HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

MEMBERS OF THE YORTA YORTA ABORIGINAL COMMUNITY — APPELLANT

AND

STATE OF VICTORIA & ORS — RESPONDENTS

Members of the Yorta Yorta Aboriginal Community v Victoria
[2002] HCA 58
12 December 2002
M128/2001

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation:

N J Young QC with K R Howie SC and T P Keely for the appellant (instructed by Arnold Bloch Leibler)

G Griffith QC with H M Wright QC, M Sloss and S G E McLeish for the first respondents (instructed by Victorian Government Solicitor)

V B Hughston SC with J A Waters for the second respondent (instructed by Crown Solicitor for the State of New South Wales)

G E Hiley QC with G J Moloney for the first, third and fourth named third respondents (instructed by Suzanna Sheed & Associates)

No appearance for the second, fifth, sixth, seventh and eighth named third respondents

A C Neal with P G Willis for the fourth and fifth respondents (instructed by J G Thompson and Williams Love Lawyers)

J E Curtis-Smith for the sixth respondents (instructed by Hargraves)

No appearance for the seventh and eighth respondents

B M Selway QC, Solicitor-General for the State of South Australia with J H Dnistrianski for the ninth respondent (instructed by Crown Solicitor for the State of South Australia)

J Basten QC with R W Blowes for the tenth respondent (instructed by Chalk & Fitzgerald)

Interveners:

D M J Bennett QC, Solicitor-General of the Commonwealth of Australia with M A Perry intervening on behalf of the Attorney-General of the Commonwealth of Australia (instructed by Australian Government Solictor)

B W Walker SC with S E Pritchard intervening on behalf of the Human Rights and Equal Opportunity Commission (instructed by Human Rights and Equal Opportunity Commission)

M F Rynne intervening on behalf of the South West Aboriginal Land and Sea Council Aboriginal Corporation (instructed by South West Aboriginal Land and Sea Council Aboriginal Corporation)

CATCHWORDS

Members of the Yorta Yorta Aboriginal Community v Victoria

Aboriginals – Native title to land – Determination of native title – Native title rights and interests in s 223(1) *Native Title Act* 1993 (Cth) – Possessed under traditional laws acknowledged and traditional customs observed in s 223(1)(a).

Aboriginals – Native title to land – Determination of native title – Consequences of sovereignty – Whether traditional laws and customs observed must originate in pre-sovereignty laws and customs – Effect of development of, or changes in, traditional laws and customs since sovereignty – Whether proof of continuous acknowledgment and observance of traditional laws and customs required – Effect of interruption to continuous acknowledgment and observance of traditional laws and customs – Whether substantially uninterrupted acknowledgment and observance is sufficient – Whether traditional law and customs need only be presently acknowledged and observed – Whether continuous existence of claimant society required – Effect of cessation of claimant society on acknowledgment and observance of traditional laws and customs.

Aboriginals – Native title to land – Native title rights and interests – Section 223(1)(c) *Native Title Act* 1993 (Cth) – Meaning of rights and interests recognised by the common law of Australia – Whether there are common law requirements of native title.

Aboriginals – Native title to land – Extinguishment of native title – Whether s 223 *Native Title Act* 1993 (Cth) incorporates notions of extinguishment of native title – Whether concepts of "abandonment" or "expiration" of native title can be applied.

Aboriginals – Native title to land – Evidence – Proof – Oral and written testimony.

Words and phrases – Traditional laws and customs – Traditional – Determination of native title – Native title rights and interests – Rights and interests recognised by the common law of Australia.

Native Title Act 1993 (Cth), ss 223, 225.

1 GLEESON CJ, GUMMOW AND HAYNE JJ. In February 1994, application was made to the Native Title Registrar for a determination of native title to land and waters in northern Victoria and southern New South Wales. Several areas of land and waters were claimed; all were said to be public lands and waters. For the most part, the areas claimed straddled the Murray River (from a point in the west near Cohuna to a point in the east near Howlong) or straddled the Goulburn River (from its junction with the Murray, south to a point near Murchison). In addition to those areas, a number of other areas were claimed. All the areas claimed lay within a more or less oval-shaped area bisected by the Murray River (measuring about 150 kilometres on its north-south axis and over 200 kilometres on its east-west axis) which was said to be traditional Yorta Yorta territory. The precise basis for fixing the boundaries of this oval-shaped area was later to be said by the trial judge in this matter not to have been established in evidence.

2 The application was originally made in the name of an incorporated body, but later, eight named persons were substituted as applicants on behalf of the members of the Yorta Yorta Aboriginal community. Although the proceedings in this Court, and in the courts below, have described the claimant party simply as "Members of the Yorta Yorta Aboriginal community" it is convenient to refer to them as "the claimants" or "the appellants".

3 Pursuant to the *Native Title Act* 1993 (Cth), as it stood at the relevant time, the application was accepted by the Native Title Registrar in May 1994, and in May 1995, under the then applicable provisions of that Act, the matter was referred to the Federal Court for decision.

4 This was the first application for determination of native title to come on for trial after the enactment of the *Native Title Act*. It was tried between October 1996 and November 1998. Oral evidence was taken at trial from 201 witnesses; 48 witness statements were admitted into evidence without formal proof. The hearing occupied 114 days.

5 After evidence had been completed, and the primary judge had reserved his decision, the *Native Title Amendment Act* 1998 (Cth) ("the 1998 Amendment Act") came into operation. The parties were invited to, and did, make submissions to the primary judge (Olney J) about the consequences of those amendments. It will be necessary to return to consider some of the changes made by that Act.

6 On 18 December 1998, Olney J published his reasons for decision[1] and made a determination of native title under the *Native Title Act* that:

> "Native title does not exist in relation to the areas of land and waters identified in Schedule D to Native Title Determination Application VN 94/1 accepted by the Native Title Registrar on 26 May 1994."

7 From this determination the claimants appealed to the Full Court of the Federal Court. The Full Court, by majority (Branson and Katz JJ, Black CJ dissenting)[2], dismissed the appeal. By special leave, the claimants now appeal to this Court.

8 In order to understand the issues that fall for decision in this Court, it is necessary to begin with the statutory provisions from which those issues arise and to do so by reference first to what it was that the claimants sought.

An application for determination of native title

9 By their application, the claimants sought a determination of native title under the *Native Title Act*. The application which the claimants made, and the relief which they sought by that application, were both creatures of that Act. At the time the trial judge made his determination, s 225 of the Act provided that:

> "A ***determination of native title*** is a determination whether or not native title exists in relation to a particular area (the ***determination area***) of land or waters and, if it does exist, a determination of:
>
> (a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and
>
> (b) the nature and extent of the native title rights and interests in relation to the determination area; and
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> (c) the nature and extent of any other interests in relation to the determination area; and

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1 *The Members of the Yorta Yorta Aboriginal Community v The State of Victoria* [1998] FCA 1606.

2 *Yorta Yorta v Victoria* (2001) 110 FCR 244.

(d) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of this Act); and

(e) to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease – whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others."

As originally enacted, the *Native Title Act* had contained a different definition of "determination of native title" but that had been repealed, and a new definition substituted by the 1998 Amendment Act. The transitional provisions of the 1998 Amendment Act[3] provided that the new form of the definition applied to all determinations made after the commencement of the 1998 Amendment Act regardless of when the native title determination application was made. Accordingly, what the claimants sought was a determination having the characteristics identified in the definition set out above. Those characteristics included, if native title were determined to exist, who the persons, or each group of persons, holding the common or group rights comprising the native title are and, in addition, the nature and extent of the native title rights and interests in relation to the determination area.

10 Several of the terms used in the definition of "determination of native title" are defined elsewhere in the *Native Title Act*. For present purposes, the most important is the definition of "native title" contained in s 223 of the Act. Although that section was also amended by the 1998 Amendment Act, it is not necessary to notice the changes that were made then; for the purposes of the present matter, they may be left aside. "Native title", and the longer expression sometimes used in the Act, "native title rights and interests", are expressions defined in s 223(1) as:

"the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

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3 Sched 5, Pt 5, item 24.

(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."

11 Much of the argument of the present appeal was directed to the proper construction of this definition. In particular, considerable attention was directed to what is meant by par (c) of the definition when it says that "the rights and interests are recognised by the common law of Australia". Does this paragraph, as the majority of the Full Court held[4],

> "[incorporate] into the statutory definition of native title the requirement that, in the case of a claimed communal title, the holders of the native title are members of an identifiable community 'the members of whom are identified by one another as members of that community living under its laws and customs'[5] and that that community has continuously since the acquisition of sovereignty by the Crown been an identifiable community the members of which, under its traditional laws observed and traditional customs practised, possessed interests in the relevant land"?

Does it, again as the majority of the Full Court held[6], also incorporate into the statutory definition of native title,

> "the notion of extinguishment – whether by a positive exercise of sovereign power appropriate to achieve that result or by reason of the native title having expired so as to allow the Crown's radical title to expand to a full beneficial title"?

(Native title was said by the majority[7] to have "expired" if, at any time since the Crown acquired the radical title to the land, the traditional laws and customs, the acknowledgment and observance of which provided the foundation of native title, ceased to be acknowledged and observed or the relevant people, whether as a community, a group, or as individuals, ceased to have a connection with the land or waters in question.)

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4 (2001) 110 FCR 244 at 275 [108].

5 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 61 per Brennan J.

6 (2001) 110 FCR 244 at 275 [108].

7 (2001) 110 FCR 244 at 275 [108].

12 As these reasons will seek to explain, the questions which arise in this matter turn more on a proper understanding of par (a) of the definition of native title, and in particular what is meant by "are possessed under the traditional laws acknowledged, and the traditional customs observed" by the relevant peoples, than it does on par (c) of the definition. But, of course, it will be necessary to consider all elements of the definition.

13 Before turning to that consideration it is necessary to say something about the decisions in the courts below and about the way in which the claimants sought to demonstrate their entitlement to a determination that native title exists in relation to the land and waters the subject of their claim. That is necessary because the way in which the claimants shaped and presented their claim informs the proper understanding of the findings of fact that were made by the primary judge and the way in which he dealt with some questions of law.

The claim

14 The claimants made their claim on behalf of the members of the Yorta Yorta Aboriginal community. In their native title determination application, as amended on 2 May 1995, the claimants adopted a description of the Yorta Yorta Aboriginal community which had been prepared by a consultant anthropologist and was included by them in their application. That description noted that, in the period of nearly 155 years since Europeans first came to the area claimed, there had been "massive alterations in technical, environmental and economic circumstance". Reference was made in this regard to the use by the European settlers of land for pastoral purposes, to their use of forests for timber gathering, and to their use of waters for commercial fishing and irrigation, uses which had led to many plant and animal species which were once prolific becoming extinct or rare. Reference was made to the "impact of depopulation from disease and conflict during the early years of settlement" and to the policies of both government and others under which Aboriginal children had been separated from their parents, the performance of ceremonies and other traditional customs and practices had been forbidden, the use of traditional languages had been inhibited and "by controlling where and how the Yorta Yorta could live, they [that is, the government and others] forced the Yorta Yorta to make further adaptations to their new circumstances". At various times, different policies had been followed – absorption, segregation, integration – and each had had its effect on Aboriginal society.

15 The claimants thus acknowledged, at the outset of their claim, that much had changed in Aboriginal society as a result of European settlement. It is these changes and their consequences that lie behind the issues which arise in this matter.

The claim at trial

16 The primary judge required the claimants and some of the many other parties to the proceeding who opposed, or at least did not support, the claims made by the claimants to file and serve a statement, in summary form, of the facts and contentions upon which they relied. That statement of facts and contentions was amended at various stages of the proceeding, the last of the amendments being made after the last day of the oral hearing before the primary judge. It may be taken, therefore, to represent a summary of the case which the claimants had sought to make at the trial of their application. Two particular aspects of that case are to be noted – the way in which it was said that the claimants were the persons who held native title, and the bases upon which it was said that native title was claimed.

17 The claimants contended that, in accordance with Aboriginal custom and tradition, they had inherited native title rights and interests to the claimed areas from those Aboriginal persons who were in occupation of the land before European settlement. Those Aboriginal persons, referred to as the "ancestors", were said to have enjoyed that title uninterrupted by any non-Aboriginal person until European settlement. The claimants further asserted that, from the time of assertion of sovereignty over the claim areas (in the case of these areas, 1788) "to the times of the present generation", the ancestors and their descendants (including the claimants) had enjoyed that title, through the generations, firstly maintaining continuing uninterrupted occupation, use and enjoyment of the claimed areas and, secondly, maintaining traditional connection with, and possession of, the claimed areas.

18 The claimants contended that they maintained their traditional connection to all of the claimed areas and that they had "maintained to the present day, and continuing, a system of tradition customs and practices inherited, *in adapted form*" from the ancestors (emphasis added).

19 The reference to an *adapted* form of tradition, customs and practices was amplified in the contentions made about the bases upon which native title was claimed. Two alternative bases were advanced for the claim. First, it was said that the claimants had native title because they, or their ancestors, had been continuously physically present on, or had occupied, used and enjoyed, either all of the claimed areas, or at least large parts of the claimed areas, "[s]ince 1788 until the present day". Alternatively, it was said that, if there had not been continuous physical occupation, the claimants had native title to the claimed areas because there was a continuing traditional *connection* of the claimants and their ancestors with the claimed areas, demonstrated by a continuing system of custom and tradition incorporating a traditional relationship to land. In this

regard, reference was made to what was said to be the physical presence of individuals or groups from the claimants and their ancestors upon the claimed areas and to activities described as being "other than those involving physical presence" on the land. All of the activities of the claimants and their ancestors were said to demonstrate a system of custom and tradition, including a traditional connection with the claimed areas, which was a system "sourced in, and *in its essential features*, … continuous with" the system of custom and tradition operating among the various generations of ancestors "from 1788 to [the] present time" (emphasis added).

20 The significance of the references to adaptation of tradition and custom will be the subject of later consideration in these reasons. But in addition to that aspect of the claimants' contentions at trial, it is important to notice one other feature of them, namely, that the case which they sought to make good was that there was a connection between the native title rights and interests which they claimed to possess with the traditions and customs of Aboriginal society *as those traditions and customs existed before European settlement*. This connection was said to be established by demonstrating either continuous physical presence from the time the British Crown asserted sovereignty to the date of the proceeding or the existence of a *continuing* system of custom and tradition. Of this latter connection it was said that it could be demonstrated even though it had changed and adapted since European settlement.

The primary judge's findings

21 In his reasons for judgment the primary judge dealt with the case which the claimants had sought to make, namely, that they were descendants of Aboriginal persons who had inhabited the claim area when Europeans arrived and that either there had since been continuous occupation of the land by the claimants and their ancestors, or there was a continuing system of custom and tradition from before the time of European settlement to the time of the proceedings.

22 The primary judge found that some but not all of the claimants were descended from persons who, in 1788, were indigenous inhabitants of part of the claim area. He found further that the evidence did not demonstrate that the descendants of the original inhabitants of the claimed land had occupied the land (in what he described as "the relevant sense") since 1788, and did not demonstrate that they had continued to acknowledge and observe, throughout that period, the traditional laws and customs in relation to land of their forebears. Rather, he concluded that the evidence demonstrated that, "before the end of the 19th century the ancestors through whom the claimants claim title had ceased to occupy their traditional lands in accordance with their traditional laws and customs".

23 In this Court, and in the Full Court, the claimants attacked those findings and it will be necessary to say more about the way in which the primary judge arrived at them, but it is convenient to deal now with the nature of the attack that was made rather than the detail of the primary judge's reasoning.

The Full Court

24 On appeal to the Full Court of the Federal Court the claimants contended that in a number of respects the primary judge had applied a wrong test or tests in deciding whether they had established their asserted native title. It was contended, in effect, that the primary judge had required the claimants to establish that they, and their ancestors, had at all times since sovereignty continuously acknowledged and observed the same traditional laws and customs as had been acknowledged and observed before sovereignty, that they and their ancestors had occupied the claimed land and waters throughout that time in the same way as their ancestors had done so, and that the traditional connection which the claimants alleged they had with the land had been substantially maintained throughout the period since 1788. That is, the claimants contended on appeal to the Full Court that the primary judge had applied tests, characterised as a "frozen in time approach", which permitted no alteration of or development in the Aboriginal traditional law or custom in which the claimed native title was said to be based, and which allowed no interruption to the exercise of those rights and interests at any time after sovereignty was first asserted by the British Crown.

25 At once it can be seen that what was said in the Full Court to constitute error by the primary judge was, subject to one very important exception, for the primary judge to conclude that it was necessary for the claimants to make good the case which they had set out to establish at trial, namely, a case that either there had been continuous occupation of the claimed land since before sovereignty was claimed, or that there was a continuing system of custom and tradition from before sovereignty to the time of the proceedings. (The exception which must, of course, be noted is the claimants' contention at trial that, between the time sovereignty was asserted and the time of the proceedings, there had been adaptations to traditions, customs and practices.) But what is clear is that there was, between trial and appeal to the Full Court, a marked shift in the case which the claimants sought to make. No longer did they contend that it was necessary for them to prove the case that they had set out to establish at trial.

26 Be that as it may, and it was not suggested that the claimants were precluded from shifting their ground in this way, all members of the Full Court

concluded that the primary judge had probably not applied a "frozen in time approach"[8]. All accepted that the traditional laws and customs which found native title may have adapted and changed in the period since the arrival of European settlers without native title rights and interests necessarily being lost as a result[9]. The majority of the Court (Branson and Katz JJ) concluded[10], however, that the finding of the primary judge that there was a period of time between 1788 and the date of the claim made by the claimants during which the relevant community lost its character as a traditional Aboriginal community should not be disturbed and that, in consequence of that change, native title had "expired". By contrast, Black CJ concluded that the primary judge had applied too restrictive an approach to what is "traditional" in reaching his conclusion that native title had expired before the end of the nineteenth century[11] and that the matters should, therefore, go back for further hearing.

27 Again, the way in which the claimants shaped and presented their arguments on appeal to the Full Court informs the proper understanding of the way in which that Court dealt with the matter.

The appeal to the High Court

28 In this Court, the claimants contended that both the trial judge and the majority of the Full Court misconstrued and misapplied the definition of native title in s 223(1) of the *Native Title Act* and that, as a result, the findings of fact which the trial judge had made, and which the majority of the Full Court had upheld, were misdirected. The error which it was said that the primary judge had made was to require positive proof of continuous acknowledgment and observance of traditional laws and customs in relation to land and that the majority of the Full Court, albeit by a different path, had likewise concluded that positive proof of continuous acknowledgment and observance of traditional laws and customs was required. Rather, so the claimants contended, attention should be directed to the rights and interests *presently* possessed under traditional laws *presently* acknowledged and customs *presently* observed, and to a *present* connection by those laws and customs. It followed, so it was submitted, that

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8 (2001) 110 FCR 244 at 264 [67] per Black CJ, 288-290 [171-182] per Branson and Katz JJ.

9 (2001) 110 FCR 244 at 259-260 [49] per Black CJ, 278 [122] per Branson and Katz JJ.

10 (2001) 110 FCR 244 at 293 [194], 294 [202].

11 (2001) 110 FCR 244 at 271 [91].

occupation, as a traditional Aboriginal society of the land and waters claimed, was not a matter that need be established to prove the existence of native title rights and interests.

29 The emphasis given in the claimants' arguments in this Court, to traditional laws *presently* acknowledged and traditional customs *presently* observed, appears to constitute another important shift in emphasis away from that given at trial to continuity between sovereignty and the present. Again, however, it was not submitted that the conduct of the proceedings below precluded the claimants advancing the arguments which they did in this Court. Nonetheless, it is important to approach the criticisms which they advanced of the reasoning adopted in the courts below bearing in mind the way in which the case has been put at the various stages of its progress through the courts.

30 Further, it is as well to say that, in tracing the development of the claimants' arguments, we are not to be understood as criticising what was done. Shifts in emphasis in argument at different stages of a matter are far from unusual and when, as was the case here, the issues are novel, development of the arguments advanced by a party, not only by elaboration but also by modification, is to be expected. It is for different purposes that we have pointed out the way in which the claimants' arguments developed. First, as we have said, the reasons in the courts below must be read in the light of the arguments presented to those courts. Secondly, the developments in the claimants' arguments serve to identify a very important aspect of the issue that is to be decided in this matter.

31 As six members of the Court said in *Fejo v Northern Territory*[12]:

> "Native title has its origin in the traditional laws acknowledged and the customs observed by the indigenous people who possess the native title[13]. Native title is neither an institution of the common law nor a form of common law tenure but it is recognised by the common law[14]. *There is, therefore, an intersection of traditional laws and customs with the common law*." (emphasis added)

An application for determination of native title requires the location of that intersection, and it requires that it be located by reference to the *Native Title Act*.

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12 (1998) 195 CLR 96 at 128 [46] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

13 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 58 per Brennan J.

14 *Mabo [No 2]* (1992) 175 CLR 1 at 59-61 per Brennan J.

In particular, it must be located by reference to the definition of native title in s 223(1). Further, in this case, as the development of the claimants' argument, from trial through their appeal to the Full Court to their appeal in this Court, may be seen to reveal, it is critically important to identify what exactly it is that intersects with the common law. Is it a body of traditional law and custom as it existed *at the time of sovereignty*? Is it a body of law and custom as it exists *today* but which, in some way, is connected with a body of law and custom that existed at sovereignty? How, if at all, is account to be taken of the inescapable fact that since, and as a result of, European settlement, indigenous societies have seen very great change?

32 It is necessary, as has now been said repeatedly[15], to begin consideration of a claim for determination of native title by examination and consideration of the provisions of the *Native Title Act*. As has been pointed out above, what the claimants sought was a determination that is a creature of that Act, not the common law.

33 In undertaking that task, all elements of the definition of native title must be given effect. "Native title" means certain rights and interests of indigenous peoples. Those rights and interests may be communal, group or individual rights and interests, but they must be "in relation to" land or waters. The rights and interests must have three characteristics. The first is that they are possessed under the traditional laws acknowledged and the traditional customs observed by the peoples concerned. That is, they must find their source in traditional law and custom, not in the common law[16]. It will be necessary to return to this characteristic.

34 Secondly, the rights and interests must 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. Again, the connection to be identified is one whose source is traditional law and custom, not the common law.

35 Thirdly, the rights and interests in relation to land must be "recognised" by the common law of Australia and it was, as we have said, upon the operation of this requirement that much of the debate on the hearing of this appeal centred. Three separate strands of argument about this element of the definition of native

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15 *Commonwealth v Yarmirr* (2001) 75 ALJR 1582 at 1585 [7]; 184 ALR 113 at 119; *Western Australia v Ward* (2002) 76 ALJR 1098 at 1108 [16]; 191 ALR 1 at 16.

16 *Ward* (2002) 76 ALJR 1098 at 1109 [20]; 191 ALR 1 at 17.

title will require consideration. First, does this element of the definition permit, even require, consideration of any aspect of the general law as it stood after the decision in *Mabo v Queensland [No 2]*[17] but before the enactment of the *Native Title Act*? Secondly, does this element of the definition carry within itself any rule or principle relating to extinguishment, abandonment, or loss of native title rights, by which it can be decided whether native title rights which existed at sovereignty may no longer be the subject of a determination of native title under the *Native Title Act*? Thirdly, what, if anything, does this element of the definition of native title say about the significance that is to be attached to the identification of what traditional law or custom may have said, *at the time sovereignty was first asserted*, about the rights and interests of peoples in the land or waters in which native title is now claimed?

36 None of these questions can be answered without an understanding of the operation of *all* of the elements of the definition of native title. Most especially is that the case in connection with the third of the strands we have identified. In order to understand the work that is to be done by par (c) of the definition of native title, with its reference to recognition by the common law of Australia, it is necessary to understand the operation of par (a), and what is meant by "possessed under the traditional laws acknowledged, and the traditional customs observed". Moreover, none of the questions posed in connection with "recognition" of native title rights and interests by the common law of Australia can be examined properly without taking into account some fundamental principles: principles to which we now turn.

The consequences of sovereignty and change in sovereignty

37 First, it follows from *Mabo [No 2]* that the Crown's acquisition of sovereignty over the several parts of Australia cannot be challenged in an Australian municipal court. Secondly, upon acquisition of sovereignty over a particular part of Australia, the Crown acquired a radical title to the land in that part, but native title to that land survived the Crown's acquisition of sovereignty and radical title. What survived were rights and interests in relation to land or waters. Those rights and interests owed their origin to a normative system other than the legal system of the new sovereign power; they owed their origin to the traditional laws acknowledged and the traditional customs observed by the indigenous peoples concerned.

38 When it is recognised that the subject matter of the inquiry is rights and interests (in fact rights and interests in relation to land or waters) it is clear that

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17 (1992) 175 CLR 1.

the laws or customs in which those rights or interests find their origins must be laws or customs having a normative content and deriving, therefore, from a body of norms or normative system – the body of norms or normative system that existed before sovereignty. Thus, to continue the metaphor of intersection, the relevant intersection, concerning as it does rights and interests in land, is an intersection of two sets of norms. That intersection is sometimes expressed by saying that the radical title of the Crown was "burdened" by native title rights but, as was pointed out in *Commonwealth v Yarmirr*[18], undue emphasis should not be given to this form of expression. Radical title is a useful tool of legal analysis but it is not to be given some controlling role.

An intersection of two normative systems

39 To speak of an intersection of two sets of norms, or of two normative systems, does not identify the nature or content of either. Nor may it be immediately evident that a reference to "traditional laws acknowledged, and the traditional customs observed" is, in fact, a reference to a body of norms or normative system. Indeed, reference to a normative "system" of traditional laws and customs may itself be distracting if undue attention is given to the word "system", particularly if it were to be understood as confined in its application to systems of law that have all the characteristics of a developed European body of written laws[19].

40 Nonetheless, the fundamental premise from which the decision in *Mabo [No 2]* proceeded is that the laws and customs of the indigenous peoples of this country constituted bodies of normative rules which could give rise to, and had in fact given rise to, rights and interests in relation to land or waters. And of more immediate significance, the fundamental premise from which the *Native Title Act* proceeds is that the rights and interests with which it deals (and to which it refers as "native title") can be possessed under traditional laws and customs. Of course, those rights and interests may not, and often will not, correspond with rights and interests in land familiar to the Anglo-Australian property lawyer[20]. The rights and interests under traditional laws and customs

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18 (2001) 75 ALJR 1582 at 1594-1595 [49]; 184 ALR 113 at 131-132.

19 cf Sampford, "Legal systems and their place in legal theory", in Galligan (ed), *Essays in legal theory*, (1984) at 165.

20 *Yarmirr* (2001) 75 ALJR 1582 at 1587 [13]; 184 ALR 113 at 121.

will often reflect a different conception of "property" or "belonging"[21]. But none of those considerations denies the normative quality of the laws and customs of the indigenous societies. It is only if the rich complexity of indigenous societies is denied that reference to traditional laws and customs as a normative system jars the ear of the listener[22].

41 To speak of such rights and interests being possessed under, or rooted in, traditional law and traditional custom might provoke much jurisprudential debate about the difference between what HLA Hart referred to[23] as "merely convergent habitual behaviour in a social group" and legal rules. The reference to traditional customs might invite debate about the difference between "moral obligation" and legal rules[24]. A search for parallels between traditional law and traditional customs on the one hand and Austin's conception of a system of laws, as a body of commands or general orders backed by threats which are issued by a sovereign or subordinate in obedience to the sovereign[25], may or may not be fruitful. Likewise, to search in traditional law and traditional customs for an identified, even an identifiable, rule of recognition[26] which would distinguish between law on the one hand, and moral obligation or mere habitual behaviour on the other, may or may not be productive.

42 This last question may, however, be put aside when it is recalled that the *Native Title Act* refers to traditional laws acknowledged *and* traditional customs observed. Taken as a whole, that expression, with its use of "and" rather than "or", obviates any need to distinguish between what is a matter of traditional *law* and what is a matter of traditional *custom*. Nonetheless, because the subject of consideration is rights or interests, the rules which together constitute the

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21 cf *Yanner v Eaton* (1999) 201 CLR 351 at 365-367 [17]-[20] per Gleeson CJ, Gaudron, Kirby and Hayne JJ and *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 272 per Blackburn J. See also *Ward* (2002) 76 ALJR 1098 at 1108 [14]; 191 ALR 1 at 15-16.

22 cf *In re Southern Rhodesia* [1919] AC 211 at 233-234 per Lord Sumner.

23 Hart, *The Concept of Law*, 2nd ed (1994) at 10.

24 Hart, *The Concept of Law*, 2nd ed (1994) at 13.

25 Austin, *The Province of Jurisprudence Determined*, (1832) Lecture I, (Library of Ideas ed, 1968 impression) at 11; Hart, *The Concept of Law*, 2nd ed (1994) at 20-25.

26 Hart, *The Concept of Law*, 2nd ed (1994) at 100.

traditional laws acknowledged and traditional customs observed, and under which the rights or interests are said to be possessed, must be rules having normative content. Without that quality, there may be observable patterns of behaviour but not rights or interests in relation to land or waters.

The consequences of sovereignty for the pre-sovereignty normative system

43 What is important for present purposes, however, is not the jurisprudential questions that we have identified. It is important to recognise that the rights and interests concerned originate in a *normative* system, and to recognise some consequences that follow from the Crown's assertion of sovereignty. Upon the Crown acquiring sovereignty, the normative or law-making system which then existed could not thereafter validly create new rights, duties or interests. Rights or interests in land created after sovereignty and which owed their origin and continued existence *only* to a normative system other than that of the new sovereign power, would not and will not be given effect by the legal order of the new sovereign.

44 That is not to deny that the new legal order recognised then existing rights and interests in land. Nor is it to 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. Nor is it to say that account could never be taken of any alteration to, or development of, that traditional law and custom that occurred after sovereignty. Account may have to be taken of developments at least of a kind contemplated by that traditional law and custom. Indeed, in this matter, both the claimants and respondents accepted that there could be "significant adaptations"[27]. But what the assertion of sovereignty by the British Crown necessarily entailed was that there could thereafter be no parallel law-making system in the territory over which it asserted sovereignty. To hold otherwise would be to deny the acquisition of sovereignty and as has been pointed out earlier, that is not permissible. Because there could be no parallel law-making system after the assertion of sovereignty it also follows that the only rights or interests in relation to land or waters, originating otherwise than in the new sovereign order, which will be recognised after the assertion of that new sovereignty are those that find their origin in pre-sovereignty law and custom.

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27 (2001) 110 FCR 244 at 264 [67].

Consequences for construction of "native title"

45 Construction of the definition of native title must take account of these considerations. The first level of inquiry is whether, on the proper construction of the *Native Title Act* and the definition of native title, the Act is to be understood as creating new rights and interests in land which it calls "native title". Putting the same question another way, does an application for determination of native title seek the determination of rights and interests which find their origin in the *new* sovereign order, or is it seeking a determination of the existence of rights and interests which, recognised after the assertion of that new sovereignty, nonetheless find their origin in pre-sovereignty law and custom? Hitherto it has been accepted, and the contrary was not contended in this appeal, that the native title rights and interests to which the *Native Title Act* refers are rights and interests finding their origin in pre-sovereignty law and custom, not rights or interests which are a creature of that Act.

46 That being so, the references, in pars (a) and (b) of the definition of native title, to "traditional" law or custom must be understood in the light of the considerations that have been mentioned. As the claimants submitted, "traditional" is a word apt to refer to a means of transmission of law or custom. A traditional law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice. But in the context of the *Native Title Act*, "traditional" carries with it two other elements in its meaning. First, it conveys an understanding of the age of the traditions: the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. It is only those normative rules that are "traditional" laws and customs.

47 Secondly, and no less importantly, the reference to rights or interests in land or waters being *possessed* under traditional laws acknowledged and traditional customs observed by the peoples concerned, requires that the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty. If that normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist. And any later attempt to revive adherence to the tenets of that former system cannot and will not reconstitute the traditional laws and customs out of which rights and interests must spring if they are to fall within the definition of native title.

48 To explain why this is so requires consideration of fundamental aspects of what is meant by a body of norms (laws and customs) that give rise to rights or

interests in relation to land or waters, and what is meant by saying that the body of norms has a continuous existence and vitality.

The inextricable link between a society and its laws and customs

49 Laws and customs do not exist in a vacuum. They are, in Professor Julius Stone's words, "socially derivative and non-autonomous"[28]. As Professor Honoré has pointed out[29], it is axiomatic that "all laws are laws of a society or group". Or as was said earlier, in Paton's Jurisprudence[30], "law is but a result of all the forces that go to make society". Law and custom arise out of and, in important respects, go to define a particular society. In this context, "society" is to be understood as a body of persons united in and by its acknowledgment and observance of a body of law and customs[31]. Some of these issues were considered in *Milirrpum v Nabalco Pty Ltd*[32] where there appears to have been detailed evidence about the social organisation of the Aboriginal peoples concerned. Some were touched on by Toohey J in *Mabo [No 2]*[33] where his Honour referred to North American decisions about similar questions[34]. They appear not to be issues that were addressed directly in argument in this matter in the courts below, whether for want of evidence about them or for some other reason does not matter.

50 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 particular society that exists as a group which acknowledges and observes those laws and customs. And if the society out of which the body of laws and customs arises ceases to exist as a group which

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28 Stone, *The Province and Function of Law*, (1946) at 649.

29 Honoré, "Groups, Laws and Obedience", in Simpson (ed), *Oxford Essays in Jurisprudence (Second Series)*, (1973) 1 at 2.

30 Paton, *A Text-book of Jurisprudence*, (1946) at 34.

31 We choose the word "society" rather than "community" to emphasise this close relationship between the identification of the group and the identification of the laws and customs of that group.

32 (1971) 17 FLR 141 at 165-176.

33 (1992) 175 CLR 1 at 186-188. See also at 99-100 per Deane and Gaudron JJ.

34 In particular, *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1980) 1 FC 518 at 557-563; (1979) 107 DLR (3d) 513 at 542-547.

acknowledges and observes those laws and customs, those laws and customs cease to have continued existence and vitality. Their content may be known but if there is no society which acknowledges and observes them, it ceases to be useful, even meaningful, to speak of them as a body of laws and customs acknowledged and observed, or productive of existing rights or interests, whether in relation to land or waters or otherwise.

51 What is the position if, as is said to be the case here, the content of the laws and customs is passed on from individual to individual, despite the dispersal of the society which once acknowledged and observed them, and the descendants of those who used to acknowledge and observe these laws and customs take them up again? Are the laws and customs which those descendants acknowledge and observe "traditional laws" and "traditional customs" as those expressions are used in the *Native Title Act*, and are the rights and interests in land to which those laws and customs give rise possessed under traditional laws acknowledged and traditional customs observed?

52 Again, it is necessary to consider the several elements of the issues that thus arise. Has the society ceased to exist? Does not the survival of knowledge of the traditional ways suggest that it has not? Or is it shown that, although there is knowledge, there has been or is no observance or acknowledgment? These may be very difficult questions to resolve. Identifying a society that can be said to continue to acknowledge and observe customs will, in many cases, be very difficult. In the end, however, because laws and customs do not exist in a vacuum, because they are socially derivative and non-autonomous, if the society (the body of persons united in and by its observance and acknowledgment of a body of law and customs) ceases to acknowledge and observe them, the questions posed earlier must be answered, no.

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

54 In so far as it is useful to analyse the problem in the jurisprudential terms of the legal positivist, the relevant rule of recognition of a traditional law or custom is a rule of recognition found in the social structures of the relevant indigenous society as those structures existed at sovereignty. It is not some later

created rule of recognition rooted in the social structures of a society, even an indigenous society, if those structures were structures newly created after, or even because of, the change in sovereignty. So much necessarily follows as a consequence of the assertion of sovereignty and it finds reflection in the definition of native title and its reference to possession of rights and interests under traditional law and custom.

55 The caveat we have entered about the utility of jurisprudential analysis is not unimportant. Leaving aside the questions of choice between different schools of analytical thought, any analysis of the traditional laws and customs of societies having no well-developed written language by using analytical tools developed in connection with very differently organised societies is fraught with evident difficulty. The difficulty of that analytical task should not be understood, however, as denying the importance of recognising two cardinal facts. First, laws and customs and the society which acknowledges and observes them are inextricably interlinked. Secondly, one of the uncontestable consequences of the change in sovereignty was that the only native title rights or interests in relation to land or waters which the new sovereign order recognised were those that existed at the time of change in sovereignty. Although *those* rights survived the change in sovereignty, if *new* rights or interests were to arise, those new rights and interests must find their roots in the legal order of the new sovereign power.

56 For these reasons, it would be wrong to confine an inquiry about native title to an examination of the laws and customs now observed in an indigenous society, or to divorce that inquiry from an inquiry into the society in which the laws and customs in question operate. Further, for the same reasons, it would be wrong to confine the inquiry for connection between claimants and the land or waters concerned to an inquiry about the connection said to be demonstrated by the laws and customs which are shown *now* to be acknowledged and observed by the peoples concerned. Rather, it will be necessary to inquire about the relationship between the laws and customs now acknowledged and observed, and those that were acknowledged and observed before sovereignty, and to do so by considering whether the laws and customs can be said to be the laws and customs of the society whose laws and customs are properly described as traditional laws and customs.

57 Against this lengthy introduction it is convenient now to turn to the specific criticisms that the claimants made of the reasoning in the courts below and, for that purpose, to say more about the reasons both of the primary judge and of the majority in the Full Court.

The reasons of the primary judge

58 The claimants sought to prove their case by calling 60 witnesses. Most were part of the claimant group, but the claimants also called evidence from two anthropologists, an archaeologist and a linguist. The primary judge described the oral evidence of many of these witnesses as "in some respects both credible and compelling" but he concluded that not all of the oral evidence was of that character. In addition to this oral evidence, the claimants tendered a considerable volume of documentary material.

59 As the primary judge recognised, "[t]he difficulties inherent in proving facts in relation to a time when for the most part the only record of events is oral tradition passed down from one generation to another, cannot be overstated". Not surprisingly then, the claimants tendered as part of their case, such written material as was available and which recorded observations of Aboriginal society after the first European settlers came to the area the subject of the claim. Particular reference was made to two works by Edward M Curr who was one of the first squatters to occupy land in the claim area, near Echuca, and who lived there from 1841 to 1851. Curr wrote two books – *Recollections of Squatting in Victoria: Then Called the Port Phillip District (From 1841 to 1851)*, first published in 1883, and a four volume work entitled *The Australian Race: Its Origin, Languages, Customs, Place of Landing in Australia and the Routes by which it Spread itself over that Continent*, first published in 1886. From this evidence, and accounts of earlier travels by explorers and others through the claim area during the 1820s and 1830s, the primary judge concluded that the inference that indigenous people occupied the claim area in and before 1788 was "compelling". This conclusion was not challenged. As the primary judge noted, however, it left open whether the indigenous people who were found to be in occupation of the claim area in the 1830s and 1840s, as European settlement occurred, and about whom there were available records, were descended from those who had occupied the area at the time sovereignty was first asserted.

60 At trial, two separate questions were understood as arising. First, did the claimants demonstrate that they were descended from those who were indigenous inhabitants of the claim area in 1788? Secondly, what was the nature of the entitlement which the indigenous inhabitants enjoyed in relation to their traditional lands in accordance with their laws and customs, and what was the extent of those lands?

61 At trial, the claimants sought to address the first question by identifying 18 individuals, from whom it was said the claimants were descended, and seeking to demonstrate that one or more of those 18 "known ancestors" was a descendant of an indigenous inhabitant who occupied the claim area at or before 1788 and who enjoyed native title rights and interests to the claimed land and

waters. Demonstrating this connection between the known ancestors and the people whose traditional laws and customs, at or before European contact, entitled them to the rights of ownership, possession, occupation and use claimed by the claimants was said by the primary judge to be "[o]ne of the major problems associated with the presentation of the [claimants'] case". Of the 18 named ancestors, the trial judge found that only two had been shown to be descended from persons who were indigenous inhabitants of part of the claim area in 1788. Even so, what was said to be "a significant number of the claimant group" were found to be descended from one or other of these two persons.

62 As to the second of the questions identified (requiring identification of the nature and extent of the entitlement which the indigenous inhabitants enjoyed), the primary judge said that "[t]he most credible source of information concerning the traditional laws and customs of the area" was to be found in Curr's writings. He went on to say that:

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

63 In the Full Court[35], Black CJ concluded that this approach made no proper allowance for adaptation and change in traditional law and customs in response to European settlement, and in this Court the claimants submitted that Black CJ was correct in this conclusion. At least to the extent that the primary judge's inquiry was directed to ascertaining what were the traditional laws and customs of the peoples of the area *at the time of European settlement*, the criticism is not open. The assessment of what is the most reliable evidence about *that* subject was quintessentially a matter for the primary judge who heard the evidence that was given, and questions of whether there could be later modification to the laws and customs identified do not intrude upon it. His assessment of some evidence as more useful or more reliable than other evidence is not shown to have been flawed. The conclusion the primary judge reached did not begin from the impermissible premise that written evidence about a subject is inherently better or more reliable than oral testimony on the same subject. The assessment he made of the evidence was one which no doubt took account of the emphasis given and reliance placed by the claimants on the writings of Curr.

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35 (2001) 110 FCR 244 at 265-266 [69]-[72].

64 The question of adaptation and change was at the heart of the claimants' case. But so also was the proposition that the society, whose laws and customs had adapted and changed over time, continued to exist and, on one branch of the claimants' case, continued to occupy the claim area, or large parts of it, from before European settlement to the date of the claim.

65 It was not disputed at trial that European settlement had brought great changes. The primary judge described the effect of European settlement in the area as having had "a devastating effect" on the Aboriginal population. In his works Curr described some aspects of Aboriginal life and culture and referred to the fact that European settlement had disturbed the way of life of the Aboriginal people. Curr's observations were, however, confined to the 1840s. The disruption of traditional life continued and increased during the immediately succeeding decades. Daniel Matthews who, in 1899 wrote a paper entitled "Native Tribes of the Upper Murray", recorded that when living at Echuca in the early part of 1864 he came into contact with tribes which, in early days "were probably large, numbering several hundreds; but owing to the march of civilisation, acquired estates, incursions and reprisals, they gradually became decimated until now, [1899] they are mere fragments of tribes". These changes were hastened by Matthews' practice of attracting Aboriginals from various parts of the country to the Maloga mission he established in 1874 and the policies he adopted at Maloga of suppressing the use of indigenous languages and the observance of traditional practices.

66 The primary judge recorded that the evidence was silent about "the continued observance in Matthews' time of those aspects of traditional lifestyle" to which Curr had referred. In particular, the primary judge noted that there was no evidence about whether, as Curr had noted, the territorial areas of various tribal groups were still, in Matthews' day, recognised and protected, as they had been in Curr's. Rather, what the evidence demonstrated was that land on either side of the Murray had been taken up for pastoral purposes and that "there had been both severe dislocation of the indigenous population and a considerable reduction in its numbers due to disease".

67 The next significant event to which the primary judge referred was the presentation of a petition to the Governor of New South Wales in 1881 by 42 Aboriginals, many of whom were known to have been resident at, or otherwise connected with, Maloga. This petition, said to be by members of the Moira and Ulupna tribes, recorded that "all the land within our tribal boundaries has been taken possession of by the government and white settlers". The petitioners sought a grant of land.

68 The primary judge attached considerable significance to this petition. He said that apart from any conclusions which might have been drawn from the

absence of evidence of continued observance of traditional laws and customs in the period after the establishment of Maloga, the petition amounted to "positive evidence emanating from the Aboriginals themselves" to the effect that the descendants of those who had originally occupied the land no longer continued to acknowledge their traditional laws or observe their traditional customs. Of the petition the primary judge said that:

> "Whilst there can be little doubt that Matthews would have played a part in the composition and presentation of [it] *it has not been suggested in this proceeding that the general thrust of the statements attributed to the petitioners was factually inaccurate* or in any way misrepresented their views or their aspirations." (emphasis added)

As the primary judge pointed out, the petition had been tendered in the course of the claimants' opening address as part of what was said to demonstrate a long history of efforts to obtain land. Given that no attack on its accuracy was made at trial, it was well open to the primary judge to attach to the petition the significance he did.

69 Having regard to the petition and to the absence of evidence of contemporary records to the contrary, the primary judge concluded that, by the time the petition was presented in 1881, those through whom the claimants sought to establish native title

> "were no longer in possession of their tribal lands and had, by force of the circumstances in which they found themselves, ceased to observe those laws and customs based on tradition which might otherwise have provided a basis for the present native title claim; and the dispossession of the original inhabitants and their descendants has continued through to the present time."

Rather, the primary judge concluded that the current beliefs and practices of the claimants constituted genuine efforts on their part "to revive the lost culture of their ancestors".

70 The legal principles which the primary judge considered were to be applied to the facts found were principles which he correctly identified as being found in the *Native Title Act's* definition of native title. It is true to say that his Honour said that this definition of native title was "consistent with" language in the reasons in *Mabo [No 2]* and that it was, in his Honour's view, necessary to understand the context in which the statutory definition was developed by reference to what was said in that case. It may be that undue emphasis was given in the reasons to what was said in *Mabo [No 2]*, at the expense of recognising the principal, indeed determinative, place that should be given to the *Native Title Act*.

It may also well be, however, that this treatment of the questions owes much to the course that argument took at trial. Whether or not that is so, what is notably absent from the reasons of the primary judge is any record of an argument directing attention to what now is said to be the significance to be attached to par (c) of the definition of native title and its reference to recognition by the common law of Australia.

The Full Court

71 Contrary to what appears to have been the course of argument at trial, argument in the Full Court focused considerable attention upon par (c) of the definition of native title. The majority of the Court concluded, as has already been noted, that that paragraph incorporates into the statutory definition of native title a number of requirements among which is that the relevant indigenous community "has continuously since the acquisition of sovereignty by the Crown been an identifiable community the members of which, under its traditional laws observed and traditional customs practised, possessed interests in the relevant land"[36]. Further, so the majority concluded[37], this paragraph also incorporates notions of extinguishment and expiry of native title.

72 The majority held[38] that, on the proper construction of s 223(1) of the *Native Title Act*, a communal native title can exist only where four conditions are met, namely:

(a) possession under traditional laws currently acknowledged and traditional customs currently observed;

(b) by those laws and customs the indigenous claimants have, as members of the community, a current connection with the land or waters;

(c) the rights and interests are not inconsistent with basic precepts of the common law; and

(d) the native title claimed has not at any time since the acquisition of sovereignty been extinguished.

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36 (2001) 110 FCR 244 at 275 [108] per Branson and Katz JJ.

37 (2001) 110 FCR 244 at 275 [108] per Branson and Katz JJ.

38 (2001) 110 FCR 244 at 287-288 [168].

Three methods of extinguishment were identified by their Honours[39]:

(i) positive exercise of sovereign power;

(ii) cessation of acknowledgment and observance by the community of the traditional laws and customs upon which the native title had been founded; and

(iii) by a loss of connection with the land or waters by the relevant community, such a loss of connection necessarily resulting from "the disappearance of the community as a traditional indigenous community".

73 The majority held[40] that, "there was more than adequate evidence before [the primary judge] to support" his finding that there was a period of time, between 1788 and the claimants' making their claim, during which the relevant community lost its character as a traditional community. This statement, that "there was more than adequate evidence … to support" the finding, was then amplified in the joint reasons by reference to particular pieces of the evidence. Having made those references, their Honours went on to say[41], in effect, that the finding was one not lightly to be disturbed on appeal having regard to its being based on evidence "touching on a multitude of factors", following a long and complex hearing such that the primary judge could not be expected to refer to every matter which influenced the finding on so complex an issue as the maintenance of a traditional indigenous community. Accordingly, their Honours saw no reason to conclude from the fact that particular aspects of the evidence had not been mentioned in the reasons that he did not take them into account. Their Honours were, accordingly, not persuaded that the finding of fact should be disturbed.

The appeal to this Court

74 The claimants contended that both the primary judge, and the majority of the Full Court, wrongly held that the claimants' claim to native title failed without positive proof of continuous acknowledgment and observance of the traditional laws and customs in relation to land of the original inhabitants of the claimed land. The claimants submitted that the primary judge proceeded from

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39 (2001) 110 FCR 244 at 287-288 [168].

40 (2001) 110 FCR 244 at 293 [194].

41 (2001) 110 FCR 244 at 294-295 [202-205].

the erroneous premise that ss 223(1) and 225 of the *Native Title Act* required proof of native title according to all common law requirements of which positive proof of the kind described was one. They contended that the majority of the Full Court wrongly found this requirement in an erroneous construction of s 223(1)(c).

75 To speak of the "common law requirements" of native title is to invite fundamental error. Native title is not a creature of the common law, whether the Imperial common law as that existed at the time of sovereignty and first settlement, or the Australian common law as it exists today. Native title, for present purposes, is what is defined and described in s 223(1) of the *Native Title Act*. *Mabo [No 2]* decided that certain rights and interests relating to land, and rooted in traditional law and custom, survived the Crown's acquisition of sovereignty and radical title in Australia. It was *this* native title that was then "recognised, and protected"[42] in accordance with the *Native Title Act* and which, thereafter, was not able to be extinguished contrary to that Act[43].

76 The *Native Title Act*, when read as a whole, does not seek to create some new species of right or interest in relation to land or waters which it then calls native title. Rather, the Act has as one of its main objects[44] "to provide for the *recognition* and *protection* of native title" (emphasis added), which is to say those rights and interests in relation to land or waters with which the Act deals, but which are rights and interests finding their origin in traditional law and custom, not the Act. It follows that the reference in par (c) of s 223(1) to the rights or interests being *recognised* by the common law of Australia cannot be understood as a form of drafting by incorporation, by which some pre-existing body of the common law of Australia defining the rights or interests known as native title is brought into the Act. To understand par (c) as a drafting device of that kind would be to treat native title as owing its origins to the common law when it does not. And to speak of there being common law elements for the *establishment* of native title is to commit the same error. It is, therefore, wrong to read par (c) of the definition of native title as requiring reference to any such body of common law, for there is none to which reference could be made.

77 The reference to recognition by the common law serves a different purpose of which there are at least two relevant features. First, the requirement

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42 *Native Title Act* 1993 (Cth), s 10.

43 s 11(1).

44 s 3(a).

for recognition by the common law may require refusal of recognition to rights or interests which, in some way, are antithetical to fundamental tenets of the common law[45]. No such case was said to arise in this matter and it may be put aside. Secondly, however, recognition by the common law is a requirement that emphasises the fact that there is an intersection between legal systems and that the intersection occurred at the time of sovereignty. 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. It is those rights and interests which are "recognised" in the common law.

78 How then, if at all, does the definition of native title take account of whether there has been some modification of or adaptation to traditional law and custom, or some interruption in the exercise of native title rights and interests?

79 As foreshadowed at the outset of these reasons, much turns on a proper understanding of the reference in par (a) of the definition to "traditional" laws acknowledged and "traditional" customs observed. For the reasons given earlier, "traditional" does not mean only that which is transferred by word of mouth from generation to generation, it reflects the fundamental nature of the native title rights and interests with which the Act deals as rights and interests rooted in pre-sovereignty traditional laws and customs.

80 It may be accepted that demonstrating the content of that traditional law and custom may very well present difficult problems of proof. But the difficulty of the forensic task which may confront claimants does not alter the requirements of the statutory provision. In many cases, perhaps most, claimants will invite the Court to infer, from evidence led at trial, the content of traditional law and custom at times earlier than those described in the evidence. Much will, therefore, turn on what evidence is led to found the drawing of such an inference and that is affected by the provisions of the *Native Title Act*.

81 When the primary judge was hearing evidence in this matter the *Native Title Act* provided that, in conducting proceedings under the Act, the Federal Court, first[46], was "not bound by technicalities, legal forms or rules of evidence" and, secondly[47], "must pursue the objective of providing a mechanism of

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45 *Ward* (2002) 76 ALJR 1098 at 1109 [20]-[21]; 191 ALR 1 at 17-18.

46 s 82(3).

47 s 82(1).

determination that is fair, just, economical, informal and prompt". It may be that, under those provisions, a rather broader base could be built for drawing inferences about past practices than can be built since the 1998 Amendment Act came into operation. By that Act a new s 82 was enacted. Section 82(1) now provides that the Court is bound by the rules of evidence "except to the extent that the Court otherwise orders". (In the present case the parties were invited by the primary judge to make submissions about the effect of this amendment on the evidence that had already been received in the matter but nothing was said then, or in this Court, to turn on that point.) The kinds of evidentiary questions which may arise in this regard are well illustrated by *Milirrpum*[48] but it is neither necessary nor appropriate to consider whether the answers given to the questions that arose in that case were right. Were they to arise again, in proceedings in the Federal Court, it would be necessary to consider them by reference to the *Evidence Act* 1995 (Cth).

82 It is, however, important to notice that demonstrating the content of pre-sovereignty traditional laws and customs may be especially difficult in cases, like this, where it is recognised that the laws or customs now said to be acknowledged and observed are laws and customs that have been adapted in response to the impact of European settlement. In such cases, difficult questions of fact and degree may emerge, not only in assessing what, if any, significance should be attached to the fact of change or adaptation but also in deciding what it was that was changed or adapted. It is not possible to offer any single bright line test for deciding what inferences may be drawn or when they may be drawn, any more than it is possible to offer such a test for deciding what changes or adaptations are significant. Indeed, so far as the second of those issues is concerned, it would be wrong to attempt to reformulate the statutory language when it is the words of the definition to which effect must be given.

83 What is clear, however, is that demonstrating some change to, or adaptation of, traditional law or custom or some interruption of enjoyment or exercise of native title rights or interests in the period between the Crown asserting sovereignty and the present will not *necessarily* be fatal to a native title claim. Yet both change, and interruption in exercise, may, in a particular case, take on considerable significance in deciding the issues presented by an application for determination of native title. The relevant criterion to be applied in deciding the significance of change to, or adaptation of, traditional law or custom is readily stated (though its application to particular facts may well be difficult). The key question is whether the law and custom can still be seen to be traditional law and traditional custom. Is the change or adaptation of such a kind

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48 (1971) 17 FLR 141 at 151-165.

that it can no longer be said that the rights or interests asserted are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant peoples when that expression is understood in the sense earlier identified?

84 Interruption of use or enjoyment, however, presents more difficult questions. First, the exercise of native title rights or interests may constitute powerful evidence of both the existence of those rights and their content. Evidence that at some time, since sovereignty, some of those who now assert that they have that native title have not exercised those rights, or evidence that some of those through whom those now claiming native title rights or interests contend to be entitled to them have not exercised those rights or interests, does not inevitably answer the relevant statutory questions. Those statutory questions are directed to possession of the rights or interests, not their exercise, and are directed also to the existence of a relevant connection between the claimants and the land or waters in question.

85 Secondly, account must no doubt be taken of the fact that both pars (a) and (b) of the definition of native title are cast in the present tense. The questions thus presented are about *present* possession of rights or interests and *present* connection of claimants with the land or waters. That is not to say, however, that the continuity of the chain of possession and the continuity of the connection is irrelevant.

86 Yet again, however, it is important to bear steadily in mind that the rights and interests which are said now to be possessed must nonetheless be rights and interests possessed under the traditional laws acknowledged and the traditional customs observed by the peoples in question. Further, the connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs. For the reasons given earlier, "traditional" in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty.

87 For exactly the same reasons, acknowledgment and observance of those laws and customs must have continued substantially uninterrupted since sovereignty. Were that not so, the laws and customs acknowledged and observed *now* could not properly be described as the *traditional* laws and customs of the peoples concerned. That would be so because they would not have been transmitted from generation to generation of the society for which they constituted a normative system giving rise to rights and interests in land as the body of laws and customs which, for each of those generations of that society, was the body of laws and customs which in fact regulated and defined the rights and interests which those peoples had and could exercise in relation to the land or

waters concerned. They would be a body of laws and customs originating in the common acceptance by or agreement of a new society of indigenous peoples to acknowledge and observe laws and customs of content similar to, perhaps even identical with, those of an earlier and different society.

88 To return to a jurisprudential analysis, continuity in acknowledgment and observance of the normative rules in which the claimed rights and interests are said to find their foundations before sovereignty is essential because it is the normative quality of those rules which rendered the Crown's radical title acquired at sovereignty subject to the rights and interests then existing and which now are identified as native title.

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

Abandonment or expiry?

90 Describing the consequences of interruption in acknowledgment and observance of traditional laws and customs as "abandonment" or "expiry" of native title is apt to mislead. "Abandonment" might be understood as suggesting that there has been some conscious decision to abandon the old ways, or to give up rights and interests in relation to the land or waters. Demonstrating continuous acknowledgment and observance of traditional laws and customs would, of course, negate any suggestion of conscious decision to abandon rights or interests. But the inquiry about continuity of acknowledgment and observance does not require consideration of why, if acknowledgment and observance stopped, that happened. That is, continuity of acknowledgment and observance is a condition for establishing native title. If it is not demonstrated that that

condition was met, examining why that is so is important *only* to the extent that the presence or absence of reasons might influence the fact-finder's decision about whether there was such an interruption.

91 "Expiry" may be a more neutral term than "abandonment". It does not invite attention to what those who held native title may have thought or intended at the time that acknowledgment and observance of traditional law and custom ceased. Even so, it is a term that may distract attention from the terms in which native title is defined. That is reason enough to conclude that its use is unhelpful for it is the words of the *Native Title Act* to which the inquiry must always return.

Conclusions

92 It follows from what has been said, that the majority of the Full Court were wrong to locate questions about continuity of acknowledgment and observance of traditional law and custom in par (c) of the definition of native title. It also follows that it is wrong to read par (c) of that definition as incorporating notions of extinguishment by expiry of native title into the definition of native title. Rather, as these reasons have sought to demonstrate, questions of the kind presented for decision in this matter focus more upon the requirements of par (a) of that definition than they do on the requirements of par (c).

93 The claimants contended that, the primary judge and the Full Court having misdirected themselves as to applicable legal principle, the findings of fact made at trial, and endorsed on appeal, were misdirected. At first the claimants submitted that the matter should be remitted for retrial, a course which would have imposed very large burdens on all parties to the proceeding and could properly be said to be "a most deplorable result"[49]. Having regard to those, and perhaps other considerations, the claimants, supported by some respondents, reformulated the relief sought in this Court and submitted that the matter should be remitted for further hearing, albeit on terms that no further evidence be adduced except by leave of the Federal Court.

94 The critical question is whether the errors of law which were made at trial bore, in any relevant way, upon the primary judge's critical findings of fact that the evidence did not demonstrate that the claimants and their ancestors had continued to acknowledge and observe, throughout the period from the assertion

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49 *Balenzuela v De Gail* (1959) 101 CLR 226 at 243 per Windeyer J referring to *Scott v Scott* (1863) 3 Sw & Tr 319 at 322 [164 ER 1298 at 1299] and *Dakhyl v Labouchere* [1908] 2 KB 325 at 327.

of sovereignty in 1788 to the date of their claim, the traditional laws and customs in relation to land of their forebears, and that "before the end of the 19th century, the ancestors through whom the claimants claim title had ceased to occupy their traditional lands in accordance with their traditional laws and customs". If those findings of fact stand unaffected by error of law, the claimants' claim to native title fails and their appeal should be dismissed.

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

96 In the Full Court, the claimants submitted that the primary judge's conclusions reflected a search for absolute identity between the laws and customs now observed with those that were observed at sovereignty. This attack failed, and was not renewed in this Court. In any event, however, the findings we have identified are more radical than is acknowledged by arguments about the particular content of laws and traditions at particular times. They are findings that the forebears of the claimants had ceased to occupy their lands in accordance with traditional laws and customs and that there was no evidence that they continued to acknowledge and observe those laws and customs. Upon those findings, the claimants must fail.

97 The appeal should be dismissed with costs.

98 GAUDRON AND KIRBY JJ. This is an appeal from a decision of the Full Federal Court of Australia which, by majority (Branson and Katz JJ, Black CJ dissenting), dismissed an appeal from a determination by Olney J that native title does not exist in relation to an area of land and waters in northern Victoria and southern New South Wales including parts of the Murray River[50]. It is convenient to refer to that area of land as "the claim area".

The claimant group

99 It is not in issue that the claim area was occupied by Aboriginal people in 1788 and that they continued in occupation until dispossessed by European settlers. It was found at first instance that two Aboriginals, Edward Walker and Kitty Atkinson/Cooper, who were born in approximately 1830 within the claim area, were descended from those original inhabitants. It was further found that very many of the persons who claim to be members of the Yorta Yorta Aboriginal Community are descended from Edward Walker and Kitty Atkinson/Cooper.

Definition of native title

100 Before turning to the issues presented by this appeal, it is necessary to note that, at all relevant times, s 223(1) of the *Native Title Act* 1993 (Cth) ("the Act") has defined "native title" and "native title rights and interests" to mean:

> "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."

101 That definition speaks in the continuous present so that it is necessary under ss 223(1)(b) and (c) that native title claimants have a present connection

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50 *Yorta Yorta v Victoria* (2001) 110 FCR 244.

with the land or waters claimed and that the rights and interests claimed are presently recognised by the common law. So, too, under s 223(1)(a), it is necessary that traditional laws are presently acknowledged and traditional customs presently observed. As a matter of ordinary language, however, the word "traditional" imports a necessity for continuity with the past.

The decision at first instance

102 At first instance, Olney J noted the definition of "native title" and "native title rights and interests" in s 223(1) of the Act and, by reference to that definition and statements to be found principally in *Mabo v Queensland [No 2]*[51], expressed the view that it was necessary for the claimants to prove four matters, namely:

> 1 "that the members of the claimant group ... are descendants of the indigenous people who occupied (in the relevant sense) the claimed area prior to the assertion of Crown sovereignty";
>
> 2 "the nature and content of the traditional laws acknowledged, and the traditional customs observed by the indigenous people, in relation to their traditional land";
>
> 3 "that the traditional connexion with the land of the ancestors of the claimant group has been substantially maintained since the time sovereignty was asserted"; and
>
> 4 "the claimed rights and interests [are] rights and interests recognised by the common law of Australia".

103 For present purposes, it is sufficient to refer to the second and third of the matters identified by Olney J as necessary before native title could be held to exist in the claim area. To the extent that it repeats the substance and requirements of s 223(1)(a) of the Act, the second requirement is unexceptionable. Thus, because native title is the creature of traditional laws and customs, it is necessary to prove the nature and content of the rights and interests thus created and to establish that they are possessed under traditional laws acknowledged and customs observed. However, it is not necessary, pursuant to s 223(1)(a), to establish that those rights and interests have been continuously availed of in relation to land, or, even, that they are presently availed of.

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51 (1992) 175 CLR 1.

104 The third of the requirements specified by Olney J, namely, that "traditional connexion with the land ... has been substantially maintained since the time sovereignty was asserted" does not, in terms, find expression in s 223(1) of the Act. Rather, s 223(1)(b) requires only that there be a present connection to land or waters. The terms of s 223(1)(b) also indicate the nature of the requisite connection, namely, "by [the traditional] laws and customs [acknowledged and observed]". That paragraph does not require that the connection be physical, much less continuing occupancy. Spiritual connection by laws acknowledged and customs observed falls comfortably within the words of s 223(1)(b).

105 Save for the requirement that members of the claimant group be descendants of those who occupied the claimed area in 1788, the matters specified by Olney J did not assume great significance in his Honour's judgment. Rather, his Honour traced aspects of the dispossession of the original inhabitants of the claim area, including the establishment of the Maloga mission in 1874. Edward Walker and Kitty Atkinson/Cooper were recorded as having been at Maloga mission in 1877 and 1874, respectively. His Honour accepted that the establishment of the Maloga mission was the source of much disruption to traditional aboriginal life, including by the suppression of indigenous languages and traditional practices.

106 In 1881, some 42 Aboriginals, some of whom had been associated with the Maloga mission, including a son of Edward Walker and some descendants of Kitty Atkinson/Cooper, petitioned the Governor of New South Wales, for a grant of land to "cultivate and raise stock", stating that "all the land within [their] tribal boundaries ha[d] been taken possession of" and that they were "earnestly desirous of settling down to more orderly habits of industry". On the basis of that petition, Olney J concluded that:

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

His Honour added that "the dispossession of the original inhabitants and their descendants ha[d] continued through to the present time" and, a little later, observed that "[n]o group or individual has been shown to occupy any part of the land in the sense that the original inhabitants can be said to have occupied it".

107 After referring to current beliefs and practices by members of the claimant group, which his Honour found to be of recent origin or, at least, not to have been

proved to be part of the law or custom of the original inhabitants, Olney J concluded:

> "The evidence does not support a finding that the descendants of the original inhabitants of the claimed land have occupied the land in the relevant sense since 1788 nor that they have continued to observe and acknowledge, throughout that period, the traditional laws and customs in relation to land of their forbears. The facts in this case lead inevitably to the conclusion that before the end of the 19th century the ancestors through whom the claimants claim title had ceased to occupy their traditional lands in accordance with their traditional laws and customs. The tide of history has indeed washed away any real acknowledgement of their traditional laws and any real observance of their traditional customs."

The decision of the majority in the Full Court

108 In the Full Court, Branson and Katz JJ upheld the decision of Olney J on the basis that a reading of the whole of his Honour's judgment and of par 129, which contains the conclusion set out immediately above, makes it plain that:

> "his Honour was not satisfied that it had been shown that, throughout the entire period of time between 1788 and the date of the appellants' claim, the relevant indigenous community had maintained its character as an identifiable community the members of which lived under its laws and customs."[52]

Indeed, their Honours were of the view that Olney J "was positively satisfied that the relevant community had, before the end of the 19th century, abandoned its traditional way of life and its traditional culture and thus ceased to exist as a traditional indigenous community"[53].

Section 223(1)(c) of the Act and continuity as traditional indigenous community

109 The notion of continuity as a traditional community does not, in terms, find expression in the definition of "native title" or "native title rights and interests" in s 223(1) of the Act. The majority in the Full Court took the view that continuity of community was necessitated by s 223(1)(c) of the Act which

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52 (2001) 110 FCR 244 at 292 [191].

53 (2001) 110 FCR 244 at 292 [191].

requires that native title rights and interests be recognised by the common law. In this regard, their Honours said:

> "s 223(1)(c) incorporates into the statutory definition of native title the requirement that, in the case of a claimed communal title, the holders of the native title are members of an identifiable community '*the members of whom are identified by one another as members of that community living under its law and customs*'[54] ... and that that community has continuously since the acquisition of sovereignty by the Crown been an identifiable community the members of which, under its traditional laws observed and traditional customs practised, possessed interests in the relevant land"[55]. (emphasis added)

110 The requirement in s 223(1)(c) of the Act is that the rights and interests claimed as native title be "recognised by the common law of Australia". Native title owes its existence and incidents to traditional laws and customs, not to the common law. The role of the common law is limited to the recognition and protection of native title. That recognition and protection depends on native title not having been extinguished and its not having incidents that are repugnant to the common law. Thus, as was said in *Commonwealth v Yarmirr*, s 223(1)(c) "requires examination of whether the common law is inconsistent with the continued existence of the rights and interests that owe their origin to Aboriginal law or custom"[56].

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54 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 61 per Brennan J.

55 (2001) 110 FCR 244 at 275 [108] per Branson and Katz JJ.

56 (2001) 75 ALJR 1582 at 1600 [76] per Gleeson CJ, Gaudron, Gummow and Hayne JJ, 1617 [175]-[176] per McHugh J, 1631-1633 [254]-[259] per Kirby J; 184 ALR 113 at 139, 162, 182-184. See also *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 58-63 per Brennan J, 110 per Deane and Gaudron JJ, 178 per Toohey J; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 84-85 per Brennan CJ, 213 per Kirby J; *Fejo v Northern Territory* (1998) 195 CLR 96 at 128 [46] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ, 148-149 [101], 150-151 [105]-[106] per Kirby J; *Yanner v Eaton* (1999) 201 CLR 351 at 371-373 [32]-[37] per Gleeson CJ, Gaudron, Kirby and Hayne JJ, 382-384 [72]-[75], 399-400 [122]-[123] per Gummow J; *Western Australia v Ward* (2002) 76 ALJR 1098 at 1109 [20]-[21] per Gleeson CJ, Gaudron, Gummow and Hayne JJ, 1212 [568], 1215-1216 [584] per Kirby J, 1227-1228 [629] per Callinan J; 191 ALR 1 at 17-18, 158, 163 and 179; *Wilson v Anderson* (2002) 76 ALJR 1306 at 1307-1308 [4] per Gleeson CJ, 1315-1316 [46]-[47] per Gaudron, Gummow and Hayne JJ, 1331 [137], 1332-1333 [144]-[145] per Kirby J; 190 ALR 313 at 315, 326, 347 and 350.

111 The majority in the Full Court erred in holding that s 223(1)(c) requires continuity of traditional community as a prerequisite to a determination that native title exists. However, to say that continuity of a traditional community is not mandated by s 223(1)(c) is not to say that it is irrelevant to the existence of native title. Continuity, including continuity of community, is a matter that bears directly on the question whether present day belief and practices can be said to constitute acknowledgement of traditional laws and observance of traditional customs.

112 As the focus of much of the argument in this case has been upon the word "traditional", it is convenient, at this point, to consider the nature and extent of the continuity necessary before laws and customs can properly be described as traditional. As a matter of ordinary usage, the word "traditional" does not necessarily signify rigid adherence to past practices. Rather, it ordinarily signifies that that which it describes has been handed down from generation to generation, often by word of mouth[57].

113 As and when it occurred, European settlement almost certainly rendered the observance of traditional practices impracticable in a number of respects. So much was impliedly recognised in the Preamble to the Act which "sets out considerations taken into account by the Parliament", including that Aboriginal people and Torres Strait Islanders had been "progressively dispossessed of their lands"[58]. In the face of the acknowledged history of dispossession, it must be accepted that laws and customs may properly be described as "traditional" for the purposes of s 223(1) of the Act, notwithstanding that they do not correspond exactly with the laws and customs acknowledged and observed prior to European settlement.

114 What is necessary for laws and customs to be identified as traditional is that they should have their origins in the past and, to the extent that they differ from past practices, the differences should constitute adaptations, alterations, modifications or extensions made in accordance with the shared values or the

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57 See, for example, *The Macquarie Dictionary* 3rd ed, (1997) at 2242 which defines "tradition" as "the handing down of statements, beliefs, legends, customs, etc, from generation to generation, especially by word of mouth or by practice" and *Australian Oxford Dictionary* (1999) at 1419 which defines "tradition" as "1a a custom, opinion, or belief handed down to posterity esp orally or by practice. b this process of handing down. 2 esp an established practice or custom".

58 *Native Title Act* 1993 (Cth).

customs and practices of the people who acknowledge and observe those laws and customs.

115 As already indicated, Olney J held that various current practices of the claimant group were of recent origin or not part of the law or custom of the original inhabitants. Thus, for example, his Honour observed of the current reburial practices in relation to those whose remains had been removed from Aboriginal burial sites for scientific and other purposes were "not part of the traditional laws and customs handed down from the original inhabitants." His Honour did not consider whether the reburial practices had their origins in the past in that, for example, they had evolved out of earlier practices or constituted an adaptation of earlier laws or customs, with the consequence that they had a sufficient degree of continuity with the past that they could properly be described as traditional for the purposes of s 223(1)(a) of the Act[59].

116 Continuity of community is also a matter that bears directly on the question whether laws and customs are properly described as traditional. In *Mabo [No 2]*, Toohey J pointed out that a society must be "sufficiently organized to create and sustain rights and duties" for there to be a system of land utilization determined by that society[60]. So, too, a society must be sufficiently organised and cohesive to sustain beliefs and practices having normative influence and which, on that account, are recognisable as laws. Further, it must be sufficiently organised and cohesive to adapt, alter, modify or extend rights and duties if subsequent practices are to be seen as adaptations, alterations, modifications or extensions of laws previously acknowledged and, thus, as "traditional laws acknowledged" for the purposes of s 223(1)(a) of the Act.

117 Ordinarily, lack of continuity as a community will provide the foundation for a conclusion either that current practices are not part of traditional laws or customs, or that traditional laws and customs are no longer acknowledged and observed. However, the question whether a community has ceased to exist is not one that is to be answered solely by reference to external indicia or the observations of those who are not or were not members of that community. The question whether there is or is not continuity is primarily a question of whether, throughout the period in issue, there have been persons who have identified themselves and each other as members of the community in question.

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59 cf *Commonwealth v Yarmirr* (2001) 75 ALJR 1582 at 1600 [76] per Gleeson CJ, Gaudron, Gummow and Hayne JJ, 1640 [287]-[289], 1642 [295]-[296], 1647 [316] per Kirby J; 184 ALR 113 at 139, 194-195, 196-197, 203-204.

60 (1992) 175 CLR 1 at 187.

118 Nor is the question whether a community has ceased to exist as a community to be answered by reference to physical presence in a particular place. Communities may disperse and regroup. To the extent practicable, individuals may, on the dispersal of a community, continue to acknowledge traditional laws and observe traditional customs so that, on regrouping, it may be that it can then be said that the community continues to acknowledge traditional laws and observe traditional practices.

119 Although lack of continuity of community is directly relevant to the question whether native title exists, for present purposes the relevant questions were whether traditional laws and customs are acknowledged and observed and whether, by those laws and customs, the claimants have a connection with land and waters in the claim area. Those questions were not answered by the majority in the Full Court. That might not prove an obstacle to their being answered in this appeal were it not for the fact that Olney J did not find that the Yorta Yorta people had ceased to exist as "an identifiable community, the members [of which lived] under its laws and customs"[61]. Moreover, neither his Honour nor the majority in the Full Court considered the question whether, throughout the period, there were persons of aboriginal descent who identified themselves and others as Yorta Yorta people bound together by ancestry and by shared beliefs and practices.

Sections 223(1)(a) and (b) of the Act: traditional laws and customs; connection with land and waters

120 Relevant to the definition of "native title" and "native title rights and interests" in s 223(1) of the Act, Olney J found that "[t]he tide of history [had] ... washed away any real acknowledgement [by the Yorta Yorta people] of their traditional laws and any real observance of their traditional customs." That is a finding of fact and, although expressed in terms of a metaphor, unless it involves an error of law, that finding must lead to the conclusion that par (a) of the definition in s 223(1) of the Act has not been satisfied and, thus, that native title does not exist in the claim area.

121 Although the conclusion of Olney J that history had "washed away any real acknowledgement of ... traditional laws and any real observance of ... traditional customs" is expressed in terms which closely follow the wording of s 223(1)(a) of the Act, it is clear from its context that his Honour was not concerned with the acknowledgement of traditional laws and observance of traditional customs pursuant to which the claimant group might establish a

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61 (2001) 110 FCR 244 at 292 [190] per Branson and Katz JJ quoting Brennan J in *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 61.

connection with land or waters in the claim area but with laws and customs specifically relating to the utilisation or occupation of the land and waters claimed. Thus, his Honour's conclusion was prefaced by the statement that the evidence did not "support a finding that the descendants of the original inhabitants ... have occupied the land in the relevant sense since 1788 nor that they have continued to observe and acknowledge, throughout that period, the traditional laws and customs in relation to land of their forebears".

122 There are other indications that his Honour was concerned solely to identify acknowledgement of laws and observance of customs with respect to the utilisation or occupation of land. Thus, for example, his Honour observed that "[n]o group or individual has been shown to occupy any part of the land in the sense that the original inhabitants can be said to have occupied it." But of greater significance is his Honour's earlier statement that, for the native title claim of the Yorta Yorta people to succeed, "it must be demonstrated that the traditional connexion with the land of the ancestors of the claimant group has been substantially maintained since the time sovereignty was asserted".

123 What is required by ss 223(1)(a) and (b) of the Act is the acknowledgement of traditional laws and the observance of traditional customs by which particular Aboriginal or Torres Strait Islanders have a connection to the land and that they possess rights and interests in relation to that land under those laws and customs. There is nothing in that paragraph or any other part of the definition of "native title" or "native title rights and interests" which that "traditional connexion with the land ... [be] substantially maintained". His Honour's erroneous view that that was required was an error of law affecting the reasoning process which led to the finding that "the tide of history ha[d] washed away any real acknowledgement [by the Yorta Yorta people] of their traditional laws and any real observance of their traditional customs".

124 It may be that the error which we have identified above occurred because the appellants assumed the burden of establishing a continuing and substantial traditional connection with the land through their direct forebears, including Edward Walker and Kitty Atkinston/Cooper. However, the source of the error is immaterial. The relevant issue under ss 223(1)(a) and (b) of the Act is simply whether the Yorta Yorta people now acknowledge and observe traditional laws and customs by which they have a connection with the land and waters claimed by them.

Conclusion

125 The appeal should be allowed with costs, the order of the Full Court should be set aside and, in lieu thereof, the appeal to that Court should be allowed with costs and the matter remitted to Olney J to be determined in accordance with these reasons. The costs of the proceedings at first instance

should abide the outcome of the further determination by Olney J of the appellants' claim.

126 McHUGH J. The majority of the Full Court of the Federal Court held that s 223(1)(c) of the *Native Title Act* 1993 (Cth) invokes the common law requirement of a continuity of traditional community as a condition of a determination that native title exists. This holding is contrary to the holdings of the majority of this Court in *Commonwealth v Yarmirr*[62] and *Western Australia v Ward*[63].

127 Again in this case, Gleeson CJ, Gummow and Hayne JJ declare[64]:

> "It follows that the reference in par (c) of s 223(1) to the rights or interests being *recognised* by the common law of Australia cannot be understood as a form of drafting by incorporation, by which some pre-existing body of the common law of Australia defining the rights or interests known as native title is brought into the Act. To understand par (c) as a drafting device of that kind would be to treat native title as owing its origins to the common law when it does not. And to speak of there being common law elements for the *establishment* of native title is to commit the same error. It is, therefore, wrong to read par (c) of the definition of native title as requiring reference to any such body of common law, for there is none to which reference could be made."

128 Given the decisions in *Yarmirr* and *Ward*, the above statement concerning the construction of the Act must be accepted as correct.

129 However, I remain unconvinced that the construction that this Court has placed on s 223 accords with what the Parliament intended. In *Yarmirr*, I cited statements from the Ministers in charge of the Act when it was enacted in 1993 and when it was amended in 1997. They showed that the Parliament believed that, under the *Native Title Act*, the content of native title would depend on the developing common law. Thus, Senator Evans told the Senate in 1993[65]:

> "We are not attempting to define with precision the extent and incidence of native title. That will be a matter still for case by case determination through tribunal processes and so on. *The crucial element of the common law is the fact that native title as such, as a proprietary right capable of being recognised and enjoyed, and excluding other*

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62 (2001) 75 ALJR 1582; 184 ALR 113.

63 (2002) 76 ALJR 1098; 191 ALR 1.

64 Reasons at [76].

65 Australia, Senate, *Parliamentary Debates* (Hansard), 16 December 1993 at 5097.

> *competing forms of proprietary claim, is recognised as part of the common law of the country*". (emphasis added)

130 Similarly, Senator Minchin told the Senate in 1997[66]:

> "I repeat that our [A]ct preserves the fact of common law; who holds native title, what it consists of, is entirely a matter for the courts of Australia. *It is a common law right.*" (emphasis added)

131 Section 12 of the *Native Title Act* 1993 also made it clear that the content of native title under that Act was to be determined in accordance with the developing common law. Section 12 provided:

> "Subject to this Act, the common law of Australia in respect of native title has, after 30 June 1993, the force of a law of the Commonwealth."

132 In *Western Australia v The Commonwealth (Native Title Act Case)*[67], however, this Court held that s 12 was invalid. In the *Native Title Act Case*, six justices of the Court said:

> "If s 12 be construed as an attempt to make the common law a law of the Commonwealth, it is invalid either because it purports to confer legislative power on the courts or because the enactment of the common law relating to native title finds no constitutional support in s 51(xxvi) or (xxiv)."

133 Section 12 has now been removed from the statute book. But its enactment in the 1993 Act shows that the Parliament intended native title to be determined by the common law principles laid down in *Mabo v Queensland [No 2]*[68], particularly those formulated by Brennan J in his judgment in that case. When s 223(1)(c) of the 1993 Act referred to the rights and interests "recognised by the common law of Australia", it was, in my view, referring to the principles expounded by Brennan J in *Mabo [No2]*.

134 But this Court has now given the concept of "recognition" a narrower scope than I think the Parliament intended, and this Court's interpretation of s 223 must now be accepted as settling the law. As a result, the majority judges in the Full Court erred when they approached the case in the manner that they did.

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66 Australia, Senate, *Parliamentary Debates* (Hansard), 2 December 1997 at 10171.

67 (1995) 183 CLR 373 at 486-487.

68 (1992) 175 CLR 1.

135 Nevertheless, as the judgment of Gleeson CJ, Gummow and Hayne JJ shows[69], the trial judge found that "the forebears of the claimants had ceased to occupy their lands in accordance with traditional laws and customs and that there was no evidence that they continued to acknowledge and observe those laws and customs." Those findings were not influenced by any error of law. Because that is so, the claimants must fail.

136 The appeal should be dismissed with costs.

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69 Reasons at [69].

137 CALLINAN J. The appellants claim to be members of the Yorta Yorta community of aboriginal people, and to be entitled to a determination of native title in their favour in respect of both unalienated and alienated land and waters within a total area of approximately 5,000 square kilometres[70] ("the region"). The region includes land in New South Wales and Victoria. It straddles the Murray River. Many people, State polities, and local authorities, of whom about 500 in total chose to be represented in the proceedings, have proprietary and other interests in the region, including of course South Australia, into which the river flows and from which it enters the sea.

The Primary Proceedings

138 The claim was made by application to the Native Title Registrar on 21 February 1994. The applicant was "The Yorta Yorta Murray Goulburn Rivers Clans Incorporated". The application was said to be made on behalf of the Yorta Yorta Aboriginal community without identifying any natural persons. An incorporated body did not answer the description of "a person or persons claiming to hold the native title either alone or with others" contained in s 61(1) of the *Native Title Act* 1993 (Cth) ("the Act"). Application was subsequently made to the National Native Title Tribunal to substitute eight named persons as applicants on behalf of the members of the Yorta Yorta Aboriginal community. Those named were Ella Anselmi, Wayne Atkinson, Geraldine Briggs, Kenneth Briggs, Elizabeth Hoffman, Desmond Morgan, Colin Walker and Margaret Wirapunda. The application was referred to the Federal Court and proceeded with these eight persons as claimants.

139 Those persons, the claimant group, are described generally as the members of the Yorta Yorta Aboriginal community, and more particularly as men, women and children of Aboriginal descent who are descendants of the original inhabitants of the region, as identified on a map attached to the application. There was no evidence offered to indicate the precise basis upon which the boundary of the region was drawn. It was not related to any identifiable geographic or other feature. Within it are a number of substantial towns, including Shepparton, Mooroopna, Echuca, Mathoura, Yarrawonga and Wangaratta. Those parts of the region which were the subject of the claim to native title will be referred to as "the claimed land" and are more fully described in schedules to the application, and in the application itself in this way:

> "The area claimed is 'public land' including an area of approximately 5 hectares of land, being an ochre mine which exists on a 42,000 acre grazing occupation permit held by the Registered Proprietor of a 2071

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70 As scaled from the "Map of Claim Area" tendered in evidence before Olney J.

hectare property known as Moira Station ('the property'). A full title search of the property is set out in Schedule 1.

Public land areas within the geographic boundaries of the claimed land are detailed in the attached map set forth in Schedule B ... This map, produced using a Public and Aboriginal Lands digital spatial database ('PAL') shows the geographic boundaries of the claimed land, and some of its natural features. A description of the PAL data used in the production of the map is also set out in a PAL manual at Schedule B.

Details of the public lands claimed within NSW and Victoria are set out at Schedule D. The area contains a large number of archaeological sites. Some of these are set out in a Victorian Archaeological survey report (see Schedule C)."

140 The claimed land included vacant land and other land used for various purposes such as State forest, State park, reference area, water supply reserve, water reserve, Aboriginal freehold land, flora reserve, flora and fauna reserve, vacant Crown land, reserved Crown land, park, scenic reserve, special purpose reserve, forest reserve and mine.

141 In an amended statement of facts and contentions in the primary proceedings the appellants stated:

"To dispel any doubt, the applicants' claim includes a claim to all water which, from time to time, may be found within the claimed areas, whether such waters are, at any time, stationary or flowing, or located in natural or man made water courses, dams etc. Such claims extend to the banks and beds, underlying or supporting such waters, and all natural resources found therein. Such claims do not extend to casual waters found in the claimed areas from time to time eg non-permanent pools following heavy rain."

142 The nature and extent of the native title rights claimed were:

"(a) rights to possession, occupation, use and enjoyment of the determination area, the waters, and natural resources, to the exclusion of all others;

(b) the interest of ownership of the determination area, the waters and natural resources according to traditional law and custom and the right to be recognised as the owners of the determination area, the waters, and the natural resources, according to traditional law and custom;

(c) the right to possession, occupation, use and enjoyment of the determination area, the waters and the natural resources;

(d) the right to participate to the fullest extent practicable in the making of decisions by non native title holders, being decisions made pursuant to a law, regulation, order or administrative arrangement by Government or its agencies about access to, occupation, use and enjoyment of the determination area, the waters and the natural resources, including the right to be consulted about such decisions;

(e) the right to access and occupy the determination area and the waters;

(f) rights to use and enjoy the determination area, and the waters and the natural resources, to hunt, fish, forage for traditional foods and medicines and camp; for burial, ceremonial and educational purposes; and for any other purpose deemed appropriate by the native title holders;

(g) the right to protect places and areas of importance in and on the determination area and waters."

143 The application was determined, adversely to the appellants, at first instance by Olney J, to whom a vast array of material, both oral and written, including assertions as to the habits and customs of the appellants' ancestors and reconstructions of the past by anthropologists, was presented[71]. One of the first, and indeed most onerous tasks confronting his Honour, was to decide how to manage and treat all of that material. The Act did not provide any sure guidance. The appellants suffered two particular disadvantages to which regard had to be made: loss of traditional knowledge and practice because of dislocation and past exploitation; and, by reason of the lack of a written language and the absence therefore of any indigenous contemporaneous documents, the need to rely extensively upon the spoken word of their forebears, which, human experience knows, is at risk of being influenced and distorted in transmission through the generations, by, for example, fragility of recollection, intentional and unintentional exaggeration, embellishment, wishful thinking, justifiable sense of grievance, embroidery and self-interest. Anthropologists' reports which also relied to a large extent upon transmitted oral materials were liable to suffer from similar defects, as well, in this case, as his Honour held, as some lack of objectivity ordinarily to be expected of experts[72]. A further complication was that some witnesses on behalf of the appellants, understandably resentful of past

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71 *The Members of the Yorta Yorta Aboriginal Community v The State of Victoria* [1998] FCA 1606.

72 *The Members of the Yorta Yorta Aboriginal Community v The State of Victoria* [1998] FCA 1606 at [54].

dispossession, made emotional outbursts and failed to give evidence which could be of assistance to the Court.

144 Section 82 of the Act (the marginal note to which is "Federal Court's way of operating") was in this form when the application was made, as the evidence was led, and the case conducted:

> "(1) The Federal Court must pursue the objective of providing a mechanism of determination that is fair, just, economical, informal and prompt.
>
> (2) The Court, in conducting proceedings, must take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders.
>
> (3) The Court, in conducting proceedings, is not bound by technicalities, legal forms or rules of evidence."

145 Before Olney J gave judgment, s 82 was amended by the omission of sub-s (1). The section, in its new form, is as follows:

> "(1) The Federal Court is bound by the rules of evidence, except to the extent that the Court otherwise orders.
>
> (2) In conducting its proceedings, the Court may take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders, but not so as to prejudice unduly any other party in the proceedings."

146 His Honour conducted the trial in accordance with the former sub-ss (1) and (2). He did raise the question whether he should apply what he described as the more stringent provision, the amended section, in his analysis of the evidence. But he resolved to decide the case on the evidence admitted during the trial in accordance with the law as it was when it was given. No submission to the contrary was made then or subsequently by any of the parties.

147 Other amendments were made to the Act before Olney J gave judgment. Section 225 was replaced and re-enacted in a quite different form, to provide as follows:

> "A ***determination of native title*** is a determination whether or not native title exists in relation to a particular area (the ***determination area***) of land or waters and, if it does exist, a determination of:
>
> (a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and

(b) the nature and extent of the native title rights and interests in relation to the determination area; and

(c) the nature and extent of any other interests in relation to the determination area; and

(d) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of this Act); and

(e) to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or non-exclusive pastoral lease – whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others."

148 Schedule 5, Pt 5, item 24 of the *Native Title Amendment Act* 1998 (Cth) provided:

> "The repeal of section 225 of the old Act and insertion of section 225 in the new Act by this Act apply to all determinations made after the commencement of this Act, regardless of when any native title determination application (if relevant) was made."

Furthermore, s 94A (which is an entirely new provision) requires that:

> "An order in which the Federal Court makes a determination of native title must set out details of the matters mentioned in section 225 (which defines ***determination of native title***)."

149 His Honour held, and no one then or later suggested the contrary, that the case should be decided by reference to the new s 225.

150 On the evidence, it was clear, his Honour inferred, that the region had been occupied by Aboriginal people in 1788. Colonial explorers traversed the region from as early as the 1820s. Edward M Curr was an early squatter who occupied land in it in the vicinity of Echuca. He remained there from 1841 to 1851. Later he wrote about his experiences in two books; *Recollections of Squatting in Victoria: Then Called the Port Phillip District (From 1841 to 1851)* ("*Recollections*") first published in 1883, and a more ambitious work in four volumes, *The Australian Race: Its Origin, Languages, Customs, Place of Landing in Australia, and the Routes by which it spread itself over the Continent* published in 1886.

151 George Augustus Robinson, Chief Protector of Aborigines of Port Phillip from 1839 to 1849, made 22 expeditions into various parts of Victoria, recording,

among other things, the distribution and identity of the Aboriginal inhabitants. Several of his journeys took him into the region. He made written records of some of these which were tendered in evidence at first instance.

152 By about 1855 physical resistance by indigenous people had ceased largely because no doubt, the Aboriginal population of the region had been greatly reduced in number by disease and conflict. The white population had grown dramatically, and was to grow even more rapidly following the discovery of gold. A census in 1857 found only 1,769 Aborigines living in Victoria. In 1858 a Select Committee was appointed to "inquire into the present condition of the Aborigines of the colony, and the best means of alleviating their absolute wants". Missions and reserves were established in several places, ostensibly for that purpose but in the region they existed as ration depots only, at Echuca, Gunblower, Durham Ox, Wyuna, Toolamba, Cobram, Ulupna and Murchison. Local squatters were appointed "guardians". Children were relocated to stations where they could be educated apart from their parents and other traditional distractions. In the later 1860s some people, mainly children and young single women, were sent to Coranderrk near Healesville, places beyond the region.

153 It is relevant to set out in full the primary judge's careful summary of his findings with respect to the continuing dislocation and reduction in numbers of the original inhabitants of the region[73].

> "MALOGA MISSION
>
> In 1864 Daniel Matthews established a hardware, firearms and ships' supply store in Echuca. In the same year he attended a corroboree at Moira Lakes involving some 300 Aborigines and began visiting camps along the Murray and Goulburn Rivers. In 1865 he and his brother William took up a selection of 121 acres at Moira on the New South Wales side of the Murray. They extended their holding to 800 acres in 1868. Fringe camps already existed at Echuca by this time, and many Aboriginal people were living along the river or on nearby stations. Matthews visited Coranderrk in 1866. He had been instrumental in the transfer of a number of Echuca women and children to Coranderrk and began looking for ways to develop a similar station on the Murray. After discovering that the land which they had selected contained an area traditionally used as a meeting place the brothers decided to set aside 20 acres on the river for a mission station. They renamed their property 'Maloga'.

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73 *The Members of the Yorta Yorta Aboriginal Community v The State of Victoria* [1998] FCA 1606 at [37]-[49].

In 1874, Matthews established a school and mission station at Maloga. His diaries record the arrival and life of many of the people who appear in the upper levels of the genealogies of the present claimants. During the early years residence at Maloga tended to be intermittent. Most of those at Maloga were from Moira, and moved between the mission, a camp at Moira Station and camps around the Moira Lakes and Barmah Forest. By the end of 1876 there were sixteen Aboriginal people in residence at Maloga, either living in the school house or camping within the grounds. Numbers increased steadily during 1877, with 30 new arrivals recorded for that year. Some of those who had been sent to Coranderrk from the Murray before Maloga was established returned. In 1880 there were 59 people on the mission. By 1882 there were 113 residents, either staying at the mission itself or at an old people's camp on the river flats while receiving rations from Matthews. In 1883 the population fluctuated between 90 and 125. In 1886 the Maloga population peaked at 153.

The Maloga Mission reports suggest that those who came to it in the early years were very mobile. Most of Matthews' early efforts were directed towards getting children brought to the mission to attend school. Apart from a core group, most adults came and went; either returning to the forests along the river between Echuca and Albury, or seeking casual work on the stations of the area. In 1884 proposals for dispersing 'half castes' from missions and stations were circulated in Victoria and an Act to the same effect came into force in 1886. The Act had profound implications for many Aboriginal people living in Victoria. Extended families were split up, or forced to move away from places which had been their homes for many years. Maloga, over the New South Wales border where such provisions did not then apply, became a popular destination for some Coranderrk residents, particularly those who already had ties there by descent or marriage.

Problems began to emerge at Maloga in early 1880. Many people resented moves by Matthews in the 1870s to limit traditional ceremonial activity and the sanctions imposed, such as loss of rations, if people failed to attend Christian services. Disputes arose over many aspects of life. Residents were expelled for 'immorality', for failing to attend services, and even for going to cricket matches or foot races. Matthews also saw it as his role to physically beat children and young women if they committed offences of a moral or religious nature. The Maloga men, who were in demand as labour on stations in the region, resented the intrusions on their freedom and demanded greater autonomy. When this was refused, some left. Health problems were also an issue. Tuberculosis was a common cause of death in the 1880s. The older people, born before the arrival of whites and who had survived the period of conflict immediately after white occupation, were dying out. Matthews was also fighting to retain control of Maloga. The Aborigines Protection Association (of New South

Wales) placed its support behind a new manager, George Bellenger, who effectively replaced Matthews as head of the mission in 1887. In 1888, Bellenger, with the aid of disaffected Maloga residents, moved the houses, huts and most of the other buildings from Maloga to 1800 acres of land adjacent to Maloga, which had been created as a reserve in 1883. The new settlement was called Cummeragunja. (In official records and other published works the name of the new settlement is spelt in a variety of ways. In these reasons, except when quoting from such records and works, the currently accepted form, Cummeragunja, is used).

CUMMERAGUNJA

Bellenger proved extremely unpopular once separated from Matthews. Some residents attempted to return to Maloga. Bellenger threatened to cut off the rations of any who did so. Promises by Bellenger of individual farming lots for those who moved to Cummeragunja proved illusory. Major illnesses including typhoid also broke out. Bellenger resigned in 1891 but unrest continued under a succession of managers until George Harris was appointed in the mid 1890s. During this period many people left to set up camps along the river, or sought work on stations in the area but the recession of the early 1890s made work hard to find.

Between 1895 and 1898, 20 farm lots, each of 40 acres, were established at Cummeragunja. Despite a depressed rural sector in the 1890s, floods and plagues of rabbits the block holders had succeeded in operating many of the blocks profitably by the turn of the century. Another change of manager occurred in 1905 and the blocks were resumed in 1908. At this time New South Wales was contemplating the introduction of an 'exclusion' system for 'half castes' on reserves similar to the arrangements made in 1886 in Victoria. In 1909, the *Aborigines Protection Act* (NSW) was passed, enabling the removal of 'any Aboriginal person who … in the opinion of the Board, should be earning a living away from the reserve'. These provisions were subsequently used to exclude some of those who protested when the blocks were resumed. Much of the land itself was subsequently leased to a neighbouring white farmer.

Cummeragunja reached a peak population of 394 in 1908. By 1915 only 252 remained. The remainder had left, either as a result of direct expulsion or to keep families together when other members had been expelled. Much of the reserve land had been leased to white farmers after 1921. The irrigation system failed around 1927 and was not repaired, making it impossible to grow sufficient vegetables or even fodder for dairy cattle. Cash wages were abandoned for work on the mission in 1929 and most equipment was removed to other reserves. Employment generally became harder to find as the white work force was swelled with returned soldiers and increased settlement, and the need for labour shrunk with increasing mechanisation. In the 1930s, funding for the reserve was

cut back and work became even harder to find. The problem was compounded by official policies in New South Wales which provided able bodied men and their families with no options. Aboriginal people living on reserves were not eligible for State unemployment relief. Nor were able bodied Aboriginal people eligible for rations. Many people moved to camps in Victoria where State relief and pensions were more readily available. In the mid 1930s at least forty people were already living in bag humpies at Barmah on the Victorian side of the river.

By 1937 the situation at Cummeragunja had deteriorated badly. Twenty one cottages had been pulled down while the occupants were away working, seemingly to prevent them returning to live on the reserve. The people at Cummeragunja were very dissatisfied with the manager who they felt used the withholding of rations as a disciplinary measure to control those who disagreed with his way of running the reserve. They were also dissatisfied with the quality of education offered, which was limited to 3rd grade primary standard by a NSW government ruling. Aboriginal children living on reserves were not legally allowed to enrol in public primary or secondary schools in New South Wales at that time.

In February, 1939 all but four of the remaining families at Cummeragunja crossed over the river and set up camp near Barmah in Victoria, where those who had been expelled in earlier years had lived. After several months some people drifted back to Cummeragunja. Some of those who did, returned again after discovering no improvement at Cummeragunja. Some families stayed on the Barmah side for many years. Some moved to Melbourne. Some returned to Cummeragunja. Many others moved to Mooroopna, where other relatives were living. Many families from Cummeragunja had been working the fruit season in Mooroopna during the 1930s travelling and working as families, and camping on the river flats. During the Second World War, employment opportunities in the fruit industry increased and Mooroopna became the largest residential centre for Aboriginal people of the claim area.

The war brought greater employment opportunities. As well as seasonal work such as shearing, harvesting and fruit picking it became possible to obtain work in Melbourne and other major centres. A significant group became established in Melbourne. Apart from the availability of some local work, the situation for those camped at Mooroopna was similar to that at Barmah after the walk-off. There were roughly 300 people from Cummeragunja at Mooroopna by 1941. Although many people had moved to Mooroopna, others continued to live around Barmah. The Cummeragunja population fell dramatically and in 1953 it was announced that the station would be closed. Many moved to Barmah. All but 200 acres of the reserve was released for use by neighbouring white farmers and the resident manager was removed. Some residents were

moved to Echuca and Moama. Despite the closure, a small core group of people remained in Cummeragunja. In 1956 many were forced out by floods and moved to Echuca. There were 36 people living on Mooroopna tip in 1956, four families in housing commission houses and some 200 people living on the river flats. In 1957 police evicted many residents from shacks on the tip and the flats without notice and burnt their homes. In 1958, a 'transitional housing' project was established at Rumbalara near Mooroopna on five acres of Crown land. The houses were small, cold and poorly fitted out and totally inadequate for the number of people involved. Rumbalara was too small to accommodate the hundreds of people living in the area. Some people returned to Cummeragunja while others moved to other centres such as Echuca and Rushworth.

In 1960 there were around 70 people living at Cummeragunja. The effective reserve had been reduced to 200 acres as a result of the leasing of land by the New South Wales government to neighbouring white farmers. After a delegation of Cummeragunja men approached the government, the New South Wales Crown Solicitor found that these leases had been improperly issued. The leases were revoked and in 1966 the land was made available to the Aboriginal people. Despite financial difficulties the people at Cummeragunja grew 50 acres of wheat and 15 acres of tomatoes in 1966, obtained some cattle and grew vegetables. A drought in 1967 provided a set back, but in 1969 the community was able to obtain a loan from the Commonwealth Capital Fund for Aboriginal Enterprises to continue its operations. In 1972 Rumbalara was officially closed as a transitional housing estate. It is now used as a medical and administrative centre, and as a meeting place. Its residents moved into houses in Shepparton, Mooroopna and other centres. Those camped over the river from Cummeragunja moved into houses in Barmah or returned to Cummeragunja. Others went to Echuca or Moama.

In 1984, as a consequence of the operation of provisions of the *Aboriginal Land Rights Act* 1983 (NSW), an estate in fee simple in the former reserve land at Cummeragunja was vested in the Yorta Yorta Local Aboriginal Land Council. Subsequently, the Council acquired by purchase two further parcels in the same area. The whole of the land has since been leased to Cummeragunja Housing and Development Corporation for a term of 99 years expiring on 31 December 2084.

The Yorta Yorta Local Aboriginal Land Council is a body corporate constituted under the *Aboriginal Land Rights Act* (NSW). Its membership is open to all adult Aboriginal people residing within the Yorta Yorta Local Aboriginal Land Council area and to other Aboriginal people who have an association with the Local Aboriginal Land Council area."

154 His Honour had been invited to assess, and assessed the claims to entitlement by descent by some eighteen persons identified in a supplementary

anthropological report tendered on behalf of the appellants. His Honour concluded that the descendants of Edward Walker and of Kitty Atkinson/Cooper only had been shown to have ancestors who were, in 1788, indigenous inhabitants of the claimed area[74].

155 His Honour's next step was to attempt to identify traditional laws and customs. He did this largely by recourse to Curr's writings because Curr enjoyed four relevant advantages, nothing to gain from his accounts, a large measure of corroboration by a subsequent petition to which reference will be made, a degree of rapport with the indigenous people in the region, and a last opportunity to observe an Aboriginal society before it disintegrated. He accordingly generally preferred, but did not rely exclusively upon, the writings of Curr, to conflicting, and a deal of, oral evidence at the trial. His Honour quoted and relied on passages from *Recollections*, some of which are regrettably condescending in tone[75]:

> "Besides the fact that the Bangerang territory was parcelled out between the two sub-tribes, [Curr's Wongatpan and Towroonban] and that fishing weirs on the numerous channels which conducted the flood-waters back into the Murray were owned by individuals, and descended to their heirs, I recollect, on one occasion, a certain portion of country being pointed out to me as belonging exclusively to a boy who formed one of the party with which I was out hunting at the time. As the announcement was made to me with some little pride and ceremony by the boy's elder brother, a man of five-and-twenty, I not only complimented the proprietor on his estate, *on which my sheep were daily feeding*, but, as I was always prone to fall in with the views of my sable neighbours when possible, I offered him on the spot, with the most serious face, a stick of tobacco for the fee-simple of his patrimonial property, which, after a short consultation with his elders, was accepted and paid. On two other occasions, also, if I remember right, some Blacks objected to hunt with me over certain land, on the plea that it did not belong to them. That both individuals and families amongst the Bangerang had particular rights to certain lands I have no doubt, but practically they were little insisted on. Had, however, anyone not of the tribe attempted encroachments, it would have been an instant *casus belli*.
>
> Amongst the Bangerang there was not, as far as could be observed, anything resembling government; nor was any authority, outside of the family circle, existent. Within the family the father was absolute. The

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74 *The Members of the Yorta Yorta Aboriginal Community v The State of Victoria* [1998] FCA 1606 at [104].

75 Curr, *Recollections of Squatting in Victoria*, (1883) at 243-247.

female left the paternal family when she became a wife, and the male when he took rank as a young man. The adult male of the Bangerang recognized no authority in anyone, under any circumstances, though he was thoroughly submissive to custom. Offences against custom had sometimes a foreign aspect, and brought about wars with other tribes. Within the tribe they usually amounted to wrongs of some individuals, and for every substantial wrong custom appointed a penalty.

…

But, though there was no government, there were certain important practices among the Bangerang which deserve to be called laws. Some of the principal of these had reference to the transfer of the young from one class to another (particularized hereafter), the knocking out of their teeth, making the ornamental scars on their backs, breasts, and arms, and restrictions with respect to food. There were also others which had reference to females. In the latter case only did infractions occur with some frequency, on which occasions, as I have already noticed, the persons aggrieved, when they chose, made their complaints publicly in the camp, and publicly vindicated their rights, the offender being often constrained by custom to go through the ordeal of having a certain number of spears thrown at him, and so run the risk of death or wounds in satisfaction for the injury done.

Though each section of the Bangerang was thoroughly independent within the limits of its own territory, they were virtually one for the purposes of war. As regards war, however, as in other matters, there was no attempt to coerce any individual to join in an onslaught, or to adopt any course to which he was disinclined. A common danger or a common desire led to meetings and consultations, and so simple and uniform were interests generally that measures were usually proposed which met with the approval of all; but if anyone did dissent from them, he was at liberty to take his own course, and there was no attempt at coercion; and as there was no government, or attempt to govern, so there was no opposition. With the Wollithiga and Kailtheban the Bangerang were on very intimate terms, so that for war purposes they might almost be said to be one people. In addition, they were bound in a lesser, though a stout, friendship with the other six Bangerang-speaking septs, which, together with themselves, were surrounded by a number of tribes which looked on them as foreigners, and hated them in common; spoke a language different from theirs, and cut off stray members as opportunity offered, each tribe on its own account. Nor were these Bangerang intimacies barren of effect, for, besides a good deal of intermarriage, they did not resort to witchcraft against each other, and in the hour of need one tribe was at liberty to seek refuge in the territory of the other. At the same time, suspicion was not entirely absent amongst themselves; and had a few Bangerang men been

found on the territory of any of the six tribes without some feasible explanation to offer, they would, as likely as not, have lost their lives. However, I remember, in the very early days, several of these tribes meeting together and sending a strong body of fighting men to meet the Ngooraialum at the Protectorate Station, which occupied the present site of Murchison, and I am under the impression that alliances of the sort were frequent before the coming of the white man interfered with native policy." (original emphasis)

156 Further passages were quoted[76]:

"It is a noteworthy fact connected with the Bangerang, … that as they neither sowed nor reaped, so they never abstained from eating the whole of any food they had got with a view to the wants of the morrow. If anything was left for Tuesday, it was merely that they had been unable to consume it on Monday. In this they were like the beasts of the forest. To-day they would feast – aye, gorge – no matter about the morrow. So, also, they never spared a young animal with a view to its growing bigger.

…

I have often seen them, as an instance, land large quantities of fish with their nets and leave all the small ones to die within a yard of the water.

…

When out hunting, the game captured by each was his own property. If one of the party returned unsuccessful, he rarely asked for a share of another's game, nor did he take it ill if none were given him; but, if a bachelor, he would get some roots from any female relative he might have in the camp. If an individual killed a kangaroo without assistance, it belonged to him, though it would certainly be shared with many others; but if several assisted in the capture, the animal was divided amongst the party, the man who first drew blood, I believe, receiving the skin (which was valuable) in addition to his share of the meat.

…

The Bangerang mode of burial had nothing remarkable about it. The dead were rolled up on their opossum-rugs, the knees being drawn up to the neck with strings, when the corpse was interred in a sitting posture, or on its side, generally in a sand-hill, in which a grave about four feet deep had been excavated. A sheet of bark was then placed over the corpse, the sand

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76 Curr, *Recollections of Squatting in Victoria,* (1883) at 262, 263, 265, 286.

> filled in, and a pile of logs about seven feet long and two feet high was raised over all. Round about the tomb it was usual to make a path, and not unfrequently a spear, surmounted by a plume of emu feathers, stuck at the head of the mound, marked the spot where rested the remains of the departed. Women were interred with less ceremony."

157 By 1864 when Daniel Matthews settled in Echuca, people of many different tribal groups were living in the area. Matthews himself contributed to their dispersal. He sought to attract Aboriginal people from other parts of the country to Maloga, and adopted policies of suppressing the use of indigenous languages and the observance of traditional practices (including marriage contrary to customary laws).

158 There was no evidence, his Honour held, to suggest that either Edward Walker or Kitty Atkinson/Cooper, or their immediate descendants continued to acknowledge the traditional laws, or observe the traditional customs of their forbears in relation to land.

159 Olney J then discussed a petition presented to the Governor of New South Wales by 42 Aboriginal people:

> "To His Excellency Lord Augustus Loftus, GCB, Governor of the colony of New South Wales – The humble petition of the undersigned Aboriginal natives, residents on the Murray River in the colony of New South Wales, members of the Moira and Ulupna tribes, respectfully showeth:
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> 1. That all the land within our tribal boundaries has been taken possession of by the Government and white settlers; our hunting grounds are used for sheep pasturage and the game reduced and in many places exterminated, rendering our means of subsistence extremely precarious, and often reducing us and our wives and children to beggary.
>
> 2. We, the men of our several tribes, are desirous of honestly maintaining our young and infirm, who are in many cases the subjects of extreme want and semi-starvation, and we believe we could, in a few years support ourselves by our own industry, were a sufficient area of land granted to us to cultivate and raise stock.
>
> 3. We have been under training for some years and feel that our old mode of life is not in keeping with the instructions we have received and we are earnestly desirous of settling down to more orderly habits of industry, that we may form homes for our families.

> We more confidently ask this favour of a grant of land as our fellow natives in other colonies have proved capable of supporting themselves, where suitable land has been reserved for them.
>
> We hopefully appeal to your Excellency, as we recognise in you, The Protector specially appointed by Her Gracious Majesty the Queen 'to promote religion and education among the Aboriginal natives of the colony', and to protect us in our persons and in the free enjoyment of our possessions, and to take such measures as may be necessary for our advancement in civilization. And your petitioners, as in duty bound will ever pray."

160 His Honour's view of the relevance and importance of the petition appears from the following[77]:

> "A number of observations can be made concerning the petition and the signatories. The petition was presented in 1881, some two years before the reserve at Cummeragunja was declared and whilst Maloga was still in operation. The petitioners are described as members of the Moira and Ulupna tribes, a description which is not found in Curr's writing but suggests that the individuals concerned identified with the two main pastoral properties in the region rather than as Bangerang or any of the other sub-groups referred to by Curr. The petition contains a frank acknowledgment that 'all land within (the petitioners') tribal boundaries has been taken possession of by the government and white settlers' a state of affairs which no doubt gave rise to their desire to change 'our old mode of life' in favour of 'settling down to more orderly habits of industry'. A number of the signatories, who apparently subscribed to these sentiments were persons who are either named in the applicants' list of the 18 known ancestors or were the children of persons so named. George Charles, Sampson Barber and Bagot Morgan are three of the 18; Freddy Walker was the son of Edward Walker; and Bobby Wilberforce (Cooper), Aaron Atkinson, Jacky Wilberforce (Cooper) and John Atkinson were children of Kitty Atkinson/Cooper. Other signatories who are readily identifiable with names on Treseder's 1891 list, prepared some 10 years after the petition, include James Coghill, Whyman McLean and Peter Stuckey.
>
> Whilst there can be little doubt that Matthews would have played a part in the composition and presentation of the petition *it has not been suggested in this proceeding that the general thrust of the statements attributed to the petitioners was factually inaccurate or in any way misrepresented their views or their aspirations*. In fact, the copy of the petition was

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77 *The Members of the Yorta Yorta Aboriginal Community v The State of Victoria* [1998] FCA 1606 at [120]-[121].

tendered in the course of the applicants' counsel's opening address as evidencing a long history of efforts to obtain land. It is clear that by 1881 those through whom the claimant group now seeks to establish native title were no longer in possession of their tribal lands and had, by force of the circumstances in which they found themselves, ceased to observe those laws and customs based on tradition which might otherwise have provided a basis for the present native title claim; and the dispossession of the original inhabitants and their descendants has continued through to the present time. Although many of the claimant group reside within the claim area, many do not. No group or individual has been shown to occupy any part of the land in the sense that the original inhabitants can be said to have occupied it. The claimant group clearly fails Toohey J's test of occupation by a traditional society now and at the time of annexation[78] a state of affairs which has existed for over a century. Notwithstanding the genuine efforts of members of the claimant group to revive the lost culture of their ancestors, native title rights and interests once lost are not capable of revival. Traditional native title having expired, the Crown's radical title expanded to a full beneficial title[79]. It is however appropriate that some mention should be made of the evidence concerning the current beliefs and practices of the claimant group." (emphasis added)

161 His Honour continued[80]:

"Brennan J observed in *Mabo [No 2]*[81] that 'it is necessary to ascertain by evidence the nature and incidents of native title' and accordingly the resolution of this proceeding must depend upon the conclusions of fact which are supported by the evidence adduced. The evidence does not support a finding that the descendants of the original inhabitants of the claimed land have occupied the land in the relevant sense since 1788 nor that they have continued to observe and acknowledge, throughout that period, the traditional laws and customs in relation to land of their forebears. The facts in this case lead inevitably to the conclusion that before the end of the 19th century the ancestors through whom the claimants claim title had ceased to occupy their traditional lands in accordance with their traditional laws and customs. The tide of history has indeed washed away any real acknowledgment of their traditional

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78 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 192 per Toohey J.

79 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 60 per Brennan J.

80 *The Members of the Yorta Yorta Aboriginal Community v The State of Victoria* [1998] FCA 1606 at [129].

81 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 58 per Brennan J.

> laws and any real observance of their traditional customs. The foundation of the claim to native title in relation to the land previously occupied by those ancestors having disappeared, the native title rights and interests previously enjoyed are not capable of revival. This conclusion effectively resolves the application for a determination of native title."

162 His Honour did give consideration to some current practices of indigenous people in the region, which, it was said on behalf of the appellants, were traditional customs[82].

> "There is no doubt that mounds, middens and scarred trees which provide evidence of the indigenous occupation and use of the land are of considerable importance and indeed, many are protected under heritage legislation, but there is no evidence to suggest that they were of any significance to the original inhabitants other than for their utilitarian value, nor that any traditional law or custom required them to be preserved.
>
> Another contemporary practice which is said to be part of the Yorta Yorta tradition is the conservation of food resources. A number of witnesses gave evidence that they hunt and fish on the land and in the waters of the claim area and to some limited extent, gather 'bush tucker' for their personal consumption. Of these activities fishing appears to be by far the most popular but is currently engaged in as a recreational activity rather than as a means of sustaining life. It is said by a number of witnesses that consistent with traditional laws and customs it is their practice to take from the land and waters only such food as is necessary for immediate consumption. This practice, commendable as it is, is not one which, according to Curr's observations, was adopted by the Aboriginal people with whom he came into contact and cannot be regarded as the continuation of a traditional custom.
>
> In earlier times, following European settlement in the area, it was the practice to remove skeletal remains located at Aboriginal burial sites and take them to Melbourne, and elsewhere, for scientific examination. In more enlightened times many such remains have been returned into the custody of representatives of the Aboriginal people for reinterment in the areas from which they were removed. In the claim area reburials have been conducted since about 1984. There can be no question about the importance of the returning of remains to the appropriate country but the modern practices associated with their reburial are not part of the traditional laws and customs handed down from the original inhabitants.

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82 *The Members of the Yorta Yorta Aboriginal Community v The State of Victoria* [1998] FCA 1606 at [122]-[125].

> Similar considerations apply to the extensive involvement of Yorta Yorta people in activities associated with the conservation of the timber and water resources of the area. The advent of extensive logging of, and the introduction of cattle into, the forests in the claim area together with the interference with the natural flow of the river systems for irrigation purposes are all matters about which contemporary Yorta Yorta have expressed concern and sought to be consulted. To some extent their concerns have been recognised by government authorities. But these are issues of relatively recent origin about which the original inhabitants could have had no concern and which cannot be regarded as matters relating to the observance of traditional laws and customs."

163 His Honour did not overlook the possibility of any right of the appellants to exclude others from the region. He said this of it[83]:

> "The question of obtaining permission to enter upon or use the resources of the claim area was raised by a number of witnesses. The traditional position, according to Curr[84], was that both individuals and families amongst the Bangerang had particular rights to certain lands but in practice they were rarely insisted on except in the case of an encroachment of a person not of the tribe. The evidence concerning current practices was not entirely consistent from one witness to the next. Some witnesses said that the earlier rules concerning seeking permission to enter the country of another clan no longer applied and that all Yorta Yorta now have rights in all parts of the traditional lands (Ella Anselmi …; Kenneth Briggs …). Alfred Turner said that 20-30 years ago each sub-group would ask permission to go onto the land of another subgroup but that tradition is no longer observed … Neville Atkinson (Jr) said that the Yorta Yorta can determine who will come onto Yorta Yorta land … and Gary Nelson said that a lot of Aboriginal people ask permission before entering Yorta Yorta country … But many of the senior members of the claimant group gave no evidence of any existing practice concerning the assertion of any rights to exclude others from the claim area and no-one suggested that even the former practices extended to excluding non-Aboriginals. There is overwhelming evidence that Aboriginals and non-Aboriginals alike enter, travel through, live, fish and hunt within the claim area without seeking permission other than such as may be required by State or Commonwealth law. The tide of history has undoubtedly washed away any traditional rights that the indigenous people may have

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83 *The Members of the Yorta Yorta Aboriginal Community v The State of Victoria* [1998] FCA 1606 at [126].

84 Curr, *Recollections of Squatting in Victoria,* (1883) at 244.

previously exercised in relation to controlling access to their land within the claim area."

164 In the result therefore, his Honour determined that native title did not exist in relation to the claimed land and waters.

The appeal to the Full Court of the Federal Court

165 The appellants' appeal to the Full Federal Court (Branson and Katz JJ, Black CJ dissenting) was dismissed.

The appellants' arguments in the Full Court

166 On appeal the appellants submitted that Olney J had erroneously adopted a "frozen in time" approach. The respondents disputed that. The appellants developed their submission with a contention that the trial judge had wrongly equated the existence of native title with the existence of a "traditional society" or a "traditional lifestyle". Whilst disputing this, the respondents argued that even if it were so, the finding that native title had expired by the end of the 19th century necessarily resolved the case against the appellants.

167 A related submission by the appellants was that the trial judge failed to make the necessary findings of fact, particularly in relation to the traditional laws presently acknowledged, and the traditional customs presently observed by the members of the Yorta Yorta community. His Honour approached the matter from the wrong point in time and should have begun with the present instead of commencing with the past. They submitted that the language of the Act required that there be an assessment of the present laws and customs of the claimant group. Additionally, it was argued, the nature of an inquiry that begins in the past and examines ensuing events is, in itself, likely to result in an erroneous approach of looking exclusively to the past.

The reasoning of the Full Court

168 The Full Court were in agreement about several of the principles to be applied. Each judge accepted that the traditional laws and customs forming the foundation for native title may adapt and change. A "frozen in time" approach to the determination of native title would be an incorrect approach.

169 The majority, Justice Branson and Justice Katz, were of the opinion that the trial judge's finding, that there was a period between 1788 and the date of the applicants' claim during which the indigenous people lost their character as a traditional Aboriginal community, was a finding that was open to the judge to make, and no case had been made out for disturbing that finding. That finding provided a complete answer to the appellants' claim and by reason of it alone the appeal should be dismissed.

170 The Chief Justice (dissenting) concluded that although the primary judge did not adopt a strict "frozen in time" approach, he nevertheless was in error in that he applied too restrictive an approach to the concept of what is "traditional" when he made his finding that native title expired before the end of the 19th century. His Honour also considered that various aspects of the evidence should have been the subject of express findings by the primary judge. The Chief Justice would have remitted the case to the trial judge for further consideration so that appropriate findings might be made with respect to those aspects.

The appeal to this Court

171 All of the points sought to be made by the appellants in the Full Court of the Federal Court were raised again in this Court.

172 Whilst it must be accepted that claims of native title are to be determined in accordance with and pursuant to the Act, there are many indications in it that it is in several respects an enactment of the reasoning and language of this Court (especially of Brennan J) in *Mabo v Queensland [No 2]*[85].

173 Sections 223 to 225 of the Act relevantly provide as follows:

"**223 Native title**

(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.

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85 (1992) 175 CLR 1. *Western Australia v Ward* (2002) 76 ALJR 1098 at 1227-1228 [629] per Callinan J; 191 ALR 1 at 179.

(2) Without limiting subsection (1), ***rights and interests*** in that subsection includes hunting, gathering, or fishing, rights and interests.

224 Native title holder

The expression ***native title holder***, in relation to native title, means:

(a) if a prescribed body corporate is registered on the National Native Title Register as holding the native title rights and interests on trust – the prescribed body corporate; or

(b) in any other case – the person or persons who hold the native title.

225 Determination of native title

A ***determination of native title*** is a determination whether or not native title exists in relation to a particular area (the ***determination area***) of land or waters and, if it does exist, a determination of:

(a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and

(b) the nature and extent of the native title rights and interests in relation to the determination area; and

(c) the nature and extent of any other interests in relation to the determination area; and

(d) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of this Act); and

(e) to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease – whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others."

174 "Native title" in s 223(1) is used interchangeably with "native title rights and interests". Each and all of these must relate to land or waters because the words "in relation to land or waters" qualify them. "Where" probably means, in context, "if and only if". Claimants, to succeed, must therefore prove that there are rights and interests, that is to say, current rights and interests currently acknowledged and observed, by an identifiable group, or an individual or individuals. That does not mean that different interests may not be held by

different indigenous peoples, or that interests and rights may not be shared. The unfortunate point for the appellants is, however, that the rights and interests and the personal entitlement to them each needs to be identified. That, it seems to me, is exactly what the claimants strived, but ultimately failed to do. The group or individuals concerned must hold or own the rights under, that is, pursuant to, traditional laws or traditional customs. The repetition of the reference to the "laws and customs" and the use of the word "connection" contemplates at least a degree of continuity either of acknowledgment or observance, and possession, except arguably perhaps in exceptional cases, of which this does not appear to be one, of laws or customs which themselves contemplate discontinuity of acknowledgment or observance, or absence or departure from the land. I say that this is not such a case for the reason that no-one, and certainly not the claimants suggested otherwise. Their whole case involved a search for continuity, of occupation of the region, of families, of practices and laws, and the possession of rights and interests under traditional laws and traditional customs.

175 Paragraph (b) of s 223(1) further requires that there must be a connexion not just with the land in question, but by the laws and customs, with that land.

176 Paragraph (c) of s 223(1) means that the rights and interests, if and where established, to be the subject of a determination, must be recognisable by the common law. For rights and interests to be recognised by the common law they must be reasonably precise. In this context common law includes equity and contemplates the availability of all possible remedies in both branches of the law. Orders of courts, whether made in equity or in common law, to be enforceable need to be framed with clarity[86]. Parties placed under curial obligations to do, or abstain from doing acts need to know with certainty what their obligations are. Declarations require similar certainty. Lord Upjohn in *Morris v Redland Bricks Ltd*[87] said that such a principle was well established in the case of mandatory injunctions but there is no reason why its application should be restricted to such cases. Furthermore, a defendant will ordinarily not be in contempt for failure to

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86 For instance, equity will not provide injunctive relief in cases where it would be impossible to comply with the order sought, or where compliance, if possible, would be futile: *Attorney-General v Colney Hatch Lunatic Asylum* (1868) LR 4 Ch App 146 at 154. Further, if the granting of injunctive relief would result in uncertainty as to what conduct would be prohibited, ordinarily no relief will flow: *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* (1992) 38 FCR 1.

87 [1970] AC 652 at 666-667.

comply with an ambiguous and imprecise undertaking, and by analogy, order[88]. It follows from all of s 223(1) that if there is not precision, as to the boundaries, the persons entitled, the traditional laws and customs, and the rights and interests to which they give rise, then the common law will be unable to enforce or give effect to them just as it will not recognise and enforce traditional laws that are repugnant to it[89]. The need for precision is reinforced by the provisions of s 225 which direct attention to the identification of, and therefore certainty with respect to, each of the matters to which I have referred, and s 185 which refers to the Register of Native Title Claims is also indicative of a need for some precision, for example, with respect to the beneficiaries of the trust upon which a body corporate is to hold the relevant rights and interests.

177 The evidence at trial in this case dwelt heavily upon ancestral history. As Black CJ in the Full Court said[90]:

> "… it was not in controversy on the hearing of the appeal that native title will no longer exist once its foundation has disappeared by reason of the disappearance of any real acknowledgment of traditional law and real observance of traditional customs. Where such circumstances exist, the claimed rights and interests will no longer be possessed under what are truly 'traditional' laws acknowledged and customs observed."

178 Those who were said to be the contemporary acknowledgers and observers (of the traditional laws and customs) in this case were the descendants of indigenous occupiers at 1788 of the land, and issue was joined on their ancestry at trial. That was a correct approach. The Crown's radical title was acquired in 1788. Only what then existed could burden it at that time. It was not argued by the appellants, and rightly so in my opinion, that native title could come into existence on and after the Crown's radical title was acquired.

179 Some obscurities contained within s 223 do however need revelation, for example: what is required to satisfy the description, "traditional"; must the "tradition" be uninterrupted; what is the complete role of par (c) of s 223(1); may the common law recognise a traditional law or custom with respect to the exercise of, or entitlement to native title rights and interests which does not contain within it a means of enforcement that is itself acceptable to the common

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88 *Australian Consolidated Press Ltd v Morgan* (1965) 112 CLR 483 at 516 per Owen J. See also Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*, 3rd ed (1992) at 619-621 [21 100].

89 cf *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 61 per Brennan J.

90 *Yorta Yorta v Victoria* (2001) 110 FCR 244 at 256 [34].

law?[91] The appellants' notice of appeal implicitly accepted the need for a means of effective assertion (not repugnant to the common law) in their complaint that the primary judge did not find that the appellants had "a traditionally based authority structure". In this context Brennan J asked in *Mabo [No 2]*, whether there is an ability to assert native title effectively[92]. Other questions for which the section provides no ready answer are: is there a relevant starting point for the ascertainment of the law or custom; is actual presence, continuous or otherwise on the land necessary; may the traditional law or custom evolve; and, if it may, to what extent may it do so without losing its traditional character; and, what connexion by the laws and customs between the people and the land will suffice to satisfy the requirements of s 223(1)(b)?

180 Not all of the questions that I have posed need to be answered definitively in this appeal. It is as well, however, before moving to those of the questions that do require answers for its disposition, to restate some propositions which may bear upon some of those answers. The purposes of the Act which appear from its objects and the overview of it contained in ss 3 and 4, are to provide for the recognition and protection of native title, and, prospectively, its non-extinguishment. The judgments in *Mabo [No 2]* made no claim to create native title. The holding is that native title existed before, and at the time of first non-indigenous settlement. It was simply that, until 1992, the courts had neither recognised nor given effect to it. The result of that decision was effectively to make native title a foster child of the common law notwithstanding its fragility, elusiveness and other marked differences from its foster parent. The existence of these weaknesses was certainly one of the main reasons for the enactment of the Act. Neither the statute nor the common law (to which it must be acceptable to gain recognition, and therefore access to the panoply of legal remedies for the obtaining, keeping and vindication of it) supplements, explains, enlarges or clarifies the relevant native title law or custom, or cures deficiencies in it. Native title is not an institution of the common law[93]. It must stand on its own foundations: it is *sui generis*[94]. The role of the Act and the common law is only to protect and give effect to it.

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91 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 51-56 per Brennan J.

92 (1992) 175 CLR 1 at 51.

93 *Fejo v Northern Territory* (1998) 195 CLR 96 at 128 [46] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

94 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 89 per Deane and Gaudron JJ, 133 per Dawson J.

181 Apart from the special provisions of ss 47A and 47B[95], the Act makes no provision for non-extinguishment, or revival of native title, although there are numerous sections which do provide for its extinguishment[96]. This is an indication of a need for continuity.

182 I return to the questions that I earlier posed. The concept of "tradition" is central to the meaning and effect of s 223. It was at the forefront of the Prime Minister's second reading speech on the Bill on 16 November 1993. He said "native title is derived from the traditional laws and customs of indigenous people."[97] The word "traditional" appears in several sections of the Act. No doubt the provisions for registration of "body corporate agreements" in Pt 2 Div 3 of the Act which, among other matters, contemplates the specification of "the manner of exercise of any native title rights and interests"[98] were drawn with an eye to the deliberation to attend any departures from tradition[99]. Some grants of mining tenements are conditioned upon the protection and avoidance of any area "…of particular significance to the persons holding native title in accordance with their traditional laws and customs."[100] There is also a reference to "traditional activities" in s 44B.

183 The Act, unusually, rather than by regulation, sets out as part of it, the form of application for a determination of native title, including who may make an application, being a (current) holder or holders of the rights "according to their traditional laws and customs". Paragraph 1 of the form of application states[101]:

> "A person or persons authorised by all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title

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95 These sections are concerned with native title applications in respect of vacant Crown land, or land held expressly for the benefit of or reserved for Aboriginal and Torres Strait Islander people.

96 ss 4, 11, 23A-23JB.

97 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 16 November 1993 at 2879.

98 s 24CB(d).

99 See also s 203BE.

100 s 26A(7)(a).

101 s 61(1).

claimed, provided the person or persons are also included in the native title claim group…"

184 It is important to notice that, before the Registrar of Native Title Claims may register a claim, the Registrar must be satisfied that at least one member of a native title group currently has, or previously had a *traditional physical connection* with particular land or water[102], which strongly suggests the need for an actual presence on land.

185 Meanings relevant to customs and practices given by the *Oxford English Dictionary*[103] of "tradition" are: "a long established and generally accepted custom or method of procedure having almost the force of law; an immemorial usage; the body (or any one) of the experiences and usages of any branch or school of art or literature, handed down by predecessors and generally followed … an embodiment of old established custom or institution". Tradition, myth and legend are often indistinguishable, but the mere existence of either of the latter, in the sense of a fictitious narrative, or an unauthentic or non-historical story, however venerated by repetition, will not suffice of itself to establish native title rights and interests possessed under traditional laws or customs by people claiming a relevant connection with the land. All of the statutory criteria contained in s 223 read in the context of the Act as a whole must be satisfied.

186 It seems to me that the critical elements of traditional laws and customs and "rights and interests" in the sense and context in which the words are used in s 223 are these. The rights and interests must be definable with sufficient certainty to enable them to be enforced by the common law[104]. They must, for the same reason, be held in relation to defined land. For their enjoyment a physical presence is essential. This is so, because, if physical presence were not a necessary component of the right or interest, then the right or interest could be enjoyed elsewhere: physical occupation, presence or possession of the land would not then be essential for the observance, participation in, or enjoyment of the right in question. The Act is concerned with title, that is title to land, and the bundle of rights and interests attaching to, or arising out of that title. The definition of the rights must be found in the traditional laws or customs. Tradition requires a high degree of continuity. It also involves intergenerational transmission, acknowledgment and observance. The traditional laws and customs to which the rights and interests owe their existence must be ones which were in existence on first non-indigenous settlement, in 1788, because it was at that time that the sovereign radical title was assumed, and upon which the native

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102 s 190B(7).

103 *Oxford English Dictionary*, 2nd ed (1989), vol 18 at 354.

104 cf footnote 85.

title became a burden. And it is those traditional laws and customs which must have continued (albeit that they may have evolved, a matter which I will discuss later) in order to give real content to the rights and interests currently asserted. It follows that in order for native title to survive (absent extinguishment), and be the subject of a determination under the Act, there must have been, in 1788, a recognisable group exercising identifiable relevant traditional laws and customs, themselves reasonably certain, on and relating to defined land, involving physical presence on it, and continuity of these, until, and at the time of the determination.

187 The extent to which longstanding law and custom may evolve without ceasing to be traditional may raise difficult questions. The matter went uncontested in *Yanner v Eaton*[105], although for myself I might have questioned whether the use of a motor boat powered by mined and processed liquid fuel, and a steel tomahawk, remained in accordance with a traditional law or custom, particularly one of alleged totemic significance.

188 It is helpful however to contrast the evidence in that case with this one. The appellant there, without contradiction, indeed without any challenge, gave and called evidence capable of demonstrating between 140 and 1,300 or so years of unbroken and generally traditional enjoyment of and the undertaking of traditional activities in a particular area, an endeavour of the kind upon which the appellants here embarked but failed to achieve[106].

189 In this case, the appellants specifically, as appears from many indicators in the judgments in the Courts below, set out to satisfy the requirements of certainty that the Act demands, by proof of ownership of the rights and interests in 1788 and, or, about 1840, by certain named persons, and biological succession to them by other identified persons. Continuity, over that period, or periods, was the issue upon which the parties joined. It was the issue that the trial judge and the Full Court of the Federal Court were asked to decide. The appellants failed on this issue. On the evidence and proper meaning of the Act no other result was in my opinion likely.

190 It follows that I would reject the approach of Black CJ, in dissent, in the Full Court. In a native title case, because of the statutory emphasis upon "tradition", and because, so far as the colony of New South Wales is concerned, radical title came into existence or was acquired in 1788, any judicial inquiry will generally start with the situation then, and trace its development until now, with due regard to the evolution of the traditions in question. To do so would not be to adopt a "frozen in time" approach. Sometimes it may well be possible to start

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105 (1999) 201 CLR 351.

106 (1999) 201 CLR 351 at 402 [132]-[133].

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. As six Justices of this Court said in *Fejo v Northern Territory*[107] "[t]he underlying existence of the traditional laws and customs is a *necessary* pre-requisite for native title but their existence is not a *sufficient* basis for recognising native title." (original emphasis) The trial judge did not, as Black CJ said, fail to give appropriate weight to orally transmitted accounts. If, in a particular case, they have, as Black CJ said, "potential richness and strength"[108] then those qualities will no doubt serve to meet, and if appropriate, refute contemporaneous written records to the contrary. The primary judge did not think they did so here, and, in my opinion, paying due deference to his advantages as the trial judge in assessing the oral and oral based evidence, I think he was right in holding as he did. Olney J was alive to the possibility of evolution of tradition. It was only to be expected, however, that he would be influenced by the absence of evidence of any or any substantial degree of continuity. The onus was upon the appellants, and only they could speak of their contemporary and recent observance. His Honour fell into no error at the trial of the kind which Black CJ attributed to him. Nor was his Honour the primary judge in error in regarding quite intensive husbandry and agriculture on both sides of the Murray River as being incompatible with the traditional way of life of the early Aboriginal inhabitants, or any evolution of it.

191 I would also, with respect, hold that his Honour's criticism of the fact-finding exercise performed by the primary judge was not well-founded. His Honour was confronted with more than 11,600 pages of transcript. In excess of 201 persons gave evidence before him. It would have been neither possible nor helpful for him to refer to all of the evidence upon which any of the parties relied. Correctly, sufficiently and orthodoxly his Honour referred to such of the evidence as was relevant or necessary for his decision.

192 I would dismiss the appeal with costs.

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107 (1998) 195 CLR 96 at 128 [46] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

108 *Yorta Yorta v Victoria* (2001) 110 FCR 244 at 261 [55].