

## 4. Defining Native Title

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### Contents

Summary	73
Establishing native title rights and interests	73
Recognition of native title in <i>Mabo [No 2]</i>	73
Defining native title in the <i>Native Title Act</i> : s 223(1)	74
Section 223(1)(a): Traditional laws and customs	76
Section 223(1)(b): Connection with land or waters	79
Section 223(1)(c): Recognised by the common law	81
Problems of proof	82
Proof in native title	83
A presumption in relation to proof?	84

### Summary

4.1 This chapter sets out the legal requirements to establish native title rights and interests. It outlines the definition of native title in s 223 of the *Native Title Act* and sets out major judicial statements on its interpretation. The chapter then discusses problems in relation to proof of native title and considers whether a presumption of continuity should be introduced. The ALRC does not propose that there be a presumption of continuity. Instead, it proposes a number of amendments to the definition of native title to address the technicality and complexity of establishing native title rights and interests. These proposals are made in later chapters of this paper.

### Establishing native title rights and interests

#### Recognition of native title in *Mabo [No 2]*

4.2 In *Mabo v Queensland [No 2]* (*'Mabo [No 2]'*), the High Court found that pre-existing rights and interests in land held by Aboriginal and Torres Strait Islander peoples—native title—survived the assertion of sovereignty by the Crown.<sup>1</sup>

4.3 As noted in Chapter 2, native title has its source in the traditional laws and customs of the relevant Aboriginal and Torres Strait Islander peoples. In *Mabo [No 2]*, Brennan J stated that native title ‘has its origin in and is given its content by the

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1 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 57, 69 (Brennan J, Mason CJ, McHugh J agreeing); 100–01 (Deane and Gaudron JJ); 184 (Toohey J). The history of the recognition of native title in Australia is discussed in more detail in Ch 2.

traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory'.<sup>2</sup>

4.4 Brennan J set out the conditions for the survival of native title after the assertion of sovereignty, stating that native title will survive or continue after sovereignty where:

- a clan or group has continued to acknowledge and observe traditional laws and customs whereby their traditional connection with the land has been substantially maintained;<sup>3</sup> and
- it has not been extinguished by the valid exercise of sovereign power.<sup>4</sup>

4.5 However, where 'any real acknowledgment of traditional law and any real observance of traditional customs' has ceased, 'the foundation of native title has disappeared'.<sup>5</sup>

### **Defining native title in the *Native Title Act*: s 223(1)**

4.6 Following *Mabo [No 2]*, the *Native Title Act* was enacted to provide, among other things, a mechanism for determining native title.<sup>6</sup>

4.7 To establish that they hold native title rights and interests, claimants must be able to satisfy the definition of native title in s 223(1), which is based on Brennan J's judgment in *Mabo [No 2]*.<sup>7</sup> Section 223(1) provides that

- (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.

4.8 Briefly, the definition requires that the native title claimants show, as a matter of fact, that they possess communal, group or individual rights and interests in relation to land or waters under traditional laws acknowledged and customs observed by them, and that, by those laws and customs, they have a connection with the land or waters

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2 Ibid 58.

3 Ibid 59.

4 Ibid 63 (Brennan J); 110 (Deane and Gaudron JJ). See also Melissa Perry and Stephen Lloyd, *Australian Native Title Law* (Lawbook Co, 2003) 14–15.

5 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 60. See also Perry and Lloyd, above n 4, 22–23.

6 *Native Title Act 1993* (Cth) s 3(c).

7 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 70.

claimed.<sup>8</sup> Additionally, the native title rights and interests must be able to be recognised by the common law.<sup>9</sup> Whether they can be recognised is a question of law.

4.9 This means that native title rights and interests can be determined not to exist because:

- there is no factual foundation for them; or
- they cannot be recognised as a matter of law.

4.10 A determination of native title is made by the Court in accordance with s 225 of the *Native Title Act*:

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

- (a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and
- (b) the nature and extent of the native title rights and interests in relation to the determination area; and
- (c) the nature and extent of any other interests in relation to the determination area; and
- (d) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of this Act); and
- (e) to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease—whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.

4.11 The High Court has emphasised repeatedly that the *Native Title Act* provides the starting point for considering a determination of native title.<sup>10</sup> However, the interpretation of the Act has been guided by the basis upon which native title was first recognised in *Mabo [No 2]*.

4.12 In *Members of the Yorta Yorta Aboriginal Community v Victoria* ('*Yorta Yorta*'), Gleeson CJ, Gummow and Hayne JJ began their discussion of s 223 by emphasising this. They noted that, upon the acquisition of sovereignty over a particular part of Australia, native title—rights and interests in relation to land or waters that owed their origin to the traditional laws and customs of the relevant Indigenous peoples—survived or continued.<sup>11</sup> As they later noted,

The native title rights and interests which are the subject of the Act are those which existed at sovereignty, survived that fundamental change in legal regime, and now, by

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8 *Native Title Act 1993* (Cth) s 223(1)(a), (b).

9 *Ibid* s 223(1)(c).

10 *Commonwealth v Yarmirr* (2001) 208 CLR 1, [7]; *Western Australia v Ward* (2002) 213 CLR 1, [16], [25]; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [32], [70], [75].

11 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [37].

resort to the processes of the new legal order, can be enforced and protected. It is those rights and interests which are ‘recognised’ in the common law.<sup>12</sup>

4.13 This basis for the recognition of native title has consequences for the construction of the definition of native title in the *Native Title Act*.<sup>13</sup> The following is a short overview of major judicial statements on the various elements of the definition of native title.

### **Section 223(1)(a): Traditional laws and customs**

4.14 Section 223(1)(a) requires that rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the relevant Aboriginal or Torres Strait Islander peoples. Satisfaction of s 223(1)(a) is a question of fact.<sup>14</sup> *Yorta Yorta* provides the High Court’s fullest elaboration of how s 223(1)(a) should be construed.<sup>15</sup>

#### **‘Traditional’ laws and customs**

4.15 In *Yorta Yorta*, Gleeson CJ, Gummow and Hayne JJ found that the reference to ‘traditional’ law and custom in the definition of native title must be understood in light of the proposition that

the native title rights and interests to which the *Native Title Act* refers are rights and interests finding their origin in pre-sovereignty law and custom, not rights or interests which are a creature of that Act.<sup>16</sup>

4.16 As a result, the meaning of ‘traditional’ has been held to include a number of aspects:

- it refers to the means of transmission of a law or custom: a ‘traditional’ law or custom is one which has been passed from generation to generation of a society;<sup>17</sup>
- it refers to the age of the laws and customs: the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown;<sup>18</sup>
- the ‘normative system’—that is, the traditional laws and customs—under which rights and interests are possessed must have had a continuous existence and vitality since sovereignty.<sup>19</sup>

12 Ibid [77]. See also *Akiba v Commonwealth* (2013) 250 CLR 209, [9].

13 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [45].

14 *Western Australia v Ward* (2002) 213 CLR 1, [18]; *De Rose v South Australia (No 1)* (2003) 133 FCR 325, [161].

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

16 Ibid [45] (Gleeson CJ, Gummow and Hayne JJ).

17 Ibid [46].

18 Ibid.

19 Ibid [47]. See also Perry and Lloyd, above n 4, 22–23.

4.17 Section 223(1)(a) is in the present tense, directing attention to the present possession of rights and interests.<sup>20</sup> However, Gleeson CJ, Gummow and Hayne JJ in *Yorta Yorta* stated that, nonetheless, the

- rights and interests presently possessed must be possessed under traditional laws and customs—that is, ‘the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty’;<sup>21</sup>
- acknowledgment and observance of the traditional laws and customs must have continued ‘substantially uninterrupted’ since sovereignty. If this were not the case, the laws and customs presently acknowledged and observed could not properly be described as traditional. Instead, ‘they would be a body of laws and customs originating in the common acceptance by or agreement of a new society of indigenous peoples to acknowledge and observe laws and customs of content similar to, perhaps even identical with, those of an earlier and different society of the peoples concerned’.<sup>22</sup>

#### ***Laws and customs***

4.18 The reference, in s 223(1)(a), to laws *and* customs means that there is no need to distinguish between matters of law and matters of custom. However, rights and interests must be possessed under a set of rules with normative content, for ‘without that quality, there may be observable patterns of behaviour but not rights or interests in relation to land or waters’.<sup>23</sup>

#### ***Society***

4.19 In *Yorta Yorta*, Gleeson CJ, Gummow and Hayne JJ interpreted the requirement that rights and interests are possessed under law and custom in the light of their assertion that there is an inextricable link between a society and its laws and customs. Laws and customs cannot exist in a vacuum, so if a society—understood as a body of persons united in and by its acknowledgment of a body of laws and customs—ceases to exist, the laws and customs (and rights and interests possessed under them) also cease.<sup>24</sup>

4.20 Subsequent Federal Court judgments have considered the approach to society taken in *Yorta Yorta*. A number have emphasised that ‘society’ is not found in the words of the Act, and may be utilised as a ‘conceptual tool’ to illuminate the central question of acknowledgment and observance of traditional laws and customs.<sup>25</sup> The

20 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [85].

21 *Ibid* [86].

22 *Ibid* [87].

23 *Ibid* [42]. See also *Akiba v Queensland (No 3)* (2010) 204 FCR 1, [171]–[174].

24 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [51]–[53].

25 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [78]. See also *Banjima People v Western Australia (No 2)* (2013) 305 ALR 1, [394]; *Dempsey on behalf of the Bularnu, Waluwarra and Wangkayujuru People v Queensland (No 2)* [2014] FCA 528 (23 May 2014) [721]; *Akiba v Queensland (No 3)* (2010) 204 FCR 1, [162].

following propositions can be identified in relation to the concept of society for native title purposes:

- A society can be seen as the ‘repository’ of traditional laws and customs in existence since sovereignty.<sup>26</sup> It functions to provide a link between pre-sovereign and contemporary laws and customs.<sup>27</sup>
- Proof of the continuity of a society is insufficient to establish that there has been continuity of a normative system of traditional laws and customs.<sup>28</sup>
- The concept of society ‘does not introduce, into the judgments required by the NT Act, technical, jurisprudential or social scientific criteria for the classification of groups or aggregations of people as “societies”’.<sup>29</sup>
- In determining whether a group of people constitute a society, the central consideration is whether the group acknowledge the same body of laws and customs relating to rights and interests in land and waters.<sup>30</sup> This can be so, ‘notwithstanding that the group was composed of people from different language groups or groups linked to specific areas within the larger territory which was the subject of the application’.<sup>31</sup>
- Claimants need not establish that there exists a body of laws and customs that unite people as a society. Rather, the society is required to be united in and by its acknowledgment and observance of a body of law and customs.<sup>32</sup>
- The boundaries of a society need not coincide with the native title claim group. A native title claim group may assert that it holds individual or group rights under the traditional laws and customs of a larger society or community of which they are a part.<sup>33</sup>

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26 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [78].

27 Nick Duff, ‘What’s Needed to Prove Native Title? Finding Flexibility Within the Law on Connection’ (Research Discussion Paper 35, AIATSIS, June 2014) 34.

28 *Bodney v Bennell* (2008) 167 FCR 84, [74], [123].

29 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [78].

30 *Sampi on behalf of the Bardi and Jawi People v Western Australia* (2010) 266 ALR 537, [51].

31 *Ibid* [71]. See, eg, *Neowarra v Western Australia* [2003] FCA 1402 (8 December 2003); *Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group v Northern Territory* (2004) 207 ALR 539; *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442; *Akiba v Queensland (No 3)* (2010) 204 FCR 1.

32 *Akiba v Queensland (No 3)* (2010) 204 FCR 1, [169].

33 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [80]; *Bodney v Bennell* (2008) 167 FCR 84, [145]–[146]. This was the case in *De Rose*, in which the claim group did not assert that they constituted a discrete society or community. Instead, they asserted that they held rights and interests under the traditional laws and customs that they shared with a wider society of Aboriginal people of the Western Desert Bloc: *De Rose v South Australia (No 1)* (2003) 133 FCR 325, [275].

**Relationship between traditional laws and customs and rights and interests**

4.21 In *Western Australia v Ward* ('*Ward*'), the High Court noted that s 223(1)(a) requires both:

- the identification of laws and customs said to be traditional; and
- the identification of rights and interests possessed under those laws and customs.<sup>34</sup>

4.22 There is a relationship between rights and interests and traditional laws and customs. Native title rights and interests are those that find their origin in traditional (pre-sovereign) law and custom.<sup>35</sup> This is because:

What survived [after the Crown's acquisition of sovereignty] were rights and interests in relation to land or waters. Those rights and interests owed their origin to a normative system other than the legal system of the new sovereign power; they owed their origin to the traditional laws acknowledged and the traditional customs observed by the indigenous peoples concerned.<sup>36</sup>

4.23 Gleeson CJ, Gummow and Hayne JJ also pointed out that the relevant inquiry is into the possession, not the exercise, of rights and interests:

Evidence that at some time, since sovereignty, some of those who now assert that they have that native title have not exercised those rights, or evidence that some of those through whom those now claiming native title rights or interests contend to be entitled to them have not exercised those rights or interests, does not inevitably answer the relevant statutory questions.<sup>37</sup>

4.24 The nature and content of native title rights and interests is considered further in Chapter 8.

**Section 223(1)(b): Connection with land or waters**

4.25 Section 223(1)(b) requires that the claimants, by 'those laws and customs'—that is, the traditional laws and customs referred to in s 223(1)(a)<sup>38</sup>—have a connection with the land or waters. Satisfaction of s 223(1)(b), like s 223(1)(a), is a question of fact.<sup>39</sup>

4.26 The drafting of s 223(1)(b) has been described as 'opaque'.<sup>40</sup> Its origins in the judgment of Brennan J in *Mabo [No 2]*, but the Full Federal Court has noted that it 'appears to have been applied in the statute somewhat out of context'.<sup>41</sup>

34 *Western Australia v Ward* (2002) 213 CLR 1, [18].

35 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [44].

36 *Ibid* [37].

37 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [84].

38 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [46], [86]; *Western Australia v Ward* (2002) 213 CLR 1, [18]; *Bodney v Bennell* (2008) 167 FCR 84, [165].

39 *Gumana v Northern Territory* (2005) 141 FCR 457, [146]–[147].

40 *Bodney v Bennell* (2008) 167 FCR 84, [163]; *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [87].

41 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [87].

4.27 The High Court in *Ward* stated that a separate inquiry to that required by s 223(1)(a) is demanded by s 223(1)(b).<sup>42</sup> This is so even though the inquiry may depend on the same evidence as is used to establish s 223(1)(a).<sup>43</sup>

4.28 The connection inquiry under s 223(1)(b) requires, ‘first an identification of the content of traditional laws and customs and, secondly, the characterisation of the effect of those laws and customs as constituting a “connection” of the peoples with the land or waters in question’.<sup>44</sup> The concept of connection is ‘multifaceted, with differing aspects of it being emphasised in differing factual contexts’.<sup>45</sup>

4.29 The laws and customs connecting claimants to land or waters need not exclusively be the laws and customs giving them rights and interests in the land or waters.<sup>46</sup>

### **Connection and continuity**

4.30 Like s 223(1)(a), s 223(1)(b) is expressed in the present tense, and requires inquiry into the present connection of claimants with land or waters. However, the connection must be shown to be ‘by’ the claimants’ traditional laws and customs.<sup>47</sup> The Full Court of the Federal Court has observed that this means that connection involves an element of continuity, deriving from ‘the necessary character of the relevant laws and customs as “traditional”’.<sup>48</sup>

4.31 Continuity of acknowledgment and observance of laws and customs can manifest connection—that is, connection can be maintained by continued acknowledgment and observance of traditional laws and customs.<sup>49</sup>

4.32 *Bodney v Bennell* noted that the acknowledgment and observance of traditional laws and customs providing the required connection must have continued substantially uninterrupted since sovereignty, and the connection itself must have been ‘substantially maintained’ since that time.<sup>50</sup> In *Sampi v Western Australia*, French J expressed the continuity aspect to the connection inquiry as involving the ‘the continuing internal and

42 *Western Australia v Ward* (2002) 213 CLR 1, [43].

43 *Ibid* [18].

44 *Ibid* [64]; *Bodney v Bennell* (2008) 167 FCR 84, [169].

45 *Bodney v Bennell* (2008) 167 FCR 84, [164].

46 *Ibid* [169].

47 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [86].

48 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [88]. The Federal Court has suggested that Brennan J’s use of the term connection in *Mabo [No 2]* was intended to encompass an element of continuity of connection: *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [1079]; *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [92].

49 *Bodney v Bennell* (2008) 167 FCR 84, [48]; *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [92].

50 *Bodney v Bennell* (2008) 167 FCR 84, [168].

external assertion by [a claimant community] of its traditional relationship to the country defined by its laws and customs'.<sup>51</sup>

4.33 To establish connection 'requires demonstration that, by their actions and acknowledgement, the claimants have asserted the reality of the connection to their land or waters so made by their laws and customs'.<sup>52</sup> Lack of physical presence does not necessarily mean a loss of connection.<sup>53</sup>

***Connection to particular areas within a claim***

4.34 The connection inquiry can have a particular topographic focus within the claim area, but connection to an area may be inferred from activities in the surrounding areas.<sup>54</sup> In *Bodney v Bennell*, the Full Federal Court stated that, where connection to a particular part of a claim area is in issue, there is a need to

- examine the traditional laws and customs for s 223(1)(b) purposes as they relate to that area; and
- demonstrate that connection to that area has, in reality, been substantially maintained since the time of sovereignty.<sup>55</sup>

**Section 223(1)(c): Recognised by the common law**

4.35 Sections 223(1)(a) and 223(1)(b) indicate that native title rights and interests derive from the traditional laws and customs of Aboriginal and Torres Strait Islander peoples—not the common law. In *Ward*, the High Court noted that the common law is accorded a role in the statutory definition of native title by virtue of s 223(1)(c), in that the rights and interests are 'recognised' by the common law.<sup>56</sup>

4.36 In *Yorta Yorta*, Gleeson CJ, Gummow and Hayne JJ stated that this requirement emphasises that native title is a product of an intersection between legal systems: the rights and interests 'recognised' by the common law are rights and interests that existed at sovereignty, survived that change in legal regime, and can now be enforced and protected under the new legal order.<sup>57</sup>

4.37 The High Court has elsewhere noted that the requirement that the claimed rights and interests are recognised by the common law 'requires examination of whether the common law is inconsistent with the continued existence of the rights and interests that owe their origin to Aboriginal law or custom'.<sup>58</sup> If there is no inconsistency, the common law will 'recognise' the rights and interests by giving remedies in support of

51 *Sampi v Western Australia* [2005] FCA 777 (10 June 2005) [1079]; *Bodney v Bennell* (2008) 167 FCR 84, [174]; *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, [92].

52 *Bodney v Bennell* (2008) 167 FCR 84, [171].

53 *Ibid* [172].

54 *Ibid* [175].

55 *Ibid* [179].

56 *Western Australia v Ward* (2002) 213 CLR 1, [20].

57 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [77].

58 *Commonwealth v Yarmirr* (2001) 208 CLR 1, [76].

the relevant rights and interests to those who hold them.<sup>59</sup> If there is inconsistency, recognition by the common law will be ‘withdrawn’.<sup>60</sup>

4.38 Inconsistency may arise, and recognition may be refused, because the claimed rights and interests are in some way ‘antithetical to fundamental tenets of the common law’,<sup>61</sup> or ‘clash with the general objective of the common law of the preservation and protection of society as a whole’.<sup>62</sup>

4.39 Recognition may also cease because native title rights and interests have been ‘extinguished’.<sup>63</sup> Rights and interests will be extinguished where there have been acts done by the executive pursuant to legislative authority, or grants of rights to third parties, that are inconsistent with the claimed native title rights and interests.<sup>64</sup>

4.40 Extinguishment is, in this sense, the ‘obverse’ of recognition.<sup>65</sup> However, native title rights and interests are not extinguished ‘for the purposes of the traditional laws acknowledged and customs observed by the native title holders’.<sup>66</sup> That is,

extinguishment of native title rights and interests must be understood as the cessation of the common law’s recognition of those rights and interests, not the cessation of those rights and interests under traditional laws and customs.<sup>67</sup>

4.41 Questions of continuity of acknowledgment and observance of traditional laws and customs,<sup>68</sup> or of a traditional community,<sup>69</sup> pertain to s 223(1)(a), and not s 223(1)(c).<sup>70</sup>

## Problems of proof

4.42 The Terms of Reference for this Inquiry require the ALRC to consider whether there should be a ‘presumption of continuity of acknowledgment and observance of traditional laws and customs and connection’. The ALRC considers that it is not necessary to introduce such a presumption in light of other proposed reforms. It considers that issues with proof of native title should be addressed by amendments to

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59 Ibid [42]; *Akiba v Commonwealth* (2013) 250 CLR 209, [9].

60 *Western Australia v Ward* (2002) 213 CLR 1, [82].

61 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [77].

62 *Western Australia v Ward* (2002) 213 CLR 1, [21].

63 Ibid. For example, in *Fejo*, it was decided that native title is extinguished by a grant in fee simple, because ‘the rights that are given by a grant in fee simple are rights that are inconsistent with the native title holders continuing to hold any of the rights or interests which together make up native title’: *Fejo v Northern Territory* (1998) 195 CLR 96, [43].

64 *Western Australia v Ward* (2002) 213 CLR 1, [26], [78]; *Western Australia v Brown* [2014] HCA 8 (12 March 2014) [33]; *Akiba v Commonwealth* (2013) 250 CLR 209, [31]–[35] (French CJ and Crennan J); [52], [62] (Hayne, Kiefel and Bell JJ). See also *Native Title Act 1993* (Cth) pt 2 div 2B; s 237A.

65 *Akiba v Commonwealth* (2013) 250 CLR 209, [10].

66 Ibid. See also *Western Australia v Ward* (2002) 213 CLR 1, [21].

67 *Congoo on behalf of the Bar-Barrum People No 4 v Queensland* (2014) 218 FCR 358, [35] (North and Jagot JJ).

68 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [92] (Gleeson CJ, Gummow, Hayne JJ).

69 Ibid [111] (Gaudron and Kirby JJ).

70 Ibid [92] (Gleeson CJ, Gummow and Hayne JJ).

the definition of native title in s 223 of the *Native Title Act*. These proposed amendments are detailed in subsequent chapters.<sup>71</sup>

### Proof in native title

4.43 In a legal proceeding, a party may bear a ‘burden’ or ‘onus’ of proof of different kinds. A ‘legal’ or ‘persuasive’ burden of proof is ‘the obligation of a party to meet the requirement of a rule of law that a fact in issue be proved (or disproved)’.<sup>72</sup> An evidential burden of proof is ‘the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue’.<sup>73</sup>

### *Proof in native title determination applications*

4.44 Native claims are commenced and conducted as legal proceedings in the Federal Court—they are proceedings under the *Native Title Act*.<sup>74</sup> In those proceedings, claimants bear the persuasive burden of proving all of the elements necessary to establish the existence of native title as defined in s 223.<sup>75</sup> The standard of proof required is the civil standard—the balance of probabilities.<sup>76</sup>

4.45 Native title matters may also be resolved by consent. If an agreement between parties to a determination is reached, the Federal Court may, if satisfied that an order consistent with the terms of the agreement would be within the power of the Court<sup>77</sup> and it appears to the Court to be appropriate,<sup>78</sup> make a native title determination order over the whole or part of a determination area without a hearing.

4.46 In *Yorta Yorta*, the High Court acknowledged that ‘difficult problems of proof’ face native title claimants when seeking to establish the existence of native title rights and interests—particularly in demonstrating the content of traditional laws and customs as required by s 223(1)(a).<sup>79</sup> However, it also noted that ‘the difficulty of the forensic task does not alter the requirements of the statutory provision’.<sup>80</sup>

71 See Chs 5 and 7.

72 J D Heydon, LexisNexis, *Cross on Evidence*, Vol 1 (at Service 164) [7010].

73 *Ibid* [7015].

74 *Native Title Act 1993* (Cth) ss 13(1), 61(1).

75 *Western Australia v Ward* (2000) 99 FCR 316, [114]–[117] (Beaumont and von Doussa JJ); *Daniel v Western Australia* [2003] FCA 666 (3 July 2003) [146]; *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* (2007) 238 ALR 1, [339]. In a non-claimant application, the party making the application seeks a determination that no native title exists in a particular area. In such an application, the legal burden of establishing that no native title exists lies on the non-claimant applicant: *Worimi Local Aboriginal Land Council v Minister for Lands (NSW) (No 2)* [2008] FCA 1929 (18 December 2008) [49]. A non-claimant applicant may alternatively assert that no native title rights exist in the relevant land because any such rights and interests have been extinguished: *Gandangara Local Aboriginal Land Council v A-G (NSW)* [2013] FCA 646 (3 July 2013).

76 *Milirrpum v Nabalco* [1972] ALR 65, 119–20; *Mason v Tritton* (1993) 70 A Crim R 28, 42; *Evidence Act 1995* (Cth) s 140.

77 *Native Title Act 1993* (Cth) ss 87(1)(c), 87A(4)(a).

78 *Ibid* ss 87(1A), (2), 87A(4)(b), (5)(b).

79 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [80] (Gleeson CJ, Gummow and Hayne JJ).

80 *Ibid*.

4.47 A number of the submissions to this Inquiry emphasised the complexity of establishing that native title exists. For example, Queensland South Native Title Services (QSNTS) argued that s 223 is ‘unnecessarily complicated, fragmented and inconsistently interpreted and applied in practice’.<sup>81</sup> Goldfields Land and Sea Council commented upon the ‘unnecessary technicality and legalism in native title’.<sup>82</sup>

4.48 However, other stakeholders said that the current legal test for the proof and recognition of native title was not unduly onerous and time-consuming.<sup>83</sup>

### **A presumption in relation to proof?**

4.49 A presumption in relation to proof of native title is perceived as one response to the difficulty of establishing the existence of native title rights and interests. It was first proposed by Justice French (as he then was) in 2008.<sup>84</sup> Justice French considered that a presumption may ‘lighten some of the burden of making a case for a determination’ by lifting some elements of the burden of proof from native title claimants.<sup>85</sup>

4.50 A presumption has a specific meaning in a legal context, distinct from its ordinary meaning as an assumption of something as true, or a belief on reasonable grounds.<sup>86</sup>

4.51 A presumption of law is a rule of evidence that affects how a fact in issue is proved. A presumption of law operates so that when a fact—the ‘basic fact’—is proved, it must, in the absence of further evidence, lead to a conclusion that another fact—the ‘presumed fact’—exists.<sup>87</sup> In other words, a presumption that a fact exists will arise on proof of a basic fact. The presumption will operate unless rebutted by evidence to the contrary.<sup>88</sup> The amount of evidence required in rebuttal differs between presumptions.<sup>89</sup> Some may require ‘some’ evidence to be adduced. Others may be rebutted only by adducing evidence ‘sufficiently cogent to persuade the tribunal of fact of the non-existence of the presumed fact’.<sup>90</sup>

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81 Queensland South Native Title Services, *Submission 24*. The Law Council of Australia expressly agreed with QSNTS’s position: Law Council of Australia, *Submission 35*.

82 Goldfields Land and Sea Council, *Submission 22*. See also AIATSIS, *Submission 36*; National Congress of Australia’s First Peoples, *Submission 32*.

83 Northern Territory Government, *Submission 31*; Western Australian Government, *Submission 20*.

84 Justice Robert French, ‘Lifting the Burden of Native Title—Some Modest Proposals for Improvement’ (Speech Delivered at the Federal Court Native Title User Group, Adelaide, 9 July 2008). The model proposed by French J is largely adopted by a series of Native Title Amendment (Reform) Bills: Native Title Amendment (Reform) Bill 2011; Native Title Amendment (Reform) Bill (No 1) 2012; Native Title Amendment (Reform) Bill 2014. See also Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment (Reform) Bill 2011* (2011).

85 *Ibid.*

86 Macquarie Dictionary (Macquarie Library, Revised 3rd Ed, 2001).

87 J D Heydon, LexisNexis, *Cross on Evidence*, Vol 1 (at Service 164) [7240], [7260].

88 Some presumptions of law are irrebuttable. However, the focus here is on rebuttable presumptions. See generally *Ibid* [7265].

89 *Ibid* [7290].

90 *Ibid* [7300].

4.52 In Justice French's model, the facts necessary to satisfy s 223(1) would be presumed to exist on the proof of certain basic facts, namely, that:

- the native title claim group defined in the application applies for a determination of native title rights and interests where the rights and interests are found to be possessed under laws acknowledged and customs observed by the native title claim group;
- members of the native title claim group reasonably believe the laws and customs so acknowledged to be traditional;
- the members of the native title claim group, by their laws and customs, have a connection with the land or waters the subject of the application;
- the members of the native title claim group reasonably believe that persons from whom one or more of them was descended, acknowledged and observed traditional laws and customs at sovereignty by which those persons had a connection with the land or waters the subject of the application.<sup>91</sup>

4.53 Justice French considered that the presumption should operate subject to proof to the contrary.<sup>92</sup>

4.54 Many stakeholders supported the introduction of a presumption,<sup>93</sup> and many of these supported the model proposed by Justice French, in whole or in part.<sup>94</sup>

4.55 A number of proponents of a presumption argued that it would reduce the resource burden on claimants to establish the elements necessary to prove the existence of native title,<sup>95</sup> and would place some of that burden more appropriately on state and territory respondent parties.<sup>96</sup> Related to this, a number of submissions argued that a presumption would reduce delay and speed resolution of claims.<sup>97</sup> Other submissions argued that a presumption would be appropriate on the basis that it is unjust or

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91 Justice Robert French, 'Lifting the Burden of Native Title—Some Modest Proposals for Improvement' (Speech Delivered at the Federal Court Native Title User Group, Adelaide, 9 July 2008).

92 Ibid [30].

93 AIATSIS, *Submission 36*; Law Council of Australia, *Submission 35*; National Congress of Australia's First Peoples, *Submission 32*; Kimberley Land Council, *Submission 30*; NSW Young Lawyers Human Rights Committee, *Submission 29*; Central Desert Native Title Services, *Submission 26*; Queensland South Native Title Services, *Submission 24*; Goldfields Land and Sea Council, *Submission 22*; Native Title Services Victoria, *Submission 18*; North Queensland Land Council, *Submission 17*; National Native Title Council, *Submission 16*; Law Society of Western Australia, *Submission 9*; Cape York Land Council, *Submission 7*; Just Us Lawyers, *Submission 2*; Australian Human Rights Commission, *Submission 1*.

94 See, eg, NSW Young Lawyers Human Rights Committee, *Submission 29*; Queensland South Native Title Services, *Submission 24*; Native Title Services Victoria, *Submission 18*; Law Society of Western Australia, *Submission 9*; Cape York Land Council, *Submission 7*.

95 NSW Young Lawyers Human Rights Committee, *Submission 29*; Native Title Services Victoria, *Submission 18*; National Native Title Council, *Submission 16*; Cape York Land Council, *Submission 7*.

96 National Congress of Australia's First Peoples, *Submission 32*; National Native Title Council, *Submission 16*.

97 NSW Young Lawyers Human Rights Committee, *Submission 29*; Native Title Services Victoria, *Submission 18*; National Native Title Council, *Submission 16*; Law Society of Western Australia, *Submission 9*.

discriminatory to require native title claimants to prove their customary connection to their territories.<sup>98</sup>

4.56 However, the ALRC considers that, rather than proposing a presumption—a reform affecting how facts in issue in native title matters are proved—it is preferable to propose amendments to the definition of native title itself. These are detailed in Chapters 5 and 7. The ALRC agrees with the observation of Mr Angus Frith and Associate Professor Maureen Tehan that the benefits of introducing a presumption must substantially outweigh potential disadvantages.<sup>99</sup> The ALRC considers that such a substantial benefit has not been demonstrated, for a number of reasons. It is not clear what effect a presumption would have on a number of aspects of native title proceedings, including the resolution of claims by consent, the resources involved in native title matters, and claimants’ control of evidence. The ALRC also considers that the development of native title jurisprudence as well as case management in native title proceedings has rendered the case for a presumption less compelling. These matters are considered in more detail below.

#### ***Effect on resolution of claims by consent***

4.57 Introduction of a presumption may affect parties’ practices in ways that are detrimental to claim resolution, particularly in relation to resolution of claims by consent.

4.58 Most claims are now resolved by consent.<sup>100</sup> For example, the South Australian Government’s submission noted that it has ‘only contested one native title matter since the resolution of *De Rose*, and that was set down for trial without going through its [consent determination] process. All other determinations have been by consent’.<sup>101</sup> Similarly, the Northern Territory Government submitted that there had been no substantive litigated claims in the Northern Territory since 2007.<sup>102</sup>

4.59 Some submissions suggested that a presumption would strengthen the position of claimants in negotiations to resolve native title determination applications.<sup>103</sup> However, resolution of claims by consent currently occurs in the context of a state or territory respondent party being in a position to be satisfied of the existence of native title rights and interests on the basis of claimants’ provision of ‘connection material’—factual material capable of demonstrating the existence of the claimed native title rights and interests.

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98 National Congress of Australia’s First Peoples, *Submission 32*; Native Title Services Victoria, *Submission 18*.

99 A Frith and M Tehan, *Submission 12*.

100 See Ch 3.

101 South Australian Government, *Submission 34*.

102 Northern Territory Government, *Submission 31*.

103 See, eg, NSW Young Lawyers Human Rights Committee, *Submission 29*; National Native Title Council, *Submission 16*.

4.60 If more limited material sufficient to establish the basic facts of a presumption were to be provided by claimants, the willingness of state and territory respondents to agree to a determination is not clear.<sup>104</sup> In this, the ALRC agrees with the observation of the National Native Title Tribunal that it is not possible to predict whether introducing a presumption would result in ‘more, or more timely, consent determinations recognising the existence of native title’.<sup>105</sup>

***Will a presumption ‘reduce the burden’ on claimants?***

4.61 It is also unclear that the introduction of a presumption will have the effect of reducing the evidentiary burden on claimants. Even some advocates of a presumption conceded that the projected savings of time and resources rely on respondent parties electing not to rebut it.<sup>106</sup> AIATSIS, for example, cautions that

There is a risk that little will be gained by a presumption that States actively seek to rebut, by adducing evidence that supports an argument of discontinuity and to which claimants would then be forced to mount proof of continuity in any event.<sup>107</sup>

4.62 The Northern Territory Government submitted that a presumption ‘would not obviate the Northern Territory’s requirement to assess evidence of connection’.<sup>108</sup> Similarly, the Western Australian Government submitted that it

would still be obliged to undertake a due diligence process in respect of claims if a presumption of continuity was introduced ... It is unlikely the State would compromise due diligence by streamlining its connection assessment process, so in a consent determination context it is unlikely that there would be significant time savings ... In a contested context, it is likely that the State or other parties (including competing Indigenous parties) would seek to test the various elements comprising the presumption.<sup>109</sup>

4.63 Stakeholders who supported the presumption noted that claimants would still need to undertake research in the preparation of a claim, including research to establish that the claim group are the right people for the claim area.<sup>110</sup> Time and resources will be needed to investigate these issues. Some stakeholders considered that this would

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104 In particular, states and territories are likely to consider the compensation implications of a native title determination. The South Australian Government noted that ‘virtually all determinations of native title are followed by negotiations or claims for significant compensation for historical extinguishment’: South Australian Government, *Submission 34*.

105 National Native Title Tribunal, *Submission No 15 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, Inquiry into Native Title Amendment (Reform) Bill 2011*, August 2011. See also Queensland South Native Title Services, *Submission 24*.

106 For example, NQLC state that the presumption may constitute a change for the better and speed up the native title process if, in a significant number of cases, the States and Territories did not seek to rebut the presumption: North Queensland Land Council, *Submission 17*.

107 AIATSIS, *Submission 36*.

108 Northern Territory Government, *Submission 31*.

109 Western Australian Government, *Submission 20*.

110 AIATSIS, *Submission 36*. See also Yamatji Marlpa Aboriginal Corporation, *Submission No 8 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, Inquiry into Native Title Amendment (Reform) Bill 2011*, July 2011; Kimberley Land Council, *Submission 30*.

still involve a reduction in overall time and expense spent on claim preparation.<sup>111</sup> However, QSNTS considered that

no decline in the requisite work to prove native title may occur, at least in the short to medium term upon the presumption's introduction. ... We suggest that it is sound legal strategy for the claim group to still nevertheless prepare its material in case it needs to evidence facts required to be shown pursuant to ss 223(1)(a)–(b) of the Act in those circumstances where the State is able to provide evidence to rebut that presumption.<sup>112</sup>

### ***Effect on quality of applications***

4.64 State and territory governments also expressed concern that a presumption may, variously, promote applications by those who do not hold traditional rights and interests in an area,<sup>113</sup> or affect the quality of the evidence establishing the group and the rights and interests held.<sup>114</sup> The South Australian Government submitted that, in contested matters,

the Court would not be in receipt of anthropological and historical material explaining the basis of the rights sought and the structure of the native title group asserting native title. Such a situation does not seem appropriate to deliver just decisions (for either the applicants or the respondents).<sup>115</sup>

### ***Claimants' control of evidence of relationship to land and waters***

4.65 The ALRC considers that the introduction of a presumption may have an unfavourable effect on claimants' control of the narrative of their connection to land and waters. AIATSIS raised concerns that, if state and territory respondent parties seek to rebut a presumption, 'claimants will likely be asked to respond to anthropological research by State-commissioned researchers'. They considered that this could 'undermine cohesion within Indigenous communities', and may involve an engagement with claimants, 'without responsibility or capacity to resolve disputes or to understand their location within the broader dynamics of a claimant group or its neighbours'.<sup>116</sup>

4.66 AIATSIS's concerns echoed those raised by the Centre for Native Title Anthropology, which has warned that Aboriginal and Torres Strait Islander people involved in native title claims may lose the 'capacity to control the circumstances in which research about their history and culture occurs ... and how it is to be managed in the future'.<sup>117</sup> Such control may be particularly important in factual circumstances such as claims in relation to urban areas, or where there has been significant historical removal of groups from claimed areas. In such cases, it may be beneficial to claimants

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111 North Queensland Land Council, *Submission 17*; Cape York Land Council, *Submission 7*.

112 Queensland South Native Title Services, *Submission 24*.

113 Northern Territory Government, *Submission 31*.

114 Queensland Government Department of Natural Resources and Mines, *Submission 28*.

115 South Australian Government, *Submission 34*.

116 AIATSIS, *Submission 36*.

117 Centre for Native Title Anthropology, ANU, Submission No 20 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, August 2011.

to themselves contextualise and structure the evidence of their connection to land or waters.<sup>118</sup>

4.67 The South Australian Government also expressed concerns about the role of a respondent party in gathering evidence to rebut a presumption, submitting that, in present negotiations to settle native title matters,

Claimants are prepared to release their information knowing it will be handled sensitively and on the basis that it will not be disclosed further without their consent ... On occasion, State representatives have gone on country with claimants and their representatives to fill gaps in the material.<sup>119</sup>

4.68 However, it observed that 'it is unlikely that this collaboration would be offered if it were for the State to disprove presumptions of continuity'.<sup>120</sup>

#### ***Federal Court case management***

4.69 The Federal Court's submission detailed case management strategies that have been adopted by the Court to assist parties to reach agreement on connection issues. For example,

- In South Australia and Queensland the Court has, in particular claims, facilitated case management conferences at which the experts for the Applicant and State confer to identify the issues likely to be most contentious prior to the commencement of anthropological field work. ...
- In the Northern Territory, Western Australia, South Australia, Victoria and Queensland the Court has in various matters made orders that the experts confer under the supervision of a Registrar of the Court to identify those matters and issues about which their opinions are in agreement and those where they differ. These conferences have usually taken place in the absence of the parties' lawyers and have been remarkably successful in narrowing connection issues, often resulting in agreement between the experts on all matters.<sup>121</sup>

4.70 In light of this information, the ALRC considers that some of the assistance that a presumption would provide in narrowing the issues in contention in native title matters has been accomplished through other means.

#### ***Inferences in relation to proof of native title***

4.71 The ALRC also notes the preparedness of the Court, where appropriate, to draw inferences as to the existence of facts satisfying s 223. Additionally, submissions to this Inquiry suggest that there is an increased preparedness on the part of state and territory respondent parties to draw inferences in the context of agreeing to consent

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118 See generally Sally Babidge, 'The Proof of Native Title Connection in Absentia' in Toni Bauman and Gaynor MacDonald (eds), *Unsettling Anthropology: The Demands of Native Title on Worn Concepts and Changing Lives* (AIATSIS, 2011) 82; Paul Memmott, 'Modelling the Continuity of Aboriginal Law in Urban Native Title Claims: A Practice Example' in Toni Bauman and Gaynor MacDonald (eds), *Unsettling Anthropology: The Demands of Native Title on Worn Concepts and Changing Lives* (AIATSIS, 2011) 122.

119 South Australian Government, *Submission 34*.

120 *Ibid.*

121 Federal Court of Australia, *Submission 40*.

determinations. The ALRC considers that this approach to proof of native title rights and interests is appropriate, and that the increased willingness to draw inferences to satisfy the burden of proof makes the case for the introduction of a formal presumption in native title matters less compelling.

4.72 An inference is distinct from a presumption of law. Presumptions have a formal role in the proof of a particular fact. By contrast,

An inference is a tentative or final assent to the existence of a fact which the drawer of the inference bases on the existence of some other fact or facts. The drawing of an inference is an exercise of the ordinary powers of human reason in the light of human experience; it is not affected directly by any rule of law.<sup>122</sup>

4.73 When an inference is drawn, it may satisfy a burden of proof, but the ‘trier of fact decides whether to draw an inference and what weight to give to it’.<sup>123</sup>

4.74 Where a fact in issue may be inferred from the proof of another particular fact in a commonly recurring situation, such an inference is often referred to as a ‘presumption of fact’.<sup>124</sup> Unlike a presumption of law, a court is not obliged to draw this inference. However, ‘the party proving the basic fact is likely to win on the issue to which the presumed fact relates, in the absence of evidence to the contrary adduced by the other party’.<sup>125</sup>

4.75 In *Yorta Yorta*, it was observed that, in many, perhaps most, native title cases, claimants will invite the Court to draw inferences about the content of traditional laws and customs at times earlier than those described in the claimants’ evidence.<sup>126</sup> It is not possible, however, to offer any ‘single bright line test’ for deciding what inferences may be drawn or when they may be drawn.<sup>127</sup>

4.76 Cases since *Yorta Yorta* have elaborated on the circumstances in which inferences may be drawn as to, for example, whether laws and customs are ‘traditional’, or whether such laws and customs have been continuously acknowledged

122 Thomson Reuters, *The Laws of Australia* (at 1 September 2011) 16 Evidence, ‘16.2 Proof in Civil Cases’ [16.2.270].

123 *Ibid.*

124 J D Heydon, LexisNexis, *Cross on Evidence*, Vol 1 (at Service 164) [7215]. Heydon notes that presumptions of fact are ‘not true presumptions’, but that ‘nevertheless this misleading connotation of the term “presumption” used in connection with the ordinary processes of inferential reasoning has become so familiar that in most cases the word is hardly likely to be productive of great confusion’: *Ibid* [7255].

125 J D Heydon, LexisNexis, *Cross on Evidence*, Vol 1 (at Service 164) [7215].

126 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [80] (Gleeson CJ, Gummow and Hayne JJ). The court has been prepared, in some native title cases, to draw an inference of continuity of generational transmission of law and custom, or of the claimant group’s descent from the original inhabitants of an area at sovereignty, and that the original inhabitants of an area were a society organised under traditional laws and customs: *Neowarra v Western Australia* [2003] FCA 1402 (8 December 2003) [336]; *Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory* (2004) 207 ALR 539, [103]–[110]; *Sampi on behalf of the Bardi and Jawi People v Western Australia* (2010) 266 ALR 537, [64]–[66] (North and Mansfield JJ).

127 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [82] (Gleeson CJ, Gummow and Hayne JJ).

and observed. In this, guidance has been taken from the approach to proof of customary rights at English common law.<sup>128</sup>

4.77 To establish the existence of a custom enforceable at common law required, among other things, proof that the custom had existed since ‘time immemorial’.<sup>129</sup> The difficulty of establishing the existence of a custom from time immemorial was eased by the courts’ willingness to infer from ‘proof of the existence of a current custom that that custom had continued from time immemorial’.<sup>130</sup>

4.78 In *Gumana v Northern Territory*, Selway J noted the similarities between proof of the existence of traditional laws and customs for the purposes of establishing native title rights and interests, and proof of custom at common law.<sup>131</sup> He observed that

There is no obvious reason why the same evidentiary inference is not applicable for the purpose of proving the existence of Aboriginal custom and Aboriginal tradition at the date of settlement and, indeed, the existence of rights and interests arising under that tradition or custom.<sup>132</sup>

4.79 Selway J considered that, where there is

- a clear claim of the continuous existence of a custom or tradition that has existed at least since settlement;
- supported by credible evidence from persons who have observed that custom or tradition; and
- evidence of a general reputation that the custom or tradition had ‘always’ been observed;

then, in the absence of evidence to the contrary, there is an inference that the tradition or custom has existed at least since the date of settlement.<sup>133</sup>

4.80 The approach to the drawing of inferences set out in *Gumana* has been approved in a number of subsequent cases.<sup>134</sup> For example, in *AB (deceased) (on behalf of the Ngarla People) v Western Australia (No 4)*, Bennett J accepted the claimants’ submission that

128 Such customary rights may include, for instance, the use of an access path to a local church: *Brocklebank v Thompson* [1903] 2 Ch 344; or the playing of sports and other pastimes on a piece of land: *New Windsor Corporation v Mellor* [1975] Ch 380. See also LexisNexis, *Halsbury’s Laws of England*, Vol 32 (2012) Custom and Usage.

129 LexisNexis, *Halsbury’s Laws of England*, Vol 32 (2012) Custom and Usage.

130 *Gumana v Northern Territory* (2005) 141 FCR 457, [198].

131 *Ibid* [197]–[202].

132 *Ibid* [201].

133 *Ibid*.

134 *Sampi on behalf of the Bardi and Jawi People v Western Australia* (2010) 266 ALR 537, [63]–[65]; *Griffiths v Northern Territory* (2006) 165 FCR 300, [580]; *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* (2007) 238 ALR 1, [341]; *Wyman on behalf of the Bidjara People v Queensland (No 2)* [2013] FCA 1229 (6 December 2013) [479]; *Dempsey on behalf of the Bulamu, Waluwarra and Wangkayujuru People v Queensland (No 2)* [2014] FCA 528 (23 May 2014) [132]–[134]; *AB (deceased) (on behalf of the Ngarla People) v Western Australia (No 4)* [2012] FCA 1268 (21 November 2012) [724].

the Court is entitled to draw inferences about the content of the traditional laws and customs at sovereignty from contemporary evidence and that if the evidence establishes a contemporary normative rule, it may be reasonable to find that such a normative rule existed at sovereignty.<sup>135</sup>

4.81 State and territory respondent parties, in some circumstances, are also willing to draw inferences in relation to proof of certain facts in native title matters. Indeed, Mr John Catlin has observed that ‘consent determinations invariably are a product of a combination of agreed facts and beneficial inferences about the available evidence’.<sup>136</sup> For example, the South Australian Government submitted that it is willing, where appropriate, to draw inferences relating to information that is

- genealogical—many asserted relationships are accepted by the State without detailed analysis;
- historical—the State often relies on historical assertions made by applicants where there is no other evidence;
- anthropological—the State often accepts that contemporary differences from the historical description of a group’s traditional law and custom at sovereignty reflect an adaptation rather than a break in those traditions.<sup>137</sup>

4.82 In reasons accompanying a determination of native title by consent in *Lander v South Australia*, Mansfield J agreed with South Australia’s assessment that the evidence supported

the inference that the pre-sovereignty normative society has continued to exist throughout the period since sovereignty, and whilst there has been inevitable adaptation and evolution of the laws and customs of that society, there is nothing apparent in the Evidence to suggest the inference should not be made that the society today (as descendants of those placed in the area in the earliest records) acknowledges and observes a body of laws and customs which is substantially the same normative system as that which existed at sovereignty.<sup>138</sup>

4.83 In relation to the western desert region of Western Australia, Central Desert Native Title Services (CDNTS) noted that Western Australia had generally accepted continuity of connection on the basis of evidence from ‘current senior claimants who have living memories of their grandparents and great grandparents’. In this regard, CDNTS submitted, ‘there effectively exists an unstated “presumption of continuity” for native title claims in the region’.<sup>139</sup>

135 *AB (deceased) (on behalf of the Ngarla People) v Western Australia (No 4)* [2012] FCA 1268 (21 November 2012) [724].

136 John Catlin, ‘Recognition Is Easy’ in Toni Bauman and Lydia Glick (eds), *The Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS, 2012).

137 South Australian Government, *Submission 34*.

138 *Lander v South Australia* [2012] FCA 427 (1 May 2012) [48].

139 Central Desert Native Title Services, *Submission 26*. However, there was also some criticism that state respondent parties were not readily drawing inferences as to continuity of connection: see Queensland South Native Title Services, *Submission 24*.

4.84 The Northern Territory Government also submitted that ‘in practice, a rebuttable presumption operates in the context of resolution of pastoral estate claims’.<sup>140</sup> Additionally, the Northern Territory Government detailed the development of its streamlined process to resolve pastoral estate claims, which includes ‘not disputing the existence of native title holding group at sovereignty (subject to extinguishment)’.<sup>141</sup>

4.85 The ALRC considers that it is appropriate for the Court and respondent parties to accept that a ‘presumption of fact’, or inference, arises on proof of the circumstances set out in *Gumana*. Such an approach to the drawing of inferences will increasingly be necessary if the beneficial purpose of the Act is to be sustained as the date of Crown assertion of sovereignty grows more distant.

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140 Northern Territory Government, *Submission 31*.

141 *Ibid.*

