

Losing Sight of the Big Picture: the Narrowing of Native Title in Australia

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Native title was recognised at common law in Australia by the High Court in the seminal Mabo v. Queensland [No 2] (1992) decision. In 1993, the Australian Federal Government enshrined native title in legislation (Native Title Act 1993 (Cth)). Recently, the High Court has held that the Native Title Act takes precedence over the common law in determinations of native title. This paper argues that the recent constructions of the definition of native title depart too much from the aim of recognising native title: that is, land justice for Indigenous people in Australia. The definition as it stands requires courts to particularise native title rights and interests in detail, placing too heavy an evidential burden on Indigenous peoples. Furthermore, the process requires Australian judges to interpret and apply Indigenous laws and customs, leading to inconsistent and sometimes culturally damaging results. In particular, this paper explores these issues through a focus on the recent Full Federal Court decision, De Rose v. South Australia (2003). Canadian law on aboriginal title is used as a counterpoint in this examination of Australia's present direction.

La Haute Cour a reconnu le titre aborigène en common law en Australie dans l'arrêt de principe Mabo c. Queensland [No 2] (1992). En 1993, le gouvernement fédéral australien a enchâssé le titre aborigène dans sa loi (Native Title Act 1993 (Cth)). Récemment la Haute Cour a statué que la Native Title Act a préséance sur la common law dans la détermination du titre aborigène. Le présent article soutient que les interprétations récentes de la définition du titre aborigène s'écartent du but recherché : la reconnaissance du titre aborigène ou plus précisément la justice foncière pour les populations autochtones d'Australie. La définition actuelle laisse aux tribunaux le soin de déterminer le contenu des droits et des intérêts liés au titre aborigène, ce qui impose aux populations autochtones fardeau de preuve trop lourd. De plus, cette procédure oblige les juges australiens à interpréter et à appliquer les lois et les coutumes autochtones, ce qui donne lieu à des incohérences et des résultats parfois culturellement dommageables. L'article explore ces questions en particulier sous l'angle de la décision récente de l'ensemble de la Cour fédérale dans l'affaire De Rose c. South Australia (2003). Le droit canadien sur le titre autochtone sert de contrepoint à cette étude de la tendance australienne actuelle.

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I. Introduction

MORE THAN TWELVE YEARS AGO, the Australian High Court decided in *Mabo v. Queensland [No. 2]*¹ that native title² existed at common law in Australia, heralding a property law revolution. The past few years, however, have seen a narrowing approach to native title in Australia. The High Court has held that the federal *Native Title Act 1993*³ takes primacy over the common law in determinations of native title.⁴ The statutory definition contained in section 223(1)⁵ has been construed as requiring a strict focus on the content of Indigenous⁶ laws and customs to demonstrate native title rights and interests, with a corresponding increase in the burden of proof on claimants. The strict approach to the definition obliges judges to interpret and apply Indigenous law in making a native title determination—raising serious ques-

1. *Mabo v. State of Queensland [No. 2]* (1992) 175 C.L.R. 1; 107 A.L.R. 1 (*Mabo [No. 2]*).

2. "Native title" is the term commonly used in Australia and is interchangeable for the purposes of this article with the Canadian term, "Aboriginal title", although there are differences between the two concepts, which are discussed in Part II below.

3. (Cth) (*NTA*).

4. *Australia v. Ward* (2002), 213 C.L.R. 1 at para. 16, 191 A.L.R. 1 (H.C.A.) [*Ward* cited to C.L.R.]; *Members of the Yorta Yorta Aboriginal Community v. Victoria* (2002), 214 C.L.R. 422 at para 32, 194 A.L.R. 538 (H.C.A.) [*Yorta Yorta*].

5. The language of s. 223(1) of the *NTA* is taken from the judgment of Brennan J. in *Mabo [No. 2]*, *supra* note 1, at 69–71. The content of native title remains dependent on the particular laws and customs of each claimant group. The text of s. 223(1) follows:

Section 223 Native Title:

Common Law Rights and Interests

(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.

6. The term "Indigenous" is used in Australia to include the Aboriginal peoples of mainland Australia and Tasmania, and Torres Strait Islanders. For the purposes of this article it is used interchangeably with the term "Aboriginal."

tions about the appropriateness of this process. On the one hand, there is the potential for Australia to achieve a true legal plurality, and on the other there is the great potential for misunderstanding and injustice resulting from a failure to take real steps to equip Australian courts to deal with Indigenous perspectives. Without significant reform of Australia's native title process, Indigenous laws and customs will continue to be submitted to an assessment of their value and legitimacy by a legal system that has developed very differently and has spent much of its history denigrating Indigenous people and their culture.

In *Mabo* [No. 2], Brennan J. declared that the Australian common law would no longer be "frozen in an age of racial discrimination"⁷ but the High Court failed to set guidelines for lower courts grappling with the unique evidential issues presented by native title claims. When this issue came before the High Court in the recent *Yorta Yorta* case,⁸ the Court again failed to provide direction. Native title litigation has become increasingly costly and time-consuming. Indigenous people in the southeastern areas of Australia, which have had the most sustained contact with settlers since the acquisition of British sovereignty, face an extraordinary battle to have their societies considered sufficiently "traditional" to prove that they have maintained the connection with their Country⁹ required by the *NTA*. Australia's history of dispossession of Indigenous peoples from their land, disregard for their rights, and dismissal of their cultures demands that we attempt to redress the economic imbalance and provide real solutions to Indigenous peoples' need for land. Australia has a history of dispossessing Indigenous peoples of their land, disregarding Indigenous rights and dismissing Indigenous cultures. This demands an attempt to redress the economic imbalance and to provide real solutions to Indigenous peoples' need for land. Since the 1960s the Australian legal system has taken substantial symbolic steps towards recognizing Indigenous peoples' connection to Country and their ability to maintain their unique cultures in the face of colonisation. The value of these symbolic steps will be lost, however, if they are not translated into substantive outcomes.

Canadian and Australian law on Aboriginal rights have developed contemporaneously and, although there has been some divergence in political and legislative solutions, a cross-Pacific dialogue is to be encouraged. The Australian High Court has warned against over-reliance on authority from other jurisdictions, such as Canada, suggesting it has limited relevance to

7. *Mabo* [No. 2], *supra* note 1 at 42.

8. *Yorta Yorta*, *supra* note 4.

9. The terms "Country" or "speaking for Country" are used in Australia as an attempt to explicate the complex relationship between Indigenous Australians and land, a relationship that is deeper than the common law notion of ownership of property. See *Ward*, *supra* note 4 at para. 14.

Australia's situation.¹⁰ This is belied by both Canada and Australia's similar colonial histories of dispossession and assimilationist policies towards Indigenous peoples,¹¹ and by their present efforts towards reconciliation.¹² Our two countries continue to face similar challenges in identifying and protecting Aboriginal rights where those rights are not specifically recognized by treaty even though Canada's relations with its Aboriginal peoples are largely governed by treaties.

This paper will outline the present construction of Australian native title, including both its strengths and weaknesses. Ultimately, it will be argued that the courts' increasingly narrow approach to native title with its very literal emphasis on the *NTA* is not the best way to progress reconciliation and Indigenous land rights in Australia. Instead, substantial law reform should be undertaken with the identification and protection of traditional homelands as the central concern, and providing for the economic and political progression of Indigenous peoples. This may involve reform of the *NTA*, constitutional reform to accord protection to Indigenous rights,¹³ or a modern treaty process.¹⁴ In the meantime there are steps that can be taken by Australia's High Court to provide direction to lower courts on the use of Indigenous oral history evidence. There is also scope for a less strict approach to the present statutory definition and to look to the jurisprudence of countries like Canada on the recognition and protection of Indigenous rights. Australia and Canada can learn from each other's experiences in developing the law in this area.¹⁵

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10. *Fejo v. Northern Territory* (1998), 195 C.L.R. 96 at para. 103, 156 A.L.R. 721 (H.C.A.).
 11. For a comparative chronology of treatment of Indigenous people by the colonial and post-colonial governments of Australia, Canada and New Zealand, see Paul Havemann, "Indigenous Rights in the Political Jurisprudence of Australia, Canada, and New Zealand" in Paul Havemann ed., *Indigenous Peoples' Rights in Australia, Canada, and New Zealand* (Auckland: Oxford University Press, 1999) at 22-64.
 12. The present Australian Federal Government has distanced itself from overt acts of reconciliation. In 1997 Prime Minister John Howard refused to apologize to Australia's Indigenous people for past Government practices of removing Indigenous children from their families (referred to as the "Stolen Generations"). In 1998, the Howard Government passed the *Native Title Amendment Act 1998* (Cth) [*NTAA*] which made it more difficult to register a native title claim, and provided for greater certainty of extinguishment of native title over some land subject to statutory leases. On 15 April 2004, the Howard Government announced the closure of the Aboriginal and Torres Strait Islander Commission (the peak Indigenous organization) with the intention of mainstreaming Indigenous services and representation.
 13. Perhaps similar to s. 35(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, (U.K.), 1982, c. 11.
 14. A discussion of the push in Australia for a modern treaty process is beyond the scope of this article but see the Treaty Project run by the Gilbert + Tobin Centre of Public Law, University of New South Wales, online: <<http://www.gtcentre.unsw.edu.au/treaty-resources.asp>>.
 15. Chief Justice McLachlin of the Supreme Court of Canada has recently expressed similar views—see Rt. Hon. Beverley McLachlin, "Reconciling Sovereignty: Canada and Australia's Dialogue on Aboriginal Rights" in Peter Cane, ed., *Centenary Essays for the High Court of Australia* (Chatswood, N.S.W.: LexisNexis Butterworths, 2004) at 101, 110.

II. A Short Comparison of Native Title in Australia and Canada

CANADA AND AUSTRALIA SHARE a similar cultural and legal history stemming from their membership in the British Commonwealth and the reception of the common law of England.¹⁶ Although both have written constitutions providing for a federal system with a set division of powers between the federal and regional governments, the two countries have deviated in terms of how legislative power is allocated, and in the protection of rights and freedoms. These divergences in constitutional law may account for some of the difference in approach to Aboriginal rights, yet their similar colonial histories continue to have significance. It is really only in the last thirty years that both countries have made concerted attempts to deal with the economic and social problems confronting their Indigenous populations in the aftermath of colonialism.

In Canada, plenary power is vested in the federal government whilst the provinces only have power over those areas specified in the Constitution.¹⁷ By contrast, in Australia the federal government only has power over the areas specifically allocated to it in the Constitution.¹⁸ The federal government shares concurrent power with the Australian states over the subject matters listed in section 51, and has limited exclusive powers under section 52. In addition, under section 122 the federal government has plenary power to make laws with respect to territories ceded by the states or acquired by Australia. The Australian states exercise residual plenary powers under their respective constitutions,¹⁹ subject to the principle of federal supremacy enshrined in section 109 of the *Australian Constitution*. This section provides that "[w]hen a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid,"²⁰ thus rendering conflicting State legislation inoperative in a fashion similar to Canada's paramountcy principle.²¹

In Canada, the Constitution grants to the federal government exclusive legislative control over "Indians, and Lands reserved for the Indians."²²

16. Although it must be noted that Canada also has a civil law tradition based on the French civil code.

17. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, ss. 91-92, reprinted in R.S.C. 1985, App. II, No. 5 [*Canadian Constitution*].

18. *Commonwealth of Australia Constitution Act, 1900* (U.K.), 63 & 64 Vict., c.12 [*Australian Constitution*].

19. See for instance *Constitution Act 1975* (Vic.) s. 16: "The Parliament shall have power to make laws in and for Victoria in all cases whatsoever."

20. *Australian Constitution*, *supra* note 18, s. 109.

21. Canada's paramountcy principle is only express in relation to the subject matters covered by ss. 92A, 94A and 95 of the *Canadian Constitution*, *supra* note 17, but has been judicially implied to render inoperative conflicting provincial laws which satisfy the "impossibility of dual compliance test": see *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1.

22. *Canadian Constitution*, *supra* note 17, s. 91(24).

This provided a measure of consistency in approach to Aboriginal peoples across Canada. Additionally, as part of significant reforms in 1982, the *Canadian Constitution* was amended to accord constitutional protection to existing Aboriginal rights.²³ No such protection is accorded by the *Australian Constitution*. The division of powers under the *Australian Constitution* at Federation (in 1901) was such that only the state governments had power to legislate with regard to Aboriginal people.²⁴ By referendum in 1967, the *Australian Constitution* was amended to recognize Indigenous peoples as citizens²⁵ and to allow the federal government the power to legislate with specific regard to them.²⁶ Consequently, a random, piecemeal approach to Indigenous people developed across Australia, with each state operating its own separate policies with regard to its resident Indigenous people, and the federal government taking little part until the late 1960s.

From the beginning, land in British North America was acquired by way of treaties formed between Aboriginal peoples and the colonial Crown. *The Royal Proclamation* of 1763 (which retains legal force today), directed that Indian land could not be obtained by British subjects except where it was validly ceded to the Crown. Treaties were, therefore, concluded across much of eastern and central Canada, with the result that Aboriginal title claims generally arise only in British Columbia and parts of the maritime provinces. Despite problems of interpretation and application of treaties over the years, the significance of the treaty approach itself cannot be overemphasized: it implicitly acknowledges the sovereignty of Indigenous peoples over the land at the time of British settlement. No treaties with Indigenous people were ever formed in Australia. The Indigenous inhabitants were regarded as having "such a low level of human development that the country they occupied could be treated as a *terra nullius*—literally a land of no one."²⁷ No need was seen for treaties, or for any other consistent accommodation of Indigenous peoples or their rights. The settlers simply took the land that was desirable to them and if the Indigenous peoples resisted, they were removed or slaughtered. Much of the Australian mainland was granted to squatters in the form of statutory pastoral leases covering

23. *Canadian Constitution*, *supra* note 17, s. 35(1).

24. Originally, s. 51(xxvi) of the *Australian Constitution*, *supra* note 18, also known as the "race power," stated that the Federal Parliament had the power to make laws with respect to "[t]he people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws." [emphasis added].

25. By removing s. 127 of the *Australian Constitution*, *supra* note 18, which read: "[i]n reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted."

26. The words "other than the aboriginal race in any State" in s. 51(xxvi) of the *Australian Constitution*, *supra* note 18, were deleted. The *NTA*, *supra* note 3, was legislated under this head of power.

27. Henry Reynolds, *The Law of the Land* (Victoria: Penguin Books, 1997) at 12, cited in Peter Russell, "High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence" (1998) 61:2 Sask. L. Rev 247 at 254.

massive stretches of land, and used for grazing cattle or sheep.²⁸ At best, Indigenous peoples were allowed limited access rights to pastoral lease land or worked as unpaid labour for the new landowners. Policies such as the forcible removal of "part-Aboriginal"²⁹ children to be trained as domestics, the shifting of people onto reserves often far from their traditional land, the suppression of Aboriginal languages and cultural practices and the imposition of Christianity were implemented or allowed by various governments over the two hundred or so years since British colonisation. When viewed from this perspective, the recent developments in Australian law with respect to native title have new resonance.

Common law recognition of native title came rather late to Australia with the High Court's 1992 *Mabo [No. 2]* decision. An initial setback in the 1970s saw a single judge of the Northern Territory Supreme Court find in *Milirrpum v. Nabalco*³⁰ that the "doctrine [of communal native title] does not form, and never has formed, part of the law of any part of Australia."³¹ Although *Mabo [No. 2]* is considered to have broken new ground in Australian law, the wide survey of authorities from other countries demonstrates that the common law world had long accepted native title, albeit in slightly differing forms.³² Indeed, the High Court in *Mabo [No. 2]* relied heavily on jurisprudence from the United States, Canada, and Privy Council decisions from Africa. In Canada, a form of Aboriginal title had been recognized since the 1888 decision in *St. Catherine's Milling*,³³ although in that case the title derived from the *Royal Proclamation* of 1763, rather than the common law. Nearly a century later, in *Calder v. Attorney-General of British Columbia*,³⁴ the Supreme Court confirmed the existence of Aboriginal title at common law, although the Nishga'a people's claim in that case was unsuccessful. In *R. v. Guerin*,³⁵ Dickson J. stated that *Calder* provides solid authority for the gen-

28. Some 42% of the Australian mainland was granted in various forms of pastoral lease: Mark Love, "Lighting the Wik of Change" (1997) Issues Paper No.14 *Land, Rights, Laws: Issues of Native Title* 1 at 3. This historical patchwork of statutory grants has significant implications for Australia's Indigenous peoples as native title can exist only over unalienated Crown land.

29. The use of this term is meant in historical context and no offence is intended.

30. (1971), 17 F.L.R. 141, [1972-73] A.A.L.R. 65 (N.T.S.C.). [*Milirrpum* cited to F.L.R.].

31. *Milirrpum*, *ibid.* at 245, Blackburn J.

32. See generally *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823) [*Johnson*]; *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *R. v. Symonds* (1847), N.Z.P.C.C. 387 at 395; *Re Southern Rhodesia*, [1919] A.C. 211 (P.C.) (Lord Sumner declared that "it is to be presumed, in the absence of express confiscation or of subsequent expropriatory legislation, that the conqueror has respected...[existing property rights] and forbore to diminish or modify them" at 233. However, he went on to distinguish between Indigenous peoples on the basis of their "scale of social organization" in determining whether "to impute to such people some shadow of the rights known to our law" at 233-34). Respect for existing property rights was affirmed in *Amodu Tijani v. Secretary, Southern Nigeria*, [1921] 2 A.C. 399 (P.C.) [*Amodu Tijani*] and further in *Oyekan v. Adele*, [1957] 1 W.L.R. 876 (P.C.), 2 All E.R. 785, Lord Denning ("The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected" at 880 cited to W.L.R.).

33. *R. v. St. Catherine's Milling and Lumber Company* (1888), 14 A.C. 46 at 54 (P.C.), 2 C.N.L.C. 541.

34. [1973] S.C.R. 313, 7 C.N.L.C. 91 [*Calder* cited to S.C.R.].

35. [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 [*Guerin* cited to S.C.R.].

eral proposition that the law of Canada recognizes the existence of Aboriginal title independent of the *Royal Proclamation* or any other prerogative act or legislation. It arises at common law.³⁶ The nature and content of common law Aboriginal title in Canada was described by Lamer C.J.C. in the 1997 case of *Delgamuukw v. British Columbia*³⁷ (the Supreme Court in turn relying on *Mabo [No. 2]* as discussed below). Before considering the present forms taken by native title in Australia and aboriginal title in Canada, it is worth briefly examining the *Milirrpum* decision and the effect it had on Australian law regarding Indigenous rights. *Milirrpum* was decided in Australia while the *Calder* case was progressing through the Canadian courts. Blackburn J. had examined the lower court decisions in *Calder* and came to the conclusion that they supported his finding that “[i]n a settled colony there is no principle of communal native title except such as can be shown by prerogative or legislative act, or a course of dealing.”³⁸ However, when *Calder* reached the Supreme Court of Canada, Hall J. declared that the decision of Blackburn J. was “wholly wrong as the mass of authorities... establishes.”³⁹ *Milirrpum* was not appealed to the High Court of Australia, and it has been suggested that this was primarily for strategic reasons—because a progressive legislative response was preferred to an entrenchment of the concept of *terra nullius* by the (then conservative) High Court.⁴⁰ Subsequently, the High Court began to indicate in the late 1970s and early 1980s⁴¹ that *Milirrpum* was susceptible to challenge, and in *Mabo [No. 2]* it was overturned. However, despite its erroneous findings on the existence of common law native title, *Milirrpum* was not without significance. Blackburn J. held that the plaintiffs were unable to establish property rights, but he also stated that:

The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called “a government of laws, and not of men”, it is that shown in the evidence before me.⁴²

36. *Guerin*, *ibid.* at 375–376.

37. [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193 [*Delgamuukw*].

38. *Milirrpum*, *supra* note 30 at 223.

39. *Calder*, *supra* note 34 at 416. The court in *Calder* differed on whether the Nisga’a peoples’ Aboriginal title was extinguished or not and the case was dismissed on a technicality. Although Hall J. was in dissent, his position quickly became the prevailing view, and was specifically approved by the Supreme Court of Canada in *Delgamuukw*, *supra* note 37 at para. 133 Lamer C.J.C., and at para. 189, La Forest J.

40. Ron Levy, “Twenty Years of Land Rights—Lessons for the *Native Title Act*” [1996] 3:85 *Aboriginal Law Bulletin* 22 at 22.

41. *Coe v. Commonwealth* (1979), 24 A.L.R. 118, (H.C.A.), 53 A.L.J.R. 403; *R. v. Toohy; Ex Parte Meneling Station Pty. Ltd.* (1982), 158 C.L.R. 327, 44 A.L.R. 63 (H.C.A.).

42. *Milirrpum*, *supra* note 30 at 267.

The finding of a well-established Indigenous system of laws formed the basis of a new understanding of Indigenous people in the political mind of Australia. The judge's assessment of the Yolngu people in *Milirrpum* was used in *Mabo [No. 2]* to bolster the finding that the Indigenous peoples of Australia had systems of land use and ownership, dating from prior to the acquisition of British sovereignty, and amounting to communal native title.⁴³ The High Court also took the opportunity in *Mabo [No. 2]* to make strong statements rejecting Australia's history of devaluing Indigenous peoples and their culture:

... the doctrines of the common law which depend on the notion that native peoples may be "so low in the scale of social organization" that it is "idle to impute to such people some shadow of the rights known to our law" can hardly be retained. If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination.⁴⁴

Additionally, the finding of Blackburn J. that "the fundamental truth about the aboriginals' relationship to the land is that whatever else it is, it is a religious relationship"⁴⁵ added the force of law to Indigenous peoples' assertions of spiritual connection to Country. A recent statement by the High Court shows the present level of acceptance of this notion: "[a]s is now well recognised, the connection which Aboriginal peoples have with 'country' is essentially spiritual."⁴⁶ Although the plaintiffs in *Milirrpum* were unsuccessful in court, the case sparked a law reform process with impressive results. The Australian Federal Government initiated an inquiry into how Aboriginal land rights could be recognized in the Northern Territory⁴⁷—this ultimately led to the *Aboriginal Land Rights (Northern Territory) Act 1976 (ALRA)*.⁴⁸ Land rights grants under the *ALRA* are statutory titles taking the form of inalienable freehold vested in a Land Trust administered by Indigenous peoples. In 1993, the Full Federal Court of Australia held that grants of land under the *ALRA* do not extinguish native title rights and this is

43. *Mabo [No. 2]*, *supra* note 1 at 26, Brennan J.; at 145, per Toohey J. *Mabo [No 2]*, *supra* note 1 at 26, Brennan J. and at 183, Toohey J.

44. *Mabo [No. 2]*, *ibid.* at 41–42, Brennan J.

45. *Milirrpum*, *supra* note 30 at 167.

46. *Ward*, *supra* note 4 at para. 14, Gleeson CJ, Gaudron, Gummow and Hayne JJ. (Their Honours went on to cite with approval from *Milirrpum*, *supra* note 30).

47. As stated above, the Australian Federal Government has plenary power to make laws for the Territories: *Australian Constitution*, *supra* note 18, s. 122.

48. (Cth) (*ALRA*). This was followed by legislation in all other states and territories, although South Australia was the first Australian jurisdiction to enact legislation to transfer ownership of reserve lands to the Aboriginal people of the state in the *Aboriginal Lands Trust Act 1966*. For further discussion of the different land rights schemes, see Frith Way (with Simeon Beckett) "Governance Structures for Indigenous Australians on and off Native Title Lands: Discussion Paper 4—Land-Holding and Governance Structures under Australian Land Rights Legislation" (1998) Australian Legal Information Institute: Reconciliation and Social Justice Library (AustLII).

confirmed in the *NTA*.⁴⁹ The *ALRA* accords significant rights not available under the common law construction of native title, nor under the *NTA*.⁵⁰ Thus, despite the adverse decision and the apparent setback to the development of native title law, the *Milirrpum* case gave impetus to Aboriginal rights recognition in Australia, with the result that almost half of all land in the Northern Territory is now back in Aboriginal hands.⁵¹

The *Canadian Constitution* protects Aboriginal rights—Aboriginal title has been construed as one type of right.⁵² In Australia, it is only since the recognition of native title in its fullest form that there has been Australia-wide legal recognition of other types of Indigenous rights. Both Canada and Australia recognize the same spectrum of Indigenous rights: from full exclusive ownership (in the sense found in *Mabo* [No. 2])⁵³ at one end; to site-specific rights falling short of title in the middle; to non-site-specific rights at the other end.⁵⁴ The Australian tests for native title and Aboriginal rights are merged, and there is a confusing tendency to use the term “native title” to describe both the communal ownership of land (which is virtually the same as Canadian Aboriginal title), and discrete Indigenous rights and interests.⁵⁵

In Canada, claims for Aboriginal title are based on proof of occupation of land at the time British sovereignty was acquired over territory. There is a presumption that occupation constitutes possession and the onus is on the Crown to show abandonment. Aboriginal rights claims in Canada (that are separate from Aboriginal title) are assessed in much the same way that *all* native title claims are now assessed in Australia: a focus on the content of traditional laws and customs, coupled with a demonstration of substantial continuity since the acquisition of British sovereignty. The Australian classification of Aboriginal rights as forms of native title focuses judicial attention on the content of Aboriginal laws and customs with the result that the whole doctrine of native title is more vulnerable to such characterizations as “a bundle of rights” or “personal and usufructuary rights,” thus moving native title further away from full and equal proprietary status. What this means is that rather than simply having to prove that they have

49. *Pareroultja v. Tickner* (1993), 42 F.C.R. 32, 117 A.L.R. 206. Further, section 210 of the *NTA* states that, “[n]othing in this Act affects the rights or interests of any person under... (c) the *Aboriginal Land Rights (Northern Territory) Act 1976*.”

50. For instance, under the *ALRA*, indigenous landholders have a limited right to veto mineral exploration (see s. 40), and have a right to compensation for damage resulting from mining activities (see s. 44A). Levy, *supra* note 40 argues that the *ALRA* is in many ways superior to the *NTA*.

51. Austl., Commonwealth, Office of Aboriginal and Torres Strait Islander Affairs: Department of Immigration and Multicultural and Indigenous Affairs, *Land and Native Title Fact Sheet*, October 2003, online: <<http://www.atsia.gov.au/facts/pdf/land.pdf>>.

52. *Delgamuukw*, *supra* note 37 at para. 138.

53. *Supra* note 1 at 174–175 (“[T]he Meriam people are ... entitled as against the whole world to occupy, use and enjoy the Murray Islands”).

54. *Delgamuukw*, *supra* note 37 at paras. 137–140.

55. See Noel Pearson, “Land is Susceptible of Ownership” in Peter Cane ed., *Centenary Essays for High Court of Australia* (Sydney: LexisNexis Butterworths, 2004) 111 at 121.

occupied the land since before British settlement, claimants in Australia are now required to identify the individual rights and interests that make up their particular bundle of native title sticks. The problems arising from this approach are discussed in Part III below.

The 1997 case of *Delgamuukw*⁵⁶ drew together all the strands of the Canadian jurisprudence on Aboriginal title and remains the primary statement on the nature and content of Aboriginal title in Canada. Chief Justice Lamer provided a summary of the common law in the following terms:

Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. Those activities do not constitute the right *per se*; rather, they are parasitic on the underlying title. However, that range of uses is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's aboriginal title.⁵⁷

Aboriginal title in Canada is inalienable, although it may be ceded to the Crown. This is also the case with Australian native title, except where the traditional laws and customs of a particular community allow for a form of alienation.⁵⁸ Although a continuity of connection since sovereignty is required, as in *Mabo* [No. 2], this requirement has been interpreted as “substantial maintenance of the connection” not “an unbroken chain of continuity.”⁵⁹ This concession has the potential to do considerable justice for Aboriginal peoples who were forcibly removed from their land for some period or who were actively prevented from practising their customs and traditions by colonial and post-colonial governments. Unfortunately, in Australia there have been mixed results with regard to this aspect. In *Yorta Yorta*,⁶⁰ the High Court confirmed the primary judge's finding that the Yorta Yorta people's ancestors had ceased to acknowledge and observe their traditional laws and customs and that any present acknowledgment was mere “revival”:

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 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.⁶¹

56. *Supra* note 37.

57. *Ibid.* at para. 111.

58. See below Part III(B) for a discussion of this element in the context of the recent case of *De Rose v. State of South Australia*, [2003] FCAFC 286 [*De Rose*] (unreported).

59. *Delgamuukw*, *supra* note 37 at para. 153 (applying *Mabo* [No 2], *supra* note 1) [emphasis added].

60. *Supra* note 4.

61. *Members of the Yorta Yorta Aboriginal Community v. State of Victoria and Ors.*, (1999), 4 A.I.L.R. 91, (1998) F.C.A. 1606 at para. 129.

This finding was made despite the court's acceptance that the present Yorta Yorta people were descended from the original inhabitants of the area, and that they had continued to occupy the area since before the acquisition of British sovereignty.

The *Yorta Yorta* decision may be contrasted with the recent *De Rose Hill* case⁶² where the Full Federal Court overturned the primary judge's finding that the claimants had abandoned their connection to the land. The *De Rose Hill* claimants differed in significant ways from those in *Yorta Yorta*: the men were all initiated according to traditional practice; most of the Indigenous witnesses needed interpreters; they demonstrated traditional songs and dance at sacred places on Country; and, they applied traditional restrictions to the evidence they gave.⁶³ There was also a significant absence of written material specific to the claimants, in contrast to *Yorta Yorta* where historical accounts of the Yorta Yorta, written by white settlers, were available to the courts. Possible reasons for these divergent outcomes are discussed in Part III below.

Lamer C.J.C. took pains in *Delgamuukw* to emphasize the "inescapably economic aspect"⁶⁴ of Aboriginal title. His judgment attempted to strike the right balance between preserving Aboriginal title land for future generations without preventing much-needed economic development by Aboriginal peoples. He achieved this balance through his concept of the "inherent limitation" to prevent use of Aboriginal title lands in a manner that is fundamentally antithetical to their pre-sovereignty laws and customs. At the same time he stated that Aboriginal rights are not frozen in time. Unfortunately, effects flowing from Lamer C.J.C.'s reasoning include: the possible prevention of Aboriginal peoples deciding for themselves the appropriate uses of their traditional lands; the creation of practical difficulties in enforcing the inherent limitation; the prevention of much development of Aboriginal title lands;⁶⁵ and the consequent reduction in the commercial value of Aboriginal title lands.⁶⁶ As Professor McNeil has stated: "[i]t also fails to acknowledge that an Aboriginal nation might want to engage in land-based activities that, while in conflict with the uses they made of their lands at the time of Crown sovereignty, are culturally appropriate in the present-day."⁶⁷

62. *Supra* note 58.

63. John Basten, "Beyond *Yorta Yorta*" (2003) 2 Land, Rights, Laws: Issues of Native Title at 11.

64. *Supra* note 37 at para. 169.

65. Kent McNeil, "The Post-*Delgamuukw* Nature and Content of Aboriginal Title" in *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan Native Law Centre, 2001) 102 at 120 [McNeil "Post-*Delgamuukw*"].

66. William F. Flanagan, "Piercing the Veil of Real Property Law: *Delgamuukw v. British Columbia*" (1998-1999) 24 Queen's L.J. 279 at 313.

67. McNeil, "Post-*Delgamuukw*", *supra* note 65 at 118.

Although the inherent limitation has the noble aim of preserving Aboriginal lands for future generations, it has the effect of denying Aboriginal title-holders the right to do as they wish with their land subject to community standards imposed by legislation. This distinguishes them from all other title-holders. The limitation has two further effects: first, it denies security of tenure to Aboriginal title-holders by holding over them the possibility, however remote, that they will lose their land if they do something inconsistent with their traditional practices; and second, it begs the question of who would be entitled to bring an action declaring a breach of the limitation or preventing activities that might breach the limitation? Without fully defining the scope of the limitation, Lamer C.J.C. proposed that activities like strip mining would be unacceptable,⁶⁸ raising the possibility that "valuable resources on Aboriginal lands would be rendered unusable by anyone without destruction of the special Aboriginal relationship with the land that the inherent limit is supposed to protect."⁶⁹

In the future, unscrupulous parties may consider it worth their while to allege that Aboriginal peoples have breached the inherent limit on their title in order to gain access to valuable resources, or to add pressure to Aboriginal peoples in negotiations over land usage. A better approach would be to limit the relevance of traditional attachment to land to the initial determination of Aboriginal title, and to find that beyond that point, it is up to the title-holders to decide the uses of their land. This would also accord with the universal principles in which the concept of native title finds its source (discussed in Part III below). The environmental and heritage protection legislation that applies to all land-holders should be sufficient to protect sacred sites and to preserve land for future use.

Native title-holders in Australia are in the same position as their counterparts in Canada in that they also have the spectre of the removal of common law recognition of their native title rights hanging over them.⁷⁰ Although Canadian and Australian jurisprudence appear to be moving further apart, the issues of what use Aboriginal land can be put to, and how to recognize tradition without applying a "frozen in time" approach, demonstrate the value of learning from each country's experiences and developments.

III. Characterization of Native Title in Australia

ONE OF THE GREATEST DIFFICULTIES with the concept of native title is that it has been applied more than two hundred years after European colonization.

68. *Delgamuukw*, *supra* note 37 at para. 128.

69. McNeil, "Post-*Delgamuukw*", *supra* note 65 at 119-120.

70. The *NTA*, *supra* note 5, s. 13(5)(a) contains a procedure for the revocation of native title determinations on the ground "that events have taken place since the determination was made that have caused the determination no longer to be correct."

Native title is grounded in universal principles: namely, that the property rights of existing inhabitants should be fully respected and that there should be no discrimination between Indigenous peoples and new settlers.⁷¹ These principles are meant to apply from the moment sovereignty is acquired to limit dispossession and dissatisfaction among the Indigenous inhabitants of a new territory. However, those existing property rights should then be incorporated into the new system of law and, thus, have the same status as property rights granted by the new sovereign.

In finding that the doctrine of *terra nullius* never actually applied to Australia, the High Court attempted to apply the principle of “full respect”⁷² for Indigenous property rights retroactively; however, they could not bring themselves to allow the real consequences of taking such a step so long after it ought to have been taken. Baulking at the idea of a broad scale challenge to the legal basis of property ownership in Australia, they opted instead to shore up the titles that had been granted since the acquisition of sovereignty. Though stressing that native title is a property right, the High Court refused to extend to it the ordinary protection of just compensation for compulsory acquisition of property.⁷³ The status of native title as a property right is also undermined by its vulnerability to extinguishment by *any* inconsistent grant made since the acquisition of British sovereignty, whether legislative or executive. The High Court did find, however, that discriminatory extinguishment of native title occurring after the enactment of the *Racial Discrimination Act* 1975⁷⁴ will give rise to compensation.⁷⁵ The *NTA* accordingly contains a legislative scheme to determine compensation for discriminatory acts extinguishing native title since 1975.⁷⁶ This scheme, however, has been called “a cruel hoax”⁷⁷ because the vast majority of past acts result-

71. See *Amodu Tijani*, *supra* note 32; Richard Bartlett, “Humpies not Houses Or The denial of native title: A comparative assessment of Australia’s museum mentality” (2003) 10 *Austl. Prop. L.J.* 83 at 83 [Bartlett, “Humpies not Houses”]; Richard Bartlett, “An Obsession with Traditional Laws and Customs Creates Difficulty Establishing Native Title Claims in the South: *Yorta Yorta*” (2003) 31 *U.W.A.L.Rev.* 35 at 41; Alex Reilly, “From a Jurisprudence of Regret to a Regrettable Jurisprudence: Shaping Native Title from *Mabo* to *Ward*” *Murdoch U.E.J.L.* (2002) 9 online: *Murdoch University Electronic Journal of Law* <<http://murdoch.edu.au/elaw/issues/v9n4/reilly94nf.html>> at para. 2.
72. *Mabo* [No. 2], *supra* note 1 at 56 (citing with approval *Adeyinka Oyekan v. Musendiku Adele*, *supra* note 32 at 788).
73. *Mabo* [No. 2], *ibid.* at 15. A majority of 4:3 found that native title was not subject to the constitutional or common law protection against compulsory acquisition. Section 51(xxxi) of the *Australian Constitution* prevents the compulsory acquisition of property by the Federal Government on other than just terms. Property in this context has been given a broad meaning. See *Clunies-Ross v. Commonwealth* (1984), 155 C.L.R. 193 at 202, 55 A.L.J.R. 609 at 612 (H.C.A.). There is also a common law presumption against the removal of rights without compensation. See *Commonwealth v. Hazeldeh Ltd.* (1918), 25 C.L.R. 552 at 563 (H.C.A.) See also Kent McNeil, “Racial Discrimination and Unilateral Extinguishment of Native Title” in *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan Native Law Centre, 2001) 357 at 359–362.
74. (Cth.) [RDA].
75. *Mabo* [No. 2], *supra* note 1 at 53, 169.
76. *NTA*, *supra* note 5, Div. 5.
77. Bryan Keon-Cohen, “Indigenous Land Rights: Some things remain the same” (1999) 24 *Alt. L.J.* 121 at 124.

ing in extinguishment occurred well before 1975, and because there is no compensation where a native title claim fails because Indigenous peoples have lost their connection with the land,⁷⁸ even if the loss of connection was caused by the acts of non-Indigenous people or governments. Despite the dismissal of the concept of *terra nullius*, Australia's dispossession in law continues due to the patchwork of historical Crown grants spread across most of the country during the years following the acquisition of sovereignty.

The majority in *Mabo [No. 2]* found that native title is a burden on the Crown,⁷⁹ meaning that it exists only on Crown land, not on land that has been subject to an inconsistent grant of exclusive possession title.⁸⁰ In so doing, the High Court adopted the "pragmatic compromise"⁸¹ expounded in the American case, *Johnson v. McIntosh*.⁸² The judgment in *Johnson* was based less on principle and more on the practical nature of the political situation in the United States in the early 19th Century. Although it was recognized that the Indian nations were the rightful owners of the land, the US Supreme Court did not order that the land be returned to them. Marshall C.J. was unwilling to overturn the order established by the settler majority:

However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice....⁸³

Thus, colonial dispossession of Indigenous people may be contrary to "natural right" but we must accept that it has occurred and that its effects cannot now be reversed. As Peter Russell has stated, "[t]he greatest of American Chief Justices was not about to let his moral qualms deter him from ruling in the manner required by the government and society on which he was dependent."⁸⁴ But is this really the sort of pronouncement that courts *should* make? Is not pragmatism the realm of the legislature, whilst justice is the realm of the judiciary? Although it may seem a naïve assertion to say that courts should put to one side the practical realities, surely they should at least aspire to do so, else what faith can minorities hold in the rule of law? Perhaps there is strength to an argument that courts should not give impetus

78. *Ibid.*

79. *Mabo [No. 2]*, *supra* note 1 at 36, per Brennan J.; at 60–61, 78, 83, per Deane and Gaudron JJ. This term derived from decisions of the Privy Council, such as, *Amodu Tijani*, *supra* note 32 at 403.

80. In *Fejo*, *supra* note 10, the High Court found that an inconsistent grant of freehold always, and permanently, extinguishes native title, even if that land subsequently reverted to Crown land, and even if there was no practical inconsistency because the Aboriginal people stayed on the land continuously.

81. Richard Bartlett, *The Mabo Decision* (Sydney: Butterworths, 1993) at xi.

82. *Johnson*, *supra* note 32 at 18.

83. *Ibid.* at 591–92. Cited in Thomas Isaac, *Aboriginal Law: Cases, Materials, and Commentary* (Saskatoon: Purich, 1995) at 11.

84. Russell, *supra* note 27 at 250.

to parliament to overrule the common law,⁸⁵ but on the other hand, there is still considerable strength in the rulings of the superior courts in common law countries, and it is the court's role to ensure equality before the law for *all* citizens. In Australia a hysterical response followed *Mabo [No. 2]*, but today, Australians have grown used to the idea that Aboriginal land should be in Aboriginal hands and are perhaps ready to take a more just and less symbolic approach to Aboriginal rights to land. The recent narrowing of native title, both by the Parliament and by the courts, is a telling reason not to begin with a narrow approach when redressing historical injustice. Now may be the time for Australia to follow Canada and provide constitutional protection of Aboriginal rights or, at the least, to amend the *NTA* to provide greater certainty to native title holders.

A. THE BUNDLE OF RIGHTS ANALYSIS AND THE FOCUS ON THE CONTENT OF INDIGENOUS LAWS AND CUSTOMS

In the *Ward* decision, the High Court confirmed that the content of native title is governed by subsection 223(1)⁸⁶ of the *NTA*.⁸⁷ Although many have argued that the High Court is wrong in its insistence on the primacy of the *NTA* over the common law, and that the Court has betrayed the principles of *Mabo [No. 2]*,⁸⁸ John Basten has made the point that all the recent moves of the High Court have their roots in the *Mabo [No. 2]* decision itself.⁸⁹ The real truth may be that the *Mabo [No. 2]* decision was not as radical as it appeared at the time. It is, in many ways, a conservative and narrow decision particularly on the issues of compensation and extinguishment. Nevertheless, the narrowing scope of native title does owe much to the High Court's interpretation of the legislation, as it is the very particularization of rights and interests required by sections 223 and 225, coupled with the process of partial extinguishment⁹⁰ rather than mere suspension of conflicting native title rights, that has led to the application of the bundle of rights analysis and accordingly increased the burden on native title claimants.

The approach to native title, articulated in *Ward* and *Yorta Yorta*, emphasizes that the starting point must always be the legislation. According to the High Court, *NTA* calls for two separate but related inquiries to be undertaken in a determination of native title: first, the identification of the

85. One need only consider the U.S. Federal Government's response to Marshall C.J.'s decision in *Worcester v. Georgia*, *supra* note 32. See also Isaac, *supra* note 83 at 9, where the *Indian Removal Bill* was passed despite the Court's decision and the "trail of tears" resulted.

86. See *supra* note 4 and accompanying text.

87. *Ward*, *supra* note 4 at para. 16.

88. See generally Pearson, *supra* note 55; Reilly, *supra* note 71; Melissa Castan & Sue Kee, "The Jurisprudence of Denial" (2003) 28 *Alternative Law Journal* 83; Wayne Atkinson, "'Not One Iota' of Land Justice" (2001) 5:6 *Indigenous Law Bulletin* 19.

89. Basten, *supra* note 63.

90. *Ward*, *supra* note 4 at para. 76 where it was held that the *NTA* mandates a process of partial extinguishment where native title co-exists with other property interests.

rights and interests possessed under traditional law and custom (paragraph 223(1)(a)); and second, the identification of the connection with land or waters held by the claimants under traditional law and custom (paragraph 223(1)(b)).⁹¹ Paragraph 223(1)(c) further requires that the native title rights and interests be recognized by the common law, a provision that has been construed to mean that native title will not be recognized where it is “anti-*thetical to fundamental tenets of the common law.*”⁹² Section 225 requires that a determination must specify the nature and extent of native title rights and interests and any other rights and interests in the claim area. This enables the application of the “inconsistency of incidents” test⁹³ to decide the extent of extinguishment of native title. Only legal inconsistency extinguishes native title, not a mere factual inconsistency. The word “traditional”, in section 223, has been interpreted by the Court to import a strict requirement of continuity; native title claimants must show not only that they have continued to occupy the land since the acquisition of British sovereignty but also that they have continuously, as a society, acknowledged laws and observed customs that have remained substantially the same throughout that time.⁹⁴ This statutory inquiry leads to two problematic and unjust results: first, it encourages the determination of native title as a frozen list of activities (such as that recently found in *Daniel*⁹⁵) or as a bundle of rights that can be stripped away one by one; and second, it encourages non-Aboriginal judges to undertake a process of interpretation and application of Aboriginal law and custom for which they are not specifically trained (recently seen in the primary determination in the *De Rose Hill* case⁹⁶ discussed below in Part III(B)). According to some commentators, the finding that the source of native title lies in pre-existing laws and customs has the potential to encourage our presently mono-cultural legal system to become truly plural, granting Indigenous perspectives the same weight as European.⁹⁷ Others have stressed that the “continued interpretation of Indigenous law and Indigenous rights through the construct of White

91. *Ward, ibid.* at para. 18; *Yorta Yorta, supra* note 4 at paras. 33–34.

92. *Yorta Yorta, ibid.* at para. 77; see also *Ward, ibid.* at paras. 20–21. According to Noel Pearson, this subsection was simply intended to ensure that native title continued to develop under the common law, *supra* note 55 at 116–7.

93. This test was applied by the High Court in *Wik Peoples v. Queensland* (1996), 187 C.L.R. 1, 141 A.L.R. 129, to allow co-existence of native title rights with legal rights falling short of an exclusive possession grant. This is particularly applicable where pastoral leases have been granted under various statutes because the High Court held that many of these statutory leases did not confer exclusive possession, and therefore, did not completely extinguish native title. The test allows native title rights to continue where they do not conflict with legal rights.

94. *Yorta Yorta, supra* note 4 at paras. 46–47, 50–53.

95. *Daniel v. State of Western Australia* [2003] F.C.A. 666 para. 1163, [2003] WL 21513507 (F.C.A.) (WL) [*Daniel*].

96. *De Rose v. South Australia* [2002] F.C.A. 1342, [2002] WL 31430619 (F.C.A.) (WL). [*De Rose Hill* determination]. This case is discussed in detail in Part III(B) below.

97. See *e.g. Olthuis, supra* note 65. See also Peter Gray, “Do the Walls have ears? Indigenous Title and Courts in Australia” (2000) 28 Int’l J. Legal Info. 185.

assumptions is just a continuation of *terra nullius*, in another, more insidious form.”⁹⁸ The focus on the content of Aboriginal law and custom has the potential to result in serious misunderstanding and injustice, and puts judges in the invidious position of determining the “legitimacy” of Indigenous peoples’ laws and customs.⁹⁹ This is compounded for claimants in south-eastern Australia who must overcome the extra hurdle presented by the widespread cultural thesis that they have sadly lost their culture and traditions through the effects of colonization, and that any present apparently traditional society must be a “mere cultural revival or reinvention.”¹⁰⁰ The inevitable question for Indigenous people will be whether the intrusive examination into the legitimacy of their cultures is a fair trade-off for the (increasingly remote) possibility of a native title determination in their favour.

Native title exists at the intersection of two legal systems: the Western system imported from England and the pre-existing Indigenous systems. This view, stated by Lamer C.J.C. in *Delgamuukw*,¹⁰¹ was taken up by the Australian High Court in *Fejo*¹⁰² and confirmed in *Yorta Yorta*.¹⁰³ The point at which that intersection is relevant is the moment when British sovereignty was acquired.¹⁰⁴ In Australia, native title claimants must demonstrate that their society had a connection to the land at that moment, governed by its own system of laws, and that this society “has had a continuous existence and vitality since sovereignty.”¹⁰⁵ The High Court has held that a determination of native title requires that the claimants have continued to acknowledge and observe their unique system of laws, yet at the same time “no parallel law-making system” can exist in Australia as “[t]o hold otherwise would be to deny the acquisition of sovereignty.”¹⁰⁶ Without the continuing existence of such a legal system, claimants cannot be successful in a native title claim, thus the Court requires Indigenous peoples to acknowledge what it denies and to keep alive what it says cannot exist.¹⁰⁷ In Australia, despite Peter Gray’s assertions that *Mabo [No. 2]* “made this nation officially a legally pluralist one,”¹⁰⁸ in effect, the emphasis on pre-existing laws and customs has been to impose a higher burden of proof on Indigenous peoples claiming

98. Janet Ransley & Elena Marchetti, “The Hidden Whiteness of Australian Law: A Case Study” (2001) 10:1 Griffith L.R. 139 at 145.

99. Reilly, *supra* note 70 at para. 83.

100. David Ritter, “No Title Without History” in Mandy Paul & Geoffrey Gray, eds., *Through a Smoky Mirror: History and Native Title* (Canberra: Aboriginal Studies Press: Australian Institute of Aboriginal and Torres Strait Islander Studies, 2002) 81 at 86 [emphasis in original].

101. *Delgamuukw*, *supra* note 36 at para. 114.

102. *Fejo*, *supra* note 9 at para. 46.

103. *Yorta Yorta*, *supra* note 3 at para. 31.

104. *Yorta Yorta*, *supra* note 3 at paras. 31, 44.

105. *Ibid.* at para. 47.

106. *Ibid.* at para. 44.

107. Basten, *supra* note 62 at 5.

108. Gray, *supra* note 97 at 185.

native title. Indigenous law has been used to limit the content of Australian native title to pre-sovereignty practices (for instance, no native title right to minerals),¹⁰⁹ with the implication that Indigenous culture was incapable of “progress” without the effects of European contact:

While change and evolution are accepted and even welcome aspects of Western culture, Indigenous culture is somehow invalidated or obliterated by changing circumstances. At its extreme, this view holds the only valid form of Aboriginal culture to be one which existed prior to White occupation, and which remains unchanged.¹¹⁰

Although Toohey J. held in *Mabo* [No. 2] that an Aboriginal group cannot “surrender its rights by modifying its way of life,”¹¹¹ the particularization required by the current test for native title encourages an essentialist view of Indigenous culture. What constitutes “traditional” laws and customs becomes a subjective assessment for the primary judge to make.

The imposition of Western standards is demonstrated most plainly through the characterization of native title as a “bundle of rights” that must be recognizable to the common law.¹¹² Claimants are required to identify specifically each right or interest in the bundle of native title rights, and each right or interest in the bundle of non-native title rights existing over each piece of land claimed, to facilitate findings of the extent of extinguishment.¹¹³ In practice, the High Court’s approach increasingly requires judges to conduct an examination into the content of Aboriginal law. There is danger in this direction, as Professor McNeil has stated, in that “reliance on the substance of Aboriginal law to determine title would invite Canadian judges to interpret and apply that law, which could lead to unfortunate, culturally-destructive results.”¹¹⁴ This is exactly what is now occurring in determinations of native title in Australia. A possible solution could be to reform the *NTA* to use a multidisciplinary tribunal made up Indigenous elders, anthropologists, historians and lawyers to assess claims of native title.¹¹⁵ The Canadian approach to Aboriginal title has largely avoided this problem by stressing the paramountcy of the occupation requirement and by finding that occupancy gives rise to a presumption that there was a pre-existing system of laws governing the land and its uses.¹¹⁶ Nevertheless, it is an issue that arises with respect to determinations of Aboriginal rights.¹¹⁷ The communal

109. *Ward*, *supra* note 4 at para. 385.

110. *Ransley & Marchetti*, *supra* note 96 at 149.

111. *Supra* note 1 at 192.

112. *Ward*, *supra* note 4 at para. 95.

113. *Ibid.* at para. 29.

114. *Supra* note 64 at 108.

115. See John Borrows, “Listening for a Change: The Courts and Oral Tradition” (2001) 39 *Osgoode Hall L.J.* 1 at 31.

116. *Delgamuukw*, *supra* note 36 at para. 128, per Lamer C.J.C.; at para. 188, per La Forest J.

117. See e.g. *Mitchell v. Minister of National Revenue* [2001] 1 S.C.R. 911, 199 D.L.R. (4th) 385, 2001 SCC 33.

native title found in *Mabo* [No. 2] clearly did not rely on the content of the traditional laws and customs of the Meriam people as Moynihan J. of the Queensland Supreme Court found that there was no concept of communal title in the Murray Islands.¹¹⁸ Thus as Professor McNeil has stated, under the “full” Australian native title model (or under Canadian Aboriginal title):

[T]raditional laws and customs would apply internally to determine the nature of the rights and interests of members of the community *inter se*, which may or may not be proprietary, but would not operate externally to define or limit the community’s title as against the Crown or third parties.¹¹⁹

It was clear from *Mabo* [No. 2] that native title is a communal right that focuses on recognition of continuing connection to traditional homeland. The High Court has acknowledged that the statutory definition in section 223(1) of the *NTA* is “plainly” based on the judgment of Brennan J. in *Mabo* [No. 2],¹²⁰ yet they have determined to minimize the effect of that decision stating that its “only present relevance ... is for whatever light [it] cast[s] on the *NTA*.”¹²¹ According to Richard Bartlett, the effect of this present characterization of native title is that “[i]t entails a very literal reading of the *Native Title Act*, severed from its origins, context and purpose which renders proof of native title inappropriately difficult.”¹²² In stretching native title to cover less than exclusive possession rights, that is, by placing less emphasis on occupancy of the land¹²³ and greater emphasis on the content of traditional laws, the High Court risks native title as a whole and exposes it to the model whereby rights can be stripped away one-by-one.

The recent case of *Daniel v. Western Australia* starkly revealed the problems of the particularized approach to native title that courts will identify a list of “frozen rights”¹²⁴ to which the claimants are forever limited. In that case, Nicholson J. of the Federal Court found that the “first applicants camp from time to time and for that purpose build shelters (including boughsheds, mias (mayas) and humpies) and live there. I do not consider the evidence establishes the activity extends to building houses other than shelters.”¹²⁵

118. *Mabo* [No. 2], *supra* note 1 at 17, per Brennan J.; at 115, per Deane and Gaudron JJ.; at 156, per Dawson J.

119. Kent McNeil, “The Relevance of Traditional Laws and Customs to the Existence and Content of Native Title at Common Law” in *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan Native Law Centre, 2001) 416 at 420; Pearson, *supra* note 55 at 119, has recently made a similar point.

120. *Ward*, *supra* note 4 at para. 16.

121. *Ibid.* at para. 25.

122. Bartlett, “Humpies not Houses”, *supra* note 71 at 90.

123. In *Ward*, *supra* note 4 at para. 63, the majority judgment stated: ‘Western Australia maintained a generally similar submission in this Court—that proof of continued use of land or waters was essential to establishment of connection with that land or those waters. That submission should be rejected.’

124. See Bartlett’s discussion of *Daniel*, *supra* note 95, in “Humpies not Houses”, *supra* note 71 at 96–97.

125. *Daniel*, *supra* note 95 at para. 260.

Such a finding is an inherent danger of a native title scheme that demands the specific identification of native title rights and interests and that each be shown to be "traditional." The determination in *Daniel* took the form of a precise list of rights and activities that may be undertaken,¹²⁶ ensuring that there can be little development or evolution of the claimants' society without the risk of loss of common law recognition of their native title. An ever-narrowing focus on discrete rights does nothing to create real land justice, and one could be forgiven for thinking that the increasing cost and length of native title litigation, with the corresponding burden of proof and decreasing likelihood of a finding of "full ownership" of Country, is a good way of keeping Indigenous people distracted from alternative political measures.

B. THE DE ROSE HILL CASE

In late 2003, the Full Federal Court handed down its decision in *De Rose v. South Australia*.¹²⁷ This was a successful challenge to the first completed determination of native title in South Australia, wherein the primary judge, O'Loughlin J., found that the claimants (members of the Western Desert Bloc of Aboriginal peoples) had no native title rights due to a loss of connection with their Country.¹²⁸ The claim was for land incorporating the De Rose Hill pastoral lease-holdings.¹²⁹ The case demonstrates both the strengths and the weaknesses of the focus on the content of Aboriginal law and custom that has been held to be required by sections 223 and 225 of the *NTA*. It was accepted between the parties that the claimants' biological ancestors had *not* themselves occupied the land around De Rose Hill since before sovereignty was acquired over South Australia in 1834, but that other Aboriginal people of the Western Desert had, and the claimants had acquired their native title through traditional processes. Population shifts are common in the Western Desert and the traditional laws of Western Desert Bloc society allow for the transmission and acquisition of traditional ownership. This, in itself, shows the potential of a definition of native title that requires a focus on the content of Indigenous laws and customs. Without the demonstration (and acceptance by the court), of traditional laws and customs allowing for the transmission of rights and interests in land, the claim in *De Rose Hill* would have failed at the first hurdle. However, the case also demonstrates the potential for error and omission in the court's interpretation and application of Indigenous law, in this instance, as to what

126. *Ibid.* at para. 1163.

127. *De Rose Hill* (FC), *supra* note 96.

128. *Ibid.*

129. All of the pastoral leases contained reservations in favour of Aboriginal people, which were replaced with statutory rights under the *Pastoral Land Management and Conservation Act 1989* (S.A.) [*Pastoral Act 1989*]. Section 47(1) provides that "an Aborigine may enter, travel across or stay on pastoral land for the purpose of following the traditional pursuits of the Aboriginal people." The terms "Aborigine" and "Aboriginal people" are both defined within the Act.

constitutes a connection with the land sufficient for section 223(1)(b) of the *NTA*. The question is whether the benefit of a positive finding in a case such as this outweighs the increased burden of proof placed on present and future native title claimants.

The claimants in *De Rose Hill* sought a determination of native title for themselves and on behalf of anyone who was acknowledged to be *Nguraritja* for the land in the claim area. The primary judge found that the traditional laws and customs of the Western Desert Bloc allowed four ways of becoming a *Nguraritja*, a term that was defined to mean a traditional owner or custodian,¹³⁰ for parts of the claim area. These four ways were:

that a claimant had been born of the claim area; that the claimant had a long-term physical association with the claim area; that his or her ancestors had been born on the claim area; or that the claimants had a geographical and religious knowledge of the claim area. To these must then be added the additional requirement that the claimant is recognised as *Nguraritja* for the claim area by the other *Nguraritja*.¹³¹

In making this finding the judge accepted the claimants' oral history evidence over that of contemporaneous anthropological evidence on the Western Desert Bloc. This was made possible by the lack of anthropological or ethnographic work (or written evidence of any sort) conducted in the *De Rose Hill* area specifically. O'Loughlin J. found that, in the absence of specific contradictory evidence, the differences between the claimants' definition of *Nguraritja*, and that of the anthropologists,' could be taken "either as an example of evolutionary traditional law, or as an example of a sub-culture that was at variance with the culture or sub-culture that Professor Berndt examined."¹³² O'Loughlin J. made the following statement about the weight to be given to the oral traditions of the claimants:

I am of the view that, having regard to the nature of evidence that is prevalent in native title cases (being only oral histories of cultures supplemented to a very limited degree by occasional rock art and artefacts) I would be entitled to draw the necessary inferences in favour of the claimants, provided there was a proper foundation for me to do so.¹³³

In this way, the case differed from *Yorta Yorta* (where there was specific evidence from a squatter named Edward Curr who had lived in the area), and avoided many of the problems associated with the use of oral history in Australian courts (discussed in Part IV below). Most of the claimants in *De Rose Hill* were found to be *Nguraritja* for specific sites or dreaming tracks by one of the means described above. However, having found that traditional law established their role as traditional owners of the claim area, O'Loughlin

130. *De Rose Hill* (FC), *supra* note 96 at para. 37.

131. *Ibid.* at para. 562.

132. *Ibid.* at para. 102.

133. *Ibid.* at para. 570.

J. proceeded to determine that they had not fulfilled their duties as *Nguraritja*, and therefore, that they had lost their connection to the land in around 1978, when the Aboriginal people stopped living at De Rose Hill Station.

There were a number of ways that O'Loughlin J. erred in his approach to the *De Rose Hill* native title claim, many of which have been resolved in the Full Court appeal, but the case remains an example of the dangers of asking non-Aboriginal judges to interpret and apply Aboriginal law. Firstly, though the claimants sought communal native title rights, the primary judge assessed each claimant separately to determine whether, as individuals, they were *Nguraritja* for the claim area (thus having a connection with the land) and whether they had abandoned that connection. Secondly, O'Loughlin J.'s determination of whether each individual had lost his or her connection with the land focused on their physical absence from the claim area and their failure, in his opinion, to perform their duties as *Nguraritja*. Further, he emphasized the lack of a "social, communal or political organisation on or near the claim area."¹³⁴ O'Loughlin J. stated that "[t]he evidence in this case did not reveal anything like the cohesive society which Blackburn J described in *Milirrpum v. Nabalco*."¹³⁵ Although he then stated that the *Milirrpum* finding did not constitute a standard, merely a "working example,"¹³⁶ the very comparison reveals the danger of the *Milirrpum* model becoming an oppressive benchmark for diverse Indigenous cultures and communities across Australia. O'Loughlin J.'s assertion that he did not consider *Milirrpum* as a yardstick, is further called into question by his strict separation between what constituted "Aboriginal concerns" and what he considered "Western concerns":

It must be acknowledged that Tjutatja had a reasonably long association with the claim area even though he had been born elsewhere. However, like so many other witnesses, he left De Rose Hill, not in accordance with or because of Aboriginal culture but because of Western culture... Non-Aboriginal factors such as work and wages and his daughter's education, rather than Aboriginal law or customs, dictated his life and his lifestyle.¹³⁷

...

"These trips centred around hunting for dingoes as a bounty was paid on dingo scalps ... That did not immediately impress me as a matter of Aboriginal culture: it smacked more of western capitalism."¹³⁸

...

134. *Ibid.* at para. 901.

135. *Ibid.* at para. 912.

136. *Ibid.*

137. *Ibid.* at para. 681.

138. *Ibid.* at para. 167.

Hence, there is always the possibility that usage of a supermarket might be one of several indicia, which, when added together, might lead to the conclusion that such developments could be part of a number of instances of “modernization” that would, collectively, indicate a break with traditional laws and customs.¹³⁹

...

The disconcerting feature about Owen and his relationship to De Rose Hill—indeed his relationship to pastoral stations in general—was that it was highly orientated to European work practices and wages. More than once, he proudly told of his habit of depositing his money in the bank.¹⁴⁰

...

The fact of the matter was that it was the work and wages that brought the *Anangu* into contact with Doug—not their traditional laws and customs—and when they fell out with Doug, it was work and wages which caused them to leave the Station and to look for alternative work. Their attachment to their land was not sufficient to hold them.¹⁴¹

The propensity to characterize work, education and wages as Western, and therefore not Aboriginal, has two disturbing connotations. First, it demonstrates a “frozen in time” approach to the definition of “traditional” Indigenous society where any adaptation to the impacts of colonization is seen as reducing the “Aboriginality” of Indigenous people.¹⁴² Second, it suggests that work and education are exclusively Western concerns conjuring up images of “the Lazy Native.”¹⁴³ The findings of O’Loughlin J. also demonstrate a fundamental lack of understanding of the hardships of life in the Western Desert.¹⁴⁴ Although he found that population shifts were part of “the history and social structure of the Aboriginal people

139. *Ibid.* at para. 500. This was preceded by O’Loughlin J.’s approval of the decision of the majority in *Members of the Yorta Yorta Aboriginal Community v. Victoria* (2001) 180 A.L.R. 655 [Yorta Yorta (FC)] where the Full Federal Court stated that use of supermarkets would not demonstrate a loss of traditional connection. See generally *De Rose Hill* determination, *supra* note 96 at paras. 498–500.

140. *Ibid.* at para. 760. Owen had been head stockman at De Rose Hill Station for many years and clearly demonstrated significant knowledge of Aboriginal law and custom, as well as being considered an important figure by other claimants.

141. *Ibid.* at para. 794.

142. Steve Hemming, “Taming the Colonial Archive: History, Native Title and Colonialism” in Mandy Paul & Geoffrey Gray, eds., *Through a Smoky Mirror: History and Native Title* (Canberra: Aboriginal Studies Press: Australian Institute of Aboriginal and Torres Strait Islander Studies, 2002) 49 at 61–62. See also Ritter, *supra* note 98 at 90: “Historians, as expert witnesses, can present a counter-narrative which exposes the culture loss thesis as an argument little more sophisticated than ‘Aboriginal people ... cease to be Aboriginal by eating pizza.’”

143. Deborah Bird Rose, “Reflections on the Use of Historical Evidence in the Yorta Yorta Case” in Mandy Paul & Geoffrey Gray, eds., *Through a Smoky Mirror: History and Native Title* (Canberra: Aboriginal Studies Press: Australian Institute of Aboriginal and Torres Strait Islander Studies, 2002) 35 at 40.

144. See Dr. Peter Veth, “Abandonment” or Maintenance of Country? A Critical Examination of Mobility Patterns and Implications for Native Title’ (2003) 2 *Land, Rights, Laws: Issues of Native Title* Issues paper No. 22.

of the Western Desert Bloc,”¹⁴⁵ and therefore, were no barrier to a finding of native title, he then seemed to consider those movements non-traditional once there was any contact with European settlers. It was accepted that the “‘economic realities’ of life in a harsh environment,”¹⁴⁶ forced people to move to find food and water, and that these movements pre-dated the acquisition of British sovereignty, yet the primary judge seemed to imply that once the people had found a secure source of food they should ignore it in favour of what was, by his standard, their “traditional” practices. Steve Hemming stated that “[t]he power of western discourses to authorise acceptable national definitions of ‘Aborigines’ continues to be particularly devastating for Indigenous people in south-eastern Australia.”¹⁴⁷ In his dissenting judgment in *Yorta Yorta* (Full Court), Black C.J. warned that courts must exercise caution because of:

the irreversible consequences for indigenous people of a finding that, long ago, their ancestors ceased to acknowledge traditional laws and observe traditional customs, so that the foundation for any native title rights and interests of their ancestors vanished in those earlier times.¹⁴⁸

In the Australian native title process as it currently stands, respondents are encouraged to try to prove that claimants have lost their culture at some point in time, and thus, their connection to land, often in the face of significant evidence of present connection and present unique cultural forms.¹⁴⁹ In order for Australia to move forward as a nation, it must be accepted that history is neither a neutral force nor a “tide.”¹⁵⁰ The dispossession of Indigenous people and the disregard for their rights has been an active choice since settlement, and active steps must be taken to rectify the situation.

On appeal, the Full Court of the Federal Court found in *De Rose Hill* that the primary judge had asked the wrong question. He focused on whether the claimants had abandoned their connection to the land, rather than on whether, by the laws and customs of the Western Desert Bloc, they have maintained a connection with the land.¹⁵¹ They found that O’Loughlin J. focused unduly on the claimants’ absence from De Rose Hill Station for a period of time, and that he imported his own standard as to whether they were justified in leaving the Station:

145. *De Rose Hill* determination, *supra* note 96 at para. 372.

146. *De Rose Hill* (FC), *supra* note 61 at para. 245.

147. Hemming, *supra* note 140 at 52.

148. *Yorta Yorta* (FC), *supra* note 139 at para. 63.

149. *Yorta Yorta*, *supra* note 4 at para. 87.

150. Ritter, *supra* note 98 at 83.

151. *De Rose Hill* (FC), *supra* note 61 at paras. 74–75, 237, 309–310.

He was very much influenced by his own assessment of whether the appellants had a reasonable excuse for their failure (as his Honour saw it) to do more to perform the obligations imposed or exercise the rights conferred by traditional laws and customs. In other words, his Honour appears to have applied a standard that was not sourced in the traditional laws and customs of the Western Desert Bloc, but was rather a construct of his own.¹⁵²

Again, the failings of the present definition of native title are demonstrated. In requiring the primary judge to interpret Indigenous law, our system runs the risk of misinterpretation, misapplication or, as in this case, an incomplete application that leads the judge to “fill in the blanks” as he or she sees fit. The Full Court found that the judge should have asked the further question of what the laws and customs of the Western Desert Bloc say about absence from sacred sites and, in particular, whether they dictate that a dereliction of duties leads to loss of *Nguraritja* status.¹⁵³ Dr. Peter Veth has described the patterns of mobility among the Indigenous people of the Western Desert and their ability to maintain a connection to territory that “is enormous by world standards.”¹⁵⁴ Western Desert people are able to actively maintain Country even when physically absent “through dream spirit travel and holding objects that symbolise and embody country.”¹⁵⁵ The Full Court in *De Rose Hill* was of the opinion that the site-specific nature of the rights and responsibilities of the *Nguraritja* indicated a connection clearly. They stated that “[i]t is difficult to conceive of a construction of the word ‘connection’ that would not be satisfied in these circumstances.”¹⁵⁶ Despite the positive findings of the Full Court, the claim has not been finally determined, and the claimants must further “[open] their knowledge up for invasive scrutiny as a necessary precursor to protecting their knowledge.”¹⁵⁷ There will likely be a positive determination of native title at De Rose Hill Station, but the case reveals the risks of a system requiring examination of Indigenous law within a legal system that has not been designed for this purpose.

iv. Evidential Difficulties

IN AUSTRALIA, the tests for Indigenous rights and Indigenous title are conflated with the result that the full burden of proving the nature of native title rights (sourced from traditional laws and customs) is always on claimants. There is no presumption, as there is in Canada, that if the people are occupying the land, the burden is on the Crown to prove abandonment of native

152. *Ibid.* at para. 312.

153. *Ibid.* at paras. 313–315.

154. Veth, *supra* note 144 at 6.

155. *Ibid.*

156. *De Rose Hill* (FC), *supra* note 61 at para. 305.

157. Deborah Bird Rose, “Whose Confidentiality? Whose Intellectual Property?” in Gray, *supra* note 97 at 192.

title.¹⁵⁸ This is compounded by the 1998, amendments to the *NTA* which made the Federal Court bound by the rules of evidence in native title proceedings.¹⁵⁹ The High Court has acknowledged the “difficult problems of proof”¹⁶⁰ facing Indigenous people attempting to prove native title; however, the Court has not taken the opportunity to set guidelines for lower courts as to how they should approach oral history evidence and the challenges peculiar to Indigenous witnesses in a non-Indigenous legal system.¹⁶¹ This alone is a major failing in the *Yorta Yorta* decision and one that will, no doubt, lead to further injustice. In terms of reducing the cost and length of litigation, not to mention the reconciliation value, the High Court can achieve much justice by setting some clear guidelines to aid primary judges in native title determinations. The location of native title, at the intersection of two very different legal systems, presents an opportunity to create a modern evidentiary process that grants Indigenous and non-Indigenous perspectives the same weight. Furthermore, the recognition of forms of land ownership that pre-exist the white settlement of Australia and the associated recognition of a different legal system, could have been a basis for continuing Indigenous sovereignty in Australia. That was the promise presented by the recognition of common law native title in Australia, but it is not what has eventuated. Instead, the present characterisation of native title as a bundle of rights “is wholly inconsistent with the perspective of indigenous Australians.”¹⁶²

Whilst many judges are willing to apply the rules of evidence in a manner which is not didactic, and there has been much learnt from the work of the Land Rights Commissions in the Northern Territory,¹⁶³ there remains a lack of consistency between different judges. Under section 82 of the *NTA*, though bound by the rules of evidence, it is in the discretion of the court whether they take into account “the cultural and customary concerns” of claimants, so long as there is no undue prejudice to other parties. Where

158. Bartlett, “*Humpies not Houses*,” *supra* note 71 at 91.

159. Section 82 as amended by the *Native Title Amendment Act 1998* (Cth). When first enacted, the *NTA* provided that the court *must* take account of the cultural and customary concerns of Indigenous people and was not bound by technicalities, legal forms or the rules of evidence. Although courts are still able to take account of the Indigenous perspective, it is now purely discretionary.

160. *Yorta Yorta*, *supra* note 4 at para. 80.

161. Compare note 36; *R v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 [*Van der Peet* cited to S.C.R.]. At present, the Canadian Supreme Court has provided indications of the appropriate way to incorporate Aboriginal perspectives into the process of litigation but the law is still developing in this area. See Russell Binch, “Speaking for themselves’ Historical Determinism and Cultural Relativity in *Sui Generis* Aboriginal and Treaty Rights Litigation” (2002) 13 N.J.C.L. 245.

162. Katy Barnett, “*Western Australia v. Ward* One Step Forward and Two Steps Back: Native Title and the Bundle of Rights Analysis” (2000) 24 Melbourne U.L. Rev. 462 at 475.

163. This was the scheme administering the ALRA system of land rights grants. See Gray, *supra* note 97. But see Olney J’s comments in *Yamirr v Northern Territory of Australia* (1997), 74 F.C.R. 99 at 103, 143 A.L.R. 687 at 691, [1997] 274 FCA (15 April 1997) [*Yamirr* cited to A.L.R.]: “the present proceeding is different in character from the type of administrative inquiry required to be made under the *Land Rights Act* and I do not find the established practices of the Aboriginal Land Commissioners to be of much relevance here.”

judges are assessing events that took place long ago, much depends on to which historiographical tradition they subscribe.¹⁶⁴ Oral history evidence is routinely admitted in native title litigation under exceptions to hearsay, yet the weight it is given varies widely. As was discussed above in Part III(B), an absence of contradictory written evidence may allow courts to make an inference for the claimants, but where there is any specific written material it will, generally, be given greater weight. The appearance of Indigenous witnesses in court also represents a significant culture clash with the result that native title claims often falter on issues of credibility.

A. ORAL HISTORIES—IS THERE AN UNFAIR PREFERENCE FOR THE WRITTEN WORD?

A major significance of the Canadian *Delgamuukw* decision was in the direction provided by the Supreme Court for the use of oral histories as evidence in Aboriginal rights cases. Lamer CJC stressed that courts must rise to the challenge, and:

should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standard that would be applied in, for example, a private law torts case.¹⁶⁵

This statement followed from earlier assertions in Aboriginal rights cases. In *Simon*, the Supreme Court stated that a failure to give due weight to oral histories would “impose an impossible burden of proof” on Aboriginal peoples, and “render nugatory” any rights they have.¹⁶⁶ By contrast, the Australian High Court in *Yorta Yorta* said that:

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.¹⁶⁷

Thus, the Court failed to set any guidelines to assist lower courts in assessing Indigenous evidence and sidestepped the challenge to create a more just system. The process in Canada of including Aboriginal perspec-

164. See Ritter's comparison of Justice Lee in *Ward* and Justice Olney in *Yorta Yorta* as historians, *supra* note 98 at 86–90. For a Canadian perspective, see Joel Fortune, “Construing *Delgamuukw*: Legal Arguments, Historical Argumentation, and the Philosophy of History” (1993) 51 U.T. Fac. L. Rev. 80 at 83 where he describes McEachern C.J.'s *Delgamuukw* decision, “Ultimately, the Chief Justice's own historical viewpoint determined the legal issue.”

165. *Delgamuukw*, *supra* note 36 at para. 80, citing Lamer C.J.C.'s judgment in *Van der Peet*, *supra* note 161 at para. 68.

166. *Simon v. The Queen*, [1985] 2 SCR 387 at 408, 24 D.L.R. (4th) 390 at 407 [*Simon* cited to S.C.R.].

167. *Yorta Yorta*, *supra* note 4 at para. 80.

tives is far from over, but there is much to be said for the power of judicial pronouncements to set the process of law reform in motion.

In *Yorta Yorta* the High Court affirmed that written evidence is not “inherently better or more reliable than oral testimony on the same subject” and said that Olney J. (the primary judge in the *Yorta Yorta* determination) did not proceed from this “impermissible premise.”¹⁶⁸ Alone, this would suggest that the High Court may be approaching a more inclusive view; yet this firm statement was immediately preceded by their Honours acceptance of Olney J.’s approach:

[T]he 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:

“[t]he oral testimony of the witnesses from the claimant group is a further source of evidence *but being based upon oral traditional* [sic] passed down through many generations extending over a period in excess of two hundred years, *less weight should be accorded to it* that to the information recorded by Curr.”¹⁶⁹

There is nothing plainer from this passage than the fact that the *Yorta Yorta* people’s own descriptions of their traditional laws and customs is considered less reliable than the written words of a white squatter made at one fixed point in the history of the claim area. Whilst the common law is a product of a literate culture—it would be disingenuous to deny that—oral histories may still be used to test the veracity of written histories.¹⁷⁰ There ought not to be a general presumption that the written word is always more objective and reliable than the oral.¹⁷¹ However, the prevailing view has been that oral traditions are “liable to corruption as a result of self-interest, pride, misunderstanding or mere forgetfulness of any narrator or listener.”¹⁷² Written works, particularly if they were made by a disinterested party before the litigation was contemplated, are presumed to be reliable and accurate. The result is an inherent prejudice in Western legal systems that sets the written word above the oral word, with a consequent increase in the burden on native title claimants.

B. INDIGENOUS WITNESSES

Australia’s legal system can, and should, provide for better treatment of Indigenous witnesses and their evidence, yet there are still significant cul-

168. *Ibid.* at para. 63.

169. *Ibid.* at para. 62 (emphasis added).

170. John Litchfield, ‘Mabo and Yorta Yorta: Two approaches to history and some implications for the mediation of native title issues’ (2001) *National Native Title Tribunal Occasional Papers Series* No. 3/2001, at 14. See also Borrows, *supra* note 115.

171. Litchfield, *ibid.* at 14.

172. *Nomgui v. Administration of the Territory of Papua New Guinea*, [1974] P.N.G.L.R. 349 (S.C.), Clarkson J., cited in Litchfield, *supra* note 170 at 13.

tural differences that lead to Indigenous people being misunderstood or their evidence being disregarded. Many of the expectations placed on witnesses in court are culturally alien to Indigenous people. For instance, many Indigenous people do not speak English or speak it as a second language only. As Jo-Anne Byrne has stated: “[t]o speak other than the language of the dominant culture is, in itself, inherently disadvantageous.”¹⁷³ Where Indigenous people do speak English there are two further problems. Firstly, there are crucial differences between Aboriginal English and “standard” Australian English “which can create serious misunderstandings which are all the more difficult to detect because of the illusion of commonality which a largely shared vocabulary provides.”¹⁷⁴ Secondly, Indigenous people have a propensity to answer “yes” to direct questions as it is “considered shameful to give a direct negative in answer to a direct request.”¹⁷⁵ There is often a different concept of time among Indigenous people that leads them to answer equivocally or to place events by reference to the birth of a child or other significant event. Furthermore, complex traditional laws restricting the transmission of Indigenous cultural knowledge are very important. As Peter Gray has stated, “the answer ‘I don’t know’ serves as a useful device to prevent shame, embarrassment or explanation.”¹⁷⁶ If that answer is accepted at face value, considerable injustice may, and often does, result. On the other hand, witnesses who speak “standard” English very well, and who have had a “Western” education, face an alternative prejudice, the insinuation that they are not “real Aborigines.”¹⁷⁷ This was evident in O’Loughlin J.’s finding in *De Rose Hill*:

Sadie Singer, who was named as one of the applicants, is, in many respects, different from the other Aboriginal claimants. Although well versed in Aboriginal culture, she has had a long and continuing exposure to a western lifestyle. She is quite fluent in English and, limiting my observations to the witnesses in this case, she had the rare ability to appreciate both Aboriginal and European concepts. That, unfortunately, did not mean that she was thereby an impressive witness; in some respects I found her evidence difficult to accept. In particular, I seriously doubt that she has any affinity with *De Rose Hill*. In my opinion, she joined in this native title claim, not because she believed that she holds communal, group or individual rights and interests in and over the claim area, but because she believes that her participation in the case would somehow advance the cause of other Aboriginal people.¹⁷⁸

173. Jo-Anne Byrne, “Indigenous Witnesses and the *Native Title Act 1993* (Cth)” (2003) *National Native Title Tribunal Occasional Papers Series No 2/2003* at 3.

174. *Ibid.* at 4.

175. Gray, *supra* note 97 at 206.

176. *Ibid.* at 207.

177. Hemming, *supra* note 142 at 52.

178. *De Rose Hill* determination, *supra* note 96 at para. 860.

Though Sadie was “well-versed in Aboriginal culture” this was not enough to overcome the taint of Western influence. As Steve Hemming has stated:

There is a double-bind for Indigenous people in south-eastern Australia. If, in the context of native title cases, they present knowledge that appears to be too ‘traditional’, too much like the Northern Territory land rights model, then they run the risk of being accused of fabricating tradition.¹⁷⁹

The obligation to prove the authenticity of their Aboriginality (discussed above in Part III(B)), adds unfairly to the burden of proof on Indigenous people in court proceedings and does much to increase their dissatisfaction with the litigation process.

Under Indigenous law and custom, knowledge is inherently valuable and is subject to many restrictions. This is a source of significant cultural conflict between the Western and Indigenous legal systems. The former emphasises openness and requires all the relevant evidence to be placed before the court for assessment by the fact-finder; the latter emphasizes secrecy and maintains strict rules about who may speak, where they can speak, when they can speak and who may listen.¹⁸⁰ The very word “secret” carries a sinister connotation in Western culture, and if Aboriginal people resist or defer the revelation of important cultural knowledge during court proceedings, “[t]he delay in releasing the information may then give rise to suspicion on the part of the non-Aboriginal participants that what is being revealed is recent invention.”¹⁸¹ And yet, Aboriginal people risk serious consequences under their own laws if they reveal restricted knowledge to the wrong person or at the wrong time. Jo-Anne Byrne has called this the “hidden cost of recognition:” “[h]aving decided to ‘pay the price’, Indigenous people must then give evidence in a system which struggles to understand and come to terms with the practical consequences of that decision for both traditions.”¹⁸² The very act of presenting their cultural knowledge for judicial assessment can have significant consequences for Indigenous people. In the Canadian context, John Borrows has said that:

179. Hemming, *supra* note 142 at 57.

180. Gray, *supra* note 97 at 190.

181. *Ibid.* at 192.

182. Byrne, *supra* note 173 at 3.

To directly challenge or question elders about what they know about the world, and how they know it, strains the legal and constitutional structure of many Aboriginal communities. To treat elders in this way can be a substantial breach of one of the central protocols within many Aboriginal nations, somewhat akin to asking judges to comment on their decision after it is written. To subject elders to intensive questioning can come across as ignorance and contempt for the knowledge they have preserved, and a disrespect and disdain for the structures of the culture that they represent. Yet such behaviour is currently mandated by the Canadian legal system, and reveals the problems Aboriginal elders encounter in placing their traditions before the courts.¹⁸³

These observations apply equally to Australia and demonstrate the need for reform of the native title process. If Indigenous people have to go through a culturally damaging process where the authenticity of their culture is constantly on trial, they may well decide that it is not worth it. Such a result would benefit nobody.

v. Conclusion

MUCH HAS OCCURRED in the developing field of native title law in Australia during the past twelve years. Not all of it, however, has been good news for Indigenous peoples. In many ways, the great promise of *Mabo* has not resulted in substantial gains, either economically or politically. Australia is a country that has few constitutionally protected rights and freedoms, and one of those—the protection against compulsory acquisition of property other than on just terms—has been held not to apply to native title. “Full respect” for native title was never accorded, not even by the High Court, which endorsed the principle. The symbolic importance of the recognition of prior Indigenous ownership of Australia should not be overlooked but the jurisprudence of native title must be assessed by its success in redressing the historical wrongs caused by colonisation. The present focus on the content of Indigenous laws and customs, together with the restrictive application of the term “traditional” makes it unlikely that Indigenous peoples, who have had sustained contact with white settlers since the acquisition of British sovereignty, will be successful in claims for native title. Even, as in the *De Rose Hill* case, where Indigenous people maintain their language, their knowledge and their traditional practices, a restrictive application of what constitutes “authentic” Aboriginality reveals the inherent prejudice in our legal system.

Fundamentally, native title ought to be about land justice, and about recognizing and protecting the ownership by Indigenous peoples of their traditional homelands. This broader theme was understood and taken up by judges, such as, Deane and Gaudron J.J. in *Mabo* [No. 2]:

183. *Borrows*, *supra* note 115 at 33.

As has been seen, the two propositions in question [that Australia was *terra nullius* and that full legal and beneficial ownership vested in the Crown on settlement] provided the legal basis for the dispossession of the Aboriginal peoples of most of their traditional lands. The acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices.¹⁸⁴

The recent decisions of the High Court represent not so much a retreat from *Mabo* [No. 2] as getting bogged down in the details of an unwieldy, and in some ways, ill-conceived legislative scheme. What is needed now is a progressive vision able to take the lessons of the land rights and native title schemes and develop a new method of delivering land justice to Australia's Indigenous peoples. McHugh J. made this point in concluding his judgment in *Ward*:

The dispossession of the Aboriginal peoples from their lands was a great wrong. Many people believe that those of us who are the beneficiaries of that wrong have a moral responsibility to redress it to the extent that it can be redressed. But it is becoming increasingly clear—to me, at all events—that redress cannot be achieved by a system that depends on evaluating the competing legal rights of landholders and native-title holders. The deck is stacked against the native-title holders whose fragile rights must give way to the superior right of the landholders whenever the two classes of rights conflict. And it is a system that is costly and time-consuming.... It may be that the time has come to think of abandoning the present system, a system that simply seeks to declare and enforce the legal rights of the parties, irrespective of their merits.¹⁸⁵

The specific form of a new legislative or constitutional system of protecting Aboriginal rights in Australia is beyond the scope of this article, but there are some reforms that could quickly relieve the burden on native title claimants. It is within the High Court's power to provide direction to lower courts on the use of oral history evidence in native title cases. The tests for native title and Aboriginal rights may be separated as they are in Canada so that determinations of communal ownership may be decided by occupation of traditional lands, with the onus on the Crown to prove that it has been abandoned. Identification of traditional laws and customs would, therefore, be left for determinations of Aboriginal rights only and then with Indigenous peoples themselves interpreting those laws. The question is whether Australia can harness the "volatility"¹⁸⁶ of native title law to provide better outcomes for Indigenous peoples.

184. *Mabo* [No. 2], *supra* note 1 at 82.

185. *Ward*, *supra* note 4 at para. 561.

186. *Litchfield*, *supra* note 170 at 12.