influenced how their Honours dealt with another matter in *Bodney*. The state challenged the trial judge's treatment of the changes in Noongar landholding rules from smaller 'home areas' and 'runs' to larger 'boodjas' in contemporary times. The trial judge had observed that the contemporary system was 'similar in concept' to the old system but had made no finding about whether *boodjas* were the modern-day equivalent of home areas or runs. The Full Court did not hold that the shift away from the older estate system constituted an 'unacceptable change'; rather, it found that the trial judge had simply made no finding relevant to the question either way and so could not make the ultimate finding that the contemporary laws and customs were 'traditional'.¹¹⁵

Continuity of acknowledgment and observance

The joint judgment in *Yorta Yorta* interpreted the term 'traditional' in s 223(1) to require that acknowledgment and observance of the relevant laws and customs have continued 'substantially uninterrupted since sovereignty'.¹¹⁶ The rationale for this is that, where the transmission of the normative system from generation to generation has been substantially interrupted, the society defined by that normative system must necessarily have *ceased to exist* during the interruption. Accordingly, any laws and customs *subsequently* observed and acknowledged would no longer be those of the original society; rather, they would be laws and customs of some new, post-sovereignty society and therefore not 'traditional' in the relevant sense.¹¹⁷ (See 'Society', pp. 33 to 45.)

As before, the concern is to ensure that the court does not recognise any parallel lawmaking entity subsequent to the Crown's initial assertion of sovereignty — that is, the insistence on substantial continuity is a consequence of the imperative to preserve the Australian legal system's monopoly on lawmaking. Australian law may recognise rights and interests held under the laws and customs of a pre-colonial society but not those of a society formed after the Crown's assertion of sovereignty. And it is a consequence of the legal positivism

113 *Bodney v Bennell* [2008] FCAFC 63 at [120]–[121].

114 *ibid.* at [122].

115 *ibid.* at [79]–[97].

116 *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at [87].

117 *ibid.*

adopted in *Yorta Yorta* that a society is said no longer to exist if its laws and customs are not acknowledged and observed for a substantial period — even if the same group of people later begins acknowledging and observing the very same laws and customs.¹¹⁸

The term ‘substantially’ in *Yorta Yorta* serves two purposes:

1. It recognises the difficulty in proving oral traditions have been adhered to continuously over such an extended period.
2. It recognises 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.’¹¹⁹

Note that the requirement for substantial continuity applies to the acknowledgment and observance of laws and customs, not to the exercising or enjoyment of rights and interests.¹²⁰ Accordingly, while evidence that rights and interests have been exercised may constitute powerful evidence of their existence and content, evidence that they have *not* been enjoyed or exercised does not entail that the relevant laws and customs have not continued to be acknowledged and observed.¹²¹

Effects of European influence

The effects of colonisation, dispossession, missionary activity, government removals, the wage economy and a range of other historical factors that may have impacted upon traditional owners are subsumed in the case law under the term ‘European influence’. In determining whether contemporary law and custom is ‘traditional’, European influence can be seen to have two kinds of impact:

1. It can affect the evolution of law and custom (which goes to the question of how much pre-colonial law and custom has *changed*, discussed under ‘Changes to pre-colonial law and custom’ on pp. 25 to 27).
2. It can drive the process whereby the acknowledgment and observance of law and custom is interrupted or stopped entirely (which goes to the question of *continuity*, discussed on pp. 27 to 28).

Where European settlement has had the first kind of impact, evidence of the way in which law and custom has evolved will be useful in establishing the link between contemporary and pre-colonial law and custom.¹²² Such evidence can help the court to confirm the traditional nature of contemporary laws and customs, because it explains why today’s laws

118 See *Risk v Northern Territory of Australia* [2007] FCAFC 46; *Risk v Northern Territory of Australia* [2007] HCATrans 472.

119 *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at [89].

120 *ibid.* at [84].

121 *ibid.*

122 *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at [82]. See the discussion of European influence as creating a ‘social crisis’ necessitating the adaptation of descent rules: *Rubibi Community v Western Australia (No. 5)* [2005] FCA 1025 at [292]–[363].

and customs are different (even ‘significantly’ different) from their pre-colonial form. By contrast, where it is alleged that observance and acknowledgment have been substantially interrupted (as in *Yorta Yorta* or *Risk*), evidence of European settlement’s role in bringing this interruption about may serve only to reinforce that premise.¹²³

In *Bodney*, the Full Court criticised the manner in which the trial judge made allowances for the impacts of European settlement.¹²⁴ Their Honours held that once an interruption had been characterised as ‘substantial’ no further inquiry into the reason for that interruption could mitigate its effect of destroying the basis for native title:

European settlement is what justifies the expression ‘substantially uninterrupted’ rather than ‘uninterrupted’. ... But if, as would appear to be the case here, there has been a substantial interruption, it is not to be mitigated by reference to white settlement. The continuity enquiry does not involve consideration of why acknowledgment and observance stopped.¹²⁵

There is an ambiguity as to what use, if any, courts may make of the impacts of European settlement in deciding *whether* an interruption is ‘substantial’. In *Yorta Yorta* the joint judgment said:

If it is not demonstrated that [the ‘no substantial interruption’] 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.¹²⁶

The *Bodney* judgment should be treated with caution insofar as it suggests that evidence of European influence is irrelevant to the question of *change*, as opposed to *interruption*.¹²⁷ For example, the Full Court in *Bodney* took issue with the trial judge’s conclusion that the shift from runs to *boodjas* as units of Noongar territory was a ‘significant change’ but nevertheless ‘readily understandable’ in light of European settlement.¹²⁸ Their Honours similarly criticised the trial judge’s acceptance of changes to Noongar descent rules as ‘inevitable’ for allowing the Noongar community to survive colonisation.¹²⁹ The Full Court’s criticism was that the trial judge had erroneously seen evidence of European influence as ‘mitigating the effect of change’ on the question of traditionality.¹³⁰ Their Honours appear to have conflated the concept of a ‘significant change’ with that of a ‘substantial interruption’, concluding that the former will be fatal to a claim as much as the latter. That would be inconsistent with the

123 *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at [90].

124 *Bodney v Bennell* [2008] FCAFC 63 at [97].

125 *ibid.*

126 *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at [90].

127 While this may appear to be a somewhat artificial distinction, it is nevertheless one made by the court in *Yorta Yorta*, with societal discontinuity and cultural change being dealt with separately and differently: *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at [46]–[47].

128 *Bodney v Bennell* [2008] FCAFC 63 at [97].

129 *ibid.*

130 *ibid.*

position taken in *Yorta Yorta*, and in much of the case law, that even 'significant adaptations' may occur without depriving law and custom of their status as 'traditional'.¹³¹

The 'working backwards' approach

Occasionally debates arise over the proper approach to determining whether laws and customs are 'traditional'. Does one begin by establishing the content of the pre-colonial laws and customs and then work forwards to determine whether subsequent changes fall within the bounds of the 'traditional'? Or does one begin with an examination of the laws and customs that are observed and acknowledged today and then trace them backwards to determine whether they bear sufficient relation to the pre-colonial laws and customs to be characterised as 'traditional'?

In reality, these two approaches are not relevantly different. As Callinan J said in *Yorta Yorta*:

...any judicial inquiry will generally start with the situation then [at the assertion of Crown sovereignty], and trace its development until now, with due regard to the evolution of the traditions in question...Sometimes it may well be possible to start with the present and look backwards to see whether the former is in truth a current manifestation of the latter. No matter which starting point is chosen, the relevant relationship between past, present and the land must still be established.¹³²

The issue was raised in *Moses*, when the state party asserted that the trial judge had impermissibly inferred the content of pre-colonial law and custom from the content of contemporary law and custom. The Full Court held that this was a mischaracterisation of the trial judge's reasoning and that the trial judge had performed the necessary factual inquiry about 'tradition'.¹³³

In many cases it may be more efficient in practice to employ the 'working backwards' approach, since there is no need to establish the pre-colonial existence and post-colonial continuity of laws and customs that are no longer acknowledged or observed. Provided the presently acknowledged and observed laws and customs, which go to supporting the claimed rights and interests, can be found to be rooted in the laws and customs of the pre-colonial society, the inquiry need go no further. The contrary view, to the extent that it was expressed by the trial judge in *Wongatha*,¹³⁴ can be taken to be inconsistent with decisions of the Full Court in that it suggests the 'continuity' inquiry is subservient to the 'society'

131 *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at [44]; see also *Neowarra v Western Australia* [2003] FCA 1402 at [163] and *Rubibi Community v Western Australia (No. 5)* [2005] FCA 1025 at [368].

132 *Members of the Yorta Yorta Aboriginal Community v Victoria* 214 CLR 422; [2002] HCA 58 at [90].

133 *Moses v Western Australia* [2007] FCAFC 78 at [322]–[331].

134 Per Lindgren J: 'In my opinion, this approach is flawed. It fails to take into account the reason why the inquiry as to continuous acknowledgment and observance must be made. That reason is to ensure that pre-sovereignty society that sustained the existence of rights and interests in land or waters still exists. I suggest that, to this end, it is necessary to have some conception of that body of laws and customs, the acknowledgment and observance of which unified people into a society at sovereignty': *Harrington-Smith on behalf of the Wongatha People v Western Australia (No. 9)* [2007] FCA 31 at [966].

question rather than vice versa (see ‘Society’, pp. 33 to 45) and that a claim could fail because of a failure to acknowledge and observe laws and customs which were unrelated to the claimed rights and interests in land.¹³⁵

Inferences

It is notoriously difficult to produce proof of the content of law and custom as it stood at the time the Crown’s sovereignty was first asserted.¹³⁶ In litigation where the question of ‘tradition’ is put into issue, the applicants may be required to prove that their laws and customs originate in those of the pre-colonial society, but even so the court may make inferences about the position at sovereignty from evidence about law and custom at later dates.¹³⁷ In the *Sampi* trial judgment, for example, French J dealt with inferences as follows:

The longevity of the traditional laws and customs and the inference of their continuity since the time of sovereignty is supported by their content together with the continuity of Aboriginal occupation of the area and the evidence of long term consistent forms of land use emerging from the archaeological evidence... The density of named sites and natural features combined with the physical evidence of substantially consistent usage of marine resources going back to sovereignty in my opinion supports the inference that the laws and customs explained today by the Aboriginal witnesses whose evidence in this respect I have accepted, represents a body of law and custom which has continued substantially uninterrupted since that time.¹³⁸

On appeal, the Full Court in *Sampi* dealt with inferences in a similar way:

In the present circumstances the constitutional status and elaborate nature of the rules in question make it improbable that the system arose in the relatively short period between sovereignty and the time of the witnesses’ ‘old people’. We accept the view expressed by Mr Bagshaw in his report (at page 18) that: ‘...the structural features (i.e. systems of kinship, social organization and local organization) common to both societies are, in my opinion, of a sufficiently fundamental order that they may be reasonably assumed to have developed among both peoples well before European contact’.¹³⁹

Inferences can be stronger or weaker depending on the circumstances. For example, in the *Jango* trial judgment Sackville J said:

135 *De Rose v South Australia (No. 2)* [2005] FCAFC 110 at [52]; *Bodney v Bennell* [2008] FCAFC 63 at [74]–[77], [80].

136 *Members of the Yorta Yorta Aboriginal Community v Victoria* 214 CLR 422; [2002] HCA 58 at [80]–[82].

137 E.g. *Members of the Yorta Yorta Aboriginal Community v Victoria* 214 CLR 422; [2002] HCA 58 at [80]–[82]; *Daniel v Western Australia* [2003] FCA 666 at [149]; *Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory of Australia* [2004] FCA 472 at [74], [100]–[112]; *Harrington-Smith on behalf of the Wongatha People v Western Australia (No. 9)* [2007] FCA 31 at [335]–[345], [969].

138 *Sampi v Western Australia* [2005] FCA 777 at [1055].

139 *Sampi on behalf of the Bardi and Jawi People v Western Australia* [2010] FCAFC 26 at [65].

If the indigenous evidence consistently favoured a particular set of laws and customs, an inference might well be available that the laws and customs described by the witnesses have remained substantially intact since sovereignty, or at least that any changes have been of a kind contemplated by pre-sovereignty norms. The evidence is not, however, consistent. Accordingly, the force of any inference that might otherwise be available is much reduced. Indeed, the fact that in modern times people apparently have adhered to such different versions of law and custom rather suggests that the changes that have occurred since sovereignty are not mere 'adaptations'.¹⁴⁰

It would not necessarily be inconsistent with the *Yorta Yorta* framework for a single normative system to develop, over time, into two or more divergent 'traditions' of law and custom, so long as the adaptations in each remained within the scope contemplated by the pre-colonial law and custom. In that case, there might be inconsistency between two 'traditions', both of which owed their origin to the original society, but there would be no relevant cessation of observance or acknowledgment. This question has not yet come before a court.

In *Gumana*, Selway J discussed the difficulty of establishing the content of 18th-century Indigenous law and custom, and noted that the common law already possesses an established method of dealing with evidence about customs from 'time immemorial':

Like the evidence called to prove Aboriginal custom, the evidence called to prove the existence of a custom from 'time immemorial' for the purposes of the common law was often oral evidence and it was subject to the same difficulties in relating that evidence back — although not just to the 18th century, but to the 12th and 13th centuries. In practice those difficulties were ameliorated by the readiness of the common law courts to infer from proof of the existence of a current custom that that custom had continued from time immemorial... The inference was a strong one: see Jessell MR in *Hammerton v Honey* (1876) 24 WR 603 at 604:

It is impossible to prove the actual usage in all time by living testimony. The usual course taken is this: Persons of middle or old age are called, who state that, in their time, usually at least half a century, the usage has always prevailed. That is considered, in the absence of countervailing evidence, to show that usage has prevailed from all time.

Indeed, some of the more ancient commentators express the relevant rule in the negative. Coke, for example, defines 'time out of mind' as 'time whereof there is no memory of man to the contrary' (Co Litt 114b. See also 1 Bl Com *76-77)...

There is no obvious reason why the same evidentiary inference is not applicable for the purpose of proving the existence of Aboriginal custom and Aboriginal tradition at the date of settlement and, indeed, the existence of rights and

140 *Jango v Northern Territory of Australia* [2006] FCA 318 at [504].

interests arising under that tradition or custom...This does not mean that mere assertion is sufficient to establish the continuity of the tradition back to the date of settlement: contrast *Yorta*. However, in my view where there is a clear claim of the continuous existence of a custom or tradition that has existed at least since settlement supported by credible evidence from persons who have observed that custom or tradition and evidence of a general reputation that the custom or tradition had 'always' been observed then, in the absence of evidence to the contrary, there is an inference that the tradition or custom has existed at least since the date of settlement. That was not the case in *Yorta*. It is the case here.¹⁴¹

This approach was endorsed by Weiberg J in *Griffiths* at first instance, and the Full Court on appeal did not find fault with that.¹⁴²

In the context of a negotiated consent determination, there is even more scope for inference. It is perhaps worth reiterating that the Act does not state that a determination of native title may not be made unless the matters in s 223(1) are proved on the balance of probabilities. Rather, the court may make a determination, and s 223(1) defines the proper subject of that determination. It is open for parties to make inferences about the longevity and continuity of laws and customs, and what constitutes a reasonable basis for such inferences will depend on the circumstances.

Society

The concept of 'society' was introduced by the joint judgment in *Yorta Yorta* to denote a body of persons 'united in and by' its acknowledgment and observance of a body of law and customs.¹⁴³ The term 'society' does not relevantly appear in the Act, nor in the *Mabo (No. 2)* judgment, but rather was introduced by the joint judgment in *Yorta Yorta* to flesh out what it means for laws and customs to be 'traditional' under s 223(1).¹⁴⁴

The concept of 'society' was made necessary by their Honours' endorsement of positivist theories of law, which hold that a legal right cannot exist independently of a group of people that acknowledges the legal system giving rise to the right. One can, for example, read *about* an ancient Babylonian legal code, but the rules it contains do not exist in the world *as law* today because there is no group of people who currently treat the rules as binding on themselves.¹⁴⁵ So for the Australian legal system to recognise rights and interests held under an Indigenous system of law and custom, it must be shown that the Indigenous system is embodied — given reality — by a contemporary group of people for whom the laws and customs have ongoing meaning and normatively binding effect. This group of law-acknowledgers is called, in the language of the *Yorta Yorta* judgment, a 'society'.

141 *Gumana v Northern Territory of Australia* [2005] FCA 50 at [198]–[201].

142 *Griffiths v Northern Territory of Australia* [2006] FCA 903 at [580]–[585].

143 *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at [49].

144 The qualification to this is that a range of appointed positions under the Native Title Act require candidates to have knowledge or expertise in relation to 'Aboriginal or Torres Strait Islander societies'; e.g. ss. 37B, 95, 106A, 110, 124, 131A. This usage, though, is irrelevant to the definition or proof of native title.

145 See *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at [50].

As discussed in the previous section of this paper, the 'traditionality' requirement in the Native Title Act demands that the laws and customs currently acknowledged and observed by a claimant group be rooted in the pre-colonial body of law and custom. According to the positivist logic just described, this means they must be the laws and customs of a contemporary society which is *the same society* as existed when the Crown's sovereignty was first asserted. That of course does not mean that the society today must consist of the same *individuals* (since those individuals are long gone) but rather that the successive generations have continued to constitute the same society through their acknowledgment and observance of a common body of laws and customs.¹⁴⁶ Importantly, this conception of society is the source of the law's flexibility in recognising change and adaptation in the content of traditional law and custom. As established in the previous section of this paper, native title claimants are not required to show that their contemporary laws and customs are identical to those acknowledged and observed in pre-colonial times. Even significant adaptations will not necessarily deprive the laws of their traditional status, so long as they are the laws of the same society as existed at sovereignty.¹⁴⁷

The function of the 'society' concept, then, is to provide a link between the laws and customs of today and those of the pre-sovereignty era. If that link is broken (as it was held to have been in *Yorta Yorta*), the rights and interests will not be recognised under the Native Title Act. Society is in this sense the vessel of continuity.¹⁴⁸

How clearly must society be defined for s 223?

The 'society' question was relevant — even decisive — in the *Yorta Yorta* case because of the finding that the relevant society had ceased to exist in the sense of continuously acknowledging and observing traditional laws and customs (see 'Continuity of

146 An analogy to the human body may assist. It is said that the individual cells making up our bodies are constantly in a process of dying and regrowing, with the effect that none of the actual cells that constituted our infant bodies remain with us in adult life. Nevertheless, we think of ourselves as being the same person because of the element of continuity across time. (The neatness of this analogy is complicated to some extent by the evidence that there are, in fact, some parts of the body where the same cells are possessed at birth and death: see N Wade, 'Your body is younger than you think', *New York Times*, 2 August 2005, <http://www.nytimes.com/2005/08/02/science/02cell.html?pagewanted=all>). An important distinction between this analogy and the concept of 'society' in native title law is that the mere continuity of a named community of individuals is not sufficient to constitute a society. Instead, the community's acknowledgment and observance of law and custom is central: *Bodney v Bennell* [2008] FCAFC 63 at [80]. Further, it is worth noting that anthropologists have actively resisted comparisons between societies and organisms; e.g. K Palmer, *Societies, communities and native title*, Land, Rights, Laws: Issues of Native Title 4(1): 6, August 2009, Native Title Research Unit, AIATSIS. This criticism is addressed in the next section of the paper.

147 *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at [56]. To return to the analogy of the human body: while our personalities and the appearance of our bodies differ greatly across several decades, we are identifiably the same person throughout the entire period because of the element of continuity.

148 Note that this does not mean that claimants can succeed by establishing continuity of society in isolation from continuity of observance and acknowledgment. It is the latter that is demanded by the Native Title Act. See *Bodney v Bennell* [2008] FCAFC 63 at [70]–[124].

acknowledgment and observance’, pp. 27 to 28). In other cases, such as *Sampi*¹⁴⁹ and *Sebastian*,¹⁵⁰ ‘society’ was in issue because some parts of the claim area were alleged to have been held under the laws of one society at the assertion of sovereignty but later taken over by another society.¹⁵¹ That raised the question of whether native title rights and interests could be transmitted, post-sovereignty, between different societies.

So there are two situations in which ‘society’ might be decisive: firstly, where there is doubt about the substantial continuity of the claimant group’s acknowledgment and observance of law and custom since the assertion of sovereignty (the *Yorta Yorta* point); and, secondly, where there is dispute about the geographical extent of the society at sovereignty (the *Sampi* point). In cases where there is no real dispute as to either, it may not be necessary to examine in detail the bounds of the relevant normative system.¹⁵²

The following quote from the Full Court in *Alyawarr* is instructive:

The concept of a ‘society’ in existence since sovereignty as the repository of traditional laws and customs in existence since that time derives from the reasoning in *Yorta Yorta*...It does not require arcane construction. It is not a word which appears in the [Native Title] Act. It is a conceptual tool for use in its application.¹⁵³

The proposition that claimants need to establish a single, clearly bounded society for the purposes of s. 223 is not entailed by anything in the Act nor in the *Yorta Yorta* judgment. It is true that the joint judgment in that case used language that suggested any given set of laws would be referable to a single, bounded societal unit.¹⁵⁴ This no doubt reflected

149 *Sampi on behalf of the Bardi and Jawi People v Western Australia* [2010] FCAFC 26.

150 *Western Australia v Sebastian* [2008] FCAFC 65.

151 Similar considerations arose in *Wongatha* around the geographical extent of the Western Desert Cultural Bloc society’s territories at sovereignty compared to the present day: *Harrington-Smith on behalf of the Wongatha People v Western Australia (No. 9)* [2007] FCA 31.

152 See *Gumana v Northern Territory of Australia* [2005] FCA 50 at [148]. Note that, e.g., in the *Ward* decision no particular attention was given to identifying ‘the society’ in question (*Western Australia v Ward* [2002] HCA 28). Although that decision preceded *Yorta Yorta* by some four months, there is no reason to believe that the High Court’s view of the matter changed in that time. A more recent example is *King v Northern Territory of Australia* [2007] FCA 944, in which the question of ‘society’ was addressed in a minimal way because there was no dispute among the parties (see [9]). In *Griffiths v Northern Territory of Australia* [2006] FCA 903 the ‘society issue’ was effectively rolled into the principal inquiry into the continuity of the acknowledgment and observance of traditional law and custom. There does not appear to be any firm attempt to ‘pin down’ the exact extent of ‘the society’ save to say that it includes the claim group. The judge says at [301]: ‘[The expert witnesses’] reasons for concluding that the claimants share a culture and identify with each other include the common understandings regarding their relationship with the natural world, and their participation in activities founded upon a shared spiritual belief. The claimants have characteristics that are similar to those of other indigenous communities in the Victoria River district. However, aspects of their beliefs can also be found in varying forms throughout indigenous societies in many parts of Australia’.

153 *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [78].

154 E.g. ‘To speak of rights and interests possessed under an identified body of laws and customs is, therefore, to speak of rights and interests that are the creatures of the laws and customs of a

an unspoken assumption about the nature of politico-legal structures in general from an Anglo-European perspective; namely, that there is a one-to-one relationship between each 'body of laws and customs' and 'a particular society'.¹⁵⁵ Yet this assumption will in many cases be factually incorrect in light of a more complex anthropological or political reality. It is possible to have simultaneously one societal grouping defined by a common set of laws and customs *and* a larger encompassing societal group defined by a more general, overarching set of norms.¹⁵⁶ Importantly, nothing in the *Yorta Yorta* decision turned on the question of the geographic or demographic extent of the society in question, or on whether there was one society or many. *Yorta Yorta* was a case about societal discontinuity — it did not articulate any requirements about societal structure or definition.

The relevant legal question is whether the claimants hold rights and interests under a normative system with substantially continuous vitality and existence since the assertion of sovereignty. This does not logically entail an inquiry into the precise boundaries of that system, nor a requirement that there be just one societal grouping relevant for all purposes.¹⁵⁷ Unambiguous demarcation and unitary internal structure are not group attributes that are logically necessary to the function for which the term 'society' was introduced; namely, to serve as the vital conduit between the pre-colonial Indigenous legal system and the contemporary Indigenous legal system. That function is just as well served by complex and diffuse normative systems as it is by explicitly bounded unitary systems. The question of 'society' is instrumental in answering the main question of whether the relevant laws and customs are 'traditional' in the requisite sense, rather than being an independent element of proof in itself.¹⁵⁸

While in many cases claimants may well be able to establish a fairly distinct and well-defined 'jural public', there will be many others in which there simply is no bright line separating one law-and-custom group from its neighbour.¹⁵⁹ There may be 'nested' subgroups within larger groups, complex systems of norms that overlap different areas or populations in

particular society that exists as a group which acknowledges and observes those laws and customs [emphasis added]' (*Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at [49]–[50]).

155 A Rumsey, 'Language and territoriality in Aboriginal Australia' in Michael Walsh & Colin Yallop (eds), *Language and culture in Aboriginal Australia*, Aboriginal Studies Press, Canberra, 1993, p. 192.

156 An analogy may be drawn with the federal division of power in the Australian Constitution. Western Australians are united in and by their acknowledgment of a common body of Western Australian law, and also join with their eastern compatriots in acknowledging a common body of Commonwealth law. Working from the *Yorta Yorta* definition of society, there are arguably two societies co-existing, or at least two levels of a composite society. By the same token, arguably the global body of Muslims (or at least Muslims belonging to a common school of legal interpretation) may be said to constitute a society unified in and by its acknowledgment and observance of a common body of law and custom, a society which clearly overlaps with other secular geographically defined societies.

157 See *Moses v Western Australia* [2007] FCAFC 78 at [349].

158 *Northern Territory v Alaywarr* [2005] FCAFC 135 at [78]; *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v Queensland (No. 2)* [2010] FCA 643 at [162].

159 See P Sutton, *Native title in Australia: an ethnographic perspective*, Cambridge University Press, Cambridge, 2003, pp. 54–84; K Palmer, *Societies, communities and native title*, Land, Rights, Laws: Issues of Native Title 4(1): 6, AIATSIS, August 2009.

different ways, or what Paul Burke calls a ‘patchwork of variable mutual recognition’.¹⁶⁰ The differences are likely to be contextual, depending on the subject matter of the relevant law or custom, the nature of the threat or dispute in question and other factors.¹⁶¹ Whether or not one can identify a single, clearly bounded ‘society’ associated with a given set of laws and customs will depend on the structure and circumstances of the relevant group and on the way in which the evidence is presented. This is reflected in the following comment of French J in the *Sampi* trial judgment:

Any finding of fact as to whether there is a relevant ‘society’ of Aboriginal peoples today capable of being the subject of a determination of native title is evaluative in character. The question could conceivably have more than one correct answer, although s 225 does seem to require identification of ‘the person or each group of persons’ who hold the common or group rights comprising the native title.¹⁶²

Yet this complexity has no necessary bearing on the primary inquiry under the *Yorta Yorta* test, which is whether the laws and customs of the contemporary claim group are grounded in those of their pre-colonial forebears via a substantially uninterrupted continuity.

There have been litigated cases in which the ‘society’ question posed problems for applicants and considerable space in the judgments was devoted to the identification of the relevant society. These largely have been cases in which there were disputes as to the relevant law and custom, or where it was alleged that a particular pre-colonial society had ceased to exist and the people claiming native title over that land must therefore be claiming under a newer, post-sovereignty normative system.

In *Bodney*, for example, Mr Bodney’s appeal was unsuccessful partly because of the unsatisfactory state of the evidence about the normative system under which Mr Bodney was claiming.¹⁶³ The difficulty facing Mr Bodney was that the system of law and custom that he propounded, and by which he sought to challenge the Single Noongar Claim, appeared to be inconsistent with the other evidence about how law and custom worked in the south-west of the state. In particular, there were significant inconsistencies (both internally and compared to the other evidence) about the basis of landholdings and descent within the system of law and custom he sought to establish. When the court asked rhetorically ‘...what was the society (or community) under whose laws and customs those landholders were possessed of rights and interests in their land?’, this was in the context of a substantial body of evidence supporting a competing view of the law and custom in the south-west.¹⁶⁴

160 P Burke, ‘Overlapping jural publics: a model for dealing with the “society” question in native title’ in Toni Bauman (ed.), *Dilemmas in applied native title anthropology in Australia*, Native Title Research Unit, AIATSIS, Canberra, 2010, p. 55; see also Finn J’s reference to a ‘quilt of united parts’ in *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v Queensland (No. 2)* [2010] FCA 643 at [170], [490].

161 P Burke, ‘Overlapping jural publics: a model for dealing with the “society” question in native title’ in Toni Bauman (ed.), *Dilemmas in applied native title anthropology in Australia*, AIATSIS, Canberra, 2010.

162 *Sampi v Western Australia* [2005] FCA 777 at [970].

163 *Bodney v Bennell* [2008] FCAFC 63 at [225]–[237].

164 *ibid.* at [226].

In both *Sampi*¹⁶⁵ and *Sebastian*¹⁶⁶ the issue of society took on greater significance because there was a live controversy as to whether land held under one normative system had been 'absorbed' into the landholdings of a different society after the assertion of colonial sovereignty. In each of those cases it was found, on the evidence, that the different pre-colonial groups had always existed within the one normative system and so the issue of intersocietal succession did not arise.¹⁶⁷

Two cases in which the definition of the relevant society was given extensive treatment are *Akiba* and *Wongatha*. In *Akiba*, the court was prompted to examine the society issue because it was put into issue by the state and Commonwealth parties. The question may have had some bearing on the geographical extent of the determination, and there may have been concerns that a finding that there was one single Torres Strait society would be inconsistent with previous determinations over land in the Torres Strait (which had been made on the basis of each island or group of islands constituting a separate society). Notably, though, after finding that there was indeed a single overarching Torres Strait Islander society, Finn J observed:

The issue of authorisation apart, the answers to the question of native title rights and interests — which is, after all, the concern of the [Native Title] Act — would in all probability be the same whether my conclusion had been one, or four, or thirteen societies.¹⁶⁸

In *Wongatha*, the society question arose in respect of the proper casting of the claim group. Lindgren J assumed, without making a formal finding, that the Western Desert Cultural Bloc formed the relevant society.¹⁶⁹ His Honour went on to say:

Perhaps the present issue is, after all, academic. No-one has suggested that the laws and customs under which rights and interests in land are held vary from one region to another within the Western Desert (it has been suggested that other laws and customs may do so). Their content is the same, whether they are seen as depending on a regional society or on the larger WDCB.¹⁷⁰

To summarise, the concept of 'society' is indeed essential to the *Yorta Yorta* reasoning, but there is no separate requirement (whether a procedural requirement in the Act or a legal requirement implied by the jurisprudence) that a single, clearly defined society be identified. 'Society' is both a vehicle for continuity (allowing the recognition of rights and interests under laws and customs that have been adapted since pre-colonial times) and a potential site for the loss of native title (for example, where a society has 'ceased to exist'). If

165 *Sampi on behalf of the Bardi and Jawi People v Western Australia* [2010] FCAFC 26.

166 *Western Australia v Sebastian* [2008] FCAFC 65.

167 *Sampi on behalf of the Bardi and Jawi People v Western Australia* [2010] FCAFC 26 at [79]; *Western Australia v Sebastian* [2008] FCAFC 65 at [90].

168 *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v Queensland (No. 2)* [2010] FCA 643 at [492].

169 *Harrington-Smith on behalf of the Wongatha People v Western Australia (No. 9)* [2007] FCA 31 at [710]–[738], [979]–[1003]. Note Lindgren J had 'serious doubts over whether the [Western Desert Cultural Bloc] is a society with a system of norms, as discussed in *Yorta Yorta*', at [304].

170 *Harrington-Smith on behalf of the Wongatha People v Western Australia (No. 9)* [2007] FCA 31 at [1287].

the contemporary acknowledgment and observance of law and custom can be established, and if there has been continuity in that acknowledgment and observance since pre-colonial times, then there is no further need to establish definitively the boundaries of that system of law and custom.¹⁷¹

Factors relevant to determining the scope of the relevant society

As indicated above, the joint judgment in *Yorta Yorta* defined a ‘society’ as ‘a body of persons united in and by its acknowledgment and observance of a body of law and customs’.¹⁷² The footnote to that definition states that the term ‘society’ was chosen over ‘community’ in order to ‘emphasise this close relationship between the identification of the group and the identification of the laws and customs of that group’. Society, then, is a construct grounded primarily in the commonality of law and custom rather than similarity of language, proximity of residence, kinship ties or feelings of common identity.

The following statement by French J in the *Sampi* trial judgment, which was not challenged by the Full Court on appeal, underlines the centrality of law and custom to the ‘society’ inquiry:

The use of taxonomies of ‘societies’ by reference to social, scientific or jurisprudential criteria other than those emerging from the terms of ss 223 and 225 as interpreted in *Yorta Yorta* may import elements into their application which are not required by the language or by the common law which they incorporate by reference. They may restrict the beneficial application of the Act to a field narrower than that defined by its words. Such an approach is antithetical to its purposes made evident in the Preamble and the ‘Objects’ clause in s 3(a). Care should therefore be taken in the identification of ‘tribes’ or ‘societies’ so that such limiting criteria are not imported *sub silentio* into this aspect of the fact finding process.¹⁷³

It is echoed by comments of the Full Court in *Alyawarr*:

[The concept of a ‘society’] does not introduce, into the judgments required by the [Native Title] Act, technical, jurisprudential or social scientific criteria for the classification of groups or aggregations of people as ‘societies’. The introduction of such elements would potentially involve the application of criteria for the determination of native title rights and interests foreign to the language of the [Native Title] Act and confining its application in a way not warranted by its language or stated purposes.¹⁷⁴

171 Again, the approach taken by the Full Court in *Bodney* implies that the proper focus is on acknowledgment and observance rather than ‘society’ per se: *Bodney v Bennell* [2008] FCAFC 63 at [70]–[124]. This distinction is perhaps informed by a suggestion that the trial judge in *Bennell* treated ‘society’ as having a broader meaning than a group of people united in and by their acknowledgment and observance of law and custom.

172 *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at [49].

173 *Sampi v Western Australia* [2005] FCA 777 at [969].

174 *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [78].

In considering the relevance of factors other than the bare facts of acknowledgment and observance, the Full Court in *Sampi* said:

Whilst the ultimate fact to be proved by native title claimants is that they have been continuously united in their acknowledgement of laws and observance of customs, there are many subsidiary facts from which an inference may be drawn about that ultimate fact. It is too narrow to exclude from consideration factors which may bear on the existence of a normative system whilst not being direct evidence of the existence of that system.¹⁷⁵

That meant that the trial judge had not erred in principle in allowing a 'constellation of factors' to inform his inquiry into whether there was a single society united in and by its observance of a common body of law and custom. The Full Court held, however, that he had erred in the *weight* he gave to the various factors and the inferences drawn from them.¹⁷⁶ There was a considerable body of evidence pointing to the existence of a single society (Bardi-Jawi) which the Full Court considered outweighed the evidence suggesting two separate societies (Bardi and Jawi). In particular, it considered the following factors on their own to be insufficient to support the trial judge's finding of two societies:

- the use of the self-referents Bardi and Jawi
- the assertion by some of the Aboriginal witnesses that they were either Bardi or Jawi and not the other
- the awareness among the Bardi and Jawi people that they had distinct territories
- the fact that the Bardi and Jawi people recognised their languages as distinct from each other
- certain dissimilarities in ritual, myth and technology practices.

It is perhaps significant that the Full Court did not simply remit the matter for the trial judge to reconsider but was sufficiently confident of the existence of a single society to actually substitute a finding to that effect — this in spite of its acceptance that the above factors were supported by the evidence and were not strictly irrelevant.

So the following factors are unlikely to weigh heavily *by themselves* against a finding that there is a single society, in light of the centrality of law and custom to the concept of 'society' and in light of the beneficial objects of the Act, although it is permissible for courts to *consider* them, and each case will depend on its own facts:

- the so-called 'emic' view of groups as being distinct from other named groups ('emic' meaning in this context the internal 'subjective' view of group members themselves, as opposed to the 'etic' view of an external observer)
- the existence of clear territorial boundaries between groups
- differences in language.¹⁷⁷

175 *Sampi v Western Australia* [2010] FCAFC 26 at [77].

176 See *Sampi v Western Australia* [2010] FCAFC 26 at [51], [54], [71].

177 See *Sampi v Western Australia* [2010] FCAFC 26 at [67]–[80]; *Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory of Australia* [2004] FCA 472 at [132];

As Finn J said in *Akiba*: ‘If self-identification could properly be taken to be a sharp indicator of “society” in this matter, there would be thirteen societies at the level of island communities. If language was such an indicator, there would be five.’¹⁷⁸ In the event, his Honour found that there was just one society.¹⁷⁹ He later clarified:

So far as concerns the apparent paradox between a ‘wider society’ yet a local island based identity, I consider it to be more illusory than real. There was a time when, for many purposes, people of this country self-identified first and foremost by reference to their State of origin. Within the confines of Australia they had no reason for the most part to do otherwise, the more so if property and family were similarly located.

...

Notwithstanding the basis upon which Islanders identify self and others, I do not regard identity as such a useful indicator of a ‘society’ in this matter. For reasons I have already given, a local community based ‘society’ fails to accommodate the phenomenon of sharing island land and waters by two or more island communities. Further, accepting that intra-Island matters are characteristically settled by laws and customs having purely local application, the severing of Island communities for reason of identity ignores those laws and customs dealing with relationships between, and reciprocal obligations of, persons on different Islands. Such laws and customs, as I have indicated, are replicated across Torres Strait. Similarly it attributes no significance to laws and customs which, though local in operation (eg in relation to elders), are characteristic of all of the Island communities. Importantly, to use identity as the State proposes disregards context in a variety of ways.¹⁸⁰

In the recent *Gawler Ranges* consent determination,¹⁸¹ Mansfield J accepted that the claim group comprised a distinct ‘Gawler Ranges’ society composed of members of three different language groups (Kokatha, which is associated with the Western Desert Cultural Bloc; Barngarla, part of the ‘Lakes Groups’ to the east of the Gawler Ranges; and Wirangu, associated with coastal areas to the west and south). Membership of the claim group,

Neowarra v Western Australia [2003] FCA 1402 at 120; *King v Northern Territory of Australia* [2007] FCA 944 at [9].

178 *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v Queensland (No. 2)* [2010] FCA 643 at [470].

179 Additional factors considered relevant to that finding included the ‘common marine orientation of the island communities’ and ‘inter-Island “reciprocity and exchange”’: *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v Queensland (No. 2)* [2010] FCA 643 at [465]. In *Sampi*, the Full Court considered that ‘the proof of the existence of songs about the sea is capable of showing that there were rules about the use of the sea even though the proof of the songs themselves is not proof of the law or custom’: *Sampi on behalf of the Bardi and Jawi People v Western Australia* [2010] FCAFC 26 at [77].

180 *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v Queensland (No. 2)* [2010] FCA 643 at [471], [474].

181 *McNamara on behalf of the Gawler Ranges People v South Australia* [2011] FCA 1471.

and the society, was not open to all persons from those three groups but rather only to those who could trace ancestry to a recognised Gawler Ranges apical ancestor. Further, membership had to be activated by birth, long residence or repeated visits in the claim area. There was some dispute within the claim group about the extension of membership to particular persons, which had arisen from disagreements about the activation of their group membership. Mansfield J, however, considered this to be an 'intra-mural' matter, meaning that it was for the claim group to work out rather than the state or the court. His Honour did not appear to consider that the acceptance of the Western Desert Cultural Bloc as a society in previous determinations¹⁸² precluded him from finding that there was a distinct Gawler Ranges society that in some way 'overlapped' with the larger Bloc society.

What is required for a common normative system?

Given that a common normative system is central to the definition of a society, the question arises: *how* similar or uniform do the laws and customs need to be to fall within the same society?

The cases establish, both through their outcomes and through explicit statements, that the definition does not require uniform acknowledgment and observance of an identical set of laws and customs throughout the territory and population of the society. In *Akiba*, Finn J said:

I do not take their Honours in *Yorta Yorta*...to be suggesting that the defining characteristics of a particular society and of its laws and customs may not admit of considerable diversity in the groups constituting the society and of differential application of, and local differences in, the laws and customs, that relate to such groups.¹⁸³

Later, his Honour added that:

...where there are dispersed groups who claim to make up a society, not only should a significant extent of localised difference be tolerated, it should also be expected. Not even separated but related families can be expected to be uniformly the same in their ways. Far less ought be expected of groups dispersed over a region such as Torres Strait.¹⁸⁴

Similarly, in *Sebastian* the Full Court said:

There does not appear to be any prescription in *Yorta Yorta*...that *all the same traditions and customs* of each clan be observed and acknowledged by the two clans for them to operate under the one normative system. *Yorta Yorta* consistently

182 See *Billy Patch on behalf of the Birrilburu People v Western Australia* [2008] FCA 944 at [16]; *Harrington-Smith on behalf of the Wongatha People v Western Australia (No. 9)* [2007] FCA 31 at [738]; *Jango v Northern Territory of Australia* [2006] FCA 318 at [352]; *De Rose v South Australia (No. 2)* [2005] FCAFC 110 at [90].

183 *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v Queensland (No. 2)* [2010] FCA 643 at [168].

184 *ibid.* at [456].

refers to ‘a body of law and customs’ rather than ‘the identical body and law and customs’.¹⁸⁵

In that case, the Full Court found no error in the trial judge’s conclusion that, despite the existence of two slightly different cultural/legal traditions in the northern and southern parts of the claim area, there was a single society encompassing the whole. The court said:

The body of laws and customs under which native title rights and interests are possessed by a group of persons does not require that each member of the group has precisely the same knowledge of those laws and customs or that each member of the group fully comprehends in precisely the same way as each other member of the group how those laws and customs operate.¹⁸⁶

It is worth noting that some judges and analysts have considered it important to identify the relevant society by reference to those very laws and customs that support the particular rights and interests in relation to land and water that make up the native title.¹⁸⁷ On this view, a grouping of people defined by their acknowledgment and observance of a set of laws and customs that do not relate to those rights and interests will not be relevant to the question of ‘society’ in the *Yorta Yorta* sense.¹⁸⁸ As is clear, though, from the judicial views quoted in ‘Which laws and customs?’, pp. 22 to 23, it will generally be difficult to distinguish so precisely between different ‘jurisdictional levels’ of traditional law and custom. It would be incongruous, in light of the beneficial objectives of the legislation mentioned previously, if a claim were to fail on the basis that the society asserted by the claimants was not defined in respect of the right kinds of laws and customs.

How to deal with uncertainty or conflicting accounts

In a number of cases it has been argued by respondents that inconsistency or conflicting interpretations of law and custom constitute evidence that there is no single society covering a claim area. In *Wongatha*, for example, the trial judge accepted the state’s submission that ‘the presence of overlapping claims and the lack of agreement as to who possess native title rights and interests in the Cosmo Newbery area, the lack of agreement on the relevant principles that should apply, and the lack of any means to either resolve or objectively determine those disputes, evidences the lack of any overriding normative system.’¹⁸⁹ (Despite that acceptance, Lindgren J went on to assume without making a finding that there was a single society covering the claim area.)¹⁹⁰ It may be that Lindgren J’s inquiry into an ‘overriding’ normative system may go beyond what is required by the Act as interpreted by *Yorta Yorta*.

185 *Western Australia v Sebastian* [2008] FCAFC 65 at [84].

186 *ibid.* at [84]; see also *Sampi v Western Australia* [2005] FCA 777 at [1016].

187 See G Hiley, ‘What is the relevant “society” for native title purposes? Will any society do?’, *Native Title News* 8(9): 143–147, Butterworths, 2008.

188 To return to the federalism analogy, this view would hold that, while there may be both a ‘Western Australian society’ and an ‘Australian society’, the only relevant society is the one united in and by its acknowledgment of laws relating to land ownership — in this instance, Western Australia.

189 *Harrington-Smith on behalf of the Wongatha People v Western Australia (No. 9)* [2007] FCA 31 at [1001].

190 *ibid.* at [1003].

In *Akiba*, Finn J rejected the contention that:

...the Applicant must establish a body of laws and customs which *united* people across Torres Strait. That turns the *Yorta Yorta HC* requirement on its head. The society is required to be united in and by its *acknowledgement and observance* of a body of law and customs.¹⁹¹

So the concept of 'society' for *Yorta Yorta* purposes does not require that the common body of laws and customs 'unite' the society in the sense of making it a harmonious unitary polity. The existence of different interpretations of that common body of laws and customs does not entail the existence of multiple societies. As French J said in the *Sampi* trial judgment:

An apposite analogy may be seen in the differences of view among those directly involved in the administration of the Australian legal system and commentary on it in connection with matters such as the interpretation of the common law and equity and even of the Constitution and statutes. There are sometimes debates about the origins and content of particular rules of judge-made law. And outside the very small population of persons involved in the administration of the law, there is, in the wider community, a range of awareness of the law from the well-informed to the profoundly ignorant. None of that detracts from the existence and validity of the legal rules by which our society is governed. In a system of law and custom transmitted by oral tradition these general propositions have even greater force.¹⁹²

Although one might attempt to distinguish the two situations by pointing to the existence of a hierarchical dispute resolution structure in the Australian legal system, it must be remembered that no such structure is required to meet the definitions of 'law and custom' or 'society' in the Native Title Act.¹⁹³

Relationship between society and claim group (communal, group or individual)

There is no legal or logical requirement that the society coincide with the claim group: a claim group may claim under a larger society.¹⁹⁴ Further, a society-wide communal claim may succeed even though there is differential 'intramural' allocation of rights — that is, where law and custom allocate different rights to different groups or individuals.¹⁹⁵

191 *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v Queensland (No. 2)* [2010] FCA 643 at [169].

192 *Sampi v Western Australia* [2005] FCA 777 at [1061].

193 E.g. *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v Queensland (No. 2)* [2010] FCA 643 at [441].

194 See, e.g., *De Rose v South Australia (No. 2)* [2005] FCAFC 110 at [236]–[237].

195 *Western Australia v Ward* [2000] FCA 191 at [202], [239]; *Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory of Australia* [2004] FCA 472 at [79]–[86]; *Neowarra v Western Australia* [2003] FCA 1402; *Sampi v Western Australia* [2005] FCA 777 at [1069]; *Gumana v Northern Territory of Australia* [2007] FCAFC 23 at [135]–[163]; *Bodney v Bennell* [2008] FCAFC 63 at [144]–[159]; *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v Queensland (No. 2)* [2010] FCA 643 at [245].

Additionally, a single determination can be made in favour of a claim group constituted by multiple distinct societies.¹⁹⁶

Migration of different groups within a society to different parts of the land and water associated with that society may be contemplated by the law and custom of that society, and in such cases will not present a bar to claimants.¹⁹⁷ The matter of rights and interests transmitted *between* societies, though, has not been definitively determined. In one case, the court expressed doubts as to whether the Act would recognise rights and interests held by members of a transferee society, even if the transferor society had traditional laws and customs about the transmission of those rights and interests.¹⁹⁸ The Full Court in *Sebastian* ‘noted’ that view without expressing a concluded view of its own.¹⁹⁹ To return to the language of the joint judgment in *Yorta Yorta*, the consequences of Crown sovereignty in preventing the creation of new rights does not deny:

...the efficacy of rules of transmission of rights and interests under traditional laws and traditional customs which existed at sovereignty, where those native title rights continue to be recognised by the legal order of the new sovereign. The rights and interests in land which the new sovereign order recognised included the rules of traditional law and custom which dealt with the transmission of those interests.²⁰⁰

On the face of the *Yorta Yorta* reasoning, it would appear that the intersocietal transmission of rights and interests ought to be recognised under the Act if there were rules under the relevant laws and customs for the transmission and reception of rights and interests across societies.²⁰¹ That is particularly so given the Full Court’s position in *Bodney* that the touchstone principle is that ‘what cannot be created after sovereignty are rights that impose a greater burden on the Crown’s radical title’.²⁰²

Connection

Section 223(1)(b) of the Native Title Act includes as part of the definition of native title the condition that ‘the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters.’

196 *Lardil Peoples v Queensland* [2004] FCA 298 at [200], [207], [140].

197 *De Rose v South Australia* [2003] FCAFC 286 at [268].

198 *Dale v Moses* [2007] FCAFC 82 at [120].

199 *Western Australia v Sebastian* [2008] FCAFC 65 at [99].

200 *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at [44].

201 An appropriate analogy would be the transfer of land or other property between citizens (or even governments) of different states in the contemporary international system. It may be sufficient for each state’s domestic laws to contemplate the transfer. In addition, there is an applicable body of private and public international law. To the extent that this body of supra-societal law implies the existence of an international ‘society’, that society could ground the relevant laws to govern the transfer (see H Bull, *The anarchical society: a study of order in world politics*, 3rd edn, Palgrave, Basingstoke, 2002. Such a meta-society could be implied in cases of intersocietal succession among Aboriginal or Torres Strait Islander groups.

202 *Bodney v Bennell* [2008] FCAFC 63 at [120]–[121].

This statutory language derives from the judgment of Brennan J in *Mabo (No. 2)*:

Native title to particular land (whether classified by the common law as proprietary, usufructuary or otherwise), its incidents and the persons entitled thereto are ascertained according to the laws and customs of the indigenous people who, by those laws and customs, have a connection with the land...

Native title to an area of land which a clan or group is entitled to enjoy under the laws and customs of an indigenous people is extinguished if the clan or group, by ceasing to acknowledge those laws, and (so far as practicable) observe those customs, loses its connection with the land or on the death of the last of the members of the group or clan.²⁰³

It is apparent from this quote that his Honour was using 'connection' to refer to a consequence or characteristic of the laws and customs — that is, Indigenous peoples have a connection with the land by virtue of their laws and customs. Courts have held that it is legitimate to refer to Brennan J's usage as extrinsic material to aid the construction of the Act.²⁰⁴

That interpretation is supported by the High Court's judgment in *Ward*. The joint judgment in that case made a number of points about the interpretation of s. 223(1)(b) (separated into dot points here for ease of reading):

- 'In its terms, s 223(1)(b) is not directed to how Aboriginal peoples use or occupy land or waters.'
- '...it requires first an identification of the content of traditional laws and customs and, secondly, the *characterisation of the effect of those laws and customs as constituting a "connection"* [emphasis added] of the peoples with the land or waters in question.'
- '...there may be cases where the way in which land or waters are used will reveal something about the kind of connection that exists under traditional law or custom between Aboriginal peoples and the land or waters concerned. But the absence of evidence of some recent use of the land or waters does not, of itself, require the conclusion that there can be no relevant connection.'
- 'Whether there is a relevant connection depends, in the first instance, upon the content of traditional law and custom and, in the second, upon what is meant by "connection" by those laws and customs.'²⁰⁵

This approach is supported in *Yorta Yorta*, where the joint judgment explained that s. 223(1)

203 *Mabo v Queensland (No. 2)* [1992] HCA 23 at [83].

204 *Sampi v Western Australia* [2005] FCA 777 at [1079]; *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [92]. As noted above, it is incorrect to directly import common law notions into the interpretation of the Native Title Act: *Western Australia v Ward* [2002] HCA 28 at [16]; *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at [32] and [70]. Nevertheless, as also noted above, the thing that the Native Title Act recognises and protects is the same thing that was previously recognised under the common law in *Mabo (No. 2)*. See *Yorta Yorta* at [75]–[77].

205 *Western Australia v Ward* [2002] HCA 28 at [64].

(b) requires that ‘the rights and interests [have] the characteristic that, by the traditional laws acknowledged and the traditional customs observed by the relevant peoples, those peoples have “a connection with” the land or waters’.²⁰⁶ The joint judgment indicated that the ‘source’ of that connection is traditional law and custom rather than the common law and also spoke of a connection to land being ‘demonstrated by’ laws and customs.²⁰⁷

After considering the case law on s. 223(1)(b), the Full Court in *Alyawarr* summarised the position as follows:

From the preceding it can be seen that ‘connection’ is *descriptive of the relationship to the land and waters which is, in effect, declared or asserted by the acknowledgment of laws and observance of customs which concern the land and waters in various ways* [emphasis added]. To observe laws and acknowledge customs which tell the stories of the land and define the rules for its protection and use in ways spiritual and material is to keep the relevant connection to the land. There is inescapably an element of continuity involved which derives from the necessary character of the relevant laws and customs as ‘traditional’. The acknowledgment and observance, and thereby the connection, is not transient but continuing.²⁰⁸

And, in rejecting a ‘restrictive’ view of connection contended by the Territory party, the court said that the concept of connection:

...involves the relationship of the relevant community to its country defined by laws and customs which it acknowledges and observes. The relationship may be expressed in various ways including, but not limited to, physical presence on the land.²⁰⁹

What does para (b) add to the definition of native title?

In light of this close relationship between the concept of ‘connection’ and traditional laws and customs, courts have at times struggled to identify precisely what is added to the definition of native title by the inclusion of s. 223(1)(b).²¹⁰

For example, in *De Rose*, the Full Court said:

At first glance, it may not be evident what par (b) of s 223(1) adds to par (a). If Aboriginal people possess rights and interests in relation to land under the traditional laws acknowledged and the traditional customs observed by them, it

206 *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at [34].

207 *ibid.* at [34], [56].

208 *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [88].

209 *ibid.* at [111].

210 French CJ, in an extrajudicial speech, described the s. 223(1)(b) requirement as ‘elusive’: RS French, ‘Native title: a constitutional shift?’, JD Lecture Series, University of Melbourne Law School, 24 March 2009.

would seem to be a small step to conclude that the people, by those laws and customs, have a connection with the land.²¹¹

In that case, given that the established rights and responsibilities of *nguraritja* (traditional custodians or owners) were clearly referable to particular land or sites, 'it would seem to follow that there is a "connection" by the traditional laws and customs between the *nguraritja* and "their" land.'²¹² Their Honours found it difficult to conceive of a construction of the word 'connection' that would not have been satisfied in those circumstances.

The possibility should not be discounted that the drafters of s. 223 included para (b) without specifically intending that it constitute an additional element of proof. As the Full Court remarked in *Alyawarr*:

The drafting is opaque because the word 'connection' is taken from a judgment and appears to have been applied in the statute somewhat out of context.²¹³

Nevertheless, courts have considered themselves bound by the principle of statutory construction that holds that Parliament would not include a provision if it did not intend it to have substantive effect. Accordingly, they have been obliged to attempt to give paragraph (b) 'work to do'.²¹⁴ In the *Sampi* trial judgment, French J took para (b) to mean that 'connection' is a 'relationship that exists by virtue of [traditional] law and customs' but noted there was more than one way of interpreting that.²¹⁵ One possibility, his Honour said, was that the relevant connection is constituted simply because of the authority conferred by traditional law and custom to enjoy and exercise the rights and interests which arise under it. This construction was avoided, however, because:

...the 'connection' requirement under s 223(1)(b) would mean little more than the requirement under s 223(1)(a) that the applicants have rights and interests in relation to the land or waters. It would render s 223(1)(b) largely redundant.²¹⁶

In preference to that more minimalist construction, French J favoured one that traced the term 'connection' back to the way it was used in *Mabo (No. 2)* — that is, in the collocation 'continuing connection', with the emphasis on continuity. Accordingly, his Honour treated s. 223(1)(b) as referring to 'continuity of association under traditional law and custom'.²¹⁷ This interpretation was supported by the Full Court in *Alyawarr*, who considered that insufficient emphasis had been placed on 'continuity of observance as a manifestation of connection'.²¹⁸

211 *De Rose v South Australia* [2003] FCAFC 286 at [305].

212 *De Rose v South Australia* [2003] FCAFC 286 at [305].

213 *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [87].

214 See, e.g., *Harrington-Smith on behalf of the Wongatha People v Western Australia (No. 9)* [2007] FCA 31 at [1880]; *Bodney v Bennell* [2008] FCAFC 63 at [165].

215 *Sampi v Western Australia* [2005] FCA 777 at [1077].

216 *ibid.*

217 *Sampi v Western Australia* [2005] FCA 777 at [1079].

218 *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [92].

The independent operation of paras (a) and (b) was emphasised by the High Court in *Ward*:

...it is important to notice that there are two inquiries required by the statutory definition: in the one case for the rights and interests possessed under traditional laws and customs and, in the other, for connection with land or waters by those laws and customs.

The distinction is critical for any attempt (as is made in this litigation) to treat the maintenance and protection of cultural knowledge of native title holders as a matter with which the [Native Title Act] is concerned. The cultural knowledge in question may be possessed under the traditional laws acknowledged and traditional customs observed by the relevant peoples. The issue which then arises is whether, by those laws and customs, there is 'a connection with' the land or waters in question.²¹⁹

Despite the emphasis on the independence of paras (a) and (b), the court in *Ward* noted that the two inquiries may depend on the same evidence, because evidence of the acknowledgment and observance of laws and customs will also establish whether the claimants are connected to the land or waters by those laws and customs.²²⁰

How is 'connection' established?

At the outset, it is clearly established in the case law that physical occupation, use or visitation is not required by s. 223(1)(b)²²¹. The content of the laws and customs themselves will determine what is necessary for the claimants to possess the requisite connection, and this may or may not include a physical element. As French J stated in *Sampi* (which was not challenged by the Full Court on appeal):

...the connection requirement involves the continuing internal and external assertion by the group of its traditional relationship to the country defined by its laws and customs and which may be expressed by its physical presence there or otherwise.²²²

There has been occasional debate over whether 'spiritual connection' is sufficient, with the High Court in *Ward* declining to express a view.²²³ Yet, given the operation which s. 223(1)(b) has been given in the case law outlined above, it is probably unhelpful to speak of 'physical connection' or 'spiritual connection' at all. Rather, s. 223(1)(b) is concerned

219 *Western Australia v Ward* [2002] HCA 28 at [18]–[19].

220 *ibid*.

221 *Neowarra v Western Australia* [2003] FCA 1402 at [347]–[358]; *De Rose v South Australia* [2003] FCAFC 286 at [303]–[328]; *Sampi v Western Australia* [2005] FCA 777 at [1079]; *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [92]; *Western Australia v Ward* [2000] FCA 191 at [243] (not dissented from in the High Court on appeal).

222 *Sampi v Western Australia* [2005] FCA 777 at [1079]; see also *Neowarra* at [353].

223 *Western Australia v Ward* [2002] HCA 28 at [64]. RD Nicholson J in *Daniel* took 'spiritual connection' into consideration in arriving at a positive finding on s. 223(1)(b) and was not found by the Full Court to have been in error: *Daniel v Western Australia* [2003] FCA 666 at [422].

with a *customary–legal* connection which in a given case could be established by physical presence or by spiritual or emotional ties.

Certainly, there is no *requirement* that the connection be spiritual in nature. The relevance of spiritual beliefs, rules and practices to the question of ‘connection’ will in each case be determined by the content of the relevant laws and customs.²²⁴

Courts have dealt with ‘connection’ in diverse ways, which perhaps reflects some uncertainty about the nature of inquiry it involves. The following summaries indicate some of the factors that have been held to establish connection in the case law. (Quotes from the summaries have been paraphrased as bullet points for ease of reading.)

In *Ward*, the following circumstances (as summarised by Sundberg J in *Neowarra*)²²⁵ were held to establish connection.²²⁶

- In relation to one area, connection consisted of evidence identifying the boundaries of Gajerrong country, that the area was Gajerrong, and that present members of the community had maintained connection with the country through adherence to their traditional laws and customs.
- In relation to an area now flooded by Lake Kununurra and Lake Argyle, where it was impracticable to engage in physical activities on country, a spiritual relationship with the land was maintained by continuing to acknowledge and observe traditional laws and customs involving ritual knowledge, ceremony and customary practices.
- In relation to islands, some of which had not been visited by claimants, a claimant’s continued assertion of a relationship with the islands was accepted as sufficient connection.
- In relation to another area where actual presence was minimal, their Honours found that none of the witnesses said their connection with the land had ceased. Accordingly, they held that it was open to the trial judge to find a connection had been substantially maintained so far as it was practicable to do so.

Sundberg J went on to comment that ‘It can be seen from these examples that little is required to constitute a continuing connection.’²²⁷

In *Daniels*, the trial judge treated ‘connection’ largely as an absence of ‘disintegration’ or being ‘washed away’.²²⁸ While there had been evidence of one group’s language passing out of use and the adoption by the group of the ritual practices of a neighbouring group,

224 *Sampi v Western Australia* [2005] FCA 777 at [1078]–[1079]; *Gumana v Northern Territory of Australia* [2005] FCA 50 at [226]–[228]; *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v Queensland (No. 2)* [2010] FCA 643 [3], [172], [251]; cf. *Western Australia v Ward* [2002] HCA 28 at [14].

225 *Neowarra v Western Australia* [2003] FCA 1402 at [350].

226 These aspects are taken from the Full Court judgment; they were not disturbed in the High Court appeal.

227 *Neowarra v Western Australia* [2003] FCA 1402 at [350].

228 *Daniel v Western Australia* [2003] FCA 666 at [424].

the group was nevertheless found to have maintained sufficient connection.²²⁹ In respect of another group, the trial judge found that connection to their country had been maintained despite the group's migration to a different area.²³⁰

In *Griffiths*,²³¹ the trial judge (whose approach in this respect was not disturbed on appeal) relied on the following factors as establishing connection:

- The claimants occupy the area not randomly, or because they have happened onto it recently, but because their forbears occupied the region generations ago.
- The land was, and still is, a major part of their economic, cultural and spiritual life.
- Although the presence of their ancestors may not have amounted to possession at common law, it certainly qualified as 'occupancy', in a broad sense, even allowing for the fact that other indigenous groups frequently came onto the land for ceremonial and other purposes.
- While traditional connection to land *can* be lost by forcible removal, this did not occur in the relevant area here.

In *Neowarra*, Sundberg J took a number of factors into account in addressing the question of 'connection'. These can be broadly grouped into two categories, although his Honour did not expressly divide them in this manner: firstly, characteristics of law and custom which are relatable to land; and, secondly, factual matters that indicate the claimants maintain physical and other links to the relevant area. His Honour concluded that the characteristics of laws and customs were such that observing them gave the claimants a connection with the land or waters.²³²

The characteristics of law and custom identified were as follows:

- Rock paintings of the *wanjina*, ancestral creator beings, are physically present on land throughout the claim area. The *wunggurr* places for individuals are identifiable locations.
- The languages of the area are related to the land. They are language countries, not merely languages spoken by people who live on the country.
- Clans have clan estates — areas of land.
- Moieties have their own countries.
- Claimants travel over the country and practise their laws and customs there.
- The *wurnan*, a system of cultural exchange, is directly connected to land.
- Rituals are carried out at special sites.

229 *ibid.* at [423].

230 *ibid.* at [421].

231 *Griffiths v Northern Territory of Australia* [2006] FCA 903 at [562].

232 *Neowarra v Western Australia* [2003] FCA 1402 at [352]–[353]. See also *Bodney*: '...though the connection inquiry requires the formal characterisation of the laws and customs we have noted, it equally requires demonstration that, by their actions and acknowledgement, the claimants have asserted the reality of the connection to their land or waters so made by their laws and customs': *Bodney v Bennell* [2008] FCAFC 63 at [171].

The factual matters considered relevant were as follows:

- There is continued acknowledgment of traditional laws and observance of traditional customs.
- Traditional ceremonies are enacted at particular sites within and outside the claim area.
- Ritual knowledge is passed on from generation to generation.
- Children are taught the laws and customs by their parents and grandparents.
- Stories from history are passed on and widely known.
- Many senior claimants were able to give detailed descriptions of the boundaries of their ancestral countries and language areas.
- There is evidence of the *wurnan* routes.
- There is also much evidence that where physical connection is not maintained with country it is mainly due to practicalities: distance, the location of many claimants far from their country, age, and difficulty of access to rough terrain.

His Honour was satisfied that one group of claimants had maintained their connection with their countries even though they were located away from them:

They maintain that connection by practising their laws and customs at Mowanjum, and by asserting claims to country inherited from their forebears and having that assertion respected by their peers. I find that it is a characteristic of their laws and customs that a connection with country can be maintained by way of that assertion and acceptance.²³³

The Full Court in *De Rose (No. 2)*²³⁴ identified a number of rights and responsibilities of *nguraritja*, traditional custodians or owners, which the trial judge had found to be defined by the relevant law and custom:

- the right to live on their country, to collect food, water and other resources, to hunt and to travel where they want to go (so long as they do not offend the *tjukurpa*)
- the right to erect shelters on the land, to gather shrubs and bushes for medicinal purposes, to use timber to make, for example, *miru* (a spear-thrower) and *wana* (a digging stick used by women to dig for *tjala* (honey ant) and goannas)
- the right to instruct any Anangu visitor to the land as to where he or she can go (including specifying avoidance places) and where (if at all) water and food may be obtained
- the right to impose sanctions on a visitor who violates the rules — for example, by hunting on the *nguraritja*'s country without permission
- the obligation to teach young people about country, including the special places, water points, bush tucker, and the correct traditional ways of preparing food
- the obligation to clean secret and sacred sites on the land
- the obligation to learn the *tjukurpa* for country and to perform the appropriate *inma* and other ceremonies.

233 *Neowarra v Western Australia* [2003] FCA 1402 at [353].

234 *De Rose v South Australia (No. 2)* [2005] FCAFC 110 at [112].

The court concluded, on the basis of these findings as to the content of the traditional laws and customs, that:

...the effect of those laws and customs is, in our opinion, plainly to constitute a ‘connection’ between Peter De Rose (and any others who are Nguraritja for the claim area) and the claim area. The traditional laws and customs confer rights and responsibilities on Peter De Rose over the claim area. They establish that he is inextricably linked to his country in a variety of ways. The ‘connection’ required to satisfy s 223(1)(b) of the [Native Title Act] is present.²³⁵

Specificity — by person and by place

There is some uncertainty about the level of specificity with which connection needs to be established for s 223(1)(b). In general, the courts have resisted interpreting s 223(1)(b) to require a fine-grained geographical or demographic approach to connection. Where courts have found that there are considerable linkages between ‘estate groups’, such as to justify treating the claim as ‘communal’, they have tended to deal with the ‘connection’ question as applying to the claim area, and the claimant group, as a whole.

In *Alyawarr*, the Full Court said that ‘connection’ ‘...does not depend on the precise locus, within a community, of native title rights and interests intramurally allocated, provided that they can be regarded as held by a community as a whole.’²³⁶

The Full Court held that it was a consequence of the trial judge’s findings about the character of the relevant community — namely that they constituted one native title holding community — that the relevant inquiry into connection should be cast at the communal or claim group level: ‘His Honour was correct to treat the relevant title as communal over the whole area rather than as severally held by the estate groups in respect of their particular estates.’²³⁷ Special leave to appeal to the High Court from this judgment was refused.²³⁸

In *Daniel*, the trial judge observed that, while claimants must prove the extent of the area to which a traditional connection is asserted, ‘problems of proof dictate that boundaries need not be proven precisely or with absolute accuracy.’²³⁹ His Honour, after dealing with some conflicting anthropological evidence, approached the question of connection on the basis that native title was held by the claimants in the claim area as a whole. He said:

Following the decisions in *Ward HC* and in *Yorta Yorta* it became apparent that the concentration on notions of composite community and estate groups, which had featured so heavily in the anthropological evidence given earlier in the trial, were not to be the central focus of the inquiry. This accords with the submission by senior counsel for the first applicants that it is not necessary for connection

235 *ibid.* at [113].

236 *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [111].

237 *ibid.* at [112].

238 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Group* [2006] HCATrans 251.

239 *Daniel v Western Australia* [2003] FCA 666 at [113].

to be established estate by estate and that, in dealing with a territorial area, it is appropriate to have regard to the evidence as a whole.²⁴⁰

On appeal, the Full Court found no error in the trial judge's approach to connection.²⁴¹

In *Sebastian*, the trial judge found the different groups within the claim area to be subsets of the one Yawuru society and that native title was held communally. Accordingly, his Honour found that the requisite connection existed on the basis of evidence relating to the entire claim area. On appeal, the Full Court rejected the state party's contention that the trial judge had erred in not considering the connection of the northern and southern areas separately. It held that his Honour was entitled to find that there was a single society holding native title communally and therefore his approach to connection was sound.²⁴²

In *Sampi*, similarly, the trial judge found that the evidence had established the necessary connection at the communal level. French J explained:

This is so notwithstanding that particular estates may have fallen vacant or people moved around within the claim area to live in convenient centres. There was sufficient evidence of ongoing visitation and the assertion of the relevant relationship to country by Aboriginal witnesses to establish that the requisite connection of the Bardi people, as a whole, exists.²⁴³

In *Neowarra*, Sundberg J rejected an argument by the state party that the applicants' claim ought to have been based on estate groups rather than on the broader communal claim. The state, without success, had argued that the applicants were impermissibly attempting '...to translate particular and discrete connections between individuals or small groups of individuals and particular places into a broader, all-encompassing native title involving the entire claimant group and the entire claim area.'²⁴⁴

Notably, two decisions — *Wongatha* and *Bodney* — took a different approach to the specificity with which connection must be established. In *Wongatha*, Lindgren J found that the relevant law and custom conferred native title rights and interests on individuals rather than on groups. Accordingly, he was of the view that the claimants had miscast their claim as based on a group rather than on individuals:

...in the case of a claim of group rights and interests, it is the claim group (the claimants as an entity) that must have the connection required by para (b) of s 223(1). The Wongatha Claim does not meet this requirement for the same reason that it does not meet the requirement of para (a) of s 223 (1): the Wongatha Claim group (like the other Claim groups) is not one recognised, directly or indirectly, by pre-sovereignty Aboriginal law and custom, as having a connection with the Wongatha Claim area. Any connection is at the individual

240 *ibid.* at [244].

241 *Moses v Western Australia* [2007] FCAFC 78 at [313], [344].

242 *Western Australia v Sebastian* [2008] FCAFC 65 at [54]–[78].

243 *Sampi v Western Australia* [2005] FCA 777 at [1079].

244 *Neowarra v Western Australia* [2003] FCA 1402 at [358].

rather than at the group level, and is with a 'my country' area rather than with the entire Wongatha Claim area.²⁴⁵

In relation to the evidence about the claimants having resided in the claim area, Lindgren J pointed out that the claimants had 'addressed the question as if it raised no more than an issue of residence, but did not explain what pre-sovereignty laws and customs had to say about residence'.²⁴⁶ It seems as though Lindgren J was applying the standard legal principles as already outlined: that connection is something conferred on claimants by traditional laws and customs, and that the question of whether such a connection exists will depend on the content of the law and custom and its application to the facts.²⁴⁷ His Honour, however, made findings about the relevant law and custom that led him to conclude that the relevant connection needed to be established at the individual level.

In *Bodney*, the Full Court took issue with the way in which the trial judge had approached the question of connection. They found that the trial judge had failed to inquire, as a factual matter, whether the laws and customs of the Noongar people supported a communal, as opposed to group-based, claim.²⁴⁸ His Honour had in effect assumed that native title could be recognised communally rather than at the group level. The court had reservations about whether this was the proper approach but were not prepared to say it was clearly wrong. They considered themselves bound to adhere to the approach taken by the respective full courts in *Ward* and *Alyawarr*, which established that ordinarily native title is communal.²⁴⁹

So much for specificity as to *the persons* for whom connection needs to be established. The court went on, however, to challenge the approach that the trial judge took to the *area* over which connection needed to be demonstrated. Their Honours said:

Where, as in the present matter, it is contended that connection has been lost with a particular part of the claim area, because the connection to that area by the laws and customs has not been shown to have been substantially maintained, the connection inquiry itself must address that contention and, if it is established, its significance for the communal claim to that part of the area must be assessed...²⁵⁰

The court found that the trial judge had not made specific findings of fact about whether the claimant group had maintained a connection to the Perth Metropolitan Area, in respect of which a separate proceeding had been instituted for procedural reasons. Instead, he had satisfied himself that the claimants had demonstrated the necessary connection between themselves and the whole claim area and concluded from this that they had thereby demonstrated the necessary connection to the Perth Metropolitan Area. That was held to

245 *Harrington-Smith on behalf of the Wongatha People v Western Australia (No. 9)* [2007] FCA 31 at [1882].

246 *ibid.* at [1885].

247 See *Harrington-Smith on behalf of the Wongatha People v Western Australia (No. 9)* [2007] FCA 31 at [1903].

248 *Bodney v Bennell* [2008] FCAFC 63 at [153].

249 *ibid.* at [158]. See also L Strelein, 'Communal, group and individual rights: the "recognition level" and who holds native title', in *The problem with section 223 of the Native Title Act 1993: issues and possibilities*, AIATSIS Research Publications, forthcoming.

250 *Bodney v Bennell* [2008] FCAFC 63 at [167].

be an error on the trial judge's part.²⁵¹ According to the Full Court, the proper approach to be taken where connection to a particular area has been put into issue is: '(i) to examine the traditional laws and customs for s 223(1)(b) purposes as they relate to that area, and (ii) to demonstrate that connection to that area has, in reality, been substantially maintained since the time of sovereignty.'²⁵²

Note that this statement only applies 'where a matter put in issue in a proceeding is whether connection has been maintained to a particular part of a claim area'.²⁵³ If no party contests the claimants' connection to a particular area then the approach of the trial judge may be appropriate, as indicated by the other cases collected above (see *Sampi* in particular²⁵⁴). Accordingly, in a situation where a government respondent was otherwise inclined to agree to a consent determination, there would be no legal requirement for it to be satisfied about connection at any particular geographical scale.

Conclusion

The primary purpose of this paper was to set the legal scene for native title consent determinations. The first part of the paper addressed the requirements of ss 87 and 87A of the Native Title Act, giving special attention to the meaning of 'appropriate'. Different judicial approaches to 'appropriateness' were identified, with the mainstream approach treating the informed consent of the parties as the central consideration. 'Informed' consent is taken to require government respondents to give appropriate consideration to the evidentiary material to ensure its cogency. In this respect, governments are expected to be satisfied that there is a 'credible' or 'reasonably arguable' case. It is plain that even the 'hands-on' judges, who see the court as having a substantive fact-finding role in consent determinations, would not expect to assess the evidence with anywhere near the same rigour as they would in contested litigation; nor would they expect government respondents to do so. All that is required is that native title is supported 'on the face' of the evidence.

It was explained previously that this summary of the law on consent determinations should not be taken as an argument in favour of a careless approach to native title determinations. There are legal and policy considerations that make it extremely important to identify the appropriate group configuration of rights holders and the appropriate geographical extent of their rights. Ensuring that determinations are made in favour of 'the right people for country' is a requirement of simple justice and a necessary condition for the success of future governance and decision-making.

These considerations, however, do not justify a heavy and detailed emphasis on proof of continuity in observance and acknowledgment, geographic connection within claim areas, or the definition of 'society'. The requirement for cultural continuity as part of the 'tradition' inquiry is a technical question that stems from doctrinal limitations on the ability of Australian courts to recognise laws made outside the Australian legal system after the first assertion

251 *ibid.* at [167], [177]–[180].

252 *ibid.* at [179].

253 *ibid.*

254 *Bodney v Bennell* [2008] FCAFC 63 at [176].

of colonial sovereignty. It does not have any direct bearing on matters of intra-Indigenous justice or fairness between Indigenous and non-Indigenous people. The identification and delineation of the relevant society, as argued earlier, is a subsidiary question within the main 'tradition' inquiry, and the law does not require consistency in how that question is handled across claims.

In all three issues (continuity, connection and society) there are inherent difficulties of proof, particularly where native title parties are asked to prove a negative proposition (such as the absence of substantial interruption in acknowledgment and observance of law and custom). It is always theoretically possible to zoom in to a finer level of detail and demand connection evidence for smaller areas, or continuity evidence for shorter time periods, so inferences will inevitably be necessary at some stage. All the law requires is that the evidence supporting native title be 'cogent', 'credible' or 'reasonably arguable'. This means that where inferences are fairly open on the material the making of such inferences is supported by both sound legal principle and important policy considerations. Further, government respondents have on occasion been warned by courts not to impose too high an evidentiary burden on claimants lest they defeat the original beneficial purpose of the Native Title Act's scheme for negotiated settlements. Flexibility on evidentiary issues, then, is not merely legally permissible; it is legally incumbent on government respondents.

Finally, the analysis of legal principles in the second part of this paper applies as much to litigation as it does to consent determinations. Indeed, almost all of the cases cited emerged from contested trials. Together they constitute the law by which future native title litigation will be decided. Accordingly, parties' decisions about whether or not to go to litigation should be informed by those cases and the principles they contain. It remains true that consent determination negotiations should not take litigation as their standard. The courts have been clear that respondents should not adopt the position that they will not agree until they are convinced that the claimants would succeed at trial. But, at the least, negotiations should not take place under the misapprehension that native title is harder to prove at trial than it really is. To give effect to the original vision of the Native Title Act as a framework for the consensual resolution of land claims, parties should negotiate with a clear view of the flexibility that exists in the law on connection.

Throughout Australia the native title claims of Aboriginal and Torres Strait Islander peoples are resolved primarily through negotiated consent determinations, whereby the court recognises native title following the agreement of the parties, rather than through contested litigation. Negotiations leading up to a consent determination often raise two separate legal questions: firstly, is the claimants' case so strong that they would succeed in contested litigation; and, secondly, is the claimants' case strong enough to justify the government respondent party agreeing to recognise native title without a trial? The first question tells the government respondent whether agreement is advisable; the second tells them whether it is permissible.

This paper presents a summary of case law on particular aspects of section 223(1) of the Native Title Act. It seeks to identify the 'minimum' legal requirements for a court to make a determination of native title. The purpose is to locate the points of flexibility within the law on native title 'connection', which can in turn inform discussions about the circumstances in which governments may (as opposed to must) enter into consent determinations.

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